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I Can Has Lawyer? The Conflict between the Participatory Culture of the Internet and the Legal Profession

Lucille A. Jewel

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I Can Has Lawyer?¹

The Conflict between the Participatory Culture of the Internet and the Legal Profession

by
LUCILLE A. JEWEL*

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1. The title of this Article is a reference to the popular website <http://icanhascheezburger.com>. This website allows users to upload humorous photographs of cats or “lolcats” (shorthand for cat photographs that make you laugh out loud) with accompanying speech captions. After users vote on which pictures are the funniest, the website features the most popular photos. The collective joke within this website is that many of the cats speak with poor grammar and spelling. By exemplifying how participatory culture fosters user participation, a sense of community, and a shared identity among Internet users, the whimsical icanhascheezburger.com is in sharp contrast with the culture of the legal profession, which emphasizes proper language, measured behavior, and formality. See, e.g., Jenna Wortham, *Once Just a Site with Funny Cat Pictures and Now a Web Empire*, N.Y. TIMES, Jun. 13, 2010, available at <http://www.nytimes.com/2010/06/14/technology/internet/14burger.html>.

* Associate Professor, Atlanta’s John Marshall Law School.

I. Introduction

The Internet allows citizens to comment on public affairs with an amplified and unfiltered voice, creating an open, community-based culture where robust debate flourishes. Users now have the autonomy to produce cultural meanings outside of traditional institutions such as large-scale media outlets and government entities. This new Internet-based culture of sharing and commenting has been labeled “participatory culture.”² However, some of the ideals and practices of participatory culture clash with the traditional legal culture as it exists in the United States. Specifically, professional conflicts are emerging with respect to blogs and emails where lawyers air caustic, uncensored, and highly critical views of the legal profession and the judiciary. Although these online narratives often reflect a view that the structure of the legal system is badly broken, they may also run afoul of professional norms or ethical rules that prohibit attorneys from impugning the integrity of the legal system. This Article’s thesis is that as the democratic ideals inherent in participatory culture become more deeply embedded in our society, the legal profession should also evolve and embrace a more pluralistic and unconstrained approach toward professionalism.

As I have written previously, the legal culture within the United States is a straight-laced culture, highly dependent on formalism and hierarchy.³ Cultural meanings, such as what it means to be a lawyer and the correct legal analysis that flows from a case, are tightly controlled by few—law professors,⁴ judges,⁵ and institutions, such as

2. A participatory culture is “a culture with relatively low barriers to artistic expression and civil engagement, strong support for creating and sharing one’s creations, and some type of informal mentorship whereby what is known by the most experienced is passed along to novices.” Henry Jenkins et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* 3 (2006), available at http://digital.learning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS_WHITE_PAPER.PDF.

3. See generally, Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008).

4. The law professor controls legal meanings by structuring classroom dialogue to emphasize precedent and procedure, which tends to greatly limit the story of what happens in a case. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL* 54–56 (2007) (theorizing, from an ethnographic standpoint, how legal educational institutions reproduce formalistic thinking).

5. The Cardozo-penned *Palsgraf* decision illustrates how judicial authors use the clipped prose of legal formalism to strip all personal information and social context from a case. See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928); JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 112–13 (1976). Jerome Frank also critiqued Cardozo for using “a private time-machine to transport himself back into 18th Century England” in

the American Bar Association (“ABA”).⁶ With respect to commonly accepted narratives for the legal profession and proper legal analysis in the classroom or courtroom, an analogy can be made to the “one-to-many” model of mass media communication, where a few large entities controlled most of the information.⁷ Now, technology has given everyone the ability to comment and participate in the creation of cultural meanings. The Internet also enables users to comment and critique with real-time immediacy, in contrast to the slower pace by which meaning was created in the older mass media system.⁸ Now that we are living in a “many-to-many” media environment, a culture clash is emerging within the legal profession where professional rules and norms have heretofore enforced a culture of restraint.

This cultural conflict can be seen in electronic narratives that go “viral,”⁹ where lawyers comment on the lack of humanism within big law firm firing practices, expose the alienating work environments experienced by low-level contract attorneys, or criticize judges who show hostility toward criminal defense attorneys. Within these

order to translate “himself into a past alien speech environment.” Anon Y. Mous (Jerome Frank), *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 631 (1943). Cardozo’s language allowed him to promote his prose as reasoned analysis when, in Judge Posner’s view, it was really a “substitution of words for thought.” RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 119 (1990). Excised from Cardozo’s opinion are the facts that Mrs. Palsgraf was a “very poor” mother of three children who made \$416 a year as a house cleaner with substantial legal and medical debts. NOONAN, *supra*, at 125–28.

6. Through its model rules of professional conduct (adopted by most states), the ABA is an institution that controls the meanings with respect to lawyer professionalism. See Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 672–73 (1994) (offering a perspective of the ABA’s model rules of professional conduct as the product of a few elite lawyers imposing their own view of professional conduct that excludes minority views).

7. See, e.g., CLAY SHIRKY, *HERE COMES EVERYBODY* 86 (2008) (explaining traditional mass media communication as a “one-to-many” model); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 3 (2006) (explaining how new technology now allows nonmarket participants to produce information in a decentralized way, in contrast with the older mass-media regime).

8. MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 491 (2010).

9. The Internet allows information to reach viral dimensions and impact a mass audience in much the same way that a viral disease gets transmitted to the public. See Eytan Adar & Lada A. Adamic, *Tracking Information Epidemics in Blogspace*, 2005 INST. ELECTRICAL & ELECTRONICS ENG’RS COMPUTER SOC’Y CONF. ON WEB INTELLIGENCE 1–2, available at www.cond.org/trackingblogepidemics.pdf; David Kempe, Jon Kleinberg & Eva Tardos, *Maximizing the Spread of Influence Through a Social Network*, 9 ASS’N COMPUTING MACHINERY SPECIAL INT. GROUP ON KNOWLEDGE DISCOVERY & DATA MINING 137 (2003); Limor Shifman & Mike Thelwall, *Assessing Global Diffusion with Web Memetics: The Spread and Evolution of a Popular Joke*, 60 J. AM. SOC’Y INFO. SCI. & TECH. 2567, 2567 (2009).

electronic forums, lawyers regularly speak out against the characters (such as the law school administrators, judges, and elite attorneys) who they perceive to wield arbitrary power over them. Often using a sarcastic and caustic tone, these narratives portray the practice of law as a dark, lonely, and alienating experience.

These narratives question commonly held perceptions of what it means to be a lawyer and disclose experiences at odds with traditional understandings of a lawyer's professional identity. From a critical standpoint, they portray a broken legal profession, implicitly arguing that the liberal humanism the profession supposedly embodies does not apply to all lawyers. These stories are, in effect, structural critiques of the profession. Penned by the outliers of the legal profession, they provide a culturally valuable perspective on what it means to be an American lawyer in the twenty-first century.

Nonetheless, such critical postings conflict with the notion that attorneys should not criticize the integrity of the legal profession or the judiciary.¹⁰ However, because they afford a valuable critique of the profession, professional norms and ethical rules should not operate to shut out these stories. It is a positive development that technology gives ordinary attorneys the power to inform the culture of the profession, as opposed to previous models where only elite and powerful practitioners were given a voice.¹¹

Part II of this Article describes the characteristics of participatory culture relevant to the legal profession. Part III explores the emerging format of the online lawyer narrative, and Part IV discusses its cultural value. Part V analyzes the professionalism issues raised by these new narratives.

II. Participatory Culture

“The term, participatory culture, contrasts with older notions of passive media spectatorship.”¹² Consumers and media producers no

10. See e.g., John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, at A1, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html> (detailing recent conflicts between attorneys who blog about their professional experiences and bar ethics rules).

11. Control over cultural meanings within the law profession is exemplified by the ABA Model Rules of Professional Conduct, which were first promulgated at the beginning of the twentieth century by the most elite members of the bar and continue to be molded by leadership within the ABA, the majority of which consists of attorneys with corporate law firm practices. See Mashburn, *supra* note 6, at 663, 669, 673 (1994).

12. HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 3 (2006) [hereinafter JENKINS, CONVERGENCE CULTURE].

longer operate in separate roles; instead, they interact with each other under a new paradigm.¹³ For example, a person purchasing a product on Amazon.com might function as a traditional passive consumer buying a product in the marketplace. However, technology also opens up the potential for the consumer to actively produce information about the product, by writing an online review. On the Internet, “[t]he producers are the audience, the act of making is the act of watching, and every link is both a point of departure and a destination.”¹⁴

A culture of sharing and collaborating, often outside traditional economic incentives, is one of the hallmarks of participatory culture. New technology has created a marked increase “in our ability to share, to cooperate with one another, and to take collective action, all outside the framework of traditional institutions and organizations.”¹⁵ People are also demonstrating a remarkable eagerness to contribute to online social projects even though they do not receive direct economic compensation from these activities.¹⁶ Instead of economic fruits, persons contribute to projects out of simple altruistic desire or because of the ego boost that comes from seeing their work online.¹⁷ Clay Shirky offers Wikipedia and Linux as examples of successful projects that have capitalized on the phenomenon of people desiring to collectively participate and contribute to reach an end goal.¹⁸ In the case of open-source software Linux, companies such as IBM have demonstrated that it is possible to profit from a product that is not owned in the traditional sense.¹⁹

Community is another central theme within participatory culture.²⁰ New interactive media technology fosters new kinds of

13. *Id.*

14. Kevin Kelly, *We Are the Web*, WIRED, Aug. 2005, available at <http://www.wired.com/wired/archive/13.08/tech.html>.

15. SHIRKY, *supra* note 7, at 21.

16. *Id.* at 132–33. See also, BENKLER, *supra* note 7, at 7 (explaining that new technology has fostered a “robust ethic of open sharing,” where production is longer dependent on exclusive property rights).

17. SHIRKY, *supra* note 7, at 132–33; ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR* 53 (2001).

18. SHIRKY, *supra* note 7, at 137, 239–40.

19. BENKLER, *supra* note 7, at 124; see also, SHIRKY, *supra* note 7 at 258–59 (“What the open source movement teaches us is that the communal can be at least as durable as the commercial.”).

20. Mary Chayko defines “community” as a “set of people who share a special kind of identity and culture and regular, patterned social interaction.” MARY CHAYKO, *PORTABLE COMMUNITIES: THE SOCIAL DYNAMICS OF ONLINE AND MOBILE*

social communities, defined by common interests rather than by geography, which make valuable contributions to a society.²¹ People can now customize their social relations in ways that fit them better. Instead of relying on preexisting institutions (such as schools, religious institutions, churches, the Rotary Club, etc.) to meet one's need for social connectivity, individuals can seek out new community relationships based on subjects that interest them.²² In online communities, members develop a shared repertoire and shared language,²³ often developing "in-jokes" and specialized jargon that apply to the group's identity.²⁴ While some critics argue that technology has made life more alienating and lonely,²⁵ others argue that the Internet enables people to "form real, consequential bonds with people [they] have never met face to face—and in this world of wireless computers and mobile devices [they] can do it nearly all the time, everywhere [they] go."²⁶

Technology has also opened up discourse to many more individuals, leading to a freer flow of information and content.²⁷ Participatory culture contains new opportunities for "civic

CONNECTEDNESS 6 (2008). In a community, there is a sense of neighborliness, warmth, support, and belonging. *Id.*

21. Henry Jenkins et al., *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* 50 (2006), available at <http://www.macfound.org> (search for "Participatory Culture") [hereinafter *Confronting the Challenges of Participatory Culture*] (explaining how digital networks "tap the participation of large-scale social communities."); CHAYKO, *supra* note 20 at 29 (explaining how online communities emerge when "people who may be spatially separated focus on the same things, in much the same way, at the same time.").

22. BENKLER, *supra* note 7, at 367. One example of a robust online community would be the some ten million persons who play the online game World of Warcraft. See CASTELLS, *supra* note 8, at xxix.

23. K. Guldberg and R. Pilkington, *A Community of Practice Approach to the Development of Non-Traditional Learners Through Networked Learning*, 22 J. COMPUTER ASSISTED LEARNING 159, 161 (2006).

24. One example of a shared jargon would be the term "hacker," which originated at MIT's Tech model railroad club, but came to mean a computer "enthusiast, . . . artist, tinkerer, [] problem solver, [and] an expert." RAYMOND, *supra* note 17, at xii, 4. Computer acronyms, such as "LOL" (laugh out loud), "IMHO" (in my humble opinion), and "ROFL" (roll on the floor laughing) also originated as a shared vocabulary within the hacker community but have now entered mainstream culture. See WIKIPEDIA, <http://en.wikipedia.org/wiki/LOL> (last visited Apr. 7, 2011).

25. CASTELLS, *supra* note 8, at 387.

26. CHAYKO, *supra* note 20, at 3.

27. See JENKINS, CONVERGENCE CULTURE, *supra* note 12, at 18 (explaining how new media "raise[s] expectations of a freer flow of ideas and content" and inspires consumers to participate more fully in their culture.").

engagement, political empowerment, and economic advancement.”²⁸ New Media theorist Yochai Benkler argues that the new information environment has the potential to increase democratic participation and ultimately foster a more critical and self-reflective culture.²⁹ It is no longer necessary to be affiliated with a powerful industrial or state institution in order to disseminate information in a mass format.³⁰ The decentralization of information production creates more opportunities for citizens to perform the watchdog function of society, to critique and observe public affairs.³¹ Thus, the relative ease by which information can be disseminated en masse has led to a more transparent and malleable culture.³² Participants can be more “self-reflective and critical of the culture they occupy, thereby enabling them to become more self-reflective participants in conversations within that culture.”³³

New technology also has the capacity to improve individual autonomy. Citizens are now able to “participate in public conversation continuously and pervasively, not as passive recipients of ‘received wisdom’ from professional talking heads, but as active participants in conversations carried out at many levels of political and social structure.”³⁴ Moreover, by authoring and disseminating narratives based on their own experiences, people can engage in “new practices of self-directed agency as a lived experience.”³⁵ Although the most optimistic technophile view expressed at the dawn of the Internet Age in the 1990s—that the Internet would solve all of the world’s social problems—has not come to pass, the Internet has nonetheless led to great improvements in our culture, when compared to the earlier mass-media driven culture.³⁶

A final attribute of participatory culture is its immediacy—events can be commented upon in realtime as they are unfolding.³⁷ This

28. Jenkins et al., *supra* note 12, at 8.

29. BENKLER, *supra* note 7, at 2.

30. *Id.* at 4.

31. *Id.* at 11.

32. *Id.* at 15.

33. *Id.*

34. *Id.* at 130.

35. *Id.* at 137.

36. Although Yochai Benkler dismisses the view that the Internet has wholly revolutionized the structure of democracy in the public sphere, he maintains that new technology has led to a vastly improved information landscape compared to the older mass-media model. *See id.* at 10, 212–15.

37. CASTELLS, *supra* note 8, at 491; *see also* Andrew Keen, *Twitter vs CNN: Blood on the Streets*, THE TELEGRAPH, (Jun. 23, 2009, 6:01 PM), <http://www.telegraph.co.uk>

immediacy, enabled by new media communication forms such as Twitter and blogs, represents a substantial change from the slower paced and highly filtered mass-media information dissemination model. Citizens around the world are now using real-time communication devices to stage spontaneous political protests and publicize governmental abuses as they occur.³⁸

In addition to the temporal change in how information is disseminated, the Internet also enables public support for an issue to build very quickly.³⁹ Internet stories that receive a great amount of public interest have the power to demand action from institutions that usually move at a much slower pace. Clay Shirky gives the example of Evan Guttman, who, frustrated by the New York City Police Department's refusal to change a report of a phone from missing to stolen, turned to the Internet for public support.⁴⁰ Mr. Guttman wrote about his frustration with the NYPD on a website devoted to the subject of retrieving the stolen phone.⁴¹ Within a matter of days, the website generated so much public interest in the phone and the police's handling of the matter that the NYPD changed its course and agreed to alter the report.⁴² Without the Internet's ability to quickly harness public support for his plight, Mr. Guttman would have had to resort to more prolonged and possibly futile bureaucratic processes to change the police report.⁴³ Thus, in contrast to the time-consuming task of requesting action from traditional institutions and bureaucracies, new technology can provide a quicker way of getting things done.⁴⁴

If we accept a technophile view of the Internet, we can say that we have an emergent culture that is making our society more open, transparent, and egalitarian. Individuals have more chances to forge social connections across long distances that give their lives deeper meaning. Technology has also given individuals more autonomy in that they are able to disseminate cultural critiques to mass audiences. But what happens when the open ideals of participatory culture

[/technology/5614541/Twitter-vs-CNN-Blood-on-the-streets.html](#) (discussing the view that “instantaneous decentralized Twitter [is] the speedy future [of journalism]” and CNN represents “the all-too-pedestrian past.”).

38. BENKLER, *supra* note 7, at 219; SHIRKY, *supra* note 7, at 184–87.

39. SHIRKY, *supra* note 7, at 12 (noting that “a story can go from local to global in a heartbeat.”).

40. *Id.* at 5.

41. *Id.* at 5–6.

42. *Id.*

43. *Id.* at 13–14.

44. *Id.* at 22.

interact with the more closed system of American legal culture? We are seeing friction between these two worlds with the appearance of online, lawyer-penned narratives that offer cynically dark views of the practice of law. The next sections will study these new narratives and analyze the professionalism conflicts that they raise.

III. Online Lawyer Narratives

A. The Online Narrative Format

The Internet has led to a “radical increase in the number of storytellers and the qualitative diversity of stories told.”⁴⁵ Users can now tell stories across a variety of platforms, through emails, threaded posts, online debates, profiles, web log postings, and profile descriptions.⁴⁶ These new narratives play a valuable role in our society, leading to new types of communities and more individual autonomy. User stories engender the formation of new communities by fostering a collective identity and sense of togetherness.⁴⁷ In addition to the benefits of forming community bonds, online narratives also provide a way for individuals, previously silenced under mass media information regimes, to comment on their culture.⁴⁸

B. New Media Lawyer Narratives

Within the legal profession, the Internet has enabled a new kind of lawyer-penned narrative stories that function outside the confines of the traditional culture of the American legal profession. Some of these stories detail the alienation, exclusionary hierarchy, and lack of humanity in the legal job marketplace. Other online lawyer narratives expose the hypocritical aspects of a broken criminal justice system that insists on deference and respect for judges, even when those judges exercise power over criminal defense attorneys and their clients in unfair and unjust ways. Viewed collectively, these new narratives portray the practice of law as a dismal enterprise and question the traditional wisdom that the legal profession is a “noble profession” whose members dispense wisdom from high-level

45. BENKLER, *supra* note 7, at 166.

46. CHAYKO, *supra* note 20, at 31 (positing the view that much of online communication can be characterized as people sharing narratives and stories).

47. *Id.* at 33–34.

48. BENKLER, *supra* note 7, at 15.

positions and never have to worry about issues of financial stability.⁴⁹ The next three sections will explore these new narratives.

1. New Media Lawyer Narratives as Tales of Economic Stress and Alienation

Some emerging new media lawyer stories are viewable as a reaction to the current economic stresses within the legal profession, particularly the alarming trend of law firms cutting jobs; delegating low-level legal tasks to temporary “staff attorneys” who are paid by the hour and receive no benefits; and outsourcing legal work overseas.⁵⁰

The dire economic climate coupled with the legal profession’s hierarchical elitism has exacerbated the plight of attorneys who attend lesser ranked law schools (often borrowing excessive sums of money to do so). As the effects of the Great Recession continue to buffet the legal job market, attorneys from the most prestigious schools, previously assured a “golden ticket” in terms of a high salary at a big firm upon graduation, are facing newfound employment challenges.⁵¹ Because the legal profession adheres to a rigid hierarchical structure when it comes to educational qualifications,⁵² the job situation for law graduates at the lower end of the prestige ladder is even bleaker.⁵³ The result is that a large number of attorneys

49. See Jewel, *supra* note 3, at 1178, 1220 (explaining the traditional understanding that lawyers are members of a noble profession who impart wisdom, occupy positions of power, do good things in society, and never seem to worry about making a living). See also Mashburn, *supra* note 6, at 668 (explaining that the dominant professional ideology of law portrays the lawyer as an aristocratic character who is not to be trifled with monetary concerns).

50. See generally, Larry E. Ribstein, *The Death of Big Law*, 2010 WISC. L. REV. 749 (explaining how recent economic trends are negatively affecting the traditional “big-law” firm business model); Marc S. Galanter & William D. Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1875–77 (2008) (explaining the trend of big law firms employing staff attorneys and outsourcing strategies).

51. Gerry Shih, *Downturn Dims Prospects Even At Top Law Schools*, N.Y. TIMES, Aug. 25, 2009, available at <http://www.nytimes.com/2009/08/26/business/26lawyers.html> (explaining that even graduates from the most elite institutions—such as Yale and NYU—are having difficulties securing jobs).

52. See Jewel, *supra* note 3, at 1181–85 (explaining that law degrees have differing economic values depending on the perceived prestige of the granting institution).

53. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, available at http://online.wsj.com/public/article_print/SB119040786780835602.html (explaining the challenges that law graduates with non-elite credentials face in a shrinking job market and discussing calls for more accountability in terms of law schools reporting employment data concerning their graduates).

from lower ranked schools are saddled with high amounts of student debt, with no feasible way to pay it off.⁵⁴

A host of lawyer blogs such as *Temporary Attorney: The Sweatshop Edition* (“Temporary Attorney”),⁵⁵ *But I Did Everything Right*,⁵⁶ *Esq. Never*,⁵⁷ *Shilling Me Softly*,⁵⁸ and *Third Tier Reality*⁵⁹ expose the negative experiences of attorneys caught up in this system of high student debt and limited job opportunities.⁶⁰ The Third Tier Reality blogger posts the following mission statement for his blog:

My goal is to inform potential law school students and applicants of the ugly realities of attending law school. Do not attend unless: (1) You get into a top 8 law school; (2) you get a full-tuition scholarship to attend; (3) you have employment as an attorney secured through a relative or close friend; or (4) you are fully aware beforehand that your huge investment

54. Justin Pope, *Analysis: Law Schools Growing, But Jobs Aren't*, LAW.COM, (June 17, 2008), <http://www.law.com/jsp/article.jsp?id=1202422330611> (explaining the experience of one recent law graduate, who was forced to move back in with his parents as he searched for a legal job and struggled to pay off his student debts); Christine Hurt, *Minding Our Own Business Forum: Bubbles, Student Loans and Sub-Prime Debt*, THE CONGLOMERATE, (Apr. 19, 2010), <http://www.theconglomerate.org/2010/04/death-of-big-law-forum-bubbles-student-loans-and-subprime-debt.html> (explaining that the practice of investing in a legal education by borrowing heavily is analogous to the sub-prime phenomenon in that both schemes rely on the faulty promise that the subject—real estate and, in this case, a law degree—would consistently rise in value; the financial situation for students attending lower ranked schools is especially dire, given the diminished value of a law degree from those schools); Debra Cassens Weiss, *1/3 of Law Students Expect to Graduate with 120K in Debt*, ABA J., Jan. 6, 2010, http://www.abajournal.com/news/article/almost_1_3_of_law_students_expect_to_graduate_with_120k_in_debt (1/3 of American law students now expect to graduate with over \$120,000 in student debt).

55. helpme123, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION, <http://temporaryattorney.blogspot.com/> (“With over 5,000 daily visitors, help expose the nasty sweatshops, swindling law schools, and opportunistic staffing agencies.”) (last visited Apr. 8, 2011).

56. BUT I DID EVERYTHING RIGHT!, <http://butidideverythingrightorsothought.blogspot.com/> (“Everyday is a cloudy day in the life of a disenchanting lawyer.”) (last visited Apr. 8, 2011.)

57. ESQ. NEVER, <http://esqnever.blogspot.com/> (“I’m a 2nd Tier Toilet . . . err, Law School Graduate who has realized that the law isn’t for me. I’ll be sharing my quest to find a successful career in another field while also trying to expose the law school scam.”) (last visited Apr. 8, 2011).

58. SHILLING ME SOFTLY, <http://shillingmesoftly.blogspot.com> (last visited Apr. 8, 2011).

59. NANDO, THIRD TIER REALITY, <http://thirdtierreality.blogspot.com/> (last visited Apr. 8, 2011).

60. Ashby Jones, Law Blog, *Thinking About Law School? These Blogs Tell You Why You Shouldn't*, WALL ST. J. LAW BLOG (Mar. 29, 2010, 1:58 PM), <http://blogs.wsj.com/law/2010/03/29/thinking-about-law-school-these-blogs-tells-you-why-you-shouldnt/>.

in time, energy, and money does not, in any way, guarantee a job as an attorney or in the legal industry.⁶¹

The reverse Horatio Alger themes within these blogs render them emotionally compelling, but there is also a great bitterness to them. The tone of these stories is often sarcastic and irreverent toward their subjects. For instance, *Temporary Attorney* contains a list of “beastly behavior awards.”⁶² These awards are for those who, in the authors’ view, perpetuate a system where law students, relying on law school marketing materials touting lucrative law careers for its graduates, borrow heavily from private lenders to attend law school.⁶³ Upon graduation, students find out that their law school’s optimistic tales of career success are inaccurate and based on incomplete statistics.⁶⁴ In a series of postings entitled “Profiles in Hypocrisy,” the *Third Tier Reality* blog posts caustic annotations of law schools’ marketing materials, commenting on their inaccurate and misleading nature.⁶⁵

According to the critiques on these websites, instead of a lucrative law career upon licensure, graduates of low-tier law schools, or “toilet”⁶⁶ law schools, encounter a stagnant job market where the only

61. Nando, *THIRD TIER REALITY*, *supra* note 59.

62. See, e.g., helpme123, *Open Letter to Dean Richard Slimeball*, *TEMPORARY ATTORNEY: THE SWEATSHOP EDITION*, <http://temporaryattorney.blogspot.com/2009/11/open-letter-to-dean-richard-slimeball.html> (Nov. 16, 2009, 9:59 AM) [hereinafter *Dean Richard Slimeball*] (Dean Richard Matasar of New York Law School “won” the Beastly Behavior award for 2009 for a perceived conflict of interest for serving as chairman of the Access Group, a student lending organization, and for serving as the head of New York Law School); helpme123, *2007 Beastly Behavior Award: Joan King*, *TEMPORARY ATTORNEY: THE SWEATSHOP EDITION*, <http://temporaryattorney.blogspot.com/2007/12/2007-beastly-behavior-award-joan-king.html> (Dec. 27, 2007, 6:10 PM) (Career Services Administrator Joan King, of Brooklyn Law School, “won” the beastly behavior award for 2007 for allegedly publicizing optimistic, but incomplete, employment data for Brooklyn Law Graduates). See also, Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 *IND. L.J.* 791 (2008) (generally critiquing the “gaming” strategies that law schools engage in to maximize post-graduate employment data, which in turn affects the schools’ *U.S. News and World Report* rankings).

63. See sources cited *supra* note 62.

64. See sources cited *supra* note 62.

65. Nando, *Profiles in Hypocrisy: TTT Dean Thomas*, *THIRD TIER REALITY*, <http://thirddtierreality.blogspot.com/2010/04/profiles-in-hypocrisy-ttt-dean-thomas.html> (Apr. 20, 2010, 5:35 AM).

66. One of the markers of an Internet community is a shared language or new type of jargon. See *supra* notes 21–24 and accompanying text. On these websites, the word “toilet” and the acronym TTT (third tier toilet) have emerged as terms for law schools outside the top two tiers (the top 100 law schools) listed in *U.S. News and World Report’s* annual ranking. See helpme123, *Toilet Law Schools Popping Up*, *TEMPORARY*

available work is as a temporary attorney performing monotonous, low-level law tasks (such as document review) with no client contact and no opportunity to develop one's legal skills.⁶⁷ To make matters worse, even temporary employment opportunities are shrinking, driven in part by large law firms outsourcing this type of routine legal work overseas, to places like India.⁶⁸ Thus, other objects of ire on the *Temporary Attorney* website include law business leaders who champion outsourcing as a way for law firms to cut costs and increase profits.⁶⁹

In addition to leveling harsh criticism for the profit seeking and snobbery within the legal profession and legal education, these websites provide an alternative narrative space for lawyers to share their stories. For instance, through the posting and comment functions on *Temporary Attorney: The Sweatshop Edition*, anonymous temporary attorney bloggers exchange reports of reviewing documents on computer screens for sixteen hours a day in poorly ventilated, cockroach-infested basements.⁷⁰ Workers must obtain permission to use the bathroom and are not allowed to leave the premises to, for instance, walk outside to get a cup of coffee, unless it is during the forty-five minute lunch time allocation.⁷¹ Female attorney workers report being assaulted by other workers, yet are too afraid to report the assault for fear of losing the job.⁷²

ATTORNEY: THE SWEATSHOP EDITION, <http://temporaryattorney.blogspot.com/2008/06/toilet-law-schools-popping-up.html> (June 12, 2008, 3:24 PM).

67. See Arin Greenwood, *Attorney at Blah*, WASH. CITY PAPER, Nov. 19, 2007, available at <http://www.washingtoncitypaper.com/display.php?id=34054>.

68. See Arin Greenwood, *Manhattan Work at Mumbai Prices: Inside India's Hottest Legal Outsourcing Firm*, 93 A.B.A. J. 36, 40 (2007), available at http://abajournal.com/magazine/manhattan_work_at_mumbai_prices/; Daniel Brook, *Made in India: Are Your Lawyers In New York or New Delhi*, LEGAL AFFAIRS, May/June 2005, available at http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp.

69. See helpme123, *Beastly Behavior Award: David Perla*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Dec. 30, 2008, 2:46 PM), <http://temporaryattorney.blogspot.com/2008/12/2008-beastly-behavior-award-david-perla.html> (awarding David Perla, CEO of outsourcing firm Pangea3, the website's beastly behavior award in 2008).

70. Julie Triedman, *Slaves of New York*, THE AM. LAWYER, Mar. 2006, at 19.

71. See *id.* See also helpme123, *The "Update Legal" Shearman and Sterling Project*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Jan. 28, 2008, 12:16 AM), <http://temporaryattorney.blogspot.com/2008/01/update-legal-shearman-sterling-project.html> (detailing the work requirements for a document review job at New York law firm Shearman and Sterling).

72. helpme123, *Another Assault at LabaToilet?*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Mar. 24, 2010, 3:29 PM), <http://temporaryattorney.blogspot.com/2010/03/another-assault-at-labatoilet.html> ("I quit labaton several weeks ago after I too was assaulted in front of several witnesses in the eating area and no one

The posts and comments on *Temporary Attorney* are often ugly and sometimes contain negative racial stereotypes about the perceived behavioral traits of various staff attorneys. The anonymity of the blog forum also makes determining the truth of the posts difficult. Nonetheless, there are some instances of the blog's comments function, which allows users to question the accuracy of a particular post, serving as a type of peer-review that maintains the integrity of the forum.⁷³ Despite the hostile and often corrosive nature of the forum, *Temporary Attorney* provides attorneys working in this realm with a place to vent, to feel connected, and to share similar experiences of alienation and isolation. Thus, these "new" websites have opened up spaces that did not previously exist within the profession's traditional confines: a public forum for attorney criticism and a community gathering place.

2. Viral Lawyer Emails

Lawyer narratives, in the form of viral⁷⁴ emails that receive a wide audience by virtue of the ease with which an email can be forwarded across cyberspace, are also challenging and critiquing the traditional culture of the legal profession. The first widely circulated viral email of this type originated from an associate at the venerable Cadwalader, Wickersham & Taft law firm in 2001.⁷⁵ In a farewell email of sorts

confronted/reported the asshole who hit me to anyone, including me because we were all afraid of losing our jobs, just as happened to other people recently.”).

73. For instance, the posting about the woman being assaulted at a document review project was questioned in several comments. See Comments to helpme123, *Another Assault at LabaToilet?*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION, <http://temporaryattorney.blogspot.com/2010/03/another-assault-at-labatoilet.html> (Mar. 24, 2010, 3:29 PM). Yochai Benker refers to this process of accuracy questioning, played out within the comments section of a blog, as peer accreditation. BENKLER, *supra* note 7, at 76–80 (explaining how peer accreditation works on *Slashdot*, a user moderated technology news website).

74. For an explanation of the viral concept as applied to the Internet, see *supra* note 9 and surrounding text. Neal Stephenson's novel *Snow Crash* affords the best explanation of the viral concept within new media culture:

We are all susceptible to the pull of viral ideas. Like mass hysteria. Or a tune that gets into your head that you keep on humming all day until you spread it to someone else. Jokes. Urban legends. Crackpot religions. Marxism. No matter how smart we get, there is always this deep irrational part that makes us potential hosts for self-replicating information.

NEAL STEPHENSON, *SNOW CRASH* 399–400 (1992).

75. See Ben McGrath, *Oops*, THE NEW YORKER, June 30, 2003, available at http://www.newyorker.com/archive/2003/06/30/030630ta_talk_mcgrath (identifying this email as “2001’s most celebrated legal e-mail.”). Although the email was widely circulated in 2001, it has mostly disappeared from cyberspace, but its text is still available at autoadmit.com, a forum for prospective and current law students. See posting of h4ck3d

sent to the entire firm, the author wrote of his perception that he was let go from his summer associate job because he asked for time off to take care of his ailing mother and because he spent time at a firm function inquiring about his sick daughter on his cell phone.⁷⁶ Lashing out at the firm's white shoe culture, the author asked if he was fired because he "would not eat lobster tails because [he] called them giant cockroaches" or because of his Italian-American heritage. Although poorly written and executed, the email nonetheless expressed the sentiment of a disappointed future lawyer who felt excluded by the culture of a big law firm and alienated by its lack of humanity.

On May 5, 2008, Paul Hastings associate Shinyung Oh sent a mass email concerning the termination of her employment.⁷⁷ The email was re-posted on blogs and eventually made its way to the *Wall Street Journal's* Law Blog, which interviewed her about the email.⁷⁸ In the email, Oh explained how she was terminated just six days after having a miscarriage. She recounted that just days before her termination, a female partner simply sat stone-faced while Oh broke down in tears thinking about her miscarriage.⁷⁹ Oh wrote: "[w]e are human beings first before we are partners or associates."

Oh also questioned the firm's reasoning for her termination, based on a single negative performance review, when one week prior, a partner had told her that her work was "great" and that the slow business in no way affected her performance.⁸⁰ "What I do not understand is the attempt to blame the associate for not bringing in the business that should have been brought in by each of you and to hide your personal failures by attempting to tarnish my excellent performance record and looking to undermine my sense of self-esteem."⁸¹ Oh was commenting on the large law firm practice of making "stealth layoffs," which justify personnel decisions in terms of

4cc0unt, AUTOADMIT.COM (Feb. 23, 2005, 5:01 AM), http://www.xoxohth.com/thread.php?thread_id=140158&mc=140&forum_id=2.

76. *Id.*

77. The email was picked up and reposted on the popular *Above the Law* blog. See David Lat, *Breaking: A Dramatic Farewell (and Proof of Paul Hastings Layoffs)*, ABOVE THE LAW (May 5, 2008, 3:48 PM), <http://abovethelaw.com/2008/05/breaking-a-dramatic-farewell-emailand-proof-of-paul-hastings-layoffs-/>.

78. Amir Efrati, Law Blog, *Fired Paul Hastings Associate Talks to Law Blog*, WALL ST. J. (May 8, 2008, 9:01 PM), <http://blogs.wsj.com/law/2008/05/08/fired-paul-hastings-associate-talks-to-law-blog/>.

79. Lat, *supra* note 77. Ms. Oh further wrote: "[E]ven a few words of sympathy or concern would have made a world of difference. What kind of people squander human relationships so easily?" *Id.*

80. *Id.*

81. *Id.*

an attorney's objective performance,⁸² a practice that ignores the possibility that the large firm's outdated structure, combined with contemporary market forces, is what drives attorney layoffs.⁸³

When the *Wall Street Journal's* Law Blog interviewed her, Oh explained that she wrote the email because she "didn't want other associates who may be laid off because of downsizing by the firm—but told it is because of their performance—to doubt their own abilities."⁸⁴ This example shows the power, inherent within New Media, for one person's critique of a powerful legal institution to make its way to a mass audience. Although it may not have affected the stealth layoff practices of the large law firms, the email did succeed as a comment on the great unfairness of the practice. It also probably helped other attorneys caught in a similar bind to feel less alienated.

3. *New Media Lawyer Narratives as Critiques of a Broken Criminal Defense Culture*

Online, we have also seen criminal defense lawyers lashing out at a hostile "judge-centered" culture where prosecutors and judges employ systemic strategies to encourage defendants to make plea bargains or waive other rights in an effort to lighten a judge's docket or prosecutor's caseload.⁸⁵ In a criminal justice system that is notoriously overloaded and understaffed, this ingrained culture seeks to make the lives of the judges and prosecutors, and sometimes even the beleaguered criminal defense attorneys, more manageable.⁸⁶

82. Law Shucks, *More Hypocrisy in Stealth Layoffs*, LAW SHUCKS, (Feb. 6, 2009), <http://lawshucks.com/2009/02/06/more-hypocrisy-in-stealth-layoffs/> (explaining the phenomenon of "stealth layoffs," which occurs "when firms lay off attorneys supposedly for performance reasons, but in fact are doing so by imposing arbitrarily tighter standards due to economic conditions."). See also, David Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 533-34 (1996) (explaining that law firms are incentivized to portray associate layoffs in terms of objective performance rather than as a result of market forces).

83. See Ribstein, *supra* note 50 (explaining the current shrinkage of large law firms as the product of an outdated firm structure and current market forces).

84. Efrati, *supra* note 78.

85. See Jonathan Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training and Mentoring*, 3 HARV. LAW AND POL'Y REV. 161, 162-63 (2009); John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We To Do?* 57 U. MIAMI L. REV. 955, 965-66 (2003) (describing criminal defense bar as a culture that emphasizes efficient resolution of cases that discourages defense attorneys from zealously advocating on behalf of their clients).

86. See Rapping, *supra* note 85, at 162-63, 166-67.

However, the culture operates at the expense of the defendant, who often receives the short end of the stick.⁸⁷

On Tuesday, October 30, 2006, defense attorney Sean Conway blogged about his frustration with a Fort Lauderdale judge's practice of giving defense attorneys the choice of a too-short period in which to prepare for a trial or asking for a continuance and consequently waiving the defendant's right to a speedy trial.⁸⁸ Conway posted that his understanding of the relevant criminal procedure rule was that defendants and their attorneys must receive a reasonable amount of time to prepare for trial, calculated from the date a guilty plea is entered.⁸⁹ However, in calculating the trial preparation time period, the judge Conway was appearing before used the date the attorney was appointed to the defendant, a later date that left Conway with an insufficient amount of time in which to prepare for trial.⁹⁰ Using colorful and irreverent language (perhaps because Halloween was the next day), Conway called the judge an "Evil, Unfair Witch," stated that she had an "ugly, condescending attitude," that she was "unfit for her position," and that she was "seemingly mentally ill."⁹¹

On the basis of this blog post, in April of 2007, the State Bar of Florida initiated disciplinary proceedings against Conway, asserting that he violated various rules, including Florida Bar Rule 4-8.2(a), which prohibits attorneys from making a statement that the lawyer "knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . ." ⁹² and Florida Bar Rule 4-8.4(d), which prohibits attorneys from "engaging in

87. *See id.*

88. Sean Conway, *Judge Aleman's new (illegal) "One-week to prepare" policy*, JAABLOG (Oct. 30, 2006, 9:11 PM), <http://jaablog.jaablaw.com/2006/10/30/judge-alemans-new-illegal-oneweek-to-prepare-policy.aspx>. *See also* Letter from the Florida Bar to Sean William Conway 2 (Apr. 13, 2007), *available at* <http://www.citmedialaw.org/sites/citmedialaw.org/files/2007-04-03-Letter%20Notifying%20Conway%20of%20Bar%20Investigation.pdf>; John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, *available at* <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

89. Conway, *supra* note 88.

90. *Id.*

91. *Id.* The subject of Conway's post, Judge Cheryl Aleman, was reprimanded by the Florida Supreme Court in a separate incident for engaging in "arrogant, discourteous, and impatient" behavior with lawyers. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, *available at* <http://www.nytimes.com/2009/09/13/us/13lawyers.html>.

92. FLA. RULE OF PROF'L CONDUCT 4-8.2(a) (2010). This rule is identical to MODEL RULE OF PROF'L CONDUCT 8.2(a) (1983).

conduct in connection with the practice of law that is prejudicial to the administration of justice.”⁹³

After a referee’s report was issued that recommended discipline for Conway, the parties agreed to resolve the case through a conditional guilty plea for consent judgment, in which Conway admitted to making improper derogatory remarks about a judge.⁹⁴ Before the Florida Supreme Court approved the plea, however, it directed the parties to brief the issue of whether the First Amendment protected any of Conway’s remarks.⁹⁵ In response, both parties filed briefs, along with the ACLU of Florida, which submitted an amicus brief arguing against imposing discipline on Conway.⁹⁶

On October 29, 2008, the Florida Supreme Court approved the conditional plea, directing that Conway receive a public reprimand and pay costs in the amount of \$1,250.00.⁹⁷ Because the Court approved the discipline of Conway without a written opinion, we do not know what its precise reasoning was.⁹⁸ However, it appears that the Court followed its prior precedent and applied an objective “reasonable attorney” standard in evaluating lawyer violations of Florida Bar Rule 4-8.2(a),⁹⁹ as opposed to the more expansive “actual malice” subjective standard used in nonlawyer libel cases involving public figures.¹⁰⁰ Under the objective standard, an attorney can be disciplined for statements about judges if, viewed from the standpoint of a reasonable attorney, he or she did not have “an objectively reasonable factual basis for making the statements.”¹⁰¹ The subjective “actual malice” approach would look to the actual mindset of the attorney and would not impose discipline unless he/she made the statements knowing they were false or with a reckless disregard as to

93. FLA. RULE OF PROF’L CONDUCT 4-8.4(d) (2010). This rule is identical to MODEL RULE OF PROF’L CONDUCT 8.4(d) (1983).

94. Brief of Complainant at 2, Fla. Bar v. Conway, 996 So. 2d. 213 (Fla. 2008) No. SC08-326 [hereinafter Brief of Complainant, Fla. Bar v. Conway].

95. *See id.* *See also* Fla. Bar v. Conway, No. SC08-326, docket entry for June 23, 2008.

96. *See* Fla. Bar v. Conway, No. SC08-326, docket entry for July 14, 2008.

97. Fla. Bar v. Conway, 2008 WL 4748577, *1 (Fla. Oct. 29, 2008).

98. Obtaining clarity on the Court’s reasoning is further hampered by the fact that Conway signed a plea agreement, admitting that his comments about the judge were improper and a rules violation. *See* Brief of Complainant, Fla. Bar v. Conway, *supra* note 94, at 2.

99. *Id.* at 6–8 (citing Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001)).

100. Brief of Complainant, Fla. Bar v. Conway, *supra* note 94, at 7 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

101. Fla. Bar v. Ray, 797 So. 2d 556, 559 (Fla. 2001).

their truth.¹⁰² The Florida Supreme Court also appears to have rejected the argument that Conway's comments were not actionable because they were opinions rather than facts capable of being proven true or false.¹⁰³

In writing his blog post, Sean Conway believed that he was alerting other defense attorneys within his community to the unfair and prejudicial practices of a publicly elected judge.¹⁰⁴ In response to the disciplinary complaint against him, he wrote the following in his letter to the Florida Bar:

The article . . . [informs] all defense attorneys, as well as prosecutors, of Judge Aleman's violation of Rule 3.160 of the Florida Rules of Criminal Procedure. Defendants depend on defense attorneys to zealously defend their rights. With people's liberty at stake, it is critical to point out Judge Aleman's illegal behavior to other defense attorneys and prosecutors.¹⁰⁵

At the end of its Brief to the Florida Supreme Court, the Florida State Bar asserts that it is acceptable to silence lawyer criticism of the legal profession because of the important interest of upholding the integrity of the bar:

Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in members of the legal profession. When a lawyer commits any act or conducts himself in such fashion as to cause criticism of the Bar, he thereby impairs the confidence and respect which the Bar

102. See, e.g., *Matter of Green*, 11 P.3d 1078, 1084 (Colo. 2000); *Okla. Bar Ass'n v. Porter*, 766 P.2d 958, 969 (Okla. 1988); *Ramsey v. Bd. of Prof'l Responsibility*, 771 S.W.2d 116, 121–22 (Tenn. 1989), *cert. denied*, 493 U.S. 917 (1989).

103. Brief of Complainant, *Fla. Bar v. Conway*, *supra* note 88, at 10 (citing *In re Nathan*, 671 N.W.2d 578, 584 (Minn. 2003)) ("Merely cloaking an assertion of fact as an opinion does not give the assertion constitutional protection."). On the other hand, the one circuit court case on point, *Standing Committee on Discipline v. Yagman*, held that if an attorney's remark is an opinion, then the First Amendment protects the speech. 55 F.3d 1430, 1438 (9th Cir. 1995).

104. Letter from Sean Christopher Conway to Alan Anthony Pascal, Bar Counsel, in *The Florida Bar 1* (Apr. 17, 2007), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/20070403Letter%20Notifying%20Conway%20of%20Bar%20Investigation.pdf>.

105. *Id.*

generally should enjoy in the eyes of the public . . . Without the respect and confidence of the public, it is impossible for the profession to discharge its duties effectively and efficiently, which duties are graver now than ever before in history.¹⁰⁶

The sentiment expressed in the above quote assumes that the legal profession is in good working order. In contrast to such an assumption, Conway's blog posting points to deep structural problems within the legal profession. Conway was not just criticizing a judge, but an entire institutional culture that bends the rights of criminal defendants in order to promote efficient docket management practices.¹⁰⁷ That he called this judge an evil, unfair witch may have been ill-advised, but these words reflect the opinion of a highly frustrated lawyer operating within a broken criminal justice system.

The Conway case is one of the first cases where participatory culture, mirroring the ideals that underlie the First Amendment, has clashed with professional disciplinary rules, but more such cases are likely forthcoming. In her comprehensive analysis of the First Amendment rights of attorneys who, like Conway, are critical of the judiciary, Margaret Tarkington convincingly argues why the approach of broadly imposing discipline for attorney speech is wrong from the standpoint of both Supreme Court precedent and the policies that underlie the First Amendment.¹⁰⁸ Tarkington's thesis is that attorney speech critical of the judiciary should be protected because it is, at its heart, political speech about governmental officials.¹⁰⁹ That a lawyer's speech about judges is core political speech gains even more credence when we consider that thirty-nine states elect members of their judiciary, either initially or by retention elections.¹¹⁰ Following this line of argument, the Conway decision runs contrary to the principles that underlie the First Amendment, namely that free speech engenders participatory democracy and serves as a check against government oppression.¹¹¹

106. Brief of Complainant, *Fla. Bar v. Sean William Conway*, *supra* note 94, at 19 (quoting *Fla. Bar v. Wagner*, 212 So. 2d 770, 772–73 (Fla. 1968)).

107. See Rapping, *supra* note 85, at 162–63, 166–67.

108. Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567 (2009).

109. *Id.* at 1575.

110. *Id.* at 1577.

111. *Id.* at 1575–76 (citing Alexander Meiklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) (discussing the idea that free speech provides the means for democratic self-governance)); *id.* at 1579–80 (citing Vincent Blasi, *The Checking*

The democratic ideals that underlie both the First Amendment and participatory culture would be better served by applying the subjective “actual malice” standard derived from *New York Times Co. v. Sullivan*,¹¹² which would analyze the attorney’s individual mindset concerning the truth or falsity of his or her statement.¹¹³ The objective standard, accepted by the majority of U.S. courts, is unworkable because it allows members of the judiciary (the subjects of the criticism) to decide as a matter of law what is reasonable criticism.¹¹⁴ This approach enshrines a traditional view of what it means to be a professional, leaving no room for lawyers in the minority who may have a differing view of what is “reasonable” in a professional context.

It would also be advisable to impose narrow limits on the type of attorney speech that would be subject to discipline. For instance, in *Standing Committee on Discipline v. Yagman*, the Ninth Circuit held that attorneys would be free to voice their opinions about judicial officers, even if those opinions are critical, harsh, and disrespectful.¹¹⁵ Thus, Conway’s comment of the judge being an “Evil, Unfair Witch,” was his opinion rather than a literal false statement of fact, and would not be grounds for attorney discipline.¹¹⁶ Unfortunately, however, most courts decline to follow *Yagman* and dismiss the fact/opinion issue as a “false dichotomy” and impose discipline whenever there is an insult to the court.¹¹⁷

A narrow rule imposing discipline for specific factual statements would uphold professional standards by preventing attorneys from

Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) (discussing the other core ideal within the First Amendment, as providing a “checking-value” against the abuse of power by public officials)).

112. 376 U.S. 254, 279–80 (1960).

113. Only three states have adopted the subjective *Sullivan* standard for evaluating attorney speech critical of the judiciary. See *Matter of Green*, 11 P.3d 1078, 1084 (Colo. 2000); *Okla. Bar Ass’n v. Porter*, 766 P.2d 958, 969 (Okla. 1988); *Ramsey v. Bd. of Prof’l Responsibility*, 771 S.W.2d 116, 121–22 (Tenn. 1989).

114. See *Tarkington*, *supra* note 108, at 1590, 1607. The problem is that in these proceedings, “[t]he Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding.” *Id.* at 1607 (quoting *In re Wilkins*, 777 N.E.2d 714, 720–21 (Ind. 2002) (per curiam) (Boehm, J., dissenting), *modified*, 782 N.E.2d 985, 987 (Ind. 2003)).

115. 55 F.3d 1430, 1438 (citing *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19 (1990)).

116. See *id.*

117. See Steven Wisotsky, *Incivility and Unprofessionalism on Appeal: Impugning the Integrity of Judges*, 7 J. APP. PRAC. & PROC. 303, 304–05 (2005) (citing *In re Westfall*, 808 S.W.2d 829, 832 (Mo. 1991)).

uttering bald-faced lies.¹¹⁸ However, attorneys would be free to voice criticism in the form of opinions, rhetorical hyperbole, name-calling, and subjective theories.¹¹⁹ Protecting an attorney's right to express his or her critical opinions and theories about the judiciary is the right approach because it would support a robust, though sometimes distasteful, discourse that ultimately leads to more transparency and accountability within the judiciary.

Moreover, the accepted rationale for restricting attorney speech—that an attorney's criticism damages public faith in the legal system (of which the judiciary is a part)¹²⁰—is not a strong enough reason to engage in wholesale censorship. First, as recognized by the Supreme Court, the proffered fear that the judicial system would fall apart from untrammelled criticism is generally unfounded and based on mere conjecture.¹²¹ Second, at its essence, this theory allows one branch of the government to silence criticism about itself in order to protect its reputation—exactly the type of authoritarian behavior the First Amendment was meant to curb.¹²²

As I will explain more deeply in the next section, the outcome in the Conway case is also harmful from a professional culture standpoint because it silences critical outsider voices. When we ignore alternative viewpoints from within the profession, we are reinforcing the harmful and hierarchical strains within our culture and privileging an elite, non-pluralistic view of what it means to be a lawyer. We should not elevate concerns over the integrity of the bar and the legal profession above an individual's words,¹²³ albeit disrespectful words, that make a structural or institutional critique.

IV. The Cultural Value of Critical Online Lawyer Narratives.

One might ask, why should we care that some disgruntled lawyers have taken to online whining about their unhappiness with the legal

118. It would also be appropriate to discipline attorneys whose speech poses a "substantial likelihood" of materially prejudicing a pending proceeding. *See, e.g., Yagman*, 55 F.3d at 1442; MODEL RULES OF PROF'L CONDUCT RS. 3.5 (prohibiting conduct that is disruptive to a tribunal), 3.6 (prohibiting trial publicity that has a substantial likelihood of materially prejudicing a pending proceeding).

119. *See Yagman*, 55 F.3d at 1438, 1440–41. The First Amendment protects opinion-based speech because there is less danger that members of the public would take such statements at face value. *See id.* at 1439.

120. Tarkington, *supra* note 108, at 1630–31 (quoting *Yagman*, 55 F.3d at 1437).

121. *Id.* at 1637 (citing *Landmark Commc'ns, Inc. v. Va.*, 493 U.S. 829, 841 (1979)).

122. *See id.* at 1632–33.

123. When questioned as to why he blogged about the judge, Conway replied that he felt that "[a]ll I had left were my words." Schwartz, *supra* note 88.

profession? In terms of the cultural value that these digital stories bring to the table, there are two reasons why we should care. The first reason has to do with the value that the narrative form, in particular, brings to our understanding of the legal profession. Narrative information in a digital format, such as blogs and emails, have been identified as a new kind of literature, like the novel in some ways, but ultimately breaking new ground with a new, more interactive and sharable format.¹²⁴ Scholars have long argued that we can learn much from narrative perspectives from literature and film that depict life in the law.¹²⁵ Richard Weisberg, outlining the history of the law and literature movement, writes that law narratives provide the “best source (outside of ourselves) of sense and sensibility.”¹²⁶ Law and literature pioneer James Elkins similarly writes that “[a] narrative perspective is the kind of seeing that places its characters in a world that extends beyond what I, a solitary mind, can imagine.”¹²⁷ Thus, these blog postings and emails, viewable as a new kind of lawyer narrative, bring value to the profession by offering a different perspective on the practice of law outside of a traditionalist and formalist framework.

Second, these messages are penned by lawyers who, for some reason or another, exist outside of the wood-paneled offices where legal meaning is traditionally made in our profession. Because these lawyers exist outside the elite levels of the profession, they can be considered “outsider” attorneys, in the same way that critical theorists use that term to designate minority individuals who do not

124. See Steve Himmer, *The Labyrinth Unwound: Weblogs as Literature*, INTO THE BLOGOSPHERE (2004) http://blog.lib.umn.edu/blogosphere/labyrinth_unbound.html (arguing that the web log form is a “distinct literary form” that shares many narrative attributes with the novel); Laura J. Gurak & Smiljana Antonijevic, *Digital Rhetoric and Public Discourse*, in THE SAGE HANDBOOK OF RHETORICAL STUDIES (Lundsford, ed., 2009) and LAURA GURAK, PERSUASION AND PRIVACY IN CYBERSPACE 61–62 (1997) (situating email messages within concept of digital rhetoric).

125. See e.g., Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 2 (2000) (arguing that literature and film depictions of lawyers function as an important reflection upon the ethics and morality of lawyering); Lance McMillian, *Tortured Souls: Unhappy Lawyers Viewed Through the Medium of Film*, 19 SETON HALL J. SPORTS & ENT. L. 31, 34 (2009) (positing that we have much to learn from “the portrayal of tortured attorneys through the medium of film.”).

126. Richard Weisberg, *Coming of Age Some More: “Law and Literature” Beyond the Cradle*, 13 NOVA L. REV. 107, 110 (1989).

127. James R. Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL EDUC. 47, 53 (1990).

fit into mainstream or majority culture.¹²⁸ Carrie Menkel-Meadow argues that “we learn so much more by including new perspectives and new knowers who are beginning to find their voices.”¹²⁹ For instance, an outsider voice can innovate within the formal legal system, imagining new causes of action, new legal categories, and new, less litigious ways of lawyering such as alternative dispute resolution.¹³⁰

Thus, the narrative approach and the unique perspective that informs these messages bring value to our understanding of what it means to be a lawyer in the twenty-first century. We no longer live in a world where the gentlemanly small-town lawyer model applies to everyone. We now have a class of lawyers writing about experiences that differ vastly from the previously existing stories about the elite lawyers predominant in our popular culture, such as the Harvard Law School of *Paper Chase*¹³¹ and *One-L*¹³² fame or the large law firm culture portrayed by Louis Auchincloss in *Diary of a Yuppie*¹³³ and William Keates’ in *Proceed with Caution*.¹³⁴ Moreover, these new online lawyer authors—jobless, ridden with debt, and struggling to make a living in a hostile profession—are experiencing the practice of law that contrasts mightily with another commonplace lawyer motif, the lawyer as heroic figure advancing a just cause in society.¹³⁵ These lawyers are not fighting public injustice or even discussing the soulless

128. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261–65 (1992) (categorizing African Americans, Mexicans, Native Americans, and Asians as “outsiders” within popular culture).

129. Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 35 (1988).

130. *Id.* at 35–50. Menkel-Meadow writes about the impact that feminist voices have had in the legal system.

131. JOHN OSBOURNE, *THE PAPER CHASE* (1971) (fictional account of Harvard Law School in the late 1960s and early 1970s that aptly captures the terrifying elements of the Socratic method through the book’s Professor Kingsfield character, who was later played by John Houseman in the *Paper Chase* movie and television series).

132. SCOTT TURROW, *ONE L* (1977) (Turrow’s memoir of his first year at Harvard Law School that recounts the cutthroat competition, frustration, and the ultimate intellectual rewards that came to him at the year’s completion).

133. LOUIS AUCHINCLOSS, *DIARY OF A YUPPIE* (1986) (short novel about a young associate structuring corporate takeover deals at a large New York City law firm during the “me” decade (the 1980s)).

134. WILLIAM R. KEATES, *PROCEED WITH CAUTION: A DIARY OF THE FIRST YEAR AT ONE OF AMERICA’S LARGEST, MOST PRESTIGIOUS LAW FIRMS* (1997) (nonfiction account of the stressful and demanding life of a highly paid associate at a large New York City law firm).

135. The obvious example of a heroic lawyer model would be Atticus Finch. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

but lucrative life of a big law firm associate; rather, they report on the daily injustices inflicted upon them on a very microlevel. They are, for instance, berated by hostile judges or spend their workday reviewing documents on a screen and entering codes on a keyboard, over and over again. The perspectives that inform these new online lawyer narratives are culturally valuable because they provide a competing view, albeit a dark and sometimes mundane one, of lawyering in America today.

V. Professionalism Issues

The narratives described above do not paint a pretty picture of law practice. For instance, many of the websites often juxtapose images of pigs with posts about the actions of the ABA or large law firms.¹³⁶ Another favorite visual rhetoric device is to juxtapose an image of a filthy toilet in connection with a post pointing out the inaccuracies in the marketing materials employed by a lower tier “toilet” law school.¹³⁷ It is also common to see vicious character attacks on persons in positions of power perceived to be responsible for some of the problems within the legal profession.¹³⁸ However, the recurring theme within these narratives is that there are lawyers, outside of the elite legal institutions, who believe that the legal profession is broken and feel betrayed by the dichotomy between the law profession’s ideals, usually expressed in terms of liberal humanism, and the harsh reality of practicing law in an alienating and unrewarding environment.

Because these new narratives are often bitter, sarcastic, and highly critical of the bar, the first reaction of most lawyers would be to recoil in disgust, brand the authors as unethical or unprofessional,¹³⁹ or reject them as having a “sour grapes” minority

136. See Nando, *ABA Pigs at a Trough*, THIRD TIER REALITY (Apr. 1, 2010, 3:58 AM) <http://thirddtierreality.blogspot.com/2010/04/aba-pigs-at-trough-law-school-is-poor.html> (using a photograph of pigs in conjunction with a post on the ABA); helpme123, *2009 Most Profitable Year Ever for the Paul Weiss Slave Drivers*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Feb. 1, 2010, 5:10 PM) <http://temporaryattorney.blogspot.com/2010/02/2009-most-profitable-year-ever-for-paul.html> (using imagery of pigs in conjunction with a post on large law firm Paul Weiss).

137. See Nando, *Call the Plumber: Seton Hall University School of Law*, THIRD TIER REALITY (Apr. 8, 2010, 4:11 AM), <http://thirddtierreality.blogspot.com/2010/04/call-plumber-seton-hall-university.html>.

138. See, e.g., *supra* notes 65, 70, and accompanying text.

139. The term “professional” represents a higher, normative concept that looks at what attorneys *should* do as opposed to what they must do, which is the province of the ethics rules. See Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The*

view of the profession and not worthy of further thought.¹⁴⁰ However, there are at least three reasons why it would be a mistake to discipline these authors or dismiss their stories as a minority view of the profession.

The first two reasons involve a critical reconsideration of two doctrines that inform our professional identity: the ideology of liberal humanism and the profession's codified ethics rules and underlying norms. First, like most democratic institutions, the legal profession is founded upon liberal ideals of human autonomy and dignity. However, in the law profession, institutions and organizations (such as law firms and law schools) operate in a capitalistic and hierarchical environment and can actually restrict human dignity and autonomy. Nonetheless, traditional professional discourse leaves little room for criticizing the deep institutional structures of our profession. When

Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approaches of the Canons, 83 N.C. L. REV. 411, 440–41 (2005) (discussing how “ethics” has become synonymous with the minimum rules governing attorney conduct whereas “professionalism” embodies a more normative standard as to what lawyers “should” do); Jeffrey A. Maine, *Importance of Ethics and Morality in Today's Legal World*, 29 STETSON L. REV. 1073, 1077–78 (2000) (explaining that disciplinary rules such as the Model Rules of Professional Conduct contain the minimum ethical standards whereas true professionalism requires one to go beyond the bounds of the disciplinary rules).

As the example of Sean Conway shows, Model Rule of Professional Conduct 8.2(a) (as adopted in most states, including Florida) provides a strong basis for imposing attorney discipline for negative stories about judges. A few states have professional rules that support discipline for more general criticism of the profession. In Illinois, for instance, attorneys may be disciplined for conduct that brings “the courts or the legal profession into disrepute.” See, e.g., ILL. SUP. CT. R. 770. Additional authority for disciplining attorneys for general critiques of the legal system can be found in the preamble to the ABA Model Rules of Professional Conduct, which exhorts lawyers to “respect the legal system and for those who serve it, including judges, other lawyers, and public officials.” See Steven Wisotsky, *Incivility and Unprofessionalism on Appeal: Impugning the Integrity of Judges*, 7 J. APP. PRAC. & PROCESS 303, 309, n.34 (2005) (citing *5-H Corp. v. Padovano*, 708 So. 2d 244, 245–46, 248 (Fla. 1997)). See also, Preamble, ¶ 6, MODEL RULES OF PROF'L CONDUCT (2002) (“A lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”). Outside the context of criticizing judges or prejudicing an ongoing trial, the case law does not generally support the idea of imposing attorney discipline for broad-based critiques of the legal system. Such criticism would, however, violate the implicit professional norms that underlie the ethics rules. See *infra* notes 152–54 and accompanying text.

140. See, e.g., Knut, *All You Need to Know About the “Scam-Blogs”: An Evolution and a Guide for New Readers*, FIRST TIER TOILET (Jan. 11, 2011), <http://firsttiertoilet.blogspot.com/2011/01/all-you-need-to-know-about-scam-blogs.html> (explaining that in the first few years of the anti-law school scamblogging movement, “[a]nyone who dared to raised [sic] his voice about the serious problems in legal education and legal employment would be viciously insulted as an embittered loser.”).

viewed from this critical standpoint, online critical lawyer narratives are doing more than just expressing bitter dissatisfaction with the profession; they are attacking the very substrates on which the profession stands. This necessary and valuable criticism may help the profession evolve away from the elitism and mercenary profit seeking that seem to plague the culture. Second, to the extent that ethics rules or professionalism norms can be used to silence critical lawyers, we should question the premises that underlie these rules. What are these rules meant to protect and what assumptions are they based on? Perhaps the rules should be reconsidered if they fail to account for the values of a plurality of the profession.

The third reason that critical online lawyer forums should be allowed to thrive is because they provide important community and therapeutic benefits. With the Internet, non elite lawyers now have a valuable community space to commiserate, express dissent, and formulate critiques that could lead to positive change. I will discuss these three inquiries in turn. In the last part of this section, I will consider potential arguments against the legal profession embracing participatory culture.

A. Critical Lawyer Narratives as a Structural Critique

Online lawyer narratives provide a compelling structural¹⁴¹ critique of the liberal humanism (or liberal individualism) that informs much of the legal culture in America, including our professional ideals.¹⁴² Liberal humanism exalts notions of human liberty and agency but also requires adherence to capitalistic and

141. As a sociological perspective, structuralism has many academic variations but all of them are generally concerned with studying the organizational forms that emerge from human interactions. See Bruce H. Mayhew, *Structuralism v. Individualism: Part I, Shadowboxing in the Dark*, 59 SOCIAL FORCES 335, 335–39 (1980). Structuralists are concerned with “identifying deeper, underlying . . . patterns that find expression in surface level cultural forms.” John W. Mohr, *Introduction: Structures, Institutions, and Cultural Analysis*, 27 POETICS 57, 57 (2000). Susan Carle uses the term structural to refer to how social structures determine inequalities of power and resources that can in turn affect how lawyers approach advocacy for their clients. Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 101, 114–16 (2008).

142. In general, the law uses themes of equality and objectivity (liberal humanism ideals) to foster the ideas that social outcomes are the fair result of neutral processes rather than the result of preexisting inequalities. See MERTZ, *supra* note 4, at 4–6, 212–14 (explaining the process by which the law employs abstract and formalistic legal reasoning, which emphasizes procedure and precedent, at the expense of social context and moral issues); Jewel, *supra* note 3, at 1157–60 (explaining Bourdieu’s theory of how the law emphasizes neutrality and objectivity in order to instill public faith in the system, a process that tends to obscure how legal outcomes often favor dominant groups).

institutional organizational forms that can restrict human dignity.¹⁴³ Moreover, generally speaking, there is little room within liberal discourse for a deeper structural critique of how our institutions perpetuate longstanding patterns of inequality.¹⁴⁴ For instance, in the realm of economics, rational actor theory illustrates how a liberal humanist idea leaves little space for a foundational critique. While the theory that social outcomes are a product of an individual's free choice in the market sounds egalitarian and fair, it also operates as a closed ontology that leaves no room to discuss how most differential social outcomes result from preexisting differences in capital holdings.¹⁴⁵

Within traditional narratives about American lawyers, expressions of liberal humanism assume that our legal institutions enable lawyers to reside in autonomous positions of power, exercise wisdom, do good things in society, and make a comfortable living.¹⁴⁶

143. From a critical theory perspective, David Baker provides a good explanation of the internal conflict within liberal humanism between individual autonomy and institutional organizations:

[L]iberalism has normative, institutional, and theoretical content. The key normative content, which is the most persistent and fundamental aspect of liberalism, exalts the values of human equality, self-determination, and self-realization—that is, of liberty and autonomy. Historically, the institutional content of liberalism has included capitalist or market economic forms, bureaucratic organizational forms, and, at its best, democratic political forms. The theoretical content attempts to explain and justify liberal institutions in terms of liberal norms, and sometimes to explain and justify liberal norms themselves. In this theoretical component, liberalism faces the impossible task of explaining how its key values of liberty and autonomy are consistent with a social structure that in reality controls and limits human choice.

David Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 304 (1984).

144. Thus, “[p]rogress within liberal thought requires first exposing the contradictions between its institutions and its values and then recommending the reform or transformation of those institutions.” *Id.* at 304.

145. See, e.g., Jewel, *supra* note 3, at 1163–64. See also MERTZ, *supra* note 4, at 212. The concept of individual merit is another example of a liberal humanist idea that leaves little room for a deeper critique. The traditional idea is that an individual's merit (in the form of school prestige, test scores, grades, etc.) determines where he/she ends up in society. However, the merit narrative leaves no space for the empirical reality (at least within the legal profession) that one's place in society is highly influenced by the amount of social, cultural, and economic capital one holds prior to entering the education/career system. See Jewel, *supra* note 3, at 1173–75.

146. See generally, ANTHONY KRONMAN, *THE LOST LAWYER* 299 (1993) (The ability to exercise practical wisdom on behalf of a client requires lawyers to suspend their own (financial) self-interest and “clear an affective space in which his client's interests may be

There is the view that the practice of law is a privilege because it provides attorneys with the power and influence that comes with counseling clients, appearing in court, and otherwise impacting the lives of individuals with the law.¹⁴⁷ But these humanistic assumptions about the practice of law do not necessarily match the alienating experience of many of America's lawyers working in the professional hierarchy. For instance, autonomy, comfort, and the ability to impart professional wisdom do not exist for lawyers stuck performing monotonous data entry tasks for an hourly wage and no insurance benefits.¹⁴⁸ A hardworking associate, blindsided by her termination coming just six days after a serious personal tragedy, sees little humanity within her former law firm.¹⁴⁹ A criminal defense attorney's ability to serve society is highly constrained by a criminal justice culture that directs the attorney to make decisions that promote judicial efficiency but thwart true justice for the client.¹⁵⁰

These lawyers can hardly be blamed for perceiving the practice of law as an onerous burden rather than an exalted privilege. If the underlying philosophical premises for American lawyer professionalism do not apply to these attorneys, we cannot expect them to blindly adhere to the culture's traditional ideals. On a psychological level, perhaps these online stories are so uncomfortable because they question the very core of our professional identity, which is based on democratic notions of fairness, justice, and human dignity. Though unpleasant, these deep questions about our profession need to be dealt with. Accordingly, these new critical voices should not be dismissed as unprofessional or untoward.

B. The Rules of Professional Conduct—A Non-Pluralistic View?

To the extent that the Rules of Professional Conduct and the norms that underlie them can be used to restrict negative lawyer comments about the legal profession, legal system, or the judiciary, we should critically examine the institutional forces that shaped them. A critical evaluation of the Model Rules of Professional Conduct

entertained with real feeling.”); Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 101, 117 (2008) (citing DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 36 (2007)) (Carle places David Luban's conceptions of lawyer professionalism, wherein the lawyer should always strive to promote human dignity, as being based on a philosophy of liberal individualism).

147. See *In re Snyder*, 472 U.S. 633, 646–47 (1985) (citing *People ex rel. Karlin v. Culkun*, 248 N.Y. 465, 470–71 (1928)).

148. See *supra* notes 51–73 and accompanying text.

149. See *supra* notes 78–85 and accompanying text.

150. See *supra* notes 88–106 and accompanying text.

supports the conclusion that they may not reflect the views of all lawyers as to what it means to behave in a professional manner. Accordingly, current rules and norms that restrict attorney speech can be viewed as limiting the kinds of lawyers who are allowed to contribute to the culture of the profession.

With respect to lawyers who disparage the legal system or the judiciary online, the Model Rules of Professional Conduct are primarily aimed at policing communication in a litigation context. The rules support discipline for statements made about specific judges¹⁵¹ and statements that are disruptive to a pending trial.¹⁵² While discipline may also be imposed for the broad concept of conduct that is “prejudicial to the administration of justice,” this rule has generally been applied only in a litigation context.¹⁵³

Outside of a specific case, however, lawyers who publicly malign the legal system and legal profession in a general sense certainly violate the *norms* of the profession, as evidenced by the precepts embodied in the Preamble to the Rules. For instance, paragraph five of the Preamble states that “[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.”¹⁵⁴ Preamble paragraph 6 requires lawyers to “further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”¹⁵⁵ And finally, preamble paragraph nine states that lawyers should maintain a “professional, courteous and civil attitude toward all persons involved in the legal system.”¹⁵⁶ Arguably, online lawyers who publicly

151. See MODEL RULES OF PROF’L CONDUCT R. 8.2(a) (2009).

152. See MODEL RULES OF PROF’L CONDUCT R. 3.5(d) (2009).

153. See generally, 7A C.J.S. *Attorney & Client* § 84 (2010) (collecting and annotating discipline cases concerning lawyers who engaged in conduct prejudicial to the administration of justice). See also, 16 IA. PRAC., LAWYER & JUDICIAL ETHICS § 12:4(d)(1) (2010) (the rule prohibiting conduct prejudicial to the administration of justice “attaches to lawyer conduct that inappropriately disrupts the legal process, impairs the ability of a participant in the process to effectively present a case, impedes progress of the matter . . . or perverts the disposition of a matter.”).

154. Preamble, ¶ 5, MODEL RULES OF PROF’L CONDUCT (1983).

155. *Id.* at ¶ 6.

156. *Id.* at ¶ 9.

denigrate the legal system in a way that could be viewed as crude or vulgar¹⁵⁷ would violate these standards.

There are two relevant critiques to the ideology of professionalism, embodied in the ABA Model Rules of Professional Conduct (“Model Rules”). The first point of critique is that, as Professor Amy Mashburn compellingly points out, the ABA’s Model Rules might not reflect a broad consensus of all attorneys as to what professionalism means.¹⁵⁸ Professor Mashburn explains how, at the turn of the twentieth century, an elite and exclusive group of lawyers within the ABA formulated the first set of ethical rules for the legal profession.¹⁵⁹ The newly promulgated rules reflected the aristocratic ideals of these “best men of the bar,” codifying the idea that lawyers should not be concerned with money and that law practice should not be conducted as a business or trade.¹⁶⁰ At the time the first ethics rules were promulgated, there was a general fear among elite attorneys that the wrong (i.e., non Anglo-Saxon) kind of persons were gaining entry into the profession.¹⁶¹ Mashburn argues that an elite group of attorneys continues to define the norms of the legal profession, as evidenced by the heavy influence that corporate lawyers exercise within the ABA.¹⁶²

Mashburn also remarks that the exhortation that lawyers should be more civil and polite may not represent the interests of non-elite lawyers.¹⁶³ In fact, concepts of decorum and civility can sometimes clash with an attorney’s zealous advocacy for a client or for social change.¹⁶⁴ The problem with a unitary view of professionalism is that it relies on the false premise that the law is a monolithic profession that places all attorneys in the same position.¹⁶⁵ The reality is that not all attorneys can afford to treat the practice of law as a noble profession rather than a business or trade. Furthermore, not all attorneys are in a position to engage in deferential and measured

157. The disapproval of crude and vulgar lawyers can also be viewed as the legal profession’s attempt to maintain its image as an upper-class culture built around distinction and good taste. The concept of vulgarity, as a polar opposite to the concepts of distinction and taste, is a cultural marker for the lower classes. See Jewel, *supra* note 3, at 1170–71, 1197–1201.

158. Mashburn, *supra* note 6, at 663–69.

159. *Id.* at 668–69.

160. *Id.*

161. *Id.* at 669.

162. *Id.* at 672, 675–76.

163. *Id.* at 655–58, 87.

164. *Id.* at 686.

165. *Id.* at 665–67.

behavior, particularly when they are representing the poor and powerless or advocating for radical social change.

This critique of the Model Rules can be extended to the Internet's lawyer storytellers, who are writing about experiences that do not reflect the traditional view of professionalism envisioned by America's more elite lawyers. For instance, the practice of law is not a noble profession for a lawyer being paid by the hour to key in data in an airless basement far away from the mahogany and glass offices of an elite law firm;¹⁶⁶ who must check his or her cell phone at the door before beginning work;¹⁶⁷ and who is often berated by supervising attorneys (usually full-time associates at a prestigious law firm) for not keying in entries fast enough.¹⁶⁸ In these circumstances, the concept of being polite, deferential, and maintaining the public's confidence in the integrity of the legal system does not make much sense. Moreover, if Mashburn is correct and elite and powerful practitioners have monopolized the task of codifying our professional rules and norms, then it is a positive development that technology now gives all attorneys the power to inform the culture of the profession.

C. An Online Community Space for Disenfranchised Lawyers

The narrative outlets described in this paper have the potential to influence the profession to change for the better, but perhaps more importantly, they provide attorneys, shut out from the traditional social outlets of the legal profession, a place to go to feel connected and human after spending time in a distinctly non-human work environment.

One argument in favor of allowing these narratives to flourish online is that this information could reach a critical mass and influence true structural change within the profession. This argument has appeal and indeed, the content of these online narratives has been picked up by more traditional Internet news outlets, such as the *Wall*

166. helpme123, *The Lexolution Chicken Coop is Once Again Open for Business*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Feb. 15, 2010, 10:15 AM), <http://temporaryattorney.blogspot.com/2010/02/lexolution-chicken-coop-is-once-again.html>.

167. helpme123, *Discover Ready*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Mar. 20, 2010, 9:24 AM), <http://temporaryattorney.blogspot.com/2010/03/discoverready.html>; helpme123 *Blacklisted by Lexolution*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Nov. 17, 2009, 10:08 AM), <http://temporaryattorney.blogspot.com/2009/11/blacklisted-by-lexolution.html>.

168. helpme123, *Jones Day: A Follow Up*, TEMPORARY ATTORNEY: THE SWEATSHOP EDITION (Feb. 12, 2010, 12:10 AM), <http://temporaryattorney.blogspot.com/2010/02/jones-day-follow-up.html>.

Street Journal's Law Blog and the *New York Times*.¹⁶⁹ Moreover, after reading the contract attorney blogs, a managing partner at one law firm decided to integrate a document review department into the firm, treating its workers more like full-time employees (albeit without benefits).¹⁷⁰ Law school administrators might also be listening in on these painful stories. Dean Richard Matasar¹⁷¹ of New York Law School has recently stated that law schools might be “exploiting” nonelite students by encouraging them to incur excessive debt to attend law school when there is only a slim chance that these students will find employment that enables them to keep up with their loan payments.¹⁷²

However, even if these narratives are not able to achieve actual structural change, they allow these lawyers a small outlet to express the alienation they suffer on a daily basis. As Michel de Certeau writes, it is not likely that a single individual, caught up in an institutional system of power and hierarchy, will succeed in effecting

169. See, e.g., Ashby Jones, Law Blog, *Thinking About Law School? These Blogs Tell You Why You Shouldn't*, WALL ST. J., (Mar. 29, 2010, 1:58 PM) <http://blogs.wsj.com/law/2010/03/29/thinking-about-law-school-these-blogs-tells-you-why-you-shouldnt/>; Amir Efrati, *supra* note 78; John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, September 13, 2009, available at <http://www.nytimes.com/2009/09/13/us/13lawyers.html>; Arin Greenwood, *Attorney at Blah*, WASH. CITY PAPER, Nov. 19, 2007, available at <http://www.washingtoncitypaper.com/display.php?id=34054>.

170. Julie Kay, *Contract Lawyers: Cheaper by the Hour*, THE NAT'L L.J., Jan. 12, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427338861> (the managing partner stated: “I’ve read the blogs, and we just felt it was not healthy for us, for the profession or the clients if there’s a bad environment.”).

171. *Temporary Attorney: The Sweatshop Edition* singled Matasar out for its 2009 “beastly behavior award” because of a perceived conflict of interest for concurrently serving as the chairman of a student loan company lending to New York Law School and as Dean of the law school. See *Dean Richard Slimeball*, *supra* note 62.

172. Debra Cassens Weiss, *Law School Deans Says Schools Exploiting Students Who Don't Succeed*, A.B.A. J., Jan. 20, 2009, http://www.abajournal.com/news/article/law_dean_says_schools_exploiting_students_who_dont_succeed/. In the article, Matasar is quoted as saying:

We took them. We took their money. We live on their money. . . . And if they don't have a good outcome in life, we're exploiting them. It's our responsibility to own the outcomes of our institutions. If they're not doing well . . . it's gotta be fixed. Or we should shut the damn place down. And that's a moral responsibility that we bear in the academy.

Id.

Despite being singled out as a target worthy of attack, Dean Matasar appears to be aware of the problems faced by non-elite students and has compellingly written that law schools should behave as fiduciaries toward their students, as opposed to self-interested market actors. See Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67 (2008).

true structural change.¹⁷³ But what can be accomplished are forms of resistance in the way one experiences “everyday life.”¹⁷⁴ Thus, these alternative lawyer narratives validate Certau’s theory that those who lack power create their own cultural forms in opposition to the dominant culture as a way of “mak[ing] do with what they have” “in a network of already established forces and representations.”¹⁷⁵

In addition, these online narratives engender a sense of community and belongingness. Lonely and alienated in the physical world, the Internet affords marginalized attorneys spaces that have the same neighborly characteristics as a traditional community marked by geographic borders.¹⁷⁶ Although they are ugly and full of verbal wormwood, these online spaces provide frustrated attorneys with an outlet for dissent, perhaps relieving some of the stress, frustration, and disenchantment that come from working in a hostile and dehumanizing profession. In this case, the community function that the Internet affords should trump concerns over professionalism and maintaining public confidence in the legal profession.

D. A Response to Arguments Against a Participatory Culture within the Legal Profession

Worth considering are three possible arguments against relaxing the norms within the legal profession to embrace a more vibrant culture. The first deals with the concern that if we relax our professional norms and standards, more attorneys will engage in irreverent behavior and the already shaky reputation of attorneys (as evidenced in the popularity of lawyer jokes)¹⁷⁷ will be further damaged. However, as Margaret Tarkington points out with respect to the judiciary, this type of slippery-slope argument is based primarily on conjecture and surmise.¹⁷⁸ Moreover, although our

173. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* xiv (1984). In describing the alienating environment of modern work life, de Certeau borrows Michel Foucault’s concept of “discipline,” which describes how modern institutions employ myriad of micro rules, regimentations, and time tables imposed on our everyday life, ensuring the retention of social order and the status quo. *See e.g.*, MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 205, 216, 220 (1979).

174. DE CERTEAU, *supra* note 173, at xiv.

175. *Id.* at 18, 32.

176. *See supra* notes 20–26 and accompanying text (discussing the ways that the Internet supports new kinds of communities).

177. *See, e.g.*, Patricia L. Garcia, *Did You Hear the One About the Lawyer?* 70 TEX. B. J. 960 (2007); Ward Blacklock, *Lawyer Bashing: It’s Time to Turn the Tide*, 24 ST. MARY’S L. J. 1219 (1993) (reflecting the view that the proliferation of lawyer jokes encapsulates the public’s lack of confidence in the legal profession).

178. *See supra* note 123 and accompanying text.

professional culture should become more relaxed and expansive, *most* attorneys, from the standpoint of self-preservation, will adhere to traditional behavioral norms and will decline to speak out against the profession with the bitter vitriol and repugnant rhetoric that appears on blogs critical of the profession.¹⁷⁹ There is a built-in disincentive to stray from the dominant code of behavior because transgressive conduct carries negative career consequences in terms of the ability to find a job and maintain credibility with clients and the courts.¹⁸⁰ However, we should not deny the choice of some attorneys, operating at the margins of the profession, to criticize the profession from within, even if these views are expressed in unpalatable ways that run contrary to traditional notions of how attorneys are supposed to behave.

The doctrinaire view is that attorneys should always “demonstrate a “belief in the essentiality of the chastity of the goddess of justice.”¹⁸¹ This quote from the Florida Supreme Court exemplifies the outdated aristocratic notions that have informed the culture of the legal profession for many years.¹⁸² However, the Internet has given voice to a group of lawyers who would vehemently disagree that there is such a thing as a gendered deity of justice or that this deity retains any type

179. To support her point that the judiciary does not need protection from attorney criticism, Margaret Tarkington cites to an article by David Pimentel arguing that the adversary system incentivizes lawyers to restrain their criticism of the judges they practice in front of. Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 430 n.390 (2010) (citing David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 933–34 (2009)). The loss of goodwill from the bench and loss of respect from professional peers can negatively effect an attorney’s reputation and ability to make a living. *Id.* Thus, there is a certain amount of self-regulation that goes on within the legal profession. This reasoning can be applied beyond the context of judicial criticism, supporting the prediction that relaxing our rules and norms would not unduly harm the legal profession.

180. See Jewel, *supra* note 3, at 1178 (explaining how the image of the virtuous passive attorney exemplifies the belief that only attorneys of preexisting wealth and means are capable of maintaining “professional” ideals). The aristocratic/chivalrous view of the legal profession is also reflected in the prohibition on direct solicitation of clients. This rule, now canonized as ABA Model Rule of Professional Conduct section 7.3, derives from the opinion of the elite lawyers who drafted the first ethics rules for the profession in 1908. These lawyers believed that attorneys should not dirty their hands by actively soliciting clients but should instead passively await clients “[l]ike young maidens awaiting suitors.” See Jewel, *supra* note 3, at 1178 (citing JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 41 (1976)).

181. *In re Shimek*, 284 So. 2d 686, 690 (Fla. 1973) (quoted in Tarkington, *supra* note 108, at 1569).

182. See Jewel, *supra* note 3, at 1178 (explaining how longstanding professional rules against lawyer advertising and solicitation were designed to uphold a lawyering model based on passive restraint, which reinforces the aristocratic idea that only lawyers of pre-existing wealth and means have the ability to maintain the dignity of the legal profession).

of virginal virtue. The Internet is an appropriate arena to roundly challenge the legal profession's obsolete and unworkable themes and author new narratives that reflect an evolving professional identity (for better or worse).

The second argument is that attorneys should resort to more traditional means for criticizing the legal system. If dealing with a problematic judge, for instance, the attorney should make a complaint to his or her state's commission on judicial conduct¹⁸³ or appeal that judge's ruling using the available processes within the legal system.¹⁸⁴ What this argument misses is that the beauty of the Internet is that it provides an *alternative* way of getting things done without having to rely on traditional institutions.¹⁸⁵ The Internet's democratic architecture allows all voices to be heard, amplifying the most resonant in a way that is unfettered by the formal constraints of the legal system. Sole reliance on the legal system to redress problems would be slow, heavily filtered through formalistic legal procedures, and would preclude the garnering of mass public support for the problem. Limiting attorney speech to formal legal mechanisms would deny the possibility, enabled by participatory culture, of obtaining relief¹⁸⁶ by sharing narratives that raise immediate public awareness and support.

Finally, there is the argument that criticism of the legal system should refrain from vulgarity and crudeness but should instead maintain proper decorum and respect.¹⁸⁷ However, this argument ignores the fact that an idea's power sometimes derives from the inflammatory way in which it is expressed.¹⁸⁸ Because the Internet

183. See Tarkington, *supra* note 108, at 1602, n.210 (collecting authorities supporting the idea that in cases where there is a problem with a judge, the appropriate response is to file a complaint with the relevant judicial disciplinary authority).

184. See Witosky, *supra* note 117, at 314–15 (arguing that if a trial or appellate judge erred, the professional thing to do is to present the error on its merits to a higher court).

185. See SHIRKY, *supra* note 7, at 22 (explaining how new technology has created “novel alternatives for group action” in competition with “traditional institutional forms for getting things done.”).

186. “Relief” refers to the emotional release that comes with sharing one's story as well as possible remedial action by institutions in response to public awareness of the problem.

187. The rhetoric on websites such as Temporary Attorney: The Sweatshop Edition, Esq. Never, and Third Tier Reality has been referred to as “vulgar” and “disgusting.” See Brian Tamanaha, *Wake Up, Fellow Law Professors, to the Casualties of our Enterprise*, BALKINIZATION (June 13, 2010, 6:48 PM), <http://balkin.blogspot.com/2010/06/wake-up-fellow-law-professors-to.html>.

188. Justice Rehnquist recognized this point with respect to crude political cartoons, noting that a cartoon's success as political commentary seemed to be related to how far it

amplifies the stories that hold the most resonance for an audience, transgressive rhetoric might be what causes an idea to gain viral momentum and reach exponential dimensions in exposure. Moreover, to impose such narrow restrictions on the means by which an idea can be expressed runs contrary to the democratic ideals of participatory culture, which values communication outside the bounds of traditional institutions.¹⁸⁹

In advocating a liberty-based theory for expansive First Amendment rights, C. Edwin Baker noted the importance of individuals being able to control the means by which they express their ideas and communicate beyond the confines of traditional institutions.¹⁹⁰ Baker wrote that communication outside the bounds of traditional hierarchical institutions has the potential to advance “increased human autonomy and self-determinism, and the attainment of a less alienated, more democratic society.”¹⁹¹ Writing before the advent of the Internet, Baker based his thesis on the idea’s democratic potential.¹⁹² As the Internet is now making this potential a reality, a too-rigid application of our professional rules and norms should not retard this progress.

VI. Conclusion

By allowing a wider swath of participants to comment on the culture of the law, the Internet is changing the face of the legal profession. The online voices of attorneys are sometimes grating and difficult to stomach, but they often expose deep problems within our profession that otherwise would not be aired. It will do no good to silence the voices that are identifying cracks in the structure of our profession simply because they do not comply with traditional professional norms. These stories are culturally valuable because their narrative approach and outsider perspective shed new light on what it means to be a lawyer in America. Further, the structural critique of law practice as an alienating, nonautonomous, and

went “beyond the bounds of good taste and conventional manners.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (quoting CHARLES PRESS, *THE POLITICAL CARTOON* 251 (1981)).

189. See Benkler, *supra* note 7, at 212–14 (explaining the concept that the Internet’s elimination of mass communication costs has had a democratizing effect on American society).

190. See C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 337 (1984).

191. *Id.*

192. *Id.*

undignified enterprise is a critique that needs to be heard. Accordingly, our professional norms and ethical rules should not operate to shut these narratives out. In the interest of enriching our professional identity, we should embrace the participatory culture of the Internet and allow a diversity of viewpoints to flourish in the profession.