LAWYERS AND THE PUBLIC INTEREST

BY
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It is encouraging to welcome a new student-initiated and student-edited "public interest" law journal. The legal profession is in crisis. Even though lawyers have seldom been a popular class, I doubt whether there has ever been a time when they ranked as low in public esteem as they do today, or a time when senior members of the Bar looked with as much sadness upon contemporary trends in their profession. The founding of this Journal, the widespread student demand for more courses in public interest law, and the intense interest in enlarging post-graduation opportunities to practice public interest law all seemingly evince law students' deep idealistic concern about the current role the bulk of our profession plays in society. This Journal, by focusing as it plans upon "poverty law; institutional access to and delivery of legal services; and ethical legal decision-making," can promote thoughtful discussion of the nature of the profession's obligations to the public. And reform is most likely to come from the young, who are idealistic enough to feel a sense of public responsibility and who, if they persist, can continue to pursue the ideal when they, in their turn, achieve positions of influence and power.

I.

What is "public interest law"? The very words suggest a dichotomy that worries many members of the profession. If some branches of the law are properly described as "public interest law," then there must be others in which the public interest is either irrelevant or so marginally relevant that we may forget it. Is this implication either accurate or desirable? Our society allows large measures of private property and private ordering of relationships because such freedom to choose and pursue individual goals is believed to be in the general interest. Much of the law, perhaps most notably property and contract law, is therefore directly concerned with rights and duties among private persons. But surely even in these instances the law-giver must choose the rules that will make private ordering work best in the general interest and build confidence in the system of justice.

The term "public interest law" carries more meaning when used to describe

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fields of practice. Law students concerned with progress and the common good often come to see themselves as facing a basic choice: "Shall I sell out upon graduation for the good life or shall I practice public interest law?" Practicing public interest law in this context means chiefly working as a Public Defender and representing indigents or other particular interests not adequately served by the profession. Those who make this choice are less concerned with material success than with the common good, including care for the weak and helpless; they are indeed serving the public interest. The new Public Interest Law Journal makes these quintessential public interest fields one of its focuses by addressing poverty law issues and the problems of institutional access to and delivery of legal services.

Yet even in this sense the term "public interest law" carries a profoundly disturbing negative perception. Are other branches of the legal profession in nowise concerned with the public interest? Must we lawyers now acknowledge that Richard Reeves gave an essentially fair and accurate, even though biting, description of the typical lawyer when he wrote:

> The point about lawyers . . . is that they are free to commit outrages against common morality and sense behind hallowed and intricate shields, canons, and jargon.[1]

Judging from a letter I received shortly after Watergate even some members of the teaching branch of the profession acknowledge the truth of Reeves' view:

> A law professor told me recently that there are three basic characteristics of lawyers a law school education has done nothing to correct: (1) * * * (2) lawyers are technicians who make no moral judgments, who are hired to hear a client's predicament and set to work figuring out the techniques needed to extricate the client from his bind; (3) lawyers going into government service carry with them their technical, extricating competence and strict devotion to each client's predicament, cannot conceive of themselves as serving "all" those people who make up the public.

Neither description does justice to the traditional view. Fifty years ago the phrase "public interest law" was unknown. Public spirited law students did not see themselves as facing the dilemma of choosing between "public interest law" and typical private practice. Part of the explanation may well be that we were too little mindful of the needs of those now served by public interest lawyers, but surely the chief reason was the force of the idea that all lawyers belonged to a profession carrying constant obligations to the public interest and many opportunities to serve it in daily practice. Dean Roscoe Pound underscored the point when he defined a profession as —

> a group . . . .pursuing a learned art as a common calling in the spirit of public service, no less a public service because it may incidentally be a

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[1] Reeves, *The Trouble with Lawyers*, NEW YORK MAGAZINE, July 29, 1974, at 27.

> means of livelihood. Pursuit of the learned art in the spirit of public service, is the primary purpose.[2]

We were made mindful of such eminent examples as that of Elihu Root, a great lawyer and public servant of the first quarter of the present century, who later explained that he spent much of his time in private practice advising clients, "The law lets you do it, but don't; it's a rotten thing to do."

Doubtless there was always some gap between the ideal and the reality. Still, because ideals firmly held do shape reality, the question of how should we lawyers seek to conduct ourselves today has critical importance. Shall we see ourselves as specialists highly trained in an increasingly technical field—"professionals" we still would claim—who put our knowledge of law and legal skills to the use the client dictates along with the client's accountants, engineers, economists, and other specialists? Or will we see ourselves as pursuing an independent calling, serving our clients but also and simultaneously serving larger public interests?

Those who cling to the traditional view and find joy in seeking to pursue it see desperate need for more conscious thought and discussion about the present and future role of the lawyer everywhere in the profession, including at the law schools. Happily, this Journal seeks to provide a forum for such discussion by including in its charter a focus upon "ethical legal decision-making."

II.

Lawyers make decisions affecting their clients chiefly in two contexts: (1) in conducting litigation, and (2) in counselling, *i.e.*, in deciding what advice to give clients and whether and how to implement their clients' decisions. Ethical sensibility obviously requires the lawyer either to free himself from self-interest or to stand aside before performing either function. The hard questions run along broader lines: Is the lawyer a specialist-technician charged exclusively with conducting litigation as a hired gun and with showing the client how to accomplish the client's stated wishes? May—and perhaps, should—the lawyer take into account anything beyond legality and the client's selfish interests? The long range interest the client may have forgotten? The public interest (whatever this may mean)? Other, competing private interests?

1. In litigation the lawyer becomes part of an adversary system, but this need not discharge him from all obligations other than winning. The Solicitor General of the United States as the federal government's advocate in the U.S. Supreme Court is part of the adversary system: his task is not to decide the controversy but to present one side. Yet the great Solicitors General have always been acutely aware of their role as officers of the Court, even to the point of confessing error when it would be stultifying to advocate the government's position and, on rare but important occasions, of refusing even to sign the government's brief when the client dictated a position that the Solicitor

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[2] R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at 5 (1953).

General concluded he could not espouse without violating his professional obligation to the fair administration of justice.[3]

The ambivalence occasionally gives rise to close questions. During my tenure, an individual who had been discharged by the Federal Aviation Administration brought an action claiming his discharge violated the Fifth Amendment's guarantee against deprivation of liberty or property without due process of law. The facts were clear-cut. The plaintiff had become employed by the Central Intelligence Agency after an initial security check but subject to more complete investigation. Before the investigation was complete, the plaintiff transferred to the FAA where he worked in Denver as an air traffic controller. The check revealed incidents of homosexual activity while he was young. The CIA forwarded the report to FAA. The FAA then discharged him, although he was married and had children. After the district court and court of appeals had upheld the discharge,[4] the plaintiff sought and obtained certiorari.[5] What course should the Office of the Solicitor General follow? On the one hand, the discharge seemed egregiously unfair. On the other hand, surely our client, the FAA, was not only the responsible agency but far and away the best judge of evidence of the possible emotional instability of an air traffic controller. The precedents gave the government markedly more freedom in making discharges than they do today. We pressed the FAA to reconsider, but its counsel and personnel officers refused. The impasse persisted until one morning FAA Administrator Halaby telephoned, "Archie, you know that case my people and you are fighting about. I'll make you a deal. I'm heading for the West Coast. I'll stop off in Denver and see the fellow. If I think he is emotionally stable enough to be an air traffic controller, we'll put him back to work. If I don't, you defend us. Okay?" Few government administrators are as willing to put themselves on the line. I accepted the offer. In due course the plaintiff was restored to his position with back pay.[6]

Even though few lawyers have the degree of independence that public office combined with a special tradition gives the Solicitor General, all lawyers, by long tradition, used to face similar ambivalent obligations under old Canon 32, entitled THE LAWYER'S DUTY IN THE LAST ANALYSIS, where the Bar spoke of its members as "ministers of the law obligated to render no service and give no advice involving disloyalty to the law . . . or deception or betrayal of the public." During litigation the lawyer must be loyal to the client, but he or she must also maintain the temple of justice. One may seek to hide this conflict, stressing the duty of loyalty owed to our clients, and then rationalize preferring the client's interest by saying that justice is best served by the adversary

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[3] Solicitor General Simon Sobeloff, for example, declined to defend the practice of discharging government employees under the loyalty and security programs of the 1950s on the basis of the statements of unidentified informers. *See* Peters v. Hobby, 349 U.S. 331 (1955).

[4] Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963).

[5] 376 U.S. 904 (1964).

[6] Certiorari was dismissed by agreement, *see* 379 U.S. 951 (1964).

system. So it is—up to a point. But surely it is plain that some tactics conducive to winning a particular lawsuit or obtaining a favorable settlement are inconsistent with the fair and reasoned administration of justice. For "ministers of the law", winning cannot be the only thing; indeed, there are times when it cannot be the first thing. Concern for "ethical legal decision-making" calls for examination of the conflict of interest between zealous advocacy and service of justice, of the ambivalent nature of this undertaking, and for reflection upon where the balance should be struck.

Does the trial bar today conduct litigation with sufficient devotion to building and maintaining a judicial system that achieves the largest humanly-attainable measure of justice? Actual practice falls very far short of the ideal if anecdotal evidence and the writings of Marvin Frankel, Geoffrey Hazard, and John Stewart are reliable. Do the enormous costs of wearing down the opposing party by protracted discovery, meritless appeals, or other dilatory tactics serve justice? What does it do to the system of justice and public confidence in the profession when the trial of criminal cases is repeatedly postponed to suit the convenience of counsel, or when counsel undertake such heavy dockets that few of their clients come to trial without long delay because of counsel's other court engagements?

These are questions that the legal profession must answer by self-examination if it is to retain its independence. The editors have wisely chosen to stimulate such discussion in the Journal.

2. Similar questions face the lawyer in the role of the counselor and draftsman. How broad should the lawyer's perspective be? The narrowest view was well-described in the writing of a fellow academic in the early 1970s. He asked the reader to imagine that a man about to undergo surgery went to his lawyer's office and asked the lawyer to draw him a new will cutting off his only son without a penny. The son, who was deeply and conscientiously oppose to the war in Vietnam, had gone to Canada to avoid the draft. He had been denied deferment as a conscientious objector, because he could not say that he was conscientiously opposed to *all* war. In the conventional view, the professor wrote, the role-differentiated character of the lawyer's work would render irrelevant such ordinary moral questions as whether this is a very bad reason for disinheriting a child. The lawyer's only job would be to draw the will, thus providing the competence that the client lacks.[7]

I wonder. I doubt whether a wise lawyer takes so limited a view of his responsibility. If the father asks, "Can I cut my son off without a penny," the lawyer doubtless must answer, "Yes, if you use the right words." If the client-father replies, "Then do it," the lawyer's responsibility, in my view, is not to begin drafting the will. Instead, in words matching their personal relationship, the lawyer should remind the father of all the unhappy implications of what he proposes, speak of the son's strength of character even though misdirected

[7] Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Human Rights 1, 6 (1975).

in the particular instance, and suggest that if the client were to die in surgery and could return twenty years later, he would probably regret his decision. I suspect that most lawyers would follow the latter course and that many such fathers would take this advice despite their original intention. Such lawyers would be widening their own and their clients' vision to take into account the sons' welfare and the clients' long range interests.

Does "ethical legal decision-making" likewise require the counsellor to press upon the business client competing public and private interests which the client's conduct may affect and which may in turn affect the client's own long-run welfare?

Consider the problem of toxic waste. From the viewpoint of a detached observer the prime need is to get the most toxic dumps cleaned up quickly. It is also pretty clear that the job will be done quickest and best by the enthusiastic cooperation of the EPA and the chemical industry. The EPA cannot solve the problem alone because, among other handicaps, it lacks the necessary information. The chemical companies cannot be left to solve the problem alone, even if they were all willing and able. Some years ago, I chanced to read an address by William G. Simeral, Executive Vice President of the DuPont Company and Chairman of the Board of the Chemical Manufacturers Association, calling upon the individual companies for more energetic involvement in the work of cleaning up the dumps. He then added:

> I must caution you on one thing, however. I know that your lawyers will be able to cite many good reasons for not doing any of this. But if we're ever going to succeed, we must be willing to accept at least some legal risks. We can't be perceived as hiding behind our lawyers.

As a lawyer proud of our profession, I felt a little sad. I felt considerably sadder when I next read the report of a conference on the same subject in which EPA lawyers explained that they must insist upon the stiffest possible view of a chemical company's liability, even though this view makes it very hard for a chemical company to cooperate. The EPA lawyers argued that taking any other position would subject their clients, the EPA and government officials, to public and congressional criticism.

Both the EPA and the chemical companies' lawyers had a duty to point out the risks on either side. Were their roles then exhausted? Or should they, embracing a broader vision of their professional roles, have gone on to develop new and imaginative ways of getting the job done while also meeting the most pressing needs and relieving the deepest fears of either side? Did "ethical decision-making" at least require the effort?[8]

The great lawyers of the past played this broader, creative role in both public life and private practice. They were free society's experts in creating and operating the formal accommodations, institutions and procedures that permit the pursuit of individual goals yet ease the conflicts and encourage the cooper-

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[8] The text above is not intended to suggest that there has been a great deal of efforts subsequent to the occasions mentioned in the text.

ation among people with rival interests without which the social enterprise cannot progress. Nothing contributed as much to lawyers' creativity as the ideal that the lawyer is not the client's "hired gun" but follows an independent calling. The "independent lawyer" develops the capacity for taking a longer and broader view than the first look of many clients engaged in pressing immediate self-advantage. Independence keeps him free of the emotional involvement that confuses judgment. The lawyer's habit of examining the implications of each step he takes and each assertion he makes reminds the independent lawyer, and enables him or her to remind clients, of the extent to which the client's true long-range goals are bound up with the welfare of those whom their conduct affects and, ultimately, of the whole community.

In the end, of course, it is for the client to decide, partly because the wise lawyer knows that he or she does not always know what is best for everyone, and ultimately because it is not the lawyer's but the client's enterprize and activity. The crunch in "ethical legal decision-making" of this sort comes when the lawyer must decide whether he can in good conscience put his "extricating competence" to the clients' use. Here, I think, the independent lawyer cannot always hide his personal responsibility behind his professional role. Not everything is a matter of conscience. The lawyer is not always right about what conscience or a sense of public responsibility requires. On the other hand, he will soon lose both his independence and his influence if he is always ready to devote his skill and legal knowledge to any enterprise not involving personal legal liability or crime.

III.

Conditions in late 18th and 19th century America were more favorable to true lawyer independence than conditions today. The leading lawyers were among the few best and most broadly educated members of the community. The community was smaller and simpler. Except in cities, the lawyer knew most of his community's elements by personal contact. Even in the cities he was likely to be in touch with varied aspects of community life. His list of clients would typically be drawn from varied walks of life, thus freeing him not only from economic dependence upon a single set of interests but from the danger of perceiving conflicts from a single point of view. The typical American lawyer of the late 18th and 19th century was also heavily engaged in or aspired to a role in public life. In a very real sense, the lawyer's post was at the nerve center of the community where he could see it whole and promote an independent public view. Alexander Hamilton's description is doubtless idealized but the practice could approach the aspiration:

> Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of society.[9]

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[9] The Federalist No. 35 at 221 (J. Cooke ed. 1961).

During the past century the sociology and economics of the profession changed. For a time its public influence declined because it seemed dominated by big business and the financial community. A little later the bar as a whole was greatly enriched by the addition of lawyers specializing in the representation of segments of society previously without legal voice or power: labor union lawyers, lawyers for civil rights and civil liberties organizations, for environmentalists and other so-called "public interest" groups. But in the industrial and financial centers the mix of clients represented by any one lawyer or even one firm became and still becomes narrower every year. And the narrow focus of the lawyer's clients tends to become the lawyer's own.

The exponential increase in the volume and complexity of the law also makes it hard for any one lawyer to avoid ever-narrower specialization. Many large business and financial enterprises even turn to different law firms for different kinds of legal service. Fewer and fewer lawyers practicing alone or in firms see the full range of a client's business, and they see even smaller fractions of the whole community. The vast corporate enterprises that span the country and even continents invite the creation of mega-law-firms able to serve the client in all its locations but with their own heavy capital costs, burdensome payrolls, and impersonality that put ever-greater emphasis upon billable hours and the bottom line.

Under such conditions it will be harder to revitalize the ideal of practicing law as an independent public calling; but the opportunities are there even outside the areas called "public interest law." Many are in government, others in part-time *pro bono* work and in law firms representing charitable and other public institutions. Practice in a town or small city is more varied than in the great centers. Counselling new enterprises offers the greater opportunities to shape their course to both private and public benefit. And it is hard for me to believe that even the largest enterprises are not ready to value today's Elihu Roots who win confidence initially for their high legal skills and judgment and then for their breadth of both experience and vision. The question for those concerned with "ethical legal decision-making" is not only whether the old ideal of an independent profession dedicated to public service is worth preserving but how to revitalize it under current conditions.

The vision of the independent lawyer shone brightest in times when the American people were bound together by a strong sense of their common bonds, and were buoyed by confidence in the ultimate success of great adventure. Today, the national outlook is less confident and more cynical. Divisiveness prevails. And the realists, especially in the academic branch of the profession, scorn the traditional ideal of the lawyer as always promoting self-deception or fraudulent rhetoric contrary to fact.

But these will not do as excuses. Realism is essential to honesty both in academic criticism and as we look at ourselves in the glass. But the realism is incomplete if it omits the ideals we pursue. The traditional ideals of the profession are operative facts if we hold and pursue them honestly enough to make a difference, even though our reach exceeds our grasp. Being includes becoming. What we seek to be is part of what we are. The very founding of

this Journal is proof that the ideal of a profession serving the public interest and making decisions in the public interest while also serving its clients well is an operative fact.