

Jerome Hall Lecture[†]

Fall 2002

Seeking Justice, Preserving Liberty

by
GEOFFREY C. HAZARD, JR.*

Introduction

The title of this lecture, as many will recognize, is comprised of the core concepts behind the American Bar Association's watchword: "ABA Defending Liberty, Pursuing Justice."¹ This phrase was adopted by the ABA a few years ago and evidently was intended to signify the role of lawyers in our society.²

"Seeking Justice" brings to mind the protection of interests of individuals, particularly the poor in need of legal aid and the criminally accused in need of an advocate's assistance in court.

† After a distinguished career at the University of Indiana, Professor Jerome Hall joined the Hastings 65 Club faculty in 1970. He continued teaching and writing in the fields of criminal law, jurisprudence, and religion and the law until his retirement from Hastings in 1988. Before his death in 1992, Professor Hall left a generous bequest to the College to establish the Jerome Hall Lectureship. The purpose of the lectureship is to bring to distinguished scholars, judges, lawyers, philosophers, theologians, and historians to Hastings who have special competence in the fields of criminal law, jurisprudence, legal history, moral philosophy and ethics.

* Trustee Professor of Law at the University of Pennsylvania; Sterling Professor at Law Emeritus at Yale University; J.D. Columbia University Law School; B.A. Swarthmore College. Past Director of the American Law Institute for 1984–99; Executive Director of the American Bar Foundation 1964–70; Reporter for the ABA's Special Commission on Evaluation of Professional Standards from 1978–83; Reporter for the American Law Institute's *Restatement of Judgments, Second* 1973–82; Reporter for the *Principles and Rules of Transnational Civil Procedure*.

1. AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 2 (2001), available at <http://www.abanet.org/policy/mo/chap1-12.pdf>.

2. *Id.* (adopted in 1997).

Under a broader connotation, the term “seeking justice” can suggest the term “humans rights,” with all the implications of the latter, including international human rights, freedom from oppression on the basis of sex, freedom from the threat of terrorism, etc.

The term “preserving liberty” is more ambiguous, perhaps designedly so. For me the phrase brings to mind, among other ideas, the distinction in political philosophy between liberty and equality. “Liberty” is juxtaposed with “equality” in the classic formulation of political goals in the French Revolution, “Liberty, Equality and Fraternity.”³ In modern theory of political economy, liberty usually connotes government dedicated to freedom of entrepreneurship with the right to accumulate wealth, while equality connotes government dedicated to redistribution of income and wealth, creation of economic and social safety nets, and similar measures.

I have adopted the ABA watchword to organize the basic thesis of this presentation. The thesis is that the American legal profession generally, and American law schools typically, are inappropriately silent, apologetic, or simplistically critical regarding the professional activities in which a very large majority of American lawyers are actually engaged. One of these activities is providing fee-for-service representation to ordinary individuals. The other is legal representation in matters of business interests. This is not to demean the importance of seeking justice, in the full meaning of that concept suggested above. But the thesis does argue that disregard or disparagement of the legal profession’s role regarding the mundane affairs of ordinary citizens and the legal needs of business enterprise disregards vital social interests and is ultimately utopian.

I. Seeking Justice

It is very important that the law and lawyers be concerned with legal protection for the interests of individuals, and that lawyers be involved in providing such protection. Attention to the interests of individuals is necessarily implied by the concept of democracy, whatever might be the precise definition of that form of government. Every one of our citizens is entitled to Due Process,⁴ to a fair hearing,⁵ to protection against improper search and seizure,⁶ to exercise

3. See, e.g., Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1033 (1989).

4. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

5. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

6. See U.S. CONST. amend. IV.

freedom of conscience,⁷ and to the other great personal interests recognized in our Bill of Rights.⁸ In my opinion, government should also be responsible for safety nets of various kinds for the ordinary citizen, such as public education and reasonable health care. Provision of safety nets requires government regulation and especially government finance, which means taxes, particularly taxation on the wealthy.

However, that aspect of social justice is not the special responsibility of the legal profession. The bar's special responsibility concerning social justice arises in connection with assistance in legal disputes, where the lawyer's role as advocate is implicated. Many lawyers in ordinary private practice provide legal assistance to those who cannot afford a lawyer. They do so simply by serving without fee or, having served upon the basis of a fee agreement, being unable to collect their fee. Another and much smaller sector of the profession is engaged full time in legal aid employment, including public defender service. The extent of the profession's collective effort in legal aid, the old-fashioned part-time kind and the newer full-time variety, cannot be precisely measured, perhaps cannot even be roughly estimated. But some kind of approximation is possible.

We do know that about 8,500 lawyers are employed in legal aid and defender offices.⁹ This is out of a total lawyer population of about 850,000.¹⁰ It seems a reasonable assumption that the unpaid legal service provided by lawyers in private practice totals at least the quantity provided by the regular staff. On this basis, we could estimate that "seeking justice" for the indigent, through legal aid, public defender and private law practice, is the occupation of perhaps two percent of the professional effort of the practicing bar. Not much.

Even so, provision of government financing for legal aid and public defender offices remains politically very controversial. It might be worth careful study to inquire whether the continued controversial character of legal aid is a consequence of the "activist"

7. See U.S. CONST. amend. I; James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and a Democratic State*, 1998 BYU L. REV. 479, 486 (freedom of conscience encapsulates freedom of speech and freedom of religion).

8. See U.S. CONST. amends. I-X.

9. CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995*, at 7 (1999) (indicating that 8,499 lawyers were so employed in 1995).

10. *Id.* at 1.

political terms in which the program is advocated.¹¹ However, critics of government-funded legal aid have never documented systematic abuse of that process. Instead, they implicitly acknowledge that legal aid is a political nuisance because it has been effective as far as it has been permitted to operate. The organized bar, and the American Bar Association in particular, can justly take satisfaction in their faithful support of the legal aid movement.

In any event, a much greater number of lawyers are involved in providing representation of ordinary individuals through fee-for-service arrangements in which lawyers actually collect their fees. This too is a form of seeking justice. Ordinary individuals in the course of their lives run into various legal difficulties of one kind or another. Much of the legal assistance they require is not technically sophisticated and some of it is quite mundane, but providing that assistance meets an important social need and is what many lawyers do for their living. Most of this representation is provided on the basis of a contingent fee or up front fee, because lawyer's services are expensive in terms of the average client's ability to pay.¹²

Perhaps the best inventories of these areas of legal service are found in the advertisements for lawyers' services in the yellow pages of telephone books. These advertisements, like all advertising, get right to the point—no “whereas” clauses, no formal dressing up, no beating about the bush. Through experience in the use of advertising over the last twenty or thirty years, lawyers have figured out the needs of ordinary people in the way of legal problems, and how to get attention about meeting those needs.¹³ To quote from an advertisement in a local telephone directory in an Eastern city: “Criminal Defense . . . Divorce/Annulment . . . Immigration . . . Real Estate . . . Bankruptcy . . .”¹⁴ Or from another somewhat longer listing: “Construction Accidents . . . On the Job Injuries . . . Slip, Trip

11. Years ago I had occasion to notice the very conservative terms in which the American Bar President, Lewis Powell, at the time embraced the proposed federal Legal Services Corporation. Its advocates were calling the program a mechanism for social change, whereas he called it legal aid. See Geoffrey C. Hazard, Jr., *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 700 (1969).

12. See Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyer's Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 375 (1998).

13. See AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, *YELLOW PAGES LAWYER ADVERTISING: AN ANALYSIS OF EFFECTIVE ELEMENTS* 62, 73, 104–05 (1992) [hereinafter *YELLOW PAGES*]; see also Geoffrey C. Hazard, Jr., *Is There an American “Legal Profession?”*, 54 STAN. L. REV. 1463, 1468 (2002).

14. BELL ATLANTIC, *MANHATTAN CONSUMER YELLOW PAGES* 832 (2000) (advertising services of Schwatzapfel, Novick, Truhowsky & Marcus, P.C.).

& Fall . . . Auto Accidents . . . Wrongful Death . . . Wills, Trusts & Estates . . . Matrimonial . . .”¹⁵ And most of the ads say that a response will result in a free consultation and no fee until recovery.¹⁶

It is difficult to measure the proportion of all legal services that are devoted to this kind of practice. Many of the “yellow page” lawyers are in firms that also can handle the legal problems of small business and most of them would be delighted to enlarge their practice in that field.¹⁷ The yellow page lawyers generally are in two or three person firms, although to an increasing extent this kind of legal service is provided by firms of somewhat larger size.¹⁸ However, the number of lawyers situated in solo practice and in firms with three or fewer members can reasonably be taken as a proxy demonstrating the proportion of legal services provided to ordinary individuals on fee-for-service engagements.

According to the American Bar Foundation study, there are about 360,000 lawyers in solo or two or three lawyer practice settings, out of a total lawyer population of about 850,000.¹⁹ On that basis, the proportion of legal services in this category is about 42%.

I suggest that lawyers in this form of practice are also “seeking justice.” One can be seeking justice while being paid for doing so.

Another sector of the lawyer work force is employed in prosecutor offices. In a very conventional sense, prosecutors seek justice for society and on behalf of victims of crime. It is no doubt quite unconventional to think of this kind of legal service as seeking justice for those accused of crime. But the sober and restrained exercise of prosecutorial discretion is an important safeguard against the arbitrary exercise of the power of the state.

The lawyer census figures do not differentiate between prosecutors and lawyers employed in other capacities by state and local government. The total in both categories is about 39,000.²⁰ Perhaps a third or a quarter of these are in prosecutor offices. The number of prosecuting attorneys among the lawyer population is therefore quite small, but not inconsequential.

Adding up the lawyers involved in the foregoing job categories, about 50% of the bar is engaged in fee-for-service practice primarily to individuals, in prosecutor offices, and in legal aid or public

15. *Id.* at 842 (advertising services of Rosenberg, Minc & Armstrong).

16. *See id.* at 832–53.

17. *See* YELLOW PAGES, *supra* note 13, at 119–20, 128.

18. *Id.* at viii, 78, 112–13.

19. CARSON, *supra* note 9, at 25.

20. *Id.* at 24.

defender offices. By subtraction we would conclude that about half of the membership in the legal profession is a residual category—those involved solely or primarily in representation addressed to business operations.

II. Preserving Liberty

Careful note should be taken that the category just defined, amounting to half of the practicing bar, is “representation addressed to business operations.” This category includes not only lawyers representing profit-making businesses but two other categories whose classification is perhaps more unconventional. One category is of lawyers employed by nonprofit organizations either as staff attorneys or through independent law firms. That would include service to organizations such as hospitals and universities, trade associations and labor unions.²¹ The other category includes lawyers employed on the legal staff of government apart from those in prosecutor offices.²² Using the Bar Foundation figures, the latter category includes about 30,000 lawyers.²³ I include these lawyers among those involved in “representation addressed to business operations,” for reasons explained below.

It seems pretty clear that most lawyers affiliated with law firms having more than five lawyers are engaged primarily if not exclusively in representation of businesses and other organizations, or in representation of individuals concerned with their business interests or involved in other “business like” activities. This category of law practice includes creation and transformation of corporations, partnerships, and other organizations; drafting securities and mortgages and other financial instruments, legal “maintenance” of operations through board and stockholder meetings, acquiring and managing real estate, managing the legal aspects of holdings of private wealth, the tax and regulatory aspects of these endeavors, and, not least important by any means, bankruptcy and other credit-related practice. The number of lawyers in this category is now somewhat more than 250,000.²⁴ That is somewhat less than a third of the practicing bar.

21. Hazard, *supra* note 13, at 1372.

22. *Id.*

23. The ABA figures record 5,493 lawyers in those employed by a “private association.” See CARSON, *supra* note 9, at 24. They record 38,823 as employed by “state/local government.” *Id.* I estimated that about one quarter of the latter were in prosecutor offices, which would leave about 25,000 to 30,000 in other government service.

24. See *id.* at 25.

I suggest that we consider government lawyers, at all levels of government, except those involved in prosecution of ordinary crime, as involved in business practice. Of course, in any specific alignment of the lawyers involved, the lawyers for the government are in opposition to lawyers for the corporations and other businesses. But the two sets of lawyers are working on the same legal problems, using essentially the same professional skills, applying the same technical expertise and terminology, and invoking the same sources of legal authority to achieve their objectives.

In short, the legal problems addressed by government agency lawyers are for the most part business legal problems, extending that term to include problems of nonprofit organizations.

The phenomenon of the “revolving door” between government service and private practice suggests a similar interpretation. Many lawyers have begun their professional careers in government service, with one or another regulatory agency, and then moved on to private practice in the very field of regulation in which they were previously engaged. Thereafter, some of them at a more senior level return to government.

A. A Symbiotic Relationship

The professional calling under consideration is that being pursued by lawyers on either side of what can be called the regulatory divide: lawyers seeking to enforce government regulation and lawyers seeking to resist, deflect or ameliorate government regulation. In another presentation I called the relationship symbiotic; it could be called dialectical, with due apology to Professor Hegel.

The point to be made is that on both sides of the divide the lawyers are involved in the same substantive fields: environmental law, labor law, securities regulation, antitrust, tax, etc. The point can be made more parochially and crudely: There would be much less work for lawyers representing business if it were not for lawyers in government, and vice versa.

Corporate lawyers and regulatory lawyers have a deep and continuing interactive professional relationship with each other. The practice of both groups revolves around business problems.²⁵ In terms of the ABA watchwords, the practice consists of efforts, on one side, to maintain or expand the “liberty” of business interests, and, on the other side, to impose constraints. Taken together, these fields of

25. See Hazard, *supra* note 13, at 1469–70.

practice are the vocation of a very large minority of the practicing bar, perhaps, even a majority.

Evidence from other sources suggests that this pattern has existed here and elsewhere for the last two hundred years. Put more simply, the major component of law practice today and yesterday, and in all likelihood in the future as well, is business law.

B. The Legal Profession's Ethical Focus

Although the predominant activity in contemporary American law practice thus is corporate law, the predominant theme in the profession's rhetoric and ethical concerns has been that of pursuing justice and defending liberty of individuals. There are many examples of this orientation. There is the strong admonition, set forth in Rule 6.1 of the Rules of Professional Conduct, that lawyers should render some service *pro bono publico*.²⁶ In some states this admonition has become a binding obligation.²⁷ The ABA has strongly supported the federal Legal Services Corporation, in the face of antagonism from some conservative political interests.²⁸ The ABA maintains a special fund for legal help to the poor, supported by donations from ABA members.²⁹ Many local bars have given moral, political and financial support to local legal aid and defender organizations. The bar has been steadfast, sometimes unfortunately only at the rhetorical level, that all persons accused of crime are entitled to competent legal representation, even where the accusation is of a horrendous crime.³⁰

These professional efforts are substantial in themselves and are important public statements as well. The profession can rightly take satisfaction in them. Nevertheless, it has to be recognized that the justifiable need for additional legal assistance on the part of people who are not affluent or poor is huge, if not infinite.

26. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

27. See, e.g., *In re Snyder*, 734 F.2d 334, 338-39 (8th Cir. 1984); *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965); cf. CAL. BUS. & PROF. CODE § 6068(h) (Deering 2003) ("Duties of Attorney. It is the duty of an attorney to do all of the following: . . . Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.").

28. See Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 889 (1991).

29. AMERICAN BAR ENDOWMENT, WHAT DOES THE AMERICAN BAR ENDOWMENT DO?, at <http://www.abeendowment.org/aboutus/WhatDoesABEDo.htm> (last visited Nov. 17, 2002).

30. See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

This theme of seeking justice is also predominant in the rhetoric of legal education. Most law schools now have clinical programs in which the students participate in legal assistance to the poor. Some of them have special scholarship or tuition remission plans to reward students who come from economically deprived circumstances or who, upon graduation, go into legal services for the poor. Much of contemporary legal scholarship addresses the interests of disfavored sectors of the community such as racial minorities, immigrants, and gays and lesbians. The schedules of visiting speakers at law schools tend toward advocacy for those interests. Some contemporary legal scholarship consists of frontal attacks on the prevailing constellation of political and economic interests, with the implicit or explicit theme that there should be fundamental change in the constitution of our community.

In general, the emphasis on these themes is probably good for the profession, good for law students who will soon be entering the profession, and good for the country. There are people in many sectors of our society who are in misery, in a state of deprivation, or are alienated. It is well that those of us who are more fortunate hear their cries, even the cries uttered in anger. The disregard or disdain sometimes manifested toward the sources of these voices is saddening, often shocking. Measures of reform and redress are continually required in a progressive regime—which we consider the United States to be—and knowledge of the problems to which reform is addressed is essential to intelligent formulation of responses. One wonders whether those who are in the main stream and well-off lack the moral courage to recognize that many others in our country—and outside as well—are not so fortunate, and are not to blame for their misfortunes.

In a free country the voices of protest will continue. Those who cannot stand the complaints should get out of the kitchen.

C. Disparagement of the Practice of Business Law

However, frontal attacks on the capitalist system, and lawyers who serve it, are something else. Attacks in this tenor seem to have abated since the collapse of the Soviet system and a growing recognition that a full-fledged socialist regime cannot be sustained except through political oppression. Perhaps more important for constitutional theory and practice has been the loss of enthusiasm for socialist programs in Britain and Germany. It is now recognized that some form of capitalism is essential to a constitutional regime, and some form of constitutional regime is essential to democracy.

But in law schools (and, I am told, in the English and Philosophy Departments of many universities) there remain many antagonistic voices. Those in law schools have been aptly characterized by Dean Gene R. Nichol as “Law’s Disengaged Left.”³¹ Dean Kronman’s book, *The Lost Lawyer*, can be interpreted as a more subtle and restrained expression of a similar sentiment.³²

D. The Virtues of Capitalism

It seems to me that in law and political philosophy, and therefore in the legal profession and in legal education, we need to confront more systematically the problem of accommodating the ideal of democracy, particularly the ideals of equality and social justice, with the economic reality of what it takes to achieve material abundance at a level that can make the democratic ideal a practical possibility. The present state of political philosophy has left us ill-equipped for this task. In political theory we remain torn between the ideal of equality, notably as expounded by John Rawls,³³ and recognition that a regime capable of high industrial production cannot be honestly and seriously predicated on equality. In practice, business leaders, business schools and other partisans of that interest simply ignore the issues of social justice, or indeed are oblivious that such issues exist. Law schools teach corporate law, turn out corporate practitioners, recognize and commend their alumni who are in corporate practice, but talk almost exclusively of human rights and seeking justice.

The students must think we are hiding something.

Conclusion

This is not the proper occasion for an undertaking in political theory. However, this much seems clear:

First, the conventional description of democracy embraces the concept of equality. In contrast with the concept of democratic equality, however, capitalism requires political and legal arrangements that are, as a practical matter, inconsistent with the ideal of equality. These arrangements include a profit-making incentive system, competition, decentralized control of the means of production, and resultant differentials in material and status rewards.

31. See generally Gene Nichol, *Law’s Disengaged Left*, 50 J. LEGAL EDUC. 547 (2000).

32. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

33. JOHN RAWLS, *A THEORY OF JUSTICE* 441–49 (rev. ed. 1999).

Second, it is and will continue to be problematic to determine at what strength the profit-making incentive should be allowed to operate. Subsidiary issues include how progressive taxation should be; how far down in the work force the competitive drive should permeate and how much it may be moderated by such measures as minimum wage requirements, unionization, etc. Still other issues include how much control of decentralized production should repose in corporate management; how much controlled by legally enforced worker rights; and so on.

Third, working out these arrangements involves political interpolation between contradictory general premises. Put differently, there are indeed "contradictions" in our system that cannot be avoided. Real-world resolution of these issues cannot be simply derived from "principle." Recognition of the necessity for interpolation affects not only conventional political rhetoric but also the legal techniques for implementing specific measures of reform.

Fourth, and finally, if the foregoing is essentially correct, or even approximately so, then the legal assistance provided by lawyers to business interests is part of a continuing social dialectic. I suggest that the representation of the business interest in these controversies, along side representation of individuals seeking justice, has been an essential element in the dialectic and therefore a positive social good. As a vocation, representation of the business interest, if practiced properly, is therefore honorable, and does not require apology. It does require, however, thoughtful political, legal and moral reflection.