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DEMOCRACY, EQUALITY, AND THE ROLE OF THE LEGAL PROFESSION

ANTHONY G. SOLARI*

What do lawyers do? To the detriment of the legal profession, the American public is formulating a decisively negative answer to this question. Increasingly, lawyers are seen as self serving “hired guns” more concerned with the “bottom line” than with the pursuit of justice. One need only compare, for example, the portrayal of lawyers in “Perry Mason” (however inaccurate that portrayal may have been) to their portrayal in “The Verdict” or in “L.A. Law” in order to see just how much popular perceptions of the profession have changed.¹ The view that lawyers are “just a bunch of whores”— as a character in “The Verdict” put it — is increasingly widespread, and opinion surveys have confirmed statistically what Hollywood has portrayed dramatically.²

While some undoubtedly take satisfaction in this state of affairs, there is cause for deep concern here. The public’s loss of esteem for the legal profession reflects a profound loss of faith in our society as a whole. The legal profession shares in the responsibility for this state of affairs. It has contributed to the crisis of public confidence by losing sight of the very purpose which justifies its existence: insuring fairness and equality both in and before the law. More than an important social function, it is a sacred trust. This is especially so in a commercial republic like ours, where the “free market” mechanism has worked to replace civic virtue

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1. It is true that lawyers have not always been viewed in a positive light. For example, John Donne said in the early seventeenth century: “When sicke with Poetrie, and possess with muse/Thou wast, and mad, I hop’d; but men which chuse/Law practise for meere gaine, bold soule, repute/Worse then imbrothel’d strumpets prostitute.” J. DONNE, SATYRE II in *DONNE POETICAL WORKS*, 134 (H.Grierson ed. 1933).

What can be said is that in the last forty years, Americans have changed their perceptions of the integrity and honesty of the profession as a whole in response to their experience with lawyers who have been less concerned with right than with the size of their fees. We might add, that disparaging remarks about the legal profession throughout history probably reflect a similar disillusionment.

2. From the mid 1970’s on, an average of only 25% of surveyed adults responded that lawyers had a very high or high standard of honesty. In 1985 only between 8% and 9% of adults said they would recommend a legal career to a young man or woman. *G. Gallup, The Gallup Poll, Public Opinion 1985*, 226 (1985).

with the "ethic" of self interest and where public purpose has succumbed to the anarchy of interest group libertarianism operating in an atmosphere of mutual exploitation.

It would be unfair, however, to lay the blame entirely at the door of the profession. A chain is only as strong as its weakest link, and a legal system can only be as good or just as the society of which it is a part. I will argue in what follows, that the problems of the legal profession are inseparable from those of society at large, and that our current predicament stems from a lack of public purpose and public spiritedness properly understood. Furthermore, I will argue that these problems are in turn caused by a set of fundamental contradictions which underlie our socio-political order. My argument obviously extends beyond a narrow focus on the legal profession. This is necessary, however, if the problems facing the profession are to be properly identified and understood. Only once this has been accomplished can solutions be explored.

In what follows I will be formulating an argument as to the above mentioned contradictions and will offer a rough outline of some solutions. In Part I, I will make some brief points about interpreting the founders. In Part II, I explicate the classical view of political life, contrasting it with what the founders' thoughts on politics were which are presented in Part III. In Part IV, I argue that the founders were motivated by an aristocratic impulse, and in Part V, I place the legal profession within this group and squarely at the focus of the founders' views on politics. Part VI examines the role capitalism plays in all of this. At this point in the essay, I will have occasionally responded to the points made by James Beckwith in his *What Should Lawyers Do? An Essay on Lawyers, The Free Economy, Redistribution, and Democratic Legitimacy*. In Parts VII and VIII, I take some time for a more detailed examination of his argument. Part IX consists of a set of proposals for solving some of the dilemmas and issues discussed in my essay and calls for the legal profession to closely examine the course it presently seems to be charting.

Before I begin, I would like to make a point or two about the chances of finding solutions to the profession's problems. It is a difficult task and given the complexity and depth of the factors involved, I tend to be somewhat pessimistic as to the probability of success. It seems certain, however, that our chances of finding solutions will not be improved through recourse to pietistic homilies about man's ignorance or about the need for trust in "our Creator" who will, presumably, step in to save mankind from itself. Such sentiments (which are more appropriate to the church than to the academy) pass all too easily in current intellectual discourse. At times tritely sincere, often they are stated for the purpose of ideologically justifying an existing or desired state of affairs.³

3. On the use of religion in this manner and for some interesting recent examples, see R.

Man has created the problems he faces and he had better well be capable of solving them. True enough, man is not omniscient and the recognition of this fact is the hallmark of the truly wise. But even Socrates, who humbly claimed to have no true "wisdom", knew that his powers of reason gave him insights into human affairs not shared by most others.⁴ Socrates believed in the power of these insights to solve some of man's problems, and his insights have profoundly shaped our world. Solving the problems we face will be impossible without absolute confidence in our ability to do so. Recognizing the gaps in man's knowledge is one thing. Hiding one's head in the sands of ignorance and hoping our problems will rectify themselves or be solved for us by some *deus ex machina* is quite another.⁵

I. INTERPRETING THE FOUNDERS

Beginnings are crucially important times and this is no less true of societies than it is of individuals. The problems the legal profession faces can be traced in substantial part to the founding of the republic, and in this regard, the triumph of the Federalist's views at the constitutional convention are especially important.

Discussions about the founders' intentions are perilous undertakings. The founders were a diverse group of men with differing views on both the events of their time and the constitution on which they labored.⁶ Those who speak of *the* intent of *the* founders assume a coherence and agreement in the founders' thoughts that never existed. Nevertheless, fools rush in where wise men tread with caution. Just what the founders' intentions were is debatable. However, we do know that they were possessed of sufficient foresight to see that times would change and that the constitution they created would have to be vague if it was to remain a document relevant to future generations.

In speculating on the interpretive arts, James Madison well knew that which many contemporary observers fail to realize:

But no language is so copious as to supply words and phrases for every complex idea or so correct as not to include many equivocally denoting

BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER, & S. TIPTON, *HABITS OF THE HEART* 219-49 (1985) [hereinafter BELLAH]. See also D. BELL, *THE CULTURAL CONTRADICTION OF CAPITALISM* 146-50, 157 (1978).

4. On the insights into human affairs that philosophy gave Plato, see PLATO, *THE REPUBLIC OF PLATO* 193-96 (A. Bloom trans. & ed. 1968).

5. In ancient Greek and Roman drama, deities were brought in through the use of stage machinery to resolve difficult situations. In modern usage, the phrase refers to any artificial or improbable device used to resolve some situation or untangle a plot. See *THE AMERICAN HERITAGE DICTIONARY* 360 (W. Morris ed. 1981).

6. For a concise statement on the differences between Hamilton and Jefferson - or on the federalists and anti-federalists, see *THE ENCYCLOPEDIA OF AMERICAN HISTORY* 123-24 (R. Morris ed. 1953).

different ideas And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.⁷

When a document is left intentionally vague, as our constitution was, how much more difficult is the task of knowing the intent of its authors?

This is not to say that we must abandon attempts to understand the founders or to make use of what they have left us. In doing so, however, we must be exacting in our use of citation. This allows those observing the debate to decide for themselves the correctness of the interpretation.

For example, we should be suspicious when we are told, as a recent contributor to these pages attempts to tell us,⁸ that Madison argued against “redistribution of wealth” through the “abuse of politics” and that he favored something called “wealth creation in the market.”⁹ No documentary evidence is offered for these attributions, which later in the same discussion, serve as an example of something called an “interpretivist” as opposed to a “non-interpretivist” approach to constitutional law.¹⁰ Given Madison’s actual views, this is not surprising. In his discussions of the Senate in the Federalist Papers,¹¹ Madison made the case for stable government. Stability is important because one of the problems instability creates is:

The unreasonable advantage it gives to the sagacious, the enterprising and moneyed few over the industrious and uninformed mass of the people . . . [this is] a harvest reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said with some truth that the laws are made for the few, not the *many*.¹²

Madison recognized that wealth is never “created,” especially not by entrepreneurs, but has its source in the sweat and toil of the countless people who wrest value from nature.¹³ While Madison did fear the redistributive passions of the many,¹⁴ he also recognized that the unequal distribution of property was “the most common and durable source of

7. THE FEDERALIST NO. 37, at 229 (J. Madison) (C. Rossiter ed. 1961), (This edition is used throughout this essay).

8. Beckwith, *What Should Lawyers Do? An Essay on Lawyers, The Free Economy, Redistribution, and Democratic Legitimacy*, 16 N.C. CENT. L.J. 1 (1986).

9. *Id.* at 11.

10. *Id.* at 20.

11. THE FEDERALIST NO. 62, at 381 (J. Madison).

12. *Id.* (emphasis in original).

13. Others have recognized this fact as well, especially Karl Marx. K. MARX, EARLY WRITINGS 259-63, 268, 270-71, 276-77 (R. Livingstone, G. Benton trans. 1975).

14. Shay’s Rebellion in Western Massachusetts with its call for debt alleviation and lessening of property differences troubled Madison and acted as a spur to the constitutional convention.

faction,"¹⁵ and as such one of the greatest dangers to Republican government. It was, Madison argued, "the principle task of modern legislatures to regulate these varied and interfering interests."¹⁶

In what follows, I will make every effort to be as careful in citation as scholarship demands.

II. THE CLASSICAL VIEW OF POLITICS

In besting the anti-federalists at the constitutional convention and in the ensuing debate over ratification, the federalists did more than assure the creation of a strong federal government. Their victory involved a rejection of the view of political life left to them by antiquity in favor of a "new science of politics" based on modern beliefs about the nature of man and his relationship to the public sphere.¹⁷ It is from the federalists' rejection of the classic view of politics that the difficulties of the legal profession stem. It will be necessary, therefore, to explicate this view in some detail.

To the ancient Greeks man was a political and social animal. It was, therefore, man's nature to live in civil society, and Aristotle tells us that men were not considered fully human unless they participated in the act of governance.¹⁸ According to Aristotle, those who have no city, no state, are by nature either too bad or too good; either animals or gods.¹⁹ Participation in society enabled men to become virtuous, and "the excellent or complete human being is the end for which the city exists."²⁰ Since the state was a necessary condition for the fulfillment of human potential, it was also "both natural and prior to the individual."²¹ Men, being rational, would recognize that they were dependent upon the state if they were to gain the best things life had to offer. This classical understanding of the relationship between man and the state included views on the individual, freedom, and equality that are quite different from our own. All three can be illuminated through a discussion of the classical idea of citizenship.

15. THE FEDERALIST No. 10, at 78, 79 (J. Madison).

16. *Id.* at 79.

17. I am heavily indebted to the following works and individuals for the views expressed in this section. It would be at best unfair of me not to acknowledge that in large part, I owe the interpretation presented here to their influence. McWilliams, *On Equality as the Moral Foundation for Community*, in THE MORAL FOUNDATION OF THE AMERICAN REPUBLIC 183 (R. Howitz 2d ed. 1979); McWilliams, *Democracy and the Citizen: Community, Dignity, and the Crisis of Contemporary Politics in America*, in HOW DEMOCRATIC IS THE CONSTITUTION 79 (R. Goldwin & W. Schamberg eds. 1980) [hereinafter *Democracy and the Citizen*]; R. BAKER, G. POMPER, & W.C. McWILLIAMS, AMERICAN GOVERNMENT chs. 1 & 15 (1st ed. 1983) [hereinafter BAKER].

18. ARISTOTLE, THE POLITICS 28-29 (T.A. Sinclair ed. 1976).

19. *Id.*

20. *Democracy and the Citizen*, *supra* note 17, at 83.

21. ARISTOTLE, *supra* note 18, at 29.

“To ancient political science, citizenship came first in the ordering of democracies.”²² The test of the good citizen, Aristotle tells us, is “to know well how to rule and be ruled.”²³ In a democratic regime, ruling means that “each citizen must be able to share in defining the public’s alternatives and have an equal say in what is chosen and for what end.”²⁴ In turn, the democratic citizen is ruled by virtue of his acceptance of the will of the majority.

Accepting majority rule may not always be easy, especially if one feels the majority is wrong, or if one is part of a powerful minority. We each accept majority rule because we understand our dependence on our fellows for the good life, and because, as Cary McWilliams has said, we accept “the principle [of] the political equality of all citizens.”²⁵ If other members of the community are corrupt (i.e., unjust, anti-democratic, or radically individualistic) or if the political society is misdirected (i.e., its aim is “only the good of the rulers” or the few), my ability to achieve “the good life” will be correspondingly hindered.²⁶ Of the three personal failings mentioned, that of the radical individualist - one who loves his personal freedom above all and defines it in the modern sense of “doing as one likes” - presents the greatest danger to republican government because both anti-democratic and unjust behaviors stem from his all-encompassing self love.

Individualism, the clarion call of our era, was recognized by the ancients as an inevitable part of life.²⁷ Our bodies and our senses remind us of our separateness from one another. We search for that which makes us happy and favor those who help us achieve it. The public-spirited, democratic citizen learns to control his private urges, and tries to learn “not to confuse [his] private interests with the public good.”²⁸ This is a stern requirement, but a necessary one if democracy is to work. It is in this sense that one must learn to “rule oneself” as a prerequisite to democratic participation.

Self rule, understood this way, means that “freedom” is not “doing as one likes.” We define it this way, however, because political freedom does tend to suggest to us that we are, indeed, doing “as we like.” This leads us to privatize our understanding of freedom and associate it with our personal desires. Democratic citizens, according to Aristotle, must be educated so as to avoid this confusion of thought.²⁹

22. *Democracy and the Citizen*, *supra* note 17, at 80.

23. ARISTOTLE, *supra* note 18, at 109.

24. *Democracy and the Citizen*, *supra* note 17, at 80.

25. *Id.* at 81.

26. ARISTOTLE, *supra* note 18, at 115.

27. *See, e.g., id.* at 25-32; BELLAH, *supra* note 3, at 142-63.

28. BAKER, *supra* note 17, at 17.

29. On this argument, *see Democracy and the Citizen*, *supra* note 17; ARISTOTLE, *supra* note 18, at 236-37.

Present day commentators, taking their cue from the founders, define freedom in the modern sense of doing as one likes.³⁰ Liberty is understood to be the concern of individuals, “scattered independent actors who are free to pursue their own subjective preferences,”³¹ and who as a result “enjoy a greatly heightened personal autonomy.”³² They see democracy as “a method for the attainment of liberty,”³³ and in so viewing it, turn on its head the classical view that it is *freedom* properly defined that makes *democracy* possible.

Unfortunately, the modern individualist is no democrat. His hedonistic narcissism, and the freedom society allows him to pursue it, suggest to him that *any* restraint is a form of oppression, a denial of his “rights.” Such a person will do little to “keep in check that element of badness which exists in each and all of us.”³⁴ Modern democracy, based upon this mistaken and self-serving understanding of freedom:

tends to produce individuals who always prefer their private good. . . . Democratic citizens reject any rule about which they have had no say, but the individualist rejects any rule he does not like. Individualists would prefer not to be ruled at all and democracy can never be more than a second choice.³⁵

The idea of individual liberty must be “kept subordinate to the democratic first principle, political liberty and equal citizenship.”³⁶ A sense of public-spiritedness must act to guide us in our understanding of these concepts.

The classical idea of citizenship can also illuminate the concept of equality, a proper understanding of which is also necessary to democracy. Of the many threats posed to democracy by a lack of self rule (we moderns call it self control), perhaps the most dangerous is avarice. In the ungoverned soul, the desire for money and possessions knows no bounds. Lauded by present day defenders of capitalism as the driving force behind men’s actions,³⁷ the ancients understood it as the hallmark of beasts,³⁸ resulting in the unequal distribution of property so dangerous to democratic societies. Aristotle argued that it is the “duty of a truly democratic politician . . . to see that people are not destitute, for destitu-

30. See, e.g., Beckwith, *supra* note 8, at 3-6; BELLAH, *supra* note 3, at 142-63.

31. Beckwith, *supra* note 8, at 4.

32. *Id.*

33. *Id.*

34. ARISTOTLE, *supra* note 18, at 241; *Democracy and the Citizen*, *supra* note 17, at 82-83.

35. BAKER, *supra* note 17, at 16 (emphasis in original).

36. *Democracy and the Citizen*, *supra* note 17, at 82.

37. The entire argument Mr. Beckwith makes presupposes this view of human nature. The fact that he does not feel the need to explicitly state it only indicates how much it is taken for granted. Introductory economics texts are also good examples in this regard. See generally W. BAUMOL & A. BLENDER, *ECONOMICS: PRINCIPLES AND POLICY* (2d ed. 1982); P. HEYNE, *THE ECONOMIC WAY OF THINKING* (1973).

38. See, e.g., ARISTOTLE, *supra* note 18, at 64, 74, 76, 77.

tion is a cause of deterioration of democracy.”³⁹ Prosperity should be pursued, and “all that can be got from the revenues should be collected into a single fund and distributed to those in need.”⁴⁰

The founders also recognized the challenges to republican government posed by poverty. We have already touched upon Madison’s views in this regard. Thomas Paine, author of the influential “*Common Sense*,” argued that the elimination of poverty could only come about by changing the institution of private property.⁴¹ Society, Paine argued, was “entitled to receive the surplus that men accumulated beyond their own labor.”⁴²

Paine argued that a properly run government would give each person reaching adulthood a sum that would allow them a decent start in life.⁴³ Jefferson, sounding remarkably like Paine, stated that the rights of property were not without limits. “Where there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right.”⁴⁴

It would seem that redistributive policies played an important part in the founders’ thoughts. Jefferson and Paine, among others, understood that the equal exercise of political rights is dependent upon either limiting or narrowing differences in wealth among citizens. Great wealth makes men arrogant and gives them an illusion of self sufficiency. Poverty, conversely, makes the poor resentful of the wealthy and destroys the sense of dignity that democratic citizens need if they are to feel that participation in public life matters. Without dignity, the poor “have no reason to act responsibly” and they are likely to doubt whether anything like a “common good” exists.⁴⁵

We can see, therefore, that more than just equal treatment before the law is necessary for democracy to succeed. Equality of condition, or at the least, a narrow inequality of condition is necessary as well. However, as Aristotle pointed out, even this is a second best alternative, for, “[e]ven if one were to fix a moderate amount for all, that would still not answer the purpose; for it is more necessary to equalize appetites than property and this can only be done by adequate education under the laws.”⁴⁶ Even better than redistribution as a boon to democracy is the well governed soul in which avarice and greed have been brought to heel.

39. *Id.* at 246.

40. *Id.*

41. T. PAINE, *Agrarian Justice*, in *THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE* 605, 613-23 (P. Foner ed. 1974).

42. *Id.* at 605.

43. *Id.*

44. T. JEFFERSON, *HIS POLITICAL WRITINGS* 56 (E. Dumbauld ed. 1976).

45. BAKER, *supra* note 17, at 14-15; *see also Democracy and the Citizen, supra* note 17, at 84-85.

46. ARISTOTLE, *supra* note 18, at 74.

Such individuals seem ever more rare in our society. Their nurture and cultivation is the concern of us all.

The preceding argument suggests why "wealth creation" is a futile, unrealistic, and even hubristic means of alleviating poverty. Given the boundless acquisitiveness of the anarchic soul, we could never "create" enough wealth to satisfy man's insatiable greed. The sheer numbers of people in America alone should give one cause to doubt such a solution which would, it should be mentioned, entail the absolute subjugation and exploitation of all of nature. A Godlike dream held by many in our time, it is especially characteristic of those with a blind faith in the power of modern technology. It is also an attitude that has directly contributed to the environmental crisis we now face. The old maxim "those who have get" provides us with yet another reason why "wealth creation" is no solution to the problem of poverty. The legal profession would do well to question those of its members who tout "wealth creation" as the "golden rule" by which lawyers should shape their actions.

III. THE FOUNDERS AND THEIR REJECTION OF THE CLASSICAL VIEW

The federalist and classical views on government differ on the issue of man's nature and on that of the purpose or ends of political life. Man, according to both Madison and Hamilton, is not by nature a political animal. Nor is he virtuous unless compelled to be so. In the Federalist No. 10, Madison argued that the causes of strife are sown into the very nature of man and that men are more likely to "vex and oppress each other than to co-operate for their common good."⁴⁷

Incited by differing opinions on religion or government and inflamed by the unequal distribution of property, men will form mutually antagonistic factions with the stronger of them oppressing the weaker.⁴⁸ Sounding much like Thomas Hobbes who strongly influenced him, Madison said that at such times "anarchy may as truly be said to reign as in a state of nature where the weaker individual is not secured against the violence of the stronger."⁴⁹ According to this new science of politics, people submit to government not in order to become virtuous, but out of fear for their lives and the security of their possessions.⁵⁰ Under this view, people are "naturally free" with few, if any, obligations to their fellow men.⁵¹

Taking the argument further, Madison and Hamilton proceed to a more shattering assertion. Men, they said, cannot realistically be ex-

47. THE FEDERALIST NO. 10, at 79 (J. Madison).

48. *Id.*

49. *Id.* No. 51, at 324 (J. Madison).

50. *Id.* at 324-25.

51. *See id.* No. 10 (J. Madison); *see also* Baker, *supra* note 7, at 15.

pected to control their passions or learn to govern their souls!⁵² Hamilton asserted that “the passions of men will not conform to the dictates of reason and justice without constraint,”⁵³ and Madison added that even the wisest and best human beings are not exempt, for “[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”⁵⁴

Those who take this view argue that government exists merely to channel and, if necessary, check man’s natural propensities. People give up some of their liberties in order to enjoy those they do not surrender. It may be unfortunate that this is so, but men are not angels. If they were, government would not be necessary for “what is government itself but the greatest of all reflections on human nature?”⁵⁵ To the modern individualist, government “is always to some degree oppressive, since we give up to it some of the liberty that is ours by natural right.”⁵⁶ Government plays a delicate balancing act keeping men in line on the one hand and allowing them the freedom to pursue their interests on the other.⁵⁷

The federalists sought to achieve this balance in two ways. First, they created a large nation-state under a federal government of considerable power. This made it difficult for individuals to form factious alliances with one another, leaving them alone and thus rendered more “timid and cautious.”⁵⁸ Madison put it this way: “the society itself will be broken into so many parts, interests, and classes of citizens that the rights of individuals or the minority, will be in little danger from interested combinations of the majority.”⁵⁹

Second, the government itself was constructed so as to prevent any person or group of “interested” individuals from creating a majority tyranny. Working like a self regulating machine, the constitution was supposed to produce good results even when its citizens and leaders were at their worst.⁶⁰ This, Hamilton thought, would often be the case, as “a dangerous ambition . . . often lurks behind the specious mask of zeal for the rights of the people . . .”⁶¹ In our government, ambition would be made to counteract ambition in a delicate system of checks and

52. THE FEDERALIST NO. 15, at 110 (A. Hamilton); *id.* No. 55 (J. Madison); *see also Democracy & the Citizen. supra* note 17, at 90.

53. THE FEDERALIST NO. 15, at 110 (A. Hamilton).

54. *Id.* No. 55, at 342 (J. Madison).

55. *Id.* No. 51, at 322 (J. Madison).

56. *Democracy and the Citizen, supra* note 17, at 87.

57. THE FEDERALIST NO. 10, at 78 (J. Madison).

58. *Democracy and the Citizen, supra* note 17, at 91; *see also* THE FEDERALIST NO. 15, at 105-13 (A. Hamilton); *id.* No. 16, at 113-18 (J. Madison).

59. THE FEDERALIST NO. 52, at 324 (J. Madison). For a discussion on Madison as a nationalist, *see* J. Bauer, James Madison and the Revision of Republicanism in Post-Revolutionary America (Apr. 12, 1984) (unpublished doctoral dissertation, Dep’t of Political Science, Duke Univ.).

60. BAKER, *supra* note 17, at 44.

61. THE FEDERALIST NO. 1, at 35 (A. Hamilton).

balances.⁶²

Seeing themselves as realists, the founders felt it was not government's task to make men virtuous because at heart they believed men to be incapable of it. Government would protect individual liberty, thus elevating to the first principle of our political life that concept of freedom which came only second in the ancients' reckoning.⁶³

IV. NOT REPUBLICANISM BUT ARISTOCRACY

Following this accepted wisdom, it was recently argued in these pages that "republicanism" was the "viewpoint of the American founders."⁶⁴ This republicanism, the author tells us, was "consistent with the insights of both the religious community and the economists."⁶⁵ To which economists and to what religious community the author is referring is never made quite clear. In actuality, although the federalists paid lip service to republican ideals, "[t]heir real concern was liberty, not republican government"⁶⁶

In a departure from their otherwise consistent rejection of the classical view of politics, the founders made a case for the favored participation of "the better class of citizens" in public affairs. Plato argued that rule by the "best" citizens (i.e., the noblest, most just members of society) was superior to the rule by the many. Since the nature of justice, virtue, and nobility are knowable primarily through philosophy, those citizens with the time and inclination to engage in it would theoretically make the best rulers.⁶⁷ In a line of argument remarkably similar to this, Madison said that in his time, those best suited to rule consisted principally of the "freeholders," men of landed property.⁶⁸ According to Madison, this group of citizens possessed the necessary "merit" which would allow them to "make decisions affecting the public good on the basis of reason . . . rather than passion"⁶⁹ Landed wealth better suited men to rule, because it gave them the means to educate themselves and education allowed them to more consistently control their passions.⁷⁰

Too much popular control of government was risky. The people are

62. *Id.* No. 51, at 322 (J. Madison).

63. *Democracy and the Citizen*, *supra* note 17, at 86.

64. Beckwith, *supra* note 8, at 6.

65. *Id.*

66. *Democracy and the Citizen*, *supra* note 17, at 86.

67. PLATO, *supra* note 4, at 375e-76e, 473e-503b.

68. J. Bauer, *supra* note 59, at 78-83.

69. *Id.* at 83.

70. The reader should recall in this context that at the time of the founding, formal education was generally available only to those with the means to pay. The influence of the wealthy was further augmented by limiting the right to vote to those with property. White women, Black men and women, Indians, and most poor persons were all excluded from voting participation.

often subject to "errors" and "delusions."⁷¹ They often call for measures which they later "lament and condemn."⁷² "In those critical moments," Madison said, "how salutary would be the interference of some temperate and respectable body of citizens [who would] check the misguided career and suspend the blow meditated by the people against themselves until reason, justice, and truth can regain their authority over the public mind?"⁷³

The unpredictable nature of the people thus makes "majority rule and periodic elections prudent though not strictly necessary."⁷⁴ The landed wealthy, Madison believed "would be the safest depositories of Republican liberty."⁷⁵ The founders had grave doubts about the ability of the American people to rule themselves well. Madison's advocacy of something like an aristocracy of landed gentry stands "in stark contrast to the republican contention that popular participation is the very definition of liberty and just rule."⁷⁶

V. THE ROLE OF THE LEGAL PROFESSION AND AN IMPORTANT CONTRADICTION

Most of the founders, it is often noted, belonged to this "better class of citizens." A list of them reads as a "Who's Who" of the period. Madison, Mason, and Washington were prominent land holders. Others were wealthy merchants. Significantly, lawyers were among the most influential of the founders. Hamilton, Morris, Randolph, Wilson, Patterson, and Jefferson were all prominent attorneys.⁷⁷ As educated men, attorneys were versed in both philosophy and theology. Steeped in the classics, they were familiar with what the greatest thinkers had to say on justice, virtue, and the purpose of civic life. They understood, for example, what the uneducated of their day and the Ivan Boesky's⁷⁸ and wealthy entrepreneurs of our day have never learned: that the truly magnificent man reveals his character "in spending not upon himself, but on public objects. His gifts are a sort of dedication" to the common good and general welfare.⁷⁹ Educated thus, lawyers were civic, moral, and intellectual leaders who understood well that they had both a special obligation to society and a place in the public eye.

71. THE FEDERALIST NO. 63, at 384 (J. Madison).

72. *Id.*

73. *Id.*

74. *Democracy and the Citizen*, *supra* note 17, at 88.

75. J. Bauer, *supra* note 59, at 83-84.

76. *Id.*

77. ENCYCLOPEDIA OF AMERICAN HISTORY, *supra* note 6, at 625-735.

78. *Boesky Capital Gains*, N.Y. Times, Mar. 25, 1986, at D4, col. 4; *Id.*, *Boesky's Holdings Put As High As \$200 Million*, Nov. 19, 1986, at D8, col. 5.

79. ARISTOTLE, ETHICS 118 (J.A.K. Thomson trans. 1975).

This special quality was recognized by no less an observer than Alexis de Tocqueville. Writing early in our history, he said that in America, lawyers are a privileged intellectual class.⁸⁰ They represented the strongest barrier against the failings of democracy, checking and guiding its ill considered passions. Possessed of a greater nobility and more even temperament than their peers, lawyers were, for Tocqueville, the “political upper class” and it was “at the bar or the bench that the American aristocracy [was] found.”⁸¹ As the “repository of civic virtue” Madison considered them to be in the first rank of citizens.⁸² The common man, inspired by the “manly and legitimate passion for equality” looked upon members of the legal profession as models to be emulated.⁸³

In light of their aristocratic views, it seems plain that the founders recognized at least implicitly, that one could not place absolute trust in a mechanistic form of constitution or, for that matter, in the “invisible hand of the market” as a way of insuring the maintenance of a representative form of government. They could afford this lack of trust because other institutions existed which served a similar purpose. In addition to the “better class of citizens, these other institutions included religious and civic associations and the “mores” they engendered.⁸⁴ Tocqueville placed great importance on these institutions and believed that as long as they remained vibrant and public-spirited, they would help to keep democracy safe from the dangers posed by a too self-interested and privatized citizenry.⁸⁵

Churches are in particular a good example of what Tocqueville meant. He said that churches were among America’s most important *political* institutions.⁸⁶ While the laws might allow the people to do almost everything, “there are things which religion prevents them from imagining and forbids them to dare.”⁸⁷ Religion and other forms of civic association served to restrain the passions and helped men to feel less timid and alone. These institutions, in other words, served as a means by which modern men could learn to govern their souls in the way that the men of

80. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (J.P. Mayer ed. 1969).

81. *Id.* at 267-68.

82. In so far as lawyers were of the privileged class, this would be the case. See J. Bauer, *supra* note 59, at 80.

83. A. DE TOCQUEVILLE, *supra* note 80, at 57. For a similar argument on the legal profession’s early view of its role, see Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A Progressive Critique* 19 (D. Kairys ed. 1982).

84. “Mores” or “moures” can best be defined as “habits of the heart.” For Tocqueville, they were a combination of accepted beliefs, customs, habits, and the like. Good institutions would produce mores that were conducive to a democratic culture. These institutions included the family, churches, and civic associations. Compare this with the civic culture discussion. See *infra* text accompanying notes 128-29.

85. A. DE TOCQUEVILLE, *supra* note 80, at 277-315; see generally *id.* at ch. 9.

86. *Id.* at 292.

87. *Id.*

antiquity did. Through direct self representation and association men became noble, public spirited citizens whose hearts were habituated to good rule. The founders hoped that institutions like these, combined with the other devices they built into our form of government would be enough to prevent democracy's deterioration.

In retrospect, it is plain to see that the founders' overall rejection of the classical ideal of politics set forces in motion that were much too powerful for these institutions to handle. Among the first to recognize what was happening, Tocqueville observed that our modern love of freedom and individualism was leading men to behave in ways that were destructive to the very institutions on which democracy depended.⁸⁸ The pursuit of one's "economic interest" created in men an "increasing love of well being" which made them "afraid of material disturbances."⁸⁹ The result was a love of "public peace" and tranquility which became the sole political passion, destroying in citizens any feeling of public spiritedness. In almost prophetic fashion, Tocqueville said: "I see an innumerable multitude of men, alike and equal constantly circling around in pursuit of the petty and banal pleasures with which they glut their souls. Each one of them, withdrawn into himself is almost unaware of the fate of the rest."⁹⁰

Such citizens find the necessary task of exercising their public and political liberties "tiresome." Too preoccupied with the pursuit of their own fortunes, they have no time for public duties. Men like this believe they are pursuing their self interest, but they have a "very crude idea of it."⁹¹ Unimpressed with the public sphere, such citizens (if that term can still be used to describe them) are happy to "give the central government new powers or to let it take them for it alone seems both anxious and able to defend them from anarchy"⁹²

For this and other reasons, individualism, private property, and the pursuit of one's self interest through "open competition" are *not* institutions which "insulate the individual from arbitrary concentrations of power."⁹³ Actually, freedom understood in the modern sense (which Mr. Beckwith adopts) leads to an *accumulation* of power by destroying the very institutions and attitudes which work to prevent its being held in ever fewer hands. By giving free reign and expression to the darkest urges of the human heart, freedom and modern individualism destroy the foundations of democracy by corrupting the souls of even the most public spirited of citizens.

88. *Id.* at 503-09.

89. *Id.* at 671.

90. *Id.* at 691-92.

91. *Id.* at 540.

92. *Id.* at 671-72.

93. Beckwith, *supra* note 8, at 4.

The legal profession was not immune to this malaise for with lawyers, "as with all men,"⁹⁴ self interest acts as a foil to public spiritedness. Assaulted by the opinions and views of the great mass of citizens the legal profession surrendered its claim to being a repository of civic virtue.

The power of public opinion to corrupt should not be doubted, for in democracies it is a formidable force. Once the public has decided on its views, there are no obstacles which can retard their general acceptance.⁹⁵ The majority uses no outright coercion to achieve its goals but "by some mighty pressure of the mind of all upon the intelligence of each it imposes its ideas and makes them penetrate men's very souls."⁹⁶

This power did not take very long to have its effect on the profession. The historical record bears witness to a legal community ever less concerned with justice, with individual lawyers viewing their profession not as a calling or avocation, but as a mere means to the end of private wealth. Private concerns came to dominate and replace public ones as motivations to enter the profession. Thus, we see leading jurists and lawyers of the period warning their peers that if the redistributive passions of the masses were not checked they would "sweep away the nation's whole social and economic foundation."⁹⁷ In Joseph Story's view, it was the profession's "glorious and not infrequently perilous duty" to "guard the sacred rights of property from the rapacity of the majority."⁹⁸

Fairness and substantive equality, once viewed as essential to the maintenance of democracy and the very definition of "justice," came to be viewed with suspicion, and only the legal profession "stood between property and redistribution."⁹⁹ Abandoning a view of themselves as "the priests at the temple of justice," lawyers became concerned with protecting the rights and privileges of the wealthy capitalist class to which they in increasing numbers belonged.

This change in the profession's self image was soon reflected in the law. Contract law, for example, had traditionally been concerned with the economic status of the contracting parties as a means of evaluating a contract's fairness.¹⁰⁰ Reflecting the increasing inequality of social relations under industrial capitalism, contract law dropped its concern for the inequalities of economic power that might exist between contracting parties.¹⁰¹ This made the body of contract law more amenable to the

94. A. DE TOCQUEVILLE, *supra* note 80, at 264.

95. *Id.* at 248.

96. *Id.* at 435.

97. Mensch, *supra* note 83, at 20.

98. *Id.*

99. *Id.*

100. *Id.* at 25-26; see also Feinman & Gabel, *Contract Law as Ideology*, in *POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 172 (D. Kairys ed. 1982).

101. Feinman & Gabel, *supra* note 100, at 174.

needs of the wealthy capitalist and served to legitimate the new order of social relations.¹⁰²

This course of events could not help but change the common man's view of the profession. Lawyers, once respected and admired came to be viewed with increasing cynicism by a public that was itself growing more cynical about the ideals of justice expounded at the time of the founding, and more corrupt as a result of their pursuit of the "petty and banal pleasures" with which they had glutted their souls.¹⁰³

VI. CAPITALISM'S CONTRIBUTION TO THE DECLINE OF THE PUBLIC SPHERE

The important part that capitalism plays in this overall picture should be quite apparent. As an economic system, capitalism fits in quite well with the political principles espoused by the founders. Individualism, freedom, and a guaranteed right to private property are all necessary, indeed *essential* prerequisites to a successfully functioning free market system. The correspondence which various founders had with Adam Smith made plain to them the nature of this political economy, and Locke provided them with a theoretical basis for their enshrinement of property as a natural and unalienable right in both the declaration of independence¹⁰⁴ and the constitution.¹⁰⁵ This "enlightened" political economy guided the founders and still serves as a basis for the views of present day conservatives.¹⁰⁶

The founders' espousal of a "new science of politics" set in motion a dynamic that undermined the civic and religious associations necessary to the maintenance of democracy. Their adoption of a capitalist economic system compounded the problem by destroying the habits of the human heart which gave birth to these institutions and which were in turn nurtured by them.

Capitalism relies on a "self interested" model of human nature. In and of itself, this is not a problem for men do naturally seek their own good. Problems arise, however, when the pursuit of one's economic self interest is divorced from a set of moral values that prevent "self interest" from becoming unbounded avarice. Adam Smith never intended economics to be divorced from such a set of moral values. For Smith, wealth and "wealth creation" were only a means to the realization of virtue and the achievement of a truly "civilized life."¹⁰⁷ Never were they meant to be-

102. *Id.* at 176.

103. A. DE TOCQUEVILLE, *supra* note 80, at 692.

104. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 327-44 (P. Laslett ed. 1965); see *The Federalist* Nos. 10, 51, 57 (Madison) No. 19 (Madison & Hamilton).

105. U.S. CONST. amend. IV.

106. See, e.g., Beckwith, *supra* note 8; M. FREIDMAN, *CAPITALISM AND FREEDOM* (1982).

107. See D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* xii (1978).

come ends in and of themselves. Smith would most likely have agreed with Aristotle in saying that: "As man is the best of all animals when he has reached his full development, so he is worst of all when divorced from law and morals."¹⁰⁸ Various economic policies may offer themselves as means, Daniel Bell tells us, but they "can only be as 'just' as the cultural value system shap[ing] [them]."¹⁰⁹

Throughout capitalism's early history, the "economic impulse" was constrained by a morality given to men by both classical and christian thinkers. With the rise of industrial capitalism and a national, as opposed to a local economy, we witnessed the emergence of "a consumption society" with an emphasis on "spending and material possessions."¹¹⁰ This development undermined "the traditional value system" with its Christian emphasis on charity, frugality, obligation to others, self control, and impulse renunciation.¹¹¹ The result, Bell argues, is that "[n]othing [is] sacred, [c]hange [becomes] the norm and the ascetic element [- once] a kind of moral legitimation of capitalist behavior - has virtually disappeared."¹¹² In short, capitalism, far from nourishing deeply held norms, as Mr. Beckwith claims, actually undermines its own moral and ethical foundations.¹¹³

In an attempt to justify this state of affairs, today's conservatives offer the pathetic excuse that capitalism has at least produced an abundance of material goods and a high standard of living. Often, in search of a sort of moral apology for the system, they attempt a vulgar reconciliation of God and mammon.¹¹⁴ Failing to recognize the antithetical nature of capitalist and more traditional religious values, these attempts result in the anarchy of logic and historical myopia that characterizes much conservative thought.

The dynamic produced by these contradictions has proved relentless, and today almost all the institutions conservatives love are either extinct or in disarray. Religion, for example, is in broad retreat, and as McWilliams points out, "the evangelical exceptions to the rule far from denying the tendency, proclaim it fervently."¹¹⁵ Commerce has devoured local communities and "reduced local regimes to a near impotence."¹¹⁶ Rather than acting to check this process, our legal system furthers it, demonstrating both its complicity in the dissolution of our political life

108. ARISTOTLE, *supra* note 18, at 29.

109. *Id.*

110. D. BELL, *supra* note 107, at 64-65.

111. *Id.*

112. *Id.* at xx.

113. Beckwith, *supra* note 8, at 5.

114. In this regard note the interplay of religious and free market views as mutual justifications in Beckwith, *supra* note 8, at 1, 6, 22, 26.

115. *Democracy and the Citizen*, *supra* note 17, at 98.

116. *Id.*

and the unself-reflective nature of its actions. Decisions such as *NLRB v. Jones and Laughlin Steel Corp.*¹¹⁷—in which the Court stated that commerce, “the plainest fact of our national life”¹¹⁸ must determine the constitutional order—speak to the point.

Our concern and alarm over this situation cannot help but be heightened when we recognize that the decline of these institutions is really only symptomatic. The cause of their decline is the anarchy, greed, and privatization of the human spirit that our blind adherence to capitalism, individualism, and the doctrine of “self interest” has produced. This more profound development will prove to be difficult to correct. Should it go unchecked much longer, it may well prove impossible to correct.

We are currently evolving an individualistic ethic so extreme that it is relativizing all of our moral, philosophic, and cultural values. The sensibility of the 1960's and 1970's exemplified this emerging ethic with their narcissism, childishness, delight in the absurd, and a “reversal of values” which celebrated the “baser rather than the higher impulses.”¹¹⁹ The Reagan administration's patriotic rhetoric and its attempt to create an image of national renewal have not been able to conceal a sense of social and personal meaninglessness that has grown to unprecedented proportions. The resulting nihilism is reflected in this decade's suicide rate and levels of substance abuse. This state of affairs has not been recognized just by members of the academia. Many in our society are aware of it. One popular artist has expressed his assessment of the situation in this way:

I think you can get to a point where nihilism, if that's the right word, is overwhelming and the basic laws that society has set up . . . become meaningless. The forces that set that in motion [are] . . . a lot of frustration, a lack of finding something you can hold on to, a lack of contact with *people* . . . That's one of the most dangerous things, I think, - isolation. [My work] is about that isolation - what happens to people when they're alienated from their friends and their community and their government and their job. Because those are the things that keep you sane, that give meaning to life in some fashion. And if they slip away and you start to exist in some void where the basic constraints of society are a joke, then life itself becomes a kind of joke . . . and anything can happen.¹²⁰

Those left seeking fraternity and community feel trapped by the nihilism they sense around them and have a difficult time overcoming the ever more arbitrary values of our society.¹²¹

117. *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1936).

118. *Id.* at 41.

119. D. BELL, *supra* note 107, at 121. On this topic see also C. LASCH, *THE CULTURE OF NARCISSISM* (1979).

120. Interview with Bruce Springsteen, *ROLLING STONE*, Dec. 6, 1984 at 21.

121. In this regard, see R. BELLAH, *supra* note 3, at 84.

VII. A DIGRESSION AND A RESPONSE

Up until now, I have not addressed the arguments made by Mr. Beckwith in a detailed way. I trust that the reader will not feel overly put upon. In my defense, I can only say that the preceding discussion was necessary if the views forthcoming were to have the necessary foundation. I have commented briefly from time to time on some of Mr. Beckwith's views and the reader will have surmised that I have serious reservations about them.¹²² There is much in Mr. Beckwith's article that invites discussion, but for reasons of space and simplicity, I will limit my attention in this section to the following issues: (1) his claim that capitalism is a necessary prerequisite to the establishment of political freedom; (2) his belief that the founders operated under this assumption; (3) his views on the purpose and goals of "liberal" academics; and (4) his distinction between "interpretivism" and "non-interpretivism." In the final section, which follows, I will discuss Mr. Beckwith's views on the role that lawyers should play in our society, contrasting them with my own assessment of what is needed if the profession is to secure a viable future for itself.

The first two issues can be dealt with simultaneously. In their zeal to justify and legitimate capitalism, Mr. Beckwith and conservatives like him try to convince us that capitalism is the source of our freedoms and the *summum bonum* of our political life.¹²³ The views I have presented thus far suggest this to be a dubious achievement, but their position is flawed for yet another reason. Namely, these claims reverse the direction of cause and effect where politics and economics are concerned.

According to Mr. Beckwith, "As economic liberty contracts, so does political freedom."¹²⁴ He tells us that socialism "usually begets the extinction of whatever political liberty existed previously," and that political freedom cannot survive a "governmental monopoly of economic power."¹²⁵ In each statement, we see political freedom expanding or contracting, living or dying, in response to the size and scope of the "free market." The problem here is that political liberty and the governmental institutions that guarantee it *precede* capitalism and do not follow it. Historically, capitalism first appears in those countries with a *prior* commitment to political and individual liberty. Creating one of the

122. I would like to make it clear that in so far as Mr. Beckwith's views reflect those of other conservatives (which they do in large part), I am not responding to Mr. Beckwith alone, but to these kinds of arguments generally.

123. The reader should keep in mind that for Mr. Beckwith, freedom means "doing as one likes." This is important because capitalism is particularly good at helping people "do as they like." Once this concept of freedom is challenged as problematic, the argument that capitalism is necessary to freedom is called into question. See Beckwith, *supra* note 8, at 4.

124. Beckwith, *supra* note 8, at 4.

125. *Id.* at 2.

contradictions that plague his work, Mr. Beckwith seems to *implicitly* recognize this fact when he says: "Why in England at that time? Largely because the legal guarantees of the common law and the flexible social and cultural system . . . encouraged risk taking . . ." ¹²⁶ An historical analysis sufficient to support my views exceeds the scope of this essay. However, I believe I can make my case through an inspection of Mr. Beckwith's own assertions.

In trotting out the tired and misused examples of the Soviet Union, China, Jamaica, and in short, all socialist systems as "proof" that socialism destroys liberty, ¹²⁷ Mr. Beckwith partakes of the same historical and factual myopia of which he accuses the "non-interpretivists." Political liberty is not something that springs into the human heart overnight. It must be nurtured and cultivated over a period of time. There are important and deep seated differences between a democratic or "civic" culture and a non-democratic one. ¹²⁸ Almond and Verba state quite plainly that "A democratic form of participatory political system requires as well a political culture consistent with it." ¹²⁹ Furthermore, "What must be learned about democracy is a matter of attitude and feeling, and this is [hard] to learn." ¹³⁰ The establishment or demise of capitalism is not in and of itself either necessary or sufficient for the establishment or denial of political freedom. Throughout his article, Mr. Beckwith treats capitalism as a magic balm whose application produces material wealth and liberty in all nations be they developed or developing. ¹³¹ Nothing could be further from the truth, for as Almond informs us, "the transfer of the political culture of the western democratic states to the emerging nations encounters serious difficulties." ¹³² It is plain that the people now under the control of the Soviet, Chinese, Vietnamese, or Ugandan governments *never* enjoyed a democratic culture. Socialism did not destroy some pre-existing state of freedom for it never existed to begin with.

Also, Mr. Beckwith conveniently ignores any and all cases where socialism and liberty coexist. Sweden, the Netherlands, Yugoslavia, Nicaragua, and Spain come most readily to mind. Furthermore, Chile, Guatemala and South Africa all have capitalist economic systems more "laissez-faire" than our own, yet by what stretch of the imagination can the people in these countries be said to be free? Mr. Beckwith's brand of "non-interpretivism" has lead him to his own a-historical abstractions,

126. *Id.* at 3-4.

127. *Id.* at 3-6.

128. G. ALMOND & S. VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 1-20 (1963).

129. *Id.* at 63.

130. *Id.* at 64.

131. See Beckwith, *supra* note 8, at 3.

132. G. ALMOND & S. VERBA, *supra* note 128, at 3.

evidence of which can be seen in his shameless assertion that Chile's democratic socialism was a "bitter experience" and that at least "living standards are rising in contrast with trends as recent as a decade ago."¹³³

In short, political liberty and a democratic culture are not the products of capitalism. There are both capitalist states without freedom and socialist states with it. *If anything*, logic would indicate that political liberty precedes the establishment of capitalism, for a liberal political order guarantees the individual and property rights without which capitalism cannot function. This view was also that of the founders, and can be illustrated by examining their writings.

The objections raised to British rule were first and foremost political ones. It was not taxes per se which bothered the colonists. They understood that taxes were the price to be paid for British protection which in turn "enabled them to travel, trade, and otherwise conduct business."¹³⁴ What the colonists objected to was the imposition of taxes without their *consent*. The Declaration of Independence makes it clear that the founders objected to England's abrogation of those *political* freedoms *without which* a person could not pursue his private interests.¹³⁵ In the Federalist Papers, Hamilton and Madison sought to justify the constitution by arguing that it would guarantee those *political* freedoms necessary to "an active commerce."¹³⁶ The problem with British rule was not that it did not support a market approach to exchange, but that it unjustly took from the colonists the fruit of their labor and that the king had refused to "assent to laws the most wholesome and necessary for the public good."¹³⁷

I am not trying to create the impression that the views of the founders and those of modern day conservatives are completely divergent. They share a common view of man's nature, they both reject the classical view of political life, and they both view government as being created to preserve and protect "liberty" (individually and privately defined). The problem with conservative interpretations of the founders lies in their selective use of what the founders left us. The founders may indeed have believed that man's innate tendencies could not be "transformed."¹³⁸ I have demonstrated, however, that they did believe that *some* men, - by virtue of their education - could transcend their base instincts and act in a public spirited manner. Their skepticism about the prospects of good-

133. Beckwith, *supra* note 8, at 3-4. Note the fact that no supporting evidence for these flimsy assertions is ever offered.

134. R. BAKER, G. POMPER, W.C. MCWILLIAMS, *AMERICAN GOVERNMENT* 545 (2d ed. 1987) [hereinafter *AMERICAN GOVERNMENT*].

135. See *The Declaration of Independence* (U.S. 1776).

136. *THE FEDERALIST* No. 11, at 87 (A. Hamilton); see also *id.* Nos. 11-14 (A. Hamilton Nos. 11-13, J. Madison No. 14).

137. *AMERICAN GOVERNMENT*, *supra* note 134, at 627.

138. Beckwith, *supra* note 8, at 6.

ness does not mean that they totally discounted it as a possibility.¹³⁹ In rejecting the possibility of “redemption,” or by claiming that only a divinity can bestow it, Mr. Beckwith betrays just how completely the view of human nature as base has come to dominate our collective self-image. This view abandons much of western thought and the Judeo-Christian tradition which Mr. Beckwith so reverently cherishes. Socrates and Christ both taught us that men *can* overcome their base natures.¹⁴⁰ For the Christian, salvation rests on his doing so. Redemption, or at least partial redemption, *is* of this world. To deny it, as Mr. Beckwith does, not only denigrates the best that is in us, it is also, in my opinion, a narrow if not a misconstruction of what the founders intended.

Mr. Beckwith’s views on “liberal” professors are further evidence of how completely capitalism has shaped our view of one another. No longer able to imagine that anyone could be motivated by anything other than “self interest,” Mr. Beckwith argues that “non-interpretivist” or “liberal” professors hold their views in order to further the creation of a social order that would be run by them and in which they would achieve the status they feel they deserve.¹⁴¹ Finding it either difficult or unnecessary to address their concerns, the author stoops to a ludicrous hyperbole (non-interpretivism leads to genocide)¹⁴² and an *ad hominem* argument (a belief in equality or redistribution makes one morally reprehensible).¹⁴³ Mr. Beckwith tells us that liberal professors owe their positions to the “affluence” and “security” that capitalism has created.¹⁴⁴ Presumably, this is intended to point out to them the ingratitude and lack of grace they demonstrate by criticizing the system. Given Mr. Beckwith’s position as a Professor of Law and the critical nature of his own essay, this entire argument seems to me a bit like the pot calling the kettle black.

Finally, I would like to remark upon Mr. Beckwith’s use of the words “interpretivist” and “non-interpretivist” and his assertion that “non-interpretivist” theories are both “abstract” and “philosophical.”¹⁴⁵ Concepts such as these have played a prominent role in recent conservative thought. Attorney General Edwin Meese has stated in various forums that judges and legislators should look to the intent of the founders as a basis for their decisions. The connection between these views can be seen in Mr. Beckwith’s association of interpretivism with “the written text

139. There are many examples of the founders’ recognition that the American people were of a good character. See, e.g., THE FEDERALIST NO. 65, at 384 (J. Madison).

140. See *Matthew* 5; *John* 3:16-22; *Romans* 1-8; See also PLATO, *supra* note 4, at 357b-58a, 366e-67d.

141. Beckwith, *supra* note 8, at 10, 25.

142. *Id.* at 22.

143. *Id.* at 24.

144. *Id.* at 25.

145. *Id.* at 21.

and ascertainable intent” of the founders,¹⁴⁶ and “non-interpretivism” with the “gossamer webs of moral philosophy and other ephemeral sources”¹⁴⁷

To my mind, these arguments rest upon what is at best a naive, and what is likely a seriously uninformed philosophy of history. Early in this essay, I discussed some of the problems associated with claims about the intent of the founders. But the problems with Mr. Beckwith’s views go deeper than his selective reading of the founders or his omission of those historical facts that prove troublesome to him. These problems are two-fold. The first is his assumption that the meaning of history is obvious. The second is his belief that the reasons behind the sequence of historical events can be known with certainty.

Unfortunately for Mr. Beckwith, the answer to the question of the nature and meaning of history is neither “straightforward” nor “unambiguous.”¹⁴⁸ One need only compare the different meanings attributed to history by Marx and Hegel (two of the greatest thinkers on history), to appreciate the fact that just what history does mean is open to a widely varying interpretation.¹⁴⁹ The issue of what lies behind the sequence of historical events is no less thorny a problem and is in fact intricately tied to the question of what history *is*. But again, one need only compare, for example, the Marxist explanation of the motive force of history (the interplay of productive forces and productive relationships) to the Hegelian (*geist*, mind, spirit) to the Greek (that there was no logical development to events)¹⁵⁰ to see that Mr. Beckwith’s analysis of the events and historical forces at work at the time of the founding are not the only ones possible.

As I have tried to demonstrate, egalitarian and redistributive views were very much a part of the founders’ thought. Both Paine and Jefferson had doubts about an unlimited right to property. Daniel Shays and his ill-fated rebellion indicate how wide spread these views were.¹⁵¹ Jeffersonianism (hardly an a-historical abstraction) favored both a broad diffusion of wealth and debtor interests.¹⁵² There is, in short, ample historical and *textual* evidence (since the written text is so important to Mr.

146. *Id.* at 20.

147. *Id.* at 21.

148. M. GILLESPIE, *HEGEL, HEIDEGGER, AND THE GROUND OF HISTORY* 1 (1984).

149. See Gillespie’s analysis of these views for a detailed examination of this point. *Id.* His entire work deals with the question of “What is history?” and should give one reason to doubt those who claim absolute historical understanding.

150. See *id.* at 63 for the Greek view. See *id.* at chapters 3 and 4 for Hegel’s views. See also HEGEL, *PHILOSOPHY OF RIGHT* (T. Knox trans. 1981). On Marx and history, see K. MARK & F. ENGELS, *THE GERMAN IDEOLOGY* (C. Arthur ed. 1974).

151. *ENCYCLOPEDIA OF AMERICAN HISTORY*, *supra* note 6, at 115.

152. *Id.* at 123-24.

Beckwith) to support views of the founders' intentions that are different from those espoused in "What Should Lawyers Do?"

Mr. Beckwith seems concerned that theories not be too "abstract" or "philosophical" (i.e., non-interpretivist). One might well ask how the purpose of government and the character of human nature are to be discussed if not through philosophy? The founders certainly engaged in it. Would Mr. Beckwith classify *them* as lacking "practical wisdom?"¹⁵³ It would seem he must. In fact, it is only through philosophy that certain of the truths of our existence can be ascertained. Were we to be limited to our experience or to "practical wisdom" we would likely end up like the proverbial cat which, once it had sat on a hot stove, avoided cold ones as well.

In the end, Mr. Beckwith and conservatives making similar arguments are attempting to do what Marxists have long done. They interpret the meaning of history so as to support their claims and deny its use to those with perspectives they disagree with. In formulating his position, Mr. Beckwith has had to make a most judicious use of the historical record.¹⁵⁴ We could well ask of him the questions he addresses to his opponents. Has he been fair and truthful in his use of history? Do his methods reveal an awareness of the historical illegitimacy of his views? Does he have a history he can call his own?

VIII. FURTHER ASSESSMENT AND DISCUSSION

In concluding this essay, I would like to evaluate Mr. Beckwith's prescriptions for the legal community and offer an alternative to them. The legal community faces a crucial set of challenges and decisions. Given the important function that lawyers play in our increasingly litigious society, the path its members choose to take will determine more than just the profession's future. It will be an important indication of the course America will chart as well.

Mr. Beckwith's argument can be summarized as follows. Capitalism is good because it guarantees and maximizes one's freedom to pursue one's self interest.¹⁵⁵ Socialism is bad because it limits individual freedom and cannot insulate people from "arbitrary concentrations of power."¹⁵⁶ The free market is superior to planned economies because of men's shortcomings. Man's self interested nature makes capitalism itself "natural,"¹⁵⁷ and his limited abilities mean that he cannot solve "the calculus prob-

153. Beckwith, *supra* note 8, at 21.

154. *Id.* at 22.

155. *Id.* at 4.

156. *Id.*

157. *Id.* at 2.

lem" necessary to a successfully functioning planned economy.¹⁵⁸ Unequal rewards for those who show initiative are just, therefore those who advocate redistribution are unjust, even "reprehensible."¹⁵⁹ The only proper course of action is the creation of wealth. This obviates the necessity for redistribution because it raises the standard of living of the disadvantaged without taking from the wealthy the fruits of their labor.¹⁶⁰

From these premises, the conclusions are that the members of the legal profession should work to further capitalism and protect property from attempts to redistribute it.¹⁶¹ This places the profession in the role of protecting freedom. To help them in their task, lawyers should avoid certain pitfalls and work to stop certain trends. They should avoid taking clients who are using the legal system to achieve redistribution. Lawyers "have an ethical obligation to inform their clients of the economic and moral consequences of redistribution."¹⁶² Lawyers should think twice about working for a law firm or structuring a practice that services redistributive claims.¹⁶³ Furthermore, lawyers have a duty to fight the movement of both contract and tort law toward redistributive interpretations. Such interpretations have been encouraged by "anti-business, egalitarian media and intellectual elites."¹⁶⁴ Mr. Beckwith concludes by stating that lawyers should have faith in their "creator," "confidence in themselves," and absolute faith that capitalism and wealth creation will lead to an open and just society.¹⁶⁵

If the above can be said to be a fair synopsis of the views of both Mr. Beckwith and other conservatives, then they really represent little more than an ossified philosophical liberalism of the type Milton Friedman has long championed.¹⁶⁶ As a set of recommendations to guide the legal profession, they are a prescription for disaster.

"Ossified" aptly describes these views, for they form a rigid set of precepts that are no longer conventional among most scholars. This characteristic makes itself apparent in the assertion that "contract based fee exchange" is indeed "free."¹⁶⁷ The utopian fantasy of free individuals who mutually and voluntarily engage in fair exchange bears no relationship whatever to the realities of our existence.

Indeed, this view may never have closely corresponded with reality: Gabel and Feinman have noted that even as early as the first half of the

158. *Id.* at 6.

159. *Id.*

160. *Id.* at 8-9.

161. *Id.* at 14-16.

162. *Id.* at 16.

163. *Id.* at 17-18.

164. *Id.* at 15.

165. *Id.* at 25-27.

166. See M. FRIEDMAN, *supra* note 106.

167. Beckwith, *supra* note 8, at 13.

nineteenth century, the legal community altered the nature of contract law so as to create "an imagery that made the oppression and alienation [of the system] appear to be the consequences of what the people themselves desired."¹⁶⁸

This new body of contract law did not take into account limitations on the freedom of individuals resulting from economic inequality¹⁶⁹ and it has served to hide or obscure the inequality of social relationships ever since. "The legitimation of the free market was achieved by seizing upon a narrow economic notion of freedom and equality and fusing it in the public mind with the genuine meaning."¹⁷⁰ Tort law works in a similar manner and is "intimately related to the rise of capitalism,"¹⁷¹ being very important as a means of reinforcing capitalist and bourgeois ideology.¹⁷²

The lack of correspondence with social and economic reality that characterizes these views can be seen in yet another way. They fail to take account of the fact that the inequalities of power that make contracts unfair are not often visible, and are empirically verifiable only with great difficulty. Guided by mere appearances, advocates of "free market" ideologies are quick to say: "No one forced the parties to sign," or "I didn't see anyone with a gun to their head." Overt manifestations of power are rarely, if ever, seen these days. Still, power has been brought into play because the political and economic processes have been limited to those subjects and methods which are not threatening to those who hold superior economic positions.¹⁷³ The legal system plays an instrumental part in this, because it is used to define and legitimate values, norms, and procedures in a way that predisposes the outcome of contractual negotiations. This entire structure of norms and procedures becomes internalized through the process of socialization, making it likely that most citizens will not even *consider* options which threaten the interests of the powerful.¹⁷⁴

Mr. Beckwith provides his readers with a wonderful example of the "a-historical" and "a-factual" argument he accuses his opponents of when he informs us that capitalism and private property are institutions which "insulate the individual from arbitrary concentrations of power" and that the free economy "disperses power in a manner reminiscent of the original intent of the American constitution."¹⁷⁵ Given that no evi-

168. Feinman & Gabel, *supra* note 100, at 175.

169. *Id.* at 176.

170. *Id.*

171. Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 186 (D. Kairys ed. 1982).

172. *Id.* at 194.

173. For a good exposition on power exercised in this way, see Bachrach & Baratz, *Two Faces of Power*, 56 *AM. POL. SCI. REV.* 146, 147-52 (1962).

174. *Id.*

175. Beckwith, *supra* note 8, at 4.

dence is offered in support of these abstractions, the reader has nothing with which to judge their accuracy. What are the realities of the distribution of power in America?

One fifth of our population owns almost 60% of the corporate wealth. One and six tenths per cent of the population owns 80% of all stock, 100% of all state and municipal bonds, and 88.5% of all corporate bonds. Two hundred companies account for 80% of all resources used in manufacturing. Five New York banks hold controlling shares of stock in three-fourths of the top 324 corporations. On the other side of the scale, the facts speak as plainly. One out of every four Americans is functionally illiterate. Almost thirty-three million Americans live below the minimum adequacy levels as determined by the United States Department of Labor. Twelve million Americans suffer from malnutrition and hunger.¹⁷⁶ It would be easy to continue, but the argument that capitalism is conducive to democratic liberties or that it leads to a dispersion of power should be seen for the fantasies they are.

Economic inequality has made American democracy into a kind of fiction.¹⁷⁷ The inequality of wealth and power in modern America is enormous, and "the framers of our Constitution could not have imagined the distinctions between rich and poor that exist today."¹⁷⁸ Government programs have reduced the effects of economic inequality but have not eliminated it.¹⁷⁹ Conservatives often argue that the growth of the federal government and federal involvement in the economy is "socialistic." In fact, it is not socialism - at least not as socialists understand it.¹⁸⁰ It is a form of state sponsored capitalism and as such represents "not the communization of private wealth but the privatization of the commonwealth!"¹⁸¹ Government planning and intervention in the economy is often aimed at "the preservation and regulation of capitalism, not its demise."¹⁸² The corporate and political elite do not "check and balance" one another. They "agree in broad terms about the way in which society should operate."¹⁸³ Although we are all technically "free" in that we can speak our minds, vote, write letters and so on, we cannot "command the public attention, amass the money for a major campaign, or influence elections as effectively as those with more resources."¹⁸⁴

The "paradox of the free economy" (as Mr. Beckwith wonderingly

176. M. PARENTI, *DEMOCRACY FOR THE FEW* 8 (3d ed. 1980). It should be noted that Mr. Parenti often cites United States Government statistics.

177. *AMERICAN GOVERNMENT*, *supra* note 134, at 31-35.

178. *Id.*

179. *Id.*

180. M. PARENTI, *supra* note 176, at 307.

181. *Id.*

182. *Id.* at 308.

183. *AMERICAN GOVERNMENT*, *supra* note 134, at 33.

184. BAKER, *supra* note 17, at 625.

states) is not that it has produced "the restriction of the market for goods and the redistribution of wealth by the force of transfer legislation."¹⁸⁵ Given the tremendous disparity in wealth and power in the United States, and given the way that capitalism has perverted social relationships, the true paradox revolves around the question of how the system has managed to paint itself as democratic and command the allegiance of so many people?

Should the legal profession continue in its present course, and follow Mr. Beckwith's recommendations, the trends and problems I have outlined will continue to grow worse.

The legal community's defense of, and participation in, the privileges of wealth has not gone unnoticed by their fellow citizens. It has led to cynicism and self doubt, especially among those of our brethren who have not shared in the wealth. This cynicism and loss of dignity is turning the current retreat of civic and religious association into a head long rout. With their destruction, the barriers to an ever greater centralization of power by corporations and government are being removed. Even when these institutions manage to survive, they only infrequently work to counter these values and instead are being increasingly shaped in their image. This is justified by both the capitalist and "democratic" ethos of our day on the grounds that "such institutions best serve society when they provide a mirror reflection of it."¹⁸⁶ As institutions that, at least potentially, provide people with the best answers to the question of life's meaning, their decline will result in greater anomie, meaninglessness, and nihilism.

IX. SOME PROPOSALS

Is there a solution? If so, what part would the legal community play in it? I would like to argue in the space remaining that there is hope and that it lies in a return to that understanding of politics and citizenship left to us by the thinkers of antiquity. This proposal is not a call for a return to some idealized past, a course of action of which thinkers on the right are fond. It is, rather, a call for the reawakening and reaffirmation of the best that is within us. It entails both an individual and collective act of self-overcoming, and will necessitate a re-evaluation of our commitment to capitalism as it is presently constituted, and of our individualistic, privatized understanding of freedom. The legal community can and should play a leading role in the transformation, recapturing for itself its role as a repository of civic virtue and its place among the first rank of citizens. I earlier raised the question of meaning and meaninglessness,¹⁸⁷

185. Beckwith, *supra* note 8, at 8-9.

186. C. LASCH, *supra* note 119, at 141.

187. *See supra* p. 40.

and it is with this that I would like to begin.

Life must be meaningful in order to be satisfying. This assertion may seem simplistic, even absurdly obvious. However, the fact is that Americans have not given this issue the attention it deserves, and this is because as a general rule we are not deep thinkers. The materialism and pragmatism for which we are known tends to make our thinking shallow and often we let slip a disturbing anti-intellectualism. Nevertheless, the question of meaning will not let us be, and attempts to ignore it only serve to reinforce its presence.

Marx in his early writings argued that the characteristic that set man apart from other creatures is his capacity for self-reflective conscious activity.¹⁸⁸ The ability to act and to then stand back and evaluate the act, comparing it with a previously thought out goal or standard is what is meant here. In Marx's words, man unlike other creatures "makes his life activity itself an object of his will and consciousness."¹⁸⁹ This human power separates us from other animals because:

they produce [one sidedly] while man produces the whole of nature; Animals produce only according to the standards and needs of the species to which they belong, while man is capable of producing according to the standards of every species and of applying to each object its inherent standard; hence, man also produces in accordance with the laws of beauty.¹⁹⁰

Time does not permit a complete description of Marx's analysis, but his view of human nature necessarily implies that man is the only creature that can ascribe *meaning* to his activity.¹⁹¹ He does this by considering the ends or purpose of his actions and by assigning to them a significance or import.¹⁹² However, not all ends or purposes are equally meaningful or worthy because they do not equally allow us to develop and make the fullest use of our specifically *human* capacities or powers.

In the ordering of man's activities some, such as eating, drinking, and the like, are secondary in importance. Of first importance are art (aesthetics), science, and philosophy. These "first order" activities achieve

188. K. MARX, *EARLY WRITINGS* 328 (R. Livingstone trans. 1975).

189. *Id.* at 328. In this regard and also in relationship to what follows, compare ARISTOTLE, *supra* note 18, chapters 1-3.

190. K. MARX, *supra* note 188, at 329.

191. I should make it clear that what immediately follows is not strictly Marx (except where noted). It is, rather, an argument I developed that has its starting point in what I feel is implicit in Marx's views.

192. This is the sense in which we commonly differentiate between activity that "makes sense" and that which does not. Take for example, the common occurrence of seeing someone engaged in an activity we do not understand. We ask the person what he is doing and he or she informs us of his or her purpose or ends. It is then that we come to an understanding of the significance (i.e., meaning) of the activity. Note that knowing the ends or goals also allows us to evaluate the usefulness or efficiency of the actions as well. But even this act of comparison is done with a previously thought out set of standards in mind.

their importance because unlike the others they are specifically human activities. As such, they best exemplify our human qualities. It is true that eating, drinking, and procreating are genuine human functions. But when they are "abstracted from other aspects of human activity"¹⁹³ such as art, science, and philosophy, "and turned into final and exclusive ends"¹⁹⁴ as is the case for many of our fellow citizens, "they are animal."¹⁹⁵ In other words, when our lives are reduced to simply "making a living" or we become absorbed in the pursuit of "creature comforts," and do not pursue the first order activities that define our humanness, we are in fact reduced to the level of mere animals. The end of science is the examination and understanding of physical reality;¹⁹⁶ the end of aesthetics, the understanding and assessment of the beautiful.¹⁹⁷ The end of philosophy is wisdom, through a knowledge of "the causes and laws underlying reality."¹⁹⁸ These pursuits are worthy and noble, not just because they develop our human powers to their fullest. They are noble because they also provide answers to the great questions of man's existence. Eating, drinking and the like are also meaningful, but are so only in an instrumental sense. Most people do not really consider them to be the purpose for which we exist. Art, science, and philosophy on the other hand satisfy an innate need for answers to these questions, a need generated within us by the very human power that allows us to seek for such answers in the first place. By this argument, seeking answers to the great questions of life is more than something we like to do - it is something we need to do. Both because our nature impels us to it, and because the act of answering these questions helps us to become fully human.¹⁹⁹

At this point, the reader should recall that the Greeks took a somewhat similar view. The city state or polis was justified in part because it allowed for the possibility of philosophy. It was through philosophy and political participation that men both individually and collectively achieved the good life. The ends of the individual life, the city, and of philosophy thus became the same: virtue, nobility, justice, compassion -

193. K. MARX, *supra* note 188, at 327.

194. *Id.*

195. *Id.*

196. AMERICAN HERITAGE DICTIONARY, *supra* note 5, at 21.

197. *Id.* at 985.

198. *Id.* at 1162.

199. It is for this reason that an event like the destruction of the space shuttle touches us all so deeply. The loss of life is, of course, tragic. But each and every day many more people are killed in train or plane crashes. These events do not have the same effect upon us. Why? It may be that they are in some sense "ordinary" and we are used to them. I think the reason we are so strongly affected by something like the Challenger disaster is that the space shuttle is among the highest technological achievements of man, and the goals among the most noble. When such an effort fails, it is in a real sense humanity's failure, and as such we each feel the shock and burden of the failure personally. It is, in short, a blow at our human self esteem and self confidence.

in short - the good. The classic view of politics and of citizenship would result in more than noble and just individuals who were public spirited. It would result in men whose natures were fulfilled because the city allowed them to explore (both actually, through practice, and theoretically) answers to the great or eternal questions of human existence. An important point to keep in mind is that these answers were arrived at in concert with others, in a communal, public fashion, and not individually or privately.

It is plain to see how far we have come from this view of life and politics. Radically individualistic and privatized, we tend to reject the notions that men are noble and virtuous, that they can be altruistic as a general rule, and even that they have a nature at all.²⁰⁰ We define our own morality, our own sense of justice. I have often had my sophomores tell me during discussions on the topic: "I decide what is right and wrong for me, and as long as I don't hurt anyone else, no one can tell me I'm wrong." It is an interesting view, reflecting both the individually defined morality mentioned above and the simplistic idea that hurting another person is limited to directly inflicting physical or emotional injury. Caught up in the "pursuit of the petty and banal pleasures with which they glut their souls,"²⁰¹ failing to recognize "the close connection between private fortunes and general prosperity,"²⁰² they adopt this limited, closely circumscribed definition of responsibility. A broader definition would risk making plain the fact that their heady pursuit of wealth and the moral code they construct to justify it hurts others in ways that are all too real.

We should not be surprised that our souls are glutted with the desire for "petty" and "banal" things, for our society offers us little that is meaningful in so far as goals are concerned. When people are asked what they want out of life their general response is either "happiness" or "living well."²⁰³ These responses are a direct reflection of what our society offers as its rewards for hard work and obeying the laws. Alternative answers to the question of life's meaning are left to either the churches, the home, or the college philosophy seminar. Since these institutions and others like them are becoming ever less viable in our society, the result is that our values are being increasingly determined by special interest

200. This view, that men are a *tabula rasa* has come into prominence, especially among certain psychologists and sociologists in the Post World War II era. See, e.g., LIGHT & KELLER, *SOCIOLOGY* (1985).

201. A. DE TOCQUEVILLE, *supra* note 80, at 692.

202. *Id.* at 540.

203. In conjunction with other research, I have often posed this question to my classes. The overwhelming response is "I want to be happy" or "I want to have money, cars, a nice house," and the like. When posed the question - "Well, what else?" I generally draw blank stares.

groups, the advertisers, or the entertainment industry. Such institutions are hardly the bastions of civic or moral responsibility.

Tocqueville understood the dynamic of our society in this regard. In a materialistic society, he said, people will become engrossed in the pursuit of wealth. What begins to matter is:

adding a few acres to one's fields, . . . enlarging a house . . . keeping irritations away, and satisfying one's slightest needs without trouble and almost without expense. These are *petty aims*, but the soul cleaves to them, . . . in the end they shut out the rest of the world and sometimes come between the soul and God.²⁰⁴

Obviously, one must be concerned with obtaining the means of one's subsistence. But as an answer to the great question of life's meaning, a concern with physical possessions is ignoble and base. We would do well to recall that in this regard Aristotle told us that the highest good is "what is morally fine and just."²⁰⁵ Material possessions may aid men in pursuing this end, but they cannot in and of themselves be an end.²⁰⁶ Our economic system has tried to make wealth a final and even an exclusive end, for people must value and seek after possessions if capitalism is to work. But in the end, material wealth is not a sufficient goal for life. It does not satisfy. It is interesting that the tremendous rise in the suicide rate in the United States in recent years is occurring disproportionately greater among the wealthiest and most successful members of our society. This would at least open the possibility that the pursuit of material prosperity as a life goal is a problematic one.²⁰⁷

Materialism is also a dangerous answer for democracy and democratic citizenship. As Tocqueville knew, people who are concerned with physical pleasures and the pursuit of wealth will not "waste their precious time" discussing public business.²⁰⁸ Such people view the pursuit of liberty as a threat to their prosperity.²⁰⁹ They fear anarchy and "are always ready to jettison liberty in the slightest storm."²¹⁰ We should not forget, Tocqueville told us, that:

it is through good order that all peoples have reached tyranny. That is certainly no reason for nations to despise public peace, but they should not be satisfied with that alone. A nation which asks nothing from the government beyond the maintenance of order is already a slave in the bottom of its heart. It is a slave to its prosperity and the road is free for

204. A. DE TOCQUEVILLE, *supra* note 80, at 533 (emphasis added).

205. ARISTOTLE, *supra* note 79, at 27.

206. *Id.* at 35-50.

207. See *The Strange Agony of Success*, N.Y. Times, Aug. 24, 1986 at F1, col. 2; *Almost One in Five Have Mental Disorder*, N.Y. Times, Oct. 3, 1984, at A1, col. 1; *Suicide A Growing Problem Among Young Men in U.S.*, Durham Morning Herald, June 21, 1985 at A8, col. 1; DelBello, *Needed: A U.S. Commission on Teen Age Suicide*, N.Y. Times, Sept. 12, 1984, at 31, col. 1.

208. A. DE TOCQUEVILLE, *supra* note 80, at 540.

209. *Id.*

210. *Id.*

the man to tie the fetters.²¹¹

It seems plain that the pursuit of one's own good does not necessarily produce a healthy public order, as classic economic liberalism believed it did.

In a like manner, a generalized goal of "happiness" is insufficient as an answer. In this case, it is less a problem with the goal than with the generality of the term. A rapist or child molester is "happy" as a result of his acts - but is this a worthy happiness? Americans try to achieve "happiness" largely by pursuing material prosperity. But in the end, happiness (as Plato and Aristotle told us), is best achieved through a pursuit of the good (i.e., the noble and just), and the road to this end is not the hoarding of possessions, but an active participation in political life.²¹²

A return to the classical view of politics outlined in this essay would, in my opinion, go a long way toward solving some of the problems we face. Justice and public virtue, not material wealth, would be its primary concern. As such, it would be more likely to produce public spirited citizens as opposed to radical individualists. It would also result in the pursuit of ends or goals (virtue, nobility, justice) which would provide meaning in life, leaving us with more complete, fulfilled, human beings, and reducing the meaninglessness and nihilism that increasingly characterize our society. Finally, it would also work to bring about the equalization of appetites which Aristotle thought necessary if avarice and greed were to be brought to heel. It will be a difficult task to accomplish, for "To make individuals out of citizens is easy, to make such individuals back into citizens, nearly impossible."²¹³

In order to achieve these goals we will have to re-create citizens and re-invigorate our politics. As a first step we will have to abandon our view of human nature as being primarily self interested. Doubtless this is part of our makeup, but we can no longer afford to operate under the assumption that it defines us. As did the ancients, we will have to believe that all are capable of virtue, and that they can learn to control the urge to pursue base or petty pleasures. People also need to recognize that the pursuit of meaningful answers to the eternal questions of existence is not just the work of philosophers or intellectuals. It is a human need which we ignore at the cost of our own alienation and nihilism. Our current image of man must come to be recognized for what it is: a product of our socialization, fostered by capitalism as a means of justifying and legiti-

211. *Id.*

212. See ARISTOTLE, *supra* note 79, at 25-50; ARISTOTLE, *supra* note 18, at 25-54; PLATO, *supra* note 4, at 145.

213. B. Barber, *The Real Lesson of Amerika*, N.Y. Times, Mar. 1, 1987 at 25, col. 2.

mizing its own existence.²¹⁴

As part of this re-education, we will have to learn to reject those arguments which seek to justify the status quo, and especially those which attempt to do so through appeals to religion. Mr. Beckwith is one of the many who use religion in this way. His argument that men are led by "sin" and "self interest" into error and that this possibility of error makes the anarchy of the free market necessary is a case in point.²¹⁵

This does not mean that we need to ignore all of religion's insights. The belief that men can better themselves through an act of "self overcoming" is a lesson that can inspire us in our quest to achieve virtue, public spiritedness, and a revitalized political order.²¹⁶ Faith in the power of people to achieve goodness is among the best of the teachings that religion has to offer us. We should accept such teachings or views of religion and reject those which try to make of religion an obstacle to a better world.

It is likely that we will also have to re-evaluate our present understanding of freedom. In the first place, it is a hollow definition. In a society as technologically advanced and integrated as ours is, one's freedom to do almost anything depends almost entirely upon others who must perform their assigned tasks. We are "free" in only a limited sense, because it is a dependent freedom easily (and often) impinged upon when others fail at the jobs we expect them to perform.²¹⁷

Secondly, it is an understanding of freedom that is dangerous to democracy. It makes men "forget their ancestors," "isolates them from their contemporaries" and shuts men up "in the solitude of [their] own hearts."²¹⁸ Our current understanding of freedom works in the interest of capitalism, is encouraged by it, and as Benjamin Barber recently said, it leaves Americans:

more concerned about enlarging their private sphere of happiness than invigorating the public sphere in which civic freedom flourishes. They confront without a murmur the wholesale privatization of their country, the selling of the public trust into private hands, the transfer of public tasks (prisons, hospitals, schools) to private profit groups, the redefinition of public responsibilities (welfare, support for the arts) as private functions.²¹⁹

We need to redefine freedom in a public as opposed to a private way.

214. On this see I. MESZAROS, *MARX'S THEORY OF ALIENATION* 89-91 (1982); see also J. ISRAEL, *ALIENATION FROM MARX TO MODERN SOCIOLOGY* (1971).

215. Beckwith, *supra* note 8, at 6.

216. On this issue see *Romans* 7, 8, 12:1-2; *John* 3:1-15. For a more secularized version and explanation see W. KAUFMAN, *NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST* 16, 57, 200-07 (Vintage Books, 1968).

217. I am indebted to W.C. McWilliams for these insights.

218. A. DE TOCQUEVILLE, *supra* note 80, at 508.

219. B. Barber, *supra* note 213, at 25.

Freedom should once again mean having a meaningful say in the affairs of state, and in defining the public's alternatives.²²⁰

Lastly, and perhaps most importantly, we will have to recognize that equality is at least as important as liberty for the maintenance of a democratic regime. As a basis for community it is more than a necessary condition it is an essential one.²²¹ The reader will recall the reasoning of Aristotle on the need for equality in a democracy. There is no need to repeat it. However, I would like to say a few words about equality and community.

It would seem that community is important. Certainly, in Tocqueville's view it was, for he saw it as one of the obstacles to majority tyranny. Americans continue to both value it and seek after it even as it is fading as a way of life and as a political institution. We have touched upon some of the reasons for this decline. The size and complexity of our economy have made communities powerless to determine their destinies in any practical way. As their importance has faded, so too has people's allegiance to them.²²² Capitalism has worked to undermine some of the values upon which community rests (e.g., compassion, cooperation), and moreover, our present understanding of freedom is directly hostile to community.²²³

Community (and for that matter marriage) requires sacrificing at least some of our freedoms. We may have to curb our actions at times if we are to maintain the standards or values upon which these relationships rest. To make community (or marriage) work, we cannot always "do as we like." This is an important reason why both community and marriage are troubled institutions in contemporary America. As current trends all too painfully indicate, people often sacrifice their communities or their marriages for the sake of their freedom. Loneliness and alienation are often the price they pay, and freedom becomes (in the words of the popular song) "just another word for nothing left to lose." Bred on freedom and individualism, we only, with difficulty, reconcile these conflicting demands. To the extent that we are able to re-define freedom, we may improve this state of affairs.

There is a further problem, and it lies in yet another failure to recognize what is necessary for community. Community, if it is to work, must be based upon a sense of the equal worth and dignity of all individuals.²²⁴ This sense rests upon an "intrinsic" understanding of equality, and re-

220. BAKER, *supra* note 17, at 10.

221. See W.C. McWilliams, *On Equality as the Moral Foundation for Community*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 183 (R. Horowitz ed. 1978).

222. See BAKER, *supra* note 17, at 24-25.

223. See McWilliams, *supra* note 221; *Democracy and the Citizen*, *supra* note 17.

224. See McWilliams, *supra* note 221, at 185.

jects the importance of external manifestations of difference.²²⁵ In fact, "The belief in human equality is necessarily at odds with empiricism or positivism. It demands a radical depreciation of appearances and insists on a distinction between humanity's essential equality and its differing accidental manifestations."²²⁶ Today, we tend to deny that men are intrinsically equal. Though we pay lip service to equality, we tend to judge people according to how well they manifest their "worth."²²⁷ We estimate a person's value as a worker, or husband, or mother, and judge them accordingly. No mere colloquialism, it is yet another dramatic example of the extent to which capitalism's values have come to dominate our patterns of thought and our view of one another. Furthermore, this de facto inequality is not mitigated just because "society encourages me to demand, at least, the external validation of equal treatment as a proof of my equal worth."²²⁸ If we are to revitalize community in America, it will be important to ground our idea of society in a theory of the intrinsic commonality of all men.²²⁹ My earlier discussion on those powers that define us as human²³⁰ is relevant here. I feel that this theory provides such a grounding. It allows for apparent differences in competence or ability while positing the existence of an inner quality and potentiality which all humans share. This inner quality would serve as the basis upon which we could recognize our mutual humanity and accord to one another the dignity and respect that such a recognition requires. This grounding or one like it would seem to be necessary if community is once again to be placed on a sure footing. As institutions, communities are large enough to provide the possibility of political control and small enough to maintain the dignity of the individual.²³¹ This would seem to more than justify our efforts to revive and maintain them.

At this point it might be worthwhile for me to sum up my argument. The classical view of political life was quite different from our own. To the ancients, equality, liberty, and individualism were all defined and understood in connection with an understanding of citizenship much broader and demanding than our own. The founders rejected these views in favor of a "new science of politics." In this view, the individual and his private concerns became the focus of socio-political life and the best form of government was a limited one which would not attempt to create civic virtue but would merely guarantee individual liberty.

Capitalism fit well into this scheme but its adoption only helped to

225. *Id.* at 184; see also BAKER, *supra* note 17, at 615-29.

226. *Id.* at 189.

227. *Id.* at 187.

228. *Id.*

229. *Id.* at 187-89.

230. See *supra* text accompanying notes 194-99.

231. BAKER, *supra* note 17, at 615-29.

undermine those traditional institutions (community, family, civic association), and those traditional values (compassion, charity, frugality, self denial) which kept in check the avarice and radical individualism of the human heart. These characteristics have now achieved a position of ascendancy in our society. The result has been a relativization of values, meaninglessness, purposelessness, and alienation which pose a grave threat to our democracy.

The founders had hoped that a "better class of citizen" would work to maintain civic virtue and our democratic politics. The legal community formed an important part of this group. But the emerging capitalist ethos quickly took hold of the profession's members, many of whom soon gave up the pursuit of justice, equality, and fairness in favor of a radically self interested ministering to the needs and requirements of capitalism. This has only served to exacerbate and deepen the current crisis.

Current thinkers such as Mr. Beckwith attempt to rationalize, justify, and even further this course of events. Mr. Beckwith and his supporters do this by narrowly interpreting our history, by claiming that entrepreneurial lawyers help maintain traditional values, and by arguing that attempts to achieve substantial equality and a true broadening of democracy will lead to the disastrous end of socialism. To my mind, these arguments are more than just self serving. They rationalize and justify the greed of many lawyers, lead to a worsening of our politico-economic crisis, and will only serve to make ever closer in the public mind the relationship between the legal profession and our increasingly oppressive and meaningless politics.

Solutions do exist, but are likely to require a re-thinking of our current understanding of the law and of our commitment to capitalism. In my view, these solutions *must* entail a re-creation of meaningfulness by making clear the ends or purpose of our civilization. These ends need to be defined in a secular, humanistic, and noble fashion, and should be arrived at through communally based moderately sized institutions and not individuals.

In concluding this essay, I would like to discuss the part which the legal profession could play in this. It seems to me that members of the profession must choose between a career that both supports and partakes in the existing state of affairs and one that will help to bring about the kinds of changes which both myself and others have tried to argue are necessary if we are to preserve our democracy. Frankly, I am very pessimistic as to whether the necessary changes will occur. Like Shakespeare, I believe that "Diseases desperate grown are by desperate appliance relieved, or not at all."²³² If nothing else, I feel we are indeed in desperate

232. W. SHAKESPEARE, *HAMLET THE PRINCE OF DENMARK*, Act III, scene 4, line 206.

straits, and I am not at all sure that incremental or moderate changes will suffice. This is especially true given the tremendous imbalance of power that exists between those who benefit from the system and those who seek to change it. One cannot blame the faults of the system on bad individuals, or lapses of memory, or on isolated mistakes. I have tried to show that it is the system itself that is at fault, and the problems begin with its basic assumptions. In some of this, I differ strongly with many of those I have thus far relied upon to support my arguments.

If this assessment is accurate and radical measures are resorted to, the profession will stand to lose much. In the minds of many Americans, it is already closely identified with the present structure of political and economic power. This is an accurate perception, as the greed and self interest of many in the profession has led them to support and defend the system. Whatever fate the system would suffer as a result of radical change (from either the left or right), the profession can be sure that it will share in it. However, let us for the moment be optimistic and suppose that incremental changes can provide a solution to our difficulties. In such a scenario, the legal community could well find itself admirably positioned to play a leading role. Of course, education as a means of changing values (especially in the young) would be one primary concern. But the other chief means of change would be through the law itself. The laws have a powerful effect on the behavior of people. Time assures this effect, for even though the current generation objects to changes in the law, they are eventually replaced by a new generation, who, having been educated in the law, takes it as a given. "The spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate."²³³

As makers and interpreters of the law, the legal profession is well situated to mold it so as to encourage and promote the view of citizenship, community and political life outlined above. This will take some courage, for it will likely mean learning to think about some of our fundamental "rights" in new and unusual ways.

We may, for example, have to limit the ability of people to use their wealth to influence public policy. We do this presently, but what is needed is an even more extreme restriction of property rights. What I have in mind is the complete public financing of all elections with no private contributions allowed. This would not only open up the possibility of public office to more Americans and thus improve democracy, but would also help put an end to the political power of special interest groups and wealthy businessmen. In a like manner, we could use the tax

233. A. DE TOCQUEVILLE, *supra* note 80, at 270.

system to encourage community instead of discouraging it as we now do.²³⁴ Instead of providing a deduction for moving expense, we should remove it, and provide a deduction for staying in one's home. It could be scaled so that the longer one stays, the greater the deduction. This would have the effect of discouraging mobility (something clearly not in the interests of corporations) and encouraging the setting down of roots and the maintenance of community life. Changes in first amendment guarantees of free speech may also be necessary if we are to prevent advertisers from hiding behind the first amendment while practicing insidious forms of psychological abuse. Were a person in a marriage to engage in practices similar to those used by advertisers, there would be grounds for divorce on the basis of "mental cruelty." The protection of future generations might well mean extending this concept of cruelty to involve forms of speech we now consider exempt.

Members of the profession are not likely to play such a role or seek laws which encourage a reinvigorated politic unless they are educated to see the necessity and wisdom of it. To this end, we need to continue to encourage what Mr. Beckwith calls "interdisciplinary approaches to legal scholarship."²³⁵ Lawyers need an adequate background in philosophy and ethics and should be encouraged to enroll in such courses at the graduate level as a part of the law school curriculum. They need to understand well the law's relationship to its philosophical origins (with the classical views being stressed) and to the political and economic system as well. This should all be a central part of legal training, even if it would mean a four, as opposed to a three year curriculum. The critical legal studies school is representative of the broader understanding of the law and its relationship to society that can result from such a course of instruction.²³⁶

Can the law be radical? Lawyers at least must answer this question in the affirmative, especially if they hope to play a leading role in changing our system for the better. They need believe that:

any legal system, including a legal system in a capitalist society, carries with it large components of equity and justice that can provide some degree of protection to the masses of people that provide a platform from which further progress can be made, and that also provide a vision of social justice that inspires action.²³⁷

If members of the profession can find it within themselves to use their

234. I am indebted to Carey McWilliams for this example. See also *Democracy and the Citizen*, *supra* note 80, at 101.

235. Beckwith, *supra* note 8, at 23.

236. As is exemplified in the worthy scholarship of its members. For example, see source cited *infra* note 237.

237. V. RABINOWITZ, *The Radical Tradition in the Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairy ed. 1982).

knowledge and power to promote citizenship, nobility, virtue, equality, and justice, then hope remains. Should they seek their own self-interest and follow the accepted wisdom as a means of justifying it, both we and the profession are in trouble, for our current predicament will grow worse. It is worth keeping in mind that:

If American democracy falls, it will not fall to collaborators in SS uniforms or anonymous totalitarian bogeymen. Rather it will slide into the hands of some reluctant oligarchy or an overzealous domestic party without foreign connections that will assume power by default because the public has inadvertently abjured its citizenship.²³⁸

At present, the profession on the whole still seems concerned more with the bottom line than with justice. It has only itself to blame for this widespread perception. However, whether or not the profession can reform itself, is still an open question. The possibility that it can still exist. Redemption may be possible through an act of "self overcoming" such as has been referred to. Success at this would truly be something worthy of emulation, and would more than justify placing such individuals once again among the first rank of citizens. We have even more reason for hope, given that some in the profession have always sought a virtuous and meaningful politic and have always taken seriously their position as "priests at the temple of justice." Members of the profession must learn to recognize that the pursuit of substantive equality and fairness is an important part of their heritage. Making them the goals of one's professional life is not a betrayal of the profession's purpose, but a reaffirmation and a reclamation of it. Should the profession's members be swayed by the self interested arguments of conservatives and adopt the views of Mr. Beckwith as its "*raison d'etre*" then the likelihood of radical solutions to our problems will have been made more certain. Should this happen, the question will no longer be "What Do Lawyers Do?" but rather "What Shall We Do With Lawyers?"

238. B. BARBER, *The Real Amerika*, *supra* note 211, at 25.