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Professional Identity as Advocacy

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PROFESSIONAL IDENTITY AS ADVOCACY

Robert Rubinson*

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The legal profession adheres to a story of a unified profession. Nevertheless, the profession has distinct professional sub-groups which repeatedly represent clients with interests adverse to those represented by attorneys who identify with other sub-groups. The idea of "professional identity as advocacy" describes how such professional sub-groups accuse opposing sub-groups of greed, self-aggrandizement, or worse. This is most notable in two areas: personal injury litigation and criminal cases. This process has two seemingly contradictory consequences. First, it renders narrow areas extraordinarily visible, thus defining popular discourse and conceptions about lawyers and law. Second, it masks vast areas of litigation and law that have a fundamental impact on social justice yet do not generate the "profile" triggered where professional identity as advocacy is at its most intense. This Article explores the nature and consequences of professional identity as advocacy and examines the degree to which this dynamic can or should change.

I. INTRODUCTION

The legal profession adheres to a story of a single, unified profession. The Rules of Professional Conduct, with only minor exceptions, apply to all lawyers, whatever type of law they practice.¹ Qualifications to obtain admission to the bar—graduation from law school, character and fitness review, the bar exam itself—similarly operate under the assumption that

1. See *infra* text accompanying notes 20–25.

lawyers follow identical norms however divergent the type of law they ultimately pursue.²

Groups of lawyers, however, have distinct professional sub-identities that distinguish them from other segments of the profession, particularly when the two segments repeatedly represent clients with adverse interests. This is most notable in the two areas that most capture popular and political attention: personal injury litigation and criminal justice. Popular culture defines these areas as what the practice of law is.³ It is precisely in these areas that a process I call “professional identity as advocacy” is most strident and fundamental. This process entails one group of practitioners advocating on behalf of themselves as an “in group” against an “out group,” while another group of practitioners view the situation in reverse: they view themselves as the “in group” and the prior “in group” as the “out group.” The crux of the professional identity concept is that these distinct professional groups oppose one another over and over again, and, as a result, each accuses the other of greed, self-aggrandizement, or worse. As articulated in this discourse, the stakes of who “wins” this battle are extraordinary: each side carries the banner of the public good—all the public good. The result evokes classic narratives of good versus evil. Such narratives not only embody archetypes of good and evil, but also the monumental consequences that hinge on the battle’s outcome: the fate of the world, sometimes quite literally, hangs in the balance, dependent on whether the “good guys” defeat the “bad guys.”⁴

A striking dimension of professional advocacy as identity is that it surfaces only in these relatively limited areas of practice. Other hugely important segments of the profession operate almost completely under the radar screen. One example is commercial litigation, which ordinarily entails highly resourced clients who almost always employ large law firms. As a rule, large law firms have professional identity only insofar as they represent large organizations. There is no moral or political spin to their client list: in most instances a large organization opposes another large organization.⁵ It is not the “people” against a “criminal”: it is not “the little guy” against the “bad guy.”

Another example of “under the radar screen” litigation is the extraordinarily large number of litigants who litigate in “mass justice” courts.⁶ There is indeed professional identity as advocacy in this arena, with a corps of lawyers representing, in most cases, more heavily resourced parties—creditors, landlords, the government—against a tiny corps of lawyers who provide free legal services to low-income litigants, albeit a small percentage of them. The irony here, though, is that there are so few lawyers with so

2. See *infra* text accompanying notes 29–34.

3. See *supra* text accompanying notes 66–69.

4. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 83–84 (2000) (quoting ELAINE PAGELS, *THE ORIGIN OF SATAN* 105 (1995) (referring to stories embodying cultural norms which “draw the battle lines between ‘the sons of light’ and the ‘sons of darkness’ ”)).

5. See *infra* text accompanying note 168.

6. See *infra* text accompanying notes 142–52.

few resources engaged in this arena that the “battle,” to a large extent, remains invisible. A further irony is that this invisibility masks the massive social costs and tragic consequences underlying this type of litigation. Put another way, here is an area where a little professional identity as advocacy might not be such a bad thing, but a key ingredient to get the stories told to a wider audience—resources—does not exist.

All of these dynamics have multiple consequences. It contributes to the low regard in which the profession is held because stories of professional gain at the expense of the public good tend to tarnish all lawyers. The entrenched battle lines and demonization of the “other” inhibit professional collaboration outside individual client representation. Such collaboration might enhance the administration of justice and legal reform in both civil and criminal law. It also obscures the deplorable state of access to justice.

This Article explores these issues in five parts. The first part traces the history of specialization within the legal profession. The second part explores the cognitive and social basis for professional advocacy—the creation of “in groups” and “out groups.” The third part describes the two primary examples of professional advocacy that capture the attention of the public: personal injury litigation and criminal justice. The fourth part tackles two areas that, for very different reasons, are not subject to public scrutiny: commercial litigation involving large business enterprises and individual representation in courts of mass justice. The final part explores the consequences of professional identity as advocacy on the profession and society more generally.⁷

II. OVERVIEW: THE UNITARY PROFESSION

A first step in examining professional identity as advocacy is to trace the arc of attorneys’ identity over time. Virtually every discussion that excoriates the current state of the profession⁸ recalls a misty past where the

7. I will not address two trends in the legal profession that have been covered in detail elsewhere. One is the socioeconomic, racial, and gender trends within the profession. See RICHARD L. ABEL, *AMERICAN LAWYERS* 85, 109 (1989). See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 488–90 (3d ed. 2005). Another is the decline of “professionalism.” There are innumerable bar journal articles on the subject of a growing number of “civility codes” that seek to reign in the “Rambo tactics” of litigators. For some academic treatments of the subject, see Christopher J. Piazzaola, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197 (2003); Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1 (1993). For an overview of cases involving uncivil lawyers, see Josh O’Hara, *Creating Civility: Using Reference Group Theory to Improve Inter-Lawyer Relations*, 31 VT. L. REV. 965, 966–67 (2007). In contrast, for a critique of the “civility” debate as reflecting powerful interests within the bar itself, see Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994). These themes are of great importance and I will refer to them at times, but my purpose here is to address professional segmentation that generates political and moral differentiation between categories of *clients* and the lawyers that represent them.

8. Consider the following statement of Carl T. Bogus: “The legal profession is dead or dying. It is rotting away into an occupation. On this, those assembled at the bedside concur . . .” Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 911 (1996).

profession truly was a “profession” characterized by integrity and professional service offered to all comers.⁹ This section will examine this idea as well as the notion that all lawyers are part of a common enterprise characterized by unity of goal and identity.

A. *The Rhetoric of Attorney “Independence”: Two Historical Antecedents*

A classic conception of what being a lawyer is involves decoupling clients’ cases from the advocate.¹⁰ Such decoupling creates a peculiar relationship: passionate advocacy on behalf of someone (or, in the case of businesses, something) with the advocacy distinct from an attorney’s personal beliefs. I will trace two historical examples that illustrate this paradigm of “independent” advocacy.

1. John Adams and the Boston Massacre

John Adams represented British soldiers accused of murder in the Boston Massacre. This relatively unknown fact¹¹—perhaps inconsistent with the prevailing narrative of “patriots” against “loyalists”—demonstrates that in Adams’ time the virtues of representing the despised—even those whom the attorney might otherwise despise—was alive and well. Consider the following entry from Adams’ Diary from 1773, where he reflects on his role in the Boston Massacre trial which had occurred three years earlier:

I . . . devoted myself to endless labor and Anxiety if not to infamy and death, and that for nothing, except, what indeed was and ought to be in all, sense of duty . . . [I] incurr[ed] a Clamour and hazarding popular Suspicions and prejudices which are not yet worn out and never will be forgotten . . . It was, however, one of the most gallant, generous, manly, and disinterested Actions of my whole life, and one of the best Pieces of Service I ever rendered my Country.”¹²

It is worth noting that Adams sees his act as “disinterested.” He is not his client and assumes the independent stance of advocate at a time when popular passions regarding the preeminent political issue of his day were at their zenith.¹³

9. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996).

10. Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1007 (1994).

11. There has, however, been a recent discussion of Adams’ defense of British soldiers in the Boston Massacre in the ABA’s “Law Day” held in 2011. Ed Finkel, *John Adams Gets His Day*, 97 A.B.A. J. 56 (2011).

12. 3 JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 79 (L.H. Butterfield, ed.) (1962).

13. Adams’ defense is viewed as successful. Of his eight clients, six were acquitted and, although two were found guilty, Adams succeeded in having their sentence reduced from death to branding. The preeminent history of the Boston Massacre and the resulting trial and its aftermath is HILLER B. ZOBEL, *THE BOSTON MASSACRE* (1970).

2. Abraham Lincoln and the Country Lawyer

Abraham Lincoln, given his fame, serves well as a figure representing so much of what the profession is currently not. While there is every reason to believe that Lincoln's contemporaries were generalists as he was, there is no lawyer of his time who has been even remotely researched as exhaustively as Lincoln. He can thus serve as a typical if (of course) extraordinarily notable lawyer of his time.

While Lincoln's general philosophy of practice is often encapsulated in frequently repeated quotes,¹⁴ the cases he undertook neatly encapsulate the paradigm of the non-specialist.¹⁵ He handled numerous debtor-creditor matters, representing both the debtors and the creditors. He represented railroad corporations—an enormously powerful business interest in Lincoln's time—as well as individuals litigating against railroad corporations. He represented both in-state and out-of-state litigants in diversity cases.¹⁶ While not an elected prosecutor, he assisted in prosecution by drafting indictments, acting as co-counsel, and serving directly as a state's attorney *pro tem*.¹⁷ At the same time Lincoln had an active criminal defense practice.¹⁸ He also practiced in what we would now call “transactional” work—real estate matters, trusts and estates, general legal advice to individuals and businesses, and even patents.¹⁹

This caseload is notable for several reasons. The first is its breadth: criminal law, debtor creditor, transactional practice, and commercial litigation—these embody knowledge of disparate substantive areas of the law

14. Perhaps his most famous is cited as a precursor to the mediation movement and conceptions of more collaborative, problem-solving lawyering: “Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will be business enough.” *THE WRITINGS AND SPEECHES OF ABRAHAM LINCOLN* 15 (Philip Van Doren Stern ed., 1961).

15. John A. Lupton, *THE LAW PRACTICE OF ABRAHAM LINCOLN: A NARRATIVE OVERVIEW*, http://www.papersofabrahamlincoln.org/narrative_overview.htm (last visited May 21, 2012). See also Ariens, *supra* note 10, at 1029 (Lincoln “practiced law in the traditional manner, representing clients in all kinds of legal matters, and representing any clients who came to him”; “[h]e refused to let the passions of the community determine the vigor of his defense of one who was criminally accused, and he remained an independent lawyer who knew the whole field of law”). For a searchable database of documents from cases in which Lincoln was involved, visit <http://www.lawpracticeofabrahamlincoln.org/Search.aspx>.

16. This opposing representation is all the more remarkable because railroads succeeded in transforming common law regarding who bears liability for property damages. Businesses, especially railroads, feared the financial consequences of judgments awarded to plaintiffs. Consider the result: “At the beginning of the nineteenth century, the law of nuisance provided an almost exclusive remedy for indirect interferences with property rights, and courts were prepared to award damages for injury to property regardless of social utility or absence of carelessness. By the time of the Civil War, by contrast, American courts had created a variety of legal doctrines whose primary effect was to force those injured by economic activities to bear the cost of these improvements.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 70–71 (1977); see also HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, at 38–39 (1991) (tracing the development of the “public use doctrine” to favor governmental subsidies to railroads).

17. Lupton, *supra* note 15.

18. *Id.*

19. *Id.*

that few modern practitioners could claim to possess. What is more important for purposes of this Article is how Lincoln smoothly moved from one “side” to another, representing criminal defendants to acting as prosecutor, representing large organizational entities to litigating against those entities. Here is Lincoln, like Adams before him, acting as the “disinterested” counselor who remains, as counselor, independent from those clients’ interests.

B. *The Current Ideal of Generalism and Attorney Independence*

Although widely critiqued, the rhetorical norms of the profession remain staunchly Lincolnesque.

First, the Model Rules of Professional Conduct largely remain rules of general application, guiding all types of practice. While on very rare occasions some allowances are made for distinctive qualities of certain types of practice, particularly criminal law,²⁰ there is only a single rule out of 59 that explicitly does so: Rule 3.8—“Special Responsibilities of a Prosecutor.”²¹ While lawyers “may communicate the fact that the lawyer does or does not practice in particular fields of law,” there remains a strong policy against taking this too far: in only rare cases can a “lawyer state or imply that a lawyer is certified as a specialist in a particular field of law.”²² There has been a relatively modest call for specialized sets of ethical requirements that more closely reflect the different worlds in which lawyers practice.²³ Nevertheless, apart from binding codes regulating conduct before government agencies,²⁴ these calls have led to little meaningful action by entities that regulate lawyers.

The ethical rules further embody the longstanding norm of decoupling the substance of representation from the content of representation. Under the heading “Independence from Client’s Views or Activities,” the Model

20. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2008) (making special allowances that a lawyer for a criminal defendant may require that every element of the case be established); MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (making special rules for reasonable belief about false testimony by a criminal defendant). In both of these instances, constitutional rights for a criminal defendant explicitly trump rules that otherwise apply in other contexts.

21. Arguably two other Rules address special roles an attorney might undertake: Rule 2.4 (“Lawyer Serving as a Third-Party Neutral”) and Rule 3.9 (“Advocate in Nonadjudicative Proceedings”). These examples, however, do not specify a special type of client—an important point given the issues this Article seeks to address.

22. MODEL RULES OF PROF’L CONDUCT R. 7.4. Interestingly, while such “certified specializations” are available to attorneys, only 3% of attorneys are so certified as compared to 80-90% of physicians. Thomas P. Sartwelle, *Your Doctor is Board Certified. Is Your Lawyer?*, 20 PROF’L L. 1 (2011). One reason Sartwelle identifies for these figures is the notion that “formal specialization detracts from a presumption that any licensed lawyer is competent to handle any legal problem.” *Id.* at 20. Perhaps this represents the continuing influence of the Lincolnesque paradigm.

23. For general calls in favor of such specialized codes, see Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993); Fred Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 190 (1997) (collecting citations to “specialized codes of conduct covering lawyers engaged in particular areas of practice”).

24. The most prominent recent example of agency regulation of attorneys is the Sarbanes-Oxley Act, which, in the wake of the Enron scandal, called on the Securities and Exchange Commission to pass a set of “minimum standard of professional conduct for attorneys appearing and practicing before the Commission.” 15 U.S.C. § 7245 (2006). The SEC subsequently did so. 17 C.F.R. § 205 (2010).

Rules state that “legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval” and “representing a client does not constitute approval of the client’s views or activities.”²⁵ John Adams would wholeheartedly approve.

Interestingly, the disjunction between the realities of practice and the strict generalism of the Model Rules appears to be on the rise. Non-binding ethical codes and articles that do focus on distinct areas of practice are proliferating. Examples include family law,²⁶ admiralty,²⁷ and trusts and estates.²⁸ Professional identity is well illustrated here: the depth of professional identity *in situ* virtually has compelled these practitioners to craft their own guidelines because the ethical rules guiding a unitary “professions” do not.

Another classic demonstration of the generalist paradigm is the law school curriculum, which is virtually unchanged since the time of Christopher Columbus Langdell in the nineteenth century.²⁹ The classic roster of first year classes—Civil Procedure, Property, Torts, Criminal Law, and Constitutional Law—is not about teaching the *practice* of criminal law or the *practice* of civil litigation. Rather, the endlessly repeated declaration of what legal education is about—“thinking like a lawyer”—has as its thrust the idea that “thinking like a lawyer” is consistent across practice areas.³⁰ Moreover, the ABA Standards for Approval of Law Schools remains generalist in outlook,³¹ and even recent critiques of legal education view “professional identity” in general ethical, social, and moral terms, none of which are keyed to particular areas of practice.³²

25. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. [5]. In somewhat contradictory fashion, the Rules also note that a lawyer should “accept appointments” to represent clients “except for good cause,” one of which is “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.” MODEL RULES OF PROF'L CONDUCT R. 6.2(c).

26. See AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY (2000); see also *Model Standards of Practice for Family and Divorce Mediation* (2001).

27. William W. Wright, Jr., *Admiralty Law Institute Symposium: The Uniqueness of Admiralty and Maritime Law: Ethical Considerations in Representing Multiple Parties in Litigation*, 79 TUL. L. REV. 1523 (2005).

28. See AM. COLL. OF TRUSTS AND ESTATES COUNSEL FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1993).

29. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's 52–53 (1983).

30. Indeed, legal education has traditionally eschewed “practice”—let alone specialized practice areas—as worthy of much attention. Christopher Columbus Langdell offers a pure form of this idea: to improve legal education it is “indispensable to establish at least two things: first, that the law was a science; secondly, that all the available materials of that science are contained in printed books.” Christopher C. Langdell, Address at the Commemoration of the 250th Anniversary of the Founding of Harvard College (Nov. 5, 1886), in A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 85 (1887).

31. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 302 (2010-2011) (requiring instruction in “substantive law” and “other professional skills” which are “generally regarded as necessary for effective and responsible participation in the legal profession”).

32. See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126–61 (2007). This influential study—usually referred to as the “Carnegie Report”—focuses on improving legal education in general terms, not to improve legal education in terms of

Finally, the Bar Exam, since its rise in the 1920's, is a reflection of the pure generalism characteristic of the Model Rules and legal education. The subjects tested are the familiar ones long required in law schools.³³ While the bar examination has come under intense scrutiny,³⁴ testing superficial familiarity with standard law school fare is what the bar examination continues to try to do. Unlike board certifications in medicine, a barred lawyer can thus do anything without additional qualifications and without demonstrating expertise through further assessments. A superficial test of general knowledge thus remains the core qualification for admission to the bar despite the increasing specialization of the legal profession.

III. PROFESSIONAL IDENTITY AS ADVOCACY DEFINED

In contrast to the generalist paradigm, the profession has become increasingly specialized,³⁵ decoupled from the steadfast generalism of professional regulation, legal education, and the licensing process. While some decry this trend, often building upon the generalist paradigm and recalling the image of Lincoln, most practicing lawyers view specialization as necessary to earn a living in the market for legal services.³⁶

Be that as it may, specialization has had another consequence: the creation of warring camps, groups of lawyers who exclusively represent one side within a specialty. This is professional identity as advocacy. This Article will now trace an early, perceptive articulation of the idea, and then explore how professional identity as advocacy has become a potent aspect of today's legal landscape.

promoting substantive specialization. See also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 73 (2007) (describing "core knowledge of the law" as embodying conventional first year classes).

33. The Multistate Bar Examination tests contracts, torts, constitutional law, criminal law and procedure, evidence, and real property. THE MULTISTATE BAR EXAMINATION, <http://www.ncbex.org/multistate-tests/mbe/> (last visited Apr. 3, 2012).

34. Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995).

35. For an exhaustive history and overview of specialization, see Ariens, *supra* note 10, at 1043.

36. The influential ABA report on legal education, usually called the "MacCrate Report," discusses how "changing law and new complexities have put an increasing premium on specialization to maintain competence and keep abreast of subject matter." TASK FORCE ON LAW SCHS. AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 42 (1992). Some argue that the trend is a positive development because it lowers the cost of legal services and helps insure greater competence. See Ariens, *supra* note 10, at 1051–57.

A. *Llewellyn's Crucial Insight: "Specialization Breeds Counter-Specialization"*

Karl Llewellyn was and remains an influential figure in jurisprudence and legal education.³⁷ Among his many works, he wrote a remarkable article entitled "The Bar Specializes: With What Results?"³⁸ in 1933—almost precisely the midway point between Lincoln's time and ours. In it Llewellyn notes that the Bar has become increasingly specialized³⁹ and the new specialization is in contrast to what Llewellyn calls the "tolerable roundedness" of the "old-fashioned American lawyer."⁴⁰ Llewellyn offers a crucial insight that goes deeper than these more conventional observations: "*specialization breeds counter-specialization*."⁴¹

In three words Llewellyn articulates how specialists are not merely discrete, independent islands of expertise. Rather, one area of specialization triggers an opposing specialization. There is, thus, not only an overarching specialization in "personal injury." Rather, there is specialization on behalf of personal injury plaintiffs and a "counter-specialization" on behalf of personal injury defendants. This is far deeper than decrying specialization as a general matter in contrast to the generalist ideal.⁴² It means that specialization is a process that recalls Newton's Third Law of Motion: for every action there is an equal and opposite reaction.

B. *Llewellyn's Insight Extended: Good Versus Evil*

Llewellyn's "counter-specialization" idea generates an important result: the opposition he identifies is one of *good against evil*. One group of specialist-practitioners will argue that its opponents are not motivated by the public good or by the norms of professionalism and integrity, but by pecuniary interests, self-aggrandizement, or some general sense of self-interest and "badness."⁴³ Put another way, professional identity becomes merged into "the interests of particular classes of clients" who are good against another particular class of clients who are bad.⁴⁴

37. Llewellyn was a chief exponent of the important movement called "Legal Realism." AMERICAN LEGAL REALISM 49 (William M. Fisher III et al. eds., 1993). His work is still frequently reprinted. One of his books—THE BRAMBLE BUSH—has been called "one of the most popular introductions to the law and its study in the United States." Steve Sheppard, *Introduction to KARL LLEWELLYN, THE BRAMBLE BUSH*, at ix (Steve Sheppard ed. 2008).

38. Karl Llewellyn, *The Bar Specializes—With What Results?*, ANNALS AM. ACAD. POL. & SOC. SCI. 177 (1933).

39. *Id.*

40. *Id.* at 182.

41. *Id.* at 183 (emphasis added).

42. It is worth noting that, as with many evocations of the "good old days," the old days might not have been so good, or at least so different, as current days. See Galanter, *supra* note 9, at 549 (arguing that a Golden Age argument "emerges not from independent examination of the past but from the polemical thrust of a critique of the present").

43. I will explore the mechanisms of how this operates in much more detail in the areas of personal injury and criminal law. See *infra* text accompanying notes 66–141.

44. Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861, 870 (1997).

Social scientists offer an explanation about why this process gets underway and becomes so intractable and enduring. Humans self-identify with distinct groups which, by definition, are different from other groups.⁴⁵ Group identification can be across a dizzying number of categories even apart from perhaps the most prominent distinctions based on race, gender, religion, ethnicity, and sexual orientation. It can, for example, be based on socioeconomics, geography (whether by continent, country, region, county, city, neighborhood, block), politics, sports, employment, self-presentation (clothing, grooming), level of education, age, and many more. Some of these categories might be a core element of group-identity, or can become prominent in certain places and times.⁴⁶ Moreover, these self-identified groups have a cognitive basis and are deeply rooted in our psyches⁴⁷ and, once formed, are notoriously difficult to eradicate. They become part of the cognitive “map” through which we make sense of the world.⁴⁸

Integral to these group identities is the idea that one group—almost always one’s in-group—is “good” while the out-group is “bad.”⁴⁹ Groups distinguish and diminish opposing groups—what Cass Sunstein has called “group polarization.”⁵⁰ Yankee fans “hate” the Red Sox and vice versa,

45. For a recent and fascinating study of how quickly and seamlessly humans form into “tribes” even based on arbitrary criteria, see Daniel L. Shapiro, *Relational Identity Theory: A Systematic Approach for Transforming the Emotional Dimension of Conflict*, 65 AMER. PSYCH. 634 (2010). In Shapiro’s experiment, a group of participants were randomly selected to sit at different tables. An alien then entered the room who said the world would be destroyed unless the “tribes” chose “one tribe as the *the* tribe for anyone.” *Id.* Despite the obvious interest for all concerned in reaching consensus on this representative tribe, the ensuing discussion descended into anger and recrimination. The tribes could reach no agreement.” *Id.* at 634–35.

46. The notion of multiple identifications, or what is sometimes called “intersectionality,” tends to be submerged and simplified in discourse that emphasizes one-group identification. Consider Stanley Fish’s amusingly detailed list of groups to which he belongs: “I am, among other things, white, male, a teacher, a literary critic, a student of interpretation, a member of a law faculty, a father, a son, a husband (twice), a citizen, a (passionate) consumer, a member of the middle class, a Jew, the oldest of four children, a cousin, a brother-in-law, a son-in-law, a Democrat, short, balding, fifty, an easterner who has been a westerner and is now a southerner, a voter, a neighbor, an optimist, a department chairman.” STANLEY FISH, *DOING WHAT COMES NATURALLY* 30 (1989). See also Wayne C. Booth, *Introduction to Mikhail Bakhtin, in PROBLEMS WITH DOSTOYEVSKY’S POETICS* (Caryl Emerson ed. & trans. 1984), at xxi (describing Bakhtin’s idea about how meaning is constructed around the “immense pluralities of experience” based on, among other things, “parent, clan, class, religion, country”).

47. Charles Stangor & James E. Lange, *Mental Representations of Social Groups: Advances in Understanding Stereotypes and Stereotyping*, in 26 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 357 (1994); C. Neil Macrae et al., *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 J. PERS. & SOC. PSYCH. 37–38 (1994).

48. See Macrae, *supra* note 47 (“for reasons of cognitive economy, we categorize others as members of particular groups—groups about which we often have a great deal of generalized, or stereotypic, knowledge”) (quoting S.T. Fiske & S.L. Neubert, *A Continuum Model of Impression formation from Category-Based To Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 15 (M.P. Zanna, ed. 1990).

49. Cass Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71, 74, 91 (2000) (describing group polarization in light of “the introduction of a rival ‘outgroup’”). For a similar description in the context of cognitive science, see ZOLTAN KOVESCSES, *LANGUAGE, MIND, AND CULTURE* 109–10 (2006) (“prejudices come in the form of structured opposites that correspond to relative in-groups and out-groups”).

50. Sunstein, *supra* note 49, at 74. Although in the context of discussing deliberative democracy, Sunstein offers a rich discussion of the psychological and sociological processes that lead group members to adopt increasingly extreme views.

and hate must be based on something, and that something must be good against evil.⁵¹ The residents of *that* neighborhood are unsophisticated (bad), while *this* neighborhood's residents are caring and look out for each other (good). "Seniors" might decry "kids these days" as lazy or impudent or spoiled, while those "kids" might view "seniors" as out of touch, cranky, or narrow. The French think Americans are unrefined and boorish while Americans think the French are snobbish and unfriendly. There are deeply held norms of a binary universe at play here: they "draw[] battle lines between the 'sons of light' and the 'sons of darkness.'" ⁵²

So how does this process play out in terms of the legal profession?

C. *The Lawyer as Moral Crusader and Charlatan*

Good lawyers fight for the people. Stories of lawyerly courage in the face of oppression and injustice run deep. They are, preeminently, in the realm of the civil rights movement. The importance of these events in tracing positive lawyer identity cannot be overstated. There remain powerful images of the fight for Civil Rights;⁵³ the ringing rejection of "separate but equal" in *Brown v. Board of Education*;⁵⁴ the image of Atticus Finch in the film⁵⁵ and book⁵⁶ *To Kill a Mockingbird*. As noted earlier, there is the compelling image of "honest Abe Lincoln" displaying unwavering integrity.⁵⁷ The popularity of shows involving lawyers—particularly in criminal law—continues unabated,⁵⁸ and, in these instances, as one commentator has put it, lawyers "are shown as triumphing through law."⁵⁹ These images together represent the professional ideal in word and deed, struggling, and ultimately succeeding, in doing the "right thing."

51. The sports analogy is a telling one. Research suggests how even the somewhat arbitrary nature of sports associations breeds enormous in- and out-group feeling to such an extent that "[w]hoever you root for represents you." James C. McKinley, *Sports Psychology: It Isn't Just a Game: Clues to Avid Rooting*, N.Y. TIMES, Aug. 11, 2000. Like the Shapiro experiment, *supra* note 45, there is also the notion that rooting for sports teams relates "to a primitive time when human beings lived in small tribes, and warriors fighting to protect tribes were true genetic representatives of their people." *Id.*

52. AMSTERDAM & BRUNER, *supra* note 4, at 83–84 (quoting ELAINE PAGELS, *THE ORIGINS OF SATAN* 105 (1995)).

53. Perhaps the best-known volume tracing the history of the Civil Rights movement is TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KIND YEARS 1954-1963* (1988).

54. 347 U.S. 483 (1954).

55. *TO KILL A MOCKINGBIRD* (Universal Pictures 1962).

56. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

57. See *supra* text accompanying notes 14–19.

58. The most prominent is the *Law & Order* franchise, which has spawned numerous spinoffs and has been on the air for 20 years as of the date of this writing. *Law & Order* (Universal Media Studios). Another famous example is *Perry Mason*, which was popular both as a television show and in numerous television movie spinoffs. *Perry Mason* (CBS Television Network).

59. Marc Galanter, *Changing Legal Consciousness in America: The View from the Joke Corpus*, 23 CARDOZO L. REV. 2223, 2238 (2002) (citing films where "Justice is Done!" and where "lawyers succeed in vindicating the right").

In contrast, images of “bad lawyers” abound. Lawyer jokes are acceptable and pervasive, and have generated scholarly attention⁶⁰ and analysis.⁶¹ Among the identified categories of lawyer jokes: “the lawyer as predator,” “lawyers as a destructive force,” and “lawyers as laboratory rats.”⁶² Numerous images of unscrupulous, greedy and/or self-aggrandizing lawyers remain embedded in modern popular media.⁶³

Professional advocacy as identity draws upon contradictory images of lawyers and appropriates the positive image for the “in group” while accusing the “out group” of embodying negative stereotypes. A key to success in this effort is to collapse the “good stereotype” into something that is viewed not as stereotype at all, but as “reality.”⁶⁴ Stereotypes become real, and, so a group would argue, the group is “really” like the good stereotype while the out-group is “really” the bad stereotype. There is moral condemnation at the foundation of this discourse.⁶⁵

IV. PROFESSIONAL IDENTITY AS ADVOCACY IN TWO CONTEXTS

Professional identity as advocacy plays out in different areas of law. My first two examples—personal injury and criminal law—are perhaps the most prominent instances of this dynamic today.⁶⁶ In both instances my goal is not to assess who is right and who is wrong. It is, rather to describe the rhetorical and narrative strategies through which professional advocacy is undertaken.⁶⁷

A. *The Personal Injury Wars*

Plaintiffs and defendants in personal injury litigation are in economic equipoise, albeit perhaps not in an obvious way. The ultimate sources of

60. Marc Galanter has written an entire volume assessing and analyzing the impact of lawyer jokes. MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005). For a summary of Galanter’s findings and ideas, see Galanter, *supra* note 59.

61. For a website that collects and categorizes lawyer jokes, see Peter Tiersman, *Lawyer Jokes: Truth and Nonsense about the Legal Profession*, LAWYER JOKES, <http://www.languageandlaw.org/JOKES.HTM> (last visited Apr 7, 2012).

62. Galanter, *supra* note 59, at 2228, 2230, 2234.

63. See *infra* text accompanying notes 89–116.

64. Successful work in this regard is very much like success in advocacy more generally. See Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS ON INTERPRETIVE ANTHROPOLOGY* 167, 173 (1983) (noting that successful advocacy entails a “matching process” between what is said and what is real).

65. Marc R. Stanley, *When Bad Companies Happen to Good People*, 56 *DRAKE L. REV.* 517, 529 (2008).

66. Consider, for example, legal malpractice with its opposing camps of lawyers who represent lawyers sued for malpractice and plaintiffs suing lawyers. See, e.g., Joseph F. Cunningham et al., *An Overlooked Defense to Professional Liability*, 43 *MD. BAR J.* 4, 60–61 (July/Aug. 2010) (referring to how “[d]isgruntled” plaintiffs “proceed with clever arguments” that demonstrate the “increased ingenuity of . . . their new attorneys”).

67. While I have my personal sympathies, I resist “taking sides.” This article is about a process, not an assessment of the substance of that process.

compensation for lawyers on both sides are large organizations: defendants' lawyers directly through hourly fees and plaintiff's lawyers less directly through contingent fees.⁶⁸ This means that unlike other areas of practice—particularly those involving low-income litigants described below⁶⁹—there are resources available to both “sides” to not only articulate their professional identity, but to also communicate that identity. This is a recipe for intense professional identity as advocacy.

1. The Professional Identity of the Plaintiff's Bar

There are two primary mechanisms through which the plaintiff's bar engages in group advocacy: advertising and professional organizations.

A crucial element of expressing professional identity of the plaintiff's bar is through advertising.⁷⁰ Ads on billboards, television, buses and subways, yellow pages, and lists of “best attorneys” make the personal injury bar the most omnipresent segment of the legal profession in America. While such advertising is designed to attract clients,⁷¹ it is the *content* of how this is done and how it expresses a consistent professional identity that is of importance here.

Perhaps equally important, if less visible, are the efforts of the American Association for Justice—the primary professional organization that acts on behalf of the personal injury bar.⁷² The rhetoric employed by this group is consistent with the image fostered through advertising by the personal injury bar.

a. *Fighting for “You”*

Many communications from the personal injury bar note that personal injury lawyers will “fight for you.”⁷³ The second person pronoun “you” has

68. Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956 (2000).

69. See *infra* text accompanying notes 142–55.

70. The line of Supreme Court cases establishing First Amendment protection for attorney advertising and tracing the limits of that protection has been of incalculable significance in enabling the personal injury bar to communicate its message and, thereby, intensifying professional group identity conflicts. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (recognizing First Amendment protections for attorney advertising); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (establishing that prohibiting in-person solicitation is constitutional); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (targeted mailing to potential personal injury clients is constitutionally protected); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (direct mail solicitation constitutional); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (30 day blackout period for solicitation of potential personal injury clients is constitutional).

71. It should come as no surprise that this kind of advertising is successful at attracting clients, although competition among personal injury lawyers remains fierce. Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiff's Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 264 (2006). As is so characteristic of discourse about personal injury practice, even the title of this article offers a not very subtle clue as to where the sympathy of the author lies in the personal injury wars.

72. AMERICAN ASSOCIATION FOR JUSTICE, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/default.htm> (last visited Apr. 7, 2012).

73. There are numerous examples. See *Personal Injury Lawyers Can Fight for You*, <http://www.sylw.org/personal-injury-lawyers-can-fight-for-you.html> (last visited Apr. 11, 2012); LAW OFFICES

enormous power: the “you” addresses the reader directly. “You” necessarily entails “non-you” or, even more tellingly, a third person - “them.”⁷⁴ The “you” also extends to jurors—the epitome of the plain old citizen⁷⁵—and the notion that “tort reformers” do not trust jurors to do the right thing.⁷⁶ The power of “fight” is also telling: one doesn’t “sue” a powerful opponent: “you” fight against “them” in the mode of David and Goliath.⁷⁷

b. “Your Rights”

Often these formulations place the issues at stake in terms of “rights,” thus situating the “fight” in constitutional terms.⁷⁸ Such a “fight” for “rights” recalls the paradigmatic image of the “good lawyer”—the lawyer who fights for “civil rights” in the “Civil Rights Movement” sense of the term.⁷⁹ Yet even further is how this talk of “rights” and “justice” specifically places such lawsuits as vindicating law. Such cases are in the *public interest*—a classic technique of the professional identity wars.⁸⁰

Perhaps these themes are best summed up by how the well-known organization representing the interests of the personal injury bar—the American Trial Lawyers Association—changed its name in 2007 to the American Association for Justice.⁸¹ Its self-identified mission is “to promote a fair and effective justice system.”⁸²

c. The “Other”: Powerful Interests

These formulations also link up with the deep-rooted populism long traceable in American history and American culture: “the people”⁸³

OF JEFF MARTIN, <http://www.jeffmartinlaw.com/> (last visited Apr. 7, 2012) (an experienced attorney “will fight for you”); *The Leading Top eZines Article Site on the Net*, <http://www.topezinesarticles.com/culture-and-society/you-should-find-a-top-maryland-personal-injury-attorney-to-fight-for-you/> (note the web address itself) (last visited Apr. 11, 2012); THE LAW OFFICES OF JOSEPH J. CARIGLIA, P.C., <http://www.cariglia.com/> (last visited Apr. 7, 2012) (“we will fight for you, and we fight to win”).

74. For an account of the power of the second person pronouns, albeit in an entirely different context, see DAVID FOSTER WALLACE, *A SUPPOSEDLY FUN THING I’LL NEVER DO AGAIN* 266–67 (1997) (discussing “the near imperative use of the second person” in cruise ship advertising).

75. Stanley, *supra* note 65, at 521.

76. Perhaps ironically, a leading text on plaintiff representation in personal injury cases devotes a substantial amount of time on how to identify jurors who believe in “tort reform” in order to exercise peremptory challenges so they do not serve on juries. DAVID BALL, *DAVID BALL ON DAMAGES* 85–87 (3d ed. 2011).

77. The David and Goliath image specifically emerges in some personal injury discourse. See *The David and Goliath History of Our Civil Justice System against Toxic Waste and Environmental Harm*, PANAMA CITY, FLA. INJURY LAWYER BLOG, <http://www.personalinjurylawyer.com/feed-item/the-david-v-goliath-history-our-civil-justice-system-against-toxic-waste-enviromne> (Sept. 30, 2010).

78. LAW OFFICES OF TOBIN, REITMAN, GREENSTEIN, CARUSO, WIENER, KONRAY, & KESSLER, P.C., <http://www.teamlaw.com/> (last visited Apr. 7, 2012) (“we fight for the rights of injured people”).

79. See *supra* text accompanying notes 53–59.

80. See *supra* text accompanying note 59.

81. AMERICAN ASSOCIATION FOR JUSTICE, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm> (last visited Apr. 7, 2012).

82. *Id.*

83. See MORGAN & MORGAN, <http://www.forthethepeople.com/> (last visited Apr. 7, 2012).

against the “special interests” and “the rich.”⁸⁴ The American Association for Justice, for example, is “taking on the most powerful interests.”⁸⁵ The rhetoric can be heated: corporations are “artificial creatures”⁸⁶ who, as noted above, confront a system of “David v. Goliath.”⁸⁷ The personal injury lawyer is David with the slingshot and the only chance an ordinary citizen has to fight the power. One law firm sets up the distinctions quite neatly: the firm is “dedicated to protecting the people, not the powerful.”⁸⁸ Another formulation is as follows:

Corporations Value Profits Over Safety

We aggressively pursue personal injury and wrongful death claims on behalf of our clients, seeking to hold corporations accountable for ignoring safety measures in order to turn a quick profit. We . . . tak[e] on powerful interests, including the oil and gas companies . . .⁸⁹

2. Counterattack: Professional Identity and the “Defense Bar”

The personal injury defense bar primarily consists of firms retained by insurers and, in the case of large class action toxic tort matters, by departments within law firms. Given that this practice almost exclusively represents organizations, it would not be feasible or effective to market services to the general public. Moreover, the defense bar faces a substantial challenge in promoting the collective interests of their clients. These firms represent clients who are not easily portrayed in sympathetic terms. After all, insurance companies and large organizations are hardly well-regarded in the popular imagination. Nevertheless, the defense bar deploys and draws upon a set of stories to support its own morality tale of good versus evil.

a. A Creation Myth

The defense bar has its own organization to articulate its identity and interests—the Defense Research Institute (“DRI”). Calling itself the

84. For an overview of populist rhetoric in American culture and politics, see MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (1995); see also WILLIAM F. HOLMES, *AMERICAN POPULISM* (1994).

85. AMERICAN ASSOCIATION FOR JUSTICE, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm> (last visited Apr. 7, 2012).

86. Stanley, *supra* note 65, at 517.

87. *Id.* at 526.

88. ATLANTA PERSONAL INJURY ATTORNEY, CIVIL RIGHTS, WHISTLEBLOWER LAWYER, <http://www.hornsbylaw.com/> (last visited Apr. 7, 2012); see also *Personal Injury Attorneys Stand up for you Against Powerful Business and Corporate Interests*, LAW OFFICES OF PAUL WHITFIELD & ASSOCIATES, <http://www.whitfieldattorney.com/docs/personalinjuryattorneysstandupforyouagainstopowerfulcorporateinterests.pdf> (stories about unreasonable positions taken by personal injury defendants with document titled as stated in the url address).

89. PHILADELPHIA PERSONAL INJURY ATTORNEY, <http://www.mswattorneys.com/> (last visited Apr. 7, 2012).

“voice of the defense bar,”⁹⁰ DRI is explicit in articulating its role as filling a “need for a voice to counter plaintiff’s attorneys.”⁹¹ Consider the following story told by DRI about its origins—a creation myth, if you will:

While defense attorneys continued to handle the defense of individual claims in a traditional, time-proven manner, plaintiffs’ lawyers began to use new tactics and fashion novel arguments to boost the amount of awards . . . Black-board arguments and other hitherto unknown courtroom tactics were inflating the damages for “pain and suffering” to astronomical amounts. Contingent fees grew disproportionately, and legal liability was being extended beyond the bounds of reason. On the legislative front, plaintiffs’ representatives began to appear before legislative committees to seek expanded liability while opposing any sort of reform in the personal injury law.⁹²

The story continues that “[d]efense lawyers recognized the growing danger and the harmful impact that excessive awards would have on the civil justice system,” hence the need to “unite the defense effort” through the founding of DRI.⁹³

This story is a history by a professional in-group about the rise of a “bad” out-group, which, in turn, prompts the need for the in-group—the white hats—to counter the social ill generated by the greed of the out-group.⁹⁴ Note that the history is driven by “plaintiffs’ lawyers” and “plaintiffs’ representatives”: the players in this narrative are clearly one lawyer group against another lawyer group. Also note that in a remarkable parallel with the discourse of the plaintiffs’ bar, it is law, the very “civil justice system” itself—that is at stake and on whose behalf the defense bar is struggling to vindicate against the forces of evil.

This story demonstrates professional identity as advocacy. Nevertheless, the story only suggests the more powerful story that is at the core of the defense bar’s identity advocacy: the “litigation explosion.”

90. DRI, <http://www.dri.org/> (last visited Apr. 7, 2012).

91. *A History of DRI*, DRI 1 (2005), <http://www.dri.org/ContentDirectory/Public/About/DRI-History2005.pdf>.

92. *Id.* It is noteworthy that this narrative also hearkens to an earlier time—a “traditional, time proven” way of lawyering—thus contrasting the trouble caused by personal injury lawyers with the ideal of Abraham Lincoln and Atticus Finch. See *supra* text accompanying notes 14–19, 55–59.

93. *Id.* at 1–3.

94. There are also remarkable instances of attempting more explicitly to appropriate the stock figure of the “good lawyer” in terms I have already discussed. See *supra* text accompanying notes 53–65. One example is an explicit comparison of a President of DRI to Atticus Finch—the embodiment of integrity in the face of injustice. Steven T. Taylor, *Dallas Lawyer with Atticus Finch-Like Attributes Leads the “Voice of the Defense Bar”*, 27 OF COUNSEL 7 (2008).

b. *The “Litigation Explosion”*

A central image in the personal injury discourse is that America is being overrun by a “litigation explosion.”⁹⁵ What is remarkable is that this notion is contradicted by empirical studies of judicial dockets, which consistently show that the area of litigation growing most rapidly is commercial litigation.⁹⁶ Indeed, sometimes the “litigation explosion” is accepted as a given, thus warranting no or minimal independent support.⁹⁷

Perhaps the key to how the litigation explosion is articulated and understood is through anecdotes of laughable overreaching by the plaintiffs’ bar. Such anecdotes carry enormous rhetorical power.⁹⁸ The following discussion surveys a few of the more striking stories of this type.

i. *Of Seesaws and Childhood Obesity*

Life Without Lawyers: Liberating Americans from Too Much Law by Philip K. Howard⁹⁹ is a recent book ostensibly devoted to how, as its name suggests, law and laws are ruining the country. In the book and in interviews, it is clear that Howard, despite the broadly framed title, does not mean “too much law” and “lawyers” in the general sense; rather, he is referring only to tort law and personal injury lawyers.¹⁰⁰ In making his argument, Howard employs a series of “ghastly anecdotes.”¹⁰¹ One involves the looming threat of seesaw litigation: “If any child who falls on a seesaw can sue, all seesaws will be removed from playgrounds,” which “results in the consistent removal of school playgrounds, which leads to the larger

95. Michael D. Johnston, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU J. PUB. L. 179, 180 (2007); David Neubaer & Stephen S. Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion*, 16 JUST. SYS. J. 1 (1994).

96. See EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 23–24 (Brian J. Ostrom et al. eds., 2003) (noting that tort filings decreased in 30 states surveyed); Marc Galanter, *The Life and Times of the Big Six: Or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 945 (the largest increase in civil federal court findings is in commercial litigation).

97. See, e.g., Johnston, *supra* note 95, at 180 (arguing that there is “substantial evidence of a ‘litigation explosion’ that is consuming the productivity, profits, and general effectiveness of many American industries” while noting in a footnote that “the seriousness of the problem is hotly disputed”).

98. An element of this power is how crucial—if not essential—narratives are in understanding experience and “reality.” For an example in the context of the development of law, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 114–15 (2000) (“[k]nowing how to tell [stories] and to comprehend them may be part of our human survival kit”). Perhaps the seminal article on the role of narrative in legal discourse is Robert Cover, *The Supreme Courts, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For other excellent discussions of narrative and the law, see Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989). For a more general non-legal treatment, see LOUIS O. MINK, *NARRATIVE FORM AS A COGNITIVE INSTRUMENT, IN THE WRITING OF HISTORY: Literary Form and Historical Understanding* 129–49 (Robert H. Canary & Henry Kozicki, eds. 1978); Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5 (1980).

99. PHILIP K. HOWARD, *LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW* (2009).

100. See generally *id.*

101. *Non Fiction Review: Life without Lawyers: Liberating Americans from Too Much Law*, PUBLISHER’S WEEKLY, <http://www.publishersweekly.com/978-0-393-06566-4> (last visited Apr. 7, 2012).

problem of childhood obesity.”¹⁰² Rhetorically, the statement is a string not only of possibilities but also of inevitabilities: all falls from seesaws will generate lawsuits; all seesaws will be removed from playgrounds; the lack of seesaws will cause childhood obesity. While logicians would find this reasoning dubious at best, the argument demonstrates elements typical of professional identity rhetoric: a ridiculous example of litigation (seesaw cases) and how this type of litigation generates social harm which is not in the public interest. In this instance, the choice of the ridiculous suit is particularly compelling: innocent playground equipment—the stuff of childhood innocence—is being taken away, which not only eliminates fun, but exacerbates a well-publicized and intensifying public health threat to children.¹⁰³ This is an image of a personal injury lawyer not only as a killjoy, but as, quite literally, guilty of child endangerment.

It is also notable that Howard is a large firm partner¹⁰⁴—a theme to be explored later in the Article.

ii. Of McDonald's and Million Dollar Pants

The famous case of a massive award for spilled McDonald's coffee¹⁰⁵ triggered satire in *Seinfeld*¹⁰⁶ and is so embedded in the American psyche that a book on personal injury advocacy offers advice on voir dire of jurors should the McDonald's Coffee case crop up.¹⁰⁷ While some have sought to correct the ridiculous image with the seriousness of what “really happened,”¹⁰⁸ which is far more sympathetic than the myth suggests, the power of the story remains.

102. Rachel M. Zahorsky, *Now is the Time for 'Life Without Lawyers,' Says Covington & Burling Partner*, ABA J. DAILY, http://www.abajournal.com/news/now_is_the_time_for_life_without_lawyers_says_covington_burling_partner (last visited Apr. 7, 2012).

103. In 2010 alone, at least three books have been published regarding this issue. ROBERT A. PRETLOW, *OVERWEIGHT: WHAT KIDS SAY: WHAT'S REALLY CAUSING THE CHILDHOOD OBESITY EPIDEMIC* (2010); PREVENTING CHILDHOOD OBESITY: EVIDENCE POLICY AND PRACTICE (Elizabeth Waters et al., eds.) (2010); JENNIFER A. O'DEA, *CHILDHOOD OBESITY PREVENTION: INTERNATIONAL RESEARCH, CONTROVERSIES, AND INTERVENTIONS* (2010). The Center for Disease Control considers the problem significant enough to devote a separate section of its website to it. *Obesity and Overweight*, THE CENTER FOR DISEASE CONTROL, <http://www.cdc.gov/obesity/childhood/index.html> (last visited Apr. 7, 2012).

104. Howard is a partner at Covington and Burling. Zahorsky, *supra* note 102.

105. Only an order, not an opinion, was issued in the case. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994).

106. Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate over Tort Reform*, 26 CAP. U.L. REV. 701 (1997). Greenlee describes the episode, along with quotes from the dialogue, in detail. *Id.* at 704–09.

107. BALL, *supra* note 76, at 87. Ball's advice is for attorneys not to convince prospective jurors whether the verdict was fair or not, but, rather, “do nothing but ask questions about it” and “take no sides.” Evidently the issue of “spilled beverage” liability has become serious enough to warrant a separate American Law Reports entry. Michelle C. Kaminsky, *Liability for Vendor for Food or Beverage Spilled on Customer*, 64 A.L.R. 5th (1998).

108. Such efforts have been published in both law reviews and in bar journals. Kevin G. Cain, *And Now the Rest of the Story . . . : The McDonald's Coffee Lawsuit*, 11 J. CONSUMER & COM. L. 14 (2007); Greenlee, *supra* note 106; Steven A. Meyer, *Too Bad to Be True*, 28 PA. LAW 43, 44 (2006) (the subtitle of the article is “[w]hen someone tells a story about an outrageous jury decision, check it out: Odds are it may never have happened”).

And then there is the story of how, as a New York Times article put it, a “Judge Tries Suing Pants Off Dry Cleaners.”¹⁰⁹ In this instance, an administrative law judge sued a neighborhood dry cleaner for \$67.3 million for misplacing his pants.¹¹⁰ While not as pervasive as the McDonald’s case, the story of the judge and his pants still became “a worldwide symbol of legal abuse by seeking jackpot justice¹¹¹—a preposterous circumstance assumed to be representative of litigation.

In the rhetoric of professional identity, the underlying validity of these stories as both true and representative are accepted without question. They both establish and reinforce stories of frivolous lawsuits, greed, and overreaching—the defining characteristics of the “litigation explosion” and, by extension, what the plaintiffs’ bar is all about.

3. Battle Is Joined

In response to the McDonald’s Coffee tale, the personal injury bar decries “those who concoct mythical lawsuit anecdotes” and “generalize from the occasional aberrant case.”¹¹² Moreover, as noted above,¹¹³ the term “trial lawyers” itself has become such an epithet in political discourse that the most prominent association of personal injury attorneys recently changed its name from the “American Association of Trial Attorneys” to the “American Association for Justice”¹¹⁴—a telling attempt to seize the moral high ground in the push/pull of professional advocacy. Indeed, there is a deep political and ideological dimension to this debate, with “liberal” trial lawyers wary of free market capitalism¹¹⁵ and “conservative” political leaders arguing in favor of “tort reform.”¹¹⁶

In the end, what is striking is how the debate focuses on lawyers themselves and their rhetoric as a “group,” with each group excoriating the motives and social impact of the professional activities of the other group.

B. Criminal Justice

As the center of law and the popular imagination, criminal defense attorneys and prosecutors assume mythical roles of good against evil, both

109. Ariel Sabar & Suevon Lee, *Judge Tries Suing Pants off Dry Cleaners*, N.Y. TIMES, June 13, 2007, at A13.

110. *Id.* For the denouement, see Ariel Sabar, *In Case of Missing Trousers, Aggrieved Party Loses Again*, N.Y. TIMES, June 26, 2007 (the trial court found that “that the plaintiff is not entitled to any relief whatsoever”).

111. Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2525 (2008) (quoting Lubna Takuri, *Judge Rules in Favor of Dry Cleaner in \$54M Suit Over Missing Pants*, LAW.COM (June 26, 2007), <http://www.law.com/jsp/article.jsp?id=1182762359671>).

112. Stanley, *supra* note 65, at 519.

113. See *supra* text accompanying notes 81–82.

114. Stanley, *supra* note 65, at 518.

115. *Id.* (in the context of defending personal injury lawsuits, offering a “contrary view” to the notion “that the free market regulates itself”).

116. *Litigation and Professional Responsibility: Is Overlawyering Overtaking Democracy?*, 21 GEO. J. LEGAL ETHICS 1433 (2008) (transcript of panel). This political divide should not be simplified, however, as some conservative Christian groups argue against tort reform. Stanley, *supra* note 65, at 529.

seeking to bear the mantle of truth and justice. There are, of course, inherent differences in these roles in the special context of criminal law: prosecutors frame their role as pursuing justice to victims and preserving safety and the rule of law to society at large, while defense attorneys, classically, frame their role as preserving individual rights.¹¹⁷ At least from a broad perspective, however, both claims are legitimate, and, after all, the entire process is called the criminal justice *system*. Identity advocacy, however, shifts the emphasis from *system* to good and bad *actors* within the system.

1. Overreaching Prosecutors: Political Ambition and Ego

It is a deep seated notion that the prosecution function “is to seek justice, not merely to convict.”¹¹⁸ In the negative discourse about prosecutors, however, this is the goal that is honored in the breach. An extensive literature excoriates the “scorekeeping mentality” of prosecutors: they (that is, prosecutors as a group) promote convictions over justice¹¹⁹ by withholding exculpatory evidence tending to show the innocence of criminal defendants.¹²⁰ There is the pervasive image of the politically ambitious prosecutor whose goal is to secure high profile convictions in order to promote reelection or higher office.¹²¹ Indeed, the rapacious, unethical, politically motivated prosecutor is a longstanding stock character in American popular culture.¹²² Prosecutors also “flex their muscles in the courtroom solely for the purpose of posturing in front of the jury.”¹²³

117. See Kalthleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will not Go Away*, 77 MARQ. L. REV. 751, 766 (1994) (“prosecuting attorneys see themselves as protectors of justice, and criminal defense attorneys see themselves as defenders of individual rights”).

118. See ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTOR FUNCTION Standard 3-1.2(c). The ABA MODEL RULES OF PROFESSIONAL CONDUCT similarly note that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” R. 3.8 cmt. This notion is embedded in Supreme Court jurisprudence as well. *Berger v. United States*, 295 U.S. 78, 88 (1935) (government’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done”). See also Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM L.J. 607 (1999); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us about a Prosecutor’s Ethical Duty To “Seek Justice”*, 82 NOTRE DAME L. REV. 635 (2006).

119. See, e.g., Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283 (2001); Kenneth Bresler, *“I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996). For a response to Bresler’s article, see Thomas Hagemann, *Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151 (1996).

120. Alafair S. Burke, *Talking about Prosecutors*, 31 CARDOZO L. REV. 2119, 2119 (2010) (describing prosecutors who “withhold exculpatory evidence that might undermine their impressive conviction rates”).

121. Sandra Caron George, *Prosecutorial Discretion: What’s Politics Got To Do With It?*, 18 GEO. J. LEGAL ETHICS 739 (2005); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates’ Campaigning on Capital Cases*, 7 GEO. J. LEGAL ETHICS 941 (1994).

122. THEY WON’T FORGET (NYT 1937) (features Claude Reins in a “savage characterization of the ambitious prosecutor”). PRINCE OF THE CITY (New York Magazine 1981) (involves a plot involving “new, politically ambitious prosecutors, hungry for blood—anyone’s blood”).

123. Cassidy, *supra* note 118, at 672; Burke, *supra* note 120, at 2119 (describing literature that portrays prosecutors as “mak[ing] prejudicial and misleading statements to both judgments and juries”).

Consider the following indictment of prosecutors by a criminal defense attorney:

The prosecution is not content just to use superior resources against defendants. They are in hot pursuit of defense lawyers, especially those that are highly skilled with reputations to match. Some prosecutors want civil, criminal and disciplinary immunity for their actions. They seek to further their reputations by trapping, prosecuting, or obtaining disciplinary sanctions against defense lawyers. In some cases they are found to go overboard in their zeal, they want immunity and their own Code of Ethics whose violations, if any, they shall determine . . . [W]e will be creating a special class of impervious prosecutors, unchecked in whatever violations of the Constitution and law that they may commit.”¹²⁴

Another example, this time from the academic literature:

[A]s the courts continue to recognize new rights of criminal defendants, prosecutors continue to devise new and improper ways to impair the exercise of those rights . . . Prosecutors have found new ways to subvert the rules of evidence and to introduce inadmissible evidence indirectly under the guise of some feigned legitimate purpose. Prosecutors also have created charades to mask deals with cooperating witnesses in order to prevent exposure of the agreement through cross-examination. Prosecutors have devised other schemes and tactics to prevent the accused from gaining access to exculpatory evidence. Prosecutors have also used their control of experts to introduce outlandish opinions, distort the facts, and mislead the jury.¹²⁵

Here are the telltale signs of identity advocacy: the branding of the “other” professional group collectively (albeit with a single nod to “some” of the out group) as selfish, self-interested, promoting reputations with monumental consequences. They run amok, violating constitutional rights. There is an assumption that these instances are common, even the norm among prosecutors. As one commentator characterizes it, there is a “pre-vailing rhetoric of fault” in discourse about prosecutors.¹²⁶

124. Thomas F. Liotti, *The Uneven Playing Field: Ethical Disparities between the Prosecution and Defense Functions in Criminal Cases*, 17 *TOURO L. REV.* 467, 501 (2001).

125. Bennett L. Gershman, “*Hard Strikes and Foul Blows*”: *Berger v. United States 75 Years After*, 42 *LOY. U. CHI. L.J.* 177, 204–205 (2010).

126. Burke, *supra* note 120, at 2127. Burke relates a brief story to prove this point at the beginning of his article: After seeing a “former law school ethics professor for the first time in fifteen years . . . ‘I had barely gotten out the initial words—I was a prosecutor—before hearing her response: Morally compromised, were you?’” *Id.* at 2119.

Moreover, there are highly publicized instances of prosecutorial overreach.¹²⁷ At the national level, the Duke Lacrosse case, involving accusations of rape and ensuing revelations about prosecutor Michael D. Nifong's handling of the case, captured the public imagination.¹²⁸ After Nifong pursued indictments of three Duke Lacrosse players for rape, with Nifong making multiple statements to the media about the case, all charges against the three were dismissed. As the matter unfolded and as more information about the case emerged, Nifong became the embodiment of the overreaching prosecutor, evidently with quite a bit of justification. This image has appeared in scholarship,¹²⁹ in ensuing investigations by the Attorney General of North Carolina,¹³⁰ and, ultimately, in proceedings that led to Nifong's disbarment by the North Carolina Bar.¹³¹ Not surprisingly, the defense counsel in the case "repeatedly said Nifong pursued the case for political gain."¹³²

Although by no means reaching the same national level of public scrutiny as the Duke Lacrosse case, other cases of more local interest also involve prosecutors who fit the stereotype of the ambitious prosecutor.¹³³

2. Returning the Favor: How Can You Defend Those People?

Prosecutors inhabit unique territory in identity advocacy. On the one hand, they operate under specific ethical restrictions¹³⁴—albeit fuzzy—as to what they can or cannot say, the boundaries of which are, ultimately, of

127. For a detailed discussion of examples, see Laurie L. Levenson, *Prosecutorial Sounds Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021, 1038–51 (2010) (citing examples of improper statements by prosecutors regarding a defendant's "character and race," a defendant's "admissions or confessions," the legitimacy of DNA and scientific tests, and the creditability of witness credibility). See also Sarah K. Fleisch, *The Ethics of Legal Commentary: A Reconsideration of the Need for an Ethical Code in Light of the Duke Lacrosse Matter*, 20 GEO. J. LEGAL ETHICS 599 (2007).

128. See *Duke Lacrosse Sexual Assault Case News*, N.Y. TIMES http://topics.nytimes.com/topics/reference/timestopics/organizations/d/duke_university/duke_lacrosse_sexual_assault_case/index.html (last visited Apr. 7, 2012) (tracing coverage of the case in the New York Times).

129. See, e.g., R. Taylor Matthews, *The Duke Lacrosse Rape Case: A Public Branding, Is There a Remedy?*, 52 ST. LOUIS U. L.J. 669 (2008); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337 (2007).

130. The ensuing investigation of the matter by the North Carolina Attorney General Roy A. Cooper concluded that Nifong was "unchecked," "overreaching," and a "rogue prosecutor." Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, (April 12, 2007), <http://www.nytimes.com/2007/04/12/us/12duke.html>.

131. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

132. *Defense Attorneys: Rush to Prove Guilt in Duke Lacrosse Case*, WRAL.COM <http://www.wral.com/news/local/story/1617292/> (last visited Apr. 7, 2012).

133. For a recent example, see *In re Russell*, 797 N.W.2d 77 (S.D. 2011) (finding of unethical conduct by a prosecutor, who subsequently became a state legislator, for publicizing a Grand Jury transcript to counter criticism in his handling of a politically charged case).

134. The most prominent guideline is in MODEL RULES OF PROF'L CONDUCT R. 3.8, which prohibits prosecutors from "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." The Rule goes on to mandate that a prosecutor "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor" from making such comments. *Id.*

constitutional dimension.¹³⁵ For example, ethical guidelines prohibit prosecutors from making public statements that “heighten[] public condemnation of the accused.”¹³⁶ While the specificity and enforcement of such standards, as noted above, have been criticized,¹³⁷ they furnish at least some limitation on openly criticizing defense counsel.

On the other hand, prosecutors enjoy an inherent advantage in the identity advocacy wars. Prosecutors pursue justice by seeking to punish accused criminals, and, thus, a prosecutor’s morality is embedded in the criminal process itself. There is little need to criticize the morality of defense counsel when their clients are accused of often brutal and reprehensible crimes for which, as the assumption goes, they are guilty.¹³⁸ Public condemnation of accused rapists or murderers is pretty much a given without effort on the part prosecutors, and, by extension, those who defend the rapists and murderers are the enemy of truth and justice. As a result, identity advocacy for prosecutors, in many respects, takes care of itself.

Given these realities, much of the rhetoric in favor of the professional identity of prosecutors is less explicit and more subtle than that of the criminal defense bar. For example, the preeminent national organization for state prosecutors—the National District Attorneys Association—characterizes itself as “the voice of America’s prosecutors . . . in their efforts to protect the rights and safety of the people.”¹³⁹ There is nothing here that is directly critical of the defense bar. There is, however, an inherent critique of the defense counsel insofar as it is the criminal justice *system*—defense counsel included—that pursues justice, not just the “efforts” of prosecutors. This organization, however, omits defense counsel from this effort, thus transforming an integrated system into one in which only one element of the system—prosecutors—are on the side of the “rights and safety of the people.” Indeed, the seemingly moral high ground enjoyed by prosecutors does appear in strident form in popular discourse. This anti-defense counsel discourse is embodied in the oft-asked question, and the title of one recent book¹⁴⁰ and yet another book.¹⁴¹ “How Can You Defend Those People?”

135. The leading case is *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991) (seeking to balance prosecutor’s First Amendment rights with the constitutional concerns about a “substantial likelihood of materially prejudicing an adjudicative proceeding”).

136. MODEL RULES, *supra* note 21.

137. See generally Levenson, *supra* note 127.

138. It is notable that these spectacular instances of brutality are only a small subset of criminal cases, the vast majority of which involve matters, such as drug possession, that typically garner attention only in the aggregate or when celebrities are involved.

139. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, <http://www.ndaa.org> (last visited Apr. 7, 2012).

140. MICKEY SHERMAN, *HOW CAN YOU DEFEND THOSE PEOPLE?* (2008).

141. JAMES S. KUNIN, “HOW CAN YOU DEFEND THOSE PEOPLE”: THE MAKING OF A CRIMINAL DEFENSE LAWYER (1983). The phrase also crops up in other contexts. See, e.g., Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1515 (2005).

V. TWO SPECIAL CASES: LOW-INCOME LITIGANTS AND WALL STREET LAWYERS

To the “man on the street,” being a lawyer is usually about being a criminal lawyer or a personal injury lawyer. There is virtually no attention paid to a wide swath of the profession whose identity does not involve repeated opposition to “counter-specialists.” Such lawyers include the trusts and estates lawyer, the real estate lawyer, the lawyer who counsels small businesses, the lawyer who engages in a little bit of this and a little bit of that—that is, the many lawyers who, with little or no fanfare, engage in non-contingent fee work on behalf of, typically, middle class clients.

However, two particularly significant segments of legal services tend to operate under the radar screen. These are lawyers engaged in an extraordinarily large amount of litigation involving low-income litigants and large-scale commercial litigation. In the first case, there is professional identity as advocacy, but the nature of work, based on a number of reasons I will trace below, generate an ironic result: no one is listening. In the second case, there is no professional identity as advocacy; there is, rather, professional identity as proxy for status. The whys and wherefores of these two situations are interesting case studies of how professional identity advocacy has an impact even in contexts in which it does not exist.

A. *Professional Identity in Search of an Audience: Advocacy on Behalf of Low-Income Clients*

As I have traced in detail elsewhere,¹⁴² there is a massive adjudicatory system that operates below the level of attention of most observers, including most lawyers and the culture at large. This is the representation of individual low-income clients.

These cases fall into distinct categories. First, there are landlord-tenant matters, adjudicated in an array of fora that are both overwhelmed with cases and overwhelmingly under-resourced.¹⁴³ Second, there are cases involving claims for government benefits primarily adjudicated in a patchwork of state and federal administrative agencies.¹⁴⁴ Third, there are family law cases often involving child custody.¹⁴⁵

Few lawyers represent litigants in these cases. In contrast to personal injury practice, where the defendant’s resources fund the representation,¹⁴⁶ in these cases there is no opportunity to make a profit because the clients, by definition, have little or no resources. Thus, those with fundamental

142. Robert Robinson, *A Theory of Access to Justice*, 29 J. LEGAL. PROF. 89 (2004-2005).

143. For descriptions of such landlord-tenant courts, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Robinson, *supra* note 142, at 108–109; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revising the Role of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2057–63 (1999) (describing Boston’s “Housing Court”); *A System in Collapse*, Abell Rep., Mar. 2003, at 1.5.

144. Robinson, *supra* note 142, at 109–12.

145. Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123–24 (1993).

146. See *supra* text accompanying notes 68–69.

interests at issue—food, shelter, custody of children—are least able to obtain legal services and almost invariably receive minimal process in litigating their matters.¹⁴⁷

In terms of professional identity as advocacy, there is an immediate distinction between these matters and personal injury and criminal justice: the number of lawyers engaged in this work is miniscule.¹⁴⁸ There is, however, a corps of lawyers who do this kind of work: attorneys funded by the Legal Services Corporation, Legal Aid and Legal Services groups, and other organizations primarily funded by private foundations and, at times, governmental subsidies. Nevertheless, with few exceptions discussed below,¹⁴⁹ the number of clients in need of legal services far outstrips the supply of lawyers who engage in this work, and the low profile of these litigants preclude professional identity as advocacy from gaining traction.¹⁵⁰ Ironically, this is in the teeth of a type of practice that, perhaps, has an immensely powerful impulse towards professional identity. These lawyers usually represent low-income clients because of a deep personal belief in remedying injustice and inequality, even given the rapidly increasing disparity in salaries between those doing this work as compared to those engaged in private practice.¹⁵¹ Public interest lawyers would like nothing more than to publicize their identity and those of their clients. There are, however, virtually no movies, books, news broadcasts, or other means of popular information that examine the tens of thousands of unrepresented litigants. The situation is, as one commentator has put it, the functional equivalent of “silence in the court.”¹⁵²

There are exceptions to this general picture. The long history of controversy surrounding funding the legal services corporation is perhaps the

147. Robinson, *supra* note 142.

148. Numerous measures demonstrate this, but perhaps the most powerful has been set forth by David Luban, who found that about 1% of the \$100 billion legal industry is devoted to the needs of low-income Americans, or, while there is “about 1 lawyer for every 240 nonpoor Americans” there is “only one lawyer for every 9000 Americans” who would qualify for legal aid. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 211 (2003). For a classic treatment of the impact of this power differential, see Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 1974 LAW. & SOC. 95, 108–09 (noting that pro se’s are “one shot” players facing “repeat players” in litigation, and thus, are subject to “mass processing with little of the individuated attention of full-dress adjudication”).

149. See *supra* text accompanying note 142.

150. There remain calls for a “Civil Gideon” in order to guarantee representation in civil cases, but these efforts have not been successful. The Supreme Court has held that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 26–27 (1981). State efforts to recognize a Civil Gideon have also not fared well. See Lee Shevell, *Civil Gideon: The Poor Man’s Fight*, 16 PUB. INT. L. REV. 32, 34–35 (2010).

151. According to the National Association for Law Placement, as of 2008, the starting salary for lawyers in civil legal services is \$40,000; for firms of 50 or fewer lawyers it is \$80,000; for the largest firms it is \$145,000. *New Findings on Salaries for Public Interest Attorneys*, NALP BULLETIN, <http://www.nalp.org/2008sepnewfindings> (last visited Apr. 7, 2012).

152. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

most prominent example.¹⁵³ Another instance relates to “IOLTA”—“interest on lawyers’ trust accounts”—through which interest on client funds placed in escrow are used to fund legal services. The controversy centers on whether such funds are clients’ “property” and, if so, would using interest generated by these funds for other purposes constitute a constitutionally impermissible “taking”? The Supreme Court has entered the fray in two cases¹⁵⁴ that, in the end, leave the constitutionality of IOLTA uncertain and dependent on circumstances. Both the LSC and IOLTA controversies are intensely political, hot button issues.¹⁵⁵

Nevertheless, these issues are not joined in remotely the same way as personal injury law and criminal law. There are too few lawyers and too little money at stake for it to generate the traction that in terms of publicity is the lifeblood of professional identity as advocacy.

B. Professional Identity as Proxy for Status: The Wall Street Lawyer

A second wholly different group, and equally telling for purposes of this Article, involves lawyers who practice in large firms that represent large organizations.

The work of these firms is little known outside the narrow culture of law schools—mostly elite law schools—and the increasing numbers of large law firms themselves. For sure one could argue that this largely invisible yet huge area of practice generates substantial financial impact by multiplying transaction costs for business—costs that find their way into consumer prices—yet this group maintains its prestige and is virtually never subject to public scrutiny.¹⁵⁶ Indeed, the book on “Life without Lawyers” discussed above is about life without personal injury lawyers, not life without large firm lawyers, with the author being a large firm lawyer himself¹⁵⁷—a telling example of the point. Moreover, many large firms shy away from offending larger potentials or actual organizational clients, and thus do not take on, for example, civil rights employment cases or environmental cases.¹⁵⁸

The increasing importance of this type of practice, however, is undeniable. From 1975 to 2007, American law firms with 200 or more lawyers

153. For a detailed history of the Legal Services Corporation and its predecessors, see Alan W. Housman, Linda E. Perle, *A Brief History of Civil Legal Assistance in the United States* (Center for Law and Public Policy 2007). For regulations that limit the types of cases LSC-funded organizations can undertake, see 45 C.F.R. § 1612.1 (2010).

154. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

155. Both IOLTA cases were brought by the Washington Legal Foundation, a group dedicated to “free enterprise” and the “free enterprise system.” WLF MISSION, <http://www.wlf.org/org/mission.asp> (last visited Apr. 7, 2012).

156. Brent J. Horton, *How Corporate Lawyers Escape Sarbanes-Oxley: Disparate Treatment in the Legislative Process*, 60 S.C. L. REV. 149, 202 (2008).

157. For a description of this book, see *supra* text accompanying notes 99–104.

158. Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 118–19 (2004). Note this is in striking contrast to the practice of Abraham Lincoln, who did not shy away from representing Railroad Companies—the preeminent example of corporate power in his time. See *supra* text accompanying notes 14–18.

have grown from 4 to 150.¹⁵⁹ Fewer and fewer lawyers are representing individuals.¹⁶⁰ The question then arises of how the idea of professional identity as advocacy plays out, if at all, in this increasingly important—albeit largely hidden—context. The answer lies in the prestige accorded this bar and the commonalities of the clients they represent.

1. The “Elite” as Professional Identity

The stratification of the profession, with the “Wall Street lawyer” at the top, has been developing for well over a century. As one legal historian has noted, in the latter half of the nineteenth century, “[m]ost lawyers still went to court; but the Wall Street lawyer, who perhaps never spoke to a judge except socially, made more money and had more prestige than any courtroom lawyer could hope for.”¹⁶¹ The career of one prominent lawyer—Thomas L. Chadbourne—typifies the increasing emergence of the Wall Street lawyer. In 1896, Chadbourne’s practice included criminal and personal injury cases until, as he put it, “[i]t finally dawned on me that with the same thought and energy, we could make much more money by changing our practice and making it more corporate and commercial and less trial and criminal.”¹⁶² After this realization, he only practiced corporate law, and the law firm he created—Chadbourne and Parke—remains a major law firm serving corporate clients.¹⁶³

This stratification is extraordinarily important—probably the single most important distinction in the profession today.¹⁶⁴ Unlike Chadbourne’s candid descriptions of the reasons for the shift in his practice, the current rhetoric of the large firm is very different. It stresses the greater significance and intellectual challenges of representing large organizations; the crucial importance of graduating from an elite law school (and thus being “the best and the brightest”)¹⁶⁵ in order to gain entrée into large

159. THE LAWYER’S ALMANAC 2007, at A1–A6 (2007).

160. John P. Heinz, et al., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 29 (2005) (collecting data demonstrating that 64% of lawyers deliver legal services to large organizations—a percentage that has grown significantly over time).

161. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 483 (3d ed. 2005). See also JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 63–64 (1975) (tracing the rise of affluent, largely “corporate” lawyers from the late nineteenth-century to the early twentieth-century).

162. Ariens, *supra* note 10, at 1016–17 (quoting THE AUTOBIOGRAPHY OF THOMAS L. CHADBOURNE 34 (Charles C. Goetsch & Margaret L. Shivers, eds. 1985)).

163. *Id.*

164. Two commentators have noted as follows: “[M]uch of the differentiation within the legal profession is secondary to one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government), and those who represent individuals.” JOHN P. HEINZ AND EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

165. Even Karl Llewellyn, in his article about the specialization of the bar discussed *infra*, asserts that corporate practice attracts the “best brains”—a demonstration of the intellectual hierarchy just as prevalent in 1933 as it is today. See Llewellyn, *supra* note 38, at 178–79. Compare, however, the just-quoted statement of Thomas L. Chadbourne, who noted that business law took “the same thought and energy” as trial work—perhaps a candid statement made more possible given how close it was to the ascendancy of the elite business lawyer. See *supra* text accompanying note 162.

firms; the supposed “complexity” of corporate work that requires the services of the “best and the brightest”; equating the large amount of money at stake in large firm practice with social importance.¹⁶⁶ Each of these assertions is highly questionable,¹⁶⁷ but remains the “objective” measure of the prestige accorded to lawyers who practice in this area.

With few exceptions noted below, however, professional identity as advocacy does not operate in this context. The most obvious reason why this is the case is that in classic large business litigation, one large organizational client, represented by a large law firm, is opposed to another large organizational client, represented by another large law firm. For sure, within individual cases there are narratives of right and wrong and morality and immorality, of one side doing “the right thing” and the other side doing “the wrong thing.”¹⁶⁸ Larger political and moral stances—professional identity as advocacy—do not come into play, however, because there are not opposing *categories* of clients, such as individual personal injury plaintiffs against large organizations or prosecutors against criminal defendants. Put another way, the professional identity of opposing law firms in large firm practice is identical: they work on behalf of large organizations. There is no differential in power or in justice on behalf of one versus another.

Moreover, while there is a robust sense of gossip among lawyers or law students who are in or bound for this type of practice,¹⁶⁹ the last thing large firms want is to draw attention to themselves outside this bounded circle. To do so would be to raise issues of the social and economic impact of their own practice on business—the issue that is so essential to the accusations against the personal injury bar.¹⁷⁰ This is, perhaps, ironic given that an increasing number of large firms generate profits in excess of \$1 billion,¹⁷¹ with questions about social value and additional costs to consumers warranting at least some examination. Thus, in the case of large firms, professional identity as advocacy is studiously *avoided*, not embraced, and it appears that large firms have largely succeeded in achieving this goal.¹⁷²

166. Note the following statement in the ABA Model Rules of Professional Conduct relating to competence: “The required attention and preparation are determined in part by what is at stake: major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.” MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. [5]. This is a remarkable statement, with the circular reasoning that “complex transactions” are “complex”—reasoning that, by implication, the more intelligent members of the bar, that is, graduates of elite law schools and lawyers in large firms that hire them, are needed to competently represent clients in such matters.

167. For a detailed discussion of these assertions and what underlie them, see Robinson, *supra* note 142, at 122–28.

168. This “moral” element is not only element of advocacy, but of adjudication itself. See Robinson, *supra* note 142, at 127 (describing litigation as embodying a “morality tale”).

169. A blog called “biglaw” is one example of this type of internal conversation. ABOVE THE LAW, <http://abovethelaw.com/biglaw/> (last visited Apr. 7, 2012).

170. See *supra* text accompanying notes 90–111.

171. *The Am Law 100 2010—Gross Revenue: Baker & McKenzie Tops Skadden*, AMERICAN LAWYER.COM, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202448484841> (last visited Apr. 7, 2012). The two largest firms—Baker & McKenzie and Skadden—had profits in excess of \$2 billion in 2009.

172. Horton, *supra* note 156, at 151 (arguing that “corporate lawyers” successful and “covertly” limited the impact of legislation on their practice after the Enron scandal).

2. A Scandal Every Now and Then

To say that large firms remain below the radar screen, however, is something of a simplification. The profile of large firms does arise during highly publicized corporate fraud cases. One notable example involved Charles Keating and the Lincoln Savings & Loan scandal. As a result of the Keating scandal, the large law firm Kaye, Scholer, Fierman, Hays & Handler was charged by the Office of Thrift Supervision with wrongdoing in its representation of Keating and Keating's bank.¹⁷³ The Enron scandal was the preeminent event in recent years involving allegations of wrongdoing by large firm lawyers, and Congress passed the Sarbanes-Oxley Act in 2001 in the wake of the scandal.¹⁷⁴

In both of these instances and others, given the enormity of the fraud and its economic consequences, there were publicly aired issues of "where were the lawyers" along with "where were the accountants" and "where were the ratings agencies."¹⁷⁵ Time passes, however. For example, once the smoke cleared and public interest waned regarding the Enron debacle, the fundamental question to be answered was whether law firms should be obligated to report wrongdoing on the part of their clients to the Securities and Exchange Commission. The debate focused on the regulations that implemented Sarbanes-Oxley—a technical process that garnered minimal public attention. In the end, these regulations, after extensive lobbying by the corporate bar, provided for discretionary—not obligatory—reporting,¹⁷⁶ with some arguing that lawyers who represent organizations got favorable treatment under the Act¹⁷⁷ because of their economic power.

It is telling that these instances demonstrate how episodic the focus is on large corporate firms. A spectacular, large-scale fraud will emerge; some debate about the role of lawyers in facilitating the fraud will take place; and, then, with the passage of time, attention recedes until the next large-scale fraud will come to light.¹⁷⁸ These episodes retain none of the durability and consistency that is the hallmark of professional identity as advocacy. Large firms can deploy the substantial resources available to them collectively to influence legislation once the initial wave of public and

173. The Keating affair generated a large scholarly response. For two particularly balanced treatments of the scandal, see Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985 (1993); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 33 L. & SOC. INQUIRY 243, 259–67, 277 (1998). The matter was settled with Kaye Scholer paying forty-one million dollars. Curtis, *supra*, at 1000.

174. 15 U.S.C. § 7245 (2006).

175. Marianne C. Adams, *Breaking Past the Parallax: Finding the True Place of Lawyers in Securities Fraud*, 37 FORDHAM URB. L.J. 953, 975 (2010) (the "question on everyone's lips after Enron, and really after many corporate or securities scandals, [is] 'where were the lawyers?'").

176. 17 C.F.R. § 205 (2011).

177. Horton, *supra* note 156. Horton argues that the political influence of "corporate lawyers"—influence that operates below the radar screen of public scrutiny—led to favorable treatment under Sarbanes-Oxley in contrast to "corporate officers and accountants," both of which "made easier legislative targets." *Id.* at 202.

178. *Id.*

legislative indignation has worn off.¹⁷⁹ In Llewellyn's terms there is no "counter-specialization"¹⁸⁰ because *all* large firms have similar clients and thereby have a collective interest in operating below the radar screen.

VI. THE IMPOSSIBILITY AND INEVITABILITY OF CHANGE

Two crucial questions remain regarding professional identity as advocacy. Is this dynamic good or bad? If bad, can it change?

What little attention has been focused on this general process tends to view it as undermining the integrity of the profession and the rational consideration of the policy and legal issues that are raised. For example, one scholar argues that the "language of fault" among opposing groups of lawyers generates suspicion and, ultimately, a refusal to legitimate the perspectives of their opponents.¹⁸¹ His solution is a call for an "alternative discourse."¹⁸² Another commentator decries how each side in the tort reform debate seeks to "transform reality" to its advantage, and calls for a more subtle, less strident debate that could generate a more "multi-dimensional" discourse.¹⁸³ Given the pervasiveness of the debate described in this Article, it is, perhaps, surprising that these calls are relatively rare. Most attention is focused on "civility" or declining "professionalism,"¹⁸⁴ but these debates almost always focus on interactions between individual lawyers in litigation, not on aggregations of opposing groups of lawyers representing clients with consistently divergent interests.

Nevertheless, it is hard to disagree with the relatively few who do criticize professional identity as discourse. For sure, these debates raise crucial issues. The personal injury debate raises important questions: the impact of damage awards on the cost of medical care; the role of personal injury attorneys as private attorneys general; access to justice at least in personal injury cases for clients who otherwise cannot afford representation. These are matters worth discussing. Accusing professional groups of greedy self-interest while subverting truth and justice, however, hardly seems a productive means to foster constructive debate about public policy.

An even greater and less obvious impact of professional identity as advocacy is its tendency to surface only some issues of public policy while masking others. For example, the impact of personal injury damages on businesses is certainly worth talking about. So is the impact of billions of dollars of attorneys' fees incurred by businesses in retaining corporate lawyers in litigation against other businesses. It is, however, only the first that

179. See Horton, *supra* note 156, at 169–76 (discussing the quiet lobbying lawyer employed to amend Sarbanes-Oxley to their advantage).

180. See *supra* text accompanying notes 37–42.

181. Burke, *supra* note 120, at 2131–37.

182. *Id.* at 2131.

183. Greenlee, *supra* note 106, at 734, 737.

184. One trend in this regard is the proliferation of "civility codes." Brenda Smith, *Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151, 152 (1998).

generates scrutiny. Moreover, the tragedy of huge numbers of unrepresented litigants in matters which, by any measure, place fundamental human needs—food, shelter, custody of children—at risk remains largely invisible. There are few lawyers to “fight for your rights” in these cases, and the few there are do not have the economic wherewithal to bring the plight of their clients into the realm of popular or legislative discourse.

So what to do? One can call for a brighter, less professionally charged future with hopes of a unified and serene professional brotherhood and sisterhood and a more equitable vision of legal needs and issues. As a matter of conscious agency, of willed change, this is hard to imagine. This is not a failure of imagination itself but a reflection of the limits of change in the face of entrenched ways, supported by economic inequalities, of thinking and doing.¹⁸⁵ At the same time, there are trends in the profession which suggest that change is not only possible, but that it is inevitable. This has to do with shifting conceptions of what the practice of law *is*—a shift towards a greater focus on problem-solving and “holistic” advocacy. This Article concludes by exploring these contradictory trends:

A. *The Impossibility of Change*

On one level, professional identity as advocacy is impervious to change.¹⁸⁶ Unlike a stalemate in chess, however, this does not signal the end of the game but only a recipe for the war to continue unabated into the foreseeable future.

In personal injury, substantial economic resources available to the conflicting groups will likely generate continuing political battles on “tort reform.”¹⁸⁷ Even the occasional “compromise” will only be a jumping-off point for further identity advocacy or, alternatively, will only have minimal impact.

In the area of criminal law, the constitutional structure underpinning advocacy and the political impetus towards criminalization generates a durable structure with little chance for change. This is especially true given the “good” versus “evil” narrative inherent in criminal cases,¹⁸⁸ which lends itself to professional identity wars whatever the disproportionate resources available to prosecutors. And the stock figure of the politically ambitious prosecutor and the defense attorney seeking to “get off”

185. The numbers of strategies of “heuristics” that contribute to this tendency are legion. To take one example, there is the idea called “confirmation bias,” “biased fact assimilation,” or “anchoring” through which humans view the world as confirming judgments already arrived at. *See, e.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 54 (1992) (“people are more likely to take at face value information they agree with and scrutinize more carefully information they don’t”).

186. A good example is the idea of “caps” on contingent fees based on how far along a case gets, with higher fees being earned if a case goes to trial. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 840 (5th ed. 2009). Even such “compromise” measures are further compromised when clients can waive such caps, which is how some jurisdictions handle these caps. *Id.*

187. *See supra* text accompanying notes 68–69.

188. *See supra* text accompanying notes 121, 138–40.

criminals “on technicalities”¹⁸⁹ remain deeply embedded in American culture and not likely to change in the foreseeable future.

B. *The Inevitability of Change*

On the other hand, the conception of the legal professional appears to be shifting. These changes will not affect the identity wars *per se*, but, interestingly, shift the meaning of professional identity itself.

In recent years there have been increasing calls for a new sense of lawyers as managers of conflict, not as purveyors or intensifiers of conflict.¹⁹⁰ These calls have appeared in an interlocking set of ideas and practices. One is mediation, with its focus on a collaborative vision of conflict resolution that eschews the “zealous advocacy” of the prevailing professional and cultural norms of lawyering.¹⁹¹ It is notable that despite mediation’s heretofore “new age” reputation,¹⁹² mediation is not only practiced in virtually all areas of the law, but it is specifically practiced in the context of personal injury¹⁹³ and criminal law.¹⁹⁴ Another is “problem-solving negotiation” with its emphasis on transparency and collaboration rather on conventional strategies of negotiation.¹⁹⁵ Yet another is “collaborative lawyering,” which promotes collaboration with lawyers who explicitly decline to represent their clients should the matter wind up in litigation.¹⁹⁶ While usually associated with family law, collaborative law is spreading to

189. See *supra* text accompanying notes 138–41.

190. A good general overview of this shifting conception is Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMPLE L. REV. 785 (1999).

191. The literature on mediation is vast. For particular treatments of the impact that the mediation boom will have on how lawyers represent clients, see Richard C. Reuben, *The Lawyer Turns Peacemaker: With Mediation Emerging as the Most Popular Form of Dispute Resolution, the Quest for Common Ground Could Force Attorneys to Reinterpret Everything They Do in the Future*, 82 A.B.A. J. 54 (1996); Craig A. McEwan, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (describing empirical data demonstrating the positive impact attorneys can have in facilitating the mediation process); Jean Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology To Structure Advocacy*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999).

192. Judith Meyer, *Mediators’ Alert: Now, Certification Goes Global*, 26 ALTERNATIVES TO HIGH COST LITIGATION 67 (2008) (referring to how mediation was often viewed as a “new-age wild idea” and is now “an accepted, institutionally embraced alternative to litigation”).

193. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 54–55 (3d ed. 2003) (describing the successful mediation of a personal injury claim).

194. Criminal law mediation is usually called “victim-offender mediation.” See Catherine Pugh, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law that Prosecutors Will Actually Want to Use*, 45 CAL. W. L. REV. 179 (2008); Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365 (2001). There is also a Victim Offender Mediation Association. VICTIM OFFENDER MEDIATION ASSOCIATION, <http://www.voma.org/> (last visited Apr. 7, 2012).

195. An enormously influential text on this strategy is WILLIAM L. URY, ROGER FISHER, & BRUCE M. PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1992).

196. For an overview of the collaborative law process, see William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351 (2004).

different areas, including medical malpractice.¹⁹⁷ Another trend is characterized as “holistic lawyering” which has taken root particularly in criminal law cases.¹⁹⁸ Holistic lawyering strives to, as one well-known criminal defense public defender organization characterizes it, “view[] clients not as ‘cases,’ but as whole people” with a commitment “to working with our clients, their families, and their communities to address the critical issues that circumscribe their lives.”¹⁹⁹

These trends are not the dreams of academics; each, as the preceding citations demonstrate, are in the “real world.” They may also become more common and normalized as new generations of lawyers are educated and begin to practice, advertise, and teach. If so, professional identity as advocacy may recede, or at least become less strident, because notions of “advocacy” itself will shift into a more collaborative mode. This shift is far from inevitable, however, but the reality of the trends I have described “on the ground” suggest that it is a very real possibility.

C. *And What of Organizational and Low-Income Representation?*

As I have described,²⁰⁰ the “masking” impact of professional identity as advocacy is the most subtle and insidious of all its consequences. The foundation of such masking runs deep, seemingly arising from the depths of economic disparities and the inevitable impact that these resources have on what gets noticed and what does not.

Even so, there are glimmers of change even here as well. The economics of large firms have changed given recent economic turbulence, although whether this will lead to enduring structural change or the dissolution of the “big firm” model remains to be seen.²⁰¹ The entrenched economic disparities in low-income representation remain seemingly impervious to change, but even here new models of “community lawyering,” with a focus on attorney collaboration with communities and economic development agencies in a non-litigation context, might modify the current model of individual and “impact” litigation.²⁰² In addition, although the scandal of the inequities of access to justice remains, there continue to be calls for something to be done, even among professional organizations and an attempt at the expansion of pro bono by all lawyers.²⁰³ Any hope for positive

197. Kathleen Clark, *The Use of Collaborative Law in Medical Error Situations*, 19 No. 6 HEALTH L. 19 (2007).

198. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004).

199. *Bronx Defenders*, BRIDGE BUILDERS, <http://www.bridgebuilderscpi.org/content/bronx-defenders> (last visited Apr. 11, 2012).

200. See *supra* text accompanying notes 142, 180.

201. For a provocative and recent examination of what the author calls “the death of big law,” see Larry E. Ribstein, *The Death of Big Law*, 2010 WISC. L. REV. 749 (2010).

202. For a general description of “community lawyering,” see Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001).

203. For perhaps the most comprehensive recent overview of access to justice, including a critique of the legal profession’s response to it, see DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

trends in access must be especially guarded, however, as I have argued elsewhere.²⁰⁴

The impossibility/inevitability of change conundrum thus applies in these two special contexts as well, although it would be a great leap of faith indeed to hold that change will gain the upper hand.

VII. CONCLUSION

Professional identity as advocacy collapses the space between attorney and client. The lawyer who specializes in representing one type of client assumes the mangle of what is good, while, inevitably, in this specialist's story, the counter-specialist is bad. The counter-specialist, in contrast, tells a story that switches the roles of "good guy" and "bad guy." This creates a fight for moral superiority. And yet the very public and strident nature of the professional-identity debate hides other areas of the profession that have substantial economic and social consequences. Professional identity as advocacy renders both certain types of practice particularly salient while rendering other types of practice invisible.

The mechanisms that create this process—specialization generating counter-specialization²⁰⁵ and the morality tale these competing specialists deploy against one another²⁰⁶—are difficult, if not impossible, to dislodge. Nevertheless, perhaps the changing profession itself, without any "willed" change on the part of individual attorneys or the profession as a whole, will gradually neutralize these dynamics. As the coming years and decades unfold and as more collaborative models of what it means to be a lawyer take hold, it is possible that the premises underlying professional identity as advocacy will recede. Attorneys who embrace these new models might serve clients more effectively, and, bit by bit, the engine that generates professional identity will stop running. But even if this happens, low-income litigants who cannot afford lawyers appear, in large part, to be left out. It is this invisible group—those who do not have lawyers either appointed for them or willing to represent them because it is not economically viable to do so—who need the most attention. Perhaps, in the end, some of the efforts directed at opposing professional groups can be redirected to remedy the one place where lawyers do not go and where advocacy of any sort is most needed.

204. Robinson, *supra* note 142.

205. See *supra* text accompanying notes 37–42.

206. See *supra* text accompanying notes 43–65.