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PROFESSIONAL RESPONSIBILITY AND THE ORGANIZED BAR—AN ESSAY ON THE ROLE OF THE LAWYER AS A “SOCIAL ENGINEER”

John W. Atwood*

INTRODUCTORY COMMENTS

Democracy is an experiment, and the right of the majority to rule is no more inherent than the right of the minority to rule; and unless the majority represents sane, righteous, unselfish public sentiment, it has no inherent right.

William Allen White¹

Just as good government must, by definition be responsive to the needs of all of the citizenry, so must men and women of the law maintain constant vigil that theoretical responsiveness be actually and equitably realized. No challenge could be greater—no dream harder to transform into reality.

It must first be understood that any discussion of the role of the lawyer as a “social engineer” need not be prescriptive. Members of the bench and the bar have *always* been social engineers in the sense that, through various roles, they have engaged in prescriptive social activities, either in a progressive sense or in a reactionary sense, throughout the history of Anglo-American jurisprudence.

Indeed, Chief Justice Burger has recently articulated the role of the lawyer in this context:

A strong, independent, competent legal profession is imperative to any free people. We live in a society that is diverse, mobile and dynamic, but its very pluralism and creativeness make it capable of both enormous progress or debilitating conflicts that can blunt all semblance of order. One role of the lawyer in a common law system is to be a balance wheel, a harmonizer, a reconciler. He must be more than simply a skilled legal mechanic. *He must be that, but in*

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¹ This quote appeared recently in the ABA Journal in an American Bar Association membership advertisement. William Allen White, a newspaper publisher by trade, was most noted for his work with the Emporia Kansas Gazette and his midwestern-flavored views on Responsibility in Government. The quote quite aptly introduces a framework for concepts considered in this essay.

*a larger sense he must also be a legal architect, engineer, builder and, from time to time an inventor as well. This is the history of the lawyer in America, and in this respect he is unique among the lawyers of all societies.*²

Even the most cursory review of developments and attitudes towards developments in higher education in recent years emphasizes an intellectual search, particularly among the young, for the identity of the work that they do, a search that centers around the "how's" and the "why's" of community labor. Not surprisingly, this "identity search" has not escaped the legal profession.

The seeds of this search, *inter alia*, have been sown by fundamental and profound changes in the orientation of our educational systems, indeed, in our very life-styles and priorities. Questions of role evaluation have become paramount to many concerned members of the profession, both in response to continuing attacks upon professionals in general and equally continuing fundamental questions concerning the integrity of the law and its processes. "Man's self-awareness has never been greater or more intense."³

To many members of the organized bar this increase in awareness has perplexed them; it has been the subject of deep division and, in too many cases, outright antagonism. The intensity of this antagonism augurs against the luxury of abstract debate.

The following is an essay which has as its main subject the role of the American lawyer in meeting the need for comprehensive responsiveness to the rule of law and constitutionally promised equal justice.

The essay's sweep is broad. First, it briefly considers the plight of the profession on the starting block of the '70's. It also presents some thoughts on the meaning of Canon Eight of the *Code of Professional Responsibility* and relates that Canon to the role of the lawyer as a social engineer. It then reviews the encouraging response in the public service area of the organized bar and considers some suggestions concerning the need for cohesion of reform effort. Finally, it presents the thesis that the American lawyer has the highest duty to work in the public interest, and suggests a major re-orientation of legal education designed to both emphasize this public interest professional obligation and to acquaint more effectively the law student with the practical aspects of the law.

² Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 857 (1971) (emphasis added).

³ Shestack, *Section Activities: Annual Report of the Section of Individual Rights and Responsibilities*, HUMAN RIGHTS, Aug. 1970, at 118.

PROFESSIONALS UNDER PUBLIC INDICTMENT

The mounting attacks on professionals in general, and doctors and lawyers in particular, are known to almost everyone. Professionals are accused of all kinds of vagaries including: pervasive self interest manipulation; misuse of monopolistic power, including outrageous overpricing for essential services, outright theft and a propensity for corruption; astonishing failure to police our ranks; and, in the darkest moments of criticism, outright moral and intellectual dishonesty. While such criticism is by no means new, it seems to be increasing in frequency and intensity. In fact, the occupational "exposers" are enjoying a field day denouncing the profession in numerous books where lawyers are scarcely conceded an ounce of good intention.⁴

While the point can be easily belabored, a few brief examples of the views of some of the most highly respected members of the profession are worth noting.

By way of broadside general attack, Jethro K. Lieberman, a former editor of the *Harvard Legal Commentary*, in his book en-

⁴ Extreme criticism is abundant these days. Such critics often indict the whole American way of life. For example, Daniel Berrigan, a Catholic priest, an author of numerous books on a variety of subjects and a convicted felon, argues as follows:

"[I] have enjoyed all the fruits that America offers those fortunate enough to make it within her system. If I mourn for the death of that system, it is as one who has enjoyed its cups to the depths. If that same vintage is now turned bitter as gall in my mouth, it is because I have seen the society that might have been great, according to its own rhetoric, turn murderously against those throughout the world to whom it had once offered the fairest of hopes.

....

If then I must go to prison (and go I undoubtedly must), I shall go neither in a spirit of alienation, or bitterness, nor of despair. But simply in the hope that has sustained me in better and worst days up to now. May this offering open other alternatives to official and sanctioned murder, as a method of social change. May men of power come to a change of heart, confronting the evidence of quality of the lives we offer on behalf of our brothers."

D. BERRIGAN, *NO BARS TO MANHOOD* (Bantam ed. 1971). See also C. REICH, *THE GREENING OF AMERICA* (Bantam ed. 1971). These persons are not cited to indicate approval of their rhetoric but rather only to emphasize the intensity of feeling concerning disrespect for the law emanating from some quarters.

The temptation is irresistible to mention that Reich's "Consciousness III" if achievable, would in all likelihood be followed by "Consciousness IV"—a dictatorship. It is difficult to envision how any system can realistically perpetuate itself without power.

titled *The Tyranny of the Experts*⁵ looks professionally inward in the following way:

Professionals are dividing the world into spheres of influence and erecting large signs saying "experts at work here, do not proceed further." The public respects the signs and consequently misses the fact that what goes on behind them does not always bear much relation to the professed goals and activities of those who put them up. Professionals frequently say one thing and do another and assert that the laymen's inability to find consistency between talk and action is caused by his inherent lack of insight into the professional mysteries. But the gap exists, and it has important political, economic, and social consequences: The public is losing the power to shape its destiny.⁶

After an analysis of the rise of the professional class in the United States, Lieberman cites innumerable examples of professional and expert self-service in structuralization, practice and perpetuation, virtually all, he argues, exercised at the ultimate expense of the public. Law, he prescribes, is too serious to be entrusted to the legal profession.⁷

One does not have to leave the confines of the organized bar to sense the urgency of the indictment. For example, concerning the policing of the profession, an excellent thermometer of professional health, the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement, graphically sets out the dilemma resulting from the inadequacy of professional self-discipline:

⁵ J. LIEBERMAN, *THE TYRANNY OF THE EXPERTS* (1st ed. 1970).

⁶ *Id.* at 3.

⁷ While Mr. Lieberman's book excellently summarizes and attempts to "expose" alleged professional and specialist rank exploitation, it is open to criticism on at least two grounds:

- (1) The author assumes that our society has been an "open" one which assumption is and has been, at bare minimum, a subject of continuous debate; and
- (2) By the inclusion of such diverse "specialties" as tile layers (text at 11-13, 30, 229) and theatre ticket hawkers (text at 16, 17 n.10), one is virtually forced to ask the seemingly puerile question of who and what remaining groups in Lieberman's "public" are left to be victimized. If it is the welfare poor and the unemployed, the causative question becomes much larger in theory and in scope than simply pointing an accusatory finger at professionals and specialists, a phenomena which has increasingly become a natural result of tremendous technological growth. The book from a "clearinghouse" standpoint, however, is interesting reading with many of the author's criticisms being both pointed and compelling.

After three years of studying lawyer discipline throughout the country, this committee must report the existence of a scandalous situation that requires the immediate attention of the profession. *With few exceptions the prevailing attitudes of lawyers toward disciplinary enforcement ranges from apathy to outright hostility.* Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors. . . . The committee emphasizes that the public dissatisfaction with the bar and the courts is much more intense than generally believed within the profession.⁸

One is hard pressed to find any recent studies which do other than emphasize significant breakdown in the administration of justice in some areas of the country. There are no sacred cows. Indeed, at one time it was safe to point to the judiciary as the bastion of the pure and the good, and yet we are coldly left with a recent American Bar Foundation publication by William Thomas Braithwaite entitled "Who Judges the Judges," which is introduced with an almost eerie slam of the gavel, "There is a feeling of unease and disquietude about the quality of our judges."⁹

The criticism seems endless. Regrettably, as many members of the profession concede, much—too much—appears to be well-founded. Conversely however, while in many cases lawyers are targets for criticism, they have tended to be by nature (and under traditional notions of practice, perhaps with no economic choice) a group which has conformed in the main to the attitudes and aspirations of the vast majority of the rest of the society. They are not, however, alone responsible for the nation's current state of affairs. Rather than the turbulence of the times, the public indict-

⁸ A.B.A. SPECIAL COMM. OF EVALUATION OF DISCIPLINARY ENFORCEMENT 1, 2 (1970).

⁹ W. BRAITHWAITE, WHO JUDGES THE JUDGES—A STUDY OF PROCEDURES FOR REMOVAL AND RETIREMENT 3 (1971). The author goes on to state: "Nationally, attention has focused upon events involving the Federal judiciary, such as the Fortas case. But the states too have had similar difficulties. In Illinois, for example, the Chief Justice and an associate justice of the Supreme Court resigned in August, 1967 after a special investigating commission found that they had committed positive acts of impropriety in having business relations with a criminal defendant while an appeal in his case was pending before the Court."

This commentator, immediately after graduation from law school, had the occasion to assist one of the members of the *ad hoc* body of five lawyers, formerly designated "The Special Commission in Relation to No. 39797," in regard to certain research aspects of this inquiry. Suffice it to say that it is virtually impossible to juxtapose the intensity of this experience with the "ethics" questions considered in law school. One initial and admittedly naive reaction is simply not to believe that it could really be true.

ment stems from a variety of societal shortcomings including a comparison of projected ideals to the realities of a civilization which has been unable to keep pace socially with the urgent demands of urbanization and a spiraling technology.

CANON 8 AND THE LAWYER AS A SOCIAL ENGINEER

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government

Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.¹⁰

Canon Eight of the new code is the operative Canon concerning ethical considerations regarding law reform activities. It simply states that:

"A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM"¹¹

Ethical Consideration 8-1 provides the historical backdrop of this Canon:

Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system, *without regard to the general interest or desires of clients or former clients*.¹²

This is powerful language given the economic realities in the practical legal world.

Again, Ethical Consideration 8-2 provides that:

Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.¹³

¹⁰ ABA CODE OF PROFESSIONAL RESPONSIBILITY 1 (1969) [hereinafter cited as CODE].

¹¹ *Id.* Canon No. 8.

¹² *Id.* EC 8-1 (footnotes omitted) (emphasis added).

¹³ *Id.* EC 8-2 (footnotes omitted).

The new *Code of Professional Responsibility* has been approved by the House of Delegates of the American Bar Association and has been adopted by the vast majority of the states.¹⁴ *This action, prima facie, reaffirms the attorney's ethical obligation to responsibly pursue law reform efforts, wherever and whenever such efforts are necessary, within any of the three branches of government.*

But it is not enough simply to state that the lawyer has acted and should continue to act responsibly in this direction without briefly considering the relationship between law and the behavioral sciences. Professor Harry Kalven, Jr. of the University of Chicago Law School has spent a considerable amount of his time studying this relationship:

I would like to extract three themes from the history. First, to note the pattern of oscillation between optimism and skepticism; second, to consider whether we really have been "talking prose" for forty years, that is, doing empirical inquiry without naming it; and third, to appraise the earlier hope that the social science disciplines could be married to the law by collating existing social sciences text with legal problems.¹⁵

Indeed, the relevancy of the social sciences to the law seems impellingly clear, or, to borrow a trick from a former professor, "the logic of it is good authority, is it not."¹⁶

As Professor Kalven concludes:

We need a critical mass of empirical legal studies which are widely shared in the legal culture so that a sense of the liberating possibilities of scientific fact inquiry into social fact can develop. The studies of the past decade make prospects for the law better in this respect than they have ever been. The "golden era" will come when such work has become routine and is seen as simply another resource for legal scholarship.¹⁷

All of this is not to say that such analysis is free of problems concerning the degree of relevancy and reliability of application of empirical data to questions of law. Research *about law* as opposed to the traditional research *in law*, while still in infancy stages, is proving to be an orientation of invaluable aid when considering law reform issues. The vast bulk of Professor Kalven's

¹⁴ The *Code of Professional Responsibility* has now been officially adopted by forty-one states and has been approved by the state bar associations in seven others.

¹⁵ Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 58 (G. Hazard ed. 1968).

¹⁶ Charles Tenney, Jr., former Professor of Criminal Law, University of Nebraska College of Law, 1965 through 1967.

¹⁷ Kalven, *supra* note 15, at 71.

self-styled "soliloquy" is devoted to this subject. Of course, inevitably any such marriage of the relevance, indeed the indispensability, of application of social science precepts to substantive and procedural rules of law tends to make legal education even more difficult than it presently is and will obviously reflect further movement towards specialization. Because of the rapid development of these sciences, lifetime continuing legal education becomes even more critical. It is submitted then that enlightened effort towards positive social engineering presupposes a working knowledge of the behavioral sciences.

But in any consideration of the role of the lawyer as a social engineer it is insufficient simply to argue the relevancy and necessity of enlightened empiricism and then to point out cases of the law's frequent incompatibility with empirically documented findings. Too many scholarly "reports" are gathering too much dust on too many shelves to afford the profession that luxury. And it is to that fact that the challenge is squarely put to the profession—that meaningful social engineering is, *inter alia*, effort toward *implementation—putting reform proposals together and successfully effectuating them*. It is argued that it is toward this goal that lawyers have the most to offer in the improvement of our system of justice.

Before discussing specifics concerning implementation, it is important first to note a traditional pattern of frustration, for the most difficult law reform hurdle, perhaps by definition, has always been implementation.

Lawyers have, in an organizational and individual sense, too frequently allowed "other" interests to color their thinking with the end result that individual lawyers and the organized bar have often opposed meaningful reform.

Many lawyers have voiced frustration with the all too frequent failure to implement. Viewed in the most pessimistic context, a *circle of frustration* is seen to exist.

First, a legislative body or the executive branch of government responds to reform calls (usually springing from a crisis situation) by creating a committee, commission or study team. Then a professional staff and consultants are usually summoned. Eventually a report, or a series of reports, are issued recommending specific reforms. The reports or recommendations are studied and the "modification of recommendations to meet political demands" process begins. Often political controversy and resistance to change at this point in the frustration circle becomes so great (far too frequently with lawyer-legislators leading such resistance) that

action on implementation is first delayed and in many cases ultimately tabled or rejected completely. Of course, this could be the result of conceptual defects in the recommendations and the reports themselves, and in some cases it undoubtedly is. It is suggested, however, that in a great many cases it is a sum total of the collective legislative or executive resistance to take a positive supportive stand on issues which may, for one reason or the other, threaten to weaken a legislator's or lawyer's constituent base. And it is further submitted, that Ethical Consideration 8-1, i.e., "Thus, [lawyers] should participate in proposing and supporting legislation and programs to improve the system, *without regard to the general interest or desires of clients or former clients*,"¹⁸ is directed pointedly to this unfortunate fact. *Devotion to a client's cause is not without limitation; we cannot, in the process of fulfilling our professional and ethical obligations to our clients, allow ourselves to lose sensitivity to the general public welfare.*¹⁹

The question frequently arises as to whether the lawyer-legislator is held to a higher or different standard than a non-legal counterpart. It has traditionally been recognized that the duty of public officials to act in the public interest has always been theoretically of the highest degree. Thus, for the lawyer elected to a full or part-time position of public trust his ethical obligations become twofold. First, of course, the lawyer-legislator is subject to all of the written and unwritten rules governing the conduct of public officials. Second, as a duly enrolled attorney, he is also subject to the ethical rules governing the conduct of licensed attorneys. Thus, the lawyer-legislator has ethical obligations which may exceed, indeed perhaps occasionally conflict with, the manifested interests of his private practice constituency.

It is important to point out that partly due to the lawyer's training in the law, many lawyer-legislators have been excellent, progressive social engineers and have been instrumental in the implementation of law reform proposals. They have performed valuable educational services to the public in areas of general and particular legal expertise. Certainly, an increase in the number of progressive lawyer-legislators will contribute to the breaking of the frustration circle.

¹⁸ Code EC 8-1 (emphasis added).

¹⁹ See R. MARKS, *THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY* (American Bar Foundation 1972) for a most complete treatment of the issue. The insights developed in the major work promise to have a profound influence on the direction of the movement of the profession. It is required reading for concerned practitioners.

Perhaps, as many pragmatists argue, the realities are such that this circle cannot be broken whatever ethical rules are promulgated. Suffice it to say that if this view proves to be a correct one, the legal profession has only more intense public indictment and internal dissension to look forward to. Many are optimistic, however, that this circle can and will be broken.

As has been stated, lawyers are and always have been social engineers in the history of this nation. They have assisted in "making" the law when they act as elected officials and legislators. They have "administered" the law in their capacity as executives. Lawyers have traditionally "interpreted" the law when functioning as judges. And they have "changed" the law in their capacity as advocates. Indeed, many of the founders of our constitutional law society, in the main founding members of the American Bench and Bar, drafted our foundation documents, and determined what were to become the permanent ground rules of the future development of our society. It is submitted that such efforts, pursued in a responsible manner, further professional movement towards what Bernard G. Segal, a recent President of the American Bar Association, often referred to as "the higher calling of the law."

Yet, until Louis Brandeis popularized the legal relevance of empiricism with his stream of "Brandeis" briefs, the profession gave continued lip-service to the premise that existing social realities had little to do with the time-honored "black letter" of the law. The law was present somewhere in the libraries, was supreme, and need only be "found" and adequately presented. Somewhere there was "that case."

And again, lawyers have been positive and negative social engineers. Lawyers have always been in the forefront of social change, either as opponents of it and preservers of "the status quo," or as proponents of social reform and reform-minded social engineering. Thus, Nebraska's own William Jennings Bryan argued "The Rock of Ages" and Clarence Darrow dared to inquire into "the age of rocks."²⁰

Lawyers have engineered drives to preserve existing social structures. "Not to decide, is to decide."

Lawyers and judges have presided over essential and deep-seated major change in American social policy—first on one side and then on the other. They have not always done so with a full range of

²⁰ C. DARROW, *THE STORY OF MY LIFE* 260 (1932).

social and scientific data at their disposal, but nevertheless they have so acted.²¹

Still, it must be noted that the propriety and the advisability of social engineering on the part of the attorney has continuously been debated—vigorously debated—including quite frequently on the floor of the House of Delegates of the American Bar Association.²² In many cases such debate, when not used as a sham to avoid consideration of issues with which the organized bar has particular expertise and can make a positive contribution to national dialogue, has reached the highest levels of excellence.²³ As has often been stated, we do not need ignorant opposition to change anymore than we need ignorant change.

It is worthwhile to consider briefly one point concerning the development of lawyers that may explain some of the traditional resistance to change which has been so often a characteristic attributed to lawyers and to the organized bar. By virtue of his training, a lawyer is taught to be extremely cautious. Indeed a lawyer is usually brought in to be critical—not to determine what is right with a particular situation but rather what is wrong with it. Certainly, such training is in many respects essential to the rendering of sound legal advice. On the other hand, there is a danger that such orientation can result in a general attitude of resistance towards any proposals which would change the way things have traditionally been done. Thus, after once mastering all of the various procedural and substantive rules of the law, one can easily be inclined jealously to guard this knowledge from outside encroachment, *viz.*, the seemingly inherent human tendency to protect one's "turf," particularly when it results in a life style which is extremely pleasurable from a materialistic standpoint.

It is submitted then that positive social engineering begins with a commitment—a willingness to devote a large part of one's life,

²¹ See generally *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Betts v. Brady*, 316 U.S. 445 (1942); *Miranda v. Arizona*, 384 U.S. 436 (1966). The list goes on and on; at least it shows our resiliency.

²² Controversial issues before the House inevitably give rise to the issue of whether the requested action is germane to the profession. This issue has hopefully been clarified, as a result of House Action at the 1970 Association Annual Meeting, by the passage of a resolution to the effect that the issue of hunger in America is germane to the Association.

²³ For example, many believe that the discussion of American involvement in Vietnam considered by the ABA Assembly at the New York Annual Meeting was such a debate.

both professional and personal, to the elusive goal of the eventual realization of equal justice and opportunity as those concepts are defined in our Constitution and Bill of Rights. The theoretical guarantees of the Constitution are only as meaningful as their application to real conditions and to real people.

In most cases, law reform requires tremendous effort in education of the populace on why reform is needed and what kinds of reform proposals provide the highest probabilities of meaningfully alleviating underlying conditions which make reform necessary. Full cooperation is obviously essential to the success of such efforts.

And, admittedly, it will be extremely difficult to break the frustration circle. Efforts are underway, however, as increased monies for law reform activities are directed toward action reform programs. The success of such programs presupposes minimum cooperation, and reform related organization, of at least the majority of the profession. It also presupposes long, difficult and, in many cases, uncompensated (from a fiscal standpoint) work. It presupposes tremendous effort—national, state, city, county, and local community organized lawyer cooperation and dedication. And most importantly, it calls for tough and gutsy political effort, time taken out from practice in organizing, educating and implementing. It is submitted that it is here that lawyers can effectuate part of the marriage that Professor Kalven talks about between social realities and substantive and procedural rules of law. And it is here that the assistance and cooperation of the organized bar is most urgently needed.

There is no place in these efforts for arrogance or righteousness of position. Reaction to responsible law reform effort does not necessarily involve so-called conservative-liberal dichotomies. One would be pleasantly surprised at the number of lawyers who are aware of the need for and support efforts designed to effectuate responsible change. Approached in a very lawyer-like way, one is encouraged to note the response and interest of many of those men who younger lawyers simplistically and arrogantly prejudge as "neanderthal." Indeed, in all fairness, it should be pointed out that the record is not devoid of examples of law reform attorneys who, in the interest of their own professional advancement, lose sight of the real source of their authority—the interests of the community which they serve.

But in any discussion of social engineering, including the creation of mechanisms for delivery of legal services to all of America, rich, poor or of moderate means and the pursuit of responsible law reform, the uninitiated lawyer must first determine where and how

his efforts will be most helpful to the collective effort. While individual creative impact is critical to successful law reform, as in anything else, one might want to contact those who have expert and continuing knowledge concerning what other concerned lawyers have done in the public service area. It is the source of considerable pride to many members of the profession that the American Bar Association and the Ford Foundation have responded to this national need for non-profit coordination, clearinghouse and consultation services in the *pro bono publico* area. The evolution of this response is interesting and merits notation.

Jerome J. Shestack, who was then chairman of the ABA Section of Individual Rights and Responsibilities, appointed a special committee²⁴ to determine how to expend certain monies granted by the Ford Foundation to two sections of the American Bar Association, the Individual Rights Section and the Criminal Law Section, for "selected studies related to the administration of justice and the integrity of the law and its processes."

This committee concluded that nothing was more critical to positive social involvement than the input of the private bar toward nurturing the expanding *pro bono publico* effort. After considerable deliberation, including the full deliberation of the Individual Rights Section Council, the Section Project to Assist Interested Law Firms in *Pro Bono Publico* Programs was born.²⁵ It is axiomatic that total private bar involvement in the social and law reform effort is crucial to its success.

THE COURTS AS A VEHICLE FOR SOCIAL CHANGE

Finally, no discussion of law reform effort can be complete without considering the use of the courts as an additional vehicle for necessary social change. No battle in the legal profession today is more intense. Indeed, we have heard much pontificating on the subject. We are deeply divided—a division which has caused equally deep antagonism between various members of the profession.

²⁴ The committee is chaired by Warren Christopher of Los Angeles, a former Deputy Attorney General of the United States, and consists of William T. Coleman of Philadelphia, Pennsylvania; Paul Freund, Cambridge, Massachusetts; Rita Hauser, New York; Albert E. Jenner, Chicago, Illinois; Charles W. Joiner, Detroit, Michigan; Louis H. Pollak, New Haven, Connecticut; Robert Richardson, Atlanta, Georgia; and Jerome J. Shestack, Philadelphia, Pennsylvania.

²⁵ That Project's success over an initial one year period is documented by its Project Director Marna S. Tucker, in an article appearing in this issue.

The issue, framed in various ways, has been the subject of extensive debate throughout our history, although perhaps not as frequently fraught with the same degree of personal antagonism as seems to exist today.²⁶

For example, the former Attorney General of the United States, John N. Mitchell, argues:

Judges should not impose their own will or ideologies when exercising the judicial function, but they should sit in judgment on the legal issues before them. Young persons now flocking to the legal profession will find plenty of room in the profession for "legal activism" without attempting to make the courts a "third house of Congress." Lawyers will also find many outlets for their desire to change government and institutions in the legislative and executive branches of government.²⁷

The former Attorney General bases his argument around what he states the issue to be, i.e., whether the courts are "the best channel that can be used by the energies working for change?"²⁸

It is submitted that such generalization of the issue does not advance prospects for its ultimate resolution, or at least clarification. Rather, it would seem clear that the determination of whether or not judicial redress is the most advisable course of action to pursue, depends on: each set of facts with a complete lawyer-like analysis of the legal issues involved; the speed in which relief is necessary; and the probable result of court effort, all juxtaposed with the prospects of redress in other arenas. The courts, at least until now, have had no problem in refusing jurisdiction for a variety of reasons when judicial response is not warranted.²⁹

We are all equally familiar with the continuing and spirited efforts of civil rights organizations, legal services attorneys and private practitioners to use the courts to obtain relief when the civil rights of various individuals and organizations are threatened.

²⁶ Analysis of the political facts surrounding the decision of the United States Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803), however, would suggest otherwise.

²⁷ Mitchell, *Not Will, But Judgment*, 57 A.B.A.J. 1185 (1971). To emphasize his position, Attorney General Mitchell uses the example of William Kunstler, attorney for the Chicago Seven Conspiracy defendants.

²⁸ *Id.* (emphasis added).

²⁹ And since *Marbury v. Madison*, 5 U.S. 137 (1803), most courts have not had any difficulty with either the *basic power* of judicial review or the *equally basic power* to determine their own jurisdiction, particularly when constitutional questions are involved.

Several nations (South Africa for example) do not give to their courts power to override legislative acts on constitutional grounds. Such power, however, goes to the heart of our system of government. This fact has been most dramatically displayed recently by the California Supreme Court. That progressive court held that imposition of the death penalty constitutes cruel and unusual punishment and is therefore violative of the California Constitution. While that decision promises to be the subject of much scholarly (and in all probability some not so scholarly) interpretation, some key language concerning the judicial function is important to record here:

Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature

The cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority.³⁰

If history is any guide, it is doubtful that basic issues concerning the degree of judicial response will be dispositively resolved by law review articles, legal journal articles, or legal decisions or groups of decisions on the part of the lower and upper courts. Rather, these differing philosophies have been present since this nation's inception and promise to remain at issue as long as our system remains a responsive and viable one. This has been the way of our law, and the question is not so much one of "either-or," but rather is one of how far, under what circumstances and in what forum. To reiterate, courts are quite capable—indeed have a virtual inexhaustable supply of precedent—to determine whether any particular "law reform case" is within the jurisdiction of that particular court. Our constitution has in the past, and continues to be, a most adequate set of guidelines for such considerations.

Currently, however, these issues are becoming more unsettling, not necessarily because they are more intensely presented, for the oldtimers of the profession stress the fact that there was no group more intense than the old country trial lawyers and their supporting community audiences. Rather regrettably, and perhaps unavoidably, the antagonisms have escalated in bitterness.

³⁰ *People v. Anderson*, 100 Cal. Rptr. 152 (1972). Only one judge dissented from the majority opinion.

Again, Professor Harry Kalven, Jr., encapsulates this theme in his piece entitled *Confrontation Comes to the Courtroom*. In this insightful article he analyzes the similarity between the recent Chicago Seven Conspiracy trial and the Scopes-Evolution trial of 1925. He states:

On paper the Scopes case resulted in a test of the statute which was won by the statute. A law remained on the books for decades and may still be there. Yet the case, as we all know, is celebrated as marking a milestone in the fight for intellectual freedom. The trial was a great victory for the defense because by using a kind of confrontation tactic they appealed over the heads of the Dayton court and jury to the public outside the courtroom and literally ridiculed the law into oblivion. And the men who did it—Clarence Darrow, Dudley Field Malone, Arthur Garfield Hayes—have always been regarded by us as heroes.

The defendants in the Chicago trial have been widely accused of attempting, and succeeding, in turning it into a circus. The defense in the Scopes case have always been acclaimed for attempting, and succeeding, in turning it into a circus.³¹

Professor Kalven, however, notes two major differences, which he asserts may account for the great difference in public reaction to the two trials. Concerning one, he states:

Whenever the intent to ridicule the law, and with it the religion of the local community, that was the dominating strategy of the Scopes defense, there is no resistance to the trial procedures, no disrespect for the judge or government counsel, and, we would note, no disrespect from them. Everyone is exceedingly cordial and polite and in the end the visitors thank the court and the bar for their splendid hospitality. The trial judge, John T. Raulston, in turn makes a little speech that seems incredibly remote from the tone of today. He concludes:

"I am glad to have had these gentlemen with us. This little talk of mine comes from my heart gentlemen. I have had some difficult problems to decide in this law suit, and I only pray to God that I decided them right. If I have not the higher court will find the mistake. But if I failed to decide them right, it was for want of legal learning and legal attainments, and not for want of disposition to do everybody justice."³²

The second difference noted by Professor Kalven was that, by the court agreeing to a cross examination by Darrow of William Jennings Bryan as an expert on the Bible, outside the presence of the jury, a forum was provided for the debate of the political issues in the case. Such a forum, not surprisingly, was not provided in

³¹ Kalven, *Confrontation Comes to the Courtroom*, HUMAN RIGHTS, Aug. 1970, at 10.

³² *Id.* at 13.

the Chicago trial. Certainly, the fact that from the inception the Chicago Seven defendants faced long prison terms, while this prospect was remote for John Thomas Scopes, is also relevant.

The difference in public reaction could also have been accountable to the fact that in the *Scopes* trial any disruption was not centered around the *defendant*. Any disruption was a result of the actions of counsel, the participating audience and possibly even the court. However, in the Chicago Conspiracy trial, disruptions were not only caused by the above elements but also by the defendants, eight of them to be exact. In considering our Anglo-American heritage and our existing value system, given particularly the pedestal upon which we place the tranquility of our courts, it is easy to understand why so many members of the bar are outraged by such conduct. It is submitted, however, that fiascoes such as the Chicago Conspiracy trial are not indicative of the trial tactics of the vast majority of lawyers trying law reform cases, and that as a result issues concerning the jurisdiction of the courts to consider law reform issues can quite appropriately be handled by each particular judge considering the facts before him and the substantive and procedural body of the applicable law. Professor Kalven so speculates:

I am sanguine enough about the condition of the society, even at the moment, to suggest that there will not be many such occasions forthcoming. Not the least idiosyncrasy of the Chicago trial was, it should always be remembered, that the conspiracy was predicated on the misadventures of Convention Week.³³

Finally, both the current Chief Justice and the former one have underscored the duty of the profession to protect human rights and preserve human dignity.

As stated by Chief Justice Burger:

The recent history of the organized bar, and especially the American Bar Association, shows the power of the legal profession to bring about needed changes We will respond slowly but that is the nature of a democratic society. In those few periods of our history when we suspended basic guarantees of the individual in times of great national stress we often found, in retrospect, that we had overreacted.³⁴

³³ *Id.* at 23. The validity of this prediction is buttressed by the reports of the excellent conduct of the lawyers and defendants in the "Harrisburg" trial. The defendants are being tried by the government on charges concerning an alleged plot to kidnap Presidential Aid Henry Kissinger. Of course, Ramsay Clark, a former United States Attorney General, is leading the defense team.

³⁴ HUMAN RIGHTS, Aug. 1970, at 2.

And as former Chief Justice Earl Warren fortifies:

Now why do I choose to discuss these problems? It is because I believe from the interest it [the bar] has shown in the past for human rights and human dignity it can be helpful in arousing the Bar of the Nation to its responsibilities in helping to put an end to the divisiveness which is plaguing us. It is because I believe the law is the greatest force for maintaining civilized society, and that its ultimate objective is justice for all. It is also because I believe that the Bar can and should play a vital part in bringing the spirit of justice and the accomplishment of it into every courtroom in our land.

It is not enough merely to open the courthouse doors to everyone. The proceedings therein must also be open on equal terms to all who enter; otherwise the word "justice" is a sterile one which cannot command the respect we claim for it.

I will say no more, but will leave to you and other lawyers and judges whether there is not long overdue an awakening on the part of our profession to its responsibility for making meaningful for all our people the Bill of Rights and the words "due process" and "equal protection for the laws" as they are mandated in the 14th Amendment to the Constitution of the United States.³⁵

Thus, we are left with the satisfying and reassuring premise that our courts, when treated with the respect due them as the result of centuries of earned legitimate confidence placed in them by the vast majority of American citizens, remain a further vehicle to ensure equal justice. For as our former Attorney General notes, "certainly it is true that the good fight can be fought and won in the courts."³⁶ We should, however, bear in mind the words of one veteran law reform trial attorney, "I like to win cases, and I think of no better way to lose them than to use disruptive and confrontation tactics."³⁷

MOVEMENT IN THE ORGANIZED BAR

It follows logically that if individual lawyers have a professional and ethical obligation to work in the interests of the public, so too does the organized bar. Some refute this premise and strenuously argue that a professional organization's principal obligation is to work for the best interests of its constituent members. Often propounders of this line of argument seem to lose sight of the fact that in these turbulent times, and particularly considering the public indictment referred to in the first part of this essay, organized bar efforts exerted in the public service activities area are also in the best interests of the constituent members in that such efforts

³⁵ *Id.* at 27, 35.

³⁶ Mitchell, *supra* note 27, at 1186.

³⁷ Charles Morgan, Jr. (personal interview).

operate to improve the lawyer's public image which, as stated, seems to be in a sad state of disrepair these days.

There are many in the profession who welcome responsive and responsible change, who have and are devoting substantial amounts of their time, intellect and energies towards using their skills to meet the endless dilemmas facing us collectively. Such lawyers feel that by virtue of our training we are uniquely equipped to be in the forefront of reform effort. In the words of Jerome J. Shestack:

It may be that the legal profession has little to offer in solving society's tough issues. The profession may be too soft, too fat, too satisfied to really try. And yet the Section has proceeded on the premise that lawyers have much to offer, that we are particularly trained to unmask sham and hypocrisy, to highlight the relevant, to focus on feasible solutions—in short, to use our craft as it can and should be used.³⁸

William Reece Smith, Jr., a recent Secretary of the ABA, considered the Association's public service obligations in a panel discussion before the National Conference of Bar Presidents presented at the Association's 1972 Midwinter meeting. The panel topic was, "What guidelines are there or should there be for the Bar, in participating in public and social problems?" In answer to the necessity for involvement of *bar associations* rather than lawyers as *individuals*, he queried:

But what of lawyers who have joined together in elements of the organized bar? Should we be equally unrestrained? Those who say "yes" assert that society has grown to the point that group action is necessary for real impact. Those who say "no" contend that involvement leads to controversy, and controversy to disruption and dilution of efforts.

The problem posed has long plagued the American Bar Association, but that group has failed thus far to prescribe any specific guidelines for its participation in public affairs. Instead the main source of guidance has been the statements of Association purpose which are set forth in the ABA constitution.

The difficulty with such statements, of course, is that they are broadly framed and may be of limited assistance on close questions. For example, included in the purposes of the ABA are the obligations "to uphold the federal constitution" and "to apply the knowledge and experience of the profession to the promotion of the public good." With such sweeping mandates, it is not surprising that the ABA has in fact acted on issues of predominant political and social import.

After a review of the past history of Association participation in public affairs, he submitted the following analysis:

³⁸ Shestack, *supra* note 3.

Admittedly our stated purposes are broad and indefinite. But, in our complex society, problems of other disciplines have a way of becoming matters of legal concern. Lawyers are not omniscient, but they are trained to reason and are experienced in human affairs. We should be slow, I think, to preclude them from organized involvement in matters where their influence can be meaningful.

At the same time, I am inclined to urge observance of certain parameters, particularly in state and local bar activity.

After discussing some of those parameters which include not acting in excess of special competence, the need for more definite guidelines, objectivity, awareness of probable overall effect of Association actions, and the need for specificity, he concluded with regard to organized bar participation in public affairs: "But in the final analysis, I submit we can and should, do no more than affirm our stated purposes and seek then to interpret them with courage and good judgment as the issues arise."

As to *individual* lawyer action, he simply stated:

Few of us would seek to place any limitation upon the lawful participation of individual lawyers in political and social controversy. Members of the legal profession have long been intimately associated with the public concerns of this country and their leadership is needed now no less than before.

Many suggest that such leadership is needed now *more* than ever before, that we may be approaching the darkest hours in the history of the profession. It is also submitted that Mr. Smith's analysis itself responsibly sets out meaningful guidelines which, if followed, will go far to insure progressive and responsible bar association response in the area of public affairs.

Encouragingly, Associational professional movement in the area of Public Service Activities has been picking up steam. The past few years have borne witness to positive efforts of numerous staff lawyers in defender, legal aid and legal services offices, practicing attorneys serving on their boards, those lawyers engaged in service with local committees for civil rights under law, public service committees of state and local bars, "public interest" law firm members, sufficiently conscious law officials of government at all levels, lawyers engaged in *pro bono* activities of the private bar, and all other lawyers who see the law as a mechanism for improving the quality of life in America. While the intensity of these efforts have not yet reached the curative stage, great headway has been made in identifying problems and in isolating particular proposals for reform which now need to be implemented. There is much to be done, and the organized bar has been instrumental in supporting

this movement.³⁹ While space does not permit detailed description of these many programs some illustrative examples emphasize the commitment of the Association in the public service activities area. While these activities do not yet begin comprehensively to cover the field, they do emphasize in a positive way the depth of the present and future commitment of the Association to dedicate its resources towards the common good, particularly in areas in which the Association and its membership hold special expertise.

The Association's Division of Public Service Activities was created approximately four years ago as the result of the recommendations of a study of the Association conducted by a management consultant team. Many of us in the Division view our role as working to further the goals set out in Canon Eight of the New Code of Professional Responsibility. David Ellwanger, the Director of the Division, emphasized this thesis at the last annual meeting of his home Alabama State Bar Association. In a speech entitled "Not for Bread Alone," he stated:

We live in a troubled society. Our problems are immense. The areas are legion in which we as lawyers can and should exercise that leadership in public affairs for which our history, our heritage, our education, our training . . . uniquely prepare us. Like it or not, our responsibility goes beyond bread alone. I do not demean the dollar I make, or begrudge the dollar you make—because we all have an obligation to provide adequately for our families. But we as lawyers are entrusted with special obligation—the responsibility to serve society and our fellow man.

One activity that has been given special priority by the current President of the Association, Leon Jaworski, is the educational program of the ABA Special Committee on Youth Education for Citizenship. Sharing a common conviction that knowledge of the legal processes is fundamental to an understanding of and dedication to the healthy functioning of a democratic society, this Committee's mandate focuses on the fostering and furthering of high quality programs for the teaching of the legal processes in America's primary and secondary schools. The Committee has begun to survey state and local bar associations to ascertain the extent of current bar involvement in educational programs for teaching law, legal processes and citizenship and to interest bar associations in creating such programs if they have not already done so. As stated, President Jaworski and the Committee members are of the view that the American Bar Association has the responsibility and capacity to play a vital role in an *interdisciplinary* effort to educate

³⁹ See generally Atwood, *Towards "Common Cause" in the Organized Bar*, HUMAN RIGHTS, — 1972 at 79.

the younger generation in the root principles of law in a free society.

Another Association priority has been the Council on Legal Education Opportunity (CLEO) which was established for the purpose of significantly increasing the number of lawyers from minority and disadvantaged groups. CLEO is co-sponsored by the American Bar Association, the National Bar Association, the Association of American Law Schools, and the Law School Admission Test Council. Nearly 700 minority law students are presently in law school as a result of the CLEO program, and in addition to that number, 60 such students—the first graduating CLEO class—have entered the ranks of the profession. Over its four year history the CLEO program has proven to be one successful approach towards alleviating the serious imbalance of the number of minority group members in the legal profession.

The number of black lawyers in the United States in 1968, prior to the CLEO program, was estimated at 3,500. The impact of CLEO and the interest it has generated among law students will hopefully result in the next five years in as many minority persons entering the profession as are presently engaged in practice.

In addition to providing black and other minority students with the opportunity of entering law school, CLEO was equally concerned that there be opportunities for employment when these students finish their law school education. CLEO hopes to undertake a program to ensure that employment opportunities are made available to minority law school graduates on the same basis as other lawyers entering the profession.⁴⁰

In further demonstration of the fact that the Association is eager for more meaningful participation of the black legal community in the ABA, the National Bar Association is now represented in the ABA's House of Delegates. In addition, the Association provides facilities for the Cook County Bar Association, an affiliate of the National Bar Association, to meet as frequently as they deem necessary in the ABA headquarters. The Association is committed to achieving parity in minority group representation.

Many of the most urgent issues facing our nation relate to our cities, issues which have created an "urban crisis" without parallel

⁴⁰ See generally Atwood, James & Long, *Survey of Black Law Student Enrollment*, 16 STUDENT LAWYER J. 18 (1971). It is interesting to note that the theme of the Black American Law Students Association 1972 Convention held in Chicago, was "The Black Lawyer as a Political Tool for Social Change: A Community Perspective."

in American history. The Association's Special Committee on Housing and Urban Development Law is presently engaged in an action program to involve lawyers in the problems confronting low and moderate income families seeking adequate housing. Because housing and urban development law has grown increasingly complex over the years, the program has provided technical assistance to private attorneys—particularly minority group lawyers—representing non-profit and limited dividend development programs or groups otherwise involved in low and moderate income housing development. The program is funded at a level in excess of one million dollars from the Department of Housing and Urban Development and the Office of Economic Opportunity, along with contributions from the Ford Foundation and local sources on a matching basis. Currently, five pilot "lawyers for housing" programs operate jointly with local bar associations in St. Louis, Boston, Houston, Cincinnati, and Seattle, with four programs scheduled to start in Los Angeles, Atlanta, Cleveland, and New York City. Each city has a director and two associate lawyers who give legal help in such areas as interest subsidies, tax abatement, land-cost writedown, seed money, and other aids under federal, state and local laws. As national and local interest in providing decent housing to economically underprivileged people grows, so does the need for adequate legal expertise to deal with the legal aspects of such housing development programs. The committee will continue its efforts to provide this expertise and to provide Association imprimatur to meaningful efforts to meet growing demands in the housing area. The program will also continue to assist minority group lawyers to enter this field of practice.

The Association has also given priority attention to the delivery of legal services. For example, the Association's Lawyer Referral Service has recently employed the services of a staff lawyer, John J. O'Connor, Jr., to assist in encouraging efforts to create viable and workable state-wide lawyer referral systems.

In recognition of the need for financing of adequate legal services the American Bar Association's Special Committee on Pre-paid Legal Services, under the leadership of William McCalpin, is experimenting with a system of delivering such services to large numbers of the public, usually associated in groups having a common cause, in which the cost of service has been *prepaid* by the group member or by some organization on his behalf. Normally, 100% of the group membership is covered under the plan so the principle of spreading or pooling the risk may operate. A pilot program supported by the Ford Foundation is being sponsored by the Committee in Shreveport, Louisiana, in cooperation with the

Shreveport and State Bar Associations. While it is not presently believed that this program alone will answer the majority of problems in the delivery of legal services area it is felt that it will be instrumental in solving some of them.

It has been effectively noted that questions concerning the adequacy of legal services for people of moderate means have been considered without adequate factual foundation. As a result the Special Committee to Survey Legal Needs has been created to focus on the legal needs of middle income Americans. The Survey will seek to determine the extent to which lawyers are used by these citizens and how various factors affect the individual's use of legal services including considerations of the effectiveness of lawyer referral services, group legal services, prepaid legal cost services, and specialization, among others. The Committee is also developing a questionnaire, administered by a survey organization of national repute, which will provide an empirical base for extensive consideration of these issues.⁴¹

A recent proposal by various state legislatures to initiate efforts to call a National Constitutional Convention to propose amendments to the United States Constitution under Article 5 was recently brought to the attention of the leadership of the Association by the Section of Individual Rights and Responsibilities. The only Constitutional Convention ever held in this country occurred in 1787 when the original document that is the foundation of our present body of law was adopted. Serious questions exist concerning whether the convening of such a convention, as a matter of constitutional law, would open it to multiple amendments including the possible consideration of a new constitution. The calling of such a convention came very close to becoming a political reality when in 1967, in the aftermath of *Baker v. Carr*⁴² and *Reynolds v. Simms*,⁴³ thirty-three states of a necessary thirty-four proposed the calling of such a convention which would have amended the Constitution to allow one house of bicameral state legislatures to be apportioned on the basis of factors other than population. This movement subsided, however, when one of the thirty-three states withdrew its support. A new drive has commenced focusing on the question of federal revenue sharing.

At the July, 1971 Association meeting, the House of Delegates created a Special Committee on Constitutional Conventions Study,

⁴¹ See generally B. CHRISTIANSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (American Bar Foundation 1970).

⁴² 369 U.S. 186 (1962).

⁴³ 377 U.S. 533 (1964).

"to analyze and study all questions of whether a convention's jurisdiction can be limited to the subject matter giving rise to its call, or whether the convening of such a convention, as a matter of constitutional law, opens such a convention to multiple amendments and the consideration of a new constitution."⁴⁴ The Committee contemplates the presentation of a comprehensive report on this subject at the next meeting of the Association to be held in San Francisco, California.

No discussion of Association activities is complete without considering the highly successful Project on Standards on the Administration of Criminal Justice first proposed to the American Bar Association by the Institute of Judicial Administration in 1963. There are presently seventeen booklets of Standards contemplated, covering every stage of the administration of criminal justice from pretrial to postsentencing. Fifteen of the Standards have been approved by the House of Delegates and the final two sets of Standards (the police function and the judges' function) are in the process of being finalized. The Standards are already attracting the attention of the appellate courts and have been favorably cited over 300 times. The underlying objectives of the standards have been two fold: to promote effective law enforcement and the adequate protection of the public; and to safeguard and amplify the constitutional rights of those suspected of crime. Extensive implementing efforts under the direction of retired United States Supreme Court Associate Justice Tom C. Clark have been commenced.

The Special Committee on Crime Prevention and Control, presently chaired by Edward Bennett Williams, has given extensive consideration to the nation's awesome crime problem. The Committee, which has received foundation grants totaling nearly one half of a million dollars for a three year program to encourage state and local efforts in crime prevention and control, has worked to implement the recommendations of the President's Commission on Law Enforcement and the Administration of Justice, recognizing that crime—and the fear of crime—have become of paramount concern to the American people in recent years. The Committee has focused its attention on street crimes: robberies, burglaries, larcenies, muggings, yokings, and thefts of all kinds—and has given

⁴⁴ This Committee, chaired by the Honorable Clyde Atkins of Miami, Florida, includes as members: Warren Christopher, Los Angeles, California; Professor David Dow, Lincoln, Nebraska; John D. Feerick, New York City, New York; Adrian M. Foley, Jr., Newark, New Jersey; the Honorable Sarah T. Hughes, Dallas, Texas; Dean Albert M. Sacks, Cambridge, Massachusetts; the Honorable William S. Thompson, Washington, D.C.; and Samuel W. Witwer, Chicago, Illinois.

particular scrutiny to the relationship of narcotic addiction, police ineffectiveness and congested court calendars to the dramatic increase in such crimes.

The first stage of the Committee effort involved fact finding. Intensive staff activity was coupled with four days of private committee hearings in Washington to obtain views of knowledgeable authorities on the problems of heroin addiction, police ineffectiveness and court delays. As a result of the hearings and staff research the Committee has produced a report entitled "New Perspectives on Urban Crime" which it expects to submit to the American Bar Association's House of Delegates in San Francisco. In its present form the report is in three parts and contains significant proposals for reform. Committee efforts have now centered around the implementation of pilot projects designed to test the feasibility and practicality of the proposed reform recommendations.

The Association has also continuously worked toward providing comprehensive professional services and toward sponsoring meaningful programs of continuing legal education. Thus, as a result of the extensive efforts of concerned Association members, movement towards national implementation of client security funds has begun. Other activities, including the preparation of the *Code of Professional Responsibility*, the extensive efforts in the area of disciplinary enforcement, the study of all aspects of the economics of law practice, the investigation of law book publishing practices, and the efforts to nurture the development of paraprofessionals, have continuously and effectively been pursued by the Association. In addition, the Association's Sections, dealing in the main with the various areas of substantive law, have been the source of extensive contribution to substantive and procedural legal knowledge.

Extensive Association attention has also been given to the area of judicial services. While space does not permit comprehensive consideration of this area, analysis and implementation has included such areas as court management, judicial conduct, judicial improvements, judicial selection, tenure and compensation, coordination of judicial reform, and efforts to increase the caliber of trial advocacy.

It is significant to mention that the Association provides extensive services to state and local bar associations and maintains a staff which works in close cooperation with these Associations to assist them in whatever way possible toward furthering their stated objectives.

Finally, in accordance with the notion that the crisis in the administration of justice cannot be met by lawyers alone but

rather must be an interdisciplinary effort, the Association created the Commission on Correctional Facilities and Services, the first of its kind in the long history of the ABA.⁴⁵ The interdisciplinary commission members include outstanding national and international leaders in penology, criminology, the behavioral sciences, psychiatry, government, business, labor, the judiciary, and the law. The Commission has received extensive funding and has employed an expert staff which it has authorized to initiate a number of distinct action programs in conjunction with other appropriate organizations. Examples of these include:

1. A National Parole Aid Volunteer Program for Young Lawyers.
2. A Project to Remove Offender Employment Restrictions.
3. A Program to Reduce Functional Illiteracy Among Juvenile and Adult Offenders.
4. Activation of the Nation's Bar Associations in Support of Correctional Reform.

These activities mark the beginning of Commission addressment to the herculean task of transforming the correctional system from its present low level toward the creation of an effective apparatus to meaningfully rehabilitate offenders and return them to live purposeful lives in the society into which they were born.

The preceding ABA activities, while still exceedingly limited in scope, indicate to many that the Association has turned the corner quite well and is following the beckoning of its leadership into an excitingly relevant public service orientation.

Recently, Jonathan Adler, a young activist attorney and a contributing editor of *Juris Doctor*, "the magazine for the new lawyer," visited the ABA Center and politely informed the staff that he was preparing an article for publication concerning the American Bar Association. While it can be said that Mr. Adler might have had some preconceived notions concerning the "progressiveness" of the American Bar Association, it can also be said that he was quite surprised at what he actually discovered.

This has been the reaction of many lawyers who have not had the occasion to consider some of the recent extensive activities of the American Bar Association. To be sure, these activities are

⁴⁵ The Commission is chaired by former New Jersey Governor Richard J. Hughes, with Robert Kutak of Omaha, Nebraska, serving as vice-chairman.

as diverse and far-reaching as the individual 155,000 members of the Association—over one half of the total number of attorneys in the United States today.

Thus it was not surprising to note the appropriateness of the title of Mr. Adler's article; "Will the Real ABA Please Stand Up?"⁴⁶ And it is significant to note that Mr. Adler, not then a member of the ABA, publicly promised to join the Association as a result of his research.

The preceding constitutes only some of the highlights of extensive Association activity in attempting to meet some of the seemingly endless problems—both social and legal—confronting our Twentieth Century urbanized society. For many of us working intimately with these extensive efforts, one fact continuously looms clear—that the crisis in justice is so great and its interlocking problems so diverse and severe that it is doubtful that it can be met through the efforts of the organized bar alone. Rather, what is required is a national commitment, adequately financed and designed to provide extensive interdisciplinary diagnosis and curative measures to modernize and make more efficient and fair the entire legal process, both civil and criminal.

Thus it has been suggested that the elusiveness of our long standing constitutional goal of achieving meaningful equal justice may well be due to the fact that a vital element—a cohesive *interdisciplinary* force capable of coordinating and implementing meaningful modernization—has been missing from our system. It has been suggested that a catalytic agency designed to synchronize reform elements is critically needed. In an article, in the preparation of which this commentator has been privileged to assist, Bert H. Early, the Executive Director of the American Bar Association, has called for such a force. The article, entitled *National Institute of Justice—A Proposal*⁴⁷ (hereinafter referred to as the National Institute proposal) with a foreword by Chief Justice Warren E. Burger, urges the establishment of a new third force for equal justice.

TOWARD COHESION OF REFORM EFFORT

Any person worth his salt in the public service field knows that undistilled desire and resources alone, without responsible direction and planning, is hardly sufficient to meet any challenge effectively and efficiently—particularly a challenge as historically elusive as

⁴⁶ JURIS DOCTOR, Dec. 1971, at 12.

⁴⁷ Early, *National Institute of Justice—A Proposal*, 74 W. VA. L. REV. 226 (1972).

modernization of administration of justice efforts. Modernization must be accomplished by specially trained, legal and interdisciplinary personnel of the highest caliber.

It is also submitted, by way of companion consideration, that the organized bar must give priority attention to the acute need for comprehensive reorganization and restructuring of traditional concepts of legal education. The urgency of this need is escalating in intensity as ever-growing numbers of concerned young persons flock to the ranks of the profession. Accordingly, the kind of systematic approach to modernization as enunciated in the National Institute proposal is briefly considered here, and in the remaining portions of the essay a suggestion for reorientation of legal education, more in line with the practical needs of the public and the profession, is examined.

Stated simply, Mr. Early proposes that a National Institute of Justice—an independent, not-for-profit, federally chartered corporation designed to coordinate and support the civil and criminal machinery of justice—be established by the Congress. The article in broad perspective urges:

[T]he establishment of a national public agency, governed by the most eminently qualified individuals available, and dedicated to the mission of giving national cohesion and increased public and private support to the now inadequate and piecemeal efforts directed toward improving the justice system at all levels.⁴⁸

The Institute would not conflict with or duplicate the Federal Judicial Center, the National Center for State Courts or other existing organizations. As stated in the introduction, "[i]t would, rather, complement their activities and encourage a broader base of support."⁴⁹

If the National Institute proposal is favored in principle by a vocal majority of concerned lawyers, by-partisan effort must be expended to insure that the institute, when created, will be composed of the most highly qualified individuals in the profession, and in related disciplines, both volunteer and full-time. Nothing could be more critical to the future of such an Institute or to the nation. In fact, an opportunity to serve on the staff of the Institute should, by definition, reflect as high an honor as can be bestowed upon a professional. It is submitted that the nature of the National Institute proposal is sufficiently exciting that such a caliber of person would almost automatically, assuming charismatic and utterly competent leadership, be attracted to the Institute and its mission.

⁴⁸ *Id.* at 227.

⁴⁹ *Id.*

Incumbent within the National Institute proposal is the fact that the total cooperation of the organized bar would be instrumental to the success of the Institute. The organized bar, given the best intentions, cannot effectuate modernization alone. Possessing extensive direct experience with the problems that exist within modernization activity, Mr. Early submits the thesis that the crisis in the administration of justice in this nation is so severe and our society so replete with evidence of the seemingly inherent nature of this crisis that overwhelming reform needs cannot be met by the organized bar alone. There are, by their very nature, limitations on how much any voluntary organization can accomplish. Indeed, since volunteer leaders of the profession are elected not from the public as a whole but rather by attorneys, our domestic values, among other things, militate against the profession assuming sole responsibility for the modernization of our legal process.

This nation has proven what it is capable of accomplishing in a relatively short period of time in the technological area where, to a large extent through the efforts of the National Science Foundation, man has in the almost unbelievable time span of ten years landed and walked on the moon. In many ways, of course, it can be argued that technological advancement is easier to accomplish than social reform in that for the scientist certain "absolutes" exist. Law and the behavioral sciences, dealing with the "human element" and the host of elusive questions concerning "how" and "why" people behave as they do, appears not to be so far-advanced.

Of course, it is safe to assume that the creation of a National Institute concerning the entire area of civil and criminal law reform will not alone alleviate the crisis in the administration of justice. It is suggested, however, that such a cohesive, catalytic entity can go a long way toward channeling collective forces toward coordinated, curative efforts designed first to alleviate the most severe bottle-necks to the flow of equal justice.

Indeed, a most cursory review of relevant history books indicates the difficulty in creating and perpetuating a just and decent society. Given the historical elusiveness of our constitutional goals, the National Institute proposal holds that it will be only through an adequately funded national interdisciplinary commitment that we can meet the crisis in justice and hopefully overcome it. The stakes are high—the eventual return to domestic tranquility and the potential revival of the more progressive and humane elements of the American spirit.

TO HONE AND HARNESS LEGAL MANPOWER

"Law School Boom Credited to Growing Social Concern"⁵⁰

While headlines such as the above are often misleading, it is submitted that the overwhelming number of new law school enrollees are keenly concerned about the role of the profession in the area of public service. Such an assumption, however, is frequently disputed. Some think the trend is a fad. Others simply think that such individuals represent only the smallest minorities. Others think that the huge increase in enrollment is the result of the baby boom of World War II. Still others share the view that the increase is due to a falling off of the job market for Ph.D. holders.

Those who are of the view that this trend reflects a discovery on the part of many undergraduates that the law is where the action is appear to be growing in number. Whatever the reasons, one fact is clear, we are multiplying fast. Such multiplication of persons skilled in law is healthy for a democracy. As has been pointed out, lawyers have traditionally been (to put it mildly) strongly represented in government. But we cannot delude ourselves. Such a high proportion of representation is government of the *educational elite*. That fact, however, should not cause serious alarm. It does not necessarily have to be government of the *cultural elite* as long as a basic legal education remains realistically accessible to all American citizens without regard to race, color, creed, sex, sexual orientation, or economic class.

It follows logically that one should know the law and how it works before seeking to make it, administer it, interpret it, apply it, or change it. That is not to suggest, however, that one must receive a traditional legal degree to be qualified to perform a portion, or in some cases all, of the above functions.⁵¹

The legal profession has the most profound obligation to insure that the doors to a basic legal education remain realistically accessible to any American citizen regardless of the environment in which that citizen was raised. Surely no obligation could cut deeper into the American system with its stress on individual freedom and equal opportunity. One can recognize and hold dear this obligation, however, and equally maintain that while law school doors should be freely and fairly open, the quality of legal education should be of the highest level and of the most complete relevancy to the practical legal needs of all American citizens. Except for the present

⁵⁰ Rankin, Long Island Press (Jamaica, N.Y.), May 7, 1971.

⁵¹ The most obvious examples are those Presidents of the United States who were not lawyers. The curve descends from that point.

state of legal education it would seem to be unnecessary to suggest that a new admittee to the bar should have a basic legal education which would at least equip that new lawyer to service the ordinary and more routine legal needs confronting the average client. Sadly, and as virtually every member of the profession knows, this is simply not the reality.

Speculate for a moment about the mental trauma that would in all likelihood accompany consent to a routine operation (such as an appendectomy), if that operation were to be performed by a recent admittee to the medical profession with the same practical education as the average new admittee to the bar. It could be safely wagered that few, if any, lawyers would consent to such an operation. Fortunately, the young doctor learns the practical consideration involved in his work in the hospital under the close supervision of more experienced practitioners.

Chesterfield Smith, the new President-Elect nominee of the American Bar Association, recently emphasized this lack of practical orientation in a speech presented to the Illinois State Bar Association's Long Range Planning Committee on March 30, 1972. Mr. Smith, with characteristic candor, stated that:

One can't for very long or very closely, analyze our existing system of legal education without it becoming painfully obvious that it is producing beginning lawyers in geometrically increasing numbers with little, and usually no, practical orientation to the actual practice of law for clients. I suggest that the organized bar should re-examine the possibility of a mandated "internship" before full admission to the bar. If properly structured, such a program might well be economically beneficial to the beginning lawyer, allow him to obtain the requisite practical experience and ethical guidance in a closely supervised legal clinic, and provide substantial additional legal services for those who need them but who do not now receive them under our existing programs.

While this concept must certainly be explored in great depth, particularly considering the problems of structure and finance that would be involved, Mr. Smith's analysis suggests that new ideas be combined with past thinking in this area.⁶²

For example, the image of "legal hospitals" for the poor and in some cases people of moderate means is projected. Certainly OEO legal service programs, proposed judicare projects, pre-paid legal service plans, group legal services, lawyer referral services, etc., would all be compatible with the "legal hospital" model.

⁶² See generally AMERICAN ASS'N OF LAW SCHOOLS, PROCEEDINGS OF THE 1971 ANNUAL MEETING, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAWS (P. Carrington ed. 1971).

And from this model a new law school educational orientation, with every law school affiliated with at least one of the various legal hospitals, can readily be envisioned. First, the academic aspects of law school education could be confined to a two year period. With the elimination of the summer vacation legacy this could be accomplished with virtually no loss in total course load. Upon completion of the two year academic requirement a "bar examination" could be offered to qualify students for entry into a one to two year internship program either in one of the legal hospitals or under the direct supervision of a licensed attorney found qualified for teaching.⁵³ Upon completion of the period of internship, the prospective admittee to the bar would then take another "practical" examination which would include an oral portion. Upon the successful completion of the "practical" exam and internship requirements, the young practitioner would automatically receive certification for admission to the bar and to practice law. It is submitted that such an educational orientation would go a long way towards realistically acquainting the law student with the actual practice of law and also toward intimately familiarizing him or her with requirements of the *Code of Professional Responsibility* and the spirit of Canon Eight.

Reorientation of legal education along the above lines could harness the energies and spirit of our young people in a very constructive way while at the same time providing essential legal services at moderate cost to those who need them. It is difficult to accurately project the extent of benefits which would flow to the profession and the public from the introduction of such a program.

The newly created ABA task force to study the impact on the public and the legal profession of the rapidly increasing number of students who may soon be admitted to the bar may well want to study Mr. Smith's suggestion.

⁵³ Professor Curtis J. Berger of the Columbia University School of Law projects an extremely interesting and intellectually exciting concept concerning internship possibilities:

"The next decade may well see some form of universal service, in which every young American would join. Such a program might contain a National Lawyers Corps giving law graduates a duty tour—for a year or two—in a neighborhood law office, on an Indian reservation, as a legal adviser to servicemen, juveniles, prisoners, or in service to government—federal, state, or local. In exchange government would help finance the soaring cost of legal education." Burger, *The Legal Profession Girds for the 1970's*, COLUM. J. OF LAW AND SOCIAL PROB., Fall 1971, Vol. 8, at 75, 79.

CONCLUSION

For those young lawyers who contemplate careers in law reform special note should be taken of the comment of one of the more outstanding of the breed, namely, Charles Morgan, Jr., Director of the Southern Regional Office of the American Civil Liberties Union and a present member of the Council of the ABA Section of Individual Rights and Responsibilities. For as Mr. Morgan is fond of saying, "The Constitution is a most radical document—all we have to do is make it work."⁵⁴

The campuses seem to have quieted down in the last year or so. Facile, puerile, transparent, indeed even flippant rhetoric concerning violence as a means for obtaining redress alarmingly permeated the campus atmosphere in the '60's. Perhaps the turning point came when the terrible events of Madison, Wisconsin and the killing of a Ph.D. candidate sobered many young, so-called "radicals." The rhetoric of violence is so often easier to stomach than violence itself.

Refreshingly welcomed whispers of "working within the system" seem to be now carrying the day. While the tragedy of the '60's cannot be underplayed, perhaps much good will come from some defining of the terms which seem to have resulted from the turbulence.

And lawyers and law students have a special responsibility in this regard. It would seem that the lawyer's oath moots considerations of working within or "outside" the system. Lawyers are officers of the court, and as such, apostles of our constitutional system of government. Our highest collective challenge must be to work toward making that system responsive to the needs of the populace.

While this essay has presented some thoughts on the role of the lawyer as a social engineer one critical point must not be forgotten. Effective and responsible social engineering axiomatically presupposes a thorough working knowledge of the law. While social engineering can become a specialty it should not become so at the expense of professional excellence and competency. We must first be good lawyers.

The law reform field is a rewarding and frustrating one. Much like law school, initial questions are only followed by more difficult ones. As we advance in technology and numbers it is easy to become overwhelmed by change. Our future tranquility may well be directly proportional to the way in which we adapt, or fail to adapt,

⁵⁴ Atwood, James & Long, *supra* note 38, at 20.

to the rapidly changing times, as is pointed out in the recent book *Future Shock*.⁵⁵

And it seems that we will have to become comfortable with the thought of ending up with more questions than answers. In the words of one of the earlier and better social engineers, Clarence Darrow: "In spite of all philosophy we are prone to feel regret over things beyond control; but, alas, we go over the road once, and for all, and the best that we can do is to place a few markings along the way to help point the path for those who follow close behind."⁵⁶

Although it is hearsay, I do not believe that confidences are violated if it is stated that for many attorneys committed to sparking humane modernization movement in the profession, a common dream is shared. While it is impossible precisely to pinpoint, that dream has something to do with being able to walk safely down the street in any part of any American city. If perchance inquiry is made as to the stroller's profession, that professional, legal person, if that be the case, could respond proudly and say, "I am an attorney-at-law," and be afforded all of the earned respect that was reserved for the family doctor several decades ago.

When a person climbs the front steps of the American Bar Center located on the beautiful University of Chicago campus, that person cannot help but notice the following words chiseled on the stone ediface of the building:

TO UPHOLD AND DEFEND THE CONSTITUTION OF THE
UNITED STATES

MAINTAIN REPRESENTATIVE GOVERNMENT

ADVANCE THE SCIENCE OF JURISPRUDENCE

PROMOTE THE ADMINISTRATION OF JUSTICE AND THE UNI-
FORMITY OF LEGISLATION

UPHOLD THE HONOR OF THE PROFESSION OF LAW

PROMOTE THE PUBLIC GOOD

It is respectfully urged that more serious pursuit of these professional goals would better equip us to commence the long journey towards the eventual realization of true equal justice for all citizens. It is in furtherance of that end that this essay is dedicated.

⁵⁵ A. TOFFLER, *FUTURE SHOCK* (1970).

⁵⁶ DARROW, *supra* note 20, at 446.