3

Why Lawyers Can't Just Be Hired Guns

ROBERT W. GORDON

My theme in this essay is the public responsibilities of lawyers—their obligations to help maintain and improve the legal system: the framework of laws, procedures, and institutions that structures their roles and work.

Ordinarily this is a theme for ceremonial occasions, like Law Day sermons or bar association dinners or memorial eulogies—when we are given license to rise on the wings of rhetorical inspiration far above the realities of day-to-day practice. I want to try to approach the subject in a different spirit, as a workaday practical necessity for the legal profession. My argument is simple: that lawyers' work on behalf of clients positively requires—both for its justification and its successful functioning for the benefit of those same clients in the long run—that lawyers also help maintain and refresh the public sphere, the infrastructure of law and cultural convention that constitutes the cement of society.

The way we usually discuss the subject of lawyers' public obligations—outside ceremonial rhetoric—is as a problem in legal "ethics." We often hear things like, "Lawyers must be zealous advocates for their clients, but of course lawyers are also 'officers of the court'; and sometimes the duties mandated by these different roles come into conflict and must be appropriately balanced." And indeed some of the most contentious disputes about "ethics" in the legal profession concern such conflicts between the "private" interests of lawyers and clients and their "public" obligations to adversaries, third parties, and the justice system itself—issues like: When, if ever, should lawyers have to disclose client fraud or wrongdoing or withdraw from representing clients who persist in it? When, if ever, should they refuse to pursue client claims they believe legally frivolous? Or act to prevent clients or their witnesses from giving perjured or seriously misleading testimony or responses to discovery requests?

These are important issues, no doubt about it, but in this essay I want to look at them in a larger and slightly different perspective than we can usually get from "legal-ethics" debates. For one thing, "ethics" isn't quite what I want to talk about. I suspect that most lawyers, when they hear "ethics," think, first, that something cosmically boring is about to be said, which one would only listen to in order to satisfy a bar admission or continuing legal education requirement; or else that they are about to hear some unwelcome news about a conflict of interest disqualifying them from taking on a client. "Ethics" has come to mean either: (1) the detailed technical rules in the professional-ethical codes; or, alternatively, (2) a strictly personal morality, the morality of individual conscience, an aspect of personal character which people just have or don't have, and if they have it, acquired it, if not in kindergarten, at least well before they became lawyers. The responsibilities of lawyers I'm talking about in this essay are of a different order; and I'll call them "public responsibilities" instead of ethics, to emphasize that they are responsibilities that attach to lawyers both in their functions as lawyers and as "citizens" who benefit, and whose clients benefit, from participation in the political, legal, social, and cultural order of a capitalist constitutional democracy, and who thereby owe that order some obligations to respect and help maintain its basic ground rules.

The order is *capitalist:* that is, constituted by the basic ground rules of a system of private property and market exchange. This is not, contrary to the antigovernment rhetoric we hear a lot of these days, a state of nature, but an order created and maintained by both coercive and facilitative government actions—the enforcement of rules of property, contract, tort, commercial law, employment law, and unfair competition; the facilitation of collective action through corporations, cooperatives, partnerships, and collective bargaining.

The order is also *democratic:* meaning that the ground rules that constitute the "private" economy and society are subject to revision and modification by democratically elected representative institutions and by the administrative bureaucracies that these legislatures create to carry out legislation.

Finally, the order is *constitutional:* in that its exercises of collective power are supposed to be limited by a set of fundamental substantive and procedural constraints—enforced in our system in the last instance by courts but supposedly respected by all power-wielding bodies, private as well as public.

The general premise of a liberal polity in short is that freely chosen goals (or "self-interest," if one prefers that reductive way of speaking) are to be pursued within a framework of constraints—established by norms, customary practices, rules, institutions, and procedures and maintained by systems of culture and morals backed by social sanctions and, selectively, by law.

Let's focus first on capitalism. Even the most libertarian theorists of capitalism, like Milton Friedman, for example, would stipulate that capitalism works only if there are strong conventions maintaining the framework of order within which, supposedly, self-interested behavior will add up to the general welfare. If individual

players resort to theft, trespass, corruption, force, fraud, and monopoly; if they regularly inflict uncompensated harms upon others, and consistently get away with it, the order will collapse. The order of law, it has come to be pretty clear, is not enough in itself to sustain a market economy: a capitalist system also requires what might be called an order of custom—a cultural infrastructure of norms, learned dispositions to respect property and keep promises and pay taxes and refrain from private violence to settle disputes, and of a certain degree of mutual trust — confidence that others will, within limits, for the most part, also respect the norms. The law without the custom supporting it doesn't work, because no legal system can maintain order against persistent and pervasive violations or evasions. Without social conventions in place to maintain the framework, no state can be legitimate or strong enough to supply one. There will be no reliable system of contract enforcement, no effective safeguards against theft, fraud, and violence, no protection of consumers or labor against being cheated or abused, no effective protection of the environment, no way of extracting taxes to pay for public goods like law enforcement. Yet custom also needs the support of law. Norms of cooperation and mutual trust create openings for opportunists and free riders to abuse them, and outside of close-knit communities nonlegal social sanctions will not adequately police against such abuses. Although compliance with the framework norms has to be largely voluntary, you need coercive law to demonstrate the costs of abuse and also to reaffirm the norms against the moral "outsiders," the amoral calculators who would otherwise profit from everyone else's trusting law-abidingness.

Readers will recognize here an exaggerated—but only slightly exaggerated—description of the current Russian scene. The Russians are trying to run a market economy with no customs or traditions supporting a private framework of constraints on opportunistic behavior in those markets; and also without the legitimacy and support for the state authority to supplement and supply the deficiencies of the private framework. Framework functions that we take for granted—like routine security for personal safety and business assets, and routine contract enforcement—since they are not being supplied by custom or law enforcement, are hired out instead to private purveyors of violence, Mafiosi or ex-KGB thugs.

Let us return now to the developed capitalist economies such as ours. Such an economy in short depends as much on common agreement to abide by its ground rules as it does on competition and innovation, on the substructures of trust, cooperation, and law that maintain that agreement. These frameworks are public goods or common property; they are like the air we breathe.

Now where do lawyers come into the picture? Lawyers have a dual role. They are agents of clients, and in that role help clients to pursue their self-interest—to manipulate the rules and procedures of the legal system on their behalf, to negotiate through bureaucratic labyrinths, to repel assaults on persons or property or liberty.

But lawyers must also be agents of the common framework of institutions, customs, and norms within which their clients' interests must be pursued if the premises underlying all these individual exercises of freedom are to be made good. Let me try to develop this argument for the "public" side of lawyers' obligations.

The dominant ideology of the legal profession, the norm of zealous advocacy or adversary ideal, tends to obscure the public side of the ledger. But that side is always present, and is not adequately described by the ritualistic phrase "officer of the court." Much of the lawyer's role that is usually thought of as simply zealous representation is actually also designed to carry out the public framework-regarding aims of the legal system. The obvious example is criminal defense. Our own painful history and the experience of most other nations today teach that the criminal justice system is prone to systematic abuses. Police will break down doors at night, detain suspects in secret, and coerce confessions; prosecutors will fabricate evidence or suborn perjury of witnesses. Against such abuses, legal reformers over time have enacted both substantive and procedural safeguards. The defense counsel's primary role is to act as the outside monitor; he is the gadfly who keeps the system honest, and ensures that the police and prosecution go by the book in their treatment of suspects and collection of evidence. In this sense defense counsel is a public agent of the framework.

So, too, in the civil justice system. Lawyers serve as public agents in helping clients to vindicate claims given by the substantive law; and in preventing government agents or adversaries from abusing the law, or from gaining advantages that are not permitted by law. In short, the lawyer's role is part of the foundation of a capitalist democratic system.

The term *ethics* doesn't really capture these public functions of the lawyer. These are functions of *citizenship* in the broad sense, of obligations to the framework of law and custom that makes the overall social system—a market economy within the rule of law—work.

Well, what obligations can be derived from the role? At minimum, one would think, a set of negative obligations: in the words of the Hippocratic oath, "First, do no harm." Meaning, in this context, what the philosopher Jon Elster calls "everyday Kantianism"—refrain from actions which if multiplied and generalized would weaken or erode the essential framework of norms and customs.[1] Why are these specially obligations of lawyers? In part of course they are not, they are obligations on all citizens. (By citizens, incidentally, I don't mean technically born or naturalized citizens, but all people who benefit from participation in the framework; so a foreign company doing business in the United States or a lawyer for that company would be a citizen in this expanded sense.) But lawyers do have special obligations: they are in a unique position to safeguard framework arrangements, because they are also in a unique position both to ensure that those arrangements are carried into effect and to sabotage them. All procedures that exist to vindicate claims given by the substantive law, especially complex and expensive ones like litigation or administrative rule making, also deliver resources for strategic behavior—delay, obstruction, confusion of the record, raising costs to adversaries. The resources of law, in unscrupulous hands,

can be used to nullify law. This is why we are told that outlaw organizations like the Mafia reportedly offer a key role to the *consigliere*—the lawyer who keeps the law at bay, so that the organization can operate outside the law.

But let us take a less extreme example. Suppose that the lawyer does not represent a persistently outlaw client—the enterprise that lurks at the margins of organized society, taking advantage of its rules and customs to rip off a surplus for itself—but the more usual client, like the ordinary business firm, whose interest is sometimes in vindicating, but also sometimes in avoiding, requirements of the substantive law: in enforcing some contracts but evading obligations under others, in protecting itself against employee theft or sabotage but in circumventing labor law to forestall union organizing campaigns, in seeking compensation for torts committed against it but immunity for its own torts. If lawyers employ every strategy to defeat the claims they don't like, they will erode the process's value for its good uses as well as its bad ones. Outcomes become expensive, time-consuming, and arbitrary. They reward wealth and cunning, and bear less and less relationship to judgment on the merits. Without controls, the system can rapidly deteriorate to a tool of oppression and extortion. By raising the enforcement costs of regulation, lawyers can encourage defiance of regulation by their competitors as well as themselves, and begin a race for the bottom in which nice guys finish last, the law-observing client is an innocent simpleton, a loser in the Darwinian struggle.

The legal-social framework is a common good, and self-interested individual behavior can destroy its value for everyone. Extreme adversariness in litigation or regulatory compliance settings is problematic not just because it is incredibly unpleasant and full of posturing and bad manners, but because it erodes the conditions of the economy and social order. Repeated lying in negotiations can destroy fragile networks of trust and cooperation that alone make negotiation—especially between relative strangers—possible. Strategic contract-breaking reduces the value of all contracts everywhere that are not already backed by strong customary sanctions.

Many lawyers at this point are tempted to say: We admit all this, but enforcing the framework norms isn't our business; it's the specialized role of public enforcement agents—judges, prosecutors, agency bureaucrats, and other officials. But if you accept any of the argument so far, this just has to be wrong. A legal system, like a social system, depends largely on voluntary compliance with its norms. When compliance is replaced by underground resistance—or only nominal compliance—when drivers stop at the red lights only when they think a cop is looking, or are prepared to exhaust the traffic court's limited resources by arguing the light was green—the system has broken down. Suppose that, as happens in many of the world's societies, individuals and businesses began serious cheating on their taxes. In a world in which there are resources to audit only 1 per cent of returns, the result is total system breakdown. Taxes that depend on self-reporting can no longer be collected. Some people are not very frightened by this particular prospect; but they might be if other enforcement mechanisms broke down—if, for instance, gangs of the physically strong,

financed by the wealthy, started preying on their families and businesses, and counted on lawyers to stall enforcement of the legal controls on their predation.

In any case, lawyers, especially lawyers for powerful clients, are rarely just passive law-takers: they are active law-makers, designers of contractual and associational arrangements that create or limit rights and duties and dispute-settlement modes, and that are binding on trading partners, employees, suppliers, or customers. The employment lawyers who draft contracts requiring employees to waive rights given by state labor law and submit all disputes to arbitrators chosen by the employer; the HMO lawyers who draft clauses forbidding doctors under contract to the organization from disclosing to patients that the organization policies will not authorize certain treatments—these attorneys are engaged in what the "legal process" scholars Hart and Sacks called "private legislation".[2]

Lawyers have to help preserve the commons—to help clients comply with the letter and purpose of the frameworks of law and custom that sustain them all; and their obligation is clearly strongest where there is no adversary with access to the same body of facts to keep them honest, and no umpire or monitor to ensure conformity to legal norms and adequate protection of the interests of third parties and the integrity of the legal system.

Of course I realize that the view that I'm putting forward, a view which assigns to lawyers a major role as curators of the public frameworks that sustain our common existence, is drastically at odds with a view that is widespread if not dominant in the legal profession. This view, which I'll call the libertarian-positivist view, holds that the lawyer owes only the most minimal duties to the legal framework—the duties not to violate plain unambiguous commands of law, procedure, or ethics, not to tell plain lies to magistrates, and perhaps also not to offer such outrageously strained interpretations of facts or law to tribunals as to amount to outright misrepresentations—and owes no duties to the social framework at all, if performing them would conflict with his client's immediate interests. In this view the lawyer and client are alone together in a world where there are some positive rules: the lawyer's job is to help the client get what he wants without breaking the rules—or at least without breaking them when anyone's likely to notice—though it's all right to bend them.[3]

The problem I have with using the libertarian-positivist starting point is that in a democratic society it seems wrong to conceive of the law and the state wholly as adversaries, the "other," a bureaucratic maze to be adroitly negotiated on behalf of one's clients—and especially wrong if one's clients are members of groups who do in fact have some access to political power. We are after all members of a common political community, with agreed-upon procedures for establishing and changing its common frameworks. I would argue for the lawyer's starting from an opposite presumption from the libertarian one—though also rebuttable in particular contexts—a presumption that the law very imperfectly sets forth an approximately agreed-upon minimal framework of common purposes, a social contract. I don't mean a framework of "thick" moral norms such as a communitarian or civic republican would

imagine, but neither do I mean just a "thin" obligation to obey only the plainest unambiguous commands in circumstances where violations are likely to be detected. The domain of these obligations lies somewhere between morality and resentful minimal compliance with rules. The metaphor I'd suggest is that of a relational contract—the long-term contract calling for repeated occasions for performance, a contract structured by norms of trust, reciprocity, and fair dealing. A contract partner is not expected to sacrifice her self-interest to the other party's, but does have a duty of good-faith observance of the principles and purposes of the contractual framework that has been set up to serve their mutual advantage. With most clients, including business clients, the lawyer could start with the presumption that many good lawyers do indeed begin with—that the client is not out to get away with anything he can in pursuit of his objectives, but wants to abide by the spirit of the framework and be a good citizen—and face the more difficult dilemma of whether to advise him how to get around the rules only if he makes the intention to evade them manifest, after being advised to comply.

I readily acknowledge that there's nothing simple or straightforward about complying with framework norms in the modern regulatory state—often just figuring out what they are is a considerable undertaking. Regulatory regimes tend to be appallingly complex and technical, crammed with loopholes and ambiguities, sometimes put there by regulated interests, often inadvertent. Regulatory statutes are often utopian; full compliance is impossible. They are often in part only symbolic—sweeping commands considerably qualified or even retracted in practice by a large discretion or ridiculously low budget for enforcement. Nonetheless, I think in most contexts lawyers can fairly readily tell the difference between making good-faith efforts to comply with a plausible interpretation of the purposes of a legal regime, and using every ingenuity of his or her trade to resist or evade compliance.

And just as clearly, I'd maintain, lawyers have another obligation as well—though this is an obligation that they can discharge through collective action, through organizations, surrogates, or representatives as well as personally: and that is the obligation to work outside the context of representing clients to improve, reform, and maintain the framework of justice. One thing this obligation unmistakably calls for is helping to remedy the maldistribution—really nondistribution—of legal services to people with serious legal problems but without much money. But another is to help fix legal processes that waste everyone's money in administrative costs or otherwise systematically produce unfair results. Again, I would guess that many lawyers see this kind of framework repair and reform work as a kind of pro bono philanthropy: they are glad that some prominent lawyers are doing it, but see it as an optional task for the private bar. From this view, working on the framework is only in the actual job description of public officials—legislators, administrators, judges. And again, I would argue, that view can't be right—for reasons of both history and principle.

As a matter of tradition, in America private lawyers have assumed a large share

of the public role—sufficiently long-standing and ingrained into customary practice so that you could reasonably call it a *constitutional* role—of safeguarding the framework and adapting it to changing conditions. This role devolved on lawyers at the founding of the republic, when private lawyers assumed the major share of responsibility for making the legal case for the Revolution and in drafting the basic charters of government, the state and federal constitutions. In the early decades of the republic, private lawyers undertook the task of producing an Americanized common law to serve as the basic ground rules for commercial life. In the Progressive era, the creation of the modern state, government through administrative commissions and professional associations, was also largely the work of practicing lawyers—though academic lawyers also got into the act in a big way in drafting the legislation of the New Deal and staffing its agencies. Lawyers have of course dominated the legislative bodies of the country, especially at the federal level, for its entire history. Lawyers temporarily on leave from practice have run the foreign policy of this country for most of its existence.[4] Private lawyers don't play this role in every society; they have played it in America, primarily because with our Revolution we rejected the European model of government through a centralized bureaucracy staffed by an elite career civil service. Our senior levels of statecraft have had to come from part-time volunteers—more often than not lawyers—like Alexander Hamilton, Thomas Jefferson, John Adams, Daniel Webster, John Quincy Adams, Charles Evans Hughes, Elihu Root, Henry Stimson, Dean Acheson, John J. McCloy, John Foster Dulles, Cyrus Vance, and Warren Christopher, just for a short list.

But there is more to this story than the conspicuous lawyer-statesmen on the commanding heights of government. It's no accident that most of the names I've just mentioned were primarily active in foreign policy. In the domestic field, after the basic institutions of government had been established, Americans of the Jeffersonian persuasion turned away from Hamilton's aristocratic model of "energetic government" managed by elites drawn from professional classes.[5] Under the new ethos America was to be dominantly a commercial republic, one in which happiness was to be pursued by those free to pursue it (which at the time meant mostly white males) through labor, trade, manufactures, land cultivation, and speculation. From an early date the market economy, the sphere of "free enterprise," was naturalized, made to appear as if it were a machine that would run of itself. The background frameworks that it presupposed and helped make it run, the infrastructures of law and government and custom, because they were relegated to the background, became invisible to many of the enterprisers who depended on them without realizing it.

In fact, of course, those networks of law and government and custom were everywhere: the United States was even at the outset a thoroughly "well-regulated society"[6]—every aspect of social life was criss-crossed with legal and customary regulations of family and employment relations; of land use and common resources; of nuisances, contracts, and debt collection. Much of this regulation was decentralized and localized—government by local commissions and juries, by public enforcement

actions brought by private informers and prosecutors, by county courts, and the case-by-case governance of the common law; or by special bodies like corporations created by government to serve public purposes.[7] In a country lacking strong centralized bureaucracies, the operation of these regulatory bodies and processes was to a large extent, by default, given over to lawyers. Tocqueville commented on this fact, that lawyers were the de facto governing class, and shrewdly guessed the reason for it: in a commercial society, as Adam Smith had warned, most people's energy and attention turns inward upon their private ambitions—getting ahead, making money; in such a society, people are likely to turn away from public life, to neglect or ignore (what I have been calling) the frameworks of law, government, and public custom on which a successfully functioning system of market exchange ultimately must depend. Enter lawyers—a professional class by training and usage devoted to the legal framework and to assuming a natural leadership role in civic life.[8]

Now obviously there's a lot of disagreement about how well lawyers have discharged the public stewardship that fell into their hands at the founding of the republic. There is nothing new in complaints about lawyers—that they exact a heavy monopolists' rent for running the public machinery, that they are excessively devoted to clumsy, cumbersome, expensive procedures, that they sow complexity, confusion, and ambiguity wherever they go, that they gratuitously stir up trouble, all for their own interest and profit. Some critics persistently charge that the regulatory frameworks they have built and interpret to clients tend to shackle and overburden enterprise; while others charge to the contrary, that lawyers have managed the framework far too often to the particular benefit of their principal business clients. These are complex debates that I clearly can't try to resolve here. The point I want to make is that, whatever you think of how lawyers have taken care of their civic responsibilities, those responsibilities, in our political-economic structure, are inescapable. If lawyers do not perform them, no one else can fully substitute.[9]

So it's absurd to pretend, as libertarian lawyers often like to do, that private lawyers just take care of their clients while relinquishing the public realm to officials. In fact, of course, lawyers are anything but inactive toward the public sphere. The public framework is dynamic, malleable, negotiable. Lawyers don't just passively follow framework rules: they take on active political roles—trying to change the ground rules in their clients' favor.

Here it seems to me is the area where the lawyers have to do the most complex balancing of their roles as agents for clients and agents of the general long-term welfare of the legal system and the public sphere. Adversary practice at the individual case or transactional level is relatively cabined and contained. At the policy level, where clients are pushing for major legislative change or alteration in basic doctrine, zealous representation of immediate client interests with no regard for anything or anyone else has the potential to turn political life into an uncontained war of all against all—litigation writ large, a Darwinian zero-sum struggle among social groups for their share of the pie—at the expense of the institutions of restraint, co-

operation, and social bargaining that link the fates of the fortunate elites to those of the middling ranks and lower orders and thus promote the general welfare. The classical fears are of "rent-seeking" politics, of groups seeking public favors that milk the government for spending levels that threaten either fiscal crisis or confiscatory levels of taxation that destroy incentives to save and produce. The opposite, and in the United States more likely, danger is of public paralysis, brought about by groups that so successfully resist taxation or regulation that they exercise a practical veto on the government's being able to provide the public goods of defense, justice, order, ecosystem protection, health and safety, and the conditions of equal opportunity that most people in fact want provided; or simply of the capture of the legal system by the powerful, who use it to grab the largest shares of income, wealth, and public resources for themselves, and to neutralize and repress any other groups who might try to challenge their claims. An example of such wasteful struggle from our own history would be labor-capital relations in the United States between 1877 and 1937, relations of fairly constant zero-sum warfare, interrupted by intermittent truces and periods of exhaustion, polarizing public opinion, sharpening class conflict, leading to enormous losses through work stoppages and, just as important, to enduring legacies of bitterness and mutual distrust whose effects are still being felt in some industries today.[10]

How to reconcile these interests? What should a lawyer do whose client wants the public framework altered in its favor, when the lawyer has reason to believe that the change may do serious damage to the commons, the public sphere? Louis Brandeis, one of the earliest lawyers to address this problem, believed that in his own time most of the country's top legal talent had been recruited to the service of a single faction of civil society, that of large corporate interests. He believed that on issues of major framework change lawyers had sometimes to take a completely independent view from their clients—that they ought not to be partisan at all.[11]

Perhaps unfortunately, the Brandeis view has never taken hold and is probably no longer a practical option, if it ever was. My own view is that in the policy arena, as in ordinary transactional and litigation work, the lawyer is entitled to pursue the client's interests but without risking sabotage of the general public–regarding norms of the framework that link the client's interest with that of other social groups in a long-term relational bargain. Any number of examples would serve, but since it's a hot topic, let's take tort reform. Companies and their insurers want to minimize liability; plaintiffs want to ensure that they are compensated. To some extent these interests conflict, though the parties have common interests, even if it's sometimes hard for them to see this, in making products safer while reducing the costs of products and the transaction costs of the injury compensation system. What are the lawyers involved in tort litigation actually doing? Very little that's constructive. The plaintiffs' bar fights to hold on to the current system, remarkably unconcerned with its inherent problems: the vast majority of victims of personal injury, other than auto accident victims, are unable to reach the justice system to obtain any compensa-

tion at all, and the tort system is so expensive that half or more of its recoveries are eaten up in administrative costs, including payments to lawyers.[12] The defendants' bar has if anything been even less constructive in its public positions. Corporate and insurance counsel help to propagate the wildly exaggerated myths that the United States is in the midst of a personal-injury "litigation explosion" and "liability crisis" that add billions to the costs of products and seriously injure American competitiveness. (These are, by the way, clearly myths: filings for individual personal-injury tort claims have fallen, not risen, in the last decade; the big increases in federal civil suits are mostly increases in inter-corporate contract claims. The myths also tend to include in the count of the greatest "costs" of the system the *benefits* that victims receive in compensation for injuries.[13]) These interests promote political "reforms" of the process that would limit liability and reduce damages without substituting alternative proposals for ensuring that the system will in fact adequately compensate for injuries and keep in place incentives to make safer products; or for universalizing access to medical care so that treating accident victims could be financed outside the tort and workers-compensation systems. (In my view corporate counsel are more at fault in this debate than the plaintiffs' bar, because their own livelihoods would not be jeopardized by sensible and just reforms. One cannot expect complete objectivity from parties under threat of extinction.)

In my model, the lawyers ought to see the parties to policy conflicts like the conflict over the tort system much as one would see parties to a long-term relational contract. The aim is to make a good deal for one's clients *in the context of an ongoing relation with other interests*, not to extract everything possible for one's own side; and to build long-term collaborative relationships. The kind of negotiation I have in mind resembles that undertaken toward the beginning of this century by the National Civic Federation, a sort of private-corporatist institution that brought together (relatively) progressive employers and (relatively) conservative unions and had their lawyers try to work out institutional solutions for social disputes. The NCF was one of the main backers of the first Worker's Compensation system that moved industrial accidents out of the tort system, which was expensive and risky for both employers and employees.[14]

I think it will be apparent that what I have been mainly arguing for so far is a remarkably conservative view of the legal framework, and a very conservative role for the legal profession: oriented toward maintenance and improvement of existing frameworks. I should make clear that I think the current set of rules, procedures, institutions, and conventions of democratic capitalism is a very long distance away from a legal/social framework that would effectively realize the promise of American life. Nothing I've said should be taken as designed to restrain lawyers from working to revise the framework's ground rules, especially if they fight for revision openly rather than through surreptitious undermining of the system. And I certainly don't want to exclude the possibility that at any time, including our own time, aspects of the framework may be fundamentally unjust or unsound, and thus in need of radical

revision; and that in such times lawyers may legitimately feel a calling to a morally activist, framework-transforming politics. There are times when the lawyers' most demanding conceptions of their calling may demand principled resistance to public norms they believe to be unwise or unjust. There are times when fire must be fought with fire, unscrupulous tactics met with fierce counter tactics—though lawyers use this justification far too often as an excuse for antisocial behavior, which might be avoided by collaborative efforts to reform systems. There are times when whole segments of society must be mobilized to overturn an unjust order. Lawyers have played important parts in such movements—like the movements to abolish slavery and racial segregation—and will, one hopes, do so again.

But in our time, even the most conservative view of the lawyer's public functions, that he is to respect the integrity and aid the functioning of the existing system and its purposes, has become controversial—in a way that would really have astonished the lawyers of the early republic, the lawyers of the Progressive period, and leading lawyers generally up until around 1970 or so, who took the idea of their public functions completely for granted.[15] The dominant view of most lawyers today—not all, but seemingly most—is one that denies the public role altogether if it seems to conflict with the job of aggressively representing clients' interests the way the client perceives them.

Yet, as I've said, a legal system that depends for its ordinary enforcement on information and advice transmitted by the private bar, that depends for its maintenance and reform on the voluntary activities of the private bar, and that relies on lawyers to design the architecture of private legislation, cannot survive the repeated, relentless battering and ad hoc under-the-counter nullification by lawyers who are wholly uncommitted to their own legal system's basic purposes. Lawyers in fact probably do serve the civic frameworks better than they occasionally like to pretend; they refrain from pushing every client's case, in every representation, up to just short of the point where no plausible construction of law or facts could support it. But it seems clear that like many other groups in American social life, the legal profession in the last twenty years or so has adopted an increasingly privatized view of its role and functions. The upper bar in particular has come to see itself simply as a branch of the legal-and-financial services industry, selling bundles of technical "deliverables" to clients. There are many reasons for this trend, chief among which is the increasing competition among lawyers (and in European markets, between lawyers and accountants) for the favor of business clients. That competition has brought many benefits with it in more efficient delivery of services, but one of those benefits cannot be said to be incentives to high-minded public counseling or the expenditure of time on legal and civic reform.

Our legal culture, in short, has mostly fallen out of the habit of thinking about its public obligations (with the significant exception of the obligation of pro bono practice, which has gained increasing attention from bar associations and large law firms). I expect therefore that if the idea of lawyers as trustees for the public good—

the framework norms and long-term social contracts that keep our enterprise afloat—is going to stage a comeback, the impulse will have to come from some set of external shocks, such as legislation or administrative rules or rules of court that explicitly impose gatekeeper obligations on lawyers as independent auditors of clients' conduct. We have seen some steps taken in that direction already, in rules regulating tax shelter lawyers, securities lawyers, and the banking bar.

It would be much better, however, if the impulse were to come from the legal profession itself—especially to build and to finance organizations in which lawyers can carry out their public function of recommending improvements in the legal framework that will reduce the danger of their clients' and their own subversion of that framework. Many of the existing bar organizations, unfortunately, are losing their capacity to fulfill that function. Even the august American Law Institute has become a place which lawyers, instead of checking their clients at its door, treat as just one more forum for advancement of narrow client interests.[16]

Think of lawyers as having the job of taking care of a tank of fish. The fish are their clients, in this metaphor. As lawyers, we have to feed the fish. But the fish, as they feed, also pollute the tank. It is not enough to feed the fish. We also have to help change the water.

Notes

An early version of this essay was given as a Daniel Meador Lecture at the University of Alabama School of Law. Thanks to Deborah Rhode for helpful comments.

1. See Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), 192–95.

2. Henry Hart and Albert Sacks Jr., *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, N.Y.: Foundation Press, 1994; William N. Eskridge Jr. and Philip P. Frickey, eds.; prepared for publication from 1958 Tentative Edition), 183–339.

3. The best account and critique I know of this "dominant view" is in William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998), 30–46.

4. James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1950), 352–56; Mark C. Miller, *The High Priests of American Politics: The Role of Lawyers in American Political Institutions* (Knoxville: University of Tennessee Press, 1995), 57–75.

5. Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge: Harvard University Press, 1992), 271–76, 304–19, 326–39.

6. This phrase, and the content of much of the paragraph that follows, is taken from William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

7. See generally Novak, *People's Welfare*; and Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* (Cambridge: Harvard University Press, 1969).

8. Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1946; [illegible] 99.

legislative and appointive positions, policy elites, and reform vanguards. They now share these roles with other public actors, such as economists, think-tank intellectuals, issue and area specialists, lobbyists, and grass-roots organizers. Nonetheless the role of lawyers, as public officials, public-interest advocates, and private lawyers advising clients, remains critical, especially as translators of public initiatives into legislative form, administrative rule and procedure, and practical enforcement.

10. For an epic history, see David Montgomery, *The Fall of the House of Labor* (Cambridge: Cambridge University Press, 1987).

11. See Louis Brandeis, "The Opportunity in the Law," in Brandeis, *Business: A Profession* (Boston: Small, Maynard, 1914), 329, 340–41.

12. See Deborah R. Hensler et al., *Compensation for Accidental Injuries in the United States* (Santa Monica: Rand, Institute for Civil Justice, 1991).

13. The literature on the tort "crisis" is enormous. For useful surveys of the data and assessment of the various positions, see Marc Galanter, "Real World Torts: An Antidote to Anecdote," 55 *Maryland Law Review* 1093 (1996); and Deborah Rhode, "Too Much Law, Too Little Justice," *Georgetown Journal of Legal Ethics* (forthcoming).

14. The NCF has been sharply criticized, with reason, as a basically conservative organization that promoted Workers' Compensation schemes in large part to co-opt and blunt the edge of movements for more generous industrial-accident compensation schemes. See, e.g., James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968). It takes something like the partisan posturing of belligerents in the current battle over the tort system to make the NCF look good.

15. One of the best statements to be found anywhere on the lawyer's public functions appeared in the report that launched the American Bar Association's 1969 Model Code of Ethics. "Professional Responsibility: Report of the Joint Conference [on Professional Responsibility of the American Bar Association and Association of American Law Schools, Lon L. Fuller and John D. Randall as co-chairs]," 44 *American Bar Association Journal* 1159 (1958): "Thus partisan advocacy is a form of public service so long as it aids the process of adjudication: it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult. . . . [The lawyer as negotiator and draftsman] works against the public interests when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger processes in which he participates. . . . *Private legal practice, properly pursued, is, then, itself a public service*" [emphasis added]. "Professional Responsibility," 1162.

16. On politics within the American Law Institute, see Alan Schwartz and Robert E. Scott, "The Political Economy of Private Legislation," 143 *University of Pennsylvania Law Review* 595 (1995).