SMU | Dedman School of Law

SMU Law Review

Volume 26 | Issue 5 Article 11

January 1972

Book Review: The Lawyer and Professional Responsibility

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BOOK REVIEW

THE LAWYER AND PROFESSIONAL RESPONSIBILITY. By F. Raymond Marks, with Kirk Leswing and Barbara A. Fortinsky. Chicago: American Bar Foundation. 1972. Pp. xii, 305. $7.95 ($2.95 paper).

Recent years have brought much talk and much concern about what is termed practice of law in the public interest. What this may mean seems somewhat vague, indeed, ambiguous. The concept that the lawyer has a public responsibility is nothing new. It appears in many of the formal statements of the law, such as the traditional oath taken by the order of the serjeants (the servants) of the law.

In this book we encounter concern about the lawyer's duty to become actively involved in ways to bring the resources of law, forensic or creative, to bear on behalf of the poor, the disadvantaged, or the less influential, to the end that legal services be made available to them, or that policy views otherwise unheard be presented. A few examples of the numerous questions related to this concept of "public interest" are: What do we mean by the public interest? Wherein does it differ from the traditional concept of the lawyer's right and duty as a citizen or as a professional? How is contact to be established between the lawyer desiring to render public interest service and those in need of or desiring service? How is the service to be compensated? The evident need for answering these and related questions brought about a study by the American Bar Foundation "of the public interest responses of the private bar," conducted by the authors of this book, which, in turn, represents their interpretation of the conclusions to be drawn from the survey. The book deserves careful reading by every member of the bar who possesses any interest in the proper functioning of our polity.

At the outset, there are a few words of advice that should be given to those who share with this reviewer an empathy for the traditional language and thought-patterns of our profession. They must be prepared to find unusual methods of expression and novel concepts of the proper mission of the law and of the legal profession. They will encounter such usages as "broker" to denote one who calls attention to need for public interest services, both to the lawyer and the service recipient, and thereby "make[s] the market for public interest law."[1] That lawyers may be "brokers" probably will cause some raised eyebrows, although the term "referral" likely would not trouble us at all. That is familiar, and professionally ethical. On the other hand, terming clients and lawyers buyers and sellers in a market definitely shocks all of us who have been acculturated to drawing a line between the emphasis of a trade upon material gain and the devotion of a profession to the ideal of service and public welfare, a line of which the authors at another point seem to approve.[2]

Breeziness of style may repel many. Neither comparison of serious legal discussion of the problems dealt with by the authors to musical comedy nor reference to a lawyer's "priestly language" in explaining professional ethics appeals to me. As to internal satisfaction, said to be barred by a requirement

[1] The book under review, at 117.
[2] *Id.* at 249.

that one "be unemotional and objective at work,"[3] all experienced lawyers know that one cannot effectively represent his client unless convinced of the propriety of the latter's cause, and that there is a fierce and a satisfying joy in achieving, legitimately, the best presentation of that cause. Indeed, the authors themselves give away their prior position when they speak, albeit slightingly, of what they term "overkill,"[4] the devotion of one's full effort, beyond the monetary value at stake, to vindicating the validity of the principle which justifies the client's position. They recognize it as the ideal of a way of life requiring "the pursuit and attainment of excellence in employing the skills of the craft,"[5] which every true lawyer brings to his practice. Where they err is in assuming that "only the lawyer in the large firm finds himself continuously faced with this ideal as a standard."[6] Rather, it faces all of us who retain our own ideals, and is reinforced by the demands of judges and a natural desire to achieve the respect of our fellows at the bar.

The basic theme of the work rests upon the foundation that not all of a lawyer's working time, in or out of court, is devoted to the advancement of the private interests of his paying clients. It may be that in some, perhaps in many, instances, the client's interest is subsumed under a general public interest, and that, with or without compensation, the lawyer, in presenting the client's cause, also vindicates, openly or covertly, the public interest. On the other hand, there are many instances wherein the lawyer, again in or out of court, presents matters on behalf of society's welfare for which he expects to receive inadequate or no compensation. The authors recognize that the remunerative character of the employment is not determinative of the presence or absence of a public interest.[7] In large measure, the book's unifying principle is an analysis of the development of the concept of public interest law in our own times, and of the means of identifying and of supporting it. Since the concept itself is elusive and amorphous in character, the work exhibits inconsistency at times, without diminishing its usefulness as a stimulant to our own thought in resolving the tensions of our time.

With the growth of populistic ideas in the first half of this century, there came into general acceptance the idea that the interests of the general public, as well as, to some extent, the interests of disadvantaged individuals, should be asserted and defended by the government.[8] Hence arose various public officers and boards, charged with formulating the public interest, proposing legislation, policing professions and businesses, hearing complaints on the part

[3] *Id.* at 211.
[4] *Id.* at 254.
[5] *Id.* at 252.
[6] *Id.*
[7] For instance, in their opening chapter, the authors, while first defining the terms "pro bono" and "public interest" as having come to mean "voluntary dispensation of skills on a nonfee basis," conclude that this "obscures" and "oversimplifies," *id.* at 7, and note "in the past some underlying and silent assumptions that the public's business has been accomplished by the everyday professional pursuit for gain." *Id.* at 9. Despite giving an apparent back of the hand to these "assumptions," the subsequent development of the book reveals that actually there has been, and continues, this intermingling of public and private interest, even in fully privately funded matters.
[8] The spirit of earlier times, when public service was viewed as more of an individual activity, finds apt expression in J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION *passim* (1907).

of persons affronted by business and, occasionally, by government, and rendering decisions on these complaints when they could not be adjusted by negotiation. In the realm of criminal justice, the same movement took the form of the confrontation of the public prosecutor by the public defender. For a time, these changes worked well. Crusading zeal marked the activities of the new tribunals, and the public defenders fought the prosecutors with enthusiasm comparable to that of the compensated criminal defense counsel.[9]

With the 1960's came "new community attention to the issues of poverty and social injustice," particularly to "the failure to democratize the means of access to the legal system," stirred by "increasingly vocal and persistent demands for specific legal service, and also by demands for access to the broader legal and political processes."[10] These two types of demands form the substance of what the authors refer to as, presently, "public interest law," which, increasingly, it is sought to serve through various forms of professional activity. As we shall see, the authors' examination leads them to broaden significantly this concept.

The authors embark upon an examination of the various modes by which the private bar currently is fulfilling this public interest. Although it would seem more logical for the authors initially to explain why this "public interest response" is occurring, they instead choose to explain that there is "a new professional" and "a new profession" in which the "committed lawyer is seen as taking a role which allows him to express personal values as well as to assume an ultimate personal responsibility for his professional actions."[11] One wonders whether the interviewees upon whose statements these preachments are based are adequately equipped to pass judgment. Is it true that, save for the last dozen years, the lawyer has divorced himself from all consideration of the social consequences of the goals of his client? I spoke earlier of the need of the lawyer to convince himself of the propriety of his client's cause. Necessarily, he must establish that propriety by relating it to the various categories of the public interest. Unless he can convince the judges of the congruence between public interest and private interest, his labor will be in vain.[12] Is it only the day before yesterday that the obligation to defend the unpopular client or cause has been recognized? Our authors give recognition to outstanding luminaries of the law, from Sir Edward Coke to Charles Evans Hughes and the Association of the Bar of the City of New York, who have performed this duty.[13] They could have expanded the list indefinitely. And, while on this subject, is the lawyer who self-righteously proclaims that he will not represent a corporation accused of polluting the environment any the less to be censured

[9] For an analysis of some of the defects of this system, see Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469, 470 (1968).

[10] The book under review, at 41. *See also id.* at 51, where the authors state that their definition of public interest response "includes both efforts to democratize participation in the legal processes and policy efforts addressed to the overall good of the community." This last, of course, requires some determination as to where the overall good of the community lies.

[11] *Id.* at 201, 202.

[12] *See, e.g.*, Prudential Ins. Co. v. Saxe, 134 F.2d 16 (D.C. Cir.), *cert. denied*, 319 U.S. 745 (1943); German Ins. Co. v. Shader, 68 Neb. 1, 93 N.W. 972 (1903); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[13] The book under review, at 15.

than the lawyer who will not take the case of a civil rights worker in Mississippi? In either case, is he not refusing the defense of unpopular defendants because they are unpopular?

The authors, at least, recognize that understanding of the need to seek "responsible social changes" has been present amongst the bar for a long time.[14] Many of their interviewees, however, seem oblivious to this, as well as of the need to balance progress by stability. Thus, the strictures upon the profession for failing to recognize the need for dealing more vigorously with problems which, moving into the spotlight, are partially responsible for the emphasis upon "public interest now," seem a bit unfair.

Turning again to the forms of response toward the demand for "public interest law now" the authors first examine the private law firm, acting through either permission to partners or to associates to do public interest work upon their own time, or through public interest committees or partners who encourage volunteers to join in public interest activity under their supervision or who even are able to "draft" them to serve. All these are regarded as relatively ineffective, though symbolic of a change in attitude which may lead to effective participation, largely dependent upon the personal drive of the man in charge. The authors, however, think that, as compared with the small firm or the solo practitioner, the large law firm definitely offers a superior vehicle for the promotion of public interest practice. To the extent that the large firm has the superior resources, I would agree. But personal observation leads me to observe that very effective service may be obtained from small groups or from the solo lawyer. The authors, perhaps wisely in view of limits of time and resource, deliberately cut themselves off from gathering information concerning these units, and so they are hardly in a position to pass an authoritative judgment.

The authors also consider the public interest department or section of the large firm. They feel these to be more definite firm commitments to public interest activity, but subject to certain glaring weaknesses, such as the problem of how lawyers are to be recruited or assigned to public interest, how lawyers are affected on the prospect for promotion, and how an activity predicated on a noneconomic base can be supported, consonant with meeting the requirements of solvency for the firm.

The public interest law firms present the most recent development. The authors do not attempt a definition, although they do give certain characteristics which they found common. Within these broad outlines there is room for a variety of forms, such as the Native American Rights Fund, the Center for the Study of Responsive Law, the OEO Legal Services Program, the Stern Community Law Firm, and some individual firms and practitioners. The modes of operation of several of these programs are described. As might be expected, there is considerable difference in details of object and of method. The main difficulties center around support, and the advantages and disadvantages of reliance for support upon foundations, governments, or assorted clients within the firm's area of specialization.

[14] *Cf.* R. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

In chapter nine the authors attempt to define a "public interest client." They seem to say that public interest law practice may concern itself with bringing to the fore questions of policy not normally considered within the ambit of an individual's dispute before the court, and that the lawyer, himself, may be speaking up for these policy issues through his role as a leader of public discussion. This thought is, perhaps, carried a little further in a later sentence: "The public interest clients and the public interest lawyers object to existing conditions and practices in this country."[15] The reaction of some to this last statement may be to characterize the public interest group as mere agitators and trouble makers. This would be most myopic, however, since they may have something of importance to tell us.

At the outset, unfortunately, the authors will almost lose the average reader's attention by proclaiming that it is doubtful whether a test for determining what is worthy of being deemed in the public interest can be formulated.[16] The authors examine and reject economic tests. They rightly say that we should not "rule out interests because they lack dollars,"[17] although they do not reprehend the use of dollars to "gain access to the public forum."[18] They go on to examine the ways in which persons without dollars gain their access for the vindication of what they regard as their interests, and encounter the traditional methods: legal aid, public defenders, voluntary assumption of the task by lawyers, groups, or organizations, all of whom agree to take cases on the subjective basis of what appeals to them as the thing that should be done, given the persons and the objectives involved. Definitely, this gives no ultimate touchstone, save the conclusion that "in a pluralistic society it is far better to hear from all than from some or none. The logical definition of public interest—a totality of all interests in the community balanced for the common good—supports a hospitable view of the self-arrogated or self-elected public interest client."[19]

In chapter ten the authors survey the extent to which the man who "object[s] to existing conditions and practices in this country" and strives to change them within the framework of the law may differ in his performance as a lawyer from those not so motivated. As the representative of his clients, the authors surmise that he will, like "the traditional private lawyer" and all other lawyers, identify himself with the legitimate needs and goals of his clients. Thereby, he will gain knowledge of facts of life with which previously he may not have been acquainted. Frankly, I can see no great difference here between the old and the new, save as the latter's "education" may be along different lines. If he remains a lawyer, and does not become a revolutionary, his responses in the courts and in the world will not be different in kind although they may differ in objective.

It is in their treatment of the public interest lawyer's relation to "his Institutions"[20] that I find myself least in harmony with the authors. They seem to

[15] The book under review, at 236.
[16] *Id.* at 225.
[17] *Id.* at 226.
[18] *Id.* at 227.
[19] *Id.* at 237.
[20] *Id.* at 245.

concur in the notion that the public interest lawyer may have an image of professional responsibility differing from that of the traditional lawyer. They accept the premise that the traditionally minded opt for economic and social comfort in life styles, and so tailor their professional roles "through the mechanism of client selection or rejection." As I have already indicated, I reject this categorization. Some traditionalists may proceed in the way suggested and for the motives indicated. More of them proceed from conviction and with personal integrity. Many lawyers who proceed in the traditional manner rigorously separate their political and civic positions from their clients' views. If they are able lawyers, they attract and hold clients despite the latter's disapproval of their stand on public matters. Certainly, they are quite as able to think, and to think with a clear conscience, about the implications of their work day and of the matters they are handling as is the avowed public interest lawyer. And so I would say to the authors and to the lawyers they portray, that "all law is public interest law,"[21] and I would contend that this is the position taken by all that great company who worthily play their roles in the profession.

In chapter thirteen we find a very perceptive examination of the problem of how to support the "public interest" representation which does not generate remuneration adequate to pay its cost. It is, however, probably the least carefully written portion of the book. The suggestions are thrown out with no consideration of the multitude of details that must be resolved before the various schemes[22] could be put into successful operation. Too, the foundations upon which the suggestions are built seem faulty. One example is the parallel between professional service and public utility operation drawn by the authors. This analogy fails, in that the lawyer has neither a natural nor a de facto monopoly position, since admission to the bar is open to all who have satisfied certain educational requirements and passed a test of proficiency in the law.

To conclude, the authors have done a great service in stimulating thought concerning the problem of providing needed legal services for various objectives, and in suggesting ways whereby the need might be met. They have also raised the very pertinent issue of the need for bringing into play more factors bearing on the wisdom of policy decisions which must be made for the ongoing of society. Not all of their strictures upon the way we practice our profession seem sound, but this does not detract from their basic proposition that the individual lawyer, and lawyers as a profession, need to ponder, constantly and increasingly, their responsibilities for the effectiveness of law as the matrix of society.

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[21] *Id.* at 249.

[22] The authors suggest grants from private foundations, statutory attorney's fees, governmental financing, and tax deductions for public interest works as methods of financing public interest representation.

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