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LAWYERS IN AMERICA: A PROFESSION IN SEARCH OF DIRECTION

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The law and its chief practitioners, the members of the legal profession, are in trouble. That the profession's public image is worsening is virtually beyond debate, and that the public conduct of some of its members could get no worse is certainly beyond question. Even a cursory examination of the events of the last few years suggests that something is seriously wrong with the practice of law in America. Consider the following events, all of which have occurred in less than a decade: a public official of a large city issues an order to "shoot to maim;"¹ a series of political trials is undertaken against opponents of the Vietnam war based upon the most spurious conspiracy statute ever to confound American jurisprudence;² high-level cabinet officials are convicted of illegal activity;³ a Vice President is forced to resign;⁴ and to cap it all, a President of the United States is forced by public indignation to resign in the face of evidence imputing gross violations of the civil law and moral code of the Republic.⁵ What most of the individuals involved in these circumstances had in common was not

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¹ See N.Y. Times, April 16, 1968, at 30, col. 3.

² See, e.g., *id.*, Apr. 10, 1969, at 28, col. 1 (Chicago Seven conspiracy trial for disruptive conduct at the 1968 Democratic National Convention); *id.*, Oct. 8, 1968, at 13, col. 1 (trial of Catonsville Nine for burning draft board files with homemade napalm).

³ See *United States v. Haldeman*, No. 75-1381 (D.C. Cir., Oct. 12, 1976) (en banc).

⁴ See N.Y. Times, Oct. 11, 1973, at 1, cols. 7-8, where it is reported that former Vice President Spiro T. Agnew pleaded *nolo contendere* to a federal charge that he failed to report certain income received while Governor of Maryland in connection with illegal kickbacks in return for political favors. See also *Maryland State Bar Ass'n v. Agnew*, 271 Md. 543, 318 A.2d 811 (1974) (Agnew disbarred).

⁵ See N.Y. Times, Aug. 9, 1974, at 1, cols. 7-8 (President Nixon resigns amidst preparation for impeachment trial). See also *In re Nixon*, 53 App. Div. 2d 178, 385 N.Y.S.2d 305 (1st Dep't 1976) (disbarment of former President Nixon).

only their public office, but also, and more significantly, their membership in the legal profession. Due to their position as sworn officers of the court, their acts assume a far different character than those of the ordinary law-breaker.⁶ As members of the legal profession, American lawyers have always laid claim to a special position in our democratic society. The erosion of their ethical standards both reflects and contributes to an erosion of the legitimacy of the political system itself. Like Caesar's wife, attorneys must be above all suspicion of guilt — and they have failed to be so.

The events surrounding the final resolution of Watergate merely demonstrated publicly what the interested observer had begun to suspect some time ago, namely, that the members of the legal profession are slowly losing their moral bearings and that the profession itself is no longer able—perhaps even unwilling—to discipline its members and to take collective responsibility for their actions.⁷ When the process of disintegration began is unimportant; that it is rapidly proceeding unabated in full view of the American populace is all important. Why, in light of the American public ethos, is the legal profession suffering this decline? What factors

⁶ The attorney's special relationship with the law has engendered an expectation that he will maintain the highest standards of conduct in both his professional and private life. *See* G. SHARSWOOD, *PROFESSIONAL ETHICS* 168, 169 (1844), *quoted in* Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 547, 318 A.2d 811 (1974). This standard has, to some extent, been adopted in disciplinary proceedings. *See, e.g., In re Calhoun*, 127 Vt. 222, 245 A.2d 560 (1968) (per curiam), wherein disciplinary action was deemed necessary because an attorney's violation of the law is not only a failure "to perform a duty imposed by law on . . . citizens generally," but moreover, because "it is a breach of responsibility that tends to discredit the legal profession . . ." *Id.*

⁷ In 1970, the American Bar Association published a report documenting deficiencies in lawyer discipline in the United States. *See* Special Comm. on Evaluation of Disciplinary Enforcement, *Report*, 95 A.B.A. REP. 783, 797-98 (1970). The Special Committee concluded:

With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.

Id. at 797. The Committee also found that

lawyers fail to report violations of the Code of Professional Responsibility committed by their brethren, much less conduct that violates the criminal law; that lawyers will not appear or cooperate in proceedings against other lawyers but instead will exert their influence to stymie the proceedings; that in communities with a limited attorney population disciplinary agencies will not proceed against prominent lawyers or law firms and that, even when they do, no disciplinary action is taken, because the members of the disciplinary agency simply will not make findings against those with whom they are professionally and socially well acquainted; and that, finally, state disciplinary agencies are undermanned and underfinanced, many having no staff whatever for the investigation or prosecution of complaints.

Id. at 797-98. Thus, while exact figures are not available, it seems fair to suggest that bar associations across the country have been less than anxious to disbar or even censure their members in substantial numbers.

contributed to and continue to contribute to the erosion of ethical standards and professional trust? Certainly the necessary conditions did not evolve overnight, but rather must have been the culmination of a long and even tortuous process of development. It is the purpose of this Article to examine the conditions which appear responsible for the erosion of ethical standards in the legal profession and to assess the means available to reverse the trend towards transforming this profession into a moral laughingstock. For in the end, no republic which regards its lawyers with contempt and suspicion—however well deserved—can long remain law abiding. Indeed, it can barely remain free; it can never remain just.⁸

Any attempt to understand the behavior of the lawyer in contemporary America must begin with a simple proposition: the American legal profession has undergone a rather curious pattern of sociopolitical development when compared with the legal professions of other Anglo-Saxon democracies.⁹ It is this developmental process that has shaped much of the ethical perspectives and behavioral patterns demonstrated by lawyers today. The pull of history is indeed strong and its effects far reaching. Certainly, the understanding that the American legal system and the place of lawyers as its chief practitioners are categorically different from those of other contemporary democracies is a basic realization necessary to comprehend the nature of America's legal profession. In brief, American conceptions of the state, the economy, and the social order are radically different from European conceptions. At base, that difference revolves about the fact that Europeans have long taken it as axiomatic that the state, the economy, and the social order require some form of direction if anything but chaos is to result. Thus, the rise of socialist doctrine, for example, was a peculiarly European phenomenon. American social thought has placed itself at the opposite pole. Deeply engrained in American ideology is the premise that the social order, the economic order, and the political order are indeed self-regulating. It is from this difference in perspective that the conditions which have shaped the ethical and behavioral patterns of the American lawyer have sprung.

Consider the argument that the political order itself is self-regulating.

⁸ The court in *Maryland State Bar Ass'n v. Agnew*, 271 Md. 543, 318 A.2d 811 (1974), emphasized the profession's pivotal role in the legal system, stating:

The administration of justice under our adversary system largely depends upon the public's ability to rely on the honesty of attorneys who are placed in a position of being called upon to conduct the affairs of others both in and out of court.

Id. at 547, 318 A.2d at 814.

⁹ The sociopolitical development of the law and the legal profession, in both common law and civil law countries, has been studied extensively. *See, e.g.*, H. ABRAHAM, *THE JUDICIAL PROCESS* (2d ed. 1968); T. BECKER, *POLITICAL BEHAVIORALISM & MODERN JURISPRUDENCE: A WORKING THEORY & STUDY IN JUDICIAL DECISION-MAKING* (1964); W. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968).

One need look no further than James Madison and his famous contributions to the *Federalist Papers* for justification of this position.¹⁰ In short, Madison argued that societies are divided into self-forming factions or groups which tend to coalesce around similar interests. These groups then begin to press their interests upon government in an effort to obtain for themselves "what government has to give."¹¹ Is the group struggle to be regulated by the government? Indeed not. The struggle for resources and influence can be autoadjusting, since the very process of seeking advantage will force some groups to abandon their more extreme positions and to reconcile others. In other instances, groups will cancel each other out. Those that do succeed in penetrating the governmental structure can expect to confront a bewildering maze of checks and balances, coupled with a system marshalling a multiplicity of veto points designed to check the tyranny of any single group.¹² Out of this continuing struggle evolves a kind of general equilibrium. It is this equilibrium—defined as the ascendant coalition of interests at any point in time—that comes to pass as public policy and is identified with the public interest.¹³ Since the process of formulating such public policy is the result of "natural" forces within the body politic, it is unnecessary for government to act as regulator, formulator, or protector of the public interest. Public policy will, accordingly, form naturally, be challenged, and eventually change, all without active intervention by governmental authority.¹⁴ The result is a conception of the

¹⁰ See THE FEDERALIST No. 10 (J. Madison).

¹¹ *Id.* at 52-54 (H. Lodge ed. 1888) (J. Madison). For a contemporary argument that the American system is one of interlocking and frequently competing elites, see T. DYE & L. ZEIGLER, *THE IRONY OF DEMOCRACY: AN UNCOMMON INTRODUCTION TO AMERICAN POLITICS* (3d ed. 1975). The authors argue therein that the American political system rests upon the economic interests of powerful elites. These elites are small in number, but not necessarily conspiratorial or closed; they may even be "public-regarding." The elites are grouped by the authors into three categories: corporate, public interest, and government. Significantly, the authors found that 56.1% of government leaders are members of the legal profession, and that 25.8% of all leaders have law degrees. *Id.* at 90-98, 129-31.

¹² See Churchill, *Socialism and Centralization of Power*, in *THE CONSERVATIVE TRADITION IN EUROPEAN THOUGHT* 370 (R. Schuettinger ed. 1970). In discussing the system of checks and counterchecks, the author notes that "[t]he scheme of the American Constitution was framed to prevent any one man or any one lot, getting arbitrary control of the whole nation." *Id.* (emphasis in original).

¹³ Madison's ideas are by no means in disrepute and still hold a respectable place in the literature of the social sciences. See, e.g., D. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND POLITICAL OPINION* (2d ed. 1968). See also Mitchell, *Intelligence and the Guidance of Economic Evolution*, in *AUTHORITY AND THE INDIVIDUAL* 3,13-15 (1974). Indeed, these authors argue that pressure groups influence policy decisions in all phases of government.

¹⁴ For a similar analysis of the effects of interest groups on government, see Mitchell, *Intelligence and the Guidance of Economic Evolution*, in *AUTHORITY AND THE INDIVIDUAL* 3 (1974). There, the author suggests that

we have seldom tried to work out national plans except when some considerable group

political process as autoadjusting, based in competition, and in no need of governmental planning or guidance.¹⁵

Just as the political order does not require regulation, so too, the economic order is perceived as being self-regulating. The adoption of the free enterprise, capitalist system, complete with Smithian notions of an invisible guiding hand, are so well known as to require only passing mention here. Initially, it was assumed that a free and competitive market involving a relatively large number of buyers and sellers would, through the laws of supply and demand, ultimately regulate itself.¹⁶ So strongly is this premise rooted in American mythology that even today it is mouthed by important members of the government. There are two aspects to this conception of self-regulation: First, it is assumed that price will control the ebb and flow of goods in terms of both production and direction; second, and more importantly, it is assumed that competition will result in an equitable distribution of goods and services to all segments of the population. Accordingly, acceptance of these assumptions negates any need for regulation. Like the political order, the Smithian free enterprise economy responds only to "natural" laws of economics. Attempts at regulation are truly superfluous, and the best government is that which governs least.¹⁷

among us has become seriously dissatisfied with the results of private enterprise or of private enterprise as regulated by local or state governments. . . . And just as our individual thinking is commonly directed toward an immediate, specific difficulty, so most of our efforts at national planning have dealt with some single need that has been keenly felt by groups sufficiently numerous or sufficiently powerful to command attention.

Id. at 29. Thus, Mitchell, like Madison, considers group pressure to be the fundamental catalyst of governmental change.

¹⁵ A similar point of view has been espoused by several of this century's most prominent leaders. See, e.g., Churchill, *Socialism and Centralization of Power*, in *THE CONSERVATIVE TRADITION IN EUROPEAN THOUGHT* 370 (R. Schuettinger ed. 1970); Erhard, *Prosperity for All*, in *THE CONSERVATIVE TRADITION IN EUROPEAN THOUGHT* 358, 360 (R. Schuettinger ed. 1970).

¹⁶ See A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (E. Cannan ed. 1937).

¹⁷ See *id.* One highlight of Adam Smith's argument is his criticism of the merchantist doctrine, *i.e.*, it is the duty of the statesmen to control and regulate the economic activities of the masses. Smith contended that each individual, in his own particular situation, is a better judge of how to expand his wealth than is the distant statesmen. See Mitchell, *Intelligence and the Guidance of Economic Evolution*, in *AUTHORITY AND THE INDIVIDUAL* 3, 6 (1974). This theory has since expanded into what has become known as the doctrine of *laissez faire*. For a brief history of the *laissez faire* doctrine, see *id.*

Winston Churchill espoused a view similar to that of Adam Smith. He stated:

We hold that in these modern times planning, with all the resources of science at its disposal, should aim at giving the individual citizen as many choices as possible of what to do in all the ups and downs of daily life. The more a man's choice is free, the more likely it is to be wise and fruitful, not only to the chooser but to the community in which he dwells.

Finally, the social order also is considered to be self-regulating. The adoption, virtually intact, of the notions of Adam Smith, Charles Darwin, and Herbert Spencer make the search for anything resembling social justice logically absurd simply because such a search is patently unnecessary.¹⁸ In the operation of this social system, the fit survive and the unfit do not—although this latter condition normally translates into poverty rather than death. The entire mad scramble for survival and the resulting pecking order are purportedly governed by natural laws rooted heavily in a pseudobiology. In the end, the result in this area, like the result in the political and economic spheres, is the same, *i.e.* the need for some form of regulation in pursuit of social justice—defined here minimally in terms of mitigating at least the extremes of wealth and poverty—is dismissed as superfluous.

The framers of other democracies in the western world took an entirely different view than the one which was eventually adopted in America. This was especially the case in England, the birthplace of socialism as well as free enterprise and Social Darwinism. Generally, the regulation of the political, social, and economic order was, in the European analysis, both proper and necessary to avoid social chaos and mass injustice. This view, coupled with the rise of legal positivism as a philosophy (law as the dictates of the state as opposed to the affirmation of natural laws), clearly leads directly to the conclusion that the primary mechanism for controlling the economy, the society, and the political system should be the law. Now, when one speaks of the law as a mechanism for control, what is ultimately being suggested is that law be used to mitigate the effects of the social and economic process as they would operate if left unregulated.¹⁹ Accordingly,

Churchill, *Conservative or Socialist Planning?*, in *THE CONSERVATIVE TRADITION IN EUROPEAN THOUGHT* 372 (R. Schuettinger ed. 1970).

¹⁸ The application of Darwinian biological arguments, *see* C. DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* (1859), to human societies can be found in H. SPENCER, *SOCIAL STATICS OR ORDER TOGETHER WITH MAN VERSUS THE STATE* (2d rev. ed. 1915). Actually, Spencer preceeded Darwin's work by almost 9 years. Once Darwin had made the results of his study known, however, the Spencerian argument was able to draw upon a body of "scientific fact" for support, thus quickly enlarging its believability.

Of course, the American socioeconomic system and the legal system are not totally unregulated, since neither Smith nor Spencer provide anything close to an adequate model for our technological society. Although many interests are regulated, some interests are more regulated than others, and some are regulated to their greater self-advantage. For instance, the American Medical Association does not restrict the number of doctors in the interests of better medicine, but rather in the interests of greater income for doctors. Similarly, although the legal profession is self-regulated, this is not necessarily done in the pursuit of justice, but may be directed at the goals of income and prestige. So it is with special interest legislation; such laws protect these interests in direct proportion to their power. Accordingly, the Federal Energy Administration is manned by oil executives and the legal system by lawyers who protect the interests which can pay them.

¹⁹ For an account of the development of economic thought in England, from its beginnings

such a perspective necessitates the construction of some notion of just what political, economic, and social justice should entail. Once the law is harnessed to these conceptions, the law and its practitioners become the primary mechanisms for achieving political, economic, and social justice. This view of the law never took solid root in the American mind for the simple reason that the affirmation of existing natural laws governing politics, society, and the economy made it superfluous. Thus, any comparison between European and American systems of law and the respective positions of their legal professions must recognize this basic difference: in America the law was never conceived as an agent for achieving social justice and its practitioners have never been expected to pursue such "unnecessary" ends.²⁰

If, as has been argued, law in the United States is not perceived as a mechanism for both defining the public good and achieving that public good through its application, is it a fair question to ask just what role the American lawyer is supposed to play? If he is not an agent of social regulation aimed at achieving social justice, then what is he? In response to the implicit tension extant within the modern democracy, the lawyer, both American and European, has stressed his dual role as an officer of the court and an advocate of his client. That such roles may come into conflict is all too obvious.²¹ Indeed, the way in which such conflicts are typically resolved is important in defining the American legal profession's development and distinguishing it from its European counterpart.

Focusing for the moment on the lawyer's role as an officer of the court, it seems clear that such a role is consistent with the position that law and its agents ought to be active mechanisms for achieving and defining social justice. This role, in turn, is certainly most consistent with the European view that social, economic, and political orders are not autoadjusting in terms of either processes or ends. Accordingly, the lawyer who tends to stress his role as servant of the court is virtually flying in the face of those

as *laissez faire* through its transformation into active social control, see G. SABINE, A HISTORY OF POLITICAL THEORY 635-680 (4th ed. 1973).

²⁰ The identification of American law with the client-advocate role, especially as it pertains to defending the commercial interests of the client, is reflected in the fact that the British practice of "reading law" was quickly abandoned in America in favor of the "law school." The law school idea is essentially based on a notion of technocracy and is an offshoot of the business ethic and the predominance of business influence in the American scene. Indeed, it was the business community that first financed the professional school movement. See D. WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION 5 (1948).

²¹ The American Bar Association has recognized the conflict inherent in a lawyer's dual role. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 7. The Code states that "[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." *Id.* EC 7-19.

forces largely responsible for shaping the American public ethos. In fact, the American notions of a self-regulating sociopoliticoeconomic order is far more consistent with the lawyer's alternative role as defender of his client and his client's interests. Viewed in this light, it is hardly surprising to note that lawyers in the United States have found it convenient to stress their role as client advocates rather than as defenders of the public interest or even as servants of the law.²² In short, the very public ethos associated with social development in the United States strongly militates against a lawyer emphasizing his role as officer of the court and servant of the law. Self-adjusting public orders negate the need for adjustors. In the nature of things, this can be a very agreeable position for the individual attorney who may, as an officer of the court, cloak himself in the mantle of the law while neglecting the ethical responsibilities of such a position. Thus, he can operate to great advantage in his advocate role while paying only lip service to the duty inherent in his position as officer of the court.

Given what has been said to this point, the argument lends itself to the interpretation that the direction of the legal profession, as well as its choice of roles, is directly related to and is probably a result of those greater underlying forces which historically have shaped the American public ethos. The doctrines of indeterminate government based in the struggle of private interest groups, economic *laissez faire*, and Social Darwinism have all contributed to the general ethos of the United States; the legal profession has adopted this ethos in much the same way as any other group in our society.²³ When viewed in the aggregate, this development can hardly be termed beneficial. Denied the appropriate philosophical background against which to act out their role as servant of the court, lawyers apparently have stressed their role as advocate of client interests and have begun to view the law and its application primarily as a means of economic advancement. Such a position is starkly logical. Any self-regulating society provides little opportunity for pursuers of social justice. It does provide ample justification, however, for profitably furthering the system of interest-group politics, secure in the naive belief that the pursuit of a multiplicity of private interests will result in an equilibrium equivalent to the public interest.²⁴ In the end, a lawyer becomes just one more seller in the market place, offering his skills to the highest bidder.

²² For a discussion of the lawyer's advocate role, see Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 584 (1961).

²³ See Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 410 (1953).

²⁴ As naive as the notion may be, we Americans tend to believe rather strongly in the myth that a multiplicity of interests placed in competition will eventually produce something called the public interest. See generally Schubert, "The Public Interest" in *Administrative Decision-Making: Theorem, Theosophy, or Theory?*, 51 AM. POL. SCI. REV. 346 (1957).

To the extent that the argument advanced thus far is correct, it would seem reasonable to expect the bulk of the more successful lawyers, especially those who have been practicing for sometime, to be employed in the area of "financial" law. By financial law is meant that area of the law which pertains to various aspects of commerce. Thus, securities, banking, and tax lawyers, corporate lawyers, insurance lawyers and general corporation lawyer-lobbyists would fall into this category. In contrast, one would expect to find only a relatively small number of attorneys, most probably recent graduates of law school, engaged in the practice of "social" law, that is, law concerned with the attempt to help relatively powerless individuals or groups achieve some sort of "fair share" of the system's output.²⁵ This category includes public defenders, rent lawyers, consumer advocates, and the like. Clearly, financial law corresponds closely to the lawyer's role as client advocate, while social law is far more consistent with the philosophical and ethical justifications underpinning the role of the attorney as an officer of the court.

In the absence of definitive empirical data, this suggestion cannot be proven conclusively. Yet, even a cursory examination of the legal system reflects the sad shape of the public defender system, the general lack of criminal lawyers available in most areas of the country, the difficulty and at times inability of the poor to secure competent counsel,²⁶ an overloaded court system which virtually denies justice by delaying it, while making such delays profitable for the lawyers involved, the scandalous condition of probate procedures which encourage rather than discourage challenges to one's final testament, all to the profit of the attorney involved, and a multitude of other abuses too commonly recognized to need mentioning. All of this suggests that the social law aspects of the legal profession have been sadly neglected.²⁷ In any event, the perception of the lawyer as a

²⁵ The search for monetary gains and a prestigious practice has indeed drawn many of the more competent lawyers away from the practice of criminal law and into more "suitable arenas for distinguished counsel." Foster, *Lawmen, Medicine Men and Good Samaritans*, 52 A.B.A.J. 223, 225 (1966). This trend is so noticeable that it has been argued that the "minority practitioner is the major agent and representative of the organized Bar vis-à-vis poor people," and that there are numerous "ways in which the organized Bar has failed the ghetto poor," the class of people most in need of the criminal lawyer. Clark, *The Minority Lawyer: Link to the Ghetto*, 55 A.B.A.J. 61 (1969). At least one major factor contributing to the trend away from the practice of criminal law has been the growth of the large corporations and the concomitant large fees which a competent attorney can extract from them. See, e.g., Gossett, *The Corporation Lawyer's Social Responsibilities*, 60 A.B.A.J. 1517 (1974). See also Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121 (1968); White, *Human Dimensions of Wall Street Fiction*, 58 A.B.A.J. 175 (1972).

²⁶ See note 25 *supra*.

²⁷ See Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966); Clark, *The Minority Lawyer: Link to The Ghetto*, 55 A.B.A.J. 61 (1969); Kirgis, *Law Firms Could Better Serve the Poor*, 55 A.B.A.J. 232 (1969); *Report of the Ameri-*

servant of the economically and socially powerful is clearly well rooted in the popular mind. Hence, in light of the American public ethos, it is hardly surprising to discover a substantial proportion of the legal profession, including the most financially successful attorneys, practicing in those areas actually designed to enable powerful interest groups to press their demands upon the political system in true Madisonian fashion. To note this condition is to note the emphasis extant within the legal profession: a manifest tendency to follow the powerful and rich in the hope of acquiring personal power and wealth.²⁸ This path leads inevitably into commercial activities of one sort or another. It cannot lead towards a concern for social justice attainable through use of law as a regulatory force. It cannot so lead because the public ethos supporting the commercial bias of the law is one which regards the task of defining, pursuing, and safeguarding the public interest as unnecessary as well as unprofitable.

This argument is not intended to give the impression that the emphasis evident in the legal profession is a result of inevitable forces over which no control is possible. To be sure, lawyers, like everyone else, are heirs to historical precedent and tradition. Nonetheless, the actual practices of the profession during any period contributes to the precedents used in the future. Consequently, continued professional emphasis upon the client-advocate role is as significant a factor in defining the perspectives and practices of the legal profession as is the weight of tradition. In short, this professional emphasis has obscured the need for the bar to develop and overtly support a professionally derived view of the public interest. Instead, the more narrow view of client interest has historically been given priority. This development should not be a surprise; since the law was never intended to be a mechanism of social justice in America, it is not startling to discover that, as a profession, lawyers have failed to develop a coherent conception of what the public interest should be. The implications of this failure border on the ominous.

Members of the legal profession have always laid claim to a special position in democratic society. Like members of the medical profession, lawyers advance the argument that the inordinate amount of social prestige rendered to them is a proper reflection not merely of their economic achievement, but primarily of the nature of their being special practitioners of arts vital to the society.²⁹ While the medical doctor's special claim

can Assembly on Law and the Changing Society, 54 A.B.A.J. 450 (1969); Shriver, *Law Reform and the Poor*, 17 AM. U.L. REV. 1 (1967).

²⁸ An examination of the number of Congressmen who hold law degrees revealed that in 1973, 63% of all Senators and 48% of Representatives were lawyers. No other western democracy so places its lawyers in positions of public power. See T. DYE & L. ZEIGLER, *THE IRONY OF DEMOCRACY: AN UNCOMMON INTRODUCTION TO AMERICAN POLITICS* 322 (3d ed. 1975).

²⁹ See Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405 (1953). In classifying the law as "a harmonizing and unifying force" in our society, the author reasons

rests upon his purported ability to deal with the question of life or death, the lawyer's claim to special prestige has been based upon his role as servant of the law. Indeed, the special position of the members of the legal profession has been enshrined in sacred cows such as the attorney-client relationship, a privileged sanctuary which may actually obstruct the process of justice. Members of the bar have claimed a position which is justified largely by the assertion that they fulfill an essential function in society.

Even accepting this argument for a special position, one immediately encounters the dismal ethical practices which contradict the lawyer's claims of privilege. Because they have deemphasized their role as officers of the court while stressing their role as client advocates, it is hard to see how they differ from any other special interest group in our society. Lacking a truly moral-philosophical basis for being special practitioners, it would appear that the stressing of the client-advocate role coupled with the growing emphasis on the practice of financial law has transformed the legal profession into little more than another interest group. Significantly, however, this interest group promotes its own security and advancement largely through the practice of helping the already powerful garner and protect their prerogatives. At the same time that the lawyer claims privilege as an officer of the court, he is in the enviable position of using the law to benefit himself and the special interests which employ him. The argument of special practitioners is here transformed into one of special pleader. The ultimate irony is, of course, the lawyer's tendency to cloak this self-serving emphasis in the pseudomorality of the special practitioner. In the end, lawyers are fast beginning to resemble tribal shamans who are accorded social respect and prestige beyond all proportion to the service they perform.

If it is correct to assert that members of the legal profession have begun to act like members of any other special interest group in our society, it is not surprising that we increasingly find them adopting the morality of these other groups, a morality which is essentially that of a commercially oriented entrepreneur dedicated to the maximization of financial gain, social power, prestige, and deference.³⁰ One result of this metamorphosis is the insanity of Watergate with its ultimate irony: a

that "[w]ithout law, organized society would be impossible." He also states that "[m]en have need for more than a system of law; they have need for a system of law which functions and that means they have need for lawyers." *Id.*

³⁰ This characterization is not meant to be derogatory. Indeed, the notion that groups within the politicoeconomic arena should and do pursue the maximization of power, profit, and prestige is basic to American, Smithian, and Social Darwinist thought. Further, we find this premise enshrined in the "rationality" models developed by social scientists to explain the "real" world. See A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

conspiracy upon the part of a group of lawyers to subvert the very law they had all sworn to preserve, protect, and defend. Most certainly this is not the morality so ardently professed by a legal profession doing its best to marshal a rhetorical defense of a position from which it demands deference and respect from society at large.

But perhaps this criticism is unfair. Is it really all that bad for lawyers to adopt the dominant ethos and morality of the business culture which has so often been acclaimed as the hallmark of America's success in the world? After all, social responsibility can only be expected to extend so far and, in the end, no one works for nothing! This argument, however, is misplaced. The fact is that irrespective of the actual behavior of its members, much of which has been reprehensible, the legal profession continues to cloak its activities in traditional language, demanding deference, stressing legality, and insisting on respect for the law.³¹ The paradox is that the justification for this deference is based in the logic of the special practitioner, although the ethos of the society admits of no need for such special practitioners and the practitioners themselves violate their special moral position in service of the historical ethos. Moreover, the continued use of the role of the lawyer as a court officer to justify his elevated social position further publicly identifies the behavior of the lawyer with the legitimacy of the law.³²

It must be noted that in the final analysis there is a significant difference between the lawyer as he is perceived by the public and the lawyer's self-definition. The identification of the ethics of the lawyer with the ethics of the law is but a singular manifestation of the identification of the application of the law with the ultimate legitimacy of the state. Viewed from this perspective, a corrupt accountant or an embezzler commits only private crimes since his actions have little or no effect on popular perceptions of the legitimacy of the political order. But the corrupt acts of a lawyer and the failure of the legal profession to condemn such acts takes on the character of a public crime insofar as a corrupt lawyer tarnishes the law itself, and, as a result, erodes the legitimacy of the state as perceived by the populace. If legitimacy is to be accorded to the law, it must not only be just, it must also be perceived as just. Illegal and unethical behavior by members of the legal profession, at the very least, erodes the law and, at worst, undermines the Republic itself.

What, then, is the conclusion? It seems proper to suggest from this analysis that the legal profession in the aggregate has in fact lost its moral

³¹ See ABA CODE OF PROFESSIONAL RESPONSIBILITY; Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974); Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974); Sutton, *A Preview of the Proposed Code of Professional Responsibility*, 53 A.B.A.J. 901 (1967).

³² See Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974).

bearings. Having failed to develop a conception of the public interest, it logically stresses a role that is antithetical to the pursuit of social justice. As a consequence, the profession accepts a role readily adapted to the morality of the marketplace and the modern corporation while, simultaneously, it continues to lay claim to a privileged position in society although the justification for that position is no longer evident. If lawyers ever were special practitioners in American society their present behavior no longer qualifies them as such, legal rhetoric and moralizing to the contrary notwithstanding.

Perhaps the legal profession in America has lost its moral direction because the principles upon which it was based were incorrect to begin with. The role of the lawyer as servant of the law, so readily accepted in Europe, cannot be accepted if one accepts the premise that the political, economic, and social orders are self-regulating. To reject this premise, basic as it is to the American ethos as developed through the frontier experience, Madisonian politics, free enterprise, and social darwinism, is to reassert immediately the role of the lawyer as "servant of the law." In this capacity, a lawyer's task is to see that justice is done through the instrumentality of courts which, as even the most awkward of political science students knows, are quite capable of acting as legislatures and active instruments for the achievement of social justice.³³ Consider the dilemma: if the legal practitioner accepts his role as servant of the law, he rejects the socioeconomic system which is the foundation of his privilege; if, on the other hand, he rejects his ethical responsibilities as a legal officer, he stands revealed as the purely economic creature he indeed appears to be.

It is submitted that the premises supporting the current commercial role of law are incorrect today, just as they were incorrect when first they permeated the American social consciousness. In the final analysis, only a fool or a madman truly believes that a complex social, economic, and political entity such as the United States can truly be autoadjusting. To maintain this fiction, say a hundred years ago, was perhaps tolerable. In a modern social setting, however, to persist in this blindness borders on the criminal. Certainly, only the modern system can truly grind down the individual without even being aware that it is doing so and, indeed, doing it legally.³⁴ Accordingly, to perpetuate the commercial ethic as a means of justifying the behavior of the legal profession is not only nonsense, but also dangerous.

³³ For a discussion of the judiciary's legislative role, see G. SCHUBERT, *THE POLITICAL ROLE OF THE COURTS: JUDICIAL POLICY-MAKING* (1965).

³⁴ The Internal Revenue Code and its application by a powerful and largely uncontrolled bureaucracy is a perfect example of a system that can trap the individual, reduce his freedom, and penalize him—all legally and with little regard for the concept of fairness.

What is to be done? It seems that what the members of the legal profession must do is to begin to reaffirm their role as servants of the law and officers of the court. They must come to realize that the doctrines of a hundred years ago, invalid even then, are clearly inapplicable today. There is a clear need to reaffirm the role of law as a creative force in regulating social, economic, and political affairs in the Republic. This reaffirmation must be combined with a new perspective toward achieving some notion of social justice, and this, in turn, requires that the legal profession begin its search for such a doctrine. At present, it has failed to develop cogent and applicable ideas of what goals the law should pursue in dealing with the often hostile poles of public and private interest. Young lawyers must learn that the law is far more than a punitive force or a means to the achievement of special privileges for the already powerful. For most of society the law is the sole instrument, other than violence, with which to achieve social justice. If those who claim to be its custodians refuse to take up the challenge of seeking and achieving social justice, and decide instead to emphasize its commercial aspects as the surest route to private gain, then the public has not only been abandoned, it has been betrayed.

After all is said and done, the authors cannot help but feel that there is a clear need for a moral renaissance in the legal profession. If it is truly a "special and learned profession," then its social responsibilities, together with its power and influence, are indeed greater than those of other social groups. In the same way, its moral standards must be higher than those of other interest groups. Our charge is that they have, as a profession, lost their sense of moral direction. Unless they are able to reaffirm and rediscover this direction, acts of unethical conduct will become more frequent, and the profession perhaps even more silent in its response to such acts. More importantly, the legal profession does not stand alone. The lawyer in America, whether he likes it or not, is perceived by the public as a representative of the law. Every act of questionable conduct has a corrosive effect on the legitimacy of the law and eventually erodes public perception of the legitimacy of the general political order. In the end, the very foundations of the state are brought into question, and down that path the Republic can find only disaster.