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The Agony of Modern Legal Ethics, 1970–1985

Michael S. Ariens
St. Mary's University School of Law, mariens@stmarytx.edu

ARTICLE

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Abstract. When the American Bar Association (ABA) adopted its Code of Professional Responsibility at its annual meeting in August 1969, the American legal profession was a publicly respected and economically vibrant body. Lawyers, though always more feared than loved, became increasingly important in post-World War II America. The demand for their services exploded for a quarter-century, and lawyers assumed an increased role in the economic and political life of the United States. During the 1950s and early 1960s, the Cold War led American lawyers and other public figures to re-emphasize the rule of law as defining the difference between the United States and the Soviet Union. Relatedly, American lawyers argued they possessed a central role in maintaining the rule of law. From the 1950s through the mid-1960s, the popular image of lawyers may have peaked. It was at this time that the ABA began its work to update the 1908 Canons of Ethics. The ABA's adoption of the Code of Professional Responsibility in 1969 was the first significant reformulation of a lawyer's code of ethics, and was intended to demonstrate that lawyers deserved the trust placed in them by American society. The ABA's adoption of the Code, and its quick acceptance by most states as law, were the last acts in a "golden age."

By 1974, the American legal profession was reeling from the turmoil of the late 1960s, followed by the Watergate affair and an economic downturn that adversely affected many lawyers. The larger legal profession was buffeted by a series of lawsuits alleging antitrust violations by the ABA and state bar organizations, and the Supreme Court held in 1977 that a ban on lawyer advertising for ethical reasons was unconstitutional. Although some lawyers did exceedingly well economically during the

1970s, many struggled. In late 1977, the President of the ABA called for the Code's replacement. Shortly thereafter, the ABA's House of Delegates approved the nomination of the members of the Kutak Commission, which was handed this task. During the half-decade effort to craft the Model Rules of Professional Conduct, the problematic ethical behavior of lawyers continued to make national news. Within the profession, a significant segment of the Bar rejected the structure and tenets of the Code, demanding a "modern" code of legal ethics befitting the needs of modern lawyers. Another segment of the lawyer population challenged the particular vision within the Code of the ethical duties of lawyers in representing clients. When the ABA adopted its Model Rules of Professional Conduct, it replaced a code that combined rules and aspirations with an approach that merely set a floor regarding lawyer conduct. The drafters of the Model Rules intentionally created a law of lawyering that supplanted an ethic of lawyering. Much more so than the Code, the Model Rules ushered in the modern understanding of lawyer ethics.

This Article examines a crucial period in the history of American legal ethics, 1970–1985. Its thesis is that a shallow, though broad, consensus among American lawyers concerning the ideals of legal professionalism dissolved during the 1970s. An ideological dissensus, propelled by the scandalous behavior of some Executive Branch lawyers in the Watergate affair, joined by a heightened fear of economic torpor, shattered the post-World War II profession's accepted self-definition.

The Model Rules of Professional Conduct implicitly acknowledged this ideological disagreement, a disagreement that has coursed through the history of the American legal profession from the late 1970s to the present.

Author. Professor, St. Mary's University School of Law, San Antonio, Texas. Thanks to Vicki Mather, David Papke, and Rick Sander for their comments and suggestions. Thanks also to my research assistants, Brendan Villanueva-Le, Stephanie Green, and Dorian Ojemen for their help; and my deep thanks to Stacy Fowler of the Sarita Kenedy East Law Library at St. Mary's University, whose help with some obscure and unusual sources made this Article possible.

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I. INTRODUCTION

The House of Delegates of the American Bar Association (ABA) adopted the proposed Code of Professional Responsibility on August 12, 1969, without any recorded dissent and without amendment.[1] The ABA then created the Special Committee to Secure Adoption of the Code of Professional Responsibility to promote the Code's adoption as law in the states.[2] In its semi-annual reports beginning in February 1970, the Special Committee listed an ever-increasing number of states that had adopted the Code as law. Sixteen states, twelve state bar associations, and the District of Columbia Bar adopted the Code by summer 1970,[3] and thirty-one states, eleven state bar associations, and the District of Columbia Bar had adopted it a year later.[4] The Special Committee regularly noted that most states had approved and adopted the Code without revision.[5] And of those states that amended the Code, the Special Committee reported that none made any "fundamental" changes.[6] Within three years of its adoption by the ABA, forty-three states and the District of Columbia had adopted the Code as law, and an additional four state bar associations had adopted the Code as applicable to their members, though not law.[7] Just three states—Alabama, California, and North Carolina—had not taken

1. *See Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. ANN. REP. 378, 389–92 (1969) (adopting the Code). One amendment was proposed, but failed. *See id.* at 391–92 (discussing the proposed McCalpin amendment). After the ABA adopted the Code, the Committee on Evaluation of Ethical Standards, which drafted it, proposed two very modest amendments, which the ABA House of Delegates adopted at its February 1970 Midyear Meeting. *See Proceedings of the 1970 Midyear Meeting of the House of Delegates*, 95 A.B.A. ANN. REP. 123, 145–46 (1970) (adopting a new subsection to the definitions section of the Code, and amending DR 2-105(A)(1) as it relates to practicing patent law in the United States).

2. *See Proceedings of the 1970 Annual Meeting of the House of Delegates*, 95 A.B.A. ANN. REP. 536, 550 (1970) (stating the Special Committee's goal of "securing adoption or approval of the Code in all states").

3. *See Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 95 A.B.A. ANN. REP. 770, 770 (1970) (reviewing the various states in which the Code had been adopted or approved and recommended for adoption).

4. *See id.*, 96 A.B.A. ANN. REP. 676, 676 (1971) (reporting how many states and bar associations had adopted the Code by 1971).

5. *Id.*, 95 A.B.A. ANN. REP. 770, 770 (1970); *see also id.*, 96 A.B.A. ANN. REP. 243, 243 (1971) (restating that in most states, the Code had been adopted without change); *id.*, 96 A.B.A. ANN. REP. 676, 676 (1971) (listing states which had adopted the Code as the standard for ethical conduct).

6. *See id.*, 95 A.B.A. ANN. REP. 770, 770 (1970) (stressing that no fundamental changes had been made by the adopting states); *id.*, 96 A.B.A. ANN. REP. 243, 243 (1971) (emphasizing that amendments did not fundamentally change the Code).

7. *Id.*, 97 A.B.A. ANN. REP. 740, 741 (1972).

any "official action" concerning the Code.[8]

In his August 1972 report, Chairman Earl F. Morris reported the Special Committee was "to be discontinued."[9] This decision was made because its members maintained the "expectation that most of those jurisdictions that ha[d] not yet completed the adoption process w[ould] do so within the next several months."[10]

One example of this consensus concerning the Code is found in the adoption process undertaken in Texas. In 1969, the State Bar of Texas formed a Special Committee on Revision of the Texas Canons of Ethics. The Special Committee amended just six rules found in the ABA's Code (all based on long-standing practices in Texas).[11] The State Bar's Board of Directors approved the Code, and, as required by law, sent the proposed Code to the members of the State Bar for a vote in fall 1971. Texas lawyers "overwhelmingly approved" the adoption of the Code,[12] and the Texas Supreme Court quickly issued an order adopting the Code.

This nearly universal acceptance of the Code unraveled almost as quickly as it arrived. In August 1977, the ABA created a special committee to investigate "all facets of legal ethics."[13] As made clear by the title of his article, *The Legal Profession Needs a New Code of Ethics*,[14] ABA President William Spann, Jr. hoped the committee would supplant the Code, rather than amend it. The ABA replaced the Code with its Model Rules of Professional Conduct in 1983, but only after much rancor and division.[15] The ABA's House of Delegates met at its February 1983 Midyear Meeting to discuss approval of the proposed Model Code. Over the course of two days, it managed to work through just twenty-nine of more than 200 proposed amendments.[16] Even after the ABA's House of Delegates

8. *Id.*; *see also id.* at 741–44 (summarizing action regarding the Code in each state).

9. *Id.* at 741.

10. *Id.*

11. *See* Cullen Smith, *The New Code of Professional Responsibility for Texas Lawyers—A Step Forward*, 34 TEX. B.J. 749, 749–51 (1971) (reviewing the amended changes pending their submission to State Bar members by written ballot).

12. *See Members Vote for Bar Rule Changes*, 34 TEX. B.J. 1052, 1052 (1971) (announcing approval of the submitted amendments to the Texas State Bar Rules).

13. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, B. LEADER, Nov.–Dec. 1977, at 2, 3.

14. *Id.*

15. *See* Gerard J. Clark, Commentary, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U. L. REV. 79, 79–91 (1983) (discussing the debate among the ABA to revise the Code); Ted Schneyer, *Professionalism As Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 678 (1989) (describing the production of and debate surrounding the Model Rules).

16. Gerard J. Clark, Commentary, *Fear and Loathing in New Orleans: The Sorry Fate of the*

adopted the Model Code at its August 1983 Annual Meeting,[17] states' acceptance came much slower than was the case regarding the Code. It took five years for half of the states to adopt some version of the Model Rules,[18] and each freely amended it.[19]

Why did the American legal profession turn so quickly on the Code after so fully embracing it? This Article argues that the Code of Professional Responsibility was the last act in a "golden age" for American lawyers. Tensions from within and outside the legal profession prefigured the end of the golden age as early as 1966 and 1967. Those tensions increased through the end of the 1960s and into the 1970s, and the pervasive involvement of lawyers in the Watergate scandal was one strong sign the American legal profession had entered a new era. Watergate exacerbated an already existing crisis of public confidence regarding lawyers. This loss of public confidence was joined by a generalized fear within the legal profession of economic decline. These events negatively affected the public standing and role of lawyers. A loss of public confidence was a crisis of standing, for the public's mistrust of lawyers lessened the authority of lawyers to act as a mediating body between citizens and the state, a standing that allowed both lawyers and the public to distinguish between professionalism (good) and commercialism (bad).[20] The economic crisis lawyers faced was perceived as a crisis of status. Lawyers feared a return to a more precarious financial condition of earlier decades. Most importantly, these changes chipped away at the professional standing of lawyers with the public.

One solution to these crises was to scrap the Code and replace it with what became the Model Rules of Professional Conduct. The history of drafting and adopting the Model Rules demonstrates the institutional acknowledgment that the American legal profession was in fact a grouping of a number of subsets of lawyers, subsets that possessed very different

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Kutak Commission's Rules, 17 SUFFOLK U. L. REV. 79, 85 (1983).

17. *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 763, 764 (1983).

18. *Informational Report of the Adjunct Committee on Implementation of the Model Rules of Professional Conduct*, 113 A.B.A. ANN. REP. 64, 64 (1988).

19. *See* PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 109 (1998) (noting in 1998 that "a substantial majority of the states have adopted the Model Rules, invariably with certain changes"); *see also* CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 203 (2d ed. 1997) ("The Texas Rules depart in many important respects from the ABA Model Rules.").

20. *See* John G. Hervey, *The Decline of Professionalism in the Law: An Exploration into Some Causes*, 3 N.Y. L. FORUM 349, 349 (1957) ("[O]f all professions, the law should be the most professional and it appears that the law has a tendency to become the least professional.").

interests in the making of rules of ethics that governed lawyers' conduct.

This Article is divided into three parts. Part II discusses the golden age of American lawyering, which extends from the late 1940s largely through the adoption of the Code in 1969. Part III traces the history of the end of the golden age, from the early discontentedness of some lawyers with the legal system, joined by a similar discontent from some outside the legal profession beginning in the late 1960s to the impact of Watergate on the legal profession in the 1970s. Part IV discusses the turn from the Code and the fight within the profession to craft the Model Rules. Part IV also addresses the immediate reaction to internal claims that a significant number of lawyers had abandoned professionalism for commercialism during the late 1970s and early 1980s, a claim that has haunted the American legal profession for the past three decades. Finally, Part V offers a brief conclusion.

II. THE "GOLDEN AGE"

A. *Lawyers in American Society and Culture, 1945–1969*

There never was a legal "golden age."[21] Few lawyers practicing law from the end of World War II through the 1960s perceived the American legal profession had reached an apogee in terms of economic power, social influence, and public respect. But lawyers who practiced law during this era (1946–1970) did better economically and socially than lawyers of the 1930s or lawyers practicing in the '70s and '80s.

Much of the reason lawyers improved their economic situation was due simply to the overall economic boom in the United States from 1946 to 1964.[22] Richard Sander and E. Douglass Williams looked at lawyers' incomes for the half-century between 1929 and 1979.[23] Using constant 1983 dollars, the mean income of lawyers between 1929 and 1941 (the Great Depression) was nearly identical.[24] In contrast, median lawyer

21. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 20 (1991) (indicating the "golden age" took place in "the late 1950s and the early 1960s"); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 20 (1996) (describing what was referred to as the "golden age" in the legal profession).

22. *See* ECONOMIC REPORT OF THE PRESIDENT 207 (1964) (noting in Table C-1 an increase in gross national product from $210.7 billion in 1946 to an estimated $585 billion in 1963).

23. *See* Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 448 (1989) (comparing lawyers' incomes from 1929–1979).

24. *Id.* No data reflecting median income of lawyers was available for these listed years, or for

income in 1969 ($47,638), also in constant 1983 dollars, was almost twice as much as it was in 1947 ($25,415).[25] Sander and Williams also compared the ratio of lawyer median and mean earnings to median and mean earnings of workers in the United States. Median lawyer income in 1947 was 1.86 times the median income of all workers in the United States.[26] In 1969, median lawyer income was 1.85 times the median income in the United States.[27] Thus, lawyers received the same economic premium compared with the median worker in both 1947 and 1969. Because real income nearly doubled for all Americans during these two decades, real lawyer income also nearly doubled. But even if lawyers' real income simply matched real income increases in American society, other evidence suggested a rising influence of lawyers in American society.[28]

The demand for legal services greatly outstripped supply during the golden age. Demand for legal services increased by 86% in the 1940s and by 76% in the 1950s, while supply grew by only 12% and 35%, respectively.[29] A late 1970s study by economist B. Peter Pashigian concluded that the 1960s was a decade of "general prosperity for the legal profession."[30]

Surveys taken by state bar associations suggested the elevated status of lawyers in the 1960s. A 1963 survey of occupational status ranked lawyers eleventh in the public's view.[31] That same year, the Missouri Bar published the results of a broad survey of the Missouri public and its lawyers.[32] Public respondents to the Improvement of Legal Services Questionnaire—including both those who had used legal services and those who had never used legal services—were asked about the general reputation of lawyers. Eighty-three percent responded that the reputation of lawyers was very good (28%) or good (59%), while just 15% found that reputation fair, and only 2% believed the reputation of lawyers was poor.[33] Respondents were also asked to estimate "[h]ow many lawyers

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1935.

25. *Id.*

26. *Id.* at 449.

27. *Id.*

28. *See* RICHARD L. ABEL, AMERICAN LAWYERS 160 (1989) (discussing the high demand for legal services in post-war years).

29. *Id.*

30. B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 AM. B. FOUND. RES. J. 51, 73.

31. RICHARD L. ABEL, AMERICAN LAWYERS 163 (1989).

32. MO. BAR PRENTICE HALL SURVEY, A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT (1963).

33. *Id.* at 22. Lawyers were also surveyed, and their response was nearly identical to the

live[d] up to the Code of Ethics."[34] Sixty-eight percent concluded that "most lawyers" did so, 23% responded "half of the lawyers," and just 9% thought "few of the lawyers" abided by the Code of Ethics.[35] Interviewers asked both "non-users" and "users" about the general reputation of lawyers, using the categories "Very good," "Good," "Average," "Poor," and "Don't know." Eighty percent of non-users and users believed that lawyers' collective reputation was average or better, though the two groups differed slightly regarding the particular categorization.[36]

A similar study taken for the State Bar of Texas in the early 1970s indicated that 60% of the public had a favorable view of lawyers, and the remaining 40% split evenly with either a "neutral" or unfavorable view, including "Very Unfavorable" (9.6%) and "Mostly Unfavorable" (9%).[37]

Other cultural indicators may suggest the respect lawyers received from the American public in the 1950s through the mid-1960s. In 1955, the book *Never Plead Guilty* was published.[38] *Never Plead Guilty* was a breezy story of the many (mostly criminal defense) cases of a San Francisco lawyer named J. W. "Jake" Ehrlich.[39] It was featured on the *New York Times* Best Sellers list for eleven weeks, from September 11, 1955 to November

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response of the public. Twenty-four percent of lawyers believed the general reputation of lawyers was very good, 59% believed it was good, 14% thought it was fair, and 1% thought it was poor. *Id.* at 30.

34. *Id.* at 23.

35. *Id.* Lawyers also gave similar responses: 73% believed most lawyers lived up to the Code, while a significantly smaller percentage believed that only half of lawyers (23%) or few lawyers (5%) lived up to the Code. *Id.* at 31.

36. *Id.* at 37.

	Non-users (%)	Users (%)
Very Good	21.3	25.4
Good	50.7	40.2
Average	8	14.9

37. *Bar Attitudinal Study Completed, Results Published for First Time*, 34 TEX. B.J. 13, 14 (1971).

38. JOHN WESLEY NOBLE & BERNARD AVERBUCH, NEVER PLEAD GUILTY: THE STORY OF JAKE EHRLICH (1955). *The Art of Advocacy* by Lloyd Paul Stryker, another criminal defense lawyer, made the *New York Times* Best Sellers list the week of April 18, 1954. *See New York Times Best Sellers List*, HAWES PUBL'NS, http://www.hawes.com/1954/1954-04-18.pdf (last visited Sept. 20, 2014) (ranking sixteenth). When Ehrlich's autobiography, *A Life in My Hands*, was published in 1965, it never made the *New York Times* Best Sellers list, which then was limited to the top ten best-selling fiction and nonfiction books. JAKE EHRLICH, A LIFE IN MY HANDS (1965).

39. *See* Roger K. Newman, *Ehrlich, Jacob W. (Jake)*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 183, 183 (Roger K. Newman ed., 2009) (outlining the life and accomplishments of defense attorney Jake Ehrlich); *see also* JAKE EHRLICH, A LIFE IN MY HANDS (1965) (recounting his personal life as a criminal defense attorney).

20, 1955,[40] and reportedly sold 2–3 million copies.[41] The public's appetite for nonfiction books about law and lawyers then ratcheted upward. In 1962, three such books made the *New York Times* Best Sellers list. *My Life in Court*,[42] written by Louis Nizer and published in late 1961, tells the story of Nizer's career as a New York City civil litigator. It was on the *New York Times* Best Sellers list for an astonishing seventy-two weeks, from December 3, 1961 through April 14, 1963.[43] It topped the list for nine of those weeks. In mid-1962, Doubleday, the publisher of Nizer's book, released *Final Verdict*[44] written by Adela Rogers St. Johns. *Final Verdict* was a memoir of her life growing up in early twentieth century Los Angeles with her father, Earl Rogers, a brilliant and dissolute criminal defense lawyer.[45] It was also a study of his most famous cases, including his successful criminal defense of the late (but still famous in 1962) lawyer Clarence Darrow.[46] It was on the Best Sellers list for forty weeks, from September 16, 1962, to June 16, 1963.[47] Finally, Edward Bennett Williams, a well-known criminal defense lawyer in Washington, D.C., wrote a book calling for society to better defend civil liberties.[48] Williams used his overarching theme to help explain his representation of various unpopular figures, from Wisconsin Senator Joe McCarthy (anathema on the left) and New York City Congressman Adam Clayton Powell (anathema on the right) to Jimmy Hoffa, Mafioso Frank Costello, and even an alleged Soviet spy.[49] Although Williams's list of clients made

40. *See New York Times Best Sellers List*, HAWES PUBL'NS, http://www.hawes.com/1955/1955-11-20.pdf (last visited Sept. 20, 2014) (listing weekly *New York Times* Best Sellers lists). Thanks to Stacy Fowler for compiling these data.

41. Roger K. Newman, *Ehrlich, Jacob W. (Jake)*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 183, 183 (Roger K. Newman ed., 2009).

42. *See* LOUIS NIZER, MY LIFE IN COURT (1961); *see also* Roger K. Newman, *Nizer, Louis*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 401, 401–02 (Roger K. Newman ed., 2009) (tracing Nizer's career as a civil litigator).

43. *New York Times Best Sellers List*, HAWES PUBL'NS, http://hawes.com/1963/1963-04-14.pdf (last visited Sept. 20, 2014).

44. ADELA ROGERS ST. JOHNS, FINAL VERDICT (1962).

45. *Id.*

46. *Id.* Darrow was charged with bribing a juror in a criminal case involving the McNamara brothers, who were eventually convicted of bombing the pressroom building of the *Los Angeles Times*. *See* JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 206–33 (2011) (recounting the bombing and subsequent trial of the McNamara brothers); *id.* at 234–64 (discussing the trial and not guilty verdict in bribery case against Darrow).

47. *New York Times Best Sellers List*, HAWES PUBL'NS, http://hawes.com/1963/1963-06-16.pdf (last visited Aug. 29, 2014).

48. EDWARD BENNETT WILLIAMS, ONE MAN'S FREEDOM (1962).

49. *See id.* at 5 ("I decided to put myself on a list of lawyers who were willing to defend people without fee . . . . Most of these clients were not only penniless but friendless.").

for possibly sensational reading, the book itself was written in a sober, though accessible, manner. *One Man's Freedom* made the *New York Times* Best Sellers list sixteen of the seventeen weeks from July 8, 1962, through October 28, 1962.[50]

Fictional works about law and lawyers were also popular at this time. Robert Traver's *Anatomy of a Murder*[51] was on the *New York Times* Best Sellers list for sixty-one weeks from March 1958 through April 1959, including twenty-nine weeks at number one.[52] Harper Lee's *To Kill a Mockingbird* won the Pulitzer Prize, was on the *New York Times* Best Sellers list for ninety-eight weeks from mid-1960 through mid-1962, and has remained in print since its publication.[53]

In September 1957, the show *Perry Mason* premiered on CBS.[54] CBS aired 271 episodes of the show, which ended in May 1966.[55] During its first six seasons, the show was always one of the thirty highest rated television shows.[56] Although prosecutor Hamilton Burger usually played the fool on *Perry Mason*, the title character was portrayed as a paragon of virtue, the lawyer as a crusading knight and modern hero. The success of *Perry Mason* led to the production and airing of other dramas based on the lawyer in the courtroom. In the edgier television series *The Defenders* (1961–1964), one goal of the creator was to show a more "realistic portrayal of the legal profession at work"[57] than shown in *Perry Mason*.

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50. *New York Times Best Sellers List*, HAWES PUBL'NS, http://hawes.com/1962/1962-10-28.pdf (last visited Sept. 20, 2014).

51. ROBERT TRAVER, ANATOMY OF A MURDER (1958). Traver was the pseudonym of Michigan Supreme Court Justice John D. Voelker. On Voelker, see William Domnarski, *Voelker, John D.*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 562 (Roger K. Newman ed., 2009).

52. *New York Times Best Sellers List*, HAWES PUBL'NS, http://hawes.com/1959/1959-04-19.pdf (last visited Sept. 20, 2014).

53. HARPER LEE, TO KILL A MOCKINGBIRD (1960). It was on the list from July 11, 1960, through June 17, 1962. *New York Times Best Sellers List*, HAWES PUBL'NS, http://hawes.com/1962/1962-06-17.pdf (last visited Sept. 20, 2014).

54. Francis M. Nevins, *Perry Mason*, *in* LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 51, 51 (Michael Asimow ed., 2009); *see also* Norman Rosenberg, *Perry Mason*, *in* PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE 115, 11528 (Robert M. Jarvis & Paul R Joseph eds., 1998) (examining the classic show *Perry Mason*).

55. Francis M. Nevins, *Perry Mason*, *in* LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 51, 58 (Michael Asimow ed., 2009).

56. *See* TIM BROOKS & EARLE MARSH, THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS, 1946–PRESENT, at 1682–84 (9th ed. 2007). It was not in the top thirty during its last three years on the air. *Id.*

57. David R. Ginsburg, The Defenders: *TV Lawyers and Controversy in the New Frontier*, *in* LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION 63, 66 (Michael Asimow ed., 2009) (internal quotation marks omitted).

But as was true in *Perry Mason*, the lawyers in *The Defenders* were also unfailingly portrayed as heroic figures. *The Defenders* indirectly begat *Sam Benedict*,[58] another lawyer drama. *Sam Benedict* was on the air for one year, and fictionalized some of the cases undertaken by San Francisco lawyer Jake Ehrlich.[59] After *General Electric Theater* was canceled in mid-1962, it was replaced by another show sponsored by General Electric, *G.E. True*. Its initial episode in fall 1962 was a "lionization" of the lawyer Clarence Darrow, who had died twenty-four years earlier.[60]

This era has also been called the "golden age"[61] of the law film, as well as the "halcyon days of heroic cine-lawyers."[62] From 1957 to 1962, a plethora of movies were released to critical acclaim and commercial success, including *12 Angry Men* (1957),[63] *Paths of Glory* (1957),[64] *Witness for the Prosecution* (1957),[65] *Anatomy of a Murder* (1959),[66] *Inherit the Wind* (1960),[67] *Judgment at Nuremburg* (1961),[68] *Billy Budd* (1962),[69] and *To Kill a Mockingbird* (1962).[70] Even when the law was shown to have failed, as in *Billy Budd*, in which the title character, a sailor, is legally though unjustifiably sentenced to die, a lesson imparted to the viewer was that "men are perishable things, but justice will live as long as the human soul, and the law as long as the human mind."[71]

Another event that may suggest an elevated public standing for lawyers

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58. TIM BROOKS & EARLE MARSH, THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS, 1946–PRESENT, at 1682–84 (9th ed. 2007).

59. *Id.* at 1190.

60. RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 406 (2014). Darrow died on March 13, 1938. *See* JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 465 (2011) (recounting Darrow's career as a defense attorney); Randal Tietjen, *Darrow, Clarence S., in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 149, 149 (Roger K. Newman ed., 2009).

61. David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 475 (1999) (citing Francis M. Nevins, *Law, Lawyers and Justice in Popular Fiction and Film*, HUMAN. EDUC., May 1984, at 4).

62. PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES 1 (rev. ed. 2006).

63. 12 ANGRY MEN (United Artists 1957).

64. PATHS OF GLORY (United Artists 1957).

65. WITNESS FOR THE PROSECUTION (United Artists 1957).

66. ANATOMY OF A MURDER (Columbia 1959).

67. INHERIT THE WIND (United Artists 1960).

68. JUDGMENT AT NUREMBURG (United Artists 1961).

69. BILLY BUDD (Allied Artists 1962). This film was based on the novella by Herman Melville. Herman Melville, *Billy Budd, in* BILLY BUDD AND OTHER TALES 7 (Signet Classic 1956) (1948).

70. TO KILL A MOCKINGBIRD (United Artists 1962).

71. PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES 301 (rev. ed. 2006) (quoting BILLY BUDD (Allied Artists 1962)).

was the national celebration of "Law Day" on May 1, beginning in 1958. Law Day was initially created by the ABA in order to cultivate in the people that "respect for law that is so vital to the democratic way of life,"[72] and was officially recognized by an Act of Congress in 1961.[73] Law Day was a Cold War response to the Soviet Union's May Day celebrations,[74] when military parades in Moscow were a familiar sight on the American evening news. As noted by the ABA's then-President Charles Rhyne concerning the first Law Day:

> The selection of May 1 as "Law Day—U.S.A." has great significance. May 1 is also the day on which international Communism celebrates its past victories and looks forward to its future conquests. There could be no better date for us to recall the basic moral and philosophical principles upon which our society is based, and to contrast them with the cynical, immoral and atheistic philosophy which underlies the international Communist conspiracy.[75]

The movement to create Law Day occurred when American lawyers perceived themselves as peculiarly capable of solving apparently intractable problems. Walter E. Craig, ABA President from 1963 to 1964, declared in his Presidential Address, "It seems to me that today as possibly never before the legal profession must meet the challenge of maintaining order in our society, in maintaining respect for the judicial process and the courts and maintaining respect and confidence in the legislative process."[76] In the wake of the success of Law Day, the ABA decided to use the talents of its members for an even greater cause. It created a special committee

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72. Law Day, U.S.A., 36 U.S.C. § 113(b)(2) (2012). The first Law Day was May 1, 1958, pursuant to a Presidential Proclamation dated February 3, 1958 by Dwight D. Eisenhower at the behest of ABA President Charles S. Rhyne. *See The President's Proclamation*, 44 A.B.A. J. 342, 343 (1958) (approving May 1st as Law Day); *see also* Jason Krause, *Charlie Rhyne's Big Idea*, 94 A.B.A. J. 62, 65 (2008) (crediting Charlie Rhyne with originating Law Day). *See generally* David Ray Papke, *Law Day, in* OXFORD COMPANION TO AMERICAN LAW 491 (2002) (describing the formation and purpose of Law Day).

73. Law Day, U.S.A., Pub. L. No. 87-20, 75 Stat. 43 (1961) (codified at 36 U.S.C. § 113 (Supp. IV 1998)).

74. May 1 was acknowledged in the United States and Europe shortly after the Chicago Haymarket Square riots in 1884 as "International Workers' Day." In 1894, possibly to sever the link with the events in Haymarket Square, the United States government adopted the first Monday in September as Labor Day. *See* Pub. L. No. 53-118, 28 Stat. 96 (1894) (designating the first Monday of September in each year as Labor Day).

75. Charles S. Rhyne, *"Law Day—U.S.A.": Emphasizing the Supremacy of Law*, 44 A.B.A. J. 313, 313 (1958).

76. *See* Walter E. Craig, *The President's Annual Address: The Challenges of Professional Responsibility*, 50 A.B.A. J. 824, 828 (1964) (addressing the necessity of law and legal professions in maintaining society), *reprinted in* 89 A.B.A. ANN. REP. 435, 435 (1965).

dedicated to bringing about "World Peace through Law."[77]

Charles Rhyne claimed Law Day symbolized the difference between the Soviet Union and the United States, for only Americans "live under the rule of law."[78] More importantly, the creation of Law Day reflected the view of the American lawyer establishment that an effective rule of law required continued maintenance by lawyers of the line dividing the rule of law from the rule of persons.[79] These twinned beliefs, that the United States adhered to the rule of law and that lawyers maintained the rule of law, would be challenged by self-described "radical" and "movement" lawyers as the United States entered the convulsive latter half of the 1960s.

B. *The Transition in Legal Ethics, 1946–1964*

In the aftermath of World War II, the ABA approved the commission of a *Survey of the Legal Profession.*[80] The purpose of the survey was to study "the functioning of lawyers in a free society."[81] One of the six areas scheduled for study was professional competence and integrity, which comprised studies of legal education, admission to the Bar, and legal ethics.[82] By 1953, over 150 reports on the six areas of study had been completed, including ten on legal ethics.[83] One of those studies, published in the *Virginia Law Review* in 1951,[84] evaluated the belief of lawyers of professional adherence to the Canons of Ethics. It concluded, "The very definite impression made upon the mind of one reading the replies to these questionnaires is that the Bar of the United States, with comparatively rare exceptions, maintains a strict observance of the ethics

77. *See* Charles S. Rhyne, *World Peace Through Law*, 83 A.B.A. ANN. REP. 624 (1958) (printing the President's Annual Address). The Special Committee on World Peace through Law was created by ABA President Rhyne that year.

78. Charles S. Rhyne, *"Law Day—U.S.A.": Emphasizing the Supremacy of Law*, 44 A.B.A. J. 313, 313 (1958).

79. *See* Walter E. Craig, *The President's Annual Address: The Challenges of Professional Responsibility*, 50 A.B.A. J. 824, 828 (1964) (calling for lawyers to strive to maintain the rule of law); Charles S. Rhyne, *"Law Day—U.S.A.": Emphasizing the Supremacy of Law*, 44 A.B.A. J. 313, 315 (1958) (emphasizing the leadership role of lawyers).

80. *Proceedings of the 1946 Annual Meeting of the House of Delegates*, 71 A.B.A. ANN. REP. 307, 310 (1946).

81. *Id.* at 309–10.

82. Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 A.B.A. J. 548, 549 (1953).

83. *Id.* at 550, 553.

84. *See* Robert T. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 399 (1951) ("The purpose of this section of the Survey is to ascertain to what extent is there adherence to, or deviation from, the Canons by the lawyers in each community or state.").

standards set forth in the Canons."[85] A 1952 book, *Conduct of Judges and Lawyers: A Study of Professional Ethics*,[86] was more cautious. The authors suggested a reconsideration of the Canons, if only to reassure the public and the legal profession of their continued value: "Perhaps the time has come for a public reaffirmation of the standards of the profession with more adequate emphasis on their significance."[87]

For reasons that are unclear, a special commission of the ABA was charged in 1956 with studying the Canons.[88] The American Bar Foundation, founded by the ABA in 1952, created a special committee to study the Canons one year earlier.[89] And a relatively new organization, the American College of Trial Lawyers,[90] agreed in 1956 on a Code of Trial Conduct, which was published in 1957 in the *ABA Journal*.[91] On June 30, 1958, the Special Committee of the American Bar Foundation issued its report, concluding "[T]he present Canons of Professional Ethics of the American Bar Association do not provide adequate standards of professional conduct for members of the Bar."[92] Two weeks later, the Joint Conference on Professional Responsibility, consisting of members of the ABA and the Association of American Law Schools, and in existence

85. Robert T. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 425 (1951).

86. ORIE PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS (1952).

87. *Id.* at 20. Several other books were published about this time on lawyers and legal ethics. *See* HENRY S. DRINKER, LEGAL ETHICS, at xi (1953) (exploring the meaning of ethics within the legal profession); *see also* ALBERT P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION, at v (1954) (delineating the scope of the book to cover the recent history of the Survey of the Legal Profession). Drinker believed the "basic standards" expressed in the Canons were sufficient. *See* HENRY S. DRINKER, LEGAL ETHICS 3 (1953) (determining that the original Canons need not be altered). Blaustein and Porter were more skeptical. They concluded, quoting a 1934 statement of Harlan F. Stone, that the Canons were "generalizations designed for an earlier era." ALBERT P. BLAUSTEIN & CHARLES O. PORTER, AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION 251 (1954) (suggesting that the Canons should change with the times (quoting Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934))).

88. Philbrick McCoy, *The Canons of Ethics: A Reappraisal by the Organized Bar*, 43 A.B.A. J. 38, 38 (1957).

89. *Id.*

90. *See* MARION A. ELLIS & HOWARD E. COVINGTON, JR., SAGES OF THEIR CRAFT: THE FIRST FIFTY YEARS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS 18–23 (2000) (noting its creation in 1950).

91. *A Code of Trial Conduct: Promulgated by the College of Trial Lawyers*, 43 A.B.A. J. 223, 223 (1957). The College amended its Code in early 1963. Sherman S. Welpton, Jr., *Genesis of the Code of Trial Conduct*, 58 A.B.A. J. 709, 709 (1972).

92. REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR FOUNDATION ON CANONS OF ETHICS 96 (1958).

since 1952, issued a report attempting to reorient the legal profession's understanding of the role and meaning of standards of ethical conduct.[93] Ignoring the report of its sister organization, the ABA's House of Delegates approved the Joint Conference's report at its 1959 annual meeting.[94]

Despite this flurry of activity, no other organized effort regarding legal ethics took place for five years.[95] Less than three weeks after the murder of President John F. Kennedy, San Francisco lawyer Melvin Belli gave a public statement and answered several questions from reporters regarding his decision to represent Jack Ruby in the shooting of Lee Harvey Oswald. Belli noted the existence of an "admonition" from the court not to discuss the case, and stated his intention to obey the ethical requirements of the local bar.[96] In mid-February 1964, jury selection began in the murder trial of Jack Ruby, a trial that generated an intense public interest that continued until the trial's end a month later.[97] As noted by Belli, during the trial the "standard pattern" was for "[t]wo to three television cameras" to be placed on elevated platforms at the courthouse entrance, for photographers to mill about in "roped-off areas in the second floor corridor," and for the reporters who received tickets to begin entering the courtroom at 8:00 a.m., an hour before trial proceedings began.[98] The sheriff, in Belli's telling, aimed to cooperate by making sure Ruby was led past reporters at "the right pace."[99] Though Belli's taped pretrial comments were made with equanimity, his comments after the trial may

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93. For further discussion of the Report of the Joint Conference, see Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958); Lon L. Fuller & John D. Randall, *Professional Responsibility: A Statement*, 11 S.C. L.Q. 306 (1959); *see also* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 426–33 (2008); John M. A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 328 (1996).

94. *Proceedings of the 1959 Annual Meeting of the House of Delegates*, 84 A.B.A. ANN. REP. 502, 541–42 (1959).

95. The only reference to the Canons or to a code of ethics in the annual report of the ABA was an August 1963 statement in a supplemental report by its Standing Committee on Professional Ethics in 1963 suggesting state and local bar associations better inform lawyers of the Canons of Professional Ethics through panel discussions. *See Supplemental Report of the Standing Committee on Professional Ethics*, 88 A.B.A. ANN. REP. 575, 575 (1963) (relaying the need for panel discussions to better inform lawyers of the Canons); *see also* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 433–36 (2008) (suggesting reasons why call occurred in 1964).

96. *December 10, 1963—San Francisco lawyer Melvin Belli takes over Jack Ruby case in Dallas, Texas*, YOUTUBE (Jan. 25, 2013), https://www.youtube.com/watch?v=ffP2Wzh34_g (Melvin Belli's press conference).

97. *See* MELVIN M. BELLI WITH MAURICE C. CARROLL, DALLAS JUSTICE: THE REAL STORY OF JACK RUBY AND HIS TRIAL 113 (1964) (providing a biased presentation).

98. *Id.* at 144–45.

99. *Id.* at 145.

have been the spark that led the ABA's Board of Governors to recommend the House of Delegates create a Special Committee on Evaluation of Ethical Standards.[100] After the guilty verdict, Belli said the trial was the "biggest kangaroo-court disgrace in the history of American law."[101] In response, ABA President Walter Craig publicly disparaged Belli's statements, declaring, "The canons of ethics provide that a lawyer having any justified grievance against a member of the judiciary should lodge that grievance with the appropriate authorities and not indulge in public defamation."[102] Craig continued: "That [Belli] should so flagrantly disregard the code of professional ethics and his oath as an attorney is a discredit to him and to his profession."[103] Craig's Presidential Address in August 1964 was titled *The Challenges of Professional Responsibility*.[104] One of the three challenges listed by Craig was the possible harm to a fair trial caused by public statements made by unnamed lawyers concerning pending litigation.[105]

A day after Craig's speech, incoming ABA President Lewis F. Powell, Jr. spoke to the House of Delegates to obtain its approval to create the Special Committee.[106] He also referenced the Ruby trial: "[R]ecent events in Dallas, familiar to all of us, have stimulated a new and intense interest in the Canons, particularly those designed to prevent prejudicial publicity and to ensure fair trial."[107] Powell also suggested to the House that the reform of the Canons was a modest rather than far-reaching effort: "There is certainly no thought of starting out to rewrite de novo the ethical standards of the legal profession."[108] At the same time, "in view of the

100. *See Report of the Board of Governors*, 89 A.B.A. ANN. REP. 414, 421 (1964) (resolving to request the House of Delegates create Special Committee on Ethical Standards).

101. *Casus Belli*, TIME, Mar. 27, 1964, at 34.

102. *Id.*; *see also* MELVIN M. BELLI WITH MAURICE C. CARROLL, DALLAS JUSTICE: THE REAL STORY OF JACK RUBY AND HIS TRIAL 34 (1964) (noting and rejecting Craig's comments).

103. *Casus Belli*, TIME, Mar. 27, 1964, at 34.

104. Walter E. Craig, *The President's Annual Address: The Challenges of Professional Responsibility*, 50 A.B.A. J. 824 (1964).

105. *Id.* at 825–26. Belli had nothing but contempt for Craig and the ABA. *See* MELVIN M. BELLI WITH MAURICE C. CARROLL, DALLAS JUSTICE: THE REAL STORY OF JACK RUBY AND HIS TRIAL 34–35 (1964) ("My grievances with the American Bar Association are of long standing."). Shortly after these contretemps he resigned from the ABA. *See* MARION A. ELLIS & HOWARD E. COVINGTON, JR., SAGES OF THEIR CRAFT: THE FIRST FIFTY YEARS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS 58 (2000) ("Belli soon resigned from the ABA.").

106. *See Proceedings of the 1964 Annual Meeting of the House of Delegates*, 89 A.B.A. ANN. REP. 365, 380–81 (1965) (providing a transcript of President Lewis F. Powell, Jr.'s discussion regarding the Board's recommendation to create a Special Committee on Evaluation of Ethical Standards).

107. *Id.* at 381. Powell also declared, "But the need for a critical reexamination is far broader than may be indicated by those events in Dallas." *Id.*

108. *Id.*

changed conditions since 1908 and the experience of the past half-century, the time has surely come for the American Bar Association to take a careful look at this critical area of our responsibility."[109] The House of Delegates adopted the proposed resolution, making just one change. It charged the Special Committee with the task of proposing recommendations that "may be deemed appropriate to encourage and maintain *the highest level* of ethical standards by the legal profession."[110]

For many in leadership positions in the American Bar, the early 1960s were a time of hope and optimism, for lawyers were important. Walter Craig's 1964 comments to his ABA colleagues verged on hubris:

> The defense and the survival of our nation will not rest solely upon the preparedness and courage of our Armed Forces, nor upon the strength of our nuclear weapons, but will rest equally upon the moral and intellectual courage and understanding of our people. Who are better equipped among all the segments of our society than the members of the legal profession to assert the leadership required to instill among our people that moral and intellectual courage necessary to the survival of the philosophy of the rule of law and freedom under law?[111]

Craig's assertion that lawyers were essential to maintaining a republic was joined by complacency within the ABA about the state of the legal profession. When ABA President Powell urged the House of Delegates to create the Special Committee on Evaluation of Ethical Standards, he quoted University of Texas Law School Professor Jerre Williams to justify in part his request: "The best way to attain better ethics in the legal profession is to have a few more good disbarments."[112] Although Powell did not wholly join in Williams's sentiments, both worked from the same premise: If the legal profession could just rid itself of those few bad apples, it would be relatively easy to reach "*the highest level* of ethical standards."[113]

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109. *Id.* at 382.

110. *See id.* at 383 (amending the resolution "by submitting the words 'the highest level' for the words 'a high level'" prior to adoption).

111. Walter E. Craig, *The President's Annual Address: The Challenges of Professional Responsibility*, 50 A.B.A. J. 824, 828 (1964).

112. *Proceedings of the 1964 Annual Meeting of the House of Delegates*, 89 A.B.A. ANN. REP. 365, 382 (1964).

113. *Id.* at 382–83 (showing Powell's views on disciplinary actions in the legal profession).

C. *Creating the Code of Professional Responsibility, 1964–1969*

The Special Committee on Evaluation of Ethical Standards, known as the Wright Committee after its chairman, Arkansas lawyer Edward L. Wright, largely met in secret for the next four years.[114] Its annual report to the ABA for the years 1965–1968 consisted of either a brief, an uninformative statement, or no report at all.[115] In October 1968, the Wright Committee sent a tentative draft to a group of 550 lawyers for comments. In January 1969, the preliminary draft was sent to 20,000 lawyers.[116] After receiving "hundreds" of comments, the Wright Committee made a few changes, and presented its final draft to the ABA House of Delegates on July 1, 1969. When the House of Delegates began discussing the proposed Code, the chairman of another ABA section proposed amending the rule relaxing the restrictions on group legal services, a long-standing issue of the ABA.[117] After a brief debate, the proposed amendment was defeated.[118] The House of Delegates then adopted the proposed Code of Professional Responsibility without amendment.[119]

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114. Wright wanted to wait to release a full preliminary report, and convinced the committee of this approach. *See* Interview by Olavi Maru with Edward L. Wright, Chairman, Special Comm. on Evaluation of Ethical Standards, in Little Rock, Ark. (Oct. 28, 1976), *in* AMERICAN BAR FOUNDATION PROGRAM ON ORAL HISTORY 10 (on file with author) (responding that the decision was not to publicize partial drafts). Wright believed that if the Committee released portions of the Code, or drafts thereof, the Committee would not have received "a unified impression or reaction from the [B]ar." *Id.*

115. A review of the annual reports of the ABA between 1964 and 1968 shows that the Special Committee filed no report in several years, and in others filed a brief report indicating the Committee was continuing its work.

116. *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. ANN. REP. 728, 728 (1969).

117. *See* R. W. Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility, DR 2–103(D)(5): Stale Wine in New Bottles*, 48 TEX. L. REV. 334, 334 (1970) (noting restrictive and regressive approach taken regarding the issue). *See generally* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 442–43 (2008) (discussing how the issue of group legal services was handled by the Special Committee).

118. *See Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. ANN. REP. 378, 389–92 (1969) ("When the McCalpin amendment was put to a vote it failed.").

119. *See id.* at 392 ("[T]he House went on to adopt the code as written by the Committee on Evaluation of Ethical Standards.").

III. SOCIETAL AND PROFESSIONAL DISCONTENT, 1965–1977

A. *Introduction*

A good case can be made for various dates embracing both the beginning and the end of "the Sixties."[120] In the 1960 presidential election, forty-three-year-old John F. Kennedy defeated Richard M. Nixon in the race to follow Dwight D. Eisenhower, becoming the youngest elected President in American history.[121] In summer 1961, Freedom Riders took interstate buses to the South to continue the struggle to end segregation and foster civil rights.[122] Students for a Democratic Society, representing in part what would become known as the "New Left," issued its Port Huron statement in 1962, which began, "We are people of this generation, bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit."[123] The March on Washington for Jobs and Freedom, led by Martin Luther King Jr., took place in summer 1963, following the civil rights boycott of Birmingham, Alabama that spring.[124] The Civil Rights Act of 1964 was signed into law on July 2 by President Lyndon B. Johnson.[125]

The end of the Sixties arguably arrived as early as 1968, when Richard M. Nixon—defeated in both the 1960 presidential race and the 1962 California gubernatorial race—won the presidency.[126] Both Martin Luther King Jr. and Robert F. Kennedy were assassinated in 1968, and the

120. *See, e.g.*, JAMES T. PATTERSON, THE EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA, at xii–xvi (2012) (noting options available to historians to choose among several years and making argument the Sixties began in 1965 in part because "[b]y mid-summer [1965] . . . the pervasive optimism of late 1964 and early 1965 was already ebbing"). *See generally* TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE (1987) (discussing the Sixties).

121. JAMES T. PATTERSON, THE EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA, at xv (2012).

122. *See generally* RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 1 (2006) (considering the ramifications of CORE's actions).

123. JAMES MILLER, DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO 329 (1987).

124. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 444 (1996).

125. *See* ROBERT A. CARO, THE PASSAGE OF POWER 569 (2012) (stating that President Johnson signed the Civil Rights Act of 1964 into law on July 2); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 1 (2014) ("In the intervening hours and a thousand miles away, President Lyndon B. Johnson had signed into law the Civil Rights Act of 1964.").

126. *See generally* MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD (2005) (indicating events of 1968 ended the Sixties).

United States was again engulfed in major urban riots.[127] In 1969, the United States landed men on the moon, and the Warren Court came to an end with the retirement of Earl Warren[128] and the resignation of Abe Fortas.[129] In 1970, bombing was apparently all the rage. The United States bombed Cambodia.[130] Over 250 bombings were linked to radical groups, including the bombing of Sterling Hall at the University of Wisconsin at Madison, killing a researcher.[131] In March, a bomb created by the radical group Weather Underground blew up prematurely, destroying a Greenwich Village townhouse and killing three of its members.[132] Students were killed at both Jackson State College and, more notoriously, at Kent State University.[133] In 1972, "Nixon then had the pleasure of watching the Democrats tear themselves apart."[134] Portraying himself as "the defender of 'law and order,'"[135] and Democratic Party candidates as "soft on crime,"[136] Nixon overwhelmingly won re-election, garnering over 60% of the popular vote and the electoral vote of every state but Massachusetts and the District of Columbia.[137] United States ground troops left Vietnam in 1973, and during the summer congressional hearings on the Watergate scandal dominated television coverage.[138] In August 1974, Nixon resigned from office to avoid impeachment.[139]

In terms of beginnings, what makes 1965 a pivotal or transformative year is the societal shift from the optimism of the early 1960s to a pessimism that hovered over the next decade.[140] Evidence of this

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127. *See generally id.*

128. *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 307–13 (1982).

129. *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 373–74 (1990).

130. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 750–51 (1996).

131. *See id.* at 716 ("[T]here were at least 250 bombings linked to white-dominated radical groups in the United States."). Patterson notes the government believed the actual number of bombings was six times greater. *See id.* at 717.

132. *See id.* at 717.

133. *See id.* at 755.

134. *See id.* at 759.

135. *See id.* at 762.

136. *See id.*

137. *See id.* at 764.

138. *See id.* at 771 ("Even as the United States was pulling the last of its soldiers out of combat in Vietnam, the scandal known as Watergate was beginning to wreck Nixon's second administration.").

139. *See id.* at 771–73.

140. *See, e.g.*, JAMES T. PATTERSON, THE EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA, at xii (2012) (arguing, "By mid-summer [1965] . . . the pervasive optimism of late 1964 and early 1965 was already ebbing"); *see also* WILLIAM L. O'NEILL, COMING

optimism is found in a 1964 Gallup Poll.[141] It found that 75% of Americans believed the government would "do what is right most of the time."[142] In 1965, the war in Vietnam became an American war, as President Johnson ordered bombing in February and sent in the first American combat troops in March.[143] That same month, broadcast networks televised law enforcement officers in Selma, Alabama, beating civil rights demonstrators on what became known as Bloody Sunday.[144] The Watts riots occurred August 11–17, less than a week after the Voting Rights Act became law.[145] The end of American participation in the Vietnam War in 1973 and the resignation in August 1974 of President Richard Nixon suggest an end of the Sixties. So, too, did the first oil shock, which began in October 1973 as member nations of the Organization of the Petroleum Exporting Countries (OPEC) protested American support of Israel in the Arab–Israeli War.[146] The oil embargo foreshadowed both an end to a lengthy era of economic good times,[147] and an end of American economic dominion across much of the world. By mid-1974, the United States officially entered a recession.[148] The increase in distrust of the government over ten years was extraordinary.[149] In 1974, in the aftermath of the Watergate scandal, Gallup again asked Americans if they trusted their government to "do what is right most of the time."[150] Now, 62% believed the government would *not* do what is right most of the time.[151]

The shift in films in the portrayal of the legal system and of lawyers also suggested a drenching pessimism in American society in the mid and late 1970s. Such films as *Chinatown* (1974),[152] *...And Justice for All*

APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S, at 7 (1978) (noting after 1965 America had "precious little of either" progress or stability).

141. *See* RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 276 (2014).

142. *See id.*

143. *See* JAMES T. PATTERSON, THE EVE OF DESTRUCTION: HOW 1965 TRANSFORMED AMERICA 65, 95 (2012).

144. *See id.*

145. *See id.* at xii–xiii.

146. *See id.* at 784.

147. *See id.* at 785.

148. *See id.* at 790.

149. *See* RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 276 (2014).

150. *See id.*

151. *See id.*

152. CHINATOWN (Paramount Pictures 1974).

(1979),[153] and *Kramer v. Kramer* (1979),[154] as well as other movies of the early 1980s,[155] painted the legal system as corrupt. Most lawyers (other than the conflicted and vulnerable protagonist) were shown as participants in corruption.

Further evidence that 1973–1974 can be considered the end of the Sixties may also be found in the anxiety and pessimism of an increasing number of Americans regarding the future.[156] For example, the editor of *Intellectual Digest* magazine, speaking on the *Today* show in February 1973, declared:

> For the first time Americans have had at least a partial loss in the fundamental belief in ourselves. We've always believed we were the new men, the new people, the new society. The 'last best hope on earth,' in Lincoln's terms. For the first time we've really begun to doubt it.[157]

The argument below is that this wrenching shift from optimism to pessimism reached the American legal profession, tentatively in 1968 and 1969, and more forcefully by 1973.

B. *Disorder and Discontent, 1966–1974*

Several weeks before the 1965 Watts Riots, Johnson issued Executive Order 11,236,[158] creating the President's Commission on Law Enforcement and Administration of Justice. The Commission published its report in February 1967.[159] It began, "There is much crime in America, more than ever is reported, far more than ever is solved, far too much for the health of the Nation."[160] Six months later, and in response to a number of riots in June and July, Johnson issued Executive Order 11,365,[161] creating the National Advisory Commission on Civil Disorders. More popularly known as the Kerner Commission after its

153. ...AND JUSTICE FOR ALL (Columbia Pictures 1979).

154. KRAMER VS. KRAMER (Columbia Pictures 1979).

155. BREAKER MORANT (7 Network 1980); BODY HEAT (Ladd Co. 1981); THE VERDICT (Twentieth Century Fox 1982).

156. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 783 (1996).

157. RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 7 (2014).

158. Establishing the President's Commission on Law Enforcement and Administration of Justice, Exec. Order No. 11,236, 30 Fed. Reg. 9,349 (July 28, 1965).

159. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (Feb. 1967).

160. *Id.* at 1.

161. Establishing a National Advisory Commission on Civil Disorders, Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).

chairman, Illinois Governor Otto Kerner, it issued its final report on March 1, 1968.[162] The Commission called in part for significantly greater federal funding to reduce economic inequality between the races.[163] It also noted that civil disorders, both major and minor, increased from a reported forty-three in 1966 (which involved "considerable variations" in violence and property damage),[164] to 164 disorders "during the first nine months of 1967."[165] The Commission categorized five of these 1967 disorders as "major" in terms of violence and damage, and thirty-three as "serious" but not major.[166] The public's view of the 1967 riots may have differed from the Commission's. A February 1968 Gallup Poll asked Americans, choosing from a list of forty options, what the most important problem was facing the respondent's community.[167] For the first time ever, the top choice was "crime and lawlessness."[168] President Johnson, who called the increase in crime "a public malady," was "incensed" by some of the Kerner Commission's proposals and recommendations.[169] Johnson's pique was in large part a response to this middle class concern that government needed to do something to reduce the problem of lawlessness.[170]

One month after the publication of the Kerner Commission's report, Martin Luther King Jr. was assassinated in Memphis. Riots occurred after King's death in several cities, most notably Washington, D.C.[171] In April 1968, there "were more arrests and more injuries . . . *alone* than in all of 1967," "nearly as much property damage," and "nearly as many disorders."[172] The biggest difference between civil disorders in 1967 and those in 1968 was that fewer people were injured or killed in the latter year.[173] On June 6, 1968, shortly after midnight in Los Angeles, Democratic Party presidential candidate Robert F. Kennedy was shot and

162. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT (Mar. 1, 1968).

163. *Id.* at 2.

164. *See id.* at 21.

165. *See id.* at 3.

166. *Id.*

167. *Questionnaire Profile: The Gallup Poll #757*, GALLUP, http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIPO0757 (last visited Sept. 25, 2014).

168. *See* RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 238 (2008).

169. ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973, at 516 (1998).

170. *See id.* (indicating lawlessness was the top concern among the middle class).

171. *Id.*

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

173. *See id.*

killed by Sirhan Sirhan. In response to these murders, Johnson issued Executive Order 11,412, creating a National Commission on the Causes and Prevention of Violence.[174] On June 19, Congress adopted the Omnibus Crime Control and Safe Streets Act.[175]

The National Commission on the Causes and Prevention of Violence issued its final report in December 1969. Its summary declared, "Violence in the United States has risen to alarmingly high levels. . . . [T]he decade of the 1960s was considerably more violent than the several decades preceding it and ranks among the most violent in our history."[176] The Commission listed the increases in reported violent crime between 1960 and 1968: homicide up by 36%, forcible rape by 65%, and increases of 67% in aggravated assaults and 119% in robberies.[177]

In the presidential election year of 1968, it was not just Republican Party candidate Richard Nixon who roused audiences with an appeal to "law and order."[178] Proud liberals Robert F. Kennedy and Hubert H. Humphrey, the eventual Democratic Party presidential nominee, both included appeals to law and order in their stump speeches.[179]

Even after urban riots effectively ended after 1968, the issue of crime did not abate. In 1973, it was becoming an obsession among Americans.[180] Cultural evidence of this obsession regarding crime might be found in the fact that, in fall 1973, the three national television networks planned on broadcasting a record ten shows involving police and crime.[181] More prosaically, the FBI's Uniform Crime Reports showed an initial peak of 487.8 violent crimes per 100,000 persons in 1975, over three times the rate of 160.9 violent crimes per 100,000 persons in

174. Establishing a National Commission on the Causes and Prevention of Violence, Exec. Order No. 11,412, 33 Fed. Reg. 8,583 (June 12, 1968).

175. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

176. NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE, FINAL REPORT, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, at xv (1969).

177. *Id.* at 18.

178. *See* WILLIAM L. O'NEILL, COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S, at 380 (1978) (noting that Nixon appealed to "law and order" in his acceptance speech).

179. *See id.* at 365, 387 (noting that both Humphrey and Kennedy included an appeal to "law and order" in speeches). Humphrey's appeal occurred in the aftermath of the riots in Chicago that took place during the Democratic Party convention. *See id.* at 383–84 (noting the special report issued by the President's commission titled *Rights in Conflict*); *cf.* RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 342–43 (Scribner ed., 2008) (noting Humphrey's general election commercial on law and order prioritized the war on poverty over either doubling convictions or building more jails).

180. RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 61 (2014).

181. *Id.*

1960.[182]

Each of the Commissions created by Executive Order of President Johnson focused in part on the operation of the criminal justice system, and each found it wanting. The Task Force Report on the Courts of the President's Commission on Law Enforcement and Administration of Justice compiled information on the criminal court system.[183] It concluded, "[A] major need of all courts is better qualified, better trained personnel."[184] The Commission agreed with its Task Force: The nation needed "a massive overhaul of the lower criminal courts."[185] The Kerner Commission echoed this demand for wide-ranging criminal justice reform.[186]

The Task Force on Violent Aspects of Protest and Confrontation of the Commission on the Causes and Prevention of Violence analyzed "the nature and causes of protest and confrontation in the United States, and their occasional eruption into violence."[187] It concluded that, during these crises, too few experienced criminal defense lawyers were available, and "[w]hen lawyers are either untrained, uninterested, or unavailable, the adversary system becomes a fiction."[188]

C. *Discontent in the American Legal Profession, 1966–1972*

In late 1966, *Law & Society Review* published its first issue. A brief article titled *Civil Justice and the Poor: Issues for Sociological Research*[189] was followed by the provocatively titled article, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession.*[190] Its author,

182. *Uniform Crime Reporting Statistics*, F.B.I., http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm (last revised Mar. 29, 2010). The initial peak in homicides was a year earlier, 1974. *Id.* The overall peak for violent crime was an astonishing 758.2 acts per 100,000 persons in 1991. *Id.* The peak in homicides per 100,000 persons was in 1980. *Id.*

183. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967).

184. *Id.* at 1.

185. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 130 (1967) (recommending the lower courts be abolished or overhauled by state and federal governments).

186. *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 183 (Mar. 1, 1968).

187. JEROME H. SKOLNICK, THE POLITICS OF PROTEST, at xv (1969).

188. *Id.* at 297; *see also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) ("[T]here are not enough competent criminal lawyers available to serve even those defendants who can afford to retain counsel.").

189. Jerome E. Carlin, Jan Howard & Sheldon L. Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9 (1967).

190. Abraham S. Blumberg, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967); *see also* ABRAHAM S. BLUMBERG,

Abraham S. Blumberg, argued that criminal defense lawyers often acted as "double agents," serving the ends of the criminal justice bureaucracy rather than fulfilling their professional duty as zealous advocates for their clients.[191] Blumberg's excoriation of a subset of the lawyer population may be helpfully contrasted with *Lawmen, Medicine Men and Good Samaritans*, published in the *ABA Journal* earlier in 1966.[192] Henry Foster, a professor of law at New York University, appealed to the ideal of professionalism in encouraging lawyers to represent the "cause of unpopular clients."[193] Foster was well aware of the class division within the legal profession, and of the view that "[t]he corporate lawyer and even the general practitioner may regard the criminal and divorce courts as unsuitable arenas for distinguished counsel."[194] Foster also discussed the "sin" of uncaring lawyers, but expressed hope in the Supreme Court's 1963 decision in *Gideon v. Wainwright*.[195] *Gideon's* constitutional mandate that defense counsel be provided beyond capital cases portended good news, because it "will bring more and better lawyers into the criminal courts."[196] Blumberg's view of *Gideon* was much more pessimistic: *Gideon* and related cases "fail to take into account three crucial aspects of social structure which may tend to render the more libertarian rules as nugatory."[197] Two of those crucial aspects concerned "the relationship

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CRIMINAL JUSTICE 110–15 (1970) (reiterating conclusions); John Cratsley, *The Crime of the Courts*, *in* WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES 190, 206 (Bruce Wasserstein & Mark J. Green eds., 1970) ("But until the legislators, the electorate, and the bar are ready to support extensive and very expensive reforms, the adversary process of justice in our lower courts will continue to be merely preached."). For a critical assessment of lawyers, including the bar's ethical failings, see MURRAY TEIGH BLOOM, THE TROUBLE WITH LAWYERS 157–91 (1968).

191. *See* Abraham S. Blumberg, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 31 (1967).

192. Henry H. Foster Jr., *Lawmen, Medicine Men and Good Samaritans*, 52 A.B.A. J. 223 (1966).

193. *See id.* at 224 (indicating the traditional lawyer courageously represented the "cause of unpopular clients").

194. *Id.* at 225; *see also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 57 (1967) ("In many of our larger cities there is a distinct criminal bar of low legal and dubious ethical quality.").

195. Gideon v. Wainwright, 372 U.S. 335 (1963).

196. *See* Henry H. Foster Jr., *Lawmen, Medicine Men and Good Samaritans*, 52 A.B.A. J. 223, 225 (1966).

197. Abraham S. Blumberg, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 38 (1967); *see also* Robert Lefcourt, *Lawyers for the Poor Can't Win*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 123, 127–28 (1971) (noting system of assigning counsel in Houston "is an example of an assigned counsel system which keeps the [criminal defense] lawyer's practice primary and the client's interest secondary").

that the [criminal defense] lawyer-regular *actually* has with the court organization"[198] and "the character of the lawyer–client relationship in the criminal court,"[199] a relationship Blumberg contrasted with the "heroic" relationship usually found in novels, movies, and television shows.[200]

In July 1968, the National Lawyers Guild, an organization of left and left-leaning lawyers, held its annual convention in Santa Monica.[201] Law students and new lawyers criticized the Guild as reflecting an era (the fight against McCarthyism) that had passed, and unable to adapt to an era ("anti-war, anti-draft, and anti-poverty programs") of concern to the New Left.[202] A year earlier, those desiring to rebuild the Guild concluded, "We must now begin to re-think and criticize everything. We must re-build the Guild in its entirety."[203] For some long-time members of the Guild, the challenge of "Movement" lawyers was frustrating, if not incoherent. "As a lawyer, do you want to make an impact—in some cases admittedly almost imperceptible—upon the society in which you and 200 million other people live, or do you want just to blow a lot of wind and merely to give yourselves a big internal bang?"[204]

The 1968 Guild Convention closed with a talk from UCLA law professor Richard Wasserstrom. His speech, *Lawyers and Revolution*,[205] discussed both "whether the situation in the United States is such that the

198. Abraham S. Blumberg, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 38 (1967) (emphasis in original). The "lawyer-regular" was someone who repeatedly represented clients in a particular courtroom or courthouse.

199. *Id.*; RICHARD HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA 57 (1970).

200. Abraham S. Blumberg, *The Practice of Law As a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 38–39 (1967). Blumberg's pessimism suggests the portrayal of the lawyer as hero in popular culture was at an end. *Perry Mason* was cancelled in spring 1966. *See generally* BRUCE WASSERSTEIN & MARK J. GREEN, WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES, at xiii (1970) ("Many people [falsely] think of law as dispensed by white-haired judges in taut courtroom dramas with the defendant having a Raymond Burr [Perry Mason] or at least an E. G. Marshall [Lawrence Preston in *The Defenders*] as his counsel.").

201. Several writings detail the events surrounding the 1968 Guild Convention. Joan Andersson, *1968: The Way We Were*, GUILD NOTES, Jan. 1980, at 1; Joan Andersson et al., *The Confrontational Convention in Santa Monica, 1968*, *in* THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT TO REAGAN 261 (Ann Fagan Ginger & Eugene M. Tobin eds., 1988); David Rein, *The Movement and the Lawyer*, 28 GUILD PRAC. 1 (1969).

202. Joan Andersson, *1968: The Way We Were*, GUILD NOTES, Jan. 1980, at 1.

203. *See id.* (quoting a 1967 National Executive Board report of the Executive Secretary).

204. Norman Leonard, *The Movement Lawyer as Seen by One Over Fifty*, 28 GUILD PRAC. 14, 14 (1969).

205. Richard Wasserstrom, *Lawyers and Revolution*, 30 U. PITT. L. REV. 125 (1968), *reprinted in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 74 (Jonathan Black ed., 1971).

only, or the most justifiable, solution is a basically revolutionary one" and, if so, whether "the lawyer has some unique or even different role to play."[206] Though evincing strong doubts about whether "there has in fact been" a revolutionary movement, Wasserstrom turned "to the more specific question of the relationship of the lawyer to radical or revolutionary programs."[207] After noting "the lawyer's institutional role," the role of impartial advocate, and the role as advocate for an individual, Wasserstrom concluded the "lawyer's cast of mind" made it "at best neutral and more typically uncongenial to that of the revolutionary's."[208] To Wasserstrom, "the lawyer who is also a radical, or the radical who is also a lawyer," did possess one complementary attribute: To be "truly imaginative in consideration of the fundamental ways in which a legal system might be transformed and yet remain a system that does those things that ought to be done and that a legal system now does."[209]

Not all radical lawyers agreed with Wasserstrom's assessment. The federal criminal trial of the Chicago Eight began in September 1969, a month after the ABA approved its Code of Professional Responsibility.[210] The eight defendants were charged with conspiring to incite a riot, and, to meet federal jurisdictional requirements, of crossing state lines to do so.[211] The alleged conspiracy arose out of the protests and demonstrations in Chicago during the 1968 Democratic Party Convention.[212] The trial lasted nearly five months, and included the spectacle and specter of one defendant, Bobby Seale, being bound and gagged by order of the court.[213] Judge Julius T. Hoffman eventually declared a mistrial in Seale's case, but also found him guilty of contempt of court and sentenced him to an unprecedented four years in prison.[214] The judge held each of the

206. *Id.* at 125.

207. *Id.* at 126, 128.

208. *Id.* at 129–30.

209. *Id.* at 132.

210. United States v. Dellinger, 472 F.2d 340, 371 (7th Cir. 1972); MODEL CODE OF PROF'L RESPONSIBILITY (1969).

211. Michal R. Belknap, *Chicago Conspiracy Case, in* OXFORD COMPANION TO AMERICAN LAW 92, 92 (Kermit L. Hall ed., 2002); James T. Ely, Jr., *The Chicago Conspiracy Case, in* AMERICAN POLITICAL TRIALS 263, 270 (Michal R. Belknap ed., 1981). *See generally* JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL (rev. ed., 1993) (providing a first-hand account of the trial).

212. The 1968 Democratic National Convention was held on Aug. 26–29 in Chicago, Ill. 1 CONG. QUARTERLY, INC., GUIDE TO U.S. ELECTIONS 490 tbl.12-1 (John L. Moore ed., 6th ed. 2010).

213. James W. Ely, Jr., *The Chicago Conspiracy Case, in* AMERICAN POLITICAL TRIALS 263, 274 (Michael P. Belknap ed., 1981).

214. *Id.*

remaining seven defendants, and their two primary lawyers, William Kunstler[215] and Leonard Weinglass, in contempt.[216] Hoffman found Kunstler engaged in twenty-four specifications of contempt, and sentenced him to over four years in custody, with the sentences running consecutively.[217]

The jury acquitted all of the defendants of conspiracy and found two defendants not guilty on all charges.[218] The jury found the remaining five guilty of crossing state lines with intent to incite a riot.[219] The Seventh Circuit reversed and remanded the contempt citations in mid-1972,[220] and reversed the convictions later that year.[221] The Seventh Circuit noted the duty of the trial court and the prosecutor to meet "high standards" of conduct, and the "judge's deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning. It appears in remarks and actions both in the presence and absence of the jury."[222] Hoffman thus failed to meet those required high standards.

Some lawyers concluded Hoffman's attitude was a result of the pusillanimous behavior of the Bar. One of the defendants, Tom Hayden, quoted a University of Chicago law professor as saying "it was common knowledge that this judge callously and insistently degrades and provokes the lawyers who happen to appear before him unless they come from the office of the United States Attorney."[223] An analysis of civil disorders in Chicago in 1968 concluded that the local bar association's decision not to "criticiz[e] the courts' actions during the riots" was perceived as quietly supporting those courts, which were overwhelmed by the mass arrests.[224]

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215. William Kunstler was no stranger to controversy. DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA (1999); WILLIAM M. KUNSTLER WITH SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER (1994); David J. Langum, Sr., *Kunstler, William M.*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 320, 320 (Roger K. Newman ed., 2008).

216. James W. Ely, Jr., *The Chicago Conspiracy Case*, *in* AMERICAN POLITICAL TRIALS 263, 276 (Michael R. Belknap ed., 1981).

217. *Id.* Hoffman conducted the contempt proceedings after the jury retired to deliberate and sentenced Kunstler to consecutive short-term sentences to circumvent a limit imposed by case law preventing "sentences of no more than six months without a jury trial." DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 118–19 (1999).

218. James W. Ely, Jr., *The Chicago Conspiracy Case*, *in* AMERICAN POLITICAL TRIALS 263, 277 (Michael R. Belknap ed., 1981).

219. *Id.*; DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 119 (1999).

220. *In re* Dellinger, 461 F.2d 389, 389 (7th Cir. 1972).

221. United States v. Dellinger, 472 F.2d 340, 409 (7th Cir. 1972).

222. *Id.* at 386.

223. TOM HAYDEN, TRIAL 51 (1970) (quoting an unnamed professor).

224. JEROME H. SKOLNICK, THE POLITICS OF PROTEST 298 (1969).

The government did not retry the Chicago Seven, and never tried Seale.[225] It did retry the contempt citations in 1973, and the judge hearing the case by designation found three of the defendants and attorney William Kunstler guilty, the latter of two specifications of contempt.[226] That decision was affirmed on appeal.[227]

Even a critic of the behavior of the defendants concluded, "The Chicago Conspiracy trial was not one of the august moments in American jurisprudence."[228] Critics of the American legal system perceived the trial judge's behavior as exemplifying the absence of a true system of justice.[229]

Some radical lawyers concluded the conjunction of "radical" and "lawyer" often made no sense: "It is impossible to be a political radical while playing the games of the system in court. The confines and biases of the lawyer's role are a continuing damper on his activity as a radical, let alone a revolutionary."[230] One radical lawyer analogized lawyers to "prostitutes," because "[t]he system of justice . . . [and] especially the legal profession, is a whorehouse serving those best able to afford the luxuries of

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225. James W. Ely, Jr., *The Chicago Conspiracy Case*, *in* AMERICAN POLITICAL TRIALS 263, 280 (Michael R. Belknap ed., 1981).

226. *In re* Dellinger, 370 F. Supp. 1304, 1312, 1315, 1319–20 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974); DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 120 (1999).

227. *In re* Dellinger, 502 F.2d 813 (7th Cir. 1974).

228. James W. Ely, Jr., *The Chicago Conspiracy Case*, *in* AMERICAN POLITICAL TRIALS 280 (Michael R. Belknap ed., 1981).

229. *See* TOM HAYDEN, TRIAL 50–51, 57 (1970) (observing one decision by Hoffman to exclude testimony was decried by the *New York Times* as "the ultimate outrage"); William M. Kunstler, *Open Resistance: In Defense of the Movement*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 267, 269 (Robert Lefcourt ed., 1971) (noting the same *New York Times* editorial).

230. Jonathan Black, *Introduction: A Slight Case of Contempt*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 11, 12 (Jonathan Black ed., 1971); *see also* Beverly Axelrod, *The Radical Lawyer*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 69, 70 (Jonathan Black ed., 1971) ("[A]s a radical lawyer, I am not concerned with getting better laws enacted, or improving the legal system—that is meaningless within the context of American society."); Paul Harris, *You Don't Have to Love the Law to Be a Lawyer*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 84, 89 (Jonathan Black ed., 1971) ("[The law] is society's sophisticated means of restricting people and repressing revolution."); Henry di Suvero, *The Movement and the Legal System*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 51, 57 (Jonathan Black ed., 1971) ("There is no such thing as a radical lawyer in the sense that lawyers working within a legal framework can perform radical actions."); *cf. An Interview with Gerald Lefcourt*, *in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 307, 311 (Jonathan Black ed., 1971) ("Radical lawyers can play an important role in organizing masses of people."); Ann Fagan Ginger, *The Movement and the Lawyer*, 26 GUILD PRAC. 12, 12 (1967) ("A lawyer, then, cannot be an ordinary participant in a movement."). *See generally* ANN FAGAN GINGER, THE RELEVANT LAWYERS (1972) (describing lawyers of the Movement).

justice offered to preferred customers."[231]

For liberals sympathetic to some claims made by members of the New Left, the system of criminal justice was both inefficient and ineffective.[232] The *New York Times* published several articles in 1968–1970 by lawyers critically examining the system of justice.[233] Lewis M. Steel, associate counsel for the NAACP, argued that "[a] re-evaluation of the role of the United States Supreme Court discloses that it has struck down only the symbols of racism while condoning or overlooking the ingrained practices which have meant the survival of white supremacy."[234] Federal Judge J. Skelly Wright wrote an opinion piece titled *The Courts Have Failed the Poor*.[235] Wright concluded, "In our society, law has worked a hardship on those least able to withstand it. Rather than helping the poor surmount their poverty, the law has all too frequently served to perpetuate and even exacerbated their despair and helplessness."[236] In the aftermath of the trial of the Panther Nine in New Haven in spring 1970,[237] the *Magazine* published *Can a Black Man Get a Fair Trial in This Country?*[238] The answer was, "generally NO."[239]

The "Establishment" rejected the view of law and the American legal system taken by radicals and (some of their) lawyers.[240] The *American Bar Association Journal* published several "rule of law" responses.[241] A

231. Florynce Kennedy, *The Whorehouse Theory of Law*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 81, 81 (Robert Lefcourt ed., 1971).

232. This was also the general view of the commissions created by President Johnson. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 80 (1967) ("There is widespread consciousness of the archaic and inefficient methods used in many courts to process, schedule, and dispose of their business.").

233. *E.g.*, Haywood Burns, *Can a Black Man Get a Fair Trial in This Country?*, N.Y. TIMES MAG., July 12, 1970, at 5 (opining on the inability of black revolutionaries to have a fair trial in the United States).

234. Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES MAG., Oct. 13, 1968, at SM56.

235. J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. TIMES MAG., Mar. 9, 1969, at SM26.

236. *Id.*

237. *See* LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 203–10 (2005) (recounting the reaction on the Yale campus to the trial of the Panther Nine).

238. Haywood Burns, *Can a Black Man Get a Fair Trial in This Country?*, N.Y. TIMES MAG., July 12, 1970, at 5.

239. *Id.*

240. *E.g.*, William T. Gossett, *The Rule of Law or the Defiance of Law?*, 55 A.B.A. J. 823, 824 (1969) (criticizing the violent tactics of the radicals and their lawyers).

241. *E.g.*, *id.* at 823 ("[T]he lawful society is not only the best society but the only hope of mankind; and I can assure you that there remains no higher calling and no higher responsibility than the devotion of one's life to the sustaining and the advancement of the rule of law.").

May 1968 article by Sol M. Linowitz raised the stakes: "[O]ur social institutions are in a critical time of stress, and lawyers owe it to society, no less than to themselves, to suggest remedies for the future."[242] In response to the student protests at Columbia University, which included occupation by students of the President's office, a law professor wrote, "We lawyers have society itself as our client. We should attend to legal—and illegal—challenges to that society. The violent wing of the New Left is such a challenge."[243] The "violent wing" of the New Left was a challenge to society in large part because, these lawyers alleged, it rejected the rule of law.[244] Additional evidence was found in the 1969 ABA President's address. It was called *The Rule of Law or the Defiance of Law?*[245]

The ABA upped the ante with an editorial in its June 1970 issue challenging William Kunstler's approach to legal representation.[246] The editorial first reprinted a quote from a profile of Kunstler in the April 19, 1970 edition of the *New York Times*: "I only defend those whose goal[s] I share. I'm not a lawyer for hire. I only defend those I love."[247] Kunstler's statement contradicted the traditional ideal of the American legal profession. Working as a "lawyer for hire" was in the best tradition of the legal profession; an important value lawyers gave their clients was the critical detachment created by the lawyer's independence from the client. This was how legal elites justified defending committed Communists during the 1950s Red Scare.[248] The editorial reiterated this ideal: "Most lawyers prefer to represent popular causes and prosperous clients, but as a

242. Sol M. Linowitz, *Our Changing Society: The Lawyer's Challenge*, 54 A.B.A. J. 445, 445 (1968). Linowitz's understanding of the duties and goals of the American legal profession in the early 1960s led him to argue that "lawyers, with unique experience in negotiation, have leading roles to play in securing world peace and fostering international co-operation." *Id.* at 447. For a later assessment of the woes of the American legal profession, see SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

243. William A. Stanmeyer, *The New Left and the Old Law*, 55 A.B.A. J. 319, 319 (1969).

244. *Id.* at 320; *see also* Robert Ruppin, *Professionalism—What Is It?*, 55 A.B.A. J. 334, 335 (1969) ("We had better all realize, before it is too late, that the rule of law is the foundation of every civilized state.").

245. William T. Gossett, *The Rule of Law or the Defiance of Law?*, 55 A.B.A. J. 823 (1969).

246. Richard Bentley et al., Editorial, *A Lawyer for Hire*, 56 A.B.A. J. 552, 552 (1970).

247. Victor Navasky, *Right On! With Lawyer William Kunstler*, N.Y. TIMES MAG., Apr. 19, 1970, at 31, 92.

248. *See Proceedings of the 1953 Annual Meeting of the House of Delegates*, 78 A.B.A. ANN. REP. 118, 133 (1953) (adopting resolution of Special Committee on Individual Rights as Affected by National Security reaffirming the duty of the bar to represent even the most unpopular defendants); *see also* Marshall Beil, Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 330 (1970) (arguing that the 1953 resolution took place only after ABA had exacerbated the problem of lawyers failing to defend unpopular clients).

profession and individually we know that our ideal is to provide competent counsel for any person with a legitimate cause."[249] Thus, "to be a 'lawyer for hire' is a badge of honor."[250]

This ABA editorial brought a raft of responses.[251] The published letters to the editors were divided. Some supported the ABA's position,[252] while others criticized it on process grounds,[253] and still others substantively defended Kunstler's views.[254]

Such letters suggested a tension in the legal profession beyond the criticism of Movement lawyers. The divide among lawyers concerned both the meaning of "law" in a democratic state and the ideal of role morality, an ideal that a lawyer was more than an agent of a client.[255] Kunstler and others challenged the view that a lawyer acts in the highest interests of the calling of the legal profession when representing the legal interests of the despised. That position was a central aspect of Edward Bennett Williams' 1962 book, *One Man's Freedom.*

Two weeks before the Kunstler profile, the *New York Times* published an article written by Louis Nizer, a lawyer and author of the best seller *My Life in Court*,[256] criticizing the actions of the Chicago Seven (and their forebears).[257] Nizer denied their trial or the more recent "Panther 21"

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249. Richard Bentley et al., Editorial, *A Lawyer for Hire*, 56 A.B.A. J. 552, 552 (1970).

250. *Id.* The Navasky profile of Kunstler made a brief mention of this distinction. Kunstler, unlike Edward Bennett Williams and others who adopted the "classic lawyer's position," did not believe in the ideal of the independent lawyer, but in identifying wholly with the client. *See* Victor Navasky, *Right On! With Lawyer William Kunstler*, N.Y. TIMES MAG., Apr. 19, 1970 at 31, 93 (advocating a position that in politically-motivated prosecutions, the lawyer becomes the political agent of the client).

251. Views of Our Readers, *Kunstler and the Lawyer's Role*, 56 A.B.A. J. 716 (1970).

252. *See* Letter from Dave Freeman, Views of Our Readers, *Kunstler and the Lawyer's Role*, 56 A.B.A. J. 716, 716 (1970) (labeling Kunstler an "antiethical, misguided champion of disorder, confusion and waste").

253. *See* Letter from Robert A. Mendelson, Views of Our Readers, *Kunstler and the Lawyer's Role*, 56 A.B.A. J. 716, 716 (1970) (calling criticism "unjustified" on grounds that the profession is "intellectual enough to be tolerant of various viewpoints of the basis upon which an attorney may practice").

254. *See* Letter from Harold Weiner, Views of Our Readers, *Kunstler and the Lawyer's Role*, 56 A.B.A. J. 716, 722 (1970) ("Perhaps this society would be a lot better off if lawyers developed the same social conscience that befits members of a more rational lay society and worried more about the public good they are supposed to represent, rather than the selfish immediate interest of whoever pays the biggest fee.").

255. *See generally* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (opining on the challenges posed by the traditional model of an independent lawyer).

256. EDWARD BENNETT WILLIAMS, ONE MAN'S FREEDOM (1962).

257. Louis Nizer, *What to Do When the Judge Is Put Up Against the Wall*, N.Y. TIMES MAG., Apr. 5, 1970, at 30.

case[258] was "political," and offered five suggestions on ensuring that the "exquisite machinery" of the trial would not be harmed by the "new assault upon it."[259] Nizer suggested the court be permitted in certain circumstances to remove from the courtroom the defendant, the defense attorney, or members of the audience, and to enhance punishments of lawyers who deliberately interfered with the process of the trial through disbarment or other punishment. He also suggested making such attorney conduct a felony of obstruction of justice.[260] In Summer 1970, the American College of Trial Lawyers adopted twelve *Principles As to Disruption of the Judicial Process.*[261] The Committee drafting these principles included notable lawyers such as Simon Rifkind,[262] Whitney North Seymour,[263] and Edward Bennett Williams. Like Nizer's proposal, the Trial Lawyers argued that decorum was important not for its own sake, but was essential to a fair trial: "The dignity, decorum and courtesy which have traditionally characterized the courts of civilized nations are not empty formalities. They are essential to an atmosphere in which justice can be done."[264] Their principles were intended to ensure that the criminal accused received a fair trial, the *sine qua non* of legal process.

The Association of the Bar of the City of New York (ABCNY) sponsored an annual Benjamin N. Cardozo lecture. Edward Levi,[265] then

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258. *See generally Statement to Judge Murtagh, in* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS 122 (Jonathan Black ed., 1971); *The Panther 21: To Judge Murtagh, in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 185 (Robert Lefcourt ed., 1971). This was a statement by the defendants in response to the court's order of an indefinite recess of pretrial proceedings.

259. Louis Nizer, *What to Do When the Judge Is Put Up Against the Wall*, N.Y. TIMES MAG., Apr. 5, 1970, at 126.

260. *Id.* at 128.

261. AM. COLL. OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS (1970). Future Supreme Court Justice Lewis F. Powell, Jr. served as an ex officio member.

262. *See generally* Leslie Gorgon Fagen, *Rifkind, Simon H., in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 459 (Roger K. Newman ed., 2009).

263. *See generally* Conrad K. Harper, *Seymour, Whitney North, in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 490 (Roger K. Newman ed., 2009). Seymour was "widely respected as one of America's foremost trial and appellate lawyers." *Id.* He led many organizations, including serving as President of the American Bar Association, the Association of the Bar of the City of New York, the American College of Trial Lawyers, and on the boards of the ACLU and as co-chairman of the Lawyers' Committee for Civil Rights Under Law. *Id.* at 491.

264. AM. COLL. OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS 4 (1970).

265. *See generally* Mark L. Wolf, *Levi, Edward H., in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 331 (Roger K. Newman ed., 2009); Gerhard Casper, *For Edward Levi*, 52 U. CHI. L. REV. 281 (1985) (tracing the legal career of Edward Levi).

President of the University of Chicago, titled his November 1969 lecture *The Crisis in the Nature of Law*.[266] This crisis existed in part because the enforcement of segregation after the abolition of slavery called into question "the purpose and integrity of law."[267] Further, "an unpopular, undeclared war, using the coercion of government to force service in that war, dramatized the violence which government can command."[268] The times, then, "tests what law has to offer."[269] Levi spoke of the fundamental interest of society in the legal process, particularly the criminal trial process, which tests "society's restraint against its own deception, coercion, or unequal treatment of persons."[270] Commenting obliquely on the ongoing Chicago Seven trial, Levi rejected the notion of the criminal defendant as "victim," the tendency to "make all trials in some sense potentially political," and the overuse of conspiracy charges to "impose accountability" on the defendants.[271] Lawyers needed to acknowledge this crisis of law, and were best placed to respond to it. To overcome the crisis, it was essential that "independent" lawyers join together "in the science and practice of a discipline central to our culture and to our freedom."[272]

To celebrate its centennial anniversary the following year, the ABCNY arranged a symposium. The ABCNY accepted the foundational "belief of lawyers in the vibrancy of law."[273] This belief, wrote Whitney North Seymour—a paragon of the legal establishment[274]—was challenged "all over America, from many sources."[275] The ABCNY agreed it "should ask itself whether its premise, faith in law and in the value of trying to mold it

266. EDWARD H. LEVI, THE CRISIS IN THE NATURE OF LAW (1970).

267. *Id.* at 19.

268. *Id.* at 20.

269. *Id.*

270. *Id.* at 24.

271. *Id.* at 25. On personal accountability, Levi wrote, "The least persuasive way to make this point is through a conspiracy case. The conspiracy charge carries the disability of obscuring individual action." *Id.*

272. *Id.* at 28.

273. Whitney North Seymour, *Foreword* to IS LAW DEAD? 7, 7 (Eugene V. Rostow ed., 1971).

274. Seymour "was widely respected as one of America's foremost trial and appellate lawyers." Conrad K. Harper, *Seymour, Whitney North*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 490, 490 (Roger K. Newman ed., 2009). He led many organizations, including serving as President of the American Bar Association, the Association of the Bar of the City of New York, the American College of Trial Lawyers, and he served on the board of the ACLU and was co-chairman of the Lawyers' Committee for Civil Rights Under Law. *Id.* at 491.

275. Whitney North Seymour, *Foreword* to IS LAW DEAD? 7, 7 (Eugene V. Rostow ed., 1971); *see also* Robert Paul Wolff, *Introduction* to THE RULE OF LAW 7, 8 (Robert Paul Wolff ed., 1971) (noting "the attacks on political authority have more and more come to be focused on the institutions of the law," a reflection of more generalized attacks on all kinds of authority).

and its institutions to fit the needs of a changing society, was still valid."[276] The cheeky but illustrative title of its symposium was, *Is Law Dead?*[277]

The ABCNY invited Eugene V. Rostow,[278] former Dean of Yale Law School, to organize the symposium. Rostow contributed an introduction and an essay largely rejecting civil disobedience in American society in the ensuing book on the symposium topic.[279] Though some contributors challenged the ABCNY's faith in law, a majority offered a defense of fidelity to the ideal of law as binding a democratic society.[280]

The Association held this symposium on April 30 and May 1, 1970, the latter of which was, of course, Law Day.[281] The symbolism was apparent to the ABCNY. As members of this elite bar association gathered to listen to the symposium speakers, other lawyers joined in public protest of the "Amerikan" legal system.[282] This protest was a direct attack on the premise of Law Day, and had begun a year earlier in New York's Foley Square, where the federal courthouse for the Southern District of New York was located: "The [April 30, 1969] demonstration was aimed at countering the platitudes about this 'reaffirmation' of the concept of justice."[283] A supporter of the protests claimed the gathering totaled 500 lawyers and law students.[284] "Despite the failure of the mass media to publicize" the protests by lawyers, or their demands for legal reforms, demonstrations spread to eight cities during the next year, with a particular focus on the trial of the Chicago Eight.[285] By Law Day 1971, "over two

276. Whitney North Seymour, *Foreword* to IS LAW DEAD? 7, 7 (Eugene V. Rostow ed., 1971).

277. *Id.* at 8.

278. On Rostow's early deanship at Yale, see LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 47–50 (2005). On Rostow generally, see Geoffrey Kabaservice, *Rostow, Eugene V., in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 469 (Roger K. Newman ed., 2009).

279. *See* Eugene V. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience, in* IS LAW DEAD? 39, 45 (Eugene V. Rostow ed., 1971) ("It is the thesis of this paper that our society—as a society of consent—should not and indeed cannot acknowledge a right of civil disobedience . . . .").

280. AM. COLL. OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS (1970).

281. *Id.*

282. Gerald B. Lefcourt, *The Radical Lawyer Under Attack, in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 253, 254 (Robert Lefcourt ed., 1971).

283. *Id.*

284. *Id.* A law professor wrote, "185 young lawyers picketed outside a New York criminal court demanding reforms in the court system" on May 1, 1969. Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 267 (1970).

285. Gerald B. Lefcourt, *The Radical Lawyer Under Attack, in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 253, 258 (Robert Lefcourt ed., 1971).

thousand lawyers amassed again in New York, protesting the war and others also demanding changes in the legal system."[286]

D. *The Interested Legal Profession*

In fall 1973, "for the first time ever, there was not a single 'unfilled seat' in the first-year class of any approved law school."[287] That year also marked the second consecutive year that overall law school enrollment in ABA-approved schools exceeded 100,000, and was a third straight year of double-digit law student population growth.[288] The number of law students in ABA-approved law schools grew from 101,664 in 1972 to a peak of 122,860 in 1979, more than twice the number in 1964.[289] The number of lawyers rose from 355,242 in 1970 to 542,205 in 1980, a 53% increase.[290] Early in 1972, the ABA created a Task Force on Professional Utilization to alleviate the concerns of lawyers regarding "the increase in the number of new entrants into the profession."[291] *Business Week* piled on, concluding "the outlook for lawyers [was] grim."[292]

During the 1970s lawyer income dropped. Separate studies of lawyer income in Michigan, Maryland, and Illinois in different periods during this decade all found a decline in lawyer income, adjusting for inflation.[293] Richard Posner concluded, "[T]he price of legal services fell (in real, that is, inflation-adjusted, terms), rather than . . . rose[] between 1970 and 1985."[294] Sander and Williams provided the best evidence of the economic straits in the legal profession of the 1970s: In constant 1983

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286. *Id.* at 259.

287. James P. White, *Is That Burgeoning Law School Enrollment Ending?*, 61 A.B.A. J. 202, 202 (1975). White, the ABA consultant on legal education noted, "In 1974 only one law school reported 'unfilled seats' in its entering class." *Id.*

288. RICHARD L. ABEL, AMERICAN LAWYERS 279 tbl.21 (1989).

289. *See id.* (listing 59,813 law students in 1964).

290. *See* THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, at 4 (Barbara A. Curran et al. eds., 1985) (noting number of lawyers in Table 1.1.1); *see also* RICHARD L. ABEL, AMERICAN LAWYERS 280 (1989) (displaying these statistics). Beginning with the 1988 Supplement to the Lawyer Statistical Report and continuing through the 2005 Report, it has listed 355,242 for 1971 rather than 1970. *See* SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988, at 1 (Barbara A. Curran & Clara N. Carson eds., 1991) (presenting lawyer employment statistics); THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005, at 2 tbl.1 (Clara N. Carson with Jeeyoon Park eds., 2012) (charting the growth of the legal profession).

291. *See Report of the Task Force on Professional Utilization*, 97 A.B.A. ANN. REP. 818, 819 (1972) (quoting the charge of ABA Governors to the Task Force).

292. *Special Report, The Job Gap for College Graduates in the '70s*, BUS. WK., Sept. 23, 1972, at 48, 51.

293. RICHARD L. ABEL, AMERICAN LAWYERS 160 (1989).

294. RICHARD A. POSNER, OVERCOMING LAW 67 (1996).

dollars, the median income of lawyers in 1969 was $47,638.[295] In 1979, lawyer median income had declined to $36,716.[296] Instead of earning 1.85 times the income of the median American worker, the lawyer at the median level of lawyer income now earned 1.35 times the median income worker, a significant loss of earning power in just one decade.[297]

Though many lawyers suffered economically during the 1970s, some lawyers did quite well. Sander and Williams looked at total law firm receipts in five-year increments beginning in 1967 and ending in 1982.[298] In 1972, law firm receipts from individuals totaled 52.5%. By 1982, that percentage was 44.5%.[299] Receipts from businesses accounted for three-quarters of this change, which went from 42.3% of all receipts in 1972 to 48.6% in 1982.[300] This shift disproportionately benefitted large law firms.[301]

Another group that did well during the 1970s was a subset of plaintiffs' personal injury lawyers. Melvin Belli helped found in 1946 the National Association of Claimants' Compensation Attorneys (NACCA).[302] Its membership nearly doubled between 1964, when the successor to NACCA changed its name to the American Trial Lawyers Association (ATLA), and 1967.[303] Some personal injury lawyers did very well from the 1960s on. The Inner Circle of Advocates was created in 1972, and initially limited membership to fifty lawyers who had tried at least fifty personal injury cases and had achieved at least one verdict of $1 million or more.[304]

American lawyers also faced a number of perceived threats to their economic well-being from the government. In 1974, the Department of Justice sued the ABA alleging several antitrust violations in the Code of Professional Responsibility.[305] A subcommittee of the Senate Judiciary

295. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 448 tbl.9 (1989).

296. *Id.*

297. *Id.* at 449 tbl.10.

298. *Id.* at 441 tbl.5.

299. *Id.*

300. *Id.*

301. *See id.* at 431, 441 (asserting large firms, catering to large businesses, grew faster than small firms, which were oriented to serve individuals).

302. MARION A. ELLIS & HOWARD E. COVINGTON, JR., SAGES OF THEIR CRAFT: THE FIRST FIFTY YEARS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS 65 (2000).

303. *Id.*

304. *See The History of the Inner Circle of Advocates*, INNER CIRCLE OF ADVOCS., http://www.innercircle.org/history (last visited Aug. 29, 2014.

305. *See Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee*, 60 A.B.A. J. 791, 792–93 (1974) (statement of Bruce B. Wilson, Deputy Assistant Att'y Gen.).

Committee held hearings at the February 1974 Midyear Meeting of the ABA on a topic entitled, *The Organized Bar: Self-Serving or Serving the Public?*[306] The next year, the Supreme Court held that bar association minimum fee schedules violated federal anti-trust law.[307] The Department of Justice then filed a second antitrust complaint against the ABA, this time over its ban on lawyer advertisements.[308] In the 1977 case of *Bates v. State Bar*,[309] the Supreme Court held the absolute ban on lawyer advertising adopted in the Code and made law by most states, violated the First Amendment.[310] At the end of the year, the Federal Trade Commission publicly announced its investigation of the American legal profession.[311]

The standing of lawyers also tumbled. A Harris Poll in 1973 found that just 24% of the public had confidence in lawyers.[312] A 1976 Gallup Poll found that just 25% of the public believed lawyers rated very high or high in their "honesty and ethical standards."[313] Even a critic of American lawyers, writing in 1977, seemed somewhat sympathetic: "Since 1973, American lawyers have taken an awful beating."[314] Overshadowing all of these events was the Watergate scandal.[315]

306. *The Organized Bar: Self-Serving or Serving the Public?: Hearing Before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary*, 93d Cong. (1974).

307. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 773, 784 (1975).

308. *See* Lawrence E. Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976) (reporting filing of the second complaint).

309. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

310. *See id.* at 384 (holding the Arizona Bar's absolute ban on truthful legal advertising violated the First Amendment).

311. *See F.T.C. Goes Public on Lawyer Probe*, 64 A.B.A. J. 959, 959 (1978) (reporting on disclosures by the FTC of an effort to regulate the legal profession nationwide).

312. Michael Asimow, *Lawyers, Popular Perception of, in* OXFORD COMPANION TO AMERICAN LAW 495, 495 (Kermit. L. Hall et al., eds., 2002); *see also The Organized Bar: Self-Serving or Serving the Public?: Hearing Before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary*, 93d Cong. 7 (1974) (statement by Sen. Tunney) (noting that attorney's approval rating still beat Congress, which had an 18% confidence mark).

313. *Honesty/Ethics in Professions*, GALLUP, http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx#3 (last visited Aug. 29, 2014).

314. JETHRO K. LIEBERMAN, CRISIS AT THE BAR 35 (1978).

315. *See id.* at 35–40 (discussing how Watergate placed the ethics and image of attorneys under intense scrutiny from those both inside and outside the legal profession.); *see also* Michael Asimow, *Lawyers, Popular Perceptions of, in* OXFORD COMPANION TO AMERICAN LAW 495, 496 (Kermit. L. Hall et al., eds., 2002) ("Many people think the decline in public esteem for the profession began with the Watergate scandal in 1973.").

E. *Watergate*

Senator Talmadge. Now, will you look at exhibit No. 34–47* that you inserted in your testimony yesterday. It is also an interesting document. As I recall your testimony as you presented that yesterday, it is a list of all of the people that you thought had violated the law and what the laws may be that they violated, is that correct?"

Mr. Dean. That is correct.

Senator Talmadge. Let us start with the top of the list, now. That is in your own handwriting, is it not?

Mr. Dean. That is correct.

Senator Talmadge. This is a copy thereof?

Mr. Dean. That is correct.

Senator Talmadge. What is the significance of the letters in the top lefthand part of that sheet?

Mr. Dean. The list is broken down into two parts, Senator. One says "pre" and the other is "post."

Senator Talmadge. By "pre," you mean prior to the Watergate break-in?

Mr. Dean. That is correct.

Senator Talmadge. The planning and discussion of those events?

Mr. Dean. That is correct.

Senator Talmadge. And you list in that category Mr. Mitchell, Mr. Magruder, and Mr. Strachan, is that correct?

Mr. Dean. That is correct.

Senator Talmadge. Now, you have a star by Mr. Mitchell's name and no star by Mr. Magruder.

Mr. Dean. Maybe if I explain the whole list, it would save some questions for you.

Senator Talmadge. Surely.

Mr. Dean. I have listed for pre: Mitchell, Magruder, Strachan; post: Haldeman, Ehrlichman, Dean, LaRue, Mardian, O'Brien, Parkinson, Colson, Bittman, Kalmbach, Tony—I have by that the word "source." I will explain that in a minute; Stans.

Now, beside several of the names, after I did the list—just my first reaction was there certainly are an awful lot of lawyers involved here. So I put a little asterisk beside each lawyer, which was Mitchell, Strachan, Ehrlichman, Dean, Mardian, O'Brien, Parkinson, Colson, Bittman, and Kalmbach.

Then I put, as we were discussing the development of the list, the evidence that I knew sort of firsthand or had reason to believe that others had firsthand evidence of, that I thought that a very strong case might be made against. The ones that I was not as sure about were those I put a question[ ] mark on. This was just something I was working out in my own mind in a discussion I had with my lawyer as a result of discussions he had also had with some of the prosecutors.

> Senator Talmadge. Any significance to the star? That they are all lawyers?
> Mr. Dean. No, that was just a reaction myself, the fact that how in God's name could so many lawyers get involved in something like this?[316]

The transcript does not mark the audience reaction to this exchange during the Watergate hearings between disgraced White House counsel John Dean and Georgia Senator Herman Talmadge in summer 1973. A recent history of the era notes that, when Dean stated each person with an asterisk next to his name was a lawyer, the audience laughed.[317] It may have laughed because, as an ABA President admitted, "[e]arly in its development Watergate was characterized as a lawyer's scandal."[318]

The final report of the National Organization of Bar Counsel listed twenty-nine lawyers involved in Watergate-related bar disciplinary matters, of whom twenty-seven were also criminal defendants or unindicted co-conspirators.[319] Seven were disbarred, and eleven others, including the two not indicted or listed as unindicted co-conspirators, were publicly disciplined.[320]

Lawyers expressed both regret and defensiveness regarding the scandal, and sometimes both.[321] ABA President Robert Meserve, writing in the middle of the scandal, noted both the "painful fact" that so many involved in Watergate were lawyers, but also that "lawyers are the single largest

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316. *Watergate and Related Activities Phase I: Watergate Investigation: Hearings Before the Select Comm. on Presidential Campaign Activities of the U.S. Senate*, 93d Cong. 1053–54 (1973). Document 34-47, about which Dean and Talmadge were speaking, is reprinted at 1312. Parts of this exchange are reprinted in MARION A. ELLIS & HOWARD E. COVINGTON, JR., SAGES OF THEIR CRAFT 123 (2000), Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 673 (2000), and Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 261 (1975). *See* James F. Bresnahan & John L. Kane, *Professional Ethics and Competence in Trial Practice*, 62 A.B.A. J. 988, 989 (1976) (noting Dean's testimony on this issue was "[o]ne of the more poignant moments" of the Watergate hearings).

317. RICK PERLSTEIN, THE INVISIBLE BRIDGE: THE FALL OF NIXON AND THE RISE OF REAGAN 140 (2014).

318. James D. Fellers, *President's Page*, 61 A.B.A. J. 529, 529 (1975).

319. *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337, 1337 (1976). Other critics provide a more caustic view. *See* Jerold S. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1287 (1976) ("The law-enforcers, lawyers all, were the law-breakers.").

320. *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337, 1337 (1976); *see also* Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 678–679 (1999) (noting discipline of sixteen lawyers, not including the two lawyers not indicted or listed as unindicted co-conspirators).

321. *See* Robert W. Meserve, *Our Profession & Watergate*, 2 STUDENT LAW. 9, 10 (1973–74) ("[W]e must, of course, be extremely careful in separating what has been or will be proved from what has been alleged and is only speculation.").

occupational group in government, particularly at the federal level."[322] In a similar vein at the same time, Leroy Jeffers, President of the State Bar of Texas, wrote: "The American lawyer is under attack and the most cherished values he defends are under siege by his enemies. . . . [Lawyers] must sharply reject the frequent glib and shallow assertion that Watergate tarnishes the Bar and brings it into disrepute."[323] But reinforcing legal ethics training became a mantra in the ABA. Mere days after Richard Nixon resigned in August 1974, the ABA's House of Delegates approved a proposal making mandatory the teaching of professional responsibility in any ABA-approved law school.[324]

By mid-1975, initial calls arose to amend the Code of Professional Responsibility in light of Watergate.[325] Those calls then came more frequently.[326] One critic declared the Code was a "monument to the profession's imagined self-interest."[327] Eric Schnapper represented the pessimism of some, calling the Code "a treasure trove of moral platitudes."[328] In the May 1977 issue of the *ABA Journal*, Emory Law School Dean L. Ray Patterson wrote an article urging replacement of the Code.[329] He opened with a startling argument: "[The time] has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law."[330] Patterson laid it on thick, arguing

322. Robert W. Meserve, *President's Page*, 59 A.B.A. J. 681, 681 (1973); *see also* Robert W. Meserve, *Our Profession & Watergate*, 2 STUDENT LAW. 9, 11 (1973) ("[L]awyers are more involved in government than any other professional group.").

323. Leroy Jeffers, *A Word of Pride*, 36 TEX. B.J. 763, 763 (1973).

324. *See* Charles D. Kelso, *Report of the Section of Legal Education and Admissions to the Bar*, 99 A.B.A. ANN. REP. 1104, 1107 (1974) (describing the proposal). *See generally* Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 246–47 (2005) (explaining the history behind the law school ethics course requirement).

325. *See* Abner J. Mikva, *Ethics and Lawyers: No Time for Recession*, 1 B. LEADER 2, 3 (1975) ("[W]e must strengthen the Code of Professional Responsibility so that it contains provisions dealing with the conduct of lawyers in government service.").

326. *See, e.g.*, William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, 3 B. LEADER 2, 2–3 (1977) (suggesting Watergate and contemporary corporate bribery scandals demand a review of the Code of Professional Responsibility).

327. Jay M. Smyser, *In-House Corporate Counsel: The Erosion of Independence*, *in* VERDICTS ON LAWYERS 208, 215 (Ralph Nader & Mark Green eds., 1976); *see also* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 288 (1977) ("Like the Canons it replaced, [the Code] concentrated its energies upon the preservation of a professional monopoly, not the provision of legal services."); JETHRO K. LIEBERMAN, CRISIS AT THE BAR 65 (1978) (observing that though the "new code is more subtle [and] more modern" than the Canons, "the code remains confusing, ambiguous, and inconsistent").

328. Eric Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 203 (1978).

329. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977).

330. *Id.* at 639.

that the Code suffered "from a defect common to the adolescent stage of growth," claiming that is was "rigid and simplistic, complex and contradictory, and matters of ethics rather than law."[331] Patterson's three justifications for a new Code reflected the varying interests of American lawyers. First, the lawyer was "more than an advocate serving the interests of a client,"[332] a view that reflected those engaged in public interest work. Second, the overarching duties of a lawyer were threefold, incorporating "loyalty, candor, and fairness,"[333] a view championed by those who promoted the idea of the lawyer as facilitator of the client's interests. Third, the lawyer's legal duties depended on (1) "the particular role of the lawyer," (2) "the process of law administration in which the lawyer is engaged," and (3) "the rights and duties of the client."[334] This justification broadly encompassed the criticisms of counselors in business matters[335] as well as those advocating more zealous representation of the criminally accused.[336]

Patterson either struck an institutional nerve, or spoke as a de facto representative of the ABA, for the ABA Board of Governors publicly noted the creation of a nine-person special committee to review the Code at its annual meeting two months later.[337] ABA President William B. Spann, Jr., urged the committee to assess "all facets of legal ethics."[338] Patterson was initially appointed the special committee's reporter, and later served as its consultant.[339] The special committee was headed by Omaha lawyer

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331. *Id.*

332. *Id.* at 639–40.

333. *Id.*; *see also* L. Ray Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C. L. REV. 519, 528 (1979) (detailing the principles of conduct a lawyer must abide by, which include loyalty, candor and fairness).

334. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 640 (1977).

335. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 7 (1978) (noting that lawyers at 1976 conference regarding Code concluded, among other things, that Code "does not deal directly with the lawyer's role when he acts otherwise than as an advocate").

336. *See generally* Michael Ariens, *Brougham's Ghost*, 35 N. ILL. U. L. REV. (forthcoming 2015) (detailing efforts in the 1960s and 1970s to inculcate a model of zealous representation).

337. *See Report of the Board of Governors to the House of Delegates*, 102 A.B.A. ANN. REP. 575, 581 (1977) ("A nine-member Special Committee was created to study further enlargement and review of the Code of Professional Responsibility . . . .").

338. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, 3 B. LEADER 2, 3 (1977).

339. *See* SPECIAL COMM. ON EVALUATION OF PROF'L STANDARDS, A.B.A., COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS, Sept. 1977–Aug. 1979, at Aspen, Colo., 1 (Sept. 29, 1977) (on file at Yale Law School) (naming Patterson as reporter at the first meeting of the Special Committee held in Aspen in September 1977). Patterson later was listed as consultant upon publication of the January 1980 Discussion Draft. *See generally* MODEL RULES OF

Robert Kutak, and became known as the Kutak Commission.[340]

IV. CRISIS AND THE MODERN AMERICAN LEGAL PROFESSION

A. *End and Beginning*

The May 1979 issue of the *North Carolina Law Review* published papers from a symposium, the purpose of which was to aid revision of the Code of Professional Responsibility.[341] John Sutton, the reporter for the Wright Committee that drafted the Code, candidly explained that the Code was readily adopted "in no small part to its generally conservative approach."[342] That approach, given extensive changes in the practice of law and an insufficiently refined "philosophy underlying certain disciplinary rules and ethical considerations" generated "additional difficulties . . . and vexing questions" regarding interpretation of the Code.[343] Sutton championed a broad-ranging reform of the Code, but wished to continue the use of all three standards set forth in the Code: "regulatory laws, standards of recommended normal professional practices, and ethical norms of aspirations and professional objectives."[344]

The approach taken by the Kutak Commission was quite different. The June, 1979 issue of the *ABA Journal* included a brief item indicating the Kutak Commission's plan to dramatically restructure the Code: "As now envisioned, the [C]ode would abandon the format of canons, ethical considerations and disciplinary rules, substituting the more prevalent ABA approach of black[]letter rules with commentary."[345] The Commission planned to issue a preliminary draft in February 1980, and the story noted a debate on the proposed code would occur at the ABA's August 1979 Annual Meeting.[346] Finally, the report indicated the Commission's timeline. The preliminary draft was to be followed by a final draft in August 1980, and the ABA's House of Delegates was to discuss and

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PROF'L CONDUCT preface (Discussion Draft 1980) (discussing the growth and publication of the Model Rules of Professional Conduct).

340. Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 254 (2005).

341. Symposium, *Reflections on a Decade Under the Code of Professional Responsibility: The Need for Reform*, 57 N.C. L. REV. 497 (1979).

342. John F. Sutton, Jr., *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 497 (1979).

343. *Id.* at 499.

344. *Id.* at 517.

345. *Commission Bites Bullet on Ethics Code Issues*, 65 A.B.A. J. 887, 887 (1979); *Report of the Commission on Evaluation of Professional Standards*, 104 A.B.A. ANN. REP. 1010, 1010 (1979).

346. *Commission Bites Bullet on Ethics Code Issues*, 65 A.B.A. J. 887, 888 (1979).

consider adoption of the Code in February 1981.[347] This was not to be the case.[348]

Evidence that adoption of a new code of ethics might not be easy arose during and after the August 1979 debate on the structure and content of a code of legal ethics.[349] Like the Wright Committee before it, the Kutak Commission had met privately during its two-year existence.[350] Unlike the Wright Committee, the post-Watergate press viewed the Kutak Commission's secretiveness with suspicion.[351] The *National Law Journal* reported from the August 1979 ABA Annual Meeting, "Mr. Kutak circulated copies of the draft privately, but continued to hide it from reporters. 'What are we, the great unwashed?' one asked him."[352] At the debate, Professor Monroe Freedman called the working draft a "failure"[353] and its provisions on exceptions to the protection of client confidences "radical and radically wrong."[354] This private "working draft," dated August 2, 1979, was leaked and published in the August 13, 1979 issue of the *Daily Report for Executives*,[355] as well as in the August 27, 1979 issue of *Legal Times*, a District of Columbia law weekly.[356] Almost immediately after the debate, ATLA declared its intention to draft a code of ethics "independent of the ABA Code of Professional Responsibility."[357] When the ABA released its Discussion Draft five

347. *Id.*

348. *See* Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 241 (2005) (explaining why adoption of the Code occurred in 1983).

349. *See* Robert J. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016, 1016 (recounting the volumes of comment received following the release of the draft Rules).

350. *See, e.g.*, SPECIAL COMM. ON EVALUATION OF PROF'L STANDARDS, A.B.A., COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS, Sept. 1977–Aug. 1979, at Aspen, Colo., 1 (Sept. 29, 1977). The bound copy used for this Article is located at Yale Law School. It has no publication date, and likely was given to the library by Geoffrey Hazard, who was a member of the Yale Law School faculty when he served as Reporter for the Model Rules.

351. *See The Ethics of Secrecy*, NAT'L L.J., Sept. 3, 1979, at 16 (quoting a reporter's objection to the secrecy surrounding circulation of the draft Rules).

352. *Id.*

353. Laura Kiernan, *ABA Keeps Ethics Code Under Wraps in Dallas*, WASH. POST, Aug. 12, 1979.

354. Jonathan M. Winer, *Ethics Draft Ignites Uproar*, NAT'L L.J., Aug. 27, 1979, at 1.

355. *See* Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. LEGAL PROF. 31, 39 (1982) (stating a "working draft" was "to be reviewed by a select few" but was published by the Bureau of National Affairs' Daily Report for Executives).

356. *See The Record: Text of Initial Draft of Ethics Code Rewrite Committee*, LEGAL TIMES, Aug. 27, 1979, at 26.

357. *Trial Lawyers Group Parts Company with ABA on Ethics Code, Specialization*, 65 A.B.A. J. 1299, 1299 (1979); *see also* Jonathan M. Winer, *Ethics Draft Ignites Uproar*, NAT'L L.J., Aug. 27, 1979, at 1 (declaring that the ATLA's decision to draft a competing code was based largely on the

months later,[358] the Kutak Commission demonstrated its desire to leave the Code behind: "The Commission determined that a comprehensive reformulation was required. We have built on the Code's foundation, but we make no apology for having pushed beyond it."[359] True to its word, the ABA had drafted rules regarding client confidences that made the lawyer more than the mouthpiece of the client,[360] crafting two sets of exceptions to the duty of confidentiality.[361] The calibrated rule and its exceptions failed to satisfy either the left or the right.[362] With Freedman serving as Reporter, the Roscoe Pound-American Trial Lawyers Foundation issued its own draft Code of Conduct, which departed from the ABA Discussion Draft and rejected most exceptions to the duty of client confidentiality.[363]

The Discussion Draft consciously avoided using the words "zeal" or "zealous" in reference to client representation,[364] included a mandatory *pro bono* requirement,[365] and organized several chapters based on the differing roles lawyers undertook when representing clients. The Discussion Draft found, at best, "mixed" support.[366] This may have surprised the Commission, which spoke in authoritative terms in the Preface to the Discussion Draft:

Kutak Commission's leisurely pace).

358. MODEL RULES OF PROF'L CONDUCT preface (Discussion Draft 1980).

359. *Id.*

360. *Id.* R. 1.7 cmt.

361. *Id.* R. 1.7(b), (c). *See generally* Michael Ariens, *"Playing Chicken": An Instant History of the Battle over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239, 257–258 (2009) (discussing the history of the approach taken in the Discussion Draft regarding exceptions to client confidences).

362. *See id.* at 258 (providing examples of negative reaction to the proposed Rule 1.7).

363. Commission on Professional Responsibility of the Roscoe Pound-American Trial Lawyer's Foundation, *The American Lawyer's Code of Conduct Public Discussion Draft-June 1980*, TRIAL, Aug. 1980, at 44, 50.

364. *See* COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS, Feb. 23–24, 1979 (Research Triangle Park, North Carolina) 19–20 (n.d.) (copy on file with author) ("'Zealous,' it seems, has curiously come to mean 'overzealous.' Strong sentiment was found around the table for dropping 'zeal' altogether as a descriptive term with ethical consequences. It carries with it simply too much baggage.").

365. *See* MODEL RULES OF PROF'L CONDUCT R. 8.1 (Discussion Draft 1980) ("A lawyer shall render unpaid public interest legal service.").

366. *See* James Lindgren, *The Model Rules: A Foreword*, 1980 AM. B. FOUND. RES. J. 923, 924–25 (reciting that amongst eight reviewers consulted, none found the Model Rules an unqualified success, nor did they find it an unqualified disaster). This mixed support is demonstrated in the compilation of comments sent to Reporter Geoffrey Hazard. The comments were later bound and consist of four volumes totaling hundreds of pages. *See* COMPILATION OF COMMENTS ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4 vols. Geoffrey C. Hazard, Jr., comp. 1980) (copy on file with author).

> What follows, then, is the distillation of two and one-half years of rethinking the fundamental tenets of ethics and self-regulation in the legal profession. That process has resulted in what we believe is a fundamental clarification of the ethical judgments lawyers must daily make in the practice of law.[367]

In response to criticisms, Robert Kutak was much more circumspect about the "distillation" of "rethinking the fundamental tenets of ethics."[368] He observed that this "draft is not a final draft, nor even a tentative one, but a Discussion Draft."[369] "[T]he proposed Rules are a series of ideas meriting discussion, not fixed positions that we are prepared to aggressively defend."[370]

The Kutak Commission issued its Proposed Final Draft on May 30, 1981.[371] The rules and exceptions on client confidentiality had been greatly rewritten,[372] and the provision on mandatory *pro bono* was jettisoned.[373] After another year, the ABA published the Final Draft of the Model Rules.[374]

At the 1982 Annual Meeting, the ABA's House of Delegates began its discussion of the "more important and controversial rules."[375] In introducing the proposed Model Rules, Robert Kutak told the Delegates that the revised final draft was "not an attack on the adversary system, did not turn the focus of law practice away from clients toward outsiders, and did not impose sweeping changes in the lawyer's traditional role."[376] The debate began regarding Rule 1.5, which concerned fees and fee

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367. MODEL RULES OF PROF'L CONDUCT preface (Discussion Draft 1980).

368. *See* Robert J. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 1016, 1018 ("After 11 years of experience, we better understand the difficulty and uncertainty of attempting to legislate normative values at two levels—aspiration and minimum conduct.").

369. *Id.* at 1016.

370. *Id.*

371. MODEL RULES OF PROF'L CONDUCT (Proposed Final Draft 1981).

372. *See* Robert J. Kutak, *Chairman's Introduction* to MODEL RULES OF PROF'L CONDUCT (Proposed Final Draft 1981) (stating that following substantial public comment on client confidentiality in the Discussion Draft, the Commission broadened the general rule and narrowed its exceptions).

373. *See id.* ("The Discussion Draft . . . called for mandatory pro bono legal service. This Final Draft does not . . . .").

374. *See Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. ANN. REP. 828, 833 (1982) (reprinting Proposed Final Draft as amended through June 30, 1982).

375. *See* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 301 (1984) ("[I]t was . . . decided to commence with the more important and controversial Rules.").

376. *Proceedings of the 1982 Annual Meeting of the House of Delegates*, 107 A.B.A. ANN. REP. 603, 615 (1982).

agreements.[377] A blizzard of amendments were made by delegates of state bar associations as well as delegates representing the American College of Trial Lawyers, the National Organization of Bar Counsel, the International Association of Insurance Counsel, and the ABA's General Practice Section.[378] At least some of the votes were tallied. For example, Rule 1.5(a) required the fee to be "reasonable."[379] A proposed amendment to alter the language to ban a "clearly excessive fee" was voted down 126–177.[380] Then, the House looked at proposed Rule 1.5(b), which required the fee agreement be in writing.[381] In a 210–92 vote,[382] that requirement was deleted and substitute language that the fee agreement be, "preferably in writing," was adopted. Proposed amendments were numerous and overlapping. Even after the adoption of Rule 1.5 by the House, Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General, asked a question about the division of fees among lawyers.[383] That resulted in a post-vote motion to amend Rule 1.5, made while considering optional language on the floor, a procedural failure and an exceedingly poor use of time.[384] The motion failed.[385]

Geoffrey Hazard, the Kutak Commission's Reporter, then opened discussion of Rule 1.6 regarding confidential communications.[386] He immediately listed proposed and often contradictory amendments from representatives of the Florida, Los Angeles, the District of Columbia, and New York bars, the Criminal Justice Section, the Standing Committee on Legal Aid and Indigent Defendants, the American College of Trial Lawyers, the International Association of Insurance Counsel, and the

377. *See id.* at 604 (stating the House of Delegates' choice to begin the meeting by discussing Rule 1.5, which is about fee arrangements).

378. *See id.* at 605 (describing the process by which amendments were made and submitted).

379. *See id.* at 620 (describing the process by which delegates voted on the proposed amendment to Rule 1.5(a), which provided for a "reasonable" fee and enumerated eight factors to consider in determining "reasonableness").

380. *Id.* at 619.

381. *See id.* at 618 (evaluating the proposal to Rule 1.5(b) that fee agreements must be in writing).

382. *Id.* at 619.

383. *See id.* at 624 ("Erwin N. Griswold of the District of Columbia asked if a provision could be added applying to cases where a lawyer employs another lawyer, noting that many cases he dealt with came from other lawyers and that he might have been unethical in his practice depending on how paragraph (b) was interpreted.").

384. *Id.*

385. *Id.*

386. *See Proceedings of the 1982 Annual Meeting of the House of Delegates*, 107 A.B.A. ANN. REP. 603, 624 (1982) ("Debate then moved to proposals to amend Rule 1.6.").

General Practice Section.[387] These proposed amendments showed a deep divide among lawyers about how far client confidences were to be kept, even though this same issue had arisen on several other occasions in the 1970s.[388] The Commission anticipated this divide, noting in its 1982 report that "[n]o fundamental professional value assumed larger importance in the Commission's work than that of client[–]lawyer confidentiality."[389] Even so, disagreement arose over the scope of any exceptions to client–lawyer confidentiality.[390] Disagreement existed over more than specific exceptions to client confidences, and these differences led one delegate to move to discharge the Kutak Commission.[391] This was a direct challenge to the work of the Commission. It failed, but only after vigorous debate.[392] The House decided to cool passions by deferring further discussion to the Midyear Meeting in New Orleans.[393]

The general and specific resistance of varying lawyer organizations to the revised final draft, a draft that had been issued a year after the May 30, 1981, final draft,[394] indicated the extent of the dissensus within the institutional legal profession. At the 1983 Annual Meeting, Robert Meserve, acting as Chairman of the Commission after the death of Robert Kutak, described the process of making the Model Rules as "the result of a tremendous amount of compromise; a cross-fertilization of ideas between many interested groups and individuals who had made welcome

387. *See id.* at 624–25 (stating the long list of proposed amendments by state bar associations and professional legal associations).

388. *See* Michael Ariens, *"Playing Chicken": An Instant History of the Battle over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239, 248–55 (2008) (discussing the National Student Marketing fraud, the ABA's 1974 amendment to the Code regarding protection of client confidences involving past or current fraud, and the Lake Pleasant Bodies case, in which two criminal defense lawyers had their client direct them to the bodies of his murder victims, which they found and which they kept secret until the first day of trial).

389. *Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. ANN. REP. 828, 829 (1982).

390. *See id.* ("No commentator on the Model Rules has suggested that the confidentiality principle should have no exceptions. Disagreement arises over the scope of those exceptions.").

391. *See Proceedings of the 1982 Annual Meeting of the House of Delegates*, 107 A.B.A. ANN. REP. 603, 627–28 (1982) (explaining the motion of the Connecticut State Delegate to discharge the Commission).

392. *See id* at 628 (reciting the various delegates' positions on the motion and its failure by voice vote).

393. *See id.* at 628–29 ("[The] Chairman . . . put before the House the motion to defer to the Midyear Meeting. By voice vote, the motion passed.").

394. In its annual report to the ABA in 1981, Robert Kutak wrote for the Commission: "With the publication earlier this summer of the Proposed Final Draft of Model Rules of Professional Conduct, the work of this commission is essentially completed." *Report of the Special Commission on Evaluation of Professional Standards*, 106 A.B.A. ANN. REP. 756, 756 (1981). He was too optimistic.

suggestions which produced the report before the House."[395] Meserve, a former ABA President, implicitly accepted the idea that the American legal profession comprised interest groups with varied policy prescriptions. It was no longer the uniform entity of the late 1960s.[396]

B. *Crisis and the Model Rules*

The January 9, 1983 issue of the *New York Times* published a lengthy article of the unsavory story of O.P.M. Leasing Company.[397] O.P.M. Leasing (the initials apparently stood for "Other People's Money") had failed after receiving about $200 million in loans based on fraudulent leases. It was one of the largest frauds perpetrated in American history.[398] On June, 12, 1980, Joseph L. Hutner, the senior partner at Singer Hutner, the law firm that represented both O.P.M. Leasing and its owners, learned of the fraud.[399] Singer Hutner received advice from a law firm it hired, which concluded Singer Hutner could continue to represent O.P.M. Leasing if Singer Hutner received assurances that fraudulent actions had ended.[400] In September, Singer Hutner voted to cease representing O.P.M. Leasing, but did so gradually, upon the advice of Signer Hutner's own outside counsel.[401] O.P.M.'s fraud was not disclosed by Singer Hutner, and the firm received $250,000 in fees owed and a $250,000 retainer from O.P.M. for any future work.[402] Before the fraud was disclosed, but after Singer Hutner ended its representation, O.P.M.

395. *See Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 763, 766 (1983).

396. This belief existed from the beginning of the Commission's work. *See* SPECIAL COMM. ON EVALUATION OF PROF'L STANDARDS, A.B.A., COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS, Sept. 1977–Aug. 1979, at Aspen, Colo., 4 (Sept. 29, 1977) (on file at Yale Law School) ("[T]he profession is not the homogenous body it might once have been, but has instead become a many-faceted thing.").

397. Stuart Taylor Jr., *Ethics and the Law: A Case History*, N.Y. TIMES MAG., Jan. 9, 1983, at A31.

398. *Id.*

399. *Id.* Singer Hutner received 60% of its revenues from O.P.M. Leasing. *See id.* at A33 ("As the computer leasing company grew, so did Singer Hutner. [In] 1980 . . . it collected more than $3.2 million in fees and expenses from O.P.M.—about 60 percent of its total income.").

400. *See id.* at A31 ("The advice offered by Putzel and McLaughlin in June and thereafter was predicated on Singer Hutner's position that it did not 'know' of any ongoing fraud by O.P.M."). Singer Hutner knew from O.P.M.'s in-house accountant that this was unlikely to happen. *See id.* (reporting Singer Hutner stood idly by when O.P.M.'s accounting firm quit over suspicions of fraud).

401. *See id.* ("Singer Hutner voted formally to resign as O.P.M.'s general counsel on Sept. 23 in a daylong series of meetings punctuated by expressions of concern about the effect of a possible O.P.M. bankruptcy on the law firm's fees.").

402. *Id.*

Leasing secured $15 million more in loans.[403]

The ABA's House of Delegates renewed its debate on the Model Rules at its February 1983 Midyear Meeting.[404] Despite having approved Rules 1.1 through 1.5 in 1982, the session began with a proposed amendment to Rule 1.1.[405] The run of amendments continued, with most failing, but some, such as an amendment to Rule 1.2(d), gaining approval by a narrow margin (158–144).[406] Despite the cautionary tale of O.P.M. Leasing,[407] Rule 1.6 was amended one final time, with even fewer exceptions to the rule demanding client confidences be kept.[408]

The amendments continued through five sessions of the House of Delegates.[409] For example, the House discussed proposed Rule 3.3, which prohibited a lawyer from offering evidence the lawyer "knows to be false," and which required a lawyer to "take reasonable remedial measures" if the lawyer learned after the fact that she had offered false evidence.[410] Reasonable remedial measures included the possibility of disclosing client confidences.[411] Delegates made six different amendments intended to prohibit a lawyer from taking a remedial measure that involved disclosing client perjury.[412] Each amendment failed.[413]

The House completed its review of the Rules, but left for the Annual Meeting approval of the Preamble, Scope, Terminology, and Comments.[414] In the interim, the interested bodies hashed out most

403. *See id.* (relating how Singer Hutner's silence ultimately allowed Goodman to use innocent counsel to perpetrate more fraud).

404. *See Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 289, 291 (1983).

405. *Id.*

406. *See id.* at 291–95 (noting the failure of other proposed amendments made at the meeting, but the passage of the amendment to Rule 1.2(d)).

407. *See id.* at 296–98 (listing three separate mentions of the scandal to allow exception to rectify financial injury due to client fraud).

408. *See id.* at 298 (amending draft Rule 1.6(b) to include only two exceptions and adopting it by a vote of 207–129).

409. *See id.* at 299–369 (recounting the continuation of proposed amendments to the Model Rules through five sessions of the House of Delegates).

410. *See id.* at 333 (describing the proposed amendment to Rule 3.3, which would require a lawyer to cure any false information that may have been unknowingly given).

411. *See id.* (noting the difficulty of amending Rule 3.3, without providing for disclosure of privileged information).

412. *See id.* at 332–39 (outlining numerous amendments that attempted to address the issue of non-disclosure of confidential information).

413. *Id.* at 334–39.

414. *Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 289, 291, 369 (1983); *see also Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. ANN. REP. 763, 766 (1983) ("Action on the amendments to the blackletter Rules was

major issues.[415] In just one session, the Model Rules were approved.[416] Again, unlike approval of the Code, before the vote several delegates explained their decision to reject the Model Rules.[417] Two recommended disapproval for contrary reasons. The Florida Bar ordered its representative to vote no on the ground that a lawyer was not required to disclose a confidence from a client indicating "that he intended to commit a crime."[418] The delegate of the State Bar of California, on the other hand, urged a negative vote because "the blackletter Rules on the issue of confidentiality did not go far enough."[419]

C. *Unity Through Professionalism*

A year after it adopted the Model Rules, the ABA created a Commission on Professionalism to combat the possibility that "the Bar might be moving away from the principles of professionalism and that it was so perceived by the public."[420] That Commission issued a report in 1986 discussing the extensive changes to the legal profession since 1960. The good news was that lawyers now took "the rules [of ethics] more seriously" than before.[421] The bad news was that lawyers "tended to look at nothing but the rules."[422]

The ABA and other law institutions began a crusade to re-instill professionalism.[423] Although lawyers had written about ideals of

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completed at the previous Midyear Meeting, and the House was asked at this meeting to consider the Preamble, Scope, and Comments sections of the proposed model code.").

415. *See id.* at 766–67 (summarizing efforts since the Midyear Meeting to propose and circulate amendments to the Model Rules).

416. *Id.* at 778.

417. *See id.* at 776–77 (describing the reasons that several delegates had for opposing the Model Rules).

418. *Id.* at 776.

419. *Id.* at 777.

420. *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 111 A.B.A. ANN. REP., no. 2, 1986, at 369, 373; *see also* ABA *Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, '...In the Spirit of Public Service:' A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986) (explaining the purpose behind the formation of the Commission on Professionalism).

421. *See Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, '...In the Spirit of Public Service:' A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 259 (1986) (observing the transition from the Canons to the Model Rules was paralleled by disciplinary enforcement, which resulted in lawyers taking the rules more seriously).

422. *Id.* at 259.

423. *See id.* at 264 ("The Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice. Lawyers should exercise

professionalism before the mid-1980s,[424] such articles were episodic and rare enough that one, published in the 1969 *ABA Journal*, was titled *Professionalism—What Is It?*[425]

In 1988, the ABA House of Delegates recommended to all state and local bar associations that they adopt a lawyer's creed of professionalism.[426] This creed, a secular statement of faith, was perceived as applicable to all lawyers, and intended to remind lawyers that the profession would not countenance "abuses" such as an "excessive zeal, a 'win at any cost' mentality, 'scorched earth' tactics and the apotheosizing of 'playing hard ball.'"[427] The Section on Professional Responsibility of the Association of American Law Schools organized its annual program that year around professionalism,[428] and the American Bar Foundation sponsored a Conference on Professionalism.[429] Courts and bar associations also focused on professionalism.[430]

Within a half-decade, the professionalism crusade resulted in a flood of books[431] and articles[432] alternatively regretting or fearing the shift of law

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independent judgment as to how to pursue legal matters. They have a duty to make the system of justice work properly.").

424. *See e.g.*, John G. Hervey, *The Decline of Professionalism in the Law: An Exploration into Some Causes*, 3 N.Y. L. FORUM 349, 349–50 (1957) (commenting on the need for professionalism in the legal industry).

425. Robert Ruppin, *Professionalism—What Is It?*, 55 A.B.A. J. 334 (1969).

426. *See Report No. 2 of the Section of Tort and Insurance Practice*, 113 A.B.A. ANN. REP., no. 2, at 589, 589 (1988) ("[W]e are proposing that the ABA recommend to all state and local bar associations that they adopt a lawyers' 'Creed of Professionalism' . . . .").

427. *Id.*

428. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 261 n.4 (1995).

429. *See* ROBERT L. NELSON ET AL., LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION, at ix (Robert L. Nelson et al. eds., 1992) (describing the ABA's September 1988 Conference on Professionalism).

430. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (promulgated and adopted by the Supreme Court of Texas and the Court of Criminal Appeals Nov. 7, 1989), *reprinted in* Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 657–62 (1990); Special Comm. on Professionalism, Illinois St. B. Ass'n, *The Bar, the Bench and Professionalism in Illinois*, 76 ILL. B.J. 441 (1988).

431. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1996) (observing the impact of the professionalism debate on American society); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1995) (bemoaning the death of legal professionalism); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994) (opining on the state of legal ethics).

432. *See* Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994) (reporting on the state of professionalism in the 1990s); Nathan M. Crystal & Gregory B. Adams, *Introductory Remarks to the Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 (1993) (recognizing the impact of greater commercialization on legal ethics); Peter

from a profession to a business.[433] Between 1986 and 2007, at least 140 local or state bar associations adopted some form of professionalism creed.[434]

A second prong of the professionalism crusade was a 1983 amendment to Federal Rule of Civil Procedure 11.[435] The amendment was designed in part to limit frivolous claims.[436] Rule 11 was also intended "to deal with the abuses that undermined civility and professionalism."[437] Instead of reducing such abuses, Rule 11 "may have contributed to further undermining the public's confidence in the profession as well."[438] It did so in part by creating complex satellite litigation investigating the propriety of pleadings filed by lawyers.[439] One legal scholar very familiar with Rule 11 litigation concluded that an unintended consequence of the Rule was "a deleterious effect on lawyer relations."[440]

During the 1980s lawyers began using "ethics" as a weapon in litigation. Efforts by advocates to disqualify opposing counsel on conflict of interest grounds rose dramatically.[441] In his 1986 legal ethics treatise Charles Wolfram wrote, "The motion for a judicial order disqualifying a lawyer in pending litigation because of conflict is a traditional remedy that has come into prominence in recent years."[442] It appeared that motions to disqualify opposing counsel on conflict of interest grounds were often used

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A. Joy, *What We Talk About When We Talk About Professionalism*, 7 GEO. J. LEGAL ETHICS 987 (1993) (reviewing ROBERT L. NELSON, ET AL., LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (1992)).

433. *See, e.g.*, Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 911 (1996) ("The legal profession is dead or dying. It is rotting away into an occupation.").

434. *See* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility As an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 101 n.17, 141–42 (2011) (showing 140 bar associations adopted civility codes between 1987 and 2007).

435. *See* FED. R. CIV. P. 11 (amended 1983).

436. *See* Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 597 (1998) (showing sanctions imposed under Rule 11 were designed to raise the bar in filing federal suits).

437. *Id.* at 590.

438. *Id.*

439. *See id.* at 598 ("The 1983 Advisory Committee's invitation to use Rule 11 to attack pleadings and motions triggered an avalanche of 'satellite litigation.'").

440. *See id.* at 627–28 (citing a variety of studies showing most attorneys find Rule 11 decreased civility in the profession); *see also* Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1010 (1998) (describing some of the criticism of the effects of Rule 11 as amended in 1983).

441. *See* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 128 (2014) (citing one study showing a six-fold increase in motions to disqualify from 1970–1990).

442. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.7 at 329 (1986); *see also* Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEG. ETHICS 677, 683–84 (1997) (citing cases largely dating from the 1980s and early 1990s).

as a tool to increase the other party's litigation costs rather than a tool to rectify unethical behavior by opposing counsel.[443]

The deluge of Rule 11 motions to disqualify counsel was so great that lawyers began writing about the baneful consequences of such litigation tactics by the end of the 1980s.[444] Not only did this satellite litigation increase costs, the greater regularity of lawyers attacking the "ethics" of opposing counsel heightened the professionalism crisis.[445]

These trends occurred during another decade in which the economics of law practice boosted some lawyers, but which left other lawyers in more economically strained circumstances.[446] As was true of the 1970s, lawyers in large law firms generally did well. New associates in large law firms were paid $83,000 by the late 1980s, and partners in such firms "often hit the six- and seven-figure range."[447] The 1980s were also a great time for high-end personal injury lawyers. Houston lawyer Joe Jamail won a $10.5 billion judgment for Pennzoil against Texaco in 1985, and received a variously reported fee of $300–$420 million.[448] An article in *Forbes*, dated October 16, 1989, estimated the income of the highest-paid personal injury and corporate lawyers in the United States.[449] Of the sixty-three personal injury lawyers listed, the lowest two-year estimated income amount was $4 million, and of the seventy-one corporate lawyers

443. *See* Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 599 (1998) ("[O]nce lawyers knew that the courts would grant sanctions motions [under Rule 11], and that the likely sanction would be an award of costs and attorney's fees, lawyers had an incentive to bring sanctions motions to achieve cost-shifting . . . .").

444. *See e.g.*, Gregory P. Joseph, *The Trouble with Rule 11: Uncertain Standards and Mandatory Sanctions*, 73 A.B.A. J. 87, 88 (1987) (explaining the combination of mandatory sanctions and a subjective test under Rule 11 as "explosive").

445. *See* Paul Marcotte, *Reining in Rambo*, 75 A.B.A. J. 18, 43 (1989) (noting the growing frustration among Texas judges regarding abusive litigation tactics); Thomas J. Paprocki, *Ethics in the Everyday Practice of Law*, 35 CATH. LAW. 169, 172 (1991) (concluding restoration of civility is directly tied to adherence to ethical practice); Thomas M. Reavely, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 637 (1989) (explaining why the "Rambo" attitude should be discouraged in the legal profession); Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J. 79, 79 (1988) (refuting the notion that hardball lawyering is effective trial advocacy); *see also* Bradley W. Foster, Comment, *Playing Hardball in Federal Court; Judicial Attempts to Referee Unsportsmanlike Conduct*, 55 J. AIR L. & COM. 223, 223–24 (1989) (discussing the increasing trend of hardball trial tactics).

446. *See* E. Douglass Williams & Richard H. Sander, *Choosing to Become a Lawyer* 25 (working paper Sept. 15, 2013) (copy on file with author) (noting in Table 3 increase in median income for full-time white male lawyers from $91,386 in 1980 to $113,681 in 1990 in constant 2007 dollars, an increase of 24%). *See id.* (noting similar increases in lawyer income in 1980s in Tables 4 and 5).

447. Stephanie B. Goldberg, *Then and Now: 75 Years of Change*, 76 A.B.A. J. 56, 58 (1990).

448. MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 274 (2011).

449. *The Best Paid Trial Lawyers*, FORBES, Oct. 16, 1989, at 204.

listed, the lowest annual income was "at least $1 million."[450] In contrast, a 1984 ABA survey of 3,000 lawyers found "77 percent earned less than $75,000."[451] One dramatic expression of this difference was the growing income difference between sole practitioners and law firm partners between 1961 and 1985. Law firm partners earned an average of about 2.3 times the income of a sole practitioner in 1961.[452] By 1986, partners earned over three times the income of a sole practitioner.[453] Additionally, the ratio of lawyer median income to lawyer mean income showed a rising inequality in lawyer incomes.[454]

The professionalism crusade was intended to unify what had become an atomized profession. All lawyers, no matter their status, were called to act with "personal dignity, integrity, and independence."[455] And all lawyers were charged with pledging fealty to the ideal of professionalism "for no other reason than it is right."[456] However, neither the Model Rules nor the economic times provided the possibility of entering another golden age. The professionalism crusade was undertaken with the implicit understanding that the Model Rules and its emphasis on a law of lawyering could not make (or keep) lawyers professional. It was a crusade that allowed the profession's past to serve as a reminder of our better angels, but was insufficient to direct lawyers toward a better future.

V. CONCLUSION

A golden age is golden because we decide to compare it favorably to its ostensible competitors. Its flaws are shunted to the background, and confirmation bias leads us to the see the best in one bygone age and the worst in others. More likely, it is always the best of times and the worst of times.

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450. *Id.* at 207, 219.

451. Stephanie B. Goldberg, *Then and Now: 75 Years of Change*, 76 A.B.A. J. 56, 58 (1990).

452. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 450 tbl.11 (1989); *see also* E. Douglass Williams & Richard H. Sander, *Choosing to Become a Lawyer* 20 (working paper Sept. 15, 2013) (copy on file with author) (noting "pattern of rising inequality" in lawyer income distribution from 1960–2010).

453. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 450 tbl.11 (1989).

454. *See id.* at 449 (explaining the trend in income disparity in the legal profession).

455. THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (promulgated and adopted by the Supreme Court of Texas and the Court of Criminal Appeals Nov. 7, 1989), *reprinted in* Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 659 (1990).

456. *Id.*

The adoption of the Code of Professional Responsibility confirmed in those so inclined the existence of a golden age. The willingness of 350,000 or so lawyers[457] implicitly to delegate the task of crafting a code of ethics to fewer than a dozen indicated some type of consensus about what it meant to be an American lawyer. Nevertheless, tensions concerning the materials composing the profession's ideals had already surfaced. Those tensions were almost palpable by the mid-1970s, and disparate subgroups of lawyers agreed that the Code needed to be replaced. What those subgroups had not decided was what ethos would be reflected by the Code's successor. The Kutak Commission's answer to that question simply raised more questions.

The economics of the legal services market had undergone a transformation in the 1970s, which continued in the 1980s. Legal ethics scholar Stephen Gillers was quoted in a January 1990 *ABA Journal* article on the consequences of this transformation: "I've noticed profound and disquieting changes among practitioners—a feeling of anxiety and angst because of a loss of control."[458]

The anxiety lawyers felt was not unique to the legal profession. The United States after 1970 was awash in a sea of anxious workers and unemployed, parents and children, educators and students, and politicians and citizens.[459] The United States had fractured,[460] and lawyers and others carried with them an incomplete map of the present, and a wariness of the future.

457. *See* THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, at 4 (Barbara A. Curran et al. eds., 1985); *see also* RICHARD L. ABEL, AMERICAN LAWYERS 280 (1989).

458. Stephanie B. Goldberg, *Then and Now: 75 Years of Change*, 76 A.B.A. J. 56, 58 (1990).

459. *See* Edwin R. Render, *How Would Today's Employees Fare in a Recession?*, 4 U. PA. J. LAB. & EMP. L. 37, 39–40 (2001) (recounting the economic conditions present in the 1970s in the United States).

460. *See generally* DANIEL T. RODGERS, AGE OF FRACTURE (paperback ed., 2012) (describing the economy and society of 1960s and 1970s America).