

Sustainable Professionalism

By Trevor C.W. Farrow*

Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionizing themselves and things, in creating something entirely new, precisely in such epochs of revolutionary crisis they anxiously conjure up the spirits of the past to their service and borrow from them names, battle slogans and costumes in order to present the new scene of world history in this time-honoured disguise and this borrowed language.¹

[I]f lawyers cannot look at the society as a whole and say that certain aspects of their work ... represent a plus for this society and for the world of our children, then they had better look to last-ditch defenses. Better yet, lawyers

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¹ Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte" (1852) in Robert C. Tucker, ed., *The Marx-Engels Reader*, 2d ed. (New York: W.W. Norton, 1978) 594 at 595 [Marx, "Eighteenth Brumaire"]. I realize I am not the only one to see the instructive connections between Marx's "Eighteenth Brumaire" and professionalism (see e.g. Anthony T. Kronman, "Professionalism" (1999) 2 J.I.S.L.E. 89). I became aware of Kronman's use of Marx after making my own connections on the issue.

*should try to find a way to salvage what is worth doing out of their work and be influential in the production of what is going to happen next.*²

The traditional narrative of the legal profession has run its course. Lawyers are looking for ethically sensitive ways to practice law that “assume greater responsibility for the welfare of parties other than clients”³ and that increasingly amount “to a plus for this society and for the world of our children.”⁴ Lawyers are also seeking ways to practice law that allow them to get home at night and on weekends, see their families, work full or part-time, practice in diverse and “alternative” settings, and generally pursue a meaningful *career* in the law rather than necessarily a total *life* in the law.⁵ Similarly, law students are hoping not to be asked to make a “pact with the Devil”⁶ as the cost of becoming a lawyer, and are instead looking to find areas in the law that fit with their personal, political, and economic preferences.⁷ An increasing number of legal academics are teaching, researching, and writing about progressive changes to the way we view the role and purpose of lawyering.⁸ Law faculties are actively reforming their programs and creating centres and initiatives designed to make space for innovative ethics offerings and public interest programs.⁹ Law

² Martin Mayer, “The Trial Lawyers” in Grace W. Holmes, ed., *Excellence in Advocacy* (Michigan: Ann Arbor, The Institute of Continuing Legal Education, 1971) 51 at 60.

³ Deborah L. Rhode, “Legal Ethics in an Adversary System: The Persistent Questions” (2005-2006) 34 *Hofstra L. Rev.* 641 at 649 [footnotes omitted] [Rhode, “Persistent Questions”]. See also David B. Wilkins, “Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics,” Book Review of *The Lost Lawyer: Failing Ideals of the Legal Profession* by Anthony T. Kronman (1994) 108 *Harv. L. Rev.* 458 at 472.

⁴ Mayer, *supra* note 2.

⁵ Trevor C.W. Farrow, “Law: A Profession, Not a Life” (2002) 26 *Advocates’ Q.* 217 [Farrow, “A Profession, Not a Life”].

⁶ Duncan Kennedy, “Rebels from Principle: Changing the Corporate Law Firm from Within” (1981) *Harv. L. Sch. Bull.* 36 in Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method*, 2d ed. (New York: Aspen, 1998) 86 at 87 [Kennedy, “Rebels from Principle”].

⁷ Much of my sense of law student preferences comes from countless direct discussions with my students over the years. See also Sophie Bryan, “Personally Professional: A Law Student in Search of an Advocacy Model” (2000) 35 *Harv. C.R.-C.L.L. Rev.* 277; Marilyn Poitras, “Through My Eyes: Lessons on Life in Law School” (2005) 17 *C.J.W.L.* 41; and James R. Elkins, “Thinking Like a Lawyer: Second Thoughts” (1996) 47 *Mercer L. Rev.* 511.

⁸ See e.g. Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin, 2006) [Hutchinson, *Legal Ethics*]; Rhode, “Persistent Questions,” *supra* note 3 at 643. For a very useful discussion on trends in Canadian academic scholarship in the area of legal ethics and professionalism, see Adam M. Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 *Osgoode Hall L.J.* 1 [Dodek, “Canadian Legal Ethics”]. Further, there is a newly formed Canadian network of ethics scholars (of which I am a member) that is supported by the law school deans and that is currently seeking to create a Canadian Virtual Center for Legal Ethics and Professional Responsibility. See also Part C.II.

⁹ See e.g. Osgoode Hall Law School, “Ethical Lawyering in a Global Community” course, online: <http://osgoode.yorku.ca/QuickPlace/trevorfarrow/PageLibrary852573410062FAF0.nsf/h_Toc/92be13faec1b58390525670800167238/?OpenDocument> [“Ethical Lawyering”]; Osgoode Public Interest Requirement Program,

societies and other regulatory bodies are slowly chipping away at some of the time-honoured shields of ethically suspect client behaviour,¹⁰ while at the same time facing demands for increased accountability.¹¹ The bench and the bar are taking an active interest in addressing a perceived growing lack of professionalism within the practice.¹² The public is increasingly skeptical of the distinction that continues to be drawn between legal ethics and “ordinary standards of moral conduct.”¹³ Finally, clients are not only expecting lawyers to actively canvass methods of alternative dispute resolution—the alternative to the adversarial and costly litigation process—but they are also demanding evidence of general sustainable professional practices from their legal counsel.¹⁴

These current, contextual, and contested realities have become badges of modern progressive lives in the practice of law, as well as its visions. Taken together, they are forming a new discourse for lawyers and the legal profession that is seeking to become personally, politically, ethically, economically, and professionally sustainable. It is a discourse that makes meaningful space for a lawyer’s own principles, interests, and life preferences by balancing them with other important interests—including, but not dominated by, those of the client—in the context of the overall calculus of what counts as the “right” course of conduct both in a given retainer as well as, more generally, in a given career.¹⁵ It is a discourse that seeks to make good on what has largely only amounted to

“First Year Degree Requirements,” online: <http://www.osgoode.yorku.ca/1lb/first_year_requirements.html>. See also Harvard Law School, “Program on the Legal Profession,” online: <<http://www.law.harvard.edu/programs/plp/>>; University of Toronto, Faculty of Law, “Centre for the Legal Profession,” online: <<http://www.clp.utoronto.ca/site3.aspx>>.

¹⁰ In the US, see *e.g.* *Sarbanes-Oxley Act of 2002*, 15 U.S.C. § 307, § 7245 (2003); 17 C.F.R. § 205.3 (2005), which is discussed further in Rhode, “Persistent Questions,” *supra* note 3 at 647-48. See also Deborah L. Rhode & Paul D. Paton, “Lawyers, Ethics and Enron” (2002) 8 *Stan. J.L. Bus. & Fin.* 9. In Canada, see *e.g.* Law Society of Upper Canada, *Rules of Professional Conduct* (adopted 1 November 2000, as amended), r. 2.02 (1.1), (5)-(5.2) [LSUC, *Rules*]. See also Paul D. Paton, “Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era” (2006) 84 *Can. Bar Rev.* 533; Paul D. Paton, “The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?” in LSUC, *In the Public Interest* (Toronto: Irwin Law, 2007) 175.

¹¹ See *e.g.* Rhode, “Persistent Questions,” *supra* note 3 at 657-58.

¹² See *e.g.* Chief Justice of Ontario’s Advisory Committee on Professionalism, online: <<http://www.lsuc.on.ca/atest-news/a/hottopics/committee-on-professionalism/>>.

¹³ Samuel Dash, “Legal Ethics and Morality: Can a Legally Ethical Lawyer Be a Moral Person?” (1993) 1 *Frank G. Raichle Lecture Series on Law in American Society* 209 at 212; also at 214.

¹⁴ See *e.g.* Pamela McClintock, “Big Corporate Clients Demand Diversity” (1999) 221:99 *N.Y.L.J.* 5.

¹⁵ I have elsewhere commented on the relevance of some of these competing interests, particularly in the context of negotiation and in advocacy. See *e.g.* Trevor C.W. Farrow, “The Negotiator-as-Professional: Understanding the Competing Interests of a Representative Negotiator” (2007) 7 *Pepp. Disp. Resol. L.J.* 373 [Farrow, “The Negotiator-as-Professional”]; Trevor C.W. Farrow, “Representative Negotiation” in Colleen M. Hancz, Trevor C.W. Farrow & Frederick H. Zemans, eds., *The Theory and Practice of Representative Negotiation*

aspirational promises of equality, access to justice, and the protection of the public interest. And it is a discourse that seeks both to benefit from and take seriously its obligations to address the culturally complicated makeup of the bar and our general pluralistic and globalized civil societies. This modern discourse of an ethically sustainable profession challenges the “time-honoured”¹⁶ centrality of client autonomy and a lawyer’s unqualified loyalty to the client’s interests. Specifically, it rejects stories of lawyers, collectively, as members of a relatively homogenized profession and who, individually, are single-tasked “hired guns” focused on only one interest “in all the world.”¹⁷ According to this new model, those stories are no longer—if they ever were—sustainable.

Thinking about the profession in terms of a discourse of “professional sustainability” that takes seriously a broad range of voices and interests is surprisingly new. The label “sustainable” has not, to date, been generally applied to discussions of ethics and professionalism in the legal context.¹⁸ And because as a profession, lawyers are still “anxiously” fearful of replacing the “spirits” of “dead generations,” which continue to weigh on us “like a nightmare”¹⁹ (lawyers grow up and depend on stories of zeal, vigour, and role-differentiated behaviour²⁰ that allow them to act for all kinds of clients, including those who they think are “reprehensible,”²¹ while still being able to sleep soundly at night), a discourse of sustainable professionalism is threatening. Proponents of the dominant model borrow “names, battle slogans, and costumes”:²² names such as “zealous advocates,”²³ “shock troops,”²⁴ “hired gun[s],”²⁵ and “soldiers of the law,”²⁶ battle

(Toronto: Emond Montgomery, 2008) c. 2; and Trevor C.W. Farrow, “Ethics in Advocacy” in Alice Woolley *et al.*, eds., *Lawyers’ Ethics and Professional Regulation* (Canada: LexisNexis, 2008) c. 5 [Farrow, “Ethics in Advocacy”].

¹⁶ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

¹⁷ See *Trial of Queen Caroline*, *infra* note 68. See generally, below, Part B.

¹⁸ See further note 196 and surrounding text.

¹⁹ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

²⁰ For a discussion of role-differentiated behaviour (a behavioural approach that “often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive”), see Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues” (1975) 5 *Hum. Rts.* 1 at 3 [Wasserstrom, “Lawyers as Professionals”].

²¹ From Gary Mason, ““A rigorous defence ... is the key to our system”” *The Globe and Mail* (11 December 2007) A15 [Mason].

²² See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

²³ Richard A. Matasar, “The Pain of Moral Lawyering” (1990) 75 *Iowa L. Rev.* 975 at 975. See also *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at para. 84 (C.A.), Rosenberg J.A. Compare American Bar Association, *Model Rules of Professional Conduct* (adopted 1983, as amended) at Preamble and Scope, para. 2 [ABA, *Model Rules*].

slogans such as “fierce,” “fearless,” “resolute,” and “partisan”;²⁷ and costumes such as barristers’ gowns, tabs, and waistcoats. They doggedly and dogmatically²⁸ re-make a history under this “time-honoured disguise and this borrowed language”²⁹ in a continued effort to “create[] a world after [their] image.”³⁰

The resulting paradox created by the dominant narrative is that, although the stories that continue to be told are becoming less attractive to more people,³¹ the stories continue to be told. To my mind, given the complex realities of the current professional trajectory,³² lawyers need another story—a sustainable story—that captures those complex realities and provides for a meaningful prospect of broad-based buy-in. Alternative models that critique the dominant model provide another story.³³ Those critiques, which are becoming increasingly attractive, are often framed in terms of the “moral perspective,”³⁴ “moral lawyering,”³⁵ “the moral lawyer,”³⁶ or “the good

²⁴ Matasar, *ibid.* at 975.

²⁵ See *e.g.* Rob Atkinson, “A Dissenter’s Commentary on the Professionalism Crusade” (1995) 74 Tex. L. Rev. 259 at 304; David M. Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal. L.J. 267 at 271.

²⁶ Matasar, *supra* note 23 at 985.

²⁷ See *e.g.* *R. v. Felderhof*, *supra* note 23 at para. 85; LSUC, *Rules*, *supra* note 10 at r. 4.01(1) and commentary; and Canadian Bar Association, *Code of Professional Conduct* (adopted August 2004 and February 2006), c. IX [CBA, *Code*].

²⁸ For a useful treatment of the deployment of dogmatic language in the service of sustaining legal traditions—specifically in the context of solicitor-client privilege—see Adam M. Dodek, “Theoretical Foundations of Solicitor-Client Privilege” [unpublished].

²⁹ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

³⁰ Karl Marx & Friedrich Engels, “Manifesto of the Communist Party” (1848) [Marx & Engels, “Communist Manifesto”] in Tucker, *supra* note 1 at 477.

³¹ I realize that, although correct in my view, this statement is not uncontroversial. For example, many clients (and indeed many lawyers) are quite happy with the current model. See Part B.III, below, for more on this topic.

³² See *e.g.* *supra* notes 3-14.

³³ See Part C, below, for further discussion of these alternatives. See also Jerome E. Bickenbach, “The Redemption of the Moral Mandate of the Profession of Law” (1996) 9 Can. J.L. & Jur. 51.

³⁴ See *e.g.* Robert K. Vischer, “Legal Advice as Moral Perspective” (2006) 19 Geo. J. Legal Ethics 225.

³⁵ See *e.g.* Matasar, *supra* note 23.

³⁶ See *e.g.* Hon. Frank Iacobucci, “The Practice of Law: Business and Professionalism” (1991) 49 Advocate 859 at 863.

lawyer.”³⁷ These labels appear to connote some shared or required understanding of what counts as “moral” or “good,” whereas the safe harbours of zealous advocacy and neutral partisanship³⁸ provide sheltered, role-differentiated moral refuge, and continue to be preferred over alternative accounts. Further, these alternative models are typically criticized for underplaying the institutional value of the lawyer in the adversarial system, while at the same time overplaying the relevance or supremacy of the lawyer’s individual moral choices or preferences that risk usurping the ethical autonomy of the lawyer’s client.³⁹

In my experience, while some students and practitioners⁴⁰ are in optimistic agreement with modern critiques, most are, at worst, put off by them and are, at best, intrigued but ultimately not persuaded by their apparent moral superiority, relativity, and sermon-like⁴¹ nature. For example, I recently taught a series of mandatory first year legal ethics seminars.⁴² One of the early classes took up the relevance of a lawyer’s sense of self—moral values; social and political views; sense of societal duty, justice, and world outlook; space for personal obligations to family, friends, and other commitments; obligations to work colleagues, institutional preferences, and duties; expectations of equality and progressive workplace experiences; et cetera—in the context of a life in the law, and more specifically, in the context of the lawyer-client advocacy model. I asked the twenty-five students in the seminar to put their hands up if, ideally, they would like to maintain a meaningful sense and space for “self” after becoming lawyers (*i.e.*, whether the profession should be able to accommodate and *sustain* that sense of self). Approximately twenty-five hands went up. I then asked the same students to put their hands up if they thought creating that space could actually occur “in the real world” of practising lawyers. No hands went up. Of course this informal in-class exercise was neither scientific nor comprehensive. The reaction was, however, consistent with numerous other legal ethics classes in which I have asked the same and similar questions, and with accounts of other student

³⁷ See *e.g.* David Luban, ed., *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* (Totowa, N.J.: Rowman & Allanheld, 1983); Richard Wasserstrom, “Legal Education and the Good Lawyer” (1984) 34 *J. Legal Educ.* 155 [Wasserstrom, “Legal Education”].

³⁸ See *e.g. infra* note 66 and surrounding text.

³⁹ See Part B.I-II, below, for more on this topic.

⁴⁰ My comments here are animated by several experiences: approximately five years as a litigation lawyer at a large firm in Toronto, almost ten years of teaching ethics and professionalism to LL.B. students in several different institutions in several different jurisdictions, and more recently, teaching also in a part-time graduate program in which most students typically continue to carry on an active law practice.

⁴¹ Rob Atkinson, “How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day” (1995) 105 *Yale L.J.* 177 at 177 [Atkinson, “Perverted Professionalism”].

⁴² See “Ethical Lawyering,” *supra* note 9.

experiences as well.⁴³ The reaction tells me that, even at the outset of law school, at least some students—and my intuition is that in fact most students—already have a strongly developed sense of allegiance to the institutional history and hegemonic ideology of the practice of law. As such, they are already starting to “think like a lawyer.”⁴⁴ Clearly the “spirits of the past” have a firm hold on the “brain[s] of the living.”⁴⁵

This article seeks to demystify the power of those spirits by providing a new way to think about professionalism.⁴⁶ Specifically, by tapping into and building upon the ideas and energy of many current alternative models of professionalism, I seek to assist with the project of re-conceiving our modern understanding of professionalism. It is a professionalism that, unlike traditional (dominant) accounts, makes descriptive and normative sense of the complex modern practice of law. In so doing, I do not claim to be making a radical departure from other alternative model thinkers. In fact, what this article does is simply to recalibrate many of the current (primarily alternative) models and discussions through a slightly different lens: that of sustainability.

To frame the overall discussion, Part A provides a brief discussion of the meaning and import of legal ethics and professionalism. Part B reviews some of the relevant history of the traditional model of lawyering that continues to dominate the modern discourse of legal professionalism. Part C canvasses several alternative visions of the profession that critique the dominant model. Part D, collectively building on a number of those alternative visions, seeks to assist with the development of a sustainable discourse of professionalism.

A. Legal Ethics and Professionalism

This article does not purport to provide a full treatment of the study of ethics generally, or even of legal ethics in particular. A brief understanding of what I mean by ethics and professionalism provides a context for my underlying arguments. As a starting point, the concept of ethics invites notions of good and bad as values in themselves, from either the

⁴³ See *e.g.* Kennedy, “Rebels from Principle,” *supra* note 6 at 87 (“I think we should ask of our students that in practice they try to figure out whether there are intelligent, more or less controlled risks they can take to put their careers behind their opinions. According to my students, they ‘impliedly agreed’ not to do any such thing, and if they tried, they’d be fired, or never make partner”).

⁴⁴ See *e.g.* Elkins, *supra* note 7.

⁴⁵ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

⁴⁶ With apologies to Marx and Engels, it could be said that what I am recognizing is the “spectre” that is currently “haunting” the legal profession: the spectre of sustainable professionalism. See Marx & Engels, “Communist Manifesto,” *supra* note 30 at 473.

perspective of semantics or of justification.⁴⁷ These perspectives of ethical theory are *not* immediately interested in the application of ethical thinking to specific contexts of human action.⁴⁸ G.E. Moore, for example, explained that his approach to the topic of ethics recognizes the distinction between an underlying value itself—namely “the general enquiry into what is good”—and an evaluation of the human action that is derivative from that underlying value.⁴⁹

For the purposes of this article, my interest in ethics (and in particular legal ethics)—animated in part by Plato’s dialogue on just conduct in the *Republic*⁵⁰—is at the level of human action in context. Because this article is concerned with the derivative discussion of ethics as applied to the legal profession, my approach here adopts this derivative standpoint.⁵¹ What is “at stake” in this discussion—as Socrates contemplated in his musings with Thrasymachus about the lives of the just and unjust—is “no light matter.”⁵²

⁴⁷ Although ethicists often think of these perspectives as the subjects more specifically of either *meta-ethics* or *normative ethics*, this distinction does not matter for the purposes of this article (a distinction that, in any event, is at least for some “no longer found so convincing or important” (Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana Paperbacks, 1985) 73)). However, for a useful discussion on the basic differences between these sub-streams of ethics, see *ibid.* at c. 5. See also Rhode, *Ethics by the Pervasive Method*, *supra* note 6 at 12.

⁴⁸ That perspective is often thought of as the purview of *applied* ethics. See *e.g.* Rhode, *ibid.* at 12.

⁴⁹ G.E. Moore, *Principia Ethica* (Cambridge: Cambridge University Press, 1903) at 2.

⁵⁰ Plato, “The Republic,” Bk. I, 352d in *The Dialogues of Plato*, 3d ed., trans. by B. Jowett (London: Oxford University Press, 1931) vol. 1 at 33 [Plato, trans. by Jowett]. My thinking on the use of Plato’s *Republic* in this part of the article has been influenced by Bernard Williams. See Williams, *supra* note 47 at c. 1.

⁵¹ Although choosing Plato’s more metaphysical treatment of justice as a convenient underlying conceptual starting point, a different lens through which to think about legal ethics could be the lens of pragmatism, developed by thinkers such as William James, John Dewey, and more recently Richard Rorty (see *e.g.* Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979)). For example, rather than trying to philosophize about legal ethics and professional responsibility in the context of abstract notions of “the good,” pragmatists would be much more likely to consider the discussion’s practical applications for lawyers and clients (and other interested stakeholders) in the specific context of their everyday roles and experiences. This viewpoint might be helpful when trying to develop an understanding of professionalism—particularly from the contextual perspective of sustainability—that is contemplated in this article. However, because nothing in this article turns on my choice of conceptual lenses, I leave this as a point of departure for future fruitful thinking on ethics and professionalism. For a useful discussion of the distinction between Plato’s general philosophical approach and pragmatism, see *e.g.* Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982) at xiii ff. (“Introduction: Pragmatism and Philosophy”). See generally Williams, *supra* note 47 at 137-38; Charles Taylor, *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) at 2 ff. I am grateful to Allan Hutchinson for comments on the application of pragmatism to this project.

⁵² Plato, trans. by Jowett, *supra* note 50.

Ethics, from this perspective, involves an inquiry into “how one should live one’s life”⁵³ or “the rule of human life.”⁵⁴

When thinking about the subset of ethics that we call *legal ethics*, the starting point for the inquiry is to think about how one should live in the context of law, or more specifically, how lawyers ought to act in the context of the profession. To push this discussion further, I turn to Aristotle, who in his discussion on community—and in particular the *telos* (end) of the community of the *polis* (city)—argued that the city exists not only “for the sake of living, it exists for the sake of living well.”⁵⁵ If we then think of the legal profession as the (self-regulated) community in which we are ultimately contemplating (and judging) the ethics of a lawyer’s action, the legal profession must exist not only for the sake of practising law, but for the sake of practising it *well*. Any notion of legal ethics must therefore contemplate an understanding of lawyering that is fully engaged with a vision of what amounts to practising well.

We need to find a way of deciding what amounts to “practising well.” Religion, custom, power, and happiness have all been used over the centuries by ethicists to assess the general morality of a given course of action.⁵⁶ In the specific context of law we might consider the “legality” of a given course of conduct—the client’s conduct—and ask Rob Atkinson’s “fundamental question of professional ethics”: “Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties?”⁵⁷ According to Atkinson, this question “divides scholars of legal ethics ... into two schools: those who recognize constraints other than law’s outer limit, and those who do not.”⁵⁸ The next two parts of this article look at the

⁵³ Plato, *The Republic*, Bk. I, 352d, trans. by Robin Waterfield (Oxford: Oxford University Press, 1993) at 40.

⁵⁴ Plato, trans. by Jowett, *supra* note 50.

⁵⁵ Aristotle, *The Politics*, Bk. 1, c. 2, 1252b, trans. by Carnes Lord (Chicago: University of Chicago Press, 1984) at 37.

⁵⁶ For useful background sources, see e.g. Donald Nicholson & Julian Webb, *Professional Legal Ethics* (Oxford: Oxford University Press, 1999) c. 2; J.B. Schneewind, “Modern Moral Philosophy” in Peter Singer, ed., *A Companion to Ethics* (Oxford: Basil Blackwell Ltd., 1991) 147; and R.M. Hare, *The Language of Morals* (London: Oxford University Press, 1972). See further Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2d ed. (Oxford: Oxford University Press, 2002); George H. Sabine, *A History of Political Theory* (London: George G. Harrap & Co. Ltd., 1948); Philippa Foot, ed., *Theories of Ethics* (London: Oxford University Press, 1967); J.L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth, UK: Penguin Books Ltd., 1977); and W.D. Hudson, *Modern Moral Philosophy*, 2d ed. (London: MacMillan, 1983).

⁵⁷ Atkinson, “Perverted Professionalism,” *supra* note 41 at 184 [footnotes omitted].

⁵⁸ *Ibid.* For a similar analysis, see Vischer, *supra* note 34 at 227. Compare William H. Simon, “Visions of Practice in Legal Thought” (1984) 36 *Stan. L. Rev.* 469 at 469.

leading (and competing) approaches to thinking about Atkinson's "fundamental question."⁵⁹

Finally, the term "legal ethics" is typically used interchangeably with the term "professionalism" or "professional responsibility."⁶⁰ The sources for what counts as right or wrong for the purposes of these interchangeable approaches to ethics and/or professionalism are found in codes of professional conduct and other legal texts.⁶¹ This interchangeable approach does not typically pose a problem. Often ethics and professionalism map nicely onto one another. For example, it is generally agreed that stealing from a client or acting in a direct financial conflict with a client are bad things, both from the perspective of professional codes and from the perspective of personal morality. However, because codes of conduct are often open textured in approach and indefinite in content, what any given individual considers to be "professional" can depend on personal moral deliberation as to what counts as "ethical." As will be seen,⁶² it is therefore important to maintain the conceptual distinction between what is professional, under codes of conduct, and what is ethical, as ultimately guided by personal moral deliberation.⁶³

B. Dominant Model of Professionalism

One approach to Atkinson's "fundamental question" is provided by the traditional and still dominant view of the lawyer's role. Familiar labels such as "zealous advocate,"⁶⁴ "amoral

⁵⁹ A potential objection to using Atkinson's "fundamental question" to frame this part of the discussion is that often what counts as "legal" is not necessarily something that is neatly separate and apart from lawyers and their ethical deliberation and professional involvement. In fact, lawyers are typically very much bound up in the production of law and its procedural instruments. However, because this is more of an objection to the premise of Atkinson's question than an objection to my use of his question (which, ultimately—as is developed further in this article in Part D.I-IV—is sympathetic to this objection), I do not need to respond to it further here. For a discussion of the concerns that underline this potential objection, see *e.g.* Hutchinson, *Legal Ethics*, *supra* note 8 at 26.

⁶⁰ See *e.g.* Nathan M. Crystal, *Professional Responsibility: Problems of Practice and the Profession*, 2d ed. (New York: Aspen, 2000) at 9 ("Professional responsibility or legal ethics, like other fields of law, is a latticework of court rules, judicial decisions, statutes, and other authorities"). See also Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics*, 5th ed. (New York: Aspen, 1998) at 10-13.

⁶¹ See *e.g.* Crystal, *ibid.* at 9.

⁶² See Part D.III, below.

⁶³ For useful background discussion on professional regulation and legal ethics, see *e.g.* Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* (New Haven: Yale University Press, 1978) cc. 1-2; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed. (Toronto: Carswell, 2006) at 2-3.

⁶⁴ See *e.g.* Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975) at 9-24.

technician,”⁶⁵ and “neutral partisan”⁶⁶ are used to describe this hegemonic model of lawyering. In a nutshell, the basic defining elements of this narrative are that the lawyer’s job is to advance zealously the client’s cause with all legal means; to be personally neutral vis-à-vis the result of the client’s cause; and to leave the ultimate ethical, personal, economic, and social bases for the decision to proceed in the hands of the client. According to this view, lawyers should reject non-legal factors such as morality, popularity, religion, power, custom, et cetera and be guided only by what the law allows, thereby viewing themselves purely as legal agents for their clients.

Perhaps the “spirit[] of the past” that is most often “conjure[d] up”⁶⁷ in defence of this dominant model is that of Henry Brougham who, in defence of Queen Caroline against adultery charges brought by her husband King George IV, famously argued that a lawyer “knows but one person in all the world, and that person is his client.”⁶⁸ However, lest we think that this is a vision and language of old, the same words continue to be used by modern legal ethics scholars.⁶⁹ As David Layton has commented, the “dominant view is everywhere in Canadian law.”⁷⁰ This dominant vision of the lawyer’s role is premised on well-established arguments sounding in principle, policy, and practice. The model is also well represented in visions of lawyers as portrayed in literature, popular culture, and the media.

I. Principle

The animating principle behind the dominant position—consistent with enlightenment notions of individual autonomy and freedom—is one that champions a client’s freedom to arrange her affairs within the bounds of the law.⁷¹ According to Atkinson, “[s]ociety

⁶⁵ See e.g. Wasserstrom, “Lawyers as Professionals,” *supra* note 20 at 6.

⁶⁶ See e.g. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000) at 53 [Rhode, *Interests of Justice*]; Atkinson, “Perverted Professionalism,” *supra* note 41 at 185 [footnotes omitted].

⁶⁷ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

⁶⁸ Lord Brougham further commented, regarding the advocate’s role, that “[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.” J. Nightingale, ed., *Trial of Queen Caroline*, vol. 2 (London: J. Robins & Co., 1821) at 8 [*Trial of Queen Caroline*]. See also Farrow, “Ethics in Advocacy,” *supra* note 15.

⁶⁹ See e.g. Dash, *supra* note 13 (“A lawyer knows but one person, his client” at 217). See generally Freedman, *supra* note 64 at 9.

⁷⁰ David Layton, “The Criminal Defence Lawyer’s Role” (2004) 27 Dal. L.J. 379 at 381.

⁷¹ See e.g. Stephen L. Pepper, “The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities” (1986) Am. Bar Found. Res. J. 613 at 616-18, 626-27; Charles Fried, “The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation” (1976) 85 Yale L.J. 1060 at 1073-74, 1077.

recognizes individual autonomy as a good in the highest order ... and carves out a sphere in which individuals can exercise that autonomy without interference. By helping lay folk ... the lawyer is accomplishing a moral and social, not just professional, good.”⁷² The lawyer’s job, therefore, is to facilitate “the client’s exercise of moral autonomy as authorized by the law.”⁷³ Lawyers as champions of client freedom militate against a tyranny of the majority or of the executive (in line with de Tocqueville’s observations about lawyers⁷⁴), which is particularly important in the context of a legal profession that essentially has a monopoly over the provision of increasingly complicated and necessary legal services.⁷⁵ Any other role for the lawyer would “usurp the role not just of judge and jury, but of the legislature as well.”⁷⁶

Justifications for the dominant narrative also come from the fact that, particularly—although not exclusively—in the criminal law context, clients deserve the best defence and representation possible, especially when they are up against the power of the state and individual liberty is involved.⁷⁷ Further, according to Lon Fuller, the purpose of a rule of professional conduct that makes it proper to defend a criminal, including one whom the lawyer knows to be guilty, “is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member.”⁷⁸ The criminal law context therefore provides the strongest justification

⁷² Atkinson, “Perverved Professionalism,” *supra* note 41 at 187-88. As such, when “proponents of neutral partisanship describe their model as amoral, they are not referring to its ultimate grounding, which is emphatically moral. They are referring, rather, to the lawyer’s immunity from the task of scrutinizing the morality of particular client acts. There is the morality at the wholesale but not the retail level; a morality of the long run, not the particular case; a morality of fidelity to role obligations, not attention to particular acts” (at 188) [footnotes omitted].

⁷³ *Ibid.* at 187 [footnotes omitted].

⁷⁴ See *e.g.* Alexis de Tocqueville, *Democracy in America*, J.P. Mayer, ed., trans. by George Lawrence (New York: Harper & Row, 1969) c. 8 at 263-70.

⁷⁵ See Stephen L. Pepper, “A Rejoinder to Professors Kaufman and Luban” (1986) *Am. Bar Found. Res. J.* 657.

⁷⁶ Atkinson, “Perverved Professionalism,” *supra* note 41 at 189. See also Wasserstrom, “Lawyers as Professionals,” *supra* note 20 at 10. For useful background discussions of the dominant model, see *e.g.* William H. Simon, “Ethical Discretion in Lawyering” (1988) 101 *Harv. L. Rev.* 1083 at 1084-90 [Simon, “Ethical Discretion”]; Sharon Dolovich, “Ethical Lawyering and the Possibility of Integrity” (2002) 70 *Fordham L. Rev.* 1629 at 1632-39; Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation*, 3d ed. (Westbury: Foundation Press, 1994) at 135-213; and Vischer, *supra* note 34 at 226-27. Compare also Leonard Riskin’s critique of the traditional lawyer’s “standard philosophical map.” Leonard Riskin, “Mediation and Lawyers” (1982) 43 *Ohio St. L.J.* 29 at 44.

⁷⁷ See *e.g.* Wasserstrom, “Lawyers as Professionals,” *supra* note 20 at 7-8.

⁷⁸ Lon L. Fuller, “The Adversary System” in Harold J. Berman, ed., *Talks on American Law* (New York: Vintage Books, 1961) at 32-37.

for the dominant model,⁷⁹ even though a minority of lawyers practise criminal law.⁸⁰ Finally, the institutional setting of the adversary system requires that all participants—specifically including lawyers—“adhere to their institutional roles.”⁸¹ The dependability and predictability of the adversary system relies on the amorality of the participating advocates.⁸²

II. Policy

These animating principles and justifications for the dominant narrative have been embodied in numerous sources of policy, most notably including various codes of professional conduct. Perhaps one of the strongest modern policy statements is found in the ABA’s *Model Rules*, which provide that when acting as an advocate, “a lawyer zealously asserts the client’s position under the rules of the adversary system.”⁸³ Similarly in Canada, the CBA’s *Code* provides that when acting as an advocate, “the lawyer must ... represent the client resolutely, honourably and within the limits of the law.”⁸⁴

⁷⁹ For this reason, the dominant model’s treatment of the criminal defence lawyer is also the most difficult aspect of the dominant model to critique. In fact, there is a debate in the alternative literature about whether the alternative models, discussed further in Part C, apply equally to criminal defence work as they do to civil side work. For example, Wasserstrom argues that “the amoral behaviour of the *criminal* defense lawyer is justifiable,” and is of the view that “[o]nce we leave the peculiar situation of the criminal defense lawyer ... it is quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate.” Wasserstrom, “Lawyers as Professionals,” *supra* note 20 at 12 [emphasis in original]. See similarly Rhode, *Interests of Justice*, *supra* note 66 at 72 (arguing that the criminal context often requires role differentiated behaviour); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) at 148 (arguing that, in the criminal defence context, “the appeal to the adversary system by-and-large vindicates the kind of partisan zeal characterized in the standard conception”) [Luban, *Lawyers and Justice*]. See further Atkinson, “Perverted Professionalism,” *supra* note 41 at 191. In contrast, William Simon rejects the distinction between civil and criminal contexts as a reason to move away from the notion of justice-seeking as the basis for ethical deliberation. See William Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Cambridge: Harvard University Press, 1998) at 170-94, discussed in Dolovich, *supra* note 76 at 1647-48.

⁸⁰ See e.g. ABA Young Lawyers Division, Survey, “Career Satisfaction Among Young Lawyers” (2000) at 13 (table 11), online: ABA <http://www.abanet.org/yld/satisfaction_800.doc>.

⁸¹ Wasserstrom, “Lawyers as Professionals,” *supra* note 20 at 9-10.

⁸² *Ibid.* at 10. See also Wasserstrom, “Legal Education,” *supra* note 37 at 157-58; Abe Krash, “Professional Responsibility to Clients and the Public Interest: Is There a Conflict?” (1974) 55 Chicago Bar Record 31. For an early and colourful account of this role-based institutional argument, see James Boswell, *Boswell’s Journal of A Tour to the Hebrides with Samuel Johnson, LL.D.* (London: William Heinemann, 1936) at 14-15 (15 August 1773 journal entry).

⁸³ ABA, *Model Rules*, *supra* note 23. For commentary, see e.g. Alice Woolley, “Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer” (1996) 9 Can. J.L. & Jur. 61 [Woolley, “Integrity in Zealousness”].

⁸⁴ CBA, *Code*, *supra* note 27.

In the spirit of the dominant model's commitment to amorality, these policy provisions recognize the importance of the lawyer's ability to raise arguments that, while legal, may not be popular (or moral⁸⁵). For example, the LSUC's *Rules* provide that the lawyer "has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, *however distasteful*, that the lawyer thinks will help the client's case, and endeavour to obtain for the client the benefit of every remedy and defence authorized by law."⁸⁶

Further, in line with the principles of the dominant model, even if the lawyer has personal difficulties with the position of the client, the dominant model requires the lawyer to suppress his or her own views in favour of those of the client and to "refrain from expressing the lawyer's personal opinions on the merits of a client's case."⁸⁷ Alberta makes the same point even more bluntly: "What the lawyer believes about the merits of the case is essentially irrelevant."⁸⁸

III. Practice

Not only do the principles of the dominant model play out in the guiding policy statements in the area, they also resonate with the routine practice of most lawyers' daily work. One only needs briefly to visit the local civil or criminal courts to see the model in action.⁸⁹ The model is equally present in the context of everyday solicitor work, including real estate deals, estate matters, corporate and securities work, tax planning, et cetera.⁹⁰ In sum, the dominant model is not only the dominant model in theory, it also continues to be the dominant model in practice.

IV. Literature, Popular Culture, and Media

We also see the realities of legal practice playing themselves out in the ways that lawyers are portrayed in literature, film, popular culture, and the media. From before Shakespeare

⁸⁵ For example, according to Wasserstrom, the dominant model has been described as rendering lawyers "at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind." Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 1.

⁸⁶ LSUC, *Rules*, *supra* note 10, r. 4.01(1), commentary [emphasis added].

⁸⁷ *Ibid.*

⁸⁸ The Law Society of Alberta, *Code of Professional Conduct*, c. 10, r. 11, commentary [LSA, *Code*].

⁸⁹ See e.g. Mason, *supra* note 21.

⁹⁰ Discussed in Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 8. In the specific context of representative negotiation, see e.g. Robert F. Cochran, Jr., "Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation" (1990) 47 Wash. & Lee L. Rev. 819.

to after Shaw, lawyers continue to be viewed in literature primarily through the lens of amorality and by the choices and actions that result from that amoral viewpoint.⁹¹ For example, as Jean-Baptiste Clamence, the narrator and former successful Parisian lawyer in Camus' *La Chute (The Fall)* mused: "Now and then I still argued a case. At times even, forgetting that I no longer believed in what I was saying, *I was a good advocate.*"⁹² Representations of lawyers in movies and other popular culture venues continue with this tendency.⁹³ For example, for fans of *Law & Order*, there is no doubt that Jack McCoy's views that "justice is a by-product of winning" and that "sometimes you have to make deals with the devil" separate the attorney's personal morals from the client's causes.⁹⁴ The media also regularly highlight the ethical challenges of lawyers⁹⁵ as well as normalize or romanticize the role of the zealous advocate.⁹⁶ Either way, the dominant message is delivered and perpetuated both inside and outside of the profession.

⁹¹ For general treatments of law and literature, see *e.g.* Richard A. Posner, *Law and Literature*, rev. ed. (Cambridge, MA: Harvard University Press, 1998); and Irving Browne, *Law and Lawyers in Literature* (Littleton, CO: Fred B. Rothman, 1982); John Marshall Gest, *The Lawyer in Literature* (Boston: Boston Book Company, 1913). For a useful Canadian collection of papers and discussions on the topic of law and literature, see The Honourable Mr. Justice James M. Farley, "Law, Lawyers and Judges in Literature" (The Chief Justice of Ontario's Advisory Committee on Professionalism, Sixth Colloquium on the Legal Profession: Law and Lawyers in Literature and Film, 10 March 2006), online: <http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia/>.

⁹² Albert Camus, *The Fall*, trans. by Justin O'Brien (London: Penguin, 2000) at 79 [emphasis added]. See also Boswell's recounting of Johnson's views on the role of the lawyer, *supra* note 82.

⁹³ For a recent and compelling film that looks at various competing visions of lawyers' professional and ethical roles and obligations, see *Michael Clayton* (Warner Bros. Pictures, 2007), online: Warner Bros. <<http://michaelclayton.warnerbros.com/#>>. See further Paul Bergman, "The Movie Lawyers' Guide to Redemptive Legal Practice" in Susan D. Carle, ed., *Lawyers' Ethics and the Pursuit of Social Justice* (New York: New York University Press, 2005) at 309.

⁹⁴ The Internet Movie Database ("IMDb"), "Memorable Quotes from 'Law & Order' (1990)," online: <<http://www.imdb.com/title/tt0098844/quotes>>.

⁹⁵ See *e.g.* Kate Fillion, "'One prominent lawyer told me, 'Every lawyer is going to go into the office today and commit fraud.' Then he laughed.' Ex-Bay Street lawyer Philip Slayton talks to Kate Fillion about how lawyers became greedy, unprincipled enablers of the rich," *Maclean's* 120:30 (6 August 2007) 18 (the "Lawyers are Rats" issue). This was an interview with Philip Slayton, based on his recent book: Philip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Viking Canada, 2007). See similarly James L. Kelley, *Lawyers Crossing Lines: Nine Stories* (Durham, NC: Carolina Academic Press, 2001). For a brief discussion of the *Maclean's* issue and Philip Slayton's book, see Dodek, "Canadian Legal Ethics," *supra* note 8 at 7, 16, 38. For a review of Slayton's book, see Lorraine Lafferty, (2008) 46 Osgoode Hall L.J. 197; Tim Wilbur, "The trouble with law is lawyers" *The Globe and Mail* (4 August 2007) D3. For a recent example of media attention on a particularly ethically contentious legal issue, see Adam Liptak, "Lawyer Reveals Secret, Toppling Death Sentence" *The New York Times* (19 January 2008), online: <<http://www.nytimes.com/2008/01/19/us/19death.html?pagewanted=1>>.

⁹⁶ See *e.g.* Mason, *supra* note 21 (discussing the role of Peter Ritchie and other members of the defence team in the Robert Pickton murder trial); Liptak, *ibid.*; and Wilbur, *ibid.* (stating that the "accepted view in the profession" is that "a lawyer should be a zealous advocate...").

V. Hegemony Light

If the client's interests were truly all that was at stake for an advocate, as the purest of zealous advocacy models proposes, his or her job would be relatively straightforward: there would only be, in line with Lord Brougham's articulation, "one person in all the world."⁹⁷ Most versions of the dominant model, however, do not focus solely on the zealous representation of the client. First, lawyers—no matter how zealous—cannot engage in illegal activity by, for example, concealing evidence or obstructing justice.⁹⁸ This view is consistent with typical code of conduct provisions requiring lawyers to act "within the limits of the law."⁹⁹

Second, although slightly more controversial, most dominant trend theorists typically recognize and make space for a lawyer's obligations to the court.¹⁰⁰ For example, according to Florida State Judge David A. Demers of the Sixth Judicial Circuit for St. Petersburg, the "best definition" of professionalism balances "two primary duties: (1) zealous representation ... and (2) service as an officer of the court."¹⁰¹ What counts as service "to the court" is a contested discussion. One less controversial version of this service would be the relatively narrow and negative obligations not to, for example, "deceive a tribunal," "misstate the contents of a document [or] the testimony of a witness," or "dissuade a witness from giving evidence."¹⁰² However, given that the privilege of self-regulation has come with the responsibility of acting in the public interest,¹⁰³ acting as an officer of the court has been seen by some to include more expansive notions of lawyering responsibilities that potentially are required by the public interest.¹⁰⁴ These more

⁹⁷ *Trial of Queen Caroline*, *supra* note 68.

⁹⁸ Freedman, *supra* note 64 at 6; Fried, *supra* note 71 at 1080-82.

⁹⁹ See e.g. CBA, *Code*, *supra* note 27.

¹⁰⁰ See e.g. Freedman, *supra* note 64 at 9-24.

¹⁰¹ David A. Demers, "The Continuum of Professionalism" (1998-1999) 28 *Stetson L. Rev.* 319 at 319. See also Daniel J. Pope & Stephanie J. Kim, "Client Perjury: Should a Lawyer Defend the System or the Client?" (1997) 64 *Def. Counsel J.* 447 at 453.

¹⁰² See e.g. LSUC, *Rules*, *supra* note 10, r. 4.01(2).

¹⁰³ For various code-based and legislative statements regarding the profession's obligations to the "public interest," see generally Part C.II of this article.

¹⁰⁴ See e.g. *Rondel v. Worsley*, [1967] 1 Q.B. 443, Lord Denning M.R. (C.A.), (following n. 27 and accompanying text), *aff'd* [1969] 1 A.C. 191 (H.L.). Similarly, the former Chief Justice of Ontario—when speaking on the topic of "advocacy in the 21st century"—emphasized the various competing interests to which advocates must be faithful: "Lawyers are not solely professional advocates or 'hired guns'. And while they do not surrender their free speech rights upon admission to the bar, they are also officers of the court with fundamental obligations to uphold the integrity of the judicial process, both inside and outside the courtroom. It is the duty of counsel to be faithful both to their client and to the administration of justice." Hon. R. Roy McMurtry, "Role of the Courts and Counsel in

expansive notions are captured in code provisions that require lawyers to temper their zeal and act not only “within the limits of the law” but also “honourably”¹⁰⁵ and by discharging “all responsibilities to ... the public.”¹⁰⁶

However, but for understandings of what counts as acting “honourably” that include visions of the advocate as giving their “entire devotion to the interests of the client,”¹⁰⁷ or as acting to further the dictates of client autonomy within the spirit of the adversary system,¹⁰⁸ the dominant model of lawyering struggles to make sense of legislative dictates that put “duties” on professional bodies to act in the “public interest,” “to maintain and advance the cause of justice and the rule of law,” and “to act so as to facilitate access to justice.”¹⁰⁹ To address these ethical challenges and duties, an alternative model has developed.¹¹⁰ This alternative model is the second “school” contemplated by Atkinson in his discussion of the “fundamental question of professional ethics.”¹¹¹

C. Alternative Models of Professionalism

The basic point of departure for critiques of the dominant model, as intimated by Atkinson’s question, is the opportunity for, or obligation on, lawyers to be guided by extra-legal norms, such as morality, religion, politics, and custom, when representing their clients. Further, critics of the dominant model have a much more expansive view of the kinds of interests that must be considered when determining the appropriate course of action in a given situation. As with the dominant model of professionalism, there are equally compelling arguments in support of these alternative models sounding in principle, policy, and practice.¹¹²

Justice” (The Advocates’ Society Spring Symposium 2000, Advocacy in the 21st Century, 6 June 2000), online: <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/role.htm>>.

¹⁰⁵ See e.g. CBA, *Code*, *supra* note 27. See also LSUC, *Rules*, *supra* note 10, r. 4.01(2)(b).

¹⁰⁶ See e.g. LSUC, *Rules*, *ibid.*, r. 1.03(1)(a).

¹⁰⁷ Freedman, *supra* note 64 at 9.

¹⁰⁸ See e.g. Pepper, *supra* note 71. See further Atkinson, “Perverted Professionalism,” *supra* note 41.

¹⁰⁹ See *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2.

¹¹⁰ But see Randal N.M. Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (Toronto: Emond Montgomery, 2004) at 103-28.

¹¹¹ Atkinson, “Perverted Professionalism,” *supra* note 41 and 57.

¹¹² Although there clearly are differences between alternative models, as a general matter they maintain more similarities than differences. For a useful discussion of some of the leading alternative models, their similarities and differences, see Dolovich, *supra* note 76 at 1646-49, 1664-65, in which she writes that “[i]n the main” a number of alternative models share “the view that ethical lawyering requires the exercise of discretion by

I. Principle

The starting point for this discussion really comes from the foundational premise that lawyers, as self-regulated professionals, have been given the opportunity and responsibility to act not just in the interests of their clients but, more fundamentally, in furtherance of the “public interest.”¹¹³ Therefore, in addition to the interests of the client, the advocate must take into consideration a number of other interests (as required by his or her status as a member of the legal profession) including those of other clients, himself or herself, opposing lawyers, the court, and other sectors of society included in the overall administration of justice.¹¹⁴

A number of visions are contemplated by the various attempts to develop an alternative model, including descriptions of lawyers as “officers of justice” who are “morally reflective individuals”;¹¹⁵ descriptions of the lawyer’s role as a “moral activist[,]”¹¹⁶ requiring a “profession-wide emphasis on greater moral sensitivity and self-awareness among attorneys”;¹¹⁷ and descriptions of the lawyer’s professional duty as requiring “reflective judgment” to “further justice”¹¹⁸ and provide “moral perspective”¹¹⁹ through the

individual lawyers, who must judge for themselves in any given situation what justice requires and act accordingly” (at 1648). For a useful discussion on the distinctions between the American and Canadian perspectives on legal ethics, see Woolley, “Integrity in Zealousness,” *supra* note 83.

¹¹³ For example, according to the Supreme Court of Canada, “[c]learly, a major objective of the [New Brunswick Law Society] Act is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, requires that the Law Society perform its paramount role of protecting the interests of the public... The privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned...” *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 36 [references omitted].

¹¹⁴ For a recent discussion of some of these competing interests and some of the challenges that come with seeking to balance them, see Farrow, “The Negotiator-As-Professional,” *supra* note 15. See also Atkinson, “Perverted Professionalism,” *supra* note 41; Wasserstrom, “Legal Education,” *supra* note 37; Rhode, “Persistent Questions,” *supra* note 3; and Beverley G. Smith, *Professional Conduct for Lawyers and Judges*, 3d ed. (Fredericton: Maritime Law Book, 2007) c. 1.

¹¹⁵ Rhode, *Interests of Justice*, *supra* note 66 at 17, 67. See also Paul A. Teschner, “Lawyer Morality” (1970) 38 *Geo. Wash. L. Rev.* 789.

¹¹⁶ Luban, *Lawyers and Justice*, *supra* note 79 at 160.

¹¹⁷ Vischer, *supra* note 34 at 271.

¹¹⁸ Simon, “Ethical Discretion,” *supra* note 76 at 1083. Similarly, Simon articulates the normative underpinning of this model as a “seek justice” maxim. *Ibid.* at 1090. See further William H. Simon, “Thinking Like a Lawyer’ about Ethical Questions” (1998) 27 *Hofstra L. Rev.* 1.

¹¹⁹ Vischer, *supra* note 34 at 225.

development of “critical morality.”¹²⁰ All of these descriptions taken together, in response to Atkinson’s question,¹²¹ essentially require lawyers “to accept personal responsibility for the moral consequences of their professional actions.”¹²² In the “extreme” form, the lawyer should “avoid doing harm” by refusing to act if the lawyer thinks that the outcome of “winning” would be on balance a “bad thing” or “socially unfortunate,” in spite of the fact that “the client will pay” and that the lawyer “wouldn’t be doing anything that came close to violating the canons of professional ethics.”¹²³

As can be seen, when calculating what amounts to furthering the cause of justice or the public interest, these alternative accounts invariably rely on some sense of individual morality. They do not allow the lawyer morally to “insulat[e]” herself “within her role” from the justice or injustice of the client’s cause.¹²⁴ These various accounts take seriously the lawyer’s personal morality or sense of justice in the spirit of balancing, and indeed privileging, the interests of the public over those of the client, particularly when those interests collide. Beyond that, however, these views do not mandate *one* sense of what counts as morality. What is encouraged is not a shared sense of morality that provides “bright-line answers,” but rather “ethically reflective analysis and commitments.”¹²⁵

Further, even if we thought that the dominant model provided a viable vision of the lawyer’s role, that vision can only, in its best light, amount to a fiction. Because lawyering is a human exercise, it will always be accomplished through the lens of the human experience. According to Mark Orkin, “A lawyer cannot, more than any other man, keep his personal conscience and his professional conscience in separate pockets ... it cannot be seriously denied that every lawyer is, in some measure, the keeper of his client’s conscience.”¹²⁶ Robert Vischer has more recently developed this line of thought. He

¹²⁰ Allan C. Hutchinson, “Legal Ethics for a Fragmented Society: Between Professional and Personal” (1997) 5 Int’l J. Legal Prof. 175 at 187 [Hutchinson, “Legal Ethics for a Fragmented Society”]. More recently see generally c. 3 in Hutchinson, *Legal Ethics*, *supra* note 8.

¹²¹ Atkinson, “Perverted Professionalism,” *supra* note 41.

¹²² Rhode, *Interests of Justice*, *supra* note 66 at 66-67. See also Hutchinson, *Legal Ethics*, *supra* note 8 at 50-58, 212; Allan C. Hutchinson, “Calgary and Everything After: A Postmodern Re-vision of Lawyering” (1995) 33 Alta. L. Rev. 768; and David Luban, “Integrity: Its Causes and Cures” (2003) 72 Fordham L. Rev. 279. Similarly, according to Atkinson’s description of the moral activist, the lawyer cannot be “neutral professionally toward what she opposes personally.” *Ibid* at 191.

¹²³ Duncan Kennedy, “The Responsibility of Lawyers for the Justice of Their Causes” (1987) 18 Tex. Tech. L. Rev. 1157 at 1159 [Kennedy, “The Responsibility of Lawyers”].

¹²⁴ See Atkinson, “Perverted Professionalism,” *supra* note 41 at 190-91.

¹²⁵ Rhode, *Interests of Justice*, *supra* note 66 at 71. See *infra* notes 174 and 178 and accompanying text.

¹²⁶ Mark M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons, 1957) at 264-65 [footnotes omitted].

believes that a lawyer's own "moral convictions" are "inexorably part" of the "attorney-client dialogue," whether "acknowledged by the attorney or not."¹²⁷ If lawyers fail to acknowledge the morality that "holds sway" over their professional deliberation, that morality is "forced into the background, where it is not susceptible to exploration by the client."¹²⁸ As such, the dominant model of lawyering is a fiction and is "not a harmless fiction, for it facilitates the tendency of clients to equate legality with permissibility."¹²⁹

Finally, even if lawyers were able to compartmentalize their moral deliberation in the spirit of robust role-differentiated behaviour, by so doing, they impoverish the possibilities of giving legally and ethically sound advice to their clients¹³⁰ and run the risk of paying a significant personal and social price. According to Wasserstrom, the "nature of professions ... makes the role of professional a difficult one to shed ... In important respects, one's professional role becomes and is one's dominant role ... This is at a minimum a heavy price to pay for the professions as we know them in our culture, and especially so for lawyers."¹³¹

II. Policy

As with the dominant model of lawyering, there are equally—if not more—powerful policy statements supporting the alternative approaches to professionalism, including numerous code-based and legislative statements. From the perspective of professional codes of conduct, a good starting point in Canada is the "President's Message" that introduces the CBA's *Code*, which provides that "[s]tandards of professional ethics form the backdrop for everything lawyers do."¹³² Further, the "Preface" to the CBA's *Code* provides that its "primary concern" is "the protection of the public interest."¹³³ Similarly, in Ontario, the *Law Society Act* provides that, "[i]n carrying out its functions, duties and powers under this Act," the LSUC has a "duty" to "maintain and advance the cause of justice and the rule of law"; "facilitate access to justice"; and "protect the public interest..."¹³⁴

¹²⁷ Vischer, *supra* note 34 at 228-29.

¹²⁸ *Ibid.* at 229.

¹²⁹ *Ibid.*

¹³⁰ See e.g. Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120 at 187-88.

¹³¹ Wasserstrom, "Lawyers as Professionals," *supra* note 20 at 15. See also MacKenzie, *supra* note 63 at 1-8.

¹³² Brian A. Tabor, "President's Message" (March 2006) in CBA, *Code*, *supra* note 27 at v [Tabor, "President's Message"].

¹³³ CBA *Code*, *ibid.* at ix.

¹³⁴ *Law Society Act*, *supra* note 109, s. 4.2. Similarly, in Alberta, the Preface to the LSA's *Code* provides that the "legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis." *Supra* note 88, Preface.

There are many different code statements that support this loose notion of acting in the “public interest.” For example, the CBA’s *Code*, in its provisions governing the lawyer’s relationship to the “administration of justice,” provides that “the lawyer should not hesitate to speak out against an injustice.”¹³⁵ In Ontario, the LSUC’s *Rules* dictate that, when acting as an advocate, “a lawyer shall not ... knowingly assist or permit the client to do anything that the lawyer considers to be ... dishonourable... .”¹³⁶ Similar international examples also obtain. For example, according to the *New York Lawyer’s Code of Professional Responsibility* of the New York State Bar Association (NYSBA), a lawyer “should be temperate and dignified, and refrain from all illegal and morally reprehensible conduct.”¹³⁷ As well, the *Basic Rules on the Duties of Practicing Attorneys (Basic Rules)* of the Japan Federation of Bar Associations (JFBA) provide that the “mission of an attorney is to protect fundamental human rights and realize social justice.”¹³⁸

Providing these justice-seeking policy statements, although important, is not the end of the matter. For the alternative models of professionalism, they form just the beginning of the conversation, since the codes fail to define what constitutes an “injustice,” “dishonourable” or “morally reprehensible” conduct, or even “social justice.” Often lawyers are left to their own moral devices to understand these provisions and their application to particular courses of action (thus creating contested devices, understandings, and applications¹³⁹). For this reason, it is important to keep notions of ethics and professionalism distinct. There is also therefore a need for what Rhode contemplates as a lawyer’s ability for “ethically reflective analysis.”¹⁴⁰

There are numerous policy-based statements recognizing the need for individual deliberation by lawyers. In Canada, for example, the Law Society of Alberta acknowledges that its professional “rules and regulations ... cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or *general moral principles* in determining an appropriate course of action.”¹⁴¹ In Ontario, the LSUC regards the notion of a “competent lawyer” as someone

¹³⁵ CBA, *Code*, *supra* note 27, c. XIII, commentary 3.

¹³⁶ LSUC, *Rules*, *supra* note 10, r. 4.01(2)(b). See similarly *ibid.*, r. 1.03(1)(a) (which is not limited to the lawyer’s role as advocate).

¹³⁷ NYSBA, *New York Lawyer’s Code of Professional Responsibility*, Canon 1, EC 1-5, online: <<http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf>>.

¹³⁸ JFBA, *Basic Rules* (preliminary provision, adopted 10 November 2004) at 1, online: <http://www.nichibenren.or.jp/en/about/pdf/basic_rules.pdf>.

¹³⁹ See Part D.III, below.

¹⁴⁰ Rhode, *Interests of Justice*, *supra* note 66 at 71.

¹⁴¹ LSA, *Code*, *supra* note 88, Preface [emphasis added].

“who has and applies relevant skills, attributes, and *values*... .”¹⁴² Further, Ontario lawyers—“particularly in-house counsel”—acting for organizations in the post-Enron era “may guide organizations to act in ways that are legal, *ethical*, reputable, and consistent with the organization’s responsibilities to its constituents and to the public.”¹⁴³ By separating what amounts to “legal” and “ethical,” clearly the LSUC contemplates professionalism as an advisory exercise that involves more than simply the consideration of client conduct that is “legal.”¹⁴⁴ In the United States, the ABA acknowledges that its *Model Rules* “do not ... exhaust the *moral and ethical considerations* that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”¹⁴⁵ Similarly, in Japan, even when a lawyer “endeavor[s] to realize his or her client’s legitimate interest,” that lawyer “shall follow the *dictates of his or her conscience*.”¹⁴⁶

It is possible, although often a stretch, to harmonize the above code-based goals (of encouraging lawyers to speak out against an injustice and to avoid dishonourable or morally reprehensible conduct) with the underlying institutionally-based and autonomy-seeking policies of the dominant model of professionalism. However, even if we accept that level of harmonization, it is not credibly feasible to harmonize the tools provided by the codes for realizing those challenging goals—“general moral principles,” “relevant ... values,” “act[ing] in ways that are ... ethical,” “moral and ethical considerations,” the lawyer’s “conscience,” et cetera.¹⁴⁷—with the amoral “hired gun” principles underlying the traditional dominant model. Indeed, it is even difficult to harmonize these code-based tools with the policy-based tools used by the dominant model and found *in the very same codes*.

As I will discuss shortly, although difficult to reconcile with other seemingly conflicting code provisions that are traditionally relied upon by proponents of the dominant model,¹⁴⁸ the code provisions, discussed above, open up alternative ways of lawyering that do make meaningful room for the relevance of a lawyer’s “moral principles” and “conscience,” all of which take seriously interests beyond those of the client. We now appear to have two

¹⁴² LSUC, *Rules*, *supra* note 10, r. 2.01(1) [emphasis added].

¹⁴³ *Ibid.*, r. 2.02(5.2), commentary [emphasis added].

¹⁴⁴ See similarly *ibid.*, r. 4.01(2)(b): “When acting as an advocate, a lawyer shall not ... knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable... .” For my discussion on a potential objection regarding the distinction between “legal” and “ethical,” see *supra* note 59.

¹⁴⁵ ABA, *Model Rules*, *supra* note 23 at para. 16 [emphasis added].

¹⁴⁶ JFBA, *Basic Rules*, *supra* note 138, r. 21 [emphasis added].

¹⁴⁷ See *supra* notes 141-43 and 145-46.

¹⁴⁸ See Part B.II, above, for various dominant model code provisions.

viable visions of the lawyer actively grounded in two different but equally robust sets of code-based policy statements.

III. Practice

Notwithstanding the earlier discussion of the dominant role of the zealous advocate in today's practice, there is clear and convincing evidence that a lawyer's personal morality actively influences how lawyers practise law. Further to Vischer's argument that we cannot escape our own moral framework,¹⁴⁹ moral choices are made by lawyers throughout the project of law. As David Tanovich has argued, "over the last fifteen years, we have been engaged in an ongoing process of role morality reconstruction. Under this reconstructed institutional role, an ethic of client-centred zealous advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law's ambition."¹⁵⁰ Starting from their first days in law school, students are making more informed choices about what law schools to attend, what courses to take, and what areas of law to pursue. Lawyers are actively making decisions about which clients to take, how to represent those clients, and how to withdraw their services when a client relationship breaks down (in terms of trust, respect, et cetera).¹⁵¹ All of these practical trends accord with my own anecdotally-based assessments of lawyers and law students over the past twenty years of studying, practising, and teaching law. They also accord, as David Tanovich argues, with the conclusions of an empirical study of Ontario lawyers by Margaret Ann Wilkinson, Christa Walker, and Peter Mercer.¹⁵² This study—although far from concluding that lawyers had moved from the dominant to an alternative sensibility of lawyering—"amply demonstrates that ... lawyers are preoccupied with the constant tensions of specific solicitor-client relationships and the lawyer's overall obligations to society."¹⁵³

¹⁴⁹ Vischer, *supra* note 34 at 228-29.

¹⁵⁰ Tanovich, *supra* note 25 at 273.

¹⁵¹ In these circumstances, decisions to withdraw need not be based simply on legal or financial conflicts, but can also be based on conflicts of a personal nature. See *e.g.* LSUC, *Rules*, *supra* note 10, r. 2.04. See also relevant competence principles, r. 2.01. For a general discussion of the alternative model playing itself out in practice, see *ibid.*

¹⁵² Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views On The Practice Of Law" (2005) 18 Can. J.L. & Jur. 165, cited in Tanovich, *supra* note 25 at n. 13-15 and accompanying text. See also Peter Mercer, Margaret Ann Wilkinson & Terra Strong, "The Practice of Ethical Precepts: Dissecting Decision-Making By Lawyers" (1996) 9 Can. J.L. & Jur. 141, cited in Tanovich, *ibid.* at 270, n. 13.

¹⁵³ Wilkinson *et al.*, *ibid.* at 190, cited in Tanovich, *ibid.* at n. 15 and accompanying text.

IV. Competing Professionalisms

At the moment, then, students of professionalism are currently left with two broad and competing menu choices when thinking about how best to understand legal ethics, or put differently, how best to approach Atkinson's "fundamental question of professional ethics."¹⁵⁴ On the one hand—speaking from principle, policy, and practice—there is still robust life in the spirits of the dominant model. On the other hand, a self-conscious moral sensibility of lawyering is certainly not a stranger to the modern vision of professionalism. In fact, on each of these three indicators, there is powerful and persuasive support for those who believe that they are not guided only by law's limits in the exercise of their lawyering duties.

In my view, the principles and policies that support the alternative model fit more naturally with the modern realities of lawyering. They tend to support Tanovich's observations regarding the shift toward a "justice-seeking ethic" over the past fifteen years.¹⁵⁵ Moreover, they fit more naturally with an early version of the CBA's guiding ethics principles on a lawyer's duty: "to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and *true to himself*."¹⁵⁶ This vision nicely fits with the aspirations of my students when asked if they would prefer a vision of professionalism that allowed for the opportunity to maintain a meaningful sense and space for "self."¹⁵⁷

However, even if Tanovich is correct in that the "zealous advocacy" model is slowly being replaced by a "justice-seeking ethic," we are clearly a long way from shedding the "names, battle slogans, and costumes"¹⁵⁸ of the dominant ideology. According to David Luban, one of the most vocal supporters of an alternative vision of lawyering, although those who subscribe to an alternative vision of professionalism represent "a substantial minority of the legal profession, it is a minority view nonetheless."¹⁵⁹ So why do we continue to be so powerfully influenced by the dominant trend of professionalism?

¹⁵⁴ Atkinson, "Perverted Professionalism," *supra* note 41 and accompanying text.

¹⁵⁵ Tanovich, *supra* note 25 at 273.

¹⁵⁶ CBA, *Canons of Legal Ethics* (Ottawa: CBA, 1920) cited in Orkin, *supra* note 126 at 13 [emphasis added]. For a current articulation of these *Canons*, see e.g. Law Society of British Columbia, *Professional Conduct Handbook*, c. 1 (in force 1 January 1992).

¹⁵⁷ *Supra* note 9 and accompanying text.

¹⁵⁸ See Marx, "Eighteenth Brumaire," *supra* note 1 at 595.

¹⁵⁹ David Luban, "The Social Responsibilities of Lawyers: A Green Perspective" (1995) 63 *Geo. Wash. L. Rev.* 955 at 955 [Luban, "Social Responsibilities of Lawyers"].

Several possible answers obtain. First, there is the argument of tradition. There is no doubt that the dominant model enjoys the weight and sway of a long history and tradition. One only needs to look as far as the earlier discussion of Lord Brougham's vision of a lawyer¹⁶⁰ to find support for this tradition-based argument.¹⁶¹ However, as is typically the case with tradition- (or precedent-) based arguments, without some other compelling reason, these arguments tend to be nothing more than self-serving tautologies; the model is persuasive, because the model has been persuasive for a long time. Without something more, this line of argument fails to account for the model's continued dominance, particularly in the face of viable alternative options.

Second, perhaps the dominant model continues its hegemonic prominence because it is simply more compelling. Given its autonomy-seeking focus and its one-size-fits-all foundation (one of its "dangerously attractive" features¹⁶²), there is no need for uncomfortable ethical deliberation on the part of individual lawyers. The dominant model champions its amoral ability to be applied to all lawyers and all lawyering situations. It thereby criticizes the alternative models for overplaying the relevance or supremacy of the lawyer's individual moral choices or preferences (that risk usurping the ethical autonomy of the lawyer's client) while underplaying the institutional value of the lawyer in the adversary system. However, the problem with these arguments and justifications for the dominant model's continued prominence is that, as was demonstrated above,¹⁶³ there is compelling principle, policy, and practice-based evidence that in my view fatally challenges its assumptions and foundations.

A third and related basis for the model's continued hegemony stems from the power politics and economics of the lawyering process. Law has increasingly become a competitive business driven by complex needs of powerful clients. As Gavin MacKenzie comments, "Lawyers practise in a market economy, and the highest bidders in such an economy are wealthy and often powerful."¹⁶⁴ Having lawyers who will zealously do their bidding obviously serves the interests of clients. It also, however, often serves the interests of lawyers. Personally (and politically) it allows lawyers to sidestep the messy business of moralizing and taking personal responsibility for the deeds of their clients.¹⁶⁵ Economically, it allows lawyers to charge significant fees in exchange for adopting a morally role-differentiated professional position.

¹⁶⁰ *Supra* note 68 and accompanying text.

¹⁶¹ Compare Tanovich, *supra* note 25 at 272, n. 19 and accompanying text.

¹⁶² Farrow, "The Negotiator-as-Professional," *supra* note 15 at 398.

¹⁶³ See Part B, above.

¹⁶⁴ MacKenzie, *supra* note 63 at 1-7. See also Iacobucci, *supra* note 36 at 860.

¹⁶⁵ Discussed further in Part B.I-II, above.

There is no doubt that this power-politics basis provides a significant justification for the persistence of the dominant model that views the lawyer-client relationship as symbiotic. However, in addition to the principle, policy, and practice examples that challenge the basis of these power politics,¹⁶⁶ there is also no direct evidence supporting the basis of this argument, which is—at its root—that lawyers are exclusively willing pawns of their clients, or as MacKenzie describes, willing to “fiddle on the corners where clients throw coins.”¹⁶⁷ In my view, seeing lawyers in such a weak light cheapens not only the office of the lawyer but also the reality of the practice.¹⁶⁸ Further, as MacKenzie comments, “[t]here is no evidence that lawyers who act for the wealthy and powerful are any more or less ethical than are those who act for the poor and powerless.”¹⁶⁹ Similarly, as Hutchinson remarks, “[l]aw may well be a business, but that does not necessarily entail an unethical or unprofessional approach to conducting that business.”¹⁷⁰ These comments certainly accord with my own experience in the practice of law, in which complex and financially costly client demand often went hand-in-hand with a high degree of self-reflective ethical conduct.¹⁷¹ They also accord with increasing demands (often by wealthy, powerful clients) for ethical practices from legal counsel.¹⁷² So while certainly a significant answer, I do not think that power politics provides the ultimate answer for the dominant model’s continued persistence.

The fourth and most persuasive reason for the continued prominence of the dominant model comes not from the strength of that model but rather from a weakness in the way that the alternative models have, to date, been presented. Specifically, the alternative models are often framed in terms of the “moral perspective,” “moral lawyering,” or “the good lawyer.”¹⁷³ Even though proponents of these models sometimes see things differently,¹⁷⁴ these labels tend to connote some shared or required understanding of what counts as “moral” or “good.” It has taken the Enlightenment three hundred years to move this understanding from the realm of the family and the personal to a collective understanding of autonomy and rights at the public level of civil society. It is an

¹⁶⁶ See Part C, above.

¹⁶⁷ MacKenzie, *supra* note 63 at 1-7.

¹⁶⁸ See Part C.III, above.

¹⁶⁹ MacKenzie, *supra* note 63 at 1-7.

¹⁷⁰ Allan C. Hutchinson, “Who Are ‘Clients’? (And Why it Matters)” (2005) 84 Can. Bar Rev. 411 at 430 [Hutchinson, “Who Are ‘Clients?’”].

¹⁷¹ For a brief discussion of my former practice experience, see *e.g. supra* note 40.

¹⁷² See McClintock, *supra* note 14 and accompanying text.

¹⁷³ See *supra* notes 34-37 and accompanying text.

¹⁷⁴ See *e.g.* Rhode, *Interests of Justice*, *supra* note 66 at 71.

understanding that cannot, by most accounts of liberalism in a pluralistic and complex society, be defended.¹⁷⁵ To avoid this apparent trap, the dominant vision of the lawyer—“aiming not to inject her own vision of the good into the representation, but simply to pursue the client’s vision of the good through the maximization of the client’s legal rights”¹⁷⁶ (based on classic Rawlsian political liberalism that prefers the right over the good¹⁷⁷)—nicely sidesteps a search for shared values and visions of the good life through role-morality. As such, it fosters the Enlightenment project of individual freedom and autonomy.

Even if we are persuaded by, for example, Rhode’s answer to the problem of shared morality,¹⁷⁸ these “intolerant”¹⁷⁹ labels, by their very nature, tend to characterize the “other” side as being the opposite of a “good” lawyer, a “moral” lawyer, or a “just” lawyer, which the “other” dominant view rejects. For example, when looking for a shared conception of the public interest, Tanovich argues that it must at least require “lawyers to act in the pursuit of justice.”¹⁸⁰ In turn, justice for Tanovich “can be defined, for purposes of the lawyering process, as the *correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner.*”¹⁸¹ This definition of justice-seeking lawyering, or any of these alternative “moral” or “good”-based labels for that matter, are not wrong. In fact, by and large they are right. The problem is that these definitions and labels could be (and are) equally and credibly claimed by both sides to describe their lawyering projects. Lawyers on both sides think of themselves as “morally reflective individuals,”¹⁸² “better people,”¹⁸³ “better lawyers,”¹⁸⁴ and “correct.”¹⁸⁵ They just approach these labels from very different perspectives.

¹⁷⁵ For leading accounts of this current theory of liberalism, see *e.g.* John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); John Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Belknap Press, 1999). See also Atkinson, “A Dissenter’s Commentary,” *supra* note 25 at 343. For a concise and powerful critique of Rawlsian liberalism—primarily animated by communitarian arguments that make space for a modern sense of the “good” being prior to the “right,” see *e.g.* Michael J. Sandel, “Political Liberalism,” Book Review of *Political Liberalism* by John Rawls, (1994) 107 Harv. L. Rev. 1765. See also Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996).

¹⁷⁶ Vischer, *supra* note 34 at 227.

¹⁷⁷ *Supra* note 175.

¹⁷⁸ See Rhode, *Interests of Justice*, *supra* note 66 at 71.

¹⁷⁹ See Atkinson, “A Dissenter’s Commentary,” *supra* note 25 at 343.

¹⁸⁰ Tanovich, *supra* note 25 at 284.

¹⁸¹ *Ibid.* [citation omitted] [emphasis in original].

¹⁸² Rhode, *Interests of Justice*, *supra* note 66 at 67.

¹⁸³ Dolovich, *supra* note 76 at 1649.

¹⁸⁴ *Ibid.*

And so we return to Atkinson with two competing and intractable stories. One story, by “anxiously conjur[ing] ... up the spirits of the past,”¹⁸⁶ continues to create “a world after its own image.”¹⁸⁷ The other story, a modern story that challenges this old world image, rejects much of its “names, battle slogans, and costumes.”¹⁸⁸ In so doing, however, it has failed—at the moment of “revolutionizing” itself and of “creating something entirely new”¹⁸⁹—to replace the “time-honoured disguise and ... borrowed language.”¹⁹⁰ What is needed is a new, persuasive lens through which to see the world not in the service of “all the dead generations,”¹⁹¹ but in the service of the “living”¹⁹² in “this society”¹⁹³ and in the service of “the world of our children.”¹⁹⁴ What is needed is a story of professionalism that captures the energy and positive attributes of both sides of this debate. What is needed is a story of professionalism that is sustainable.

D. Sustainable Professionalism

A key aspect of the problem is that the two stories, on their face, disagree about how to evaluate what counts as the “right” course of action in a given circumstance. Their positions on this fundamental question¹⁹⁵ compete. If we continue to assert these competing positions without uncovering the interests that underlie their positions—unless we find some common ground or more specifically, a persuasive lens through which to see this potential common ground—we will maintain this gridlock.¹⁹⁶ By uncovering the underlying interests at stake in each of the two versions, we will start to

¹⁸⁵ Tanovich, *supra* note 25 at 284 [citation omitted].

¹⁸⁶ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

¹⁸⁷ See Marx & Engels, “Communist Manifesto,” *supra* note 30 at 477.

¹⁸⁸ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ See Mayer, *supra* note 2.

¹⁹⁴ *Ibid.*

¹⁹⁵ Atkinson, “Perverted Professionalism,” *supra* note 41.

¹⁹⁶ This process of uncovering “interests,” in the face of competing “positions,” is an application of interest-based negotiation theory. For a discussion of this theory, see Colleen M. Hanycz, “Introduction to the Negotiation Process Model” in Hanycz, Farrow & Zemans, *supra* note 15, c. 3.

see who and what we need to address and to protect in order to develop a story of professionalism that addresses all (or at least as many as possible) of those underlying interests. We will find common ground on which to build a theory of professionalism that is (as far as possible) acceptable to, or sustainable for, both sides.

I. Underlying Interests

So what are those underlying interests? For the dominant model, the client maintains the ultimate interest. More specifically, this model preferences the client's ability to maximize his or her autonomy and rights within the broad parameters of what counts as legal, and free from the moralizing of the advising lawyer. For the alternative visions, some version of "justice" or the "public interest" is the primary interest at stake. Again, this model specifically cares about the interests of a number of stakeholders—the client, the lawyer, the judge, the other side, and the public (present and future)—who, taken together, describe the interests of justice or what is thought of as the public interest. Under this model, discovering and balancing these interests actively engages the lawyer's own moral opinions and preferences in the dialogue.

The primary points of disagreement between these approaches are the number of relevant stakeholders (client versus client and others) and the relevance of a lawyer's own moral opinions (*vis-à-vis* the client's chosen course of legal conduct). Otherwise, both sides seem to agree on the basic justice-seeking premise of the lawyering exercise. We can recast this discussion, taking account of both the shared and competing interests, through a lens of sustainability.

II. Sustainability

My approach re-directs much of the positive energy and progressive ideas of the competing models of professionalism through a more persuasive, *sustainable* lens. This approach stems from my frustration from hearing students and lawyers say to me countless times that a new way of thinking about professionalism would be a good idea in theory, but is just not sustainable in reality.¹⁹⁷ This article therefore answers those skeptics by proposing a form of professionalism that is normatively sound, is descriptively accurate, and provides the basis for broad-based buy-in from as many justice-seeking stakeholders as possible. At the moment, neither the dominant nor the alternative model satisfies all three requirements.

¹⁹⁷ See *e.g.* *supra* notes 40 and 43 and accompanying text.

Interestingly, but for a handful of references to several useful but general social science initiatives looking at the role and future of professionalism,¹⁹⁸ there is little meaningful discussion of “sustainability” in the academic literature on legal ethics.¹⁹⁹ It is not a mantra that theories of professionalism have self-consciously embraced.²⁰⁰

As a general matter, sustainability has come to be primarily identified with three particular approaches: “sustainability as optimal living resource exploitation”; “sustainability as respect for ecological limits”; and “sustainability as sustainable development.”²⁰¹ While all three approaches characterize the *typical* use of the concept in modern legal parlance, they do not preclude other, more general uses of the idea. Nor do they preclude a wide range of stakeholders from engaging in discussions of sustainability broadly defined. For example, according to Stepan Wood,

[s]ustainability has emerged as one of the defining preoccupations of human affairs at the opening of the twenty-first century. It has proven to be simultaneously as alluring and as challenging to international lawyers as it has to scientists, politicians, businesspeople and others. It provides a powerful symbol around which diverse interests can converge, but at the same time it eludes concrete definition, encompasses conflicting agendas and promises to generate continuing debate and controversy.²⁰²

To my mind, the legal profession provides a new terrain for “continuing debate” about the utility of sustainability, broadly defined. There are many definitions of the word “sustain”: for example, to “uphold the validity or rightfulness of” or to “keep (a person or community ... etc.) from failing or giving way.”²⁰³ Further, “sustainable” was defined (in the context of development) in the foundational “Brundtland Report” as meeting “the needs of the present without compromising the ability of future generations to meet their own

¹⁹⁸ See e.g. John Craig, ed., *Production Values: Futures for Professionalism* (London: Demos, 2006), online: Careers Scotland <<http://www.careers-scotland.org.uk/nmsruntime/saveasdialog.asp?IID=9439&slD=1164>>.

¹⁹⁹ I realize that proving a negative is not an easy task. For purposes of this article, it is also not a necessary task.

²⁰⁰ However, as is discussed in Part D.II.4, below, several theories of professionalism do provide some useful groundwork for this approach.

²⁰¹ See Stepan Wood, “Sustainability in International Law,” *UNESCO Encyclopaedia of Life Support Systems* (Oxford: EOLSS Publishers, 2003) 1 at 1-2, online: <http://osgoode.yorku.ca/osgmedia.nsf/research/wood_stepan>. I am grateful to Stepan Wood and Hugh Benevides for helpful background comments on the concept of sustainability.

²⁰² *Ibid.* at 2.

²⁰³ William Little, *The Shorter Oxford English Dictionary on Historical Principles*, 3d ed. (Oxford: Clarendon Press, 1973), s.v. “sustain” [OED].

needs.”²⁰⁴ For my purpose, a lens of sustainability provides a “powerful symbol around which diverse interests can converge,”²⁰⁵ “encompasses conflicting agendas,”²⁰⁶ “promises to generate continuing debate and controversy,”²⁰⁷ and is open to some normative notion of “rightfulness”²⁰⁸ in the eyes of a “person or community.”²⁰⁹ Also important is the consideration of both current and future interests.²¹⁰

From before, we saw that the primary conflicting agendas involved those solely of the client as compared to those of a broader range of voices.²¹¹ Further, the theories of professionalism disagree as to the relevance or prominence of a lawyer’s individual moral opinions vis-à-vis a client’s legal course of action.²¹² Therefore, a useful lens of sustainability must take into account a broad range of these competing interests, which I have organized into four main groups: client interests, lawyer interests, ethical and professional interests (of lawyers and the profession), and the public interest.²¹³ It is important to note that the following discussion purports to be neither comprehensive regarding an individual interest nor complete regarding the totality of interests. Rather, what follows is a brief treatment of a sampling of some fundamental, perhaps competing, interests.²¹⁴

²⁰⁴ World Commission on Environment and Development (Brundtland Commission), “Our Common Future” (Oxford: Oxford University Press, 1987), transmitted to U.N. General Assembly as annex to *Development and International Co-operation: Environment*, UN GAOR, 42d Sess., Annex Agenda Item 82(e), UN Doc. A/42/427 (1987), c. 2 at para. 1, online: United Nations <<http://www.un-documents.net/ocf-02.htm>> (cited to UN Doc. A/42/427) [Brundtland Report].

²⁰⁵ Wood, *supra* note 201 at 2.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ OED, *supra* note 203.

²⁰⁹ *Ibid.*

²¹⁰ “Brundtland Report,” *supra* note 204. For a useful judicial treatment of the term “sustainability,” including the importance of non-economic “social values,” see *Tsilhqot’in Nation v. British Columbia* (2007), [2008] 1 C.N.L.R. 112 at paras. 1295-1301, D.H. Vickers J. (S.C.).

²¹¹ See Part D.I, above.

²¹² *Ibid.*

²¹³ I am adapting this framework from earlier comments I made on the topic of professionalism (particularly in the context of professionalism from a negotiator’s perspective). See Farrow, “The Negotiator-as-Professional,” *supra* note 15 at 376-77.

²¹⁴ Because I am developing a general theory of sustainable professionalism in this article, what follows is a sampling of interests that could apply in a range of practice contexts (*e.g.*, corporate, family, real estate, and criminal). It would also be useful—and should be an issue for further research—to look at this theory of sustainability within the context of specific practice areas. One area of particular interest (given its prevalence)

1. Client Interests

The dominant model of professionalism described above²¹⁵ protects and fosters meaningful space for the interests of clients, particularly powerful and wealthy clients, typically to the exclusion of all others. As we saw, based on principle, policy, and practice-based arguments, any notion of professionalism must make robust space for the realization of a client's legal interests in a free and democratic society.

At the outset, nothing in a theory of sustainability seeks to reject the importance of a client's legal interests. In fact, as Hutchinson—a primary proponent of an alternative approach to professionalism—argues, a “directive to lawyers to take responsibility for what they do (and do not do) ought not to be viewed as an excuse to ignore the needs of clients....”²¹⁶ Further, “lawyers will not foist their own values on the client, nor will they work with clients in ways that offend their own moral convictions. Initiated and *sustained* in this way, the lawyer-client relationship will be mutually respectful and engaged.”²¹⁷ Clients must play a central role in any calculus of a sustained theory of professionalism.²¹⁸ This makes sense as a descriptive matter. It also makes sense as a freedom-seeking normative matter. Important, however, is the realization that the conversation does not end here. If we are to make sense of the further principle, policy, and practice-based arguments that so powerfully animate the alternative models of professionalism,²¹⁹ we need to take seriously and make room for some of the other (sometimes competing) interests that are at stake in this discussion.

2. Lawyer Interests

As a starting point, there are numerous demands of the lawyering role that engage several self-interested notions of professionalism. First, there are pecuniary interests. Lawyers want to get paid and paid fairly for the hard work that they do and for the services that they provide. Therefore, a sustainable notion of professionalism must take

and potential challenge, would be the corporate law context, in which clients often wield significant wealth, power and influence vis-à-vis the interests of their lawyers. See MacKenzie, *supra* note 63 at 1-8 (and accompanying text). As MacKenzie notes, in this world of increased commercialism within the practice of law, the “pressure to condone unethical or even unlawful but lucrative acts can be overwhelming.” I am grateful to Allan Hutchinson for comments regarding this line of inquiry.

²¹⁵ See Part B, above.

²¹⁶ Hutchinson, *Legal Ethics*, *supra* note 8 at 213.

²¹⁷ *Ibid.* at 214 [emphasis added].

²¹⁸ A robust theory of client representation must also recognize the variety and diversity of clients and client interests. For a useful treatment of this issue, see *e.g.* Hutchinson, “Who Are ‘Clients’?”, *supra* note 170.

²¹⁹ See Part C, above.

into account the ability of lawyers to make a fair living. As the Honourable Frank Iacobucci comments, to the “extent that lawyers ... are financially successful it is often because they effectively and efficiently serve the needs of their clients, and that is an admirable thing.”²²⁰

Further, non-pecuniary interests of the lawyer will also play a prominent role in a sustainable notion of professionalism. Lawyers should expect to maintain a meaningful ability to pursue activities and interests that make for a full life not only as lawyers but also as members of society. Time at work, time at home, time with friends, and time engaging in social and political affairs should all be realizable goals of a sustainable professionalism. A sustainable notion of professionalism must avoid “slavishly adhering to billable hours and client getting at the cost of overlooking the quality of the work offered by lawyers or their contributions to the profession and the community both in legal and non-legal spheres.”²²¹

There already exists a rich and growing body of literature that deals with professional issues such as professionalism and work-life balance.²²² A sustainable discourse of professionalism must seriously grapple with those demands and that literature. As argued above,²²³ doing so does not amount to ignoring the interests of clients. It also does not guarantee or mandate a certain lifestyle or work ethic. This discourse calls for the balancing of client interests with other interests, including—as contemplated by various canons of professional conduct²²⁴—those of the lawyer. By so doing, it creates more meaningful space for the interests of the lawyer, which the dominant model, by constantly foregrounding the interests of the client, invariably backgrounds. Under a sustainable model, lawyers have more choice in the calculus of how to proceed in a given context.

3. Ethical and Professional Interests (of Lawyers and the Profession)

Numerous ethical and professional interests are at play when mapping out a sustainable vision of professionalism.²²⁵ The principles and policies that animate the alternative

²²⁰ Iacobucci, *supra* note 36 at 863.

²²¹ *Ibid.*

²²² See *e.g.* Farrow, “A Profession, Not a Life,” *supra* note 5.

²²³ See Part B, above.

²²⁴ See *e.g.* *supra* note 156 and accompanying text.

²²⁵ I recognize that some of these issues are equally of interest to the public, and could therefore be categorized in the fourth—“public interest”—subheading in this part.

models provide numerous robust bases for requiring that ethical and professional considerations be a meaningful part of a sustainable vision of professionalism.²²⁶

In addition to seeing the lawyer's role as one that should pursue "social justice" by avoiding "dishonourable" or "morally reprehensible conduct,"²²⁷ several other ethical or professional interests must form part of a sustainable discourse of professionalism. As a starting point, for this discourse to include the many different faces that make up the bar today, we must first recognize and celebrate the diversity of that bar. We must reject stories of lawyers who, collectively, are members of a homogenized and unified profession. Why? First, as a descriptive matter, such stories are not reflective of reality. As numerous commentators have noticed, those who practice law make up an increasingly diverse social, political, economic, cultural, and gender-based background.²²⁸ Second, as an economic matter, lawyers need increasingly to make sense of diversity obligations because clients are demanding that they do so. Market-based diversity incentives, in the form of diversity checklist programs, are a further reason why diversity matters in the context of understanding modern notions of professionalism.²²⁹

Third, as a normative matter, such stories act to exclude a wide range of people who are or want to be practising law in diverse and meaningful ways in society. As Constance Backhouse has articulated, traditional stories of the practice of law have often resorted to ideas of "professionalism" that "exercise power and exclusion based on gender, race, class and religion."²³⁰ As such, the Honourable Bertha Wilson, in her seminal report, *Touchstones for Change*, to the CBA on equality and diversity, forcefully articulated the

²²⁶ See Part C.I-II, above.

²²⁷ See *supra* notes 135-38 and accompanying text.

²²⁸ For discussions of this contested complexity of the profession, see *e.g.* H.W. Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1994-1995) 33 *Alta. L. Rev.* 800 at 805; Matasar, *supra* note 23 at 986. See also Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120; Harry W. Arthurs, Richard Weisman & Frederick H. Zemans, "Canadian Lawyers: A Peculiar Professionalism" in Richard L. Abel & Philip S.C. Lewis, eds., *Lawyers in Society: The Common Law World*, vol. 1 (Berkeley, Los Angeles: University of California Press, 1988) at 123; David A.A. Stager with Harry W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 321; Hazard, Jr. & Rhode, *The Legal Profession*, *supra* note 76, c. 3; and David B. Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) 57 *Md. L. Rev.* 1502.

²²⁹ See *e.g.* McClintock, *supra* note 14.

²³⁰ Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" (Paper presented to the Chief Justice of Ontario's Advisory Committee on Professionalism, First Colloquium on the Legal Profession, 20 October 2003) at 2 [unpublished], online: <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf>. See also Wilkins, *supra* note 228. See further Ulrike Schultz & Gisela Shaw, eds., *Women in the World's Legal Professions* (Portland: Hart, 2003); Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: University of British Columbia Press, 2001); and Sheila McIntyre & Elizabeth Sheehy, eds., *Calling for Change: Women, Law, and the Legal Profession* (Ottawa: University of Ottawa Press, 2006).

premise that a “starting point for a discussion on the need for change must be the recognition that gender equality is a fundamental legal norm... . The law in Canada now demands adherence to the equality principle. The legal profession should show leadership by adopting equality norms as its own.”²³¹ Clearly for a theory of professionalism to be sustainable for the diverse communities that practise law, it must speak in terms that honour that diversity, not in terms that marginalize it. As former Governor General Adrienne Clarkson argues:

[The profession] should be more of a mirror of society—and the society we’ve become—if it is to have a truer perception of the public interest and a more self-conscious awareness of its role and responsibility in the creation of our new citizenry. And this starts with greater equity and equality in the legal profession itself.²³²

A greater understanding and openness to diversity in our notions of professionalism will provide a more welcome and meaningful home for more lawyers. It will also push the profession’s understanding of and participation in a public interest that truly reflects the reality of our general pluralistic and globalized civil societies.²³³ Further, however, it will also recognize the diversity of individual lawyers, with diverse moral perspectives, which will in turn assist with the charge that by allowing lawyers to moralize about their clients’ causes, we will require some sense of a shared morality.²³⁴ Andrew Kaufman states,

²³¹ Report of the CBA Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: CBA, 1993) at 17. To date, only limited success in furthering the bar’s commitment to a robust sense of equality has obtained. See e.g. Chief Justice of Ontario Advisory Committee on Professionalism, “Elements of Professionalism” (October 2001, rev. December 2001 and June 2002), online: <<http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>>. See further Rosemary Cairns Way, “Reconceptualizing Professional Responsibility: Incorporating Equality” (2002) 25 Dal. L.J. 27.

²³² Adrienne Clarkson, “Speech on the Occasion of an Honorary Doctorate of Laws Degree from The Law Society of Upper Canada” (27 February 2003) [unpublished], online: Governor General of Canada <<http://www.gg.ca/media/doc.asp?lang=e&DocID=1091>>.

²³³ For code-based recognition of the importance of diversity in local communities, see e.g. LSUC, *Rules*, *supra* note 10, r. 1.03(1)(b). For recent comments on the modern make-up of civil society, see e.g. Unnati Gandhi, “Facing up to a new identity” *The Globe and Mail* (3 April 2008) A1; Anthony Reinhart, “A nation of newcomers” *The Globe and Mail* (5 December 2007) A1. For general background discussions, see Leopold Posposil, “Legal Levels and Multiplicity of Legal Systems” in *Anthropology of Law: A Comparative Perspective* (New York: Harper & Row, 1971) at 97; Sally Engle Merry, “Legal Pluralism” (1988) 22 *Law & Soc’y Rev.* 869; Franz von Benda-Beckmann, “Comment on Merry” (1988) 22 *Law & Soc’y Rev.* 897; David Held et al., *Global Transformations: Politics, Economics and Culture* (Stanford: Stanford University Press, 1999) at 1-28; Boaventura de Sousa Santos, “Nature and Types of Globalization(s)” in *Toward A New Legal Common Sense: Law, Globalization, And Emancipation*, 2d ed. (London: Butterworths, 2002) at 177. For early comments of mine on the topic, see e.g. Trevor C.W. Farrow, “Reviewing Globalization: Three Competing Stories, Two Emerging Themes, and How Law Schools Can and Must Participate” (2003) 13 *Meikei L. Rev.* 176, trans. into Japanese by M. Kuwahara, (2003) 44 *Aichigakuin L. Rev.* 29, republished (2004) 5 *J. Centre Int’l Stud.* 1.

²³⁴ See e.g. Rhode, *Interests of Justice*, *supra* note 66 at 71.

I do not think it all bad that the kind of advice clients get depends to some extent on the chance of whom they choose or have chosen for them as lawyers... . In some cases there are costs to leaving things to chance. But so are there costs in trying to force very different lawyers with very different sensibilities into one attitudinal mold for nearly all situations.²³⁵

Celebrating a multiplicity of voices at the bar also assists with the “last lawyer in town” objection, which is often raised by dominant model theorists as a potentially fatal concern with alternative models of professionalism. As the argument goes, if all lawyers moralize about the causes of their clients, there is a good chance that clients with unpopular causes will not be able to find lawyers to take their cases.²³⁶ The question then becomes even more difficult if you—as a moral lawyer—find yourself to be the last lawyer in town. Do you take the case? My first response to this question is: “show me evidence establishing this concern as a recurring problem and I will then start to worry about it.”²³⁷ Along the lines of “hard cases make bad law,” it just has not been our typical experience that unpopular causes have systematically gone unrepresented. Second, if that unlikely scenario were to materialize, a balancing of competing interests—those of the client, the lawyer, and the state to provide for an adversarial system that is open to all comers—might well lead on balance, under a sustainable theory of professionalism,²³⁸ to the lawyer taking the case. Third, even taking this concern at face value as a real concern (which some people do²³⁹), celebrating a pluralism of voices at the bar goes a long way to mitigating this risk. With a multitude of moral backgrounds and perspectives, a diverse bar becomes more welcoming to clients with diverse legal needs.

Other professional issues of interest to a theory of sustainable professionalism relate to some of the realities and responsibilities of practising lawyers, often seen in the context of litigation.²⁴⁰ One issue in particular that strongly militates against a robust view of adversarialism as the basis for a persuasive model of professionalism is that, as Tanovich

²³⁵ Andrew L. Kaufman, “A Commentary on Pepper’s ‘The Lawyer’s Amoral Ethical Role’” (1986) 11 Am. B. Found. Res. J. 651 at 655.

²³⁶ For commentary raising this type of concern, see *e.g.* Dash, *supra* note 13 at 220 (“If a lawyer says my moral judgments don’t allow me to support this particular person, even though I know he has a legal case, who will represent that person?”). See also Rhode, *supra* note 66 at 57; *Ibid.*

²³⁷ I am anecdotally aware that such cases do exist, particularly in more rural contexts.

²³⁸ Developed further, below, in Part D.III.

²³⁹ See *e.g.* Kaufman, *supra* note 235.

²⁴⁰ In addition to the issue of adversarialism, discussed in this section, another practice-related issue of interest to a sustainable understanding of professionalism is the issue of civility. See *e.g.* Michael Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007) 11 Can. Crim. L. Rev. 97. But see Alice Woolley, “Does Civility Matter?” (2008) 46 Osgoode Hall L.J. 175.

has recognized, at least in the context of the civil dispute resolution system, almost all cases settle.²⁴¹ The dominant model typically takes as its paradigmatic lawyer the zealous advocate, most often as conceptualized in the litigation context. However, “the ‘overwhelming preponderance’ of what lawyers do ‘involves negotiating with others,’”²⁴² which is invariably located outside of the courtroom. As such, a professionalism that is sustainable in the eyes of all lawyers, not just of those who act in the 2 per cent or so of cases that go to trial, must take into account the varied practice contexts of all non-courtroom lawyering experiences.²⁴³

4. Public Interest

Flowing from the third group is this fourth group of interests that, taken together, focus specifically on the public interest. Again, there is a vast array of interests that could be captured as part of this discussion. A notion of sustainable professionalism must maintain meaningful room for protection of the public interest, and in particular the robust and aspirational principle- and policy-based statements that animate the alternative models of professionalism in the spirit of protecting the public interest.²⁴⁴ A notion of professionalism that does not acknowledge that “[s]tandards of professional ethics form the backdrop for everything lawyers do,”²⁴⁵ and further, that a “primary concern” of the profession is “the protection of the public interest,”²⁴⁶ will not be sustainable on any calculus that makes good on the bargain with society to protect the public interest in return for the privilege of self-regulation.²⁴⁷

As a starting point, the alternative model commentator who comes closest to articulating a self-conscious theory of sustainable professionalism—primarily in the spirit of the typical notions of sustainability that focus on living resources, ecology and development²⁴⁸—is

²⁴¹ See Tanovich, *supra* note 25 at 282 [citation omitted]. For previous discussions of mine on settlement rates, see e.g. Trevor C.W. Farrow, “Dispute Resolution, Access to Justice and Legal Education” (2005) 42 Alta. L. Rev. 741 at 749, n. 43; Trevor C.W. Farrow, “Public Justice, Private Dispute Resolution and Democracy” in Ronalda Murphy and Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canada: Canadian Institute for the Administration of Justice, 2009) 301 at 321, n. 59.

²⁴² Farrow, “The Negotiator-as-Professional,” *supra* note 15 at 373 [footnote omitted].

²⁴³ For a recent discussion of the varied roles of modern lawyers, specifically including their role as settlement counsel, see Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008). For a review of the Macfarlane book, see Andrew Pirie, (2008) 46 Osgoode Hall L.J. 203.

²⁴⁴ See Parts C.I-II, above.

²⁴⁵ Tabor, “President’s Message,” *supra* note 132.

²⁴⁶ CBA, *Code*, *supra* note 27 at ix.

²⁴⁷ Discussed in *supra* note 103 and accompanying text.

²⁴⁸ Wood, *supra* note 201 at 1-4.

David Luban.²⁴⁹ In his discussion of the “social responsibility of lawyers,” Luban argues that lawyers have a responsibility in the project of “solving collective action problems.”²⁵⁰ He contemplates the notion of a “socially responsible” lawyer as a professional who “forbear[s] from collectively harmful action.”²⁵¹ Further, he defines this notion of “collective responsibility” as “the responsibility we bear not to foul our own nest, to maintain the very systems that sustain us.”²⁵² Echoing the green movement, Luban asks, “[w]hen will we reach the point of understanding that to evade our social responsibilities is little more than suicide?”²⁵³

Far from deferring to client interests that, while legal, may not be sustainable from the long-term perspective of the environment, Luban contemplates the lawyer’s role as one of an active moral agent who takes seriously the responsibility to do good in the world. Luban’s perspective is a self-consciously moral perspective. Of course what amounts to doing “good” in a given case may still be a contested discussion. And that is acceptable because having a discussion, rather than simply deferring to a client’s interests, is a significant part of the exercise of a theory of sustainable professionalism. By allowing for this discussion, Luban’s morally reflective approach enables multiple interests to be considered and balanced. It is also a perspective that takes seriously professional code dictates not only to avoid “injustice” and “dishonourable” or “morally reprehensible” conduct, but also to pursue courses of conduct that foster “social justice.”²⁵⁴

Luban is not alone on this issue. Other commentators also advocate a theory of professionalism that makes meaningful space for lawyers pursuing just causes with their legal skills. Duncan Kennedy, for example, makes no apologies for his view that lawyers “should avoid doing harm” with their “lawyer skills.”²⁵⁵ Hutchinson, although leaving significant space for client autonomy in his alternative vision of professionalism, takes seriously the centrality of the lawyer’s role by encouraging a sensibility of “critical morality” that asks: “What interests am I going to spend my life serving as a lawyer?”²⁵⁶ Each of these accounts fits with Mayer’s ultimate challenge to the bar, namely, that lawyers should demand that their efforts on behalf of their clients also amount to “a plus

²⁴⁹ Luban, “Social Responsibilities of Lawyers,” *supra* note 159 at 955.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.* at 963.

²⁵² *Ibid.* at 982.

²⁵³ *Ibid.* at 983.

²⁵⁴ See *supra* notes 135-38 and accompanying text.

²⁵⁵ Kennedy, “The Responsibility of Lawyers,” *supra* note 123 at 1161.

²⁵⁶ Hutchinson, “Legal Ethics for a Fragmented Society,” *supra* note 120 at 187.

for ... society and for the world of our children.”²⁵⁷ A sustainable notion of professionalism—one that makes good on the promise of public interest protection—therefore needs to take seriously these alternative accounts. And in case this all seems far from what should reasonably be expected of the practising bar, we should remember that calls to “maintain and advance the cause of justice and the rule of law” and to “protect the public interest” come not only from these aspirational interpretations of professional principles, but also from foundational legislative dictates that establish our very professional existence.²⁵⁸ They also, at least according to Tanovich, are already being realized.²⁵⁹

In addition to thinking about the substance of what our clients do under the rules of the legal system, there is a threshold discussion of whether or not clients can access the system in the first place. Protecting the public interest requires a theory of professionalism that contemplates a bar that is working toward meaningful access to the system for all members of society. For example, as Ontario’s *Law Society Act* provides, the LSUC has a “duty” to “facilitate access to justice.”²⁶⁰ The dominant model of professionalism, by focusing on the courtroom battlefield of the zealous advocate, proceeds on the assumption that clients have access to that battlefield in the first place. We know, however, that such ready access is not a reality for most people.²⁶¹ Access to justice in this country (in the form of access to lawyers and access to the system),²⁶² and indeed around the world, is only a fiction. As such, a sustainable professionalism must not proceed on an assumption of full access. Rather, we must start at the problematic level of today’s access realities and develop a theory of professionalism that seeks to be creative and successful vis-à-vis the bar’s obligation to “facilitate access to justice.”²⁶³

²⁵⁷ Mayer, *supra* note 2.

²⁵⁸ See *Law Society Act*, *supra* note 109, s. 4.2.

²⁵⁹ See Tanovich, *supra* note 25.

²⁶⁰ See *Law Society Act*, *supra* note 109, s. 4.2.

²⁶¹ See e.g. Ab Currie, “A National Survey of the Civil Justice Problems of Low—and Moderate—Income Canadians: Incidence and Patterns” (2006) 13 *Int’l J. Legal Prof.* 217.

²⁶² For a broader discussion of access to justice in Canada, see Roderick A. Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, W.A. Bogart & Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: LSUC, 2005) at 19 and Marc Galanter, “Access to Justice as a Moving Frontier” at 147.

²⁶³ *Law Society Act*, *supra* note 109, s. 4.2. For a useful account of the bar’s responsibilities to foster access to justice (which has influenced my thinking on the connections between access to justice and professionalism), see Richard Devlin, “Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession” (2002) 25 *Dal. L.J.* 335. See also Hutchinson, *Legal Ethics*, *supra* note 8 at 85-88.

III. Balance and Context

So where does this leave us? From a review of the competing principle, policy, and practice-based arguments that animate the dominant and alternative models of professionalism,²⁶⁴ and trying to make sense of these various complex, contextual, and sometimes competing interests—reminiscent of some of the interests set out at the beginning of this article²⁶⁵—what remains is a challenge that neither the dominant nor the alternative model has fully overcome. As I argued earlier,²⁶⁶ both sides must learn to think and speak in terms that are sustainable to a wide range of voices and interests. The dominant model, through its narrow focus primarily on one interest “in all the world,”²⁶⁷ misses a variety of other relevant people and interests. The alternative model, on the other hand—through its typical focus on the “good lawyer”—has been seen to be unrealistic in practice, at least in light of the continued use of “time-honoured disguise[s] and ... borrowed language.”²⁶⁸

This theory of sustainable professionalism addresses the gridlock created by these competing notions of professionalism. It purports to do so by harnessing both the energy and optimism of the alternative models as well as the tenacity of the dominant model. Even more importantly, it self-consciously identifies the myriad interests that are at stake in the context—those of the client, lawyer, profession, and public—and draws them into a theory of professionalism that is sustainable.

By moving beyond the centrality of the client’s interest as championed by the dominant model, instantly we open ourselves up to competing and potentially irreconcilable interests. This theory of sustainable professionalism takes seriously the complex and pluralistic landscapes of lawyers, clients, and the public. But in order to have a chance of buy-in from those broad-based stakeholders, we need to live in the world of those complexities, not in a world of fictional simplicity. As Backhouse reminds us, doing otherwise simply perpetuates exclusion.²⁶⁹ Such exclusion, in turn, fails to develop a professionalism that is sustainable on any calculus. We also need to live in a world that is not afraid of those complexities. At times conflict will be unavoidable. And when it does occur, a sustainable theory of professionalism will seek to balance and respect as many interests as possible. For example, allowing for client autonomy and meaningful space for

²⁶⁴ See Parts B and C, above.

²⁶⁵ See *supra* notes 3-14, 32, and accompanying text.

²⁶⁶ See Part C.IV, above.

²⁶⁷ *Trial of Queen Caroline*, *supra* note 68.

²⁶⁸ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

²⁶⁹ Backhouse, *supra* note 230.

moral deliberation by a lawyer is not necessarily a mutually exclusive exercise. In fact, as Hutchinson argues, it is an exercise that can in fact be mutually beneficial: "To provide sound professional judgment, it is necessary to resort to a well-honed and mature sense of moral acuity."²⁷⁰ Further, failing to develop "bridges" between the "professional role" and the "dictates of a personal morality" will "impoverish both professional and personal pursuits."²⁷¹

At times, however, the conflict will be irreconcilable. The legal demands of a client retainer may collide head-on with the dictates of a lawyer's own personal moral code. For example, what if a rich, speculative, private land developer wishes to negotiate a deal with a slum landlord over the purchase of a fully functioning, low-income rental facility that currently houses eighty subsistence-income-level families, in favour of its demolition and replacement with a high-end, multi-use condo facility that would house eight high-income families?²⁷² Would you take the retainer? How would you advise the developer? Would it make a difference if you knew that alternative housing arrangements, given the current rental market, were not immediately available to those other families? Alternatively, what if the CEO of a large privately-held downsizing transnational security firm came to you and asked you to negotiate a deal in private that would result in the termination of all employees of the Muslim faith, based on your client's unfounded occupational requirement theory that these employees, while good people, simply pose too much of a reputational and security risk (in terms of attacks against security officers in the field) and are therefore too costly to the firm?²⁷³ What course of action would avoid an "injustice," would avoid "dishonourable" or "morally reprehensible" conduct, and would promote a generally accepted notion of "social justice"?²⁷⁴

The dominant model and alternative models have not been able to find common ground on these sorts of questions. The dominant model provides that if the lawyer decides to accept the retainer (which is itself, although not required, an act that is encouraged by the dominant model), he or she must background his or her own moral views and proceed to effect the client's legally permitted instructions. Based on anecdotal experience, that is

²⁷⁰ Hutchinson, "Legal Ethics for a Fragmented Society," *supra* note 120 at 187-88.

²⁷¹ *Ibid.*

²⁷² See Farrow, "The Negotiator-as-Professional," *supra* note 15 at 388, n. 62. This hypothetical case, and my use of it in previous commentary and in class discussions, has been directly influenced by Duncan Kennedy's initial development of a similar scenario. See Kennedy, "The Responsibility of Lawyers," *supra* note 123 at 1161.

²⁷³ See Farrow, "Negotiator-as-Professional," *ibid.* See similarly Rob Atkinson's treatment of Lord Darlington's instructions to his butler (Mr. Stevens) to "let ... go" all the "Jews on the house staff" in the interests of the "safety and well-being" of his guests, based on Kazuo Ishiguro, *The Remains of the Day* (New York: Alfred A. Knopf, 1989), in Atkinson, "Perverted Professionalism," *supra* note 41 at 181-84.

²⁷⁴ See *supra* notes 135-38 and accompanying text.

not a personally satisfying, acceptable, and therefore sustainable approach for many students and lawyers.²⁷⁵

The alternative models, by typically asking the question “what does justice require?” in a given situation, immediately open the door to contextual analysis.²⁷⁶ By so doing, competing interests can be balanced and, in the end, be prioritized on a calculus of what a lawyer thinks is a “good” course of conduct. This is what Rhode contemplates as a lawyer’s ability of “ethically reflective analysis.”²⁷⁷ As they currently stand, however, the alternative models—by perceiving themselves as taking the moral (justice-seeking) high ground and by casting the lawyering exercise into a normative hierarchy—have alienated both members of the dominant model and closet members of the alternative models who fail to see room for a theory of professionalism that makes space for the institutional practicalities and realities of the practice of law.

By seeking to normalize these competing interests and discourses, through an exercise of interest identification and rationalization, the theory of sustainable professionalism recasts these interests into a broad collective of inputs. These inputs are the landscape of what amounts to the “real world” of the modern lawyering project. Seeing competing interests in this light normalizes them. It also forces any theory of professionalism to take them into account in order to be sustainable in the eyes of its various interested stakeholders.

If a lawyer chooses to represent the “rich, speculative, private land developer,”²⁷⁸ then—pursuant to a theory of sustainable professionalism—he or she is doing so because, based on an interest-based calculus that includes a broad range of voices (including the client, the lawyer, and the public), the lawyer thinks it is a “good” thing to do, not because of the feeling that he or she “has to do it.” The lawyer may choose to do so because he or she agrees with the client’s motivations. Alternatively, the lawyer may be persuaded by the principle of client autonomy that underlies the dominant model of professionalism.²⁷⁹ In the further alternative, the lawyer may choose to take on the client but then try hard to persuade the client to pursue a different course of action. The lawyer’s motivations may be that he or she disagrees with the goals of the retainer and seeks to change the client’s mind. The lawyer may simply think that it is not the kind of work that he or she wants to do. Or the lawyer may think that it is not in the public interest, or that it is not

²⁷⁵ See Farrow, “The Negotiator-as-Professional,” *supra* note 15 at 388, n. 62 and accompanying text.

²⁷⁶ See e.g. Rhode, *Interests of Justice*, *supra* note 66 at 67; Tanovich, *supra* note 25 at 302.

²⁷⁷ Rhode, *Interests of Justice*, *ibid.* at 71.

²⁷⁸ See *supra* note 272 and accompanying text.

²⁷⁹ See *supra* notes 71-76 and accompanying text.

“[h]onourable,” “moral[,],” or in the pursuit of “social justice.”²⁸⁰ Regardless, the goal is to foster deliberation both for the lawyer and between the client and the lawyer, in the spirit of enabling a sustained and engaged discussion that takes seriously a variety of potentially competing interests. This is not simply an exercise in client autonomy or an exercise in moral superiority. It is an exercise in real world, sustainable lawyering.

Some may challenge this vision as simply restating the basic premise of the alternative models. There clearly are many similarities, and from the outset I have acknowledged my debt to these alternative models.²⁸¹ My point is not fully to reject the alternative models but rather to draw on their energy and optimism. However, as I have also argued, there has been a consistent lack of buy-in to these models. This model of sustainable professionalism takes seriously the merits of those alternative approaches. At the same time it adequately responds to, often resists, but in some cases benefits from, the power of the dominant model. In the end, by accessing and being accessible to multiple norms, models, and interests, this model of sustainable professionalism does a better job of being “normatively sound,” being “descriptively accurate,” and providing the premise “for broad-based buy-in from as many justice-seeking stakeholders as possible.”²⁸²

IV. Legal Education

Before concluding, there is a further element of this discussion, and that is its connection to legal education. There are many moments within the profession at which the possibility of change can occur, including at law schools, bar admission programs, mentoring initiatives, continuing education courses, judicial speeches and judgments, discipline rulings, bench directives, and in professional rules and commentaries. Of course external sources for change also obtain, including legislative limits on self-regulation, public opinion, client demands, and others. However, it is at the initial stage of the professional experience that a sensibility of openness to alternative discourses is most palpable, possible, and important.

How we see ourselves individually as lawyers and how we see ourselves collectively as a profession are foundational questions that must be addressed in legal education. We need to realize and make use of the fact that law schools retain significant power “to structure the moral perspectives of those who experience it.”²⁸³ As Richard Wasserstrom argues, the question of “what is the nature of the good lawyer?” is potentially “one of the central

²⁸⁰ See *supra* notes 135-38 and accompanying text. See further *supra* notes 252 and 272 and accompanying text.

²⁸¹ See *e.g.* *supra* notes 46, 154-56 and accompanying text. See also Part D.II, above.

²⁸² From Part D.II, above. See *supra* note 197 and accompanying text.

²⁸³ Dolovich, *supra* note 76 at 1670.

questions, if not the central question, of legal education.”²⁸⁴ Similarly, according to Deborah Rhode, “[l]aw schools cannot be value-neutral on questions of value. One of their most crucial functions is to force a focus on the way that legal structures function, or fail to function, for the have-nots. Another is to equip and inspire students to contribute to the public good and to reflect more deeply on what that means in professional contexts.”²⁸⁵

As discussed earlier²⁸⁶ and elsewhere,²⁸⁷ there continues to be an alarming disconnect between what students think is right in the world and what students think they are going to be required to do to be “good” lawyers. This is particularly problematic, for no other reason than that it assumes, at the outset, that the role-differentiated amoral advocate championed by the dominant model is the only viable model in the context of the “real world” of lawyering. If after a full exposure to and consideration of alternative models a student prefers the dominant model of lawyering as one that should animate his or her own practice vision, then so be it. However, at the moment, those alternative models apparently do not stand a chance. All of the aspirational language that animates the principle, policy, and practice-based arguments of the alternative models—*i.e.* statutory and code-based requirements designed to promote “the cause of justice and the rule of law”²⁸⁸—are missing from the ultimate calculus of what counts as a “good” lawyer. And here we see how the dominant model perpetuates itself, notwithstanding the desires of many students and lawyers—and even some clients²⁸⁹—to engage in a deliberative exercise of “creating something entirely new.”²⁹⁰ A modern theory of professionalism must make room for these competing principle, policy, and practice-based arguments in a way that is accessible to the broad range of relevant stakeholders.

²⁸⁴ Wasserstrom, “Legal Education,” *supra* note 37 at 155.

²⁸⁵ Rhode, “Persistent Questions,” *supra* note 3 at 659-60. See generally Rhode, *Interests of Justice*, *supra* note 66, c. 7.

²⁸⁶ See *e.g.* *supra* notes 40, 42, and accompanying text.

²⁸⁷ See *e.g.* Joshua J.A. Henderson and Trevor C.W. Farrow, “The Ethical Development of Law Students: An Empirical Study” (2009) 72:1 Sask. L. Rev. 75; Farrow, “Negotiator-as-Professional,” *supra* note 15 at 388, n. 62 and accompanying text; Kennedy, *supra* note 6 at 87 (discussed further at *supra* note 43 and accompanying text).

²⁸⁸ See *Law Society Act*, *supra* note 109, s. 4.2.

²⁸⁹ See *e.g.* McClintock, *supra* note 14 and accompanying text.

²⁹⁰ See Marx, “Eighteenth Brumaire,” *supra* note 1 at 595.

E. Conclusion

As Adam Dodek comments, with some notable exceptions, scholarship generally addressing legal ethics and professionalism in Canada is still in its early days.²⁹¹ Further, Tanovich comments: “[u]nfortunately, we have only had few attempts in Canada to set out systematically a ... theory of ethical lawyering.”²⁹² This article seeks to add to those attempts.

From the start I have been troubled by the fact that, notwithstanding these powerful arguments of the alternative models, there continues to be a remaking of history in the image of the past that favours the time-honoured but increasingly fictional vision of the dominant model of lawyering. It is a descriptively inaccurate model. It is a morally problematic model. It is an exclusionary model. It does not sit well with many current and future members of the bar. On that basis I have argued that it is not a sustainable model. Further, this resigned pose of un-sustainability is particularly pernicious in the context of law school. In its place, I have argued for a model of professionalism—seen through a lens of sustainability—that makes descriptive and normative sense of our complex modern legal world. I also hope, by so doing, to participate actively in the changing dynamic of law schools with a view to providing sustainable alternatives to the dominant stories of old. We need to recast our understandings of professionalism by way of a new lawyering sensibility, which is not of moral superiority (although that may, in the end, be the case), but of individual and collective sustainability. By moving away from a client-centered discussion and toward a discussion that takes seriously a plurality of voices and preferences, including but not exclusively those of the client, we will find many more takers for this theory of sustainable professionalism as a viable discourse for the practice of law. Given what is at stake, we cannot be agnostic to this exercise. Matasar argues:

Lawyers ... must ... be the driving force behind ethical and moral change. It is not enough to bump along, oblivious of the questionable tactics the profession engages in under the name of advocacy, zealous representation, or the lawyerly posturing. Doing so diminishes us as individuals and collectively gives the profession a bad name. No, our strategies must be different. We must be disobedient when it matters most; we must be reformers, constantly seeking a more moral profession; and we must be willing to withdraw.²⁹³

²⁹¹ See Dodek, “Canadian Legal Ethics,” *supra* note 8. See also Michael Proulx & David Layton, *Ethics and the Canadian Criminal Law* (Toronto: Irwin, 2001) at 7-10.

²⁹² See Tanovich, *supra* note 25 at 309 [citation omitted].

²⁹³ Matasar, *supra* note 23 at 986.

Staying the course of the dominant model will not allow us to fully realize our potential to be “the driving force behind ethical and moral change.”²⁹⁴ We need a sustainable alternative model to facilitate change. As Socrates commented in the *Republic*, the question of how we should live our lives—or in this context how we should view ourselves as professionals—is “no light matter.”²⁹⁵ This is because, as Mayer argues, in all likelihood “this society ... and the world of our children”²⁹⁶ will largely depend on how we view ourselves as professionals.

²⁹⁴ *Ibid.*

²⁹⁵ Plato, trans. by Jowett, *supra* note 50 at Bk. I, 352d.

²⁹⁶ See Mayer, *supra* note 2.