

# FOUR PORTRAITS OF LAW PRACTICE

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## I. INTRODUCTION

In this essay I wish to reflect upon four portraits of law practice. Each portrait describes the practice of law in this country, and thereby the function of lawyers in American society. Each portrait purports to be descriptively accurate and analytically correct, and not merely a statement of aspiration or a prediction of the future. Each attempts to explain concisely the nature of the practice of law and the contribution it makes to the general welfare of society.

The four statements nevertheless differ substantially in substance and tenor. The differences perhaps are not so great that we might suppose that the legal professions in four different countries are being referenced. Nevertheless, the statements ascribe quite different characteristics to the part that law practice plays in American society. There are even greater differences in the assurance with which they assert that the practice of law positively contributes to the general welfare of the community.

## II. FOUR PORTRAITS

The first portrait is one drawn in 1942 by Professor Karl Llewellyn, then of Columbia Law School. Llewellyn, it will be recalled, was a profoundly original legal scholar and an important contributor to reshaping commercial law and to some extent the law of torts.<sup>1</sup> He was one of the founding fathers of Legal Realism and perhaps its most articulate exponent. Unlike many legal scholars, Llewellyn also was very active in the organized bar and rightly considered himself one of its members. In his accounts of legal folkways, he was prolific and imaginative as well as sardonic and often comic.

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1. See W. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

Llewellyn's 1942 portrait of the profession, however, was a serious statement. Entitled *The Crafts of Law Re-valued*,<sup>2</sup> it was delivered at a serious point in our nation's history, the plunge of the United States into World War II. With the country then mobilizing for war, its men into the armed forces and its women into the war plants, the question inevitably arose as to what value lawyers might have in such a supremely communitarian effort.

As Llewellyn noted:

With the fate of the nation in the balance there is call for business men and call for medical men and call for men of the physical sciences. There is call for architects and engineers and for the clergy. There is little call for lawyers. I find no pervading appreciation that law-skills can be mobilized to serve. I find no competitive demand in the armed services for law trained men. I find no fear among civilians that if the law men go or are drafted the community must settle down to suffer for the lack of them.<sup>3</sup>

Llewellyn's response was that lawyers were necessary, indeed indispensable. His formulation has to be considered hyperbole, in important degree at least, but it was seriously made and is worth taking seriously.

The legal crafts Llewellyn was talking about are the lawyer's techniques and skills as employed in what Llewellyn considered to be law practice. It seems evident that he had in mind at least three law practice settings. The first was business and corporate law in traditional private firm practice. The second was the lawyering that had been done in the formulation of the New Deal programs and their integration into the larger fabric of American law: the Securities Acts, the National Labor Relations Act, the Fair Labor Standards Act, the Public Utility Holding Company Act, et cetera. The third of the "law jobs," as Llewellyn called them, was the set of legal tasks being performed in the war effort—the Lend-Lease Agreement with Great Britain and counterparts with the Soviet Union and other countries, price control and rationing, the war production and procurement system, et cetera.

Llewellyn saw all these functions as being of a piece and, as such, important contributions to the welfare of the community. His description is as follows:

[O]ur work, alone among all lines of work, represent[s] man's full effort at ordered, balanced coordination of People, State and Nation, serving not parts or interests only, but the whole - not merely regulating or repressing, but gathering, guiding, directing the whole work of the whole national team. I should suppose . . . we had found our memories crowding with the instances in which grasp of the problem, wide-ranging grasp, and grasp of the men, sure-fingered grasp, and shrewd, practical invention of ways out or through or under had proved to be the work of the law-man . . . group . . . .

[T]he essence of our craftsmanship lies in skills, and wisdoms; in practical,

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2. Llewellyn, *The Crafts of Law Re-Valued*, 28 A.B.A. J. 801 (1942).

3. *Id.*

effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for *regularizing* the results . . . . [W]e concentrate on the areas of conflict, tension, friction, trouble, doubt - and in those areas we have the skills for working out results. We are the troubleshooters. We find the way out and set up the method of the way, and get men persuaded to accept it . . . .<sup>4</sup>

We might entitle this portrait "The Quiet Facilitators."

The second portrait is dated 1958. This is the statement of the Joint Conference of the American Bar Association and the Association of American Law Schools, entitled *Professional Responsibility: Report of the Joint Conference*.<sup>5</sup> The co-chairmen of the Joint Conference were John Randall of Iowa and Professor Lon Fuller of Harvard. Perhaps it is needless to say that Professor Fuller generally is credited as the principal author of the report, certainly the author of its basic thesis. Fuller, it will be recalled, was primarily a legal philosopher, and as such was one of the most influential of his generation of legal scholars. Fuller's conception of law, like Llewellyn's, was "functional" in the sense that he understood and interpreted law not merely as legal doctrine but as a social process of which legal doctrine was a part. His legal philosophy therefore addressed not only law as text but law as practice.<sup>6</sup>

The 1958 Joint Conference Report focuses primarily on private practice. In this respect it differed from Llewellyn's synopsis, which clearly included not only private practice but the practice of public law, or government-lawyering as Llewellyn would have called it. However, it seems evident that the Joint Conference Report took private practice to be the model for all law practice, public as well as private, and assumed that the practice of government lawyers essentially conformed to the private model.

The 1958 Report described the function of the legal profession as follows:

In modern society the legal profession may be said to perform three major services. The most obvious of these relates to the lawyer's role as advocate and counselor. The second has to do with the lawyer as one who designs a framework that will give form and direction to collaborative effort. His third service runs not to particular clients, but to the public as a whole.<sup>7</sup>

The second of these functions, design of "frameworks for collaborative effort," corresponds essentially to Llewellyn's description of the lawyer's function as a whole: "We . . . set up the method . . . ." Llewellyn, however, had not specifically mentioned litigation. Most likely Llewellyn conceived that litigation

4. *Id.* at 801, 802.

5. *Professional Responsibility: A Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereinafter *Professional Responsibility Report*].

6. *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* (K. Winston ed. 1981); R. SUMMERS, *LON L. FULLER* (1984).

7. *Professional Responsibility Report*, *supra* note 5, at 1160.

was simply another way to "concentrate on areas of conflict" so as to "move men into desired action" while "regularizing the results." In any case, whereas in Llewellyn's scheme litigation as such is not mentioned, the 1958 Report treats litigation as the paradigm legal process. The lawyer's primary function is considered that of participating in adversarial dialectic in which conflicting partisan interests are formulated as rational arguments and resolved by responsively rational deliberation. Thus, the Joint Conference Report states:

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by an arbiter who attempts to decide a dispute without the aid of partisan advocacy. . . .

When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving - in analysis, patience and creative power . . . .

But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion . . . .<sup>8</sup>

In contrast to this tendency of a single mind, even a judicious one, to jump to conclusions, the tripartite adversary system permits reasoned arguments and proofs that yield corresponding rational and truth-based results.<sup>9</sup> Nevertheless, the lawyer is able to perform a related function, that of negotiation, without the benefit of adversary dialectic:

Vital as is the lawyer's role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force.<sup>10</sup>

No linkage is provided between the rationality allegedly realized through the adversary system and the "effective realization of the law's aims" that is achieved through law office negotiation. The linkage may be that the lawyer's actual experience in litigation tutors him in a rationality that he can inject into negotiation. In any event, the lawyer's "quiet counsel" presumably is the mechanism through which he "designs a framework that will give form and direction to collaborative effort," which according to the 1958 Report is his second major legal service. This function is more fully described as follows:

In our society the great bulk of human relations are set, not by governmental decree, but by the voluntary action of the affected parties. Men come together to collaborate and to arrange their relations in many ways: by forming corporations, partnerships, labor unions, clubs and churches; by concluding contracts and

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8. *Id.*

9. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

10. *Professional Responsibility Report*, *supra* note 5, at 1161.

leases; by entering a hundred other large and small transactions by which their rights and duties toward one another are defined."

This in turn leads to the third service, which is trusteeship of the legal system itself. "Private legal practice, properly pursued, is, then itself a public service . . . . The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."<sup>12</sup>

Thus the 1958 Report contemplates lawyer litigation as the deployment of reason, lawyer negotiation as the mechanism of private ordering, and the combination of these two functions as fulfilling a trusteeship in which private practice is a public service. Llewellyn was to the same effect and both statements echo a thesis propounded by Brandeis in 1905.<sup>13</sup> The theme is the promotion of social ordering, including control of conflict, through intervention of the law's reason of which the lawyer is the mind and instrument.

The third portrait comes only ten years after the 1958 Joint Committee Report, but conveys a very different picture. This portrait appears in the Final Report of the 1968 Arden House Conference sponsored by the American Bar Association. The conference, entitled *Law in a Changing America*, was focused on a set of previously distributed papers; the final report was a synthesis of the discussion which ensued. I was the reporter for the conference and hence to some extent was responsible for the final report's content. However, unlike many statements emanating from such conferences, the final report had not been prepared in advance and reflected in substantial part what the participants actually said.

It is perhaps worth recalling that 1968 was the year that Lyndon Johnson was forced out of the presidency. It was the year in which we experienced disillusionment in Vietnam, the assassinations of Martin Luther King and Robert Kennedy, a summer of riots, and the victory by Richard Nixon over Hubert Humphrey in the presidential race. It was also the year that the Kerner Commission published its report on race relations and racial inequality.<sup>14</sup> The country was wracked by discord of an intensity and complexity that produced what has perhaps become irreversible change in our national self-consciousness.

Reflecting these surrounding circumstances, the 1968 Report is directly concerned with issues of social justice. It differs markedly from Llewellyn's 1942 statement and from the 1958 Joint Conference Report in taking specific account of the emergent social conflicts associated with poverty and racial discrimination. It nevertheless harkens to the faith of Llewellyn and Fuller in legal process as a mechanism of social collaboration:

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11. *Id.*

12. *Id.* at 1162.

13. L. BRANDEIS, *THE OPPORTUNITY IN THE LAW IN BUSINESS: A PROFESSION* (1913).

14. *National Advisory Committee on Civil Disorders* (1968).

Legal institutions provide a network of relationships for cooperation and for reconciling conflict in society, and so are inconspicuous when society is at peace. Their inadequacies as well as the importance of their functions become clear in times of trouble. Central to the crisis of our time are the recurring violations of the human dignity of people who live in the cities. These violations take many forms - to race discrimination, crime, inadequacy of education and employment. They have many causes - public indifference, archaic government institutions, and insufficiency of tax resources. Our complex society is pervaded by similar if less evident problems.<sup>15</sup>

But there is no evidence of the cool optimism of Llewellyn's 1942 statement or the confidence in reason found in Fuller's 1958 statement. Gone is the previous mood of self-assurance, perhaps complacency. On the other hand, there was a reaffirmation of the responsibility and capability of the legal profession to assist in ameliorating social conflict.

The legal profession is especially concerned with these problems. The law seeks fair dealing, equity and redress of grievance - these are the benefits of legal order. For many, our institutions have proved inadequate to secure the benefits of equal justice. We must overcome this failure.

Beyond this, the systematic reexamination and evaluation of the substance of our law, with a view to its continuous improvement are essential to the legal order and especially important in a period of sweeping social change. It is a professional responsibility of lawyers to create and support the institutions necessary to achieve that end.<sup>16</sup>

The 1968 statement nevertheless evinces recognition that the scope and difficulty of social conflict were different from those contemplated in the earlier statements. Llewellyn and Fuller visualized public ordering as *in pari materia* with private ordering. Both contemplated a process of ordering that was essentially architectural rather than political: "design of frameworks," "regularizing." Both Llewellyn and Fuller portrayed legal process as unobtrusive efforts on the part of creative lawyers through which the energy of conflict between interests would be synthesized into mutually beneficial collaboration. That is, social conflict is considered a positive sum game where the result will be the greater social good. The legal process and the lawyer's role are invisible in operation, neutral in political tendency, and productive of social harmony.

In the 1968 statement, however, these premises no longer are accepted. It is recognized that the character and effect of legal process is, at best, partially dependent on forces extrinsic to legal process: "Our problems arise partly from basic weakness in social, economic and political institutions and partly from weakness in the machinery of justice itself . . . . To achieve social justice will require far-reaching institutional changes . . . ." <sup>17</sup>

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15. *Law in a Changing America, Final Statement* (1968).

16. *Id.*

17. *Id.*

Thus, there was recognition that "justice" involves a distributive dimension as well as a commutative one, and that legal process is not automatically positive or at least neutral in its distributive consequences. There was also recognition that radical change in the scale of social engineering is involved when the adequacy of legal process is considered as a substantive and distributive problem. Public ordering is not necessarily private ordering at large. Micro-legal process has to be viewed in aggregate, and when viewed in aggregate must be considered macro-legal process. There was recognition that responding to problems of distributive justice required some kind of political process, and not simply the random cumulative effects of lawyering in the private model. Having gotten this far, however, the statement reverted to the images that had been portrayed by Llewellyn and Fuller: "Lawyers have special skills - as advocates, planners, negotiators and organizers - needed in achieving such objectives. They must help provide leadership in both the public and private sectors."<sup>18</sup>

Unmistakably, there are contradictions here. The contradictions seem quite evident now, however innocuous they may have been then. One contradiction is between the idea that legal process is an autonomous social force, producing a natural concert of the social interests among which it mediates, and the idea that legal process is a positive social service like education or child care whose allocation involves issues of public choice. If legal process is an autonomous adjustment mechanism, like the market for example, in principle it can function on its own if lawyers simply will stick to their professional last. On the other hand, if legal process is some kind of governmental intervention on behalf of indigents, criminal defendants, single parent families, and racial minorities, for example, then legal process presents issues of interest group politics that necessarily would be transported into the political arena. The 1968 statement did not vouchsafe the place of the legal profession in such a political arena. It was said that lawyers should "help provide leadership," but it was not said to whom leadership was to be provided or against what sources of inertia or resistance it was to be directed.

The last of the portraits to be considered was rendered in 1986 by the American Bar Association Commission on Professionalism. The commission, under the chairmanship of Justin Stanley of Chicago, was a blue ribbon group of lawyers, judges, and academics, including some persons whom we in the legal profession call "nonlawyers." The commission was constituted in response to a concern broadly shared in the legal profession that the social usefulness and therefore the social legitimacy of the practice of law had become a matter of serious doubt.

Such being the commission of the work, it is not surprising that the resulting portrait is generally less self-assured and optimistic than the three earlier ones in the gallery. The 1986 picture is not so somber that we should consider it a

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18. *Id.* at 6.

portrait of Dorian Gray. Nevertheless, the image reveals lines of care and tensions of anxiety not appearing in the earlier paintings.

We find today that, although clients generally think well of their own lawyers, lawyers as a group are blamed for some serious public problems. Many individuals blame lawyers for the huge increase in medical malpractice litigation, with a concomitant sharp increase in the costs of insurance protection, for example

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Litigation is seen to consume vast quantities of time and money. In some instances, the class action suit is perceived as benefiting only the lawyers involved. A "scorched-earth" strategy of litigation is said frequently to squander the resources of the parties to the litigation and serve primarily to benefit the lawyers. Contingent fees, and fees generally, continue to be a subject of controversy . . .

The public views lawyers, at best, as being of uneven character and quality. In a survey conducted by this Commission, under the thoughtful direction of Commission member Gustave H. Shubert, only 6% of corporate users of legal services rated "all or most" lawyers as deserving to be called "professionals." Only 7% saw professionalism increasing among lawyers; 68% said it had decreased over time. Similarly, 55% of the state and federal judges questioned in a separate poll said lawyer professionalism was declining.

The primary question for this Commission thus becomes what, if anything, can be done to improve both the reality and the perception of lawyer professionalism.<sup>19</sup>

Whereas the 1958 Report presents the adversary system as the epitome of rationality, now it is seen as the epitome of "cost, delay and uncertainty." There has been a sharp decline in "professionalism," a term not expressly defined. By implication, however, it means those virtues by which the lawyer is a neutral, invisible agent of social reconciliation. Those virtues have so atrophied that the lawyer's function has become an additional transaction cost, "squandering the resources of the parties." And whereas the 1968 Report visualized lawyers as being in the vanguard of positive social change, and Llewellyn's 1942 statement visualized them as "getting things done . . . and regularizing the results," the 1986 Report accepts that lawyers are "blamed for . . . serious social problems."

### III. INTERPRETATION

What any one of us might make of these four portraits is, as they say, a matter of interpretation. These days, fortunately, interpretation has become an "in" thing. What has become of lawyers' services that has resulted in such change in the lawyers' self-portrait? According to Llewellyn's analysis, lawyers adjust the conflicts incidental to social transformation. Legal process converts new substantive needs into socially acceptable forms, integrates emergent demands into established agendas, ameliorates, coordinates, harmonizes. According to the

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19. American Bar Ass'n Comm'n on Professionalism, . . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* 3 (1986) [hereinafter A.B.A. Comm'n Rep.].



analysis in the 1958 Report, legal process does all this through the miracle of a uniquely rational dialectic. And according to the 1968 Arden House Statement, the larger yield of legal process is, or at least can be, a decent measure of distributive justice, enhancement of civic participation, and personal self-realization on the part of every citizen.

Yet by 1986, legal process had come to be, or come to be understood, as expensive, contentious, and ultimately pointless. What went wrong? In the first place, not everything recently has gone wrong. Much of law practice continues as it used to, not as elegant and productive as Llewellyn and Fuller imagined it to be but also not as ugly and pointless. Moreover, litigation has never been the dispassionate and rational inquiry depicted by Fuller. Even as of the halcyon days of 1942 or 1958, Learned Hand a generation before had said of litigation: "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."<sup>20</sup> We should also recall Roscoe Pound's classic pronouncement in 1906, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in which he decried the cost, delay, and inefficiency of judicial process.<sup>21</sup> And before that we had Dickens' *Bleak House*: "Fog everywhere. Fog up the river . . . fog down the river . . . the dense fog is densest . . . near that leaden-headed old obstruction . . . Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Courts of Chancery."<sup>22</sup>

As they say, although things are not what they used to be, they never were that way anyhow. While litigation today is not always much better than sickness it is better than street violence and brute political manipulation by the strong which are the usual alternatives.

In the second place, the current discontent with the legal process and the practice of law is part of a larger American discontent that we must understand, endure, and eventually transcend. As a nation we are no longer sheltered in the blissful isolation presupposed by those of us brought up in the middle west. Our society continues to suffer from not having coped adequately with being a multi-racial society or with the effects of the Japanese having assumed world leadership in commercial technology and manufacturing. Compared to these social shocks, the deficiencies in our legal process, whatever they may be, essentially are derivative. Accepting these larger facts of life is not easy or pleasant but it makes for a sense of proportion.

With these longer term and larger scale parameters in mind, we can speculate more particularly about the changes that have occurred between 1942 and the present day in the relationship between law practice and the social and political structure. This calls for less sweeping conjecture than considering what it may

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20. Hand, *The Deficiencies of Trials to Get to the Heart of the Matter* (1921), reprinted in 3 A. B. OF THE CITY OF NEW YORK, LECTURES ON LEGAL TOPICS 87 (1926).

21. 40 AM. L. REV. 729 (1906), reprinted in 20 J. AM. JUD. Soc'y 176 (1937).

22. C. DICKENS, *BLEAK HOUSE*, 1-2 (1873).

take to "get America going again," as the presidential candidates are once again promising. Such speculation nevertheless calls for conjecture on a grand scale, with corresponding infirmities in precision and demonstrability. But conjectures of this scope and imprecision are the only ways we have of trying to get our bearings.

My general point is that changes in the character of law practice are the result of changes in law's function in society, and that changes in law's function in society are a consequence of changes in economic, social, and political dynamics. The function of law and therefore the character of law practice are consequences rather than causes, although it is also true that social processes are so interactive that every consequence itself becomes a cause of other consequences. Legal process and the role of lawyers have become more ubiquitous and intrusive in the present day perhaps in part because the courts have become more activist and because lawyers have gotten more pushy. Courts have indeed become more deeply and pervasively involved in all aspects of contemporary American life, from the relationships in the family,<sup>23</sup> to the employment relationship,<sup>24</sup> to relations between the other two branches of government.<sup>25</sup> Because courts are so involved, lawyers are so involved. Moreover, and partly as a consequence, the legal adversarial style has become a pattern for other public styles, such as investigative journalism and interest group agitation. These things said, however, it seems implausible that the dominant force is that of legal process operating on political process. Rather, it seems more plausible that the deep running force is that of political process operating on legal process.

More precisely, the transformation of legal process and the lawyer's function is the consequence of the decline and superseding of other political processes in our society over the last fifty years. This historical period, and particularly the three decades since *Brown v. Board of Education*,<sup>26</sup> often has been described as one of a "rights explosion." If this is true, however, there must have been a correlative derogation of positions of what previously had been authority that was legally unchallengeable. That is to say, authority exercisable without resort to legal process generally has been superseded by authority that can be exercised only under scrutiny of judicial review. But *whose* authority is it that has been superseded? Putting the question differently, if there were winners of new rights, who were the losers?

I should not be understood as saying that all enhancements of legal rights entail counterpart losses in someone else's legal position. According equality of citizenship rights without regard to race or gender, for example, seems to me to have a positive liberalizing effect on everyone, even white males. Hence, extension

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23. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1976) (right of father to custody of child born out of wedlock).

24. See, e.g., *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

25. See, e.g., *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

26. 347 U.S. 483 (1954).

of legal rights is not necessarily a zero sum game. Nevertheless, transformation of legal rights is not always a positive sum game. If the legal explosion has brought legal process and therefore lawyers to a more central position, and a position also more visible, more political, and more troublesome, what mechanisms of social control have been correspondingly displaced?

That question calls for a very large answer, one much broader than can be addressed appropriately on this occasion. Nevertheless, it seems the appropriate order of question to be asked. This is not to say that there is no avail for the ills of the bar in the remedies that are suggested in the Report of the ABA Commission on Professionalism, such as improved law school instruction in ethics or an invigoration of fraternal relationships within the bar. It is simply to say that the increased ubiquity and ferocity of legal process are the products of deep-running social, political, and economic changes which have to be identified and understood in order to understand what has become of the legal profession and its place in American life.<sup>27</sup>

An inquiry to get at this kind of answer would be to compare the role of the legal process, now and fifty years ago, with two other processes by which authority is exercised. One such other process is, of course, the electoral-parliamentary process by which policy is made by Congress and the President and their counterparts at the state and local level. It is this process to which the legal process and the role of the courts conventionally are compared, epitomized in the recent debates over the nomination of Judge Robert Bork to the United States Supreme Court.<sup>28</sup> Obviously the shifting balance between the legal-judicial process and the electoral-parliamentary process is a fundamental aspect of our constitutional history. Nevertheless, there seems to me two other types of process of which equal account should be taken.

One is autonomous private sector authority and the other is decision-making in the public sector through what C. P. Snow called "closed politics." By autonomous private-sector authority I mean generally the powers of government that are concomitants of property ownership, including ownership and management of private corporate enterprise, and private status, notably the family. By "closed politics" I mean the decision-making based on one-to-one confidential relationships and official and unofficial committees that C. P. Snow so incisively illuminated in his works *The Masters* and *Corridors of Power*. These processes of decision-making differ from each other in that the one is based on private relationships, those of property and family, while the other is based in the political structure, particularly government bureaucracy. They are similar to each other, however, in being low in visibility, informal in structure, and highly dependent on, as they used to say, "who you are" and "who you know."

I wish here only to sketch some of these relationships and how they have undergone change in the last half century. The institutions in which these are

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27. See A.B.A. Comm'n Rep., *supra* note 19, at i-iv.

28. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 1 (2d ed. 1987), and sources cited therein.

the normal decision-making procedures include the business proprietorship and the business corporation. The trend toward separation of ownership and management in the business corporation was in full movement long ago, as Berle and Means suggested,<sup>29</sup> but it had not evolved to the degree it now has. Now the managers of large corporations often are dependent on legal process in maintaining their positions as such, and on legal-political processes for maintaining the market position of their companies. Similarly, the economic and political potency of proprietorship in real property has diminished. Fifty years ago land use controls still largely were based on the law of nuisance and private covenants, subject to some intrusion by zoning laws and other public regulation. Today, the value of property itself is dependent largely on the character of the public controls to which it is subject.

A like change has taken place in the position of organized labor. Fifty years ago organized labor had independent power sufficient to require President Franklin Roosevelt to check with the Congress of Industrial Organizations before selecting Harry Truman as the nominee for vice president in the 1944 election. Forty years ago President Truman depended on organized labor to sustain war production during the Korean War. Unions in those days effectively regulated eligibility for continued employment for something like half of the jobs in which there was a weekly pay envelope. Today, the employment relationship, which was the unions' *raison d'être*, is dominated by legal controls extrinsic to collective bargaining such as Title VII and Employment Retirement Income Security Act.

There has been a parallel change in the position of local social hierarchies. It was only sixty years ago that the Lynds in their work on *Middletown* explained the structure of this country's ancient regime.<sup>30</sup> Only twenty years ago Digby Baltzell warned the WASP elite that they had better admit some fresh blood, failing to see that the WASP elite was then already suffering a sharp drop in social blood pressure, so to speak.<sup>31</sup> Robert Dahl, writing at about the same time, found that the old elites were prominent among those who governed what was taken as a more or less typical city.<sup>32</sup> Today, the typical urban locality is legally balkanized into a center city of high rise offices and the slums of the black underclass, surrounded by middle class suburbanites who have neither authority nor responsibility for what goes on in city hall. The critical issues are influenced by but no longer disposed of in the inner councils of the old downtown clubs. Rather, they are fought out in zoning boards, the field offices of the federal regulatory agencies, the United States District Courts, and in legislative battles over state aid formulas for schools and highways. The procedures are legally formalized and the direct participants almost of necessity must be the lawyers.

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29. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

30. H. LYND & R. LYND, *MIDDLETOWN* (1929).

31. D. BALTZELL, *THE PROTESTANT ESTABLISHMENT* (1964).

32. R. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961).

Broadly, a similar formalization has occurred within the public sector. Procedures for decision are more open, more formal, more "legal."

This is a sketchy and incomplete account of the emergence of public legal process as competitive not only with the electoral parliamentary process but with systems of private authority and closed politics. But the sketch is perhaps enough to suggest the point. The legal process and the lawyer's function no longer are invisible or transparent media of adjustment between economic and social interests that have autonomous resources of political power and influence. Rather legal process and the lawyer's function are the media by which, to an increasing degree, political influence itself is constituted and expresses itself. This is true at high levels of government, where presidential counsellors stand and fall according to legal process and the work of lawyers. It is true at high levels of corporate management, where the legal intricacies of takeovers and anti-takeovers can determine who tomorrow will occupy the chair of the chief executive officer.<sup>33</sup> It is true at the low levels of ordinary community life in which most of us undergo our immediate life experience, in such matters as how the school district lines are drawn and the location of the regional sewage disposal plant.

It is not simply the apotheosis of the law and the lawyers that confronts the legal profession and society. It is the eclipse of other methods of adjusting social conflict and, in Llewellyn's words, regularizing the results. Lawyers are no longer the anonymous technicians of rational adjustment between autonomous economic and political forces. They are the visible instruments for organizing and deploying political force in fundamental social conflicts.<sup>34</sup> And they understandably are troubled at acknowledging what they have become.

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33. See A. FLEISCHER, G. HAZARD & M. KLIPPER, *BOARD GAMES: THE CHANGING SHAPE OF CORPORATE POWER* (1988).

34. This, of course, is the correlative of the process by which the role of the judge has changed in "public" litigation. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).