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### The Rise and Fall of Social Trustee Professionalism

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# The Rise and Fall of Social Trustee Professionalism

Michael Ariens\*

## Abstract

Elite lawyers have long urged the private practice bar to account for the interests of more than their clients in their work. A lawyer who served merely as a “mouthpiece” or “hired gun” of clients failed to meet the standards of professionalism, of failing to act, in Roscoe Pound’s words, “in the spirit of a public service.” Pound’s view, expressed in the mid-20th century, was premised on the ideal that the lawyer pursued a public calling that incidentally was remunerative. This ideal required the lawyer to serve as a social trustee, one encumbered by duties for the benefit of society. Pound’s statement was embraced by the American Bar Association and elite lawyers as exemplifying professionalism. The lawyer as social trustee professional reached its apex in the mid-1970s. Within a decade, lawyers wrote lamenting the end of the profession of law, of its descent into a trade or business. This lament has continued for thirty years.

This essay discusses the reasons for the fall of social trustee professionalism and why lawyers should not expect its return. It suggests some parallels with a crisis of professionalism that occurred in the late nineteenth and early twentieth century, and why that crisis provides some insights into the legal profession’s present dilemma.

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## I. Introduction

At its annual meeting in August 1983, the American Bar Association (ABA) prominently featured (receiving “Presidential Showcase” status) a program of the Section on Tort and Insurance Practice (TIPS) titled *The Lawyer’s Professional Independence*.<sup>1</sup> One of the speakers, Peter Megargee Brown,<sup>2</sup> called his talk *The Decline of Lawyers’ Professional Independence*.<sup>3</sup> Brown asked, among other questions, “Is the law becoming a profession whose members are no longer obligated as officers of the court to serve both private clients and the public interest?”<sup>4</sup> His answer, as reflected in his title, was “cumulative evidence indicates a serious decline in the American lawyer’s professionalism and independence in the last ten years.”<sup>5</sup> Brown argued that one of the causes of this decline was “the promulgation of the Proposed Model Rules of Professional Conduct,”<sup>6</sup> which the ABA formally adopted at this same meeting.<sup>7</sup> That the Model Rules might be a cause of professional decline was the antithesis of the goal of the Kutak Commission that drafted the rules,<sup>8</sup> and possibly evidence that Brown’s claim was accurate.

Brown’s talk, and the TIPS program as a whole, hit a professional nerve: Brown’s views were republished in several bar journals,<sup>9</sup> and the ABA published all of the talks as a stand-alone book. ABA President Morris Harrell drew the profession’s attention to maintaining professionalism by making it the subject of his President’s Page column in the July 1983 issue of the *ABA Journal*.<sup>10</sup>

The positive reaction to this negative view led to a second program concerning the decline of professionalism, again organized by TIPS, for the 1984 ABA Annual Meeting. This program too was given Presidential Showcase status, and

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1. See THE LAWYER’S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES (John B. Davidson ed., 1984) (reprinting talks) (hereinafter PRESENT THREATS).

2. Brown’s interesting memoir provides some background of his family, though not of his law practice. See PETER MEGARGEE BROWN, FLIGHTS OF MEMORY, DAYS BEFORE YESTERDAY: A MEMOIR (1989).

3. Peter Megargee Brown, *The Decline of Lawyers’ Professional Independence*, in PRESENT THREATS, *supra* note 1, at 23.

4. *Id.* at 23-24.

5. *Id.* at 25.

6. *Id.* at 34.

7. See *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. REP. 763, 778 (1983).

8. See Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689 (2016).

9. See Peter Megargee Brown, *The Decline of Lawyers’ Professional Independence*, 55 N.Y. ST. B.J. 11 (1983); Peter Megargee Brown, *The Decline of Lawyers’ Professional Independence*, 55 CLEVE. B. ASS’N J. 306 (1984); Peter Megargee Brown, *The Decline of Lawyers’ Professional Independence*, 2 DEL. LAW. 7 (1984); Peter Megargee Brown, *Decline of Lawyers’ Professional Independence*, 31 N.C. ST. B. Q. 19 (1984). See also Peter Megargee Brown, *Misguided Lawyers*, 47 TEX. B.J. 319 (1984) (printing edited version of talk).

10. Morris Harrell, *Preserving Professionalism*, 69 ABA J. 864 (1983).

the talks were again published by the ABA as a stand-alone book.<sup>11</sup> Between the two showcases, Chief Justice Warren Burger gave a talk at the ABA's February 1984 Midyear meeting decrying the decline in lawyer professionalism.<sup>12</sup> At the 1984 Annual Meeting, the ABA created a Special Commission on Professionalism in response to the possibility that "the Bar might be moving away from the principles of professionalism and that it was so perceived by the public."<sup>13</sup> In 1986, the Special Commission issued its *Stanley Report*, ". . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*,"<sup>14</sup> the title of which indicated its views on the standing of professionalism in the American legal profession. TIPS followed up its earlier work with a *Report* to the ABA urging state and local bar associations to adopt a lawyers' creed of professionalism.<sup>15</sup> The ABA's House of Delegates enthusiastically adopted both the *Stanley Report* and the *TIPS Report*,<sup>16</sup> and a torrent of conferences, articles and books focused on this transformation of the obligations of the American lawyer.

Despite, or possibly because of, such efforts, the diagnosis of professional decline has remained a dominant theme among lawyers for three decades. Well over 100 bar associations and courts have adopted a professionalism creed since the ABA urged them to do so.<sup>17</sup> Additionally, several states have made their lawyers subject to discipline if they repeatedly and substantially fail to meet the requirements of the state-mandated creed.<sup>18</sup> But the fear of a fall continues to

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11. THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED (John B. Davidson ed., 1985) (hereinafter AN IDEAL REVISITED). See also *TIPS Notes*, 14 BRIEF 2 (1984-85) (reporting speech by Roger Cramton discussing two models of professional behavior, the "public interest" model and the market model).

12. Warren E. Burger, *The State of Justice*, ABA J., Apr. 1984, at 62.

13. *Report of the Commission on Professionalism*, 111 A.B.A. REP. NO. 2, at 369, 373 (1986).

14. ABA Comm'n on Professionalism, '. . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM' (1986). The Report was also printed as ABA Comm'n on Professionalism, '. . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*', 112 F.R.D. 243 (1987).

15. *Report No. 2 of the Section of Tort and Insurance Practice*, 113 A.B.A. REP. NO. 2, at 589 (1988).

16. *Proceedings of the 1988 Annual Meeting of the House of Delegates*, 113 A.B.A. REP. NO. 2, at 4, 25 (1988).

17. My research assistant Sumner Macdaniel has compiled a list of 123 civility and/or professionalism codes and creeds by bar associations and courts (copy on file with author). Somewhat relatedly, a June 24, 2016 Westlaw search of the phrase "In the Spirit of Public Service" since 1986 in the Secondary Sources file lists 709 references. See also Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701 (2015) (surveying 40 states, including District of Columbia, that have adopted professionalism creeds).

18. See *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013); *Ariz. Sup. Ct. R. 31* (West 2014). See also *In re Anonymous Member of the South Carolina Bar*, 709 S.E.2d 633 (S.C. 2011) (holding constitutional civility provision in attorney oath); *Matter of White*, 707 S.E.2d 411 (S.C. 2011) (holding ninety day suspension from practice appropriate due in part to White's "blatant incivility and lack of decorum").

resonate.<sup>19</sup> Individual lawyers regularly bear the burden of serving the public interest by representing unpopular (on left and right) clients and causes, and these efforts may gain some positive recognition. The civility movement's effort to focus on the rewards for positive lawyer behavior also are valuable, though such efforts operate in very narrow channels. Civility is a virtue the profession should inculcate in lawyers, but should not be equated with professionalism.<sup>20</sup> In sum, the larger legal profession remains enmeshed in a professionalism crisis, a crisis found in the fall of social trustee professionalism.

This is a story of social trustee<sup>21</sup> professionalism in the American legal profession. More particularly, it examines the reasons for the decline of social trustee professionalism beginning in the middle of the 1970s.<sup>22</sup> Social trustee professionalism in the legal profession required lawyers to use their expert knowledge to serve society.<sup>23</sup> The tension in the private practice profession was in balancing the need (or desire) for income by representing clients with a duty to serve the public. Among lawyers, professionalism was ordinarily defined in contrast with commercialism. ABA President Harrell's July 1983 column noted that, though no universally-accepted definition existed, professionalism "involves acceptance of high ethical standards, which generally include a dedication to public services for the benefit and protection of society that looks beyond the mere earning of a livelihood."<sup>24</sup> A professional was required "to serve both private clients and the public interest."<sup>25</sup> This public interest model differed from a market model, in which the lawyer was engaged in a business in which "success is measured solely by profits,"<sup>26</sup> and the lawyer was free from any duty to any discernable public interest. More particularly, the lawyer's duty to the public was premised on the lawyer's importance in serving as a mediating body between client and state in the American democratic experiment. This particular public duty required the lawyer to consider how best to generate and maintain a just society. The duty

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19. In Westlaw file Secondary Sources limited to the past three years, the phrase "in the spirit of public service" is referenced sixty times.

20. See Roger Cramton, *On Giving Meaning to "Professionalism,"* in TEACHING AND LEARNING PROFESSIONALISM 7, 14-15 (1997) (noting "[w]hen the profession talks as if civility is the heart of professionalism, it abandons a commitment to the vital task: defining lawyer roles and attitudes that will result in a just social order").

21. See generally STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 36 (1994) (noting rise and fall of social trustee professionalism in law and elsewhere).

22. Brint suggests the decline begins slightly earlier than I do. See *id.* at 10.

23. As stated by Brint, "[T]he dominant form of professionalism . . . combined civic-minded moral appeals and circumscribed technical appeals: a commitment to the public welfare and high ethical standards combined with a claim to specialized authority over a limited sphere of formal knowledge." *Id.* at 36.

24. Harrell, *supra* note 10, at 864. This predates Brint but follows closely his definition of social trustee professionalism.

25. Brown, *supra* note 3, at 24.

26. *Id.*

to client and duty to the public were often, indeed usually, congruent. Even so, a tension existed between the two that required the lawyer to use her conscience in resolving or lessening such tension.

My thesis is that the legal profession has repeatedly claimed professionalism is in decline. This most recent claim of professional decline occurred in the 1970s and early 1980s. That decline was not different in kind from earlier professionalism crises: what differentiates this professionalism crisis from earlier crises is that it appears to have no end, due largely to the fall in social trustee professionalism, including the decline in serving as a mediating institution between individual and state.

The profession's inability to move past this anxious stage is linked to several ideological and instrumental events. One ideological reason is the effect of the Model Rules of Professional Conduct. The Rules gave lawyers the opportunity to offload considerations of ethics from one's conscience to an outside authority. A second ideological reason is an unintended consequence of a greater emphasis on ending any aristocracy among American lawyers. The demise of the elite lawyer as aristocrat and of *noblesse oblige* was concomitant with the rise of market-based technocratic expertise, including in law. One instrumental reason for this professionalism crisis was the change in the structure of the large law firm, itself a result of the uninterrupted increase in the percentage of legal services given to corporate legal needs. A second reason was the continued sorting of lawyers, which created a distancing effect impairing the values of a unified bar.<sup>27</sup>

Section II discusses lawyers' understanding of the meaning of professionalism from mid-century America to 1970. Section III assesses the professionalism crisis that began in the mid-1970s, and then looks at an earlier crisis of professionalism, one that occurred from the 1890s through the 1920s. It then examines how and why the language of professionalism moved from hope to despair. Section IV offers a brief conclusion.

## II. The Professional Lawyer, 1940–1970

In 1944, former Harvard Law School Dean Roscoe Pound published a series of essays on the history of the legal profession.<sup>28</sup> He began by defining a profession: “Historically, there are three ideas involved in a profession, organization, learning, and a spirit of public service. These are essential. The remaining idea, that of gaining a livelihood, is incidental.”<sup>29</sup>

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27. See generally Michael Ariens, *Sorting: Specialization and the Privatization of the American Legal Profession*, 29 GEO. J. LEGAL ETHICS 579 (2016).

28. See Roscoe Pound, *What Is a Profession? The Rise of the Legal Profession in Antiquity*, 19 NOTRE DAME L. REV. 203 (1944); Roscoe Pound, *The Legal Profession in the Middle Ages*, 19 NOTRE DAME L. REV. 229 (1944); Roscoe Pound, *The Legal Profession in England from the End of the Middle Ages to the Nineteenth Century*, 19 NOTRE DAME L. REV. 315 (1944); Roscoe Pound, *The Legal Profession in America*, 19 NOTRE DAME L. REV. 334 (1944).

29. Pound, *What Is a Profession?*, *supra* note 28, at 204.

Shortly after the end of World War II, the ABA initiated a *Survey of the Legal Profession*, intended to evaluate “the functioning of lawyers in a free society.”<sup>30</sup> Among the many studies supported by the *Survey* was a book about the history of the legal profession (and bar associations) written by Pound. Titled *The Lawyer from Antiquity to Modern Times*, it was published in 1953. Pound slightly re-phrased his earlier definition of a profession: It consisted of a “group . . . pursuing a learned art . . . in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood.”<sup>31</sup>

### A. The Legal Profession and Anti-Communism

Pound’s history of lawyers was published at the height of the Second Red Scare, a fraught time in the long Cold War between the United States and the Soviet Union.<sup>32</sup> In 1953, the Senate Permanent Subcommittee on Investigations, whose chairman was Senator Joseph McCarthy, held regular hearings regarding claims of infiltration of American government and society by Communists.

What helped bring about McCarthy’s hearings in 1953 and 1954 were earlier instances in which Americans had sworn fealty to the Soviet Union. An early and extraordinarily prominent example was the Alger Hiss investigation by the House Committee on Un-American Activities (HUAC) during the last half of 1948. Whittaker Chambers alleged before HUAC that Hiss, a Harvard Law School graduate who had worked in the State Department during World War II, was a Communist spy.<sup>33</sup> Hiss testified under oath before HUAC two days later, and denied Chambers’s allegations.<sup>34</sup> Hiss was charged with perjury, and at his second trial ending in early 1950, was convicted.<sup>35</sup> Between those two dates, the Soviet Union exploded an atomic bomb, made possible in part by the disclosure of atomic secrets by others, including Americans.<sup>36</sup>

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30. See *Proceedings of the House of Delegates*, 71 A.B.A. REP. 310, 310 (1946). The *Survey* was initially approved by the House of Delegates in 1944 and limited to a survey of legal education and admissions to the bar. See *Proceedings of the House of Delegates*, 69 A.B.A. REP. 456 (1944). The *Survey* was funded in part by the ABA, but the Council of the *Survey* maintained its independence from the ABA. See Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 ABA J. 548, 548 (1953).

31. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

32. Much has been written regarding the Cold War, especially the period from the end of World War II to the mid-1950s. See, e.g., STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* (1982). See also GEOFFREY R. STONE, *PERILOUS TIMES* 323-426 (2004) (discussing issues of freedom of speech during Second Red Scare).

33. ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* 5 (updated ed. 1997) (1978) (noting that Chambers had qualified his allegation: “The purpose of this group at that time was not primarily espionage. Its original purpose was the Communist infiltration of the American Government. But espionage was certainly one of its eventual objectives.”).

34. *Id.* at 10.

35. *Id.* at 419-46 (discussing second trial and conviction of Hiss).

36. See RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE* 451 (2d ed. 1997) (noting that while the “Rosenberg spy ring was surprisingly productive, given its origins, it was never the primary conduit of U.S. atomic secrets to the Soviets”).

A year before the Hiss investigation, in March 1947, President Harry Truman published Executive Order 9835, creating a “loyalty program” applicable to all civilian employees in the executive branch.<sup>37</sup> The loyalty program assessed whether persons employed in the executive branch supported the Constitution and opposed Communism, in significant part by requiring them to swear an oath of loyalty to the United States government and to deny past or present membership in the Communist Party.

In 1950, as Senator Joseph McCarthy began alleging unnamed persons working in the State Department were Communists, the ABA Assembly adopted two Resolutions, one directly, and the other indirectly related to the loyalty oath and lawyer professionalism. The indirect Resolution opposed governmental legal aid because such would make the legal profession “dependent upon government hand-outs or subsidies.” The Assembly resolved, “That it is the primary responsibility of the legal profession, as part of its high tradition of service to the public, . . . and in order to forestall the threat to individual freedom implicit in growing efforts to socialize the legal profession,” to support privately-operated legal aid.<sup>38</sup>

The direct Resolution was an effort to extend to all lawyers the duty to swear loyalty to the United States. Five Texas lawyers, including future ABA President Robert G. Storey,<sup>39</sup> submitted their proposal to the Committee on Resolutions. Because the “lawyers of America” possessed a “much greater duty than citizens generally to support the principles of the Constitution and oppose the doctrines of Communism inconsistent therewith,” “it is especially appropriate that all licensed to practice law in the United States of American be required” to “attest to his loyalty to our form of government by anti-Communist oath.”<sup>40</sup>

Though the ABA loyalty oath resolution was adopted without any recorded dissent, opposition to it was voiced shortly thereafter by elite lawyers, including

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37. Exec. Order 9835 (March 21, 1947).

38. *Proceedings of the Assembly*, 75 A.B.A. REP. 87, 93-94 (1950).

39. On Storey, see *The New President of the Association: Robert Gerald Storey*, 38 ABA J. 831 (1952).

40. *Sessions of the Assembly*, 75 A.B.A. REP. 87, 94 (1950). It is not a coincidence that this Resolution was made less than a year after the end of *United States v. Dennis*, the trial of twelve persons who served on the national board of the Communist Party of the United States. *Dennis* was then “the longest criminal trial in American legal history.” STONE, *supra* note 32, at 396. Immediately after the trial verdict in *Dennis* was read, trial judge Harold Medina began contempt proceedings against the attorneys for the now-convicted defendants. See KUTLER, *supra* note 32, at 157. The lawyers’ contempt citations were upheld on appeal, *United States v. Sacher*, 182 F. 416 (2d Cir. 1950), and *Sacher v. United States*, 343 U.S. 1 (1952), and the lawyers were the subject of lengthy and significant bar disciplinary proceedings as well. See KUTLER, *supra* note 32, at 164-80. The ABA’s 1950 Annual Meeting was held in Washington, D.C., from September 18-22, at the same time the House and Senate debated and approved the McCarran Act. See 64 Stat. 987. The Act created a Subversive Activities Control Board to investigate those allegedly supporting totalitarian regimes and required Communist organizations to register with the Attorney General. It became law upon an override of President Truman’s veto.



Harvard Law School Professor Zechariah Chafee, Jr.,<sup>41</sup> Whitney North Seymour,<sup>42</sup> Harrison Tweed,<sup>43</sup> former Supreme Court Associate Justice Owen J. Roberts<sup>44</sup> and over twenty other prominent lawyers.<sup>45</sup> The Association of the Bar of the City of New York (ABCNY), of which Seymour was then President, narrowly voted to oppose the “loyalty oath for lawyers” in December 1950.<sup>46</sup> So, too, did the Massachusetts Bar Association.<sup>47</sup>

Both ABA resolutions were premised on social trustee professionalism. One justification for opposing government funding of legal aid was, “Equal justice for all implies the availability of the services of lawyers to all citizens regardless of their financial means.”<sup>48</sup> Further, opposition to government-supported legal aid was important because the “legal profession must be free and independent if it is to serve both its clients and society to the full.”<sup>49</sup> The legal profession served the public by serving those persons unable to pay. It also did so by acting as a mediating body between the citizen and the state. These commonplace connections were offered because the legal profession perceived itself as an essential aspect of the American democratic experiment.<sup>50</sup> The loyalty oath Resolution enjoyed a similar genesis. Lawyers possessed the duty to protect the liberty of the American people by acting as the primary defenders of the Constitution because of their expertise and their duty “to serve courts of justice.”<sup>51</sup>

The quest by some to demonstrate fervent patriotism left unanswered the instrumental question, How will this oath actually accomplish its goal? All lawyers swore an oath to defend the Constitution when admitted to the bar, and given the secretiveness of many of those supportive of the Soviet Union or Communism more generally, the loyalty oath appeared unlikely to smoke out any lawyer-

41. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 239 (1976). Chafee was the author of *FREE SPEECH IN THE UNITED STATES*, first published in 1921, which offered a broad defense of the right to speak, and which nearly led to his censure by a special committee at Harvard. On Chafee, see Rodney A. Smolla, *Chafee, Zechariah, Jr.*, in *YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 100 (Roger K. Newman ed., 2009) (hereinafter *YALE DICTIONARY*).

42. On Seymour, see Conrad K. Harper, *Seymour, Whitney North*, in *YALE DICTIONARY* at 490; *A VISIT WITH WHITNEY NORTH SEYMOUR* (Eleanor M. Fox comp. & ed., 1984).

43. On Tweed, see Robert MacCrate, *Tweed, Harrison*, in *YALE DICTIONARY* at 555.

44. On Roberts, see Richard D. Friedman, *Roberts, Owen Josephus*, in *YALE DICTIONARY* at 461. See *The Proposed Anti-Communist Oath, Opposition Expressed to Association's Policy*, 37 *ABA J.* 123, 124 (1951) (listing signatories).

45. See *Association Activities*, 6 *THE RECORD* 3, 4-5 (1951) (re-printing letter and signatories opposing loyalty oath).

46. See *id.* at 3.

47. *Id.*

48. *Sessions of the Assembly*, 75 *A.B.A. REP.* 87, 93 (1950).

49. *Id.*

50. For a rumination, see PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999).

51. *Sessions of the Assembly*, *supra* note 48, at 94.

Communists.<sup>52</sup> Its breadth seemed more likely to smear the reputations (and thus, economic prospects) of some lawyers, for included without explanation was the decision to frame the oath to require disclosure of past membership in the Communist Party or having been “affiliated therewith.” Even so, the language of the loyalty oath remained encased in the language of public service. The ABA Assembly understood the “high tradition of service to the public” was essential to “forestall the threat to individual liberty” in both resolutions.

A core professional concern related to the loyalty oath was the legal representation of those charged with “political crimes,” and those under investigation by a federal or state loyalty board, HUAC, or later, McCarthy.<sup>53</sup> In 1948, shortly before HUAC investigated Alger Hiss, federal judge Charles Wyzanski<sup>54</sup> gave a talk to the members of the ABCNY suggesting the creation and adoption of procedural rules protecting the rights of those subpoenaed by congressional investigating committees.<sup>55</sup> One procedural rule proposed by Wyzanski was the “right to have counsel present.”<sup>56</sup> But would lawyers agree to represent those accused of ties to Communism?

It soon became clear that too few lawyers were willing to represent alleged Communists. In November 1951, *Washington Post* publisher Philip Graham, trained as a lawyer, gave a speech to the ABCNY. He discussed the importance of lawyers in protecting the liberty of Americans when many were recklessly and harmfully accused of being Communists, or of being affiliated with Communism. Graham pessimistically concluded, “[T]he legal profession has substantially failed to meet its proper obligations of supporting individual freedom.”<sup>57</sup> Graham suggested the tepid response of the bar in defending alleged Communists, unlike its fervent response during the First Red Scare after World War I, might be a result of “the subservience of many lawyers to their client’s points of view, of the growing tendency to consider a lawyer a part of his client rather than a part of the law, and in general of the growing commercialization of the profession.”<sup>58</sup> This trend, he concluded, might leave the legal profession in the position that it “can

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52. See *Association Activities*, *supra* note 45, at 4-5 (reprinting statement of 25 bar leaders opposed to loyalty oath for lawyers, which notes that the “true communist” will “swear falsely, even at the risk of disbarment for perjury”).

53. KUTLER, *supra* note 32, at 152-182, focuses on the contempt and disbarment proceedings made against the lawyers in *United States v. Dennis*. See also AUERBACH, *supra* note 41, at 231-62.

54. On Wyzanski, see Mark I. Gelfand, *Wyzanski, Charles E.*, in *YALE DICTIONARY* at 606.

55. Charles E. Wyzanski, *Standards for Congressional Investigations*, 3 *THE RECORD* 93 (1948). A Code of Investigative Procedures was adopted by the ABA House of Delegates upon recommendation of the Special Committee on Individual Rights as Affected by National Security in 1954. See *Proceedings of the House of Delegates*, 79 *A.B.A. REP.* 115, 123-32 (1954).

56. Wyzanski, *supra* note 55, at 106.

57. Philip L. Graham, *A Publisher Looks at the Law*, 7 *THE RECORD* 14, 20 (1952).

58. *Id.* at 27-28.

no longer pretend to be guided by a sense of public responsibility higher than the ordinary self-interest of the business men and merchants.”<sup>59</sup>

Graham’s excoriation of the legal profession was, like the ABA’s 1950 resolutions, framed in terms of the lawyer’s duty to meet the standards of social trustee professionalism. The most honorable lawyer bound himself to “a sense of public responsibility,” but those lawyers were too few in supply. Graham’s indictment was largely accurate.<sup>60</sup> Although some lawyers, notably the name partners in Arnold, Fortas and Porter, represented those accused of some type of subversion or disloyalty, many were silent, often for fear of economic ruin.<sup>61</sup> As early as 1946, Attorney General Tom Clark emphasized that the revolutionary lawyer who “uses every device in the legal category to further the interests of those who would destroy our government by force, if necessary,” should be taken “to the legal woodshed for a definite and well-deserved admonition.”<sup>62</sup> In mid-1949, shortly after he was confirmed to the Court and during the trial of leaders of the Communist Party of the United States, Clark wrote that lawyers “who act like Communists and carry out Communist missions in offensives against the dignity and order of our courts” may not be fit to practice law.<sup>63</sup> John P. Frank concluded in a 1952 law review article, “It is now, as I can personally vouch from some observation, almost impossible to obtain ‘respectable counsel’ in the political cases.”<sup>64</sup> This was because “many lawyers believe they will be professionally ruined if they take such cases.”<sup>65</sup>

Shortly after Graham spoke to the members of the ABCNY, the ABA House of Delegates created a Special Committee on Individual Rights as Affected by National Security.<sup>66</sup> It appeared to act as a counterweight to the ABA’s Special Committee on Communist Tactics, Strategy and Objectives, created by the ABA

59. *Id.* at 28.

60. *See, e.g.*, GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970*, at 277 (1970) (concluding “In a sense Graham’s indictment of the legal profession was fair.”).

61. *See* LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 127-51 (1990) (concluding “whatever their reward for fighting McCarthyism, their position required courage.”).

62. *See* Tom C. Clark, *Civil Rights: The Boundless Responsibility of Lawyers*, 36 ABA J. 453, 457 (1946). *See also* ALEXANDER WOHL, *FATHER, SON, AND CONSTITUTION: HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK SHAPED AMERICAN DEMOCRACY* 123 (2013).

63. *See* KUTLER, *supra* note 32, at 154 (quoting August 30, 1949 *Look* magazine article written by Clark). *See also* WOHL, *supra* note 62, at 124. Clark was officially sworn in as an associate justice on August 24, 1949.

64. John P. Frank, *The United States Supreme Court: 1950-51*, 19 U. CHI. L. REV. 165, 199 (1952).

65. *Id.* at 200.

66. *Report of the Board of Governors*, 77 A.B.A. REP. 463 (1952) (requesting House of Delegates approve creation of Special Committee, which it did in unreported proceeding). The creation of the Special Committee may have been a result of Graham’s talk, in which he suggested, “Especially needed in these times of fear has been the creation of some respected body to examine how we can achieve a better balance of individual freedom and national security.” Graham, *supra*

in 1950.<sup>67</sup> Whitney North Seymour, a partner in the Wall Street firm of Simpson Thacher and Bartlett who had led the effort in the ABCNY to oppose the loyalty oath, was named its Chairman. The Special Committee was instructed “to make such recommendations to the Association . . . to bring about the best possible balance between the demands of national security and the exercise of the freedom of the individual citizen.”<sup>68</sup>

Eighteen months later, the House of Delegates adopted the resolutions proposed by the Special Committee.<sup>69</sup> The Special Committee’s Second Resolution was

That the American Bar Association *reaffirms the principles* that the right of defendants to the benefit of assistance of counsel and the duty of the bar to provide such aid even to the most unpopular defendants involves public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the legal profession, any client without being penalized by having imputed to him his client’s reputation, views or character.<sup>70</sup>

The Second Resolution consisted of three additional subparts, which committed the ABA to support lawyers “against criticism or attack in connection with such representation,” to “*continue* to educate the profession and the public” on the rights and duties to represent even the most unpopular client, and to urge state and local bar associations to implement “these *declarations of principles*.”<sup>71</sup>

Although unstated, these principles were enshrined in the ABA’s 1908 Canons of Ethics. Canon 15, titled *How Far a Lawyer May Go in Supporting a Client’s Cause*, demanded that the lawyer, in the discharge of his duty to his client, act without fear or favor: “No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty.”<sup>72</sup> This public responsibility was also emphasized in Canon 5, discussing *The Defense or Prosecution of Those Accused of Crime*. The criminal defense lawyer possessed a “right” to defend any accused person, “regardless of [the lawyer’s] personal opinion as to the

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note 57, at 27. As Graham noted, President Harry S. Truman asked the ABA to “turn its attention to the same matters.” *Id.*

67. See 75 A.B.A. Rep. 46 (1950) (listing members of Special Committee to Study Communist Tactics, Strategy and Objectives). That Committee issue its first *Report* at the February 1951 ABA Midyear Meeting, successfully proposing that the ABA expel from membership any person “who is a member of the Communist Part of the United States or who advocates Marxism-Leninism.” *Report of the Special Committee to Study Communist Tactics, Strategy and Objectives*, 76 A.B.A. REP. 586, 586 (1951).

68. See *Report*, *supra* note 66, at 463.

69. See *Proceedings of the House of Delegates*, 78 A.B.A. Rep. 118, 132-33 (1953). See also *Report of the Special Committee on Individual Rights as Affected by National Security*, 78 A.B.A. REP. 304 (1953).

70. *Proceedings of the House of Delegates*, 78 A.B.A. Rep. at 133 (stating Resolution II.(1)).

71. *Id.* (quoting Resolutions II.(2), II.(3), and II.(4)) (emphases in original).

72. *Canon 15*, ABA CANONS OF ETHICS (1908).

guilt of the accused.” And once the lawyer took the case, “the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits.”<sup>73</sup> This ideal had been found wanting in actual events.

One difficulty faced by Seymour’s Committee was the work of the ABA’s Special Committee on Communist Tactics. This Committee urged in its two 1953 *Reports* to the House of Delegates that lawyers who refused to testify by invoking their Fifth Amendment privilege against self-incrimination be investigated concerning their fitness to practice law.<sup>74</sup> The next year Communist Tactics took another step, concluding that “any member of the bar who avails himself of the Fifth Amendment of the Constitution to refuse to give testimony . . . as to possible communist affiliation or other subversive activities, thereby automatically disqualifies himself from the practice of the profession.”<sup>75</sup>

In early 1954, *Newsweek* magazine published an interview with Senator Joe McCarthy, chairman of the Permanent Subcommittee on Investigations.<sup>76</sup> Most of the interview concerned McCarthy’s responses to strong criticism of his tactics and allegations by lawyer Telford Taylor.<sup>77</sup> One of Taylor’s criticisms was that McCarthy’s attacks on the Army’s Signal Corps laboratories were a “fiasco.” Taylor was a former prosecutor at the Nuremberg War Trials, a lawyer in private practice in New York City, and a Reserve Brigadier General. McCarthy made vague but unsubtle claims that Taylor’s criticism of McCarthy was best explained by Taylor’s legal work “defending Communists.”<sup>78</sup>

Defending Taylor, Bethuel M. Webster, President of the ABCNY, wrote a letter to the *Newsweek* editor. Webster gave a spirited defense of Taylor’s actions. Taylor was defending “unpopular clients or in unpopular causes,”<sup>79</sup> as lawyers were duty-bound to do. Webster’s letter cited the ABCNY’s January 1953 resolution defending the right of a lawyer to defend an unpopular client without “having imputed to him his client’s reputation, views or character.”<sup>80</sup>

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73. *Canon 5*, ABA CANONS OF ETHICS (1908).

74. *Report of the Special Committee on Communist Tactics, Strategy and Objectives*, 78 A.B.A. REP. 439 (1953); *Report of the Special Committee on Communist Tactics, Strategy and Objectives*, 78 A.B.A. REP. 291 (1953).

75. *Report of the Special Committee on Communist Tactics, Strategy and Objectives*, 79 A.B.A. REP. 318, 319 (1954).

76. ‘*I am Happy to Plead Guilty*’, NEWSWEEK, Jan. 25, 1954, at 30.

77. On Taylor, see Jonathan A. Bush, *Taylor, Telford*, in YALE DICTIONARY at 540.

78. Taylor represented the labor leader and accused Communist Harry Bridges in the government’s denaturalization proceedings, not in Bridges’ criminal cases. That was irrelevant to McCarthy. See ‘*I am Happy*’, *supra* note 76, at 30. On the cases involving Bridges, see KUTLER, *supra* note 32, at 118-51.

79. *Letters*, NEWSWEEK, Mar. 1, 1954, at 2-3.

80. See *Association Activities*, 8 THE RECORD 57 (1953) (quoting adopted Resolution). *Letters*, at 3.

The ABCNY resolution helped lay the groundwork for a similar resolution adopted by the ABA in August 1953. So, too, did the fact that the New York State Bar Association followed the same path taken by the ABCNY.<sup>81</sup>

Despite institutional support for those representing unpopular clients, the problem of finding counsel for unpopular causes and clients persisted. In its 1953 *Report*, the ABA Special Committee on Individual Rights as Affected by National Security noted that “counsel of outstanding reputations, well known for their anti-Communist views, in several recent cases involving Communists, or persons accused of being Communists, which they took out of sense of public duty, have been subjected to severe personal vilification and abuse.”<sup>82</sup> Irving R. Kaufman, who presided in the 1951 criminal trial of Julius and Ethel Rosenberg for atomic espionage,<sup>83</sup> gave a talk to the Buffalo Lawyers’ Club in November 1953 decrying the threat to the right to counsel. Published in the *ABA Journal*, Kaufman concluded that the “increasing reluctance of attorneys to defend” those accused of “crimes related to Communism” was “a serious threat to the integrity of our system of criminal justice.”<sup>84</sup>

By the end of 1954, Joe McCarthy had been censured by the Senate. The Second Red Scare was coming to an end, though its reverberations continued within the legal profession for much of the next decade. State bar admissions committees and state courts possessing the power to admit applicants to the bar continued to use the threat of Communism to deny applications to practice law.<sup>85</sup> For example, George Anastaplo was denied admission to the Illinois bar by the Committee for Character and Fitness for refusing to state whether he believed in God or had ever been a Communist, as well as for paraphrasing Thomas Jefferson’s statement in the Declaration of Independence concerning the right of the people to abolish their government.<sup>86</sup> The Illinois Supreme Court affirmed the Committee’s decision in 1954, and the Supreme Court denied Anastaplo’s petition for certiorari.

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81. See *Association Activities*, *supra* note 80, at 57.

82. *Report of the Special Committee on Individual Rights as Affected by National Security*, 78 A.B.A. REP. 304, 307 (1953).

83. See *The Rosenberg Trial*, available at <http://law2.umkc.edu/faculty/projects/trials/rosenb/ROSENB.HTM> (last visited June 28, 2016). On Kaufman, see Jay C. Carlisle, *Kaufman, Irving R.*, in YALE DICTIONARY at 308.

84. Irving R. Kaufman, *Representation by Counsel: A Threatened Right*, 40 ABA J. 299, 299 (1954).

85. See generally AUERBACH, *supra* note 41, at 249-53.

86. In re Anastaplo, 121 N.E.2d 826 (Ill. 1954), *cert. denied*, 348 U.S. 946 (1955). Anastaplo’s renewed request for bar admission after *Schwartz* and *Konigsberg* were decided was rejected by the Supreme Court in *In re Anastaplo*, 366 U.S. 82 (1961). Years later, a University of Chicago law professor said Anastaplo was “the staunchest Anti-Communist” he knew. See AUERBACH, *supra* note 41, at 252 (quoting Malcolm Sharp).

By 1957, a sputtering end to the Second Red Scare seemed visible.<sup>87</sup> The Supreme Court held in two cases that state restrictions on applicants to the bar were unconstitutional. In *Schwartz v. Board of Law Examiners*,<sup>88</sup> the Court held New Mexico unconstitutionally prevented Schwartz from sitting for the bar examination. Schwartz's past membership in the Communist Party, and his use of aliases when applying for jobs to avoid discrimination as a Jew were insufficient to ban him from sitting for the New Mexico bar examination. The same day, the Court held, in *Konigsberg v. State Bar*,<sup>89</sup> that the California State Committee of Bar Examiners lacked a rational reason to refuse to issue a good character certification required before an applicant was admitted to the bar. Konigsberg refused to answer questions about his political affiliations (more specifically, whether he was or ever had been a member of the Communist Party). The Court held the Committee did not base its decision to refuse to issue the certificate of good character on Konigsberg's refusal. Instead, it based its decision on "reasonable doubts about his good character," which Konigsberg failed to dispel. Because no evidence existed to support the Committee's conclusion, the Court reversed.<sup>90</sup>

The ABA continued annually to renew the existence of the Special Committee on Communist Tactics through the 1950s, and it became a Standing Committee in 1962.<sup>91</sup> Even so, its influence waned. For example, its *Report* for the 1958 ABA Annual Meeting was quite short. It proposed resolutions urging the House of Delegates to lobby Congress to adopt laws overturning Supreme Court decisions.<sup>92</sup> The House declined to act on any of the three proposed resolutions.<sup>93</sup>

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87. Though Joseph McCarthy died that year, the Supreme Court began a "retreat" from its earlier cases concerning the constitutionality of anti-Communism measures from 1958-1962. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 135-78 (2000) (discussing "retreat").

88. 353 U.S. 232 (1957).

89. 353 U.S. 252 (1957).

90. Konigsberg's case returned to the Court in 1961. The Committee again denied him admission to the bar, this time deliberately on the ground that Konigsberg's refusal to answer questions about any affiliation with the Communist Party was obstructionist. Konigsberg's obstructionism, it concluded, prevented the Committee from determining whether he possessed required good moral character. The Court upheld the state's decision to refuse to admit him to the bar. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

91. See *Proceedings of the House of Delegates*, 87 A.B.A. REP. 135 (1962) (approving Resolution to combine Special Committee on Communist Tactics and the Special Committee on Education in the Contrast Between Liberty Under Law and Communism into a Standing Committee on Communist Tactics).

92. *Report of the Committee on Communist Tactics, Strategy and Objectives*, 83 A.B.A. REP. 429 (1958). The decisions were *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) and *Kent v. Dulles*, 357 U.S. 116 (1958).

93. *Proceedings of the House of Delegates*, 83 A.B.A. REP. 151, 228 (1958). For the 1960 Annual Meeting, Communist Tactics offered a twenty-five page *Report* to justify a resolution to create a program "to explain the nature, objectives and tactics of Communism, and its dangers to our rights and freedoms." *Report of the Special Committee on Communist Tactics, Strategy and Objectives*, 85 A.B.A. REP. 542, 542 (1960). It asked the House to print the Committee's *Report*

Also less active and influential was the Special Committee on Individual Rights. For example, it prepared no *Report* for the 1958 Annual meeting. In 1961-62, its membership was radically altered. Whitney North Seymour had been followed as ABA President by Mississippi lawyer John C. Satterfield.<sup>94</sup> Though both served on this Committee when it was created, they possessed quite different views of its objectives. Satterfield packed the Committee with a majority that linked racial unrest to Communism and the Supreme Court. Its *Report* did little but quote Democratic Senator James Eastland of Mississippi criticizing decisions of the Supreme Court.<sup>95</sup> That screed was the last statement heard from the Special Committee on Individual Rights. Though it was continued for the 1962-63 year, it made no report. It was then abolished.

### **B. Professionalism and the Economics of Law Practice**

By the late 1950s, the ABA turned from anti-Communism to issues of professionalism, the standing of the bar, and lawyer incomes. In summer 1957, outgoing ABA President David Maxwell gave the customary annual address, titled *The Public View of the Legal Profession*.<sup>96</sup> Maxwell began with the assertion that his travels as ABA President provided “abundant proof of what I had always believed—that lawyers are everywhere dedicated to the public interest.”<sup>97</sup> Unfortunately, the public was aware only of “the contumacious conduct of an infinitesimal number of our profession who persist in flouting our canons of ethics.”<sup>98</sup> Maxwell first critically discussed the *Konigsberg* and *Schwartz* cases before turning to the “valid” criticism that the bar had failed “to carry out its obligation to discipline its members.”<sup>99</sup> He closed by paraphrasing Roscoe Pound’s definition of a profession: The legal profession consisted of “an organized group of individuals possessed of the same skills and training and devoted to the same aim of serving the public interest.”<sup>100</sup> That duty to the public required the ABA and state supreme courts to work together “to give proper weight to the public interest in disciplinary proceedings as opposed to the interest of the individual lawyer accused of misconduct.”<sup>101</sup>

Incoming ABA President Charles S. Rhyne also spoke at the 1957 Annual Meeting. He emphasized Maxwell’s challenge to the ABA by encouraging its

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and send it to all members. This resolution was amended to print “a limited number of copies” which would be “made available at Headquarters.” *Id.* at 542 n.\*.

94. On Satterfield, see <http://clio.lib.olemiss.edu/cdm/landingpage/collection/satterfield> (last visited September 1, 2016).

95. *Report of the Special Committee on Individual Rights as Affected by National Security*, 87 A.B.A. REP. 726 (1962). The substance and tone of the *Report* prompted a dissent. *Id.* at 729.

96. David F. Maxwell, *The Public View of the Profession*, 82 A.B.A. REP. 362 (1957).

97. *Id.*

98. *Id.*

99. *Id.* at 368.

100. *Id.* at 372.

101. *Id.*



members to “throw out of our Association those who violate the Canons of Ethics.”<sup>102</sup> Rhyme also offered a pledge encompassing the beliefs and duties of the lawyer, a pledge that emphasized the difference between the American democratic experiment and Communism.<sup>103</sup>

The ABA Standing Committee on the Unauthorized Practice of the Law concluded in its 1957 *Report*, “The biggest and most important problem facing the American Bar as a profession today is that of the unauthorized practice of law by laymen and by corporations.”<sup>104</sup> This problem could be resolved only by a sustained effort by the bar to eliminate non-lawyers from the practice of law. The justification for this sustained effort was framed in the language of duty: Ending the unauthorized practice of law not only aided “the welfare of the profession, but of the public as well.”<sup>105</sup> Eliminating the unauthorized practice of law prevented (or limited) the negative effect of a turn to the morals of the marketplace, which would arise should non-lawyers be permitted to compete with lawyers for legal business.

Rhyme’s speech outlining his goals as President also emphasized the ABA’s need to help the “‘grass roots’ lawyers of the country.”<sup>106</sup> Like the Unauthorized Practice Committee, Rhyme recognized that, though ABA lawyers might be concerned with Communism, many were also concerned about stalled incomes. Rhyme created a Special Committee on Economics of Law Practice, which was given “the duty of laying the groundwork for the development of practical suggestions to lawyers designed to improve their economic status.”<sup>107</sup> He appointed future ABA President John C. Satterfield as chairman of the Special Committee.

The first proposal of the Economics of Law Practice Committee was to oppose elimination of the negligence principle in auto accident cases. Turning such cases into no fault matters was wrong because it “deprives a person of the right of recovery of full compensatory damages upon proof of liability or of the right of trial by jury,”<sup>108</sup> not because such a change would lessen lawyer incomes. The bulk of the Committee’s *Report* was based on its conclusion that the “economic status of the legal profession has failed to keep pace with other professions, businesses and skills

102. *Sessions of the Assembly*, 82 A.B.A. REP. 107, 127 (1957).

103. *Id.* at 128.

104. *Report of the Standing Committee on the Unauthorized Practice of the Law*, 82 A.B.A. REP. 309, 309, 316 (1957).

105. *Id.*

106. *Sessions of the Assembly*, 82 A.B.A. REP. 107, 127 (1957). One reason for this concern was a consequence of the drive to increase substantially the number of lawyers who were ABA members. The number of lawyers who were members of the ABA in 1957 was 88,396, an increase of 68 percent from the 52,624 members in 1954. See RICHARD L. ABEL, *AMERICAN LAWYERS* 290 (1989) (listing number of ABA members in selected years).

107. *Report of Special Committee on Economics of Law Practice*, 83 A.B.A. REP. 434, 435 (1958).

108. *Id.* at 434. This proposal was adopted by the House of Delegates. See *Proceedings of the House of Delegates*, 83 A.B.A. REP. 151, 171 (1958).

since the depression days of the early thirties.”<sup>109</sup> It suggested four phases of what it called “Operation Check-Up,” with the ABA, state and local bar associations, individual lawyers and clients all working together to increase lawyer income. The last group, clients, was included in Operation Check-Up because “encroachments” on the practice of law by non-lawyers was “to the detriment of the clients.”<sup>110</sup> It was the duty, then, of lawyers to remain “eternally vigilant”<sup>111</sup> in preventing non-lawyers from generating such harm by practicing law.<sup>112</sup> The Special Committee also listed its intent to publish a number of works on the economics of law practice in addition to its initial pamphlet, *The 1958 Lawyer and His 1938 Dollar*.<sup>113</sup>

*The 1958 Lawyer and His 1938 Dollar* was distributed to all 93,000 ABA members<sup>114</sup> from its initial print run of 105,000 copies, which was paid for by West Publishing Company. The 1959 *Report* of the Special Committee on Economics of Law Practice noted that “demand has been so great” that West had reprinted another 105,000 copies of the pamphlet.<sup>115</sup> The number of American lawyers was then approximately 262,000,<sup>116</sup> making the pamphlet available to virtually every American lawyer.

The *Foreword to The 1958 Lawyer* declared the Committee’s task: “to ascertain the causes which have resulted in the failure of lawyers to maintain an economic status comparable to that of persons in other professions, businesses and trades, and to propose definite remedial steps.”<sup>117</sup> These remedial steps, the Committee emphasized, were to be taken in light of the fact that the “legal profession is one primarily of service, and its success is measured by the benefits it confers upon the Nation, the state, the community and their citizens.”<sup>118</sup> It continued: “[O]ur profession has maintained its high ideals of ethics and of devotion to the public interest without sufficient regard to the mundane matters of business,

109. *Id.* at 436. The Committee stated that “since 1929” “the income of all earners in the general population increased 141 per cent, the income of our colleagues in the medical profession climbed 157 per cent while the income of lawyers has risen only 58 per cent.” *Id.*

110. *Id.* at 445. The Committee concluded that “reformers” (used in quotes in the Report) favored such encroachments to “further[] their own selfish interests.” *Id.*

111. This phrase was earlier used by Justice Oliver Wendell Holmes, Jr., in dissent in one of the Supreme Court’s initial free speech cases. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

112. *Report*, *supra* note 107, at 444.

113. ABA SPEC. COMM. ON ECON. OF L. PRAC., *THE 1958 LAWYER AND HIS 1938 DOLLAR* (1958 REPR. 1959) (hereinafter *THE 1958 LAWYER*).

114. See ABEL, *supra* note 106, at 280 (Table 22).

115. See *Report of the Special Committee on Economics of Law Practice*, 84 A.B.A. REP. 397, 399 (1959) (noting 70,000 additional copies were distributed to lawyers receiving West’s advance sheets, and another 25,000 were printed to “for use to meet individual demand”).

116. THE 1958 DISTRIBUTION OF LAWYERS IN THE UNITED STATES: A SUPPLEMENT TO PART I: DISTRIBUTION OF LAWYERS IN THE UNITED STATES: DISTRIBUTION AND INCOME (1956) (1959) (listing 262,320 lawyers).

117. *THE 1958 LAWYER*, *supra* note 113, at 3.

118. *Id.*

either from the viewpoint of business methods or reasonable compensation for services rendered.”<sup>119</sup> The 1958 lawyer needed to adopt modern business methods in order to maintain an income permitting continued “devotion to the public interest.” As the pamphlet concluded, “To maintain their status in society, lawyers must increase their net earnings.”<sup>120</sup>

The successful printing and re-printing of *The 1958 Lawyer* encouraged the Committee to issue an Economics of Law Practice Series.<sup>121</sup> Chapter I of its second pamphlet, *Lawyers’ Economic Problems and Some Bar Association Solutions*,<sup>122</sup> was titled *The Economic Dilemma of the American Lawyer*. The Committee did not demonstrate in Chapter I any “dilemma;” instead, it reiterated the failure since 1929 of non-salaried lawyer income (up 58 percent) to keep pace with increases in income for those employed in other industries (up 131 percent), with medical doctors (157 percent increase), and with dentists (83 percent increase).<sup>123</sup> Indeed, the increase in income among all non-farm Self-employed Persons was 144 percent between 1929 and 1951.<sup>124</sup> These data suggested, the Committee concluded several times, “the future of the legal profession is endangered.”<sup>125</sup>

Chapter II emphasized the need for “concerted, drastic action”<sup>126</sup> to increase lawyer income. Again, the lawyer’s duty of public service was noted: “[I]t must be remembered that the legal profession is one of service and its success is directly related to its unselfish service rendered to our nation, our state, our community and our citizenry.”<sup>127</sup> Lawyers “should never permit the making of money to become paramount to the rendition of service,” for “the ethical standards of the profession should never be compromised, nor become subservient to selfish monetary motives.”<sup>128</sup> The remainder of Chapter II focused on the pricing of legal services, particularly the trade-offs involved in minimum fee schedules, and of what to do with the lawyer who consistently set his fees below the schedule.<sup>129</sup>

*Lawyers’ Economic Problems* concluded that when a lawyer consistently charged fees below the minimum schedule, his actions “may well point to soli-

119. *Id.*

120. *Id.* at 5.

121. *Report of the Special Committee on Economics of Law Practice*, 84 A.B.A. REP. 397, 398 (1959).

122. LAWYERS’ ECONOMIC PROBLEMS AND SOME BAR ASSOCIATION SOLUTIONS (n.d. 1958-1959) (hereinafter LAWYERS’ ECONOMIC PROBLEMS).

123. *Id.* at 3.

124. *Id.*

125. *Id.* at 2. *See also id.* at 3 (“The future of the legal profession has become endangered by the creeping instability of its economic status.”); *id.* at 13 (“It is no exaggeration to say that the future of the legal profession is in danger.”).

126. *Id.* at 15.

127. *Id.*

128. *Id.*

129. Chairman John C. Satterfield had established a minimum fee schedule in Mississippi when he served as President of the Mississippi Bar Association in 1954-55. *See* [http://www.olemiss.edu/depts/general\\_library/archives/finding\\_aids/MUM00685.html#ref4](http://www.olemiss.edu/depts/general_library/archives/finding_aids/MUM00685.html#ref4) (last visited June 28, 2016).

citation of professional employment on a basis not ethical under Canon 12.”<sup>130</sup> The Committee justified its conclusion on three bases: first, that the lawyer undervalued his services; second, that the lawyer “wholly disregarded” customary charges; and third, that the lawyer’s action prevented another from obtaining employment “on the higher and reasonable fee basis.”<sup>131</sup> These were not reasons, but circular conclusions, none of which made paramount ethical standards to “selfish monetary motives.”

Both *The 1958 Lawyer* and *Lawyers’ Economic Problems* renewed the attention of lawyers to the issue of “encroachments” from non-lawyers. The ABA had a long-established Standing Committee on the Unauthorized Practice of Law. Its goal was to protect the public (and, incidentally, lawyers) from non-lawyers who performed legal work, for a “manifest public interest [was] involved in its elimination.”<sup>132</sup> One persistent fear of lawyers in the late 1950s was the practice of both law and accountancy by lawyer-accountants.<sup>133</sup>

In 1960, Harvard Law School Professor A. James Casner, formerly a member of the Unauthorized Practice Committee, was appointed to the ABA’s Standing Committee on Professional Ethics. Casner had supported an active Unauthorized Practice Committee, and his influence on the Professional Ethics Committee was almost immediate. In early 1961, the Professional Ethics Committee issued ABA Ethics Opinion 297.<sup>134</sup> It determined a lawyer-accountant who engaged in the practice of both law and accountancy violated Canon 27, which banned advertising. The Professional Ethics Committee reiterated this Opinion the following year. In Formal Opinion 305, the Committee declared Opinion 297 “was not intended to preclude certified public accountants who are also lawyers but are holding themselves out only as accountants from engaging in activities permitted under the Statement of Principles.”<sup>135</sup>

Neither Formal Opinion ended the debate. It continued in the *ABA Journal*, with an article asking, “Is Dual Practice in the Public Interest?”<sup>136</sup> The authors

130. LAWYERS’ ECONOMIC PROBLEMS, *supra* note 122, at 26.

131. *Id.*

132. *Report of the Standing Committee on the Unauthorized Practice of the Law*, 82 A.B.A. REP. 309, 309 (1957).

133. See Comment, *The Attorney-Accountant: Ethical Problems in the Joint Practice of Law and Accounting*, 3 UCLA L. REV. 360 (1956); John R. Wilson, *The Attorney-C.P.A. and the Dual Practice Problem*, 36 U. DET. L.J. 457 (1959).

134. ABA Comm. on Prof’l Ethics and Prof’l Responsibility, Formal Op. 297 (1961). This Opinion affirmed an earlier opinion banning a lawyer-accountant from practicing both professions at the same time. ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 272 (1946).

135. ABA Standing Comm. on Prof’l Ethics and Professional Responsibility, Formal Op. 305 (1962).

136. Arthur J. Levy & W. D. Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 ABA J. 1110 (1966).

unequivocally decided the ABA and the American Institute of Certified Public Accountants should answer that question “clearly and plainly.”<sup>137</sup> The ABA’s Committee on Professional Ethics and Professional Responsibility finally did so in 1972, essentially repealing its prior ban.<sup>138</sup>

The Economics of Law Practice Committee continued to publish guides for lawyers, most of which concerned more “technical” issues of law practice, and which left unmentioned the lawyer’s duty to the public interest.<sup>139</sup> The Committee’s importance to the ABA may be reflected in the 1961 decision to make it a Standing Committee.<sup>140</sup> The tension in improving lawyer incomes while serving the public may be found in the Committee’s 1962 *Report*, authored by its Chairman, and future ABA President, Lewis F. Powell, Jr.<sup>141</sup> Powell wrote, “This Committee has the responsibility for improving, properly and always with due regard to the public interest, the economic status of lawyers. It is plainly in the public interest that the economic health of the profession be safeguarded.”<sup>142</sup>

In the early 1960s the *ABA Journal* occasionally reprised the issue of lagging lawyer income in articles,<sup>143</sup> but the essays became more nuanced.<sup>144</sup> By the mid-1960s, the *Journal* limited its discussion of the economics of law practice to an assessment of lawyer income,<sup>145</sup> which showed steady increases in income. The 1965 IRS report indicated a 10 percent annual increase in “[t]otal legal service income.”<sup>146</sup> A 1983 study of lawyer incomes from 1929 to 1979 showed median lawyer income in constant 1983 dollars was twice as much in 1969 (\$47,638) as it was in 1947 (\$25,415).<sup>147</sup>

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137. *Id.* at 1116.

138. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 328 (1972).

139. See, e.g., ROBERT ASH, *TAX PROBLEMS ENCOUNTERED IN THE GENERAL PRACTICE OF LAW* (1960).

140. *Proceedings of the House of Delegates*, 86 A.B.A. REP. 351, 362-63 (1961).

141. On Powell, see JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994).

142. *Report of the Standing Committee on Economics of Law Practice*, 87 A.B.A. REP. 597, 599 (1962).

143. Gerald C. Snyder, *The Economic Anemia of the Legal Profession*, 48 ABA J. 542 (1962).

144. See Stephen E. DeForest, *Do Doctors Have the Answers to Lawyers’ Economic Problems?*, 48 ABA J. 442 (1962). He concluded: “It may be seriously questioned whether economic equality with the medical profession is a desirable end, even if it were possible to achieve. Economic success has not enhanced the status of the doctor in the community, it has not induced persons of higher caliber to enter the profession, and it has not contributed to the general welfare of the community.” *Id.* at 445.

145. See John D. Conner & N. S. Clifton, *Income of Lawyers, 1961-1962*, 51 ABA J. 753 (1965); Cullen Smith & N. S. Clifton, *Income of Lawyers, 1962-1963*, 52 ABA J. 1043 (1966); Cullen Smith & N. S. Clifton, *Income of Lawyers, 1965*, 55 ABA J. 562 (1969).

146. *Id.* at 562.

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

### C. The Civil Rights Turn, 1962–1970

ABA President John C. Satterfield's address in August 1962 was a lengthy (at 25 printed pages, it was two-and-a-half times longer than most presidential addresses) and sustained attack on the Supreme Court.<sup>148</sup> Satterfield noted that its title, *Law and Lawyers in a Changing World*, might also be "appropriately" called, "The Destruction of the United States of America."<sup>149</sup> As discussed above, Satterfield's speech was seconded by the *Report* of the Special Committee on Individual Rights, which too attacked the Supreme Court through the words of the segregationist Senator from Mississippi, James Eastland.<sup>150</sup>

Tepidly noting the relationship between the public responsibilities of the bar and the burgeoning civil rights movement was the 1962 *Report* of the Standing Committee on Bill of Rights.<sup>151</sup> The Committee began by discussing the continuing difficulty of unpopular clients obtaining legal representation. Its focus was triggered by Yale Law Dean Eugene Rostow's<sup>152</sup> talk to the State Bar of California regarding "strengthening the professional independence of the Bar,"<sup>153</sup> subsequently published in two parts in the *ABA Journal*. One of Rostow's proposals was for the legal profession to embrace more firmly and fully the principle that lawyers possess a duty to represent unpopular causes and persons. This principle, Rostow reminded his listeners, had been affirmed by the ABA at its 1953 annual meeting.

The specifics of Rostow's talk, in turn, were triggered by the 1961 *Report* of the Committee on Bill of Rights. That *Report* stated, "Complaints have come from different areas where accused persons have been deprived of right to counsel because of the refusal of members of the bar to represent discredited defendants or become involved in unpopular cases."<sup>154</sup> The Committee declared more specifically that "persons under criminal charges in certain sections of the South have been deprived of their right to effective counsel because of the refusal of lawyers of the Caucasian race to appear in the defense of colored de-

148. *Address of the President*, 87 A.B.A. REP. 516 (1962). It was reprinted in part in John C. Satterfield, *Law and Lawyers in a Changing World: The President's Annual Address*, 48 ABA J. 922 (1962).

149. *Address of the President*, *supra* note 148, at 516.

150. *Report of the Special Committee on Individual Rights as Affected by National Security*, 87 A.B.A. REP. 726 (1962).

151. *Report of the Standing Committee on Bill of Rights*, 87 A.B.A. REP. 587 (1962).

152. On Rostow, see Geoffrey Kabaservice, *Rostow, Eugene Victor*, in *YALE DICTIONARY at 469; Tributes*, 113 *YALE L.J.* 1 et seq. (2003). See generally LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2005).

153. Eugene V. Rostow, *The Lawyer and His Client (Part II)*, 48 ABA J. 146 (1962) (the talk was given on September 28, 1961). See also Eugene V. Rostow, *The Lawyer and His Client (Part I)*, 48 ABA J. 25 (1962).

154. *Report of the Standing Committee on Bill of Rights*, 86 A.B.A. REP. 474, 476 (1961). The conclusive language ("discredited defendants" and "unpopular cases") used by the Committee may indicate its resistance to the substantive claims of those involved in the civil rights movement.

defendants.”<sup>155</sup> The *Report* noted that more cases concerning the “segregation problem” were likely to arise. It emphasized the ABA’s “standing policy governing the responsibility of its members to which the lawyers in every community should adhere,” and reprinted the 1953 Resolution.<sup>156</sup>

Rostow concluded, “A visible and effective program for carrying out the principle, as it was expressed in the American Bar Association’s 1953 Resolution, could do more than any other single act to clarify public thought on the role of law and lawyers in society.”<sup>157</sup> He suggested adding the duty to represent unpopular persons to the Canons of Ethics, to keep “the problem more firmly in the foreground, both for lawyers and for bar associations.”<sup>158</sup>

The 1962 *Report* hedged on Rostow’s proposals.<sup>159</sup> After again quoting the 1953 Resolution, the ABA’s recommended oath of admission of attorneys, and Canon 31, the Committee concluded that the “Resolution recognizes the *group responsibility* of the profession, ‘the duty of the bar,’ to provide such aid, and the ‘right’ of the lawyer to defend in such causes without being penalized by public opinion.”<sup>160</sup> The *Report* then discussed the results of a two-day meeting in May with representatives from the National Bar Association (created by African-American lawyers) and the National Lawyers Guild (consisting of lawyers on the political left) about representing unpopular persons and causes. The Committee *Report* made six findings, the first of which re-emphasized the group responsibility of the bar to “see to it that defendants in unpopular causes obtain competent counsel . . . [who] are not prejudiced or damaged by undertaking such representation when requested.”<sup>161</sup>

The ABA ventured a bit further after President John F. Kennedy’s June 21, 1963 meeting with bar leaders, elite lawyers and lawyers who worked in the civil rights field.<sup>162</sup> Immediately after the meeting, Bernard J. Segal and Jerome Shestak organized many of the lawyers attending the meeting (and others who were unable to do so) into the Lawyers’ Committee for Civil Rights Under Law. The historian of the Lawyers’ Committee notes that ABA President Sylvester C.

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155. *Id.* This language may also reflect the biases of the Committee. The *Report* referred particularly to the “freedom riders,” who in May 1961 began riding interstate buses without regard to segregationist seating rules in Southern states, and who were then beaten while some law enforcement officers watched, and then arrested. The *Report* was written by Rush H. Limbaugh. A series of interviews of Limbaugh and a biographical summary is found in RUSH HUDSON LIMBAUGH AND HIS TIMES: REFLECTIONS ON A LIFE WELL LIVED (George G. Suggs, Jr., ed., 2003).

156. *Report*, *supra* note 154, at 478.

157. Rostow, *Part II*, *supra* note 153, at 150.

158. *Id.*

159. *Report of the Standing Committee on Bill of Rights*, 87 A.B.A. REP. 578 (1962).

160. *Id.* at 578 (emphasis in original).

161. *Id.* at 580.

162. See ANN GARITY CONNELL, THE LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW: THE MAKING OF A PUBLIC INTEREST LAW GROUP 77 & n.128 (2003) (listing attendees).

Smith, Jr., was “wary of Kennedy’s intentions.”<sup>163</sup> The ABA Board of Governors gave Smith permission to create a Special Committee on Civil Rights and Racial Unrest to respond to the public service responsibilities and challenges the civil rights movement created for lawyers.<sup>164</sup> Walter Schweppe, chairman of the Standing Committee on Bill of Rights and a critic of the Supreme Court, was named chairman of the Special Committee.<sup>165</sup> His appointment, and the appointment of several others, indicated the ABA’s “resistance to [President Kennedy’s] civil rights legislation.”<sup>166</sup> Even so, the Special Committee successfully proposed to the House of Delegates another re-affirmation of the duty of lawyers to represent unpopular causes and clients.<sup>167</sup>

The decision of the House of Delegates to reaffirm the 1953 Resolution did not lead southern white lawyers to represent black civil rights protesters. In Mississippi in summer 1963, “hundreds of [civil rights] activists who attempted to exercise their rights of free speech and association” were “unjustly” arrested, and “[l]ocal lawyers refused to represent black activists.”<sup>168</sup> Despite this, the ABA Committee on Bill of Rights wrote in its 1963 *Report* that it had received “no complaints” about the inability of unpopular clients to find legal representation.<sup>169</sup>

What the 1963 *Report* did not discuss were the costs borne by several southern lawyers representing civil rights activists.<sup>170</sup> Those lawyers who agreed to represent clients in civil rights school desegregation cases and other civil rights participants, and lawyers who defended clients involved in criminal cases based on other civil rights matters were subjected to official, social, and financial harm.

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163. *Id.* at 80.

164. See *Report of the Special Committee on Civil Rights and Racial Unrest*, 88 A.B.A. REP. 614 (1963).

165. See 88 A.B.A. REP. 33 (listing members of Special Committee). Rush H. Limbaugh, the former chairman of the Standing Committee, was also named to the Special Committee. As Connell notes, Limbaugh “believed it was a positive comment on his community that it ‘prided itself on the fact that it never allowed a Negro to live in it and no Negro had ever lived there permanently.’” CONNELL, *supra* note 162, at 80-81. A third member of the Committee on Bill of Rights, William Gray of Los Angeles, was also named to the Special Committee.

166. *Id.* at 80.

167. *Proceedings of the House of Delegates*, 88 A.B.A. REP. 403, 424 (1963).

168. CONNELL, *supra* note 162, at 114.

169. *Report of the Standing Committee on Bill of Rights*, 88 A.B.A. REP. 496, 496 (1963).

170. See Daniel H. Pollitt, *Counsel for the Unpopular Cause: The “Hazard of Being Undone,”* 43 N.C. L. REV. 9, 11-15 (1964) (reprinting part of Daniel H. Pollitt, *Lawyers and Neglected Clients*, HARPER’S MAG., Aug. 1964, at 81). The problem was sufficiently widespread by 1961 that the National Council on Legal Clinics published a pamphlet about how to defend such clients. See DEFENDING THE UNPOPULAR CLIENT (Howard R. Sacks ed., 1961). It was joined by a film of the same name hosted by the famous lawyer Edward Bennett Williams. See *id.* at 1. A year later, Williams wrote a best-selling book which in part explained to the public the duty of the lawyer to defend the unpopular client, a duty driven by the difference between the American political system and Communism. See EDWARD BENNETT WILLIAMS, ONE MAN’S FREEDOM (1962).



The most important change made by the ABA regarding its involvement with the civil rights movement was structural: In 1966 it created a Section on Individual Rights and Responsibilities (IRR Section), which “absorbed” the Standing Committees on American Citizenship and on Bill of Rights, as well as the Special Committee on Civil Rights and Unrest. The founder and chairman of the IRR Section, Jefferson Fordham, was a well-respected law dean who had long promoted and defended the duty of the legal profession to protect the liberties of Americans.<sup>171</sup>

The IRR Section<sup>172</sup> was founded “specifically to address civil rights and individual liberties,”<sup>173</sup> and it took its charge seriously. The ABA appeared to move in the same direction as the IRR Section. One example was the publication by the *ABA Journal* of an article by William Marbury in April 1967.<sup>174</sup> Marbury was a well-known Baltimore lawyer who attended the June 21, 1963 meeting with President Kennedy and who became a member of the Lawyers’ Committee.<sup>175</sup> He offered several examples of southern white lawyers refusing to represent black civil rights activists and concluded that lawyers had failed to “live up to what we nobly profess.”<sup>176</sup> However, the problem was too large for the individual American lawyer, who could not be expected “to run the risk of social and professional ostracism the representation of the unpopular cause sometimes brings.”<sup>177</sup> Marbury’s essay is premised on the belief that lawyers owed a duty to the public to represent unpopular causes and clients. If the bar failed to embrace such a duty, it “should be ashamed to try to cover the situation up by mouthing sanctimonious hypocrisies.”<sup>178</sup>

The Lawyers’ Committee on Civil Rights, supported by large law firms and the Ford Foundation, became more involved in the civil rights movement. After passage of the 1964 Civil Rights Act, the Mississippi board of Bar Commissioners adopted a resolution that its lawyers remain true to their oath by representing

171. See Jefferson Fordham, *The Legal Profession and American Constitutionalism*, 9 THE RECORD 518 (1957). Albert Schweppe, the former chairman of the Bill of Rights Committee, served as Vice-Chairman during the IRR Section’s first year. By the following year he was no longer an officer or otherwise listed.

172. For its history, see AMERICAN BAR ASSOCIATION, *ADVANCING THE LAW, PROTECTING THE INDIVIDUAL, DEFENDING HUMAN DIGNITY, PURSUING THE CHALLENGES INTO THE 21ST CENTURY: A BRIEF HISTORY OF THE AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES* (1999).

173. *Id.* at 9.

174. William L. Marbury, *New Responsibilities for the Bar*, 53 ABA J. 317 (1967).

175. See CONNELL, *supra* note 162, at 78 n.128. See also William L. Marbury *Dead at 86; Lawyer and Fellow at Harvard*, N.Y. TIMES, Mar. 7, 1988, available at <http://www.nytimes.com/1988/03/07/obituaries/william-l-marbury-dead-at-86-lawyer-and-a-fellow-of-harvard.html> (last visited June 27, 2016). Marbury had also represented Alger Hiss, his childhood friend, in the libel suit against Whittaker Chambers and assisted in Hiss’s criminal trials. See generally WEINSTEIN, *supra* note 33.

176. Marbury, *supra* note 174, at 318.

177. *Id.* at 319.

178. *Id.*

competently the “popular or unpopular, respected or despised, and regardless of race, color, creed or national origin” in all Mississippi courts.<sup>179</sup> The resolution was, however, an “empty gesture.”<sup>180</sup> Consequently, the Lawyers’ Committee opened a law office in Mississippi in 1965 to represent those who were unable to obtain local lawyers as counsel.<sup>181</sup>

By 1968, establishment lawyers were challenged by “Movement” lawyers, those who supported the movements for black civil rights and the end of poverty, for the student movement, and against the Vietnam War. At the 1968 annual meeting of the National Lawyers Guild, UCLA law professor Richard Wasserstrom spoke on the topic *Lawyers and Revolution*.<sup>182</sup> Wasserstrom believed that a radical lawyer, though not a contradiction in terms, was nevertheless an unlikely combination.<sup>183</sup>

Not all such self-identified lawyers agreed with Wasserstrom, at least not in action. William Kunstler<sup>184</sup> became famous during the trial of the Chicago Eight (later Seven) in late 1969 and early 1970.<sup>185</sup> Soon after the trial, Kunstler was the subject of a flattering profile in the Sunday *New York Times Magazine*.<sup>186</sup> Kunstler declared, “I am not a lawyer for hire. I only defend those I love.”<sup>187</sup>

This was anathema to that part of the legal establishment which had fought for the ideal that lawyers represented even those whose views were personally repugnant. The June 1970 issue of the *ABA Journal* editorialized in opposition to Kunstler’s declaration. The editorial praised the “lawyer for hire,” the lawyer who “is available to the bad and the ugly, the scorned and the outcast.”<sup>188</sup> Without explicitly referring to the inability of those charged as Communists or those civil rights activists in Mississippi (and elsewhere) to obtain counsel, it continued, “Most lawyers prefer to represent popular causes and prosperous clients, but as a profession and individually we know that our ideal is to provide competent counsel for any person with a legitimate cause.”<sup>189</sup> Indeed, “with respect to

179. CONNELL, *supra* note 162, at 131.

180. *Id.* (quoting Ten Year Report of the LCCR).

181. *Id.* at 132. The Mississippi Bar agreed to this arrangement as long as the Lawyers’ Committee did not divert fee-paying clients from local lawyers. *See id.*

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

183. CONNELL, *supra* note 162, at 129-30.

184. On Kunstler, see DAVID J. LANGUM, *WILLIAM KUNSTLER: THE MOST HATED LAWYER IN AMERICA* (1999); David J. Langum, *Kunstler, William M.*, in *YALE DICTIONARY* at 320.

185. On the case, see generally JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL* (rev. ed., 1993).

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

187. *Id.* at 92.

188. *See* Richard Bentley *et al.*, *Editorial, A Lawyer for Hire*, 56 ABA J. 552, 552 (1970).

189. *Id.*

representing unpopular persons, not just poor ones, to be a 'lawyer for hire' is a badge of honor."<sup>190</sup>

The editorial labeled Kunstler's approach "antiprofessional."<sup>191</sup> It was anti-professional in light of the idealized claim of the bar that lawyers were professionals because they practiced law in the spirit of a public service. Representing the unpopular cause or person meant acting fully in that spirit.

The *ABA Journal* printed a number of letters responding to its Kunstler editorial.<sup>192</sup> One writer urged lawyers to live their ideal of serving the public: "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."<sup>193</sup> This argument was telling because it spoke in the common language of the dichotomy between professionalism and commercialism.

A 1970 *Comment* in the *Harvard Civil Rights-Civil Liberties Law Review* indirectly supported Kunstler's view. It challenged the ABA's idealization of the lawyer for hire as dangerous to those lawyers who embraced it. The *Comment* began, "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities, and the politically unpopular."<sup>194</sup> It then listed events in which lawyers were sanctioned or subject to discipline after representing such clients.

From 1968 through the early 1970s the bar's professed ideals were regularly challenged for failing to meet the needs of those poor and minority persons in need of legal assistance. More broadly, some Movement lawyers challenged the American legal system. One response to these challenges was a symposium organized by Whitney North Seymour for the 1970 centennial celebration of the founding of the ABCNY.<sup>195</sup> Seymour noted the ABCNY embraced the foundational "belief of lawyers in the vibrancy of law."<sup>196</sup> Did the law remain vibrant? The organizer and a principal speaker at the symposium was Eugene Rostow. His response to the question of the symposium title, *Is Law Dead?*, was no. Others were less certain. Several books indicting the legal profession for its failure to serve the interests of the public were published in 1970 and 1971.<sup>197</sup>

190. *Id.*

191. *Id.*

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

193. Letter from Harold Weiner, *Kunstler and the Lawyer's Role*, *supra* note 192, at 722.

194. Marshall Beil, Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 301 (1970).

195. See Whitney North Seymour, *Foreword*, in *IS LAW DEAD?* 7 (Eugene V. Rostow ed., 1971).

196. *Id.*

197. See WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES (Bruce Wasserstein & Mark J. Green eds., 1970); LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (Robert Lefcourt ed., 1971); RADICAL LAWYERS, *supra* note 181.

The legal establishment re-asserted its commitment to public spirited (and thus, professional) behavior during this challenge. The ABA continued its efforts to foster civil legal aid, begun in 1964 when Lewis F. Powell, Jr., was ABA President. The ABA House of Delegates, after significant lobbying by Powell, agreed to support the creation of a federal program of legal services for the poor.<sup>198</sup> It defended the program against congressional efforts to abolish it,<sup>199</sup> and supported and lobbied for the creation of the Legal Services Corporation, first introduced in 1971 and enacted in 1974.<sup>200</sup> The ABA, most notably through President Chesterfield Smith, urged lawyers to consider creating “an affirmative duty” to “devote some portion of his services to public interest endeavors.”<sup>201</sup> The Lawyers’ Committee remained committed to the cause of assisting the civil rights movement, and large law firms began instituting formal pro bono programs. In 1974, the Washington law firm of Hogan & Hartson hired David Tatel as its first pro bono partner.<sup>202</sup>

By the end of the 1960s, large law firms wished to have their cake and eat it too. They wished to represent their well-paying clients and to be seen performing public interest work. This maintained firm income and provided an effective tool to recruit graduates of elite law schools, who wanted to practice law relevant to the turbulent times.<sup>203</sup> But the difficulty in maintaining the standard of the “lawyer for hire” remained. In 1969, the Washington, D.C., law firm of Wilmer, Cutler & Pickering sent a circular to law students declaring, “We decline to represent clients whose objectives or tactics we find unacceptable, or who ask us to present a position on any basis other than its merits.”<sup>204</sup> The unpopular client was

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198. See EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 39-43, 49-70 (2d ed. 1978). See also STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 32-34 (2008) (discussing ABA’s decision to support federal civil legal aid program); JEFFRIES, *supra* note 141, at 197-201 (noting Powell’s influence in obtaining support by House of Delegates for legal services program). *House of Delegates Proceedings*, 90 A.B.A. REP. 95, 110-11 (1965) (noting vote). This reversed the ABA’s position taken in 1950, discussed above.

199. John D. Robb, *Controversial Cases and the Legal Services Program*, 56 ABA J. 329, 329 (1970). This was the second time efforts were made to abolish it. See JOHNSON, *supra* note 198, at 219-33.

200. Legal Services Corporation Act, 42 U.S.C. § 2996 *et seq.* (2015). The bill was signed into law by President Richard M. Nixon on July 25, 1974, two weeks before he resigned from office, and just days before the House Committee on the Judiciary voted in favor of articles of impeachment. See EARL JOHNSON, JR., *2 TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* 424 (3 vols., 2014).

201. Chesterfield Smith, *Address of Chesterfield Smith*, 26 ADMIN. L. REV. 379, 381 (1974). See also Chesterfield Smith, *Lawyers Should ‘Tithe’ for the Public Interest*, 2 B. LEADER, Nov.-Dec. 1976, at 2.

202. CONNELL, *supra* note 162, at 195.

203. See *Ghetto Law*, NEWSWEEK, Jan. 19, 1970, at 55.

204. MARK J. GREEN, *THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS* 282 (1975).

now a corporation alleged to have harmed the environment. Its unpopularity was deserved, so it could be banished from the roster of the large firm's clients.

### III. Crises of Professionalism

#### A. The Professionalism Crisis, 1973–1985

The 1970s were unkind to lawyers.<sup>205</sup> The successful implementation of the ABA's 1969 Code of Professional Responsibility<sup>206</sup> rapidly gave way to a series of crises. Watergate was the most well known, and elite lawyers accepted that the Watergate affair was a "lawyers' scandal."<sup>207</sup> During the Watergate hearings, in February 1974, Senator John Tunney, chairman of a subcommittee of the Senate Committee on the Judiciary, held a hearing titled *The Organized Bar: Self-Serving or Serving the Public?*<sup>208</sup> The hearing was held at the ABA's Midyear Meeting in Houston, and part of the discussion concerned the duty of lawyers to serve the public through pro bono work.

The ABA was confident its members generally acted in the spirit of a public service. One way in which it later demonstrated the profession's commitment to service to the public was the approval by its House of Delegates in 1975 of a resolution of the Special Committee on Public Interest Practice "that it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest services."<sup>209</sup> The House of Delegates expanded the definition of "public interest services" to include bar association activities as an aspect of the administration of justice, but otherwise accepted the Special Committee's definition to mean legal work, at a reduced or no fee, concerning poverty law, civil rights law, public rights law, or charitable organization representation.<sup>210</sup>

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205. See generally Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 134 (2014).

206. The ABA House of Delegates adopted the Code without amendment in 1969. See *Proceedings of the House of Delegates*, 94 A.B.A. REP. 378, 389-92 (1969). In just three years, forty-three states and the District of Columbia had adopted the Code as law. Four bar associations adopted the Code as applicable to their members. Only three states had not taken some action concerning the Code by 1972. See *Report of Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972).

207. See Richard B. Allen, et al., *Editorial, Watergate—A Lawyers' Scandal?*, 60 ABA J. 1257 (1974) (quoting past ABA President Chesterfield Smith's observation); James D. Fellers, *President's Page*, 61 ABA J. 529, 529 (1975) ("Early in its development, Watergate was characterized as a lawyer's scandal.").

208. *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).

209. See *House of Delegates Proceedings*, 100 A.B.A. REP. 642, 684 (1975). The House of Delegates amended the Special Committee's resolution by replacing "obligation" with "responsibility." See *Report of the Special Committee on Public Interest Practice*, 100 A.B.A. REP. 965 (1975) (printing original resolution).

210. *House of Delegates Proceedings*, 100 A.B.A. REP. at 684. The House of Delegates had postponed its consideration of the Special Committee's Resolution at its Midyear Meeting in part due to the more limited definition of public interest services in the Committee's Resolution. *Com-*

Two years later, at the behest of the House of Delegates, the Special Committee issued a *Report* titled *Implementing the Lawyer's Public Interest Obligation*.<sup>211</sup> Implementing this duty required private practice lawyers to keep records of their pro bono work and commit five to ten percent of their time to such practice. The ABA's declaration of the lawyer's professional responsibility to engage in public interest work indicates the strength of the social trustee model in the middle of the decade.

That vision was reinforced in a talk to the IRR Section given by former Watergate special prosecutor Archibald Cox just days after the resignation of President Richard Nixon in August 1974.<sup>212</sup> Cox implored his listeners to mediate the "conflicting duties of 'hired gun' and 'servant of the law.'" <sup>213</sup> One of the charges hurled at those many lawyers involved in the Watergate affair was their failure to consider any interest other than their client's. Cox noted, "under modern circumstances loyalty is often more easily given to the client's interests than to the people's interests or the law."<sup>214</sup>

In 1977, ABA President William B. Spann, Jr., created what became known as the Kutak Commission, which proposed the Model Rules of Professional Conduct, adopted by the ABA in 1983.<sup>215</sup>

The Kutak Commission and the ABA agreed the lawyer was a central actor in the American democratic experiment, and one who largely acted for the good of society. The major goal of the Kutak Commission was to craft a set of ethics rules that declared the profession's adherence to the model of social trustee professionalism. A crucial part of the Commission's job was to reflect the ideal that private practice lawyers were professionals who acted in the spirit of public service, as both agents of their clients and as trustees of the public interest. After meeting privately for a year-and-a-half, the Commission members were asked what the public should know about its initial draft. Two recorded responses were, "An authoritative statement that lawyers are responsible to demands be-

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*pare Report of the Special Committee on Public Interest Practice*, 100 A.B.A. REP. 392 (1975) (printing original resolution postponed at Midyear Meeting) with *Report of the Special Committee on Public Interest Practice*, 100 A.B.A. REP. 965 (1975) (printing amended resolution filed for Annual Meeting).

211. See *Implementing the Lawyer's Public Interest Obligation*, 63 ABA J. 678 (1977) (reprinting report in part). *Report of the Special Committee on Public Interest Practice*, 102 A.B.A. REP. 868 (1977) (reprinting report in part). The *Report* used its original word "obligation," not "responsibility," as the resolution was approved by the ABA House of Delegates.

212. Cox had been fired as independent counsel investigating Watergate in the notorious Saturday Night Massacre. See KEN GORMLEY, ARCHIBALD COX 338-58 (1997).

213. Archibald COX, *The Loss of Mystical Qualities Makes It Harder to Revere the Law*, STUDENT LAW., Feb. 1975, at 8, 10.

214. *Id.* at 10.

215. See William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, 2 B. LEADER, Nov.-Dec. 1977, at 2, 3. See also Ariens, *supra* note 8, at 700-20 (detailing history of Kutak Commission's efforts).

yond those of their immediate clients,” and “Regulation of a private profession in the public interest.”<sup>216</sup> Shortly before the Kutak Commission’s “Working Draft” was first made public in mid-1979, one Commission member was quoted, “A lawyer’s duty is not solely to protect the confidences of the client. A lawyer has some duty and obligation with respect to the administration of justice, of candor to the court.”<sup>217</sup> These statements were the Commission’s response to what its Reporter called the lawyer’s “basic posture” of “my client first, last and always.”<sup>218</sup>

In both the 1979 “Working Draft” and the January 1980 Discussion Draft, the Kutak Commission included a proposal requiring lawyers to engage in pro bono activities.<sup>219</sup> It also included several provisions requiring or permitting a lawyer to disclose a client confidence, and provisions in which the lawyer was required to consider the interests of persons other than the lawyer’s client before or when engaging in a professional action.<sup>220</sup>

The Discussion Draft was savaged. Publication of the Proposed Final Draft was delayed to respond to extensive criticism from bar associations, ABA Sections and Committees, and individuals. When it was finally published in mid-1981, the Kutak Commission had made significant changes. The pro bono mandate was abandoned, though over the dissent of two members. The Proposed Final Draft reduced the number of instances in which a lawyer was required to act beyond any consideration of her client’s interests, including provisions permitting a lawyer to disclose a client confidence.

Despite the changes made in the eighteen months between publication of the Discussion Draft and the Proposed Final Draft, Chairman Robert Kutak still spoke in the language of social trustee professionalism in his *Introduction* to the Proposed Final Draft. He noted that “questions remain” concerning the shape of the lawyer’s duties: “What are the lawyer’s duties to the court? What are the limits of duty to a client? Does a client have a right to use illegal or wrongful means to gain his objectives? Does a client have a right to the assistance of a lawyer in the process?”<sup>221</sup>

The ABA House of Delegates possessed the institutional authority to answer the questions posed by Kutak. When the House began debating the Model Rules

216. COMMISSION ON EVALUATION OF ETHICAL STANDARDS JOURNALS, RESEARCH TRIANGLE, NORTH CAROLINA, FEBRUARY 23-24, 1979, at 12 (copy on file with author) (hereinafter JOURNALS).

217. See *Say Revised Ethics Code Will Be ‘Enforceable’*, 65 ABA J. 1283, 1283 (1979) (quoting Commission member Richard Sinkfield); see also MODEL RULES OF PROF’L CONDUCT Chairman’s Introduction (AM. BAR ASS’N, PROPOSED FINAL DRAFT 1981).

218. JOURNALS, SEATTLE, WASHINGTON, JUNE 29-30, 1979, *supra* note 216, at 16 (quoting Reporter Geoffrey Hazard). Even though this statement was made near the end of the Commission’s meetings, it represents the Commission’s ethos from its first meeting in 1977.

219. See Ariens, *supra* note 8, at 705-06.

220. See *id.*

221. MODEL RULES OF PROF’L CONDUCT Chairman’s Introduction, at iii (AM. BAR ASS’N, PROPOSED FINAL DRAFT 1981).

in August 1982, its answers were framed in favor of the interest of the lawyers' clients. This bias was manifested even after the Kutak Commission made further alterations to the proposed Model Rules between 1981 and 1982, which tied the lawyer more tightly to the needs and interests of the client.<sup>222</sup>

The Kutak Commission's 1982 Final Draft was accompanied by a *Report* written by Robert Kutak. Kutak now emphasized the lawyer's duty of loyalty to the client. More importantly, Kutak avoided any mention of any duty to the public in his *Report*. The shorthand often used for the lawyer's public duties was that the lawyer also acted as an "officer of the court." This shorthand was prominently used in Kutak's *Introduction* to the 1981 Proposed Final Draft.<sup>223</sup> It was eliminated from his 1982 *Report*.<sup>224</sup>

Despite these changes by the Kutak Commission, those in the House of Delegates who favored the "basic posture" of "my client, first, last and always" wanted more. In the 1982 proceedings of the House, the debate was so extensive that the House completed work on just a few rules, and failed to complete any substantive review of Model Rule 1.6 on client confidences and exceptions thereto.<sup>225</sup> At this and the February 1983 meeting on the proposed Rules, those opposed to social trustee professionalism largely succeeded.<sup>226</sup> For example, the instances in which a lawyer was permitted to disclose a client confidence to effectuate a public interest were further reduced in number.<sup>227</sup>

By the time the Model Rules of Professional Conduct were adopted by the ABA House of Delegates in August 1983, the Kutak Commission's goal had been transformed. Instead of generating a set of rules that accounted for the lawyer's duty to client and public, the rules were written to determine when the lawyer had engaged in "lawful" behavior. The Model Rules were to be interpreted as rules, not guides, and the "basic posture" of "my client first, last and always," was now central to the Model Rules.

This six-year process occurred as a number of other changes re-shaped the legal profession. The number of lawyers increased by 53 percent during the 1970s, as baby boomers filled all existing law school seats.<sup>228</sup> From 1980 to 1984, the number of lawyers grew an additional 20 percent, to over 649,000.<sup>229</sup>

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222. See Ariens, *supra* note 8, at 718-20.

223. PROPOSED FINAL DRAFT, Chairman's Introduction, at 4 (noting that a lawyer is not only "a representative of the client but also an officer of the court.").

224. See *Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. REP. 828 (1982).

225. See *House of Delegates Proceedings*, 107 A.B.A. REP. 603, 627-28 (1982).

226. Ariens, *supra* note 8, at 737-41. It should be noted that votes were often closely divided.

227. See *House of Delegates Proceedings*, 108 A.B.A. REP. 289 (1983).

228. 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 increase in lawyers from 355,242 in 1970 to 542,205 in 1980).

229. See Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW AND SOC'Y REV. 19, 19 (1986).



Median lawyer income fell precipitously. In constant 1983 dollars, the median lawyer's income dropped from \$47,638 in 1969 to \$36,716 in 1979.<sup>230</sup> Large law firms pursued growth and profits, as legal services between 1972 and 1982 increasingly came from businesses rather than individuals.<sup>231</sup> Between 1977 and 1982, total monies received by private practice lawyers doubled to \$34 billion.<sup>232</sup> This shift provided the impetus for large firms to increase the pace of growth.<sup>233</sup> The average size of the twenty largest law firms increased from 234 in 1979 to 318 in 1982 and 414 in 1985, increases of 36 percent and 30 percent, respectively.<sup>234</sup> Private law practice had become, as Robert Kutak, Chairman of the Kutak Commission wrote in a posthumously published 1984 essay, a "dog-eat-dog world."<sup>235</sup>

It was in this milieu that Peter Megargee Brown and others spoke at the 1983 ABA presidential showcase. Brown sensed a swift and dramatic change within the legal profession. Brown also correctly noted that the Model Rules were not only unhelpful in remedying the problem of a lack of lawyer professionalism, they exacerbated it. The ABA understood the problem that competition for legal business made assertions of professionalism ring hollow. And it used its significant resources to highlight this difficulty. But though claims of "antiprofessional" behavior persisted through the 1980s, it was rare to hear or read any rejoinder from large firm lawyers. Their indirect response was in the form of the now-legally permissible targeted marketing of the large firm's claims to technical expertise.

### **B. The Professionalism Crisis, 1895–1925**

In 1923, W. A. Wright, President of the Texas Bar Association, told its members that they had "overlooked" their adoption of the ABA's 1908 Canons of Ethics in 1909.<sup>236</sup> Three years later, the Association again adopted the Canons, which, as a voluntary association, meant only that its members could be expelled from the Association for violating the Canons. A few years before Wright spoke, John C. Townes, major in the United States Army and the long-time dean of the University of Texas Law Department, asked the Association to adopt a resolution excoriating lawyers who aided their clients in receiving a deferral from the local draft board through false means. Townes asked that the Association by resolution

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230. Sander & Williams, *supra* note 147, at 448 tbl.9. *See also* ABEL, *supra* note 106, at 160 (noting several state bar surveys from the 1970s indicating a decline in lawyer income).

231. Sander & Williams, *supra* note 147, at 441 tbl. 5 (noting law firm receipts between 1972 and 1982 from individuals dropped from 52.5 percent to 44.5 percent and increased from businesses from 42.3 percent to 48.6 percent).

232. *See* Roger C. Cramton, *The Lawyer's Professional Independence: Memories, Aspirations, and Realities*, in *AN IDEAL REVISITED*, *supra* note 11, at 49.

233. The pace of growth was reflected in the mid-1980s increase by Cravath, Swaine and Moore of new associate salaries.

234. ABEL, *supra* note 106, at 311 tbl. 45.c.

235. Robert J. Kutak, *The Adversary System and the Practice of Law in THE GOOD LAWYER* 172, 175 (David Luban ed., 1984).

236. *See* MICHAEL ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS* 184 (2011).

summarily dismiss those lawyers and that they be “disbarred by competent authority from the further practice of law.”<sup>237</sup> Instead of a quick affirmation of Townes’s request, the Association’s members bickered for two days regarding the proper standards for disbarment, with one noting that the Texas statute on disbarment was “practically unused.”<sup>238</sup>

In spite of the efforts of the elite of the bar, including the ABA, to direct the broader profession’s attention to the threat to professionalism from the late 1890s through the 1920s, relatively little happened. The ABA adopted its Canons of Ethics in 1908,<sup>239</sup> and many state bar associations, all of which were then voluntary, adopted them. Additionally, lawyers reached a tacit agreement concerning the extent to which the lawyer zealously represented his client in the courtroom.<sup>240</sup> A few more lawyers were disbarred as time passed, but they were a paltry few.<sup>241</sup>

During the last two decades of the 19th century, the number of lawyers nearly doubled.<sup>242</sup> Although growth slowed substantially in the first two decades of the twentieth century, by 1920 the number of licensed lawyers was 120,781.<sup>243</sup>

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237. *Id.* at 181 (quoting 37 PROC. TEX. B. ASS’N 52, 59 (1918)).

238. *Id.*

239. See *Transactions of the Thirty-first Annual Meeting of the American Bar Association, Discussion Upon Canons of Ethics*, 33 A.B.A. REP. 3, 55, 86 (1908). See generally James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003).

240. See Michael Ariens, *Brougham’s Ghost*, 35 N. ILL. U. L. REV. 263, 289-97 (2015).

241. *Id.* at 293 n.184 (listing numbers). A Westlaw search in the “allstates” file using the Boolean search “disbar! & attorney & da(bef 1930)” found the following number of cases:

1920-29 610

1910-19 582

1900-09 355

1890-99 208

Using the same file, a Boolean search “roll w/5 attorney & stri! & da(bef 1930)” found the following number of cases:

1920-29 176

1910-19 125

1900-09 117

1890-99 74

242. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 60 (2004) (noting census reports indicating increase from 64,137 lawyers in 1880 to 114,460 in 1900). As noted by Terence C. Halliday, who lists slightly different numbers, these census totals included notaries and others not admitted to this bar. See Terence C. Halliday, *Six Score Years and Ten: Demographic Transitions in the American Legal Profession*, 20 LAW AND SOC’Y REV. 53, 62 (1986). See also ROBERT A. SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900*, at 75 (1981) (noting number of Boston lawyers doubled during this time).

243. Halliday, *supra* note 242, at 62. The number of students enrolled in law schools rose from 1,653 in 1870 to 19,567 in 1910. See WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930*, at 108 tbl. 1 (1986).

For some elite lawyers, this was entirely too many. John Dos Passos wrote, in all capital letters, “The excessive number of lawyers, is detrimental, both to the community and the morale, of the profession.”<sup>244</sup>

On the one hand, the threat to professionalism came from the “shyster,” the “ambulance chaser,” and the “pettifogger.”<sup>245</sup> These lawyers, declared the bar’s elite, abused the contingent fee system and thus failed to “secure justice.”<sup>246</sup> On the other hand, President Theodore Roosevelt criticized the elite corporation lawyer for aiding the powerful in finding ways to “override and circumvent the law.”<sup>247</sup>

The elite of the bar wrote extensively about the decline of the legal profession, and did not spare themselves. In a 1901 *Yale Law Journal* article, San Francisco lawyer George Shelton quoted the late robber baron Jay Gould: “[B]rains were the cheapest meat in the market.”<sup>248</sup> Two years later, Yale published another “decline and fall” essay, *The Decadence of Law as a Profession and Its Growth as a Business*.<sup>249</sup> Dos Passos’s 1907 book *The American Lawyer* rued the turn of the practice of law from a profession to a business, a process Dos Passos concluded had begun shortly after the Civil War.<sup>250</sup> The theme throughout these writings was the lawyer’s loss of independence from the client. As yet another early twentieth century *Yale Law Journal* article put it, “Nowadays the bigger the lawyer, the more he becomes the clerk, the hired man of the business man.”<sup>251</sup> This lamentation was heard for the next decade.<sup>252</sup>

Though the members of the Texas Bar Association found it unnecessary immediately to re-adopt the Canons of Ethics when called to its members’ attention in 1923, the ABA was already working in a more urgent fashion. In 1922, the

244. JOHN DOS PASSOS, *THE AMERICAN LAWYER—AS HE WAS—AS HE IS—AS HE CAN BE* 175 (1907).

245. See Ariens, *supra* note 240, at 290 and nn.161-163 (citing articles attacking shysters and pettifoggers).

246. *The Abuse of Personal Injury Litigation*, 18 GREEN BAG 193, 202 (1906). See *Transactions*, *supra* note 239, at 61-80 (reporting discussion of and amendment to Canon 13 regarding contingent fee).

247. Theodore Roosevelt, *Address at Harvard University* (June 28, 1905), in 4 THEODORE ROOSEVELT, *PRESIDENTIAL ADDRESSES AND STATE PAPERS* 407, 419-20 (1910). See also *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905) (publishing address by Louis D. Brandeis attacking bar’s materialism).

248. George F. Shelton, *Law as a Business*, 10 YALE L.J. 275, 276 (1901).

249. Robert T. Platt, *The Decadence of Law as a Profession and its Growth as a Business*, 12 YALE L.J. 441 (1903).

250. See DOS PASSOS, *supra* note 244, at 46 (declaring “law has become a business”).

251. Champ S. Andrews, *The Law—A Business or a Profession?*, 17 YALE L.J. 602, 608 (1908).

252. See George W. Bristol, *The Passing of the Legal Profession*, 22 YALE L.J. 590 (1913); JULIUS H. COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1979) (rev. ed. G. A. Jennings Co. 1924). Canon 12 of the 1908 Canons of Ethics declared, “In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.” *Canon 12*, ABA CANONS OF ETHICS (1908).

chairman of the ABA's Committee on Professional Ethics, Thomas Francis Howe, wrote: "The ever increasing complexities of modern business, the rapid changes in its methods, and the relations of lawyers thereto, are constantly raising questions concerning proper professional conduct that were not contemplated—or even dreamed of—when the canons were prepared."<sup>253</sup> In 1924, the ABA created a Committee on Supplements to Canons of Ethics,<sup>254</sup> and the following year one of the Committee's members, Henry Sims, discussed three problems of professional ethics in the *ABA Journal*.<sup>255</sup> The articles discussed in turn the nature and extent of the lawyer's ethical duties to the court, his client, and the bar.

While writing particularly of the lawyer's duty to his client, Sims concluded the lawyer's duty was founded on "the lawyer's conscience."<sup>256</sup> Following one's conscience did not make the lawyer's task any easier. For example, in representing a client, "We must admit then, that it is exceedingly difficult to delimit the field in which the lawyer may exercise his conscience, as to the presentation of a claim or defense."<sup>257</sup> The "practical solution" was, "it is entirely a matter of purpose and common sense."<sup>258</sup>

The Special Committee presented the ABA with its proposed Supplements to the Canons in 1927.<sup>259</sup> The final proposed Canon, *Summary of the Professional Ideals of the Lawyer*, offered a set of ten numbered principles (with occasional subparts) variously touching on the lawyer's duties to client, court, fellow lawyers, society, and government.<sup>260</sup> These duties included the duty of representing the unpopular cause or client, the duty "not to refuse to serve the pauper, nor to [refuse to] defend those accused of crime, however heinous."<sup>261</sup>

One member dissented from this proposed Canon.<sup>262</sup> F. W. Grinnell concluded the Committee was mistaken if it believed this Canon would overcome

253. Thomas Francis Howe, *The Proposed Amendment to the By-Laws*, 8 ABA J. 436, 436 (1922). Howe wrote to support a change to the by-laws of the Committee on Professional Ethics permitting it to draft and published opinions interpreting the Canons. *See id.* at 379 (printing proposed amendments).

254. 47 A.B.A. REP. 26 (1924) (listing members of Special Committee).

255. *See* Henry Upson Sims, *The First Problem of Professional Ethics*, 11 ABA J. 63 (1925); Henry Upson Sims, *The Second Problem of Professional Ethics: The Lawyer's Duty to His Client*, 11 ABA J. 127 (1925); Henry Upson Sims, *The Third Problem: The Lawyer's Duty to the Bar*, 11 ABA J. 396 (1925).

256. Sims, *Second Problem*, *supra* note 255, at 128.

257. *Id.*

258. *Id.*

259. *Report of the Special Committee on Supplements to the Canons of Ethics*, 50 A.B.A. REP. 372 (1927). This Report was also published as *Proposed Supplements to Canons of Professional Ethics*, 13 ABA J. 268 (1927).

260. *Report*, *supra* note 259, at 382-85; *Proposed Supplements*, *supra* note 259, at 271-73.

261. *Report*, *supra* note 259, at 384; *Proposed Supplements*, *supra* note 259, at 272.

262. *See Report*, *supra* note 259, at 387-95 (printing Minority Report of F. W. Grinnell); *Proposed Supplements*, *supra* note 259, at 273-75. Grinnell also dissented concerning two other proposed canons.

the “tendency on the part of a considerable number of the Bar . . . ‘to regard the canons of ethics as completely covering the field, so that everything not forbidden by the canons is permitted.’”<sup>263</sup> A summary that focused on “dogmatic” statements “containing sweeping prohibitions” was “inadvisable.” Better, Grinnell believed, that the ABA offer what today are called “best practices,” for “[t]he purpose of the canons is to assist lawyers by stimulating their imagination as to sound professional behavior.”<sup>264</sup>

When the Committee returned the following year with its final *Report*, it abandoned this proposed Canon. The absence of the *Summary* was unmentioned in the debate on adopting the proposed Canons. After some debate concerning the ethics of a division of fees, the supplemental Canons were adopted.<sup>265</sup> Before the supplemental Canons were adopted, Newman Levy,<sup>266</sup> a criminal defense lawyer in New York City, wrote an article for *Harper's* titled *Lawyers and Morals*.<sup>267</sup> Levy wrote a stinging critique of the elite bar's failure to acknowledge the disconnection between professional “aspirations” and actual “conduct.”<sup>268</sup> Elites made regular efforts to “purge the bar of shysters,” for such lawyers behaved without regard to the high status of the lawyer as professional. But these efforts were more about directing the attention of the public away from the “guardians of the aristocratic tradition” than “purging” the bar. The guardians drew attention away from themselves because they were as much workers for hire as the lowest criminal defense shyster. And no changes to the canons of ethics would solve the problems of lawyer dependence and subservience to clients, for the canons concerned “manners rather than morals.”<sup>269</sup>

For the vast majority of lawyers practicing during the first three decades of the twentieth century, the Canons of Ethics meant nothing. As a member of the Special Committee on Supplements to the Canons of Ethics noted, “Many of the honorable members of the Bar have never read the canons of ethics and rightly consider that they know how to conduct themselves properly without reference to any written rule.”<sup>270</sup> Those puny few who were disbarred failed to serve even as an *in terrorem* reminder to most of the bar.

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263. *Report*, *supra* note 259, at 391; *Proposed Supplements*, *supra* note 259, at 274 (quoting Walter Taylor, a member of the Committee who died before the 1927 *Report* was completed).

264. *Report*, *supra* note 259, at 394; *Proposed Supplements*, *supra* note 259, at 275.

265. See *Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 51 A.B.A. REP. 495 (1928) (printing supplemental Canons). The ABA approved the additional Canons. See *Proceedings at the Fifty-First Meeting of the American Bar Association*, 51 A.B.A. REP. 29, 119, 130 (1928).

266. On Levy, see NEWMAN LEVY, *MY DOUBLE LIFE: ADVENTURES IN LAW AND LETTERS* (1958); *Newman Levy is Dead at 77; Lawyer Noted for Light Verse*, N.Y. TIMES, Mar. 23, 1966, at 47.

267. Newman Levy, *Lawyers and Morals*, HARPER'S MONTHLY MAG., Feb. 1927, at 288.

268. *Id.* at 289.

269. *Id.*

270. *Report*, *supra* note 259, at 392; *Proposed Supplements*, *supra* note 259, at 274 (quoting Taylor).

The value of the ABA Canons of Ethics was not in teaching the 100,000 or so lawyers who were not members of the ABA how to act (or, more precisely, how not to act); it was in reminding its own members, at least faintly, of their obligations beyond one's duty to one's clients. In this sense the Canons of Ethics acted as a slight, but occasionally effective, claim upon their conscience. This reminder was taught again and again because it's so easy to forget in the hurly-burly of practice. Levy brought to the attention of the bar elite that they failed to act as they demanded others do. Levy asked elite lawyers to search their consciences. Grinnell and Sims noted that the lawyer might be nudged to act more conscientiously, and though precious little, that was the best the profession might do.

### C. Tipping

The ABA's rejection of a Canon concerning a *Summary of the Professional Ideals of a Lawyer* had no appreciable effect on the conduct of lawyers for the next forty years. From 1925 through 1965, lawyers were largely guided by their conscience in matters of legal ethics. Particularly in the two decades following the end of World War II, lawyers were regularly reminded that their conscience should be guided by their duty as social trustees. Though the bar elite worried about the "infinitesimal" few who acted as "ethics-busters," legal ethics issues were never at the forefront of the profession's concerns through the mid-1960s. Even when ABA President Lewis Powell created a Special Committee on Evaluation of Ethical Standards in 1964, its impetus was not a crisis in the profession. This relative professional quiescence may be why the Code of Professional Responsibility was adopted without amendment and with little debate in 1969. The significant ideological challenges to the legal profession's orthodoxy beginning in the late 1960s were joined by economic challenges in the early 1970s. These threats undermined the comfortable assertions that the mere existence of a code of legal ethics was sufficient to channel the behavior of lawyers. The bar elite perceived the "lawyers' scandal" of Watergate as a tipping point to remind the profession of their duty as social trustees, which generated the creation of the Kutak Commission. The result of the Kutak Commission's work was an instantiation of the profession's rejection of social trustee professionalism.

Mark Green, a lawyer who criticized the legal profession in a number of books in the 1970s, directed a project for Public Citizen which sought "to persuade lawyers to be more responsive to client and community."<sup>271</sup> Although several of the six bar associations Public Citizen studied in the mid-1970s had worked to improve the delivery of legal services to "Americans of moderate means," most remained stuck in their ways. That included lax discipline of lawyers. The authors of *Bringing the Bar to Justice* noted a number of examples of egregious behavior by lawyers subject to few disciplinary sanctions.<sup>272</sup>

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271. Mark Green, *Introduction* in SHARON TISHER & LYNN BERNABEL, *BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS* ii (1977).

272. *See id.* at 86-117.

The failure of the bar to discipline its lawyers was, at least, a consistent failure. In an 1896 speech to the ABA, a lawyer noted, "I know of no Bar in the country which attempts to purge itself with any thoroughness."<sup>273</sup> Indeed, the "profession cannot undertake to protect society by guaranteeing the moral character of its members."<sup>274</sup> In the late 1920s, the Conference of Bar Association Delegates noted the "apathy" of the bar in following through disciplinary complaints. This was troublesome because the "increased importance of the lawyer and the great increase in the number of persons in the practice of the law make necessary more adequate methods of discipline."<sup>275</sup> In his 1957 ABA Presidential Address, David Maxwell found the failure to discipline "ethics-busters" brought "great discredit" onto the profession.<sup>276</sup> A popular book published a decade later detailed the lack of disciplinary enforcement.<sup>277</sup> Although the ABA's 1970 *Clark Report* offered a structure for disciplinary enforcement, lawyers remained largely unaffected by such reform through the mid-1970s.<sup>278</sup>

The authors of *Bringing the Bar to Justice* also claimed lawyers failed to undertake sufficient pro bono work. It reported on a study by the District of Columbia Bar Association indicating 17 percent of sole practitioners spent 20 percent or more of their time on pro bono work, compared with just 5 percent of lawyers in medium-sized firms and 4 percent of lawyers in large firms.<sup>279</sup> More alarming, a lawyer at Covington & Burling, a large Washington firm, stated that students interviewing in the mid-1970s for new associate positions "hardly ever asked now" if the firm had a pro bono program.<sup>280</sup> In the 1960s, Baltimore lawyer William Marbury had urged ABA members to fulfill their duty as professionals by representing civil rights activists. By the mid-1970s, his firm, Piper & Marbury, had closed its pro bono branch office.<sup>281</sup>

Even as the ABA encouraged its members to make pro bono work a part of their practice, change was coming. If the ABA was going to implement the professional obligation of lawyers to perform pro bono work, it was going to have to do so in the face of changing economic and ideological circumstances.

The charge to the Kutak Commission was to look at "all facets of legal ethics."<sup>282</sup> All facets of legal ethics included ideas for more effective disciplinary enforcement and pro bono work, both of which were aspects of the lawyer's public responsibility. Although excoriating the slack and inefficient lawyer disciplin-

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273. Joseph B. Warner, *The Responsibilities of the Lawyer*, 19 A.B.A. REP. 319, 339 (1896).

274. *Id.*

275. *Conference of Bar Association Delegates Discuss Major Important Questions*, 13 ABA J. 668, 674 (1927).

276. Maxwell, *supra* note 96, at 362.

277. MURRAY TEIGH BLOOM, *THE TROUBLE WITH LAWYERS* 157-91 (1968).

278. TISHER & BERNABEI, *supra* note 271, at 90-94.

279. *Id.* at 129.

280. *Id.*

281. *Id.*

282. Spann, *supra* note 215, at 3.

ary process, *Bringing the Bar to Justice* noted, “When a lawyer’s right to practice his or her profession is at stake, due process is of course essential.”<sup>283</sup> This may have been of particular interest to Green. Green served as the editor-in-chief of the *Harvard Civil Rights-Civil Liberties Law Review* in 1970 when it published a *Comment* which attacked the bar’s efforts to sanction and disbar radical lawyers.<sup>284</sup> This was in stark contrast to Maxwell’s 1957 speech, in which he argued for a “greater willingness” of courts to “give proper weight to the public interest in disciplinary proceedings as opposed to the interest of the individual lawyer accused of misconduct.”<sup>285</sup>

The Supreme Court’s due process revolution of the 1960s and early 1970s focused on protecting the rights of the individual. Those individuals included lawyers subject to a state’s disciplinary system. The Supreme Court’s decisions required the Kutak Commission to write its standards with particularity if they were to have any legal effect. The Kutak Commission made an early decision that it would fix the vagueness of the 1969 Code of Professional Responsibility by proposing rules, and only rules. The Model Rules of Professional Conduct were to be written so the lawyer knew when his or her conduct fell below that required of all lawyers. The Model Rules were not designed to “assist lawyers by stimulating their imagination as to sound professional behavior.”<sup>286</sup> They were intended to serve as the basis for discipline, “so that everything not forbidden by the canons is permitted.”<sup>287</sup>

The Kutak Commission emphasized that the clarification and implementation of legal ethics rules protected society as well as clients and the courts. Its goal was to reinforce the commitment of lawyers to standards encompassing the public’s interests. Its proposals concerning the limits of client confidences, the duty to consider others when negotiating, and duties of candor to the court, were all efforts to require the lawyer to consider interests beyond those of the client. And each proposal received extraordinary pushback, and each was more narrowly framed to benefit clients as the drafting process continued.

By mid-1982, the Kutak Commission had largely capitulated to the “basic posture” of “my client, first, last and always.” But that was not enough. A majority of a fractured House of Delegates, at both the August 1982 and January 1983 ABA meetings, rejected more forcefully the concept of social trustee professionalism. Professionalism was instead better understood as serving the client at the highest level of skill the lawyer could achieve. The client’s interests overbore all others.

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283. TISHER & BERNABEL, *supra* note 271, at 100.

284. *See* Beil, *supra* note 194.

285. Maxwell, *supra* note 96, at 372.

286. *Report*, *supra* note 259, at 394; *Proposed Supplements*, *supra* note 259, at 275.

287. *Report*, *supra* note 259, at 391; *Proposed Supplements*, at 274 (quoting Walter Taylor, a member of the Committee who died before the 1927 *Report* was completed).



The profession's negative reaction to the proposals of the Kutak Commission made it clear that social trustee professionalism no longer commanded even the formal or symbolic deference of a large number of lawyers. Part of the value of social trustee professionalism was its emphasis on duty. Among large firm lawyers this had a value in shaping the extent to which they acted in a detached, disinterested manner toward their powerful clientele. One past use of social trustee professionalism was to remind that small subset of lawyers for the powerful that their actions were subject to constraints. For both instrumental and ideological reasons, social trustee professionalism was focused on the large firm lawyer. Talks about the lawyer's duty to public service at ABA meetings, largely comprised until the 1960s of a bar elite, were reminders from one to others of the same class of the bounds of unseemly behavior and profit.

When Roscoe Pound defined a profession, he considered "incidental" the ability of a lawyer to earn a living practicing law. For the vast majority of American lawyers in American history, this had never been the case. Pound surely knew this. The lawyer's "spirit of public service" was always in tension with the mundane, prosaic work of earning a living. As the ABA began its membership drive in the late 1950s, that tension was more pronounced. The turn by the ABA to the economics of law practice at the same time made sense once a significant number of sole practitioners joined. The ABA attempted to marry income to public service by highlighting a public interest in increasing the receipts of the ordinary private practice lawyer.

The ABA's emphasis on public mindedness required such lawyers to define themselves in that light. For nearly all of the time from 1955-1972, economic growth made it easy to do good and do well. That this public-mindedness was pronounced by well-connected, large firm lawyers at the top of the ABA was of little concern to most lawyers.

When economic reverses for the ordinary lawyer began in the early 1970s, doing good and doing well were in significant tension. This tension was not relieved by slogans, appeals to the greater good, or even rules of ethics. As had always been the case, the profession's resort was to the lawyer's conscience. And in an increasingly rights-filled, individualistic age (the 1970s were called the "Me Decade" for a reason), only the lawyer chose the balance between leavening one's commercial interests with one's professional duties.

One of the Kutak Commission's proposals in its 1979 "working draft," Rule 1.8, was titled "Representation of an unpopular or indigent client." Proposed Rule 1.8 gave a lawyer substantial discretion in choosing which clients to represent. However, the commentary admonished lawyers that "important qualifications [exist] on a lawyer's freedom in selecting clients."<sup>288</sup> This was the height of social trustee professionalism. Six months later, the Kutak Commission re-

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288. See *The Record: Text of Initial Draft of Ethics Code Rewrite Committee* ("The Record"), LEGAL TIMES, Aug. 27, 1979, at 26, 31.

turned with its Discussion Draft. Unpopular and indigent clients were no longer title subjects. Instead, Discussion Draft Rule 1.15 was titled *Accepting or Declining Representation*.<sup>289</sup> The Comment returned to the lawyer's "obligation to assist in providing pro bono public service," but it placed greater emphasis on the lawyer's "qualified freedom of association" not "to assist a client whose character or cause the lawyer regards as repugnant."<sup>290</sup> In the Proposed Final Draft of May 1981, this Rule was largely eliminated. Rule 1.16, *Declining or Terminating Representation* (which was titled *Terminating Representation* in the Discussion Draft) absorbed the earlier provision urging the lawyer to represent the unpopular client, though it largely focused on when a lawyer could end a relationship with a client.<sup>291</sup> Rule 1.2, *Scope of Representation*, re-framed Discussion Draft Rule 1.3, *Client Autonomy*. The Proposed Final Draft added, in section (b) to Rule 1.2, a provision that a lawyer's representation of a client was not an endorsement of the client's views. A comment under the section, *Independence From Client's Views or Activities*, briefly reiterated the point that those "whose cause is controversial or the subject of popular disapproval" "should not be denied" legal representation.<sup>292</sup> That was it. The Kutak Commission would not generate any ethical duty to represent the unpopular cause or client in the interests of society.

#### IV. Conclusion

The identity of the legal profession turned by the time the ABA adopted the Model Rules in 1983. One definition of "profess" is to declare one's faith or allegiance. Though often honored in the breach, lawyers had professed their allegiance to their duty to society for well over a century. And during the professional crisis of the early 20th century that alleged a devolution of the practice of law to a business, lawyers resolved that crisis by reaffirming that lawyers owed a duty to serve the public, a duty from which businessmen were free. The difference between this earlier professionalism crisis and the one diagnosed by Peter Megargee Brown and others was that lawyers no longer professed their allegiance to social trustee professionalism. They collapsed their duty to society with a duty of loyalty to their clients. If the duty of loyalty to clients was the highest duty encumbering lawyers, then lawyers fulfilled that duty by the exercise of technocratic expertise. The absence of any tension found by the existence of a competing duty made the work of conscience superfluous.

Whitney North Seymour titled his 1961 ABA Presidential Address *The Unity of the Bar*.<sup>293</sup> Seymour spoke when ABA membership was increasing rapidly, and his appeal to unity was designed to bring to this body the largely aris-

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289. *Discussion Draft*, MODEL RULES OF PROF'L COND. R. 1.15 (1980).

290. *Id.*

291. *Proposed Final Draft*, MODEL RULES OF PROF'L COND. R. 1.16 (1981).

292. *Id.* at 12.

293. Whitney North Seymour, *The Unity of the Bar*, 86 A.B.A. REP. 443 (1961).

tocratic responsibility of lawyers to acknowledge a duty to “help[] the poor, defend[] the unpopular and provide[] community leadership.”<sup>294</sup> Seymour framed this duty in a historical light, as well as in an organizational context. Seymour was acutely aware of the frailties and faults of the profession dating from the Second Red Scare and continuing during the civil rights movement. In spite of these professional failures, Seymour spoke optimistically. All lawyers, not just elite lawyers, had played, and would continue to play, a central and crucial role in the development of modern America.<sup>295</sup> Symbolically, Seymour’s assertion offered to all lawyers a strong and positive sense of duty. This profession of allegiance to the ideal of the lawyer as social trustee brought a unifying role to a large, diverse body. And professionally, Seymour’s career demonstrated the social good lawyers could do.

Seymour’s appeal was the traditional claim to each lawyer’s conscience. It has ever been thus. The unintended failure of the Model Rules was its effort to assume legal standards could replace the individual lawyer’s conscience. Legal standards are the last resort in channeling behavior, including lawyer behavior. In Texas, for example, a variation of the Model Rules was adopted as law in 1990. By 1993-1994, 655 lawyers (of 59,495 licensed lawyers) were disciplined, or 1.1 percent.<sup>296</sup> That was the high water mark. By 2014-2015, a mere .3 percent of Texas lawyers were disciplined (318/96,912).<sup>297</sup>

We should not be surprised that the language of discipline fails to shock lawyers into becoming their better angels. The positive approach of civility codes does no better, and appears to be a contradiction in terms. But memory may have a value in occasionally pricking the lawyer’s conscience. At the second Presidential Showcase on the lawyer’s independence in 1984, Roger Cramton noted, “The lawyer’s professional independence *is* a memory founded on idealism and public service.”<sup>298</sup> That ideal “is and has been an occasional reality.”<sup>299</sup>

That occasional reality is all lawyers and the public can and should expect. We are not angels, and despite our best efforts, our flaws and failures are usually on display. Most of us will fail when we attempt to move self-interest to our second highest priority. But failure means we tried.

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294. *Id.* at 444.

295. *Id.* at 446.

296. *See* ARIENS, *supra* note 236, at 186.

297. *See* State Bar of Texas Commission for Lawyer Discipline, *Annual Report June 1, 2014-May 31, 2015*, at 17 (listing data).

298. Cramton, *supra* note 232, at 55.

299. *Id.*