AN EMBATTLED PROFESSION: THE ROLE OF LAWYERS IN THE REGULATORY STATE

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I. INTRODUCTION

Australia and the United States are highly professionalized societies. Both are modern complex societies wherein professionals exercise their expertise in aid of industry and government.[1] In these societies the most critical of relationships is that between private property and the individual on the one hand and government on the other. This relationship is no Johnny-come-lately.

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The views expressed are those of Eric Szweda and do not necessarily represent those of his firm.

1 Their absence is one of the obstacles in the former Soviet Union. See United States Bankruptcy Judge, S Brooks "Soviet Law and Judiciary Unprepared For Economic Reorganisation", 22 *Bankruptcy Court Decisions* A1 at p A4 (12 December 1991): "It is a judicial system largely bereft of what we would consider necessary knowledge, experience, and competence in the areas of private property law, commercial transactions, bankruptcy, and reorganisations." For an account of professionalism in Russia, see E Huskey "Advokatura: In Search of Professionalism and Pluralism in Moscow and Leningrad" (1990) 15 *Law and Social Inquiry* 419.

Philosophers have pondered it and our political and legal constitutions have attempted to resolve the tension between freedom of the individual and the role of government in public welfare.[2] The rule of law is a central tenet of both our professional societies.[3] In it we recognize the limits of governmental power. The rule of law requires professional agents for its effectuation.[4] In our tradition these agents are lawyers, whose representational function makes them the "profession par excellence".[5] The profession has played a vital role in shaping the history of our respective societies. It has been observed that "what made English history in the seventeenth century was the legal profession."[6] Lawyers are agents who will represent individuals and private organisations generally in their dealings inter se and with government.[7] The most celebrated function of the private bar is the representation of individuals who have been subjected to the overweening and arbitrary exercise of governmental power.[8] It is that function that is now under challenge and this for the reason that government in our respective modern complex societies struggles for means to efficiently exercise its powers. The power ceded to lawyers and other professionals may thwart government in reaching its objectives. This too is not new. Two learned commentators, having examined a hundred years of legal change in England, 1850-1950, commented that post-1950 the old need for a legal system which protected private property and gave certainty to transactions and transfers continued unabated.[9] Nevertheless, the prevailing ideology had changed and the enthusiasm for leaving individuals to operate legal safeguards to their advantage had to give place to overriding regulation in aid of the weak, the oppressed and the ignorant.[10]

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2 *Konigsberg v State Bar*, 336 US 36 at 52 (1961) "On one level, the claims for disclosure are one side of the familiar conflict between the competing demands of government efficiency and of constitutional rights".

3 Geoffrey De Q Walker *Rule Of Law: Foundation of Constitutional Democracy* (1988).

4 *Id* 36-40.

5 I Szelenyi and B Martin "The Legal Profession and the Rise and Fall of the New Class" in *Lawyers in Society: Comparative Theories*, Vol 3, p 269 (ed R Abel and P Lewis 1989) (discussing Ghandi).

6 E Baker, Foreword to I O Jones, *The English Revolution* (1931).

7 M S Larson "The Changing Functions of Lawyers in the Liberal State: Reflections for Comparative Analysis" in Abel and Lewis note 5 *supra*, p 441.

8 But Cf Bentham, who considered lawyers an unnecessary complication in achieving justice, for discussion *see* G J Postema *Bentham and the Common Law Tradition* (1986) pp 350-52.

9 W R Cornish and G de N Clark *Law and Society in England* 1750-1950 (1989) pp 116-117.

10 *Id.*

The starting point for our discussion reaches back to our constitutional roots. American law and constitutional tradition has demonstrated a strong distrust of government.[11] This has not been as marked in Australia. To the American revolutionaries, republicanism connotated not only a restructuring of political institutions, but called for a "regenerated society" as well.[12] Society would be structured around the virtuous and productive individual. To encourage self-determination the individual would pursue his own destiny with a minimum of interference from public authorities.[13] The centrality of the lawyer to republicanism was dramatically demonstrated over forty years prior to the revolution in the *John Peter Zenger* trial. James Alexander, a prominent attorney, had started an opposition newspaper to the rule of the colonial governor of New York, William Cosby. This paper, which was entitled "The New York Weekly Journal," was printed by John Peter Zenger and lasted for only two months before Cosby shut it down. Instead of taking action against Alexander, Cosby brought charges against Zenger; either because Zenger was an easier target, being a poor and unknown German immigrant, or because skilled printers were few in number, and it was more effective to strike at Zenger.[14] Alexander initially took up the defense of Zenger, but was disbarred by Cosby, and in his place stepped Andrew Hamilton, a lawyer from Philadelphia.[15] Hamilton focused the trial on historic examples of usurpation of power by English governments and the need for exposing tyranny.[16] Zenger was acquitted and Alexander published his *Narrative of the Case and Trial of John Peter Zenger*, which was reprinted several times over and became perhaps the most widely known source of libertarian thought in 18th century America.[17] It is said that the *Zenger* case "destroyed once and for all the notion that government officials were entitled to unqualified allegiance and support ... the trial helped create a climate of civil disobedience in which the idea of political independence was conceived and nurtured."[18]

Lawyers continued to play a prominent role in colonial resistance to English rule. John Adams, Alexander Hamilton, and John Jay are among the examples of revolutionary leaders who were also lawyers.[19] Hamilton and Jay also authored the instrumental Federalist Papers, along with James Madison. At

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11 J H Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

12 M Bloomfield "David Hoffman and The Shaping of a Republican Legal Culture" (1979) 38 *Maryland Law Review* 673.

13 *Id.*

14 P Finkleman "The Zenger Case: Prototype of a Political Trial" in *American Political Trials*, p 30 (ed M Belknap 1981).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id* at 22 (quoting R. Morris *Fair Trial: Fourteen Who Stood Accused from Ann Hutchinson to Alger Hiss* p 69 (rev ed 1967)).

19 J Shepherd *The Adams Chronicles* (1975) at p 40; J Hamilton, J Jay and J Madison *The Federalist* (*Introduction* by E M Earle, 1937), p xxiii.

least some of the power of lawyers in American society stems from their role as agents in restraining government.[20] They are vital to the idea of the rule of law in pluralist democracy. As the power of government has become manifest as a concomitant of societal complexity, the power of lawyers has magnified.[21] Even during the Jacksonian period, the influence of which persisted until the late 19th century,[22] when an organized body of lawyers was viewed as elitist and consequently attacked through legislation decreasing educational and training requirements, the body politic sought merely to open up the bar and not to destroy it.[23]

It follows that in the fabric of American society lawyers are the most fundamental professional group. Yet, their most traditional role is now directly challenged. This paper is designed to discuss the challenge, as lawyers are required by government to give place to governmental aims and goals by foregoing their representational role in the rule of law. Because the legal profession is so central to American democratic tradition, it makes a revealing case study of the tensions surrounding professions in our complex societies. If American law is willing to contemplate the demise of the strong legal representational role perhaps it is that policy makers in Australia, less sensitive to governmental overreaching, ought to be doubly aware of encroachments that may undermine the lawyer's essential place in the rule of law. This debate becomes even more pertinent given the predilection of Australian lawmakers to look to American precedents when considering regulation of markets.[24]

An immense literature is now flourishing on the topics touched upon in this paper. Professional responsibility, ethical obligations, the structure of the professional, and its public duties, are but some of the matters now actively debated. Our purpose is to crystallize some of these issues in a way that may allow some informed prognostications about the place of the legal profession as both our societies enter the last decade of the twentieth century. Australian readers may judge how far the concerns we voice in this paper may resonate in their society. Our hunch is that our differences are not of sufficient moment to discount the force of our thesis in Australia. Our point, put shortly, is that the representational role of lawyers, a cornerstone of the rule of law,[25] is threatened

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20 In England lawyers also assumed powerful political positions in both the Conservative and Liberal ranks, see W R Cornish and G de N Clark, note 9 *supra* at p 98 noting Asquith, Lloyd George, Loreburn and Haldane.

21 R Lewis and A Maude *Professional People In England* (1953) at pp 2, 5, 35.

22 M J Osiel "Lawyer as Monopolists, Aristocrats, and Enterpreneurs" (1989) 103 *Harvard Law Review* 2009 at 2026.

23 For reaction against elitism in USA see P Atiyah and R Summers, *Form And Substance In Anglo-American Law* (1987),p 38.

24 For a revealing analysis of the importance of an autonomous legal profession, see S Ellman *In a Time of Trouble: Law & Liberty in South Africa's State of Emergency* (1992) finding that the legal profession in South Africa played a critical role in restraining governmental abuses under Apartheid.

25 G de Q Walker note 3 *supra.*

by our society's response to a crisis in governance. In the regulatory state, born of a desire to bridge the gap between government impotence and social expectation, the strong representational role jars. It runs counter to the functioning of groups like lawyers in a neo-corporatist mode of organizing society. In the process, the state regulates the individual.[26]

Section II provides a short explanation of the neo-corporatist model of the state and how professions, like the law, make and implement public policy. In Section III we undertake an examination of the societal role of lawyers. We find that traditional professional culture, the rhetoric of professionalism, duties to clients and courts, ethical and moral obligations, and wider public duties historically undergirded the lawyer's representational role. The legal profession's place in history has been significant; indeed, it has molded history. The contribution has been to a vision of society as pluralistic and based on individual rights.

In Section IV, however, we suggest that the regulatory state has imposed irreconcilable pressures on the representational role of lawyers. Governance would be much easier if the strong representational role were ameliorated. Government has barely tolerated lawyers in the past but now we find that initiatives are designed to weaken the bond between lawyer and client and to place the lawyer in the position as gatekeeper of the public good. We trace some of these governmental initiatives from the well-worn needs of regulating the securities markets, to the new imperatives of putting the Humpty Dumpty of the thrift institutions debacle back together again. We note the battle against organized crime, the war on the illicit drug trade, and a weariness with overburdened administration of justice. To cure these ills government has taken steps that enfeeble the lawyers' representational role. While this is a strong trend we observe that not all have been supine in its face. The courts, on occasion, have questioned the erosion. Perhaps the stage is set for another clash between government and the courts. We can hope that our countries have a Lord Coke.[27]

II. THE LEGAL PROFESSION IN A CHANGING STATE

The legal profession, along with other professions, is often seen as a group or organisation that has won a privileged position per favour of the state. The profession is protected from marketplace forces and consequently claims economic rewards. This view is taken by both the 'right' and the 'left'. The right via economic theory views the profession as procuring state protection and claiming inordinate economic rewards.[28] The 'left', via class or Marxist theory,

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26 This development is identified and criticized by C A Reich "The Individual Sector" (1991) 100 *Yale Law Journal* 1409.

27 L L Jaffe and K J Henderson "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 *LQR* 345.

28 See M Friedman *Capitalism & Freedom* (1962), pp 137-60.

perceive of the professions as a ruling class tool. The growth of the legal profession is due to the rise of capitalism.[29]

We prefer to start on a different and more enlightening basis. In any society decisions must be made to implement policies. The role of pressure groups, lobbies, organisations, churches, etc. in society have generally been conceived as providing options to government, for government to implement or reject. This is the pluralistic model, where open political market organisations compete with each other for the benefits that the state may bestow. This theory supposed the state to be an empty vessel, but events of the 1960s and 1970s[30] established that the state too was an actor that influenced the development of policy.[31] In addition, as recent events in Australia attest, the State can be corrupted by its business connections.[32] At the same time, it was recognized that the state did not have a monopoly on the implementation of policy; organisations also could be active in policy implementation. Citizens demanded much of the state - social security, greater certainty in life's course - that strained the capacities of government. By enlisting organisations to the governmental endeavour, claims on government could be more adequately met. This has been called "neo-corporatism".[33] The organized professions are such pressure groups or organisations. Trade unions are another and their corporatist functioning is more established.[34]

The organized bar both cooperates with and opposes governmental policies. Governments align positions to accord with policies of the bar. Tort reform is a signal example of the interpenetrating policies of government, industry (including the medical profession), and the bar, in the modern process of policy making.[35] Any consensus reached is so much the stronger because of the

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29 R Abel *American Lawyers* (1989) at pp 40-126.

30 *Id* at p 384.

31 Recent economic theory of regulation has also recognized the active role of government, see F S McChesney "Rent Extraction and Interest-Group Organisation in a Coasean Model of Regulation" (1991) 20 *Journal of Legal Studies* 73.

32 *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* ("The Fitzgerald Report", 1989, Queensland). A further inquiry, the Royal Commission into Western Australian Government Dealings, is in progress.

33 T C Halliday "Legal Professions and the State: Neocorporatist Variations on the Pluralist Theme of Liberal Democracies" in R Abel and P Lewis, note 5 *supra* 375 at 384. The demand for efficacious governmental action in conflict with the "democratic wish" is explored in J A Morone *The Democratic Wish: Popular Participation and the Limits of American Government* (1990).

34 Cf the pact between the Union Movement and Government of Australia during the 1980s designed to overcome economic and industrial affairs impasse, commonly known as the Prices and Incomes Accord.

35 PH Schuck *Tort Law And The Public Interests: Competition, Innovation And Consumer Welfare* (1991).

amalgamation of interest groups. Indeed, without cooperation any resolution is likely to be unstable and short-lived.[36]

However, the neo-corporatist model is undermined by the traditional representation role of lawyers. Lawyers may be retained to destroy the result of the consensus which they, with government, are expected to implement. The representational role may appear as an artifact of a pluralistic model and unsuitable for a neo-corporatist style of governance. Thus, the attempts to compromise the representational role are supported by those avid for governmental efficacy.

In the next section we examine the representational role of lawyers. We conclude that the role is strongly rooted in history and inconsistent with attempts to bend it to governmental goals.

III. SOCIETAL ROLE OF LAWYERS

A. DUTIES TO THE COURT

Ethically, legally, in terms of history or pragmatically, the lawyer's obligation is to his client. In the adversarial system, that has evolved in the common law, this duty is a guardian of liberties of citizens. Lawyers historically, however, have had constraints imposed upon them in representing clients. For example, they are not permitted to collude with clients to commit crimes. More subtley they must at times consider the interests of third parties, such as the courts, society, government, and brethren.[37] These third party oriented constraints are largely ill-defined, whereas, duties to the client are specific.[38] Society recognizes that it is morally just to place the interests of those relationships, such as, friendship, kinship, and knowing a person in particular danger, over the interests of the wider collectivity.[39] The same holds true with the relationship of the lawyer and the client.[40] Throughout the history of the legal profession,

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36 A recent example of joisting between government and the American Bar Association is the former's proposal for tort reform issuing from the President's Council on Competitiveness and the latter's response in its "Blueprint for Improving the Civil Justice System", see C Harlan "ABA says Bush's Proposals to Reform Civil Justice System Ignores Main Issues" *Wall Street Journal* (2 February 1992), p B6B.

37 *Thread v US* 354 US 278.

38 C Wolfram *Legal Ethics* (1986) Section 4.1 at 147 "The theory on which a lawyer incurs obligations more onerous than those dictated by contract law is rarely spelled out."

39 See C Fried *Anatomy of Values* (1970), pp 207-36.

40 C Fried "The Lawyer as Friend; The Moral Foundations of the Lawyer-Client Relation" (1976) 85 *Yale Law Journal* 1060 at 1066 and 1071-72: "A lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you - not an abstract relation as under the concept of justice. That means that like a friend he acts in your interest, not his own; or rather he adopts your interests as his own. To be sure, the lawyer's range of

the representational role has been undergirded:[41] "The relationship of client and practitioner is the basis of professional morality."[42] Consequently, the lawyer is a partisan; hired to accomplish for the client that which the client would do for herself, if she possessed the legal ken to do so individually. The lawyer advises, about the law, and puts into action the client's dictates. It has been the client who must consider and take personal responsibility for her actions that she effected through counsel.[43] The client seeks legal not moral advice from legal counsel, and expects his rights to be determined by the judge or jury, not counsel.[44] History has carved out the unique place of lawyers in society and accordingly we briefly review the changing role of lawyers in our common law cultures.[45]

The occupation of the lawyer emerged in England around the 1200s, although little was written about the structure and nature of the profession prior to the 1800s.[46] Unlike today, much of the work of the lawyer was done in the presence of the court and the bench and bar interacted socially.[47] The connection between the bench and bar was close; the bench could significantly control the bar, and the bar in turn was viewed as a friend and advisor to the court.[48] Over time the English lawyer gained a measure of independence from

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concern is sharply limited, but within that limited domain the intensity of identification with the client's interests is the same".

41 G Bellow and B Moulton, *The Lawyering Process: Ethics And Professional Responsibility* (1981) at p 2 (authors note that the traditional paradigm is the lawyer as partisan).

42 R Lewis and A Maude *Professional People In England* at p 59 (1953); see also C Fried, "The Lawyer as Friend; The Moral Foundations of the Lawyer-Client Relation" note 40 *supra* at 1075: "Moreover, the legal system, by instituting the role of the legal friend, not only assures what it in justice must - the due liberty of each citizen before the law - but does it by creating an institution which exemplifies, at least in a unilateral sense, the ideal of personal relations of trust and personal care which (as in natural friendship) are good in themselves".

43 Q Johnstone and D Hobson *Lawyers And Their Work* pp 78-79 (1967); D Mellinkoff *The Conscience of A Lawyer* (1973) p 157.

44 D Mellinkoff *id*, quoting Baron Bramwell in *Johnston v Emerson*, LR 6 ex 329, 367 (1871): "A man's rights [he said] are to be determined by the Court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will abdicate a case against their own opinions. A client is entitled to say to his counsel, 'I want your advocacy, not your judgment; I prefer that of the Court.'"

45 With apologies to Winston Churchill like the English language, our common law heritage divides us: for differences see P Atiyah and R Summers *supra* note 23, pp 359-383.

46 W R Prest *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (1986) p 1.

47 R Alexander "The History of the Law as an Independent Profession and the Present English System", p 11 in *The Lawyer's Professional Independence* (ed Tort and Insurance Practice Section, American Bar Association (1984)).

48 J Dos Passos, *The American Lawyer* (1907), p 9; G Warvelle, *Essays In Legal Ethics* (2d ed 1920), p 28.

the courts. In England a strong private legal profession developed.[49] As the private profession gained strength and lawyers began representing clients for money, it seems only natural that the lawyer's advocacy function would displace their former intimacy with the courts.[50] The courts also came to be satisfied in their own permanence, and cared less about regulating the bar.[51] By the time English-trained lawyers came to Colonial America to practice, the lawyer was no longer considered a 'friend and advisor' to a court. The adversary system was firmly rooted in the English system of law[52] and this was transplanted to the colonies. The practice of law in America was fractured in terms of jurisdictions and distance and accordingly the degree of intimacy that the bench and bar still enjoy in England was lost in America.[53] In 1907, a prominent American lawyer, John Dos Passos, wrote "the courts have long since ceased to regard [the lawyer] as a real, disinterested friend, advisor and judicial adjunct. The lawyers and the courts have been effectively divorced."[54] On the other side of the Atlantic, eighty-seven years earlier, Lord Brougham had delivered his now oft-cited speech in defence of the Queen, in which he stated that "the highest and most unquestioned of his duties" was to his client.[55]

The artifact of the lawyer as officer of the court remained, however, a convenient justification for summary measures against lawyers.[56] The more cumbersome course of proceeding against the lawyer by regular legal process - in civil cases by summons; in criminal offenses by indictment - was avoided.

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49 A Carr-Saunders and P A Wilson, *The Professions*, p 540 (1933): "Broadly, we may say that the continental tradition has been to assimilate law very closely to government, whereas the Anglo-Saxon tradition has tended toward differentiating government from what I had elsewhere called, because of its different basis of order, the societal community. In terms of cultural content, the most important difference between the two traditions involves the status of private legal rights either against the government or in independence from it. In terms of social organisation, the difference consists in the much more pronounced development in England of an independent legal profession that, in the course of the repercussions attending its development, has also attained control of access to the judiciary"; R Lewis and A Maude *Professional People In England* (1953); H Perkin *The Rise of Professional Society: England Since 1880* (1989).

50 J Dos Passos note 48 *supra* at p 9; see also C Moreton "A 'best bestrustyd frende'?: A Late Medieval Lawyer and His Clients" 11 *Journal of Legal History* 183 at 187 (1990) (Identifying commercial oriented nature of pre-Reformation lawyers).

51 R Alexander note 47 *supra*, p 10.

52 S Landsman "The Rise of a Contentious Spirit: Adversary Procedure and Eighteenth Century England" (1990) 75 *Cornell Law Review* 497.

53 P Atiyah and R Summers note 23 *supra*, p 367

54 J Dos Passos note 48 *supra*, p 68.

55 S Rogers "The Ethics of Advocacy" (1889) 15 *Law Quarterly Review* 259, 269 (Quoting Lord Brougham).

56 J Dos Passos note 48 *supra*.

At the same time "the courts could, at any time, restore [the lawyer's] prestige, and take him, as it were, again to their bosom, as a real official friend."[57]

This duty to the court could be invoked also to temper the harshness of the adversarial process. The courts as law-making organs need reliable information. They need to know the law bearing upon the dispute whether or not it supports the protagonists position. The adversarial process usually ensures a well-refined level of information. However, if battle is joined too vigorously the fear is that the court may be deprived of information and the process of law-making will suffer.[58] The duty is a reminder of this higher endeavor. Even in recent times this duty was invoked by the House of Lords to justify the immunity of barristers from negligence liability.[59] However, this immunity has narrowed considerably in face of the demand that lawyers should be responsible to clients.[60] The erosion in immunity confirms the dominance of the representational model of the lawyer's role; that role is enhanced by a liability rule requiring due care in carrying out the representational function.

The weakness of the lawyer's duty to the court in the United States is underscored by the courts ready acceptance of a rule imposing liability on negligent attorneys, and this in contexts where the negligence takes place in the matters closely connected with the representation of clients in court.[61] Although the English courts do not emphasize the lawyer's duty to the court, the commitment to the law and the functioning of the courts is greater because of the bench and bar intimacy, the custom of promotion to the bench and a culture of restraint.[62]

American courts generally have not sought to regain the intimacy of the bench and bar. Under the theoretical workings of the adversary system, a close relationship with attorneys is not required and may in fact be seen as anathema to the system of justice predicated upon a neutrality.[63] Instead of relying on

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57 *Id*, p 68.

58 H K Lucke "A Common Law, Judicial and Partiality and Judge-Made Law" (1982) 98 *LQR* 29.

59 *Rondel v Worsley* [1969] 1 AC 191.

60 *Saif Ali v Sydney Mitchell* [1980] AC 198; in Australia see *Giannarelli v Wraith* (1988) 165 CLR 543 (upholding the immunity for in court conduct of barristers and solicitors).

61 *Woodruff v Tomlin* 616 F 2d 924 (6th Cir 1980), the court rejecting the reasoning in *Stricklan v Koella*, 546 S W 2d 810 (Tenn App 1976), cert denied, *id* (Tenn 1977) where the court had adopted the view espoused by the House of Lords in *Rondel v Worsley* [1969] 1 AC 191; to be sure the courts have recognised the wide degree of judgment or discretion exercised by attorneys when representing clients in court; see *Woodruff*, *id* at 931-932; *Gans v Murdy*, 762 F 2d 338 (3d Cir 1985); *Bernstein v Oppenheim & Co PC*, 160 AD 2d 428, 554 NYS 2d 487 (1990).

62 See P Atiyah and R Summers, note 23 *supra*, p 367 describing the "barrister as a genuine officer of the court and guardian of the judicial process."

63 See Bentham, who regarded the "partnership" as having "for its object the extracting, on joint account, and for joint benefit, out of the pockets of the people, in the largest quantity

attorneys as friends and advisors in the development of the common law, the courts are more likely to independently research and question the lawyer statements.[64] Modern resources available to courts make this more possible. Judges now are able to retain clerks from the ranks of recent graduates from law schools. These positions are much sought after ensuring high quality research and the injection of new ideas brought by clerks from their law school experience. Moreover, libraries with modern tools of data retrieval ease access to primary and secondary sources. An example of the initiative of law clerks is noted by the United States Supreme Court in *Business Guides Inc v Chromatic Communications Inc*,[65] where the federal trial court took it upon itself to independently investigate allegations.

> A hearing on the TRO was scheduled for November 7, 1986. Three days before the hearing, the District Judge's law clerk phoned Finley, Kumble and asked it to specify what was incorrect about each listing. Finley, Kumble relayed this request to Business Guides' Director of Research, Michael Lambe. This was apparently the first time the law firm asked its client for details about the 10 seeds. Based on Lambe's response, Business Guides was retracting its claims of copying as to three of the seeds. The District Court considered this suspicious and so conducted its own investigation into the allegations of copying. The District Judge's law clerk spent one hour telephoning the businesses named in the "seeded" listings, only to discover that 9 of the 10 listings contained incorrect information.

To be sure, on limited occasions, American courts invoke the concept of the attorney as 'officer of the court'. In these instances, however, the court is merely referring to an attorney's generic ethical obligations, such as the applicable professional norms, and not particular duties specific to being an officer of the court.[66]

This is not to say that the rhetoric of the duty of lawyers as officers of the court may not be revived to justify the imposition of duties that derogate from the lawyer's representational duties. It is this very development that we discuss in the following section.

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possible, the produce of the industry of the people", quoted from G J Postema, note 8 *supra*, p 273.

64 See C S Tomashefsky "We Do Have An Adversary System, Don't We?" 18 *Litigation* 23 (Fall 1991).

65 111 S Ct 922, 925 (1991).

66 E Gaetke "Lawyers as Officers of the Court" (1989) 42 *Vanderbilt Law Review* 39 at 42-43: "In this sense, the characterisation of lawyers as officers of the court has no meaning independent of the term "lawyer" and even encompasses allegations which derive from the lawyer's duty as a zealous advocate. Thus, one fails to act as an officer of the court whenever he acts inappropriately as a lawyer".

B. ASSERTION OF PROFESSIONALISM

Although law was an old profession, the nineteenth and early twentieth centuries saw a concerted drive to shore up its place as a profession. Like medicine this involved an attempt to rid itself of commercialism.[67] Both professions were remarkably successful in establishing a style that rejected commercialism.[68] Competition was dampened and elevated educational barriers established - the bar associations taking a leading role.[69] Ironically, the late twentieth century has witnessed a new flexing of muscle by commercialism. Medicine now is under attack for its non-commercial ways. Corporations seeking profit thrive in the medical landscape. In law, practice has become concentrated in the mega-law firm that may serve more efficiently the needs of large corporations.[70] Once again the organized profession has attempted to shore up 'professionalism' and eschew 'commercialisation'.[71]

The bar cleaved to the 'officer of the court' label for the professional imprimatur so conferred.[72] The turn of the twentieth century in the United

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67 P Starr *The Social Transformation Of American Medicine* (1982).

68 R L Solomon "Five Crises or One: The Concept of Legal Professionalism", American Bar Foundation Working Paper Series 9014 (1991).

69 J Auerbach, *Unequal Justice* (1976), pp 40-41.

70 M Galanter and T Palay, *Tournament of Lawyers*, pp 40-41 (1991): "Larger firms have been receiving an expanding share of the money spent for legal services. The largest firms have been growing faster than the legal profession as a whole. Between 1972 and 1976, the market share of the 50 largest firms doubled". Galanter and Palay also note at p 136 that mega-law firms are in a period of transition. They note:

> The present era of transformation is reminiscent of the formative era of big firms. The big firm arose from lawyers' participation in the restructuring (by consolidations, mergers, reorganisations) and financing of business organisations and from handling the litigation that swirled around them in a legal setting of unprecedented complexity. Lawyers and clients were mobile; firm arrangements were fluid and volatile. The new kind of firm that crystallized provided services that ranged far beyond what had earlier been considered the boundaries of the practice of law. Today, we are in another era of restructuring of business, the complexity of which is compounded by transnational flows of capital and new information technologies. As the demand for legal services changes, with more complex deals and more use of litigation as a business strategy, there is an expansion of services provided by lawyers. We can observe a volatility and organisational innovation that have been absent from the legal scene for generations.

71 American Bar Association Commission on Professionalism (1986); see also R Nelson, *Partners With Power* (1988); M Galanter and T Palay, *Tournament of Lawyers*, *ibid*, p 52; R Able and P Lewis, *Lawyers in Society*, p 187 (eds R Able and P Lewis, 1988 Vol I. The Common Law World); H Drinker, *Legal Ethics* (1953) (notes ever growing commercialism in all walks of life).

72 E Gaetke "Lawyers as Officers of the Court", note 66 *supra* (Professor Gaetke analyses the meaning of the concept of lawyers as officers of the court and notes that "[l]awyers like to refer to themselves as officer of the court." But, further notes that "[c]areful analysis of the role of the lawyer within the adversarial legal system reveals the characterisation to be vacuous and unduly self-laudatory.")

States brought to the fore the 'progressive' view of the law. Its advocates instituted what has been called, the professionalisation project.[73] In comparative terms, professionalisation in terms of formal norms, is viewed as having developed late in the United States.[74] For the greater part of the eighteenth and nineteenth centuries, the American lawyer looked inward to individual consciousness or to customs carried over from England as a guide to professional conduct.[75] Alabama was the first state to adopt a formal code in 1887.[76] Before then, a pair of scholars had articulated their own view of professional ethics. David Hoffman, an attorney of the Maryland Bar who became a professor of law at the University of Maryland, started the process by authoring a series of "Resolutions in Regard to Professional Deportment". These lectures were addressed chiefly to his students and published in 1836.[77] In 1854, the year of Hoffman's death, another lawyer turned law professor and eventually rising to Chief Justice of the Pennsylvania Supreme Court, George Sharswood, published "A Compend of Lectures on the Aims and Duties of the Profession of Law".[78]

Hoffman and Sharswood differed in their opinions regarding professional norms. For instance, Sharswood looked to external guidelines provided by the legal process itself, whereas Hoffman relied upon the practitioner's conscience. For Sharswood, the lawyer that "refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both the judge and jury."[79] The drafters of the *Alabama Code of Ethics* chose between the two, finding Sharswood's ideas persuasive. The American Bar Association developed its *Canons of Professional Ethics* in 1908, modelling it after the *Alabama Code of Ethics*, and likewise looking to the legal process itself as the source of norms.[80]

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73 R Abel note 29 *supra* at pp 158-63.

74 *Id* at p 40.

75 Some commentators argue professional norms are overly formalised. See eg W Simon "Ethical Discretion in Lawyering" (1988) 101 *Harvard Law Review* 1083 (Professor Simon argues that rather than operating within a system of formalised ethical rules, lawyers should exercise judgment and discretion in deciding what clients to represent and how to represent them); A McBride "Deadly Confidentiality: AIDS in Rule 1.6(b)" (1990) 4 *Georgetown Journal of Legal Ethics*, 435.

76 The *Alabama Code of Ethics* is reprinted in H Drinker, *Legal Ethics*, Appendix F (1953); Hoffman's Fifty Resolutions in Regard to Professional Deportment are reprinted in H Drinker *Legal Ethics*, Appendix E.

77 M Bloomfield, note 12 *supra* at p 687; see also D Mellinkoff, note 43 *supra* pp 171-175 (discussing differences between Hoffman and Sharswood).

78 G Sharswood, *An Essay On Professional Ethics* (5th ed 1907) (first published in 1884).

79 M Bloomfield note 43 *supra* p 687.

80 The American Bar Association's "Cannons of Professional Ethics" are reprinted in H Drinker *Legal Ethics* Appendix C (1953).

The drive to professionalise the bar was accompanied by the rhetoric of public interest. Roscoe Pound defined 'profession' as follows: "The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."[81]

Another prominent supporter of the professionalisation was Louis Brandeis, later to become an Associate Justice of the United States Supreme Court. In 1905, Brandeis stated in a speech to the Harvard Ethical Society:

> The immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed, through the respect for law, as the excesses of democracy were curbed seventy-five years ago. There will come a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression; and to this end cooperation of the abler lawyers is essential.[82]

For Pound, Brandeis, and others at the turn of the century, like many today, professionalisation was an avenue for building an autonomous and independent Bar.[83] The now familiar refrain that commercialisation has engulfed the legal profession was already being raised. With duties owed to the public and the courts, a dike was formed protecting lawyers from unacceptable client entreaties.[84] At the same time, the Bar sought to be the sole regulator of its own numbers, in part, legitimised upon the basis of the public-oriented role of the attorney. The model norms, for example, state that they are not to be considered legal standards, but only guidelines. Remembering that nineteenth century legislatures exerted significant control over the admission and training of lawyers, the Bar looked to the judiciary as a safer haven than the legislature.

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81 R Pound *The Lawyer From Antiquity to Modern Times*, p 5 (1953); H Drinker, *Legal Ethics*, p 5 (1953): "primary characteristics which distinguish the legal profession from business are:

1. a duty of public service, of which the emolument is a by-product, and in which one may obtain the highest eminence without making much money.
2. a relation as an 'officer of the court' to the administration of justice involving thorough sincerity, integrity, and reliability.
3. a relation to clients in the highest degree of fiduciary.
4. a relation to colleagues at the bar characterised by candor, fairness, and unwillingness to resort to current business methods of advertising and encroachment on their practice, or dealing directly with their clients."

82 L Brandeis, *The Opportunity in the Law, In Business - A Profession* 315 (1914); for analysis of Brandeis' views see D Luban "Noblesse Oblige Tradition in the Practice of Law", (1988) 41 *Vanderbilt Law Review* 717.

83 H Drinker, *Legal Ethics*, pp 5-7 (1953); R Alexander, note 47 *supra*, p 12.

84 *Id.*

By promoting the status of 'officers of the court', and in turn the role of the courts, the Bar sought to insulate itself from the legislatures.[85]

The American Bar Association, like the society of which it is a member, is a heterogenous community. Although the small private practitioner remains a major segment of the community of lawyers, the ranks of the big-firm attorney, the government attorney, and the in-house company attorney have grown dramatically since the turn of the century.[86] Internal and external to the ABA are many other lawyer organisations, such as the Association of American Trial Lawyers, which has drafted its own code of conduct. As seen with Pound and Brandeis, some constituents view the Bar as a necessary expression of collective power to check the capitulation of individual attorneys in the face of anti-social demands of clients in order that the attorney may fulfill the duty of public service.[87]

The representational role remains important, but representational zeal may have to be tempered, depending upon the demands of the client. For example, one of the well-known American professional ethics scholars of the 1950s, Henry Drinker, argued that "the old idea that litigation is a game between the lawyers has been supplanted by the more modern view that the lawyer is a minister of justice."[88] Drinker, however, still refers, ultimately, to the adversary system of justice in which to define the lawyer's role. Drinker's next sentence reads: "Always, however, must be borne in mind the principle that the theory of our system is still that justice is best accomplished by having all the facts and arguments on each side investigated with maximum vigor by opposing counsel, for decision by the court and jury."[89] Others criticise this conception of the role of the attorney and organized bar and argue that it sets up an unworkable paradigm fraught with internal inconsistency. One commentator has argued that the problem with this conception is that in the adversary system, the role of the lawyer is not to search for truth, but to pursue justice, which is a very different role.[90] Accordingly, the second conception upholds the zealous representational role as the touchstone of professional ethics and conceives of

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85 B Lee "The Constitutional Power of the Courts over Admissions to the Bar", (1899) 13 *Harvard Law Review* 233 at 240 ("Since attorneys are officers and members of the court, the Legislature cannot deprive the courts of discretion in as to whom they shall admit").

86 See generally M Galanter and T Palay note 70 *supra*. See also T Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (1987), pp 119-141 (observing the variegated nature of the Chicago Bar).

87 "There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service". *Shapero v Kentucky Bar Ass'n*, 486 US 466, 489 (1988) (O'Connor J, dissenting).

88 H Drinker note 83 *supra*, p 76.

89 *Id.*

90 D Mellinkoff note 44 *supra*; M Freedman *Understanding Lawyers' Ethics* (1990).

Bar associations as vigorous advocates for legitimate interests of lawyers in a pluralistic society of freely competing interest groups.[91]

Although much talk has been given to the role of third-party duties, in the end, the two sets of norms produced by the American Bar Association since its original canons firmly undergird the representational role.[92]

C. MORALITY, REGULATIONS AND REPRESENTATION

The regulation of attorney conduct, however, has gone far beyond the model norms established by the American Bar Association. Formal restrictions on lawyer conduct have been developed through malpractice suits, court rules and opinions, administrative agency regulations, and statutes on the federal and state level.[93] On another level, since Watergate the profession's norms have been criticized by moral philosophers who claim that the present model codes instill in lawyers an overly deterministic role of morality.[94] The impact of this

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91 M Osiel "Lawyers as Monopolists, Aristocrats and Entrepreneurs" (1989) 103 *Harvard Law Review* 2009; W Simon "The Idealogy of Advocacy; Procedural Justice and Professional Ethics" (1978) *Wisconsin Law Review* 29 at 31 (discussion of 'battle' versus 'truth' model of adjudication); J Leubsdorf "Three Models of Professional Reform" (1982) 67 *Cornell Law Review* 1021, 1026-1045 (1982) (analysis of market versus public utility legal models); A D'Amado and E Eberle "Three Models of Legal Ethics" (1983) 27 *St. Louis University Law Journal*, 761, 761-63: "Autonomy" model versus "socialist" model of responsibility; see also E H Greenebaum "Attorneys' Problems In Making Ethical Decisions" (1977) 52 *Indiana Law Journal*, 627.

92 See, eg G Bellow and B Moulton *The Lawyering Process: Ethics and Professional Responsibility* 21 (1981) (Code of Professional Responsibility articulates a central commitment to the client which seems to be at the heart of the traditional conception of the lawyer); E Gaetke note 66 *supra* (Professor Gaetke notes that the model rules, which amended and replaced the model code, did not alter the code's emphasis on the lawyer's role as a zealous advocate on behalf of a client).

93 See generally D Wilkins "Who Should Regulate Lawyers?" (1992) 105 *Harvard Law Review* 799; M Powell "Developments in the Regulation of Lawyers: Competing Segments and Market, Client, and Government Controls" (1985) 64 *Social Forces* 281; it must be kept in mind, however, that external restrictions, at least to some degree, have always existed. See, e.g. *Southern Guaranty Ins Co v Ash*, 182 Ga App 24, 383 SE 2d 579 (Ga App 1989) (court discusses Georgia statutes traced back to 1860 that regulate the attorney-client relationship in the State of Georgia).

94 T Schneyer "Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct"(1989) 14 *Law and Social Inquiry* 677, 731; A Goldman, *The Moral Foundations Of Professional Ethics* (1980); G Postema "Moral Responsibility and Professional Ethics" (1980) 53 *New York University Law Review* 63; see also T Schneyer "Moral Philosophy's Standard and Misconception of Legal Ethics" (1984) *Wisconsin Law Review*, 1529 (Professor Schneyer challenges the ideas of Goldman, Postema, Wasserstrom, Bayles, Simon and Luban. Professor Schneyer argues that moral philosophers view of bar

argument is that the profession's role morality unduly narrows an individual lawyer's ethical perspective, causing the lawyer to engage in and promote immoral behavior. The notion of general morality ameliorating the morality of representation, or role morality, is strongly present in Sir Gerard Brennan's extra-judicial statement:

> A duty of moral advice is often added to the duty of providing legal services, and ethical questions of nicety must be addressed. So long as the commercial branch of the profession sees itself as independent, competent and acting with a moral integrity that will not be compromised, it will continue to contribute greatly to the commercial life of this country.[95]

This appeal to wider or common morality is to a public idea of the good. It is an abstract concept and entirely separate from the process morality that justifies the lawyer's representational role. It is the amorphous quality of the wider morality that carries seeds of danger for the traditional role.[96]

The better view is to see morality in process or role terms. This morality allows the lawyer to fully commit himself to the interests of a client. The invocation of ethical norms and the acceptance of fiduciary obligations to clients are an assurance to the public and prospective clients that the privileges of professionalism will not be abused. Legal education and the traditions of an old profession were marshalled to aid the lawyer's commitment to a public spirited representation of clients. It is an assurance also that personal morality (values) will not inhibit the lawyer performing his representational role. Put differently, the appeal to public service should not be seen as subservient to government or its agencies; rather the appeal was to reinforce the notion that lawyers have a duty to represent even though it may be an unpopular cause; justice was to be served as when Erskine justified his unpopular defense of Tom Paine:

> From the moment when any advocate can be permitted to say that he will not stand between the Crown and the subject arraigned in the courts where he daily sits to practice, from that moment the liberties of England are at an end.[97]

The fundamental social changes of the eighteenth century that the legal profession helped to forge resulted not from promotion of abstract or common morality about the good society; rather they were born in a faith that fair procedures and respect for the individual were the basis of justice. The role of lawyers in social reform movements was established in the 1760s and 1770s. The adversary procedure was significantly encouraged by a flood of litigation that concerned matters like freedom of speech, the adequacy of political representatives, the abolition of slavery, and the validity of imprisonment for

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ethics is too shallow because they do not take into account the complexity and diversity of ideas within the bar concerning professional ethics).

95 Sir Gerard Brennan "Commercial Law and Morality" (1989) 17 *MULR* 100 at 106.

96 For a most thorough discussion of this clash in morality, see D Luban, *Lawyers And Justice: An Ethical Study* (1988).

97 Erskine cited in *Rondel v Worsley* [1969] 1 AC 198 at 281, per Lord Upjohn.

debt.[98] The trial of John Wilkes and his followers demonstrate the use of law by lawyers to confront governmental power.[99]

The importance of the legal profession as an autonomous profession was seen in its representational role in supporting the rule of law. The long constitutional history of England and of the United States puts that role into relief. Appeals to public morality are skeptically treated, although personal anxiety born of conflicting moralities is ever present in the lawyering function.[100]

Our analysis if accepted establishes a well-founded skepticism about the invocation of public morality. Unexplored, however, is representational morality. This paper is not the place to examine the extent to which the legal profession falls short in properly representing its clients. It is arguable that the profession does poorly in representing the best interests of its clients. Too often the lawyer-client relationship is beset by coercion and manipulation. Lawyers fail to listen and their clients needs are not recognized.[101] These concerns are significant in themselves, but more, to the extent that the lawyer fails, the profession's claim for the sanctity of the relationship is flawed and appears less robust in withstanding demands for public accountability.

D. LEGAL DOCTRINE AND THE REPRESENTATIONAL ROLE

Let us point to one legal doctrine shared by Australia and the United States that highlights the representational role. Legal professional privilege represents a striking affirmation of the lawyer's role in the administration of justice. In *Baker v Campbell*, Wilson J stated:

> The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law and the privacy and liberty of the individual is an essential mark of a free society, and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection.
>
> It is not only a matter of protection of the client. The freedom to consult ones legal advisor in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for an observance of the law within the community.[102]

The rule which excludes evidence, necessarily generated for the purpose of seeking advice on impending litigation, hinder the eliciting of the truth within

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98 S Landsman note 52 *supra* at 481.

99 *Ibidd* 582.

100 D Luban, *Lawyers And Justice: An Ethical Study* (1988).

101 S Ellmann, Lawyers and Clients (1987) 34 *University of California at Los Angeles Law Review* 717; see E W Clayton & D Partlett "Lawyer-Client Relationships" in *Winners & Losers: How Medical Malpractice Claims are Resolved* (ed F Sloan, 1992 manuscript).

102 *Baker v Campbell* (1983) 153 CLR 52 at 95 per Wilson J.

the trial. The rule is justified by the benefit garnered in terms of representation of the individual in the face of government power.[103]

For the greater part of the history of the privilege, it was only excepted to the narrow extent that testimony regarding the client's intentions to commit a crime *mala in se* would be compelled.[104] It has only been in the twentieth century that the semblances of the current crime fraud exception took hold. In this century, a subtle erosion of the professional privilege has occurred, and in recent years the erosion has accelerated. Courts in both Australia and the United States have broadened the exception by decreasing the quantum of evidence required to trigger the exception.[105] The scope of the exception has also increased by the rapid increase in criminal law, particularly in regard to behavior traditionally not dubbed 'criminal'. As more behavior becomes criminal, more and more attorney-client communications are subject to disclosure because it is easier for prosecutors to make out a case that the attorney was consulted in the furtherance of crime. While this paper shortly will turn to substantive examples of government actions that undermine the traditional representational role of the attorney, it must be kept in mind that the ever-increasing criminalisation of behavior in society makes it increasingly difficult and risky for members of society to consult third parties such as attorneys, given the increased risk of disclosure association with the crime fraud to the professional privilege.

In the next section of this paper, we turn to examples of actions taken by the United States government that threaten the historical representational role of the attorney, and in turn undermine the adversarial system of justice.

IV. A NEW RELATIONSHIP - THE REGULATORY STATE

The modern state is marked by close government regulation.[106] This regulation may be the result of tradeoffs with powerful groupings within our respective societies. Lawyers play a Janus-faced role in state regulation that assumes an increasingly neo-corporatist form. They are heavily involved in the implicit negotiations that take place when the government and social groupings are moving toward legislation. They are central afterwards to the challenging of regulation and representing clients whose interests are challenged by that

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103 *Baker v Campbell* (1983) 153 CLR 52 at 112; *Commissioner of Taxation (Cth) v Citibank Ltd* (1989) 89 ATC 4268.

104 See D Fried "Too High A Price for Truth: The Exception To The Attorney-Client Privilege For Contemplating Crimes And Frauds" (1986) 64 *North Carolina Law Review* 443.

105 *Ibid* at 469; see also, R O'Connor QC "Legal Professional Privilege: An Engine for Fraud?" (1990) 64 *ALJ* 174.

106 Cf CA Reich note 26 *supra* at 1412 (describing two kinds of regulation: regulation of the economy and regulation of the individual; the latter he finds insidious); D Fried note 104 *supra* at 469.

regulation.[107] The initial allegiance of the legal profession to the increasing number of regulatory arrangements facially seems inconsistent with its later hostile stance stemming from its representation of clients. Co-option at one point implies co-option along the line. The pattern we perceive in the law is that in regulation the government obtains the cooperation of the bar; government regulation increases the need for lawyers' services. But individuals may seek to thwart regulatory goals and will seek the services of lawyers to do so. To the extent that lawyers are obliged to remain faithful to the regulatory goals, and mute representational zeal, the regulation will be all the more successful.

Government is never comfortable with the strong representational model. Addressing the American Bar Association in 1910, President Woodrow Wilson stated:

> You are not a mere body of expert business advisors in the field of civil law or a mere body of expert advocates for those who get entangled in the meshes of the criminal law. You are the servants of the public, of the state itself. You are under bonds to serve the general interest, the integrity and enlightenment of law itself, in the advice you give individuals.[108]

In recent years, however, the government has sought to do more than merely voice support for the public oriented role of attorneys. Several administrative agencies, for example, have unfurled the banner of public spirit and duty; are handing it to attorneys, and pushing them into the battle of regulation on the side of government.

Attorneys not only frustrate regulatory actions at times, but they also possess considerable information about the people they represent. This information is potentially enormously beneficial to the information hungry regulatory state. The United States government requires, the supply to it of huge amounts of information.[109] There are over one hundred statutes that criminalise the false

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107 Cf Halliday, who does not recognize this conflicted role.

108 "The Lawyer In The Community" (1910) 35 *American Bar Association Reports* 419 at 435; in more recent times J L Mashaw and D L Harfst *The Struggle for Auto Safety* (1990) point to the failure of regulation for auto safety. One lesson they draw is that for successful agency regulation, that agency "must attempt to accommodate, if not co-opt, its adversaries." *Ibid* at 250.

109 S Kreimer "Sunlight, Secrets and Scarlett Letters: The Tension Between Privacy and Disclosure and Constitutional Law" (1991) 140 *University of Pennsylvania Law Review* 1: "the expansion of government knowledge translates into an increase in the effective power of government. At its most mundane, an increase in government knowledge means an increase in the ability to deploy existing government sanctions effectively." (Citing A F Westin, *Privacy And Freedom* 23-52 (1967) and noting that Westin argues that the control of information allows government to narrow the gap between totalitarianism and democracy; see also *Doyle v United Steel Workers*, 110 S Ct. 929, 933 (1990), where the Supreme Court stated:

> Agencies impose requirements on private parties in order to generate information to be used by the agency in pursuing some other purpose. For instance, agencies use these

reporting of information to enforce disclosure.[110] In order to enforce more fully the public goals of product liability law - deterrence and compensation - courts are demanding disclosure of increasing qualities of sensitive and valuable information held by industry.[111]

Governmental agencies have even penalised the nondisclosure of information, when Congress has not provided for affirmative disclosure.[112] Leaving no stone unturned the government is now seeking to compel the disclosure of evidence from lawyers about the lawyer's clients. As a result, the role of the lawyer as a professional advisor is changing. The transfer of information from the client to the attorney is increasingly risky for the client. The client and the attorney necessarily will have to take steps to limit the information going to counsel that later could be compelled by the government.[113] The following identifies actions taken by the United States government to obtain confidential client information from attorneys and instances where the representational role has been eroded by the demands of the regulatory state.

A. SECURITIES AND EXCHANGE COMMISSION

The crisis of governance is exemplified in the regulation of the securities market. Abuses have long existed, and recently even the most prominent members of the securities industry from New York to Tokyo have shown they are not immune to corruption.[114] The task for the Securities and Exchange Commission is indeed formidable. The Second Circuit Court of Appeals, located in New York, New York, has stated "by the very nature of its operations

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information requests in gathering background on a particular subject to develop the expertise with which to devise or fine-tune appropriate regulations, amassing diffuse data for processing into useful statistical forms, and monitoring business records and compliance reports for signs or proof of non-feasance to determine when to initiate enforcement measures.)

110 D Fried note 104 *supra* at 477.

111 A R Miller "Confidentiality, Protective Orders, and Public Access to the Courts" (1991) 105 *Harvard Law Review* 427.

112 See eg, United States Department of Justice, "Factors and Decisions on Criminal Prosecutions for Environmental Violations and the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991) (copy on file with authors).

113 *Fisher v United States* 425 U.S 391 (1980); *Schatz v Rosenberg* 943 F 2d 485, 493 (4th Cir 1991): "Attorney liability to third parties should not be expanded beyond liability for conflicts of interest. See *Flaherty* 492 A 2d at 626. Any other result may prevent a client from reposing complete trust in his lawyer for fear he might reveal a fact which would trigger the lawyer's duty to the third party".

114 T Ferguson "Long View Sees Global Gain, No Surge in Wall Street Graft" *Wall Street Journal* (24 Sept 1991) p A19 (Mutual-fund pioneer, former Tennesseean turned British Citizen, Sir John Templeton argues that morality in business is no worse off now than it has been for generations and is higher than it was a century ago, given the volume of trading today.)

the Commission with its small staff and limited resources cannot possibly examine with the degree of close scrutiny required for full disclosure each of the many financial statements which are filed."[115] Identifying the crisis of governance, the Court further stated: "The Commission necessarily must rely heavily on both the accounting and legal professions to perform their tasks diligently and responsibly."[116]

In the early 1970s the SEC inaugurated its drive to enlist corporate attorneys in the enforcement of the securities laws. In *Student Marketing*, the SEC argued that shareholders and the SEC should have been notified of misstatements in certain financial statements.[117] The intent of the SEC at this period in time was noted by its Chairman, who stated:

> Simply as a matter of enforcement technique, if we can induce the professional to be less cooperative, we will prevent many violations that would otherwise occur.
> ...
> Even if certain businessmen are not moved to fear compliance by ethical considerations or the fear of punishment, they will do far less damage if their lawyers and accountants won't play.[118]

After several opinions and a few years later, the *Student Marketing* Court rejected a broad-based disclosure duty owed by the securities bar to the investing public, and ruled that the attorneys were subject to aiding and abetting liability.[119] Courts since have continued to reject a broad based disclosure rule as proposed by the SEC or private plaintiffs.[120] In some decisions, however, the courts, while not adopting a broad based rule have nonetheless voiced

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115 *Touche, Ross & Co v Securities and Exchange Commission* 609 F 2d 570 at 581 (2nd Cir 1979).

116 *Id.*

117 *Securities and Exchange Commission v National Student Marketing Corporation*, 360 F Supp 284 at p 297 (DDC 1973).

118 Note "SEC Disiplinary Proceedings Against Attorneys Under Rule 2(e)" (1981) 79 *University of Michigan Law Review* 1270 at p 1275 n 33 (speech by Chairman Garrett "Professional Responsibility In The Securities Laws", State Bar of Texas (4 July 1974)).

119 *Securities and Exchange Commission v National Student Marketing Corporation* 457 F Supp 682 at 714 (DDC 1978).

120 See eg *Schatz v Rosenberg* 943 F 2d 485 (4th Cir 1991); *Abel v Potomic Insurance Company*, 858 F 2d 1104, 1124-26 (5th Cir 1988); *Barker v Henderson, Franklin, Starnes & Holt* 797 F 2d 490, at pp 496-97 (7th Cir 1986); *In re National Smelting of New Jersey, Inc. Bondholders Litigation*, [1989-1990 transfer binder] Fed Sec L Rep (CCH) para 94,898 (DNJ 1989); *Van Boeckle v Weiss*, [1983-1984 Transfer Binder] Fed Sec L Rep. (CCH) para 99,648 (ND Cal 1983); for recent commentary, see M Steinberg "Attorney Liability For Client Fraud" (1991) *Columbia Business Law Review* 1 (In this article Professor Steinberg presents in depth analysis of case law and the American Bar Association's applicable ethical rules, as applied to securities lawyers); see also Comment "Securities Attorneys Face Liability for Wrongs of Their Corporate Clients" (1990) 5 *St. John's Journal of Legal Commentary* 403.

support for the SEC's claim that the securities bar has significant public interest responsibilities.[121] While a broad based disclosure duty has not been accepted, the aiding and abetting theory itself has sweeping application, as seen in the *Student Marketing* case.[122]

In the early 1980s, the SEC retreated from its original position advanced in *Student Marketing*. A change of policy can be seen in the Commission's ruling in a disciplinary case, *In the Matter of William R. Carter and Charles J. Johnson, Jr.*[123] In *Carter*, the Commission reversed an administrative law judge's findings that two attorneys willfully violated the *Securities & Exchange Act* by failing to prevent and disclose to the SEC management's decision not to disclose material facts. The Commission ruled that: "So long as a lawyer is acting in good faith and exerting reasonable efforts to prevent violations of the law by his client, his professional obligations have been met."[124]

The *Carter* case is an example of the Commission's Rule 2(e) in action, which was promulgated by the Commission, and enables the SEC to discipline attorneys.[125] Rule 2(e) itself is troubling in much the same vein as the duty propositions proposed by the SEC in the courts. The rule has received widespread comment and criticism.[126] Briefly, it provides the SEC with its own forum to influence the behavior of the securities bar; perhaps through discipline attorneys will become SEC disciples. In the words of another commentator: "The Commission has begun to use the rule to coerce securities lawyers to monitor their clients' behavior more closely, thereby augmenting the limited resources of the SEC staff."[127] Although the Commission retreated from its earlier attempts at formulating disclosure duties for attorneys, it is

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121 *Securities and Exchange Commission v Spectrum Ltd* 489 F 2d 535 at 536 (2d Cir 1973).

122 *Rose v Arkansas Valley Environmental and Utility Authority* 562 F Supp 1180 at 1208 (W D Missouri 1983).

123 *In re Carter*, Exchange Act Release No 17,597 [1981 Transfer Binder] Federal Securities Law Reporter (CCH) para 82,847 (Feb 28, 1981).

124 *Id.*

125 17 CFR Section 201.2(e) (1990) (Code of Federal Regulations).

126 See eg Note "SEC Disciplinary Proceedings Against Attorneys Under Rule 2(e)" (1981) 79 *University of Michigan Law Review* 1270; S C Krane "The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel" (1981) 57 *Notre Dame Law Review* 50 (as title indicates, author argues that SEC is violating client's right to counsel).

127 *Id* at p 1270. The SEC's actions in general receive criticism on other fronts as well, see eg J Macey "The SEC Dinosaur Expands Its Turf" *Wall Street Journal* (29 January 1992) at p A12. Professor Macey, of Cornell Law School, argues that economic developments since the birth of the SEC sixty years ago have changed and have greatly diminished the need for the SEC and specifically disclosure rules. Professor Macey also argues that:

> The SEC's actions more closely resemble those of shakedown artists portrayed in gangster films than the actions of a responsible government agency. Like the innocent merchant who pays "protection," the brokerage firm and banks being investigated simply paid token fines totaling about $5 million to avoid having to pay bigger legal fees to defend against the lawsuits threatened by the SEC.

likely that the future will bring renewed efforts at the SEC to advance a broad based disclosure rule. For example, in May 1991, William McLucas, Director of the Division of Enforcement at the SEC signaled that the Commission may change its mind on *Carter*. McLucas stated:

> [t]he 1990s will probably witness further development in the debate that has surfaced intermittently at the Commission for decades. Courts have long recognised the significant role that professionals play in the securities markets. This recognition encompasses both accountants and lawyers.[128]

The latest federal case regarding an attorney's duty to disclose misrepresentations to third parties based on federal securities laws, however, rejected a broad based disclosure rule. In *Schatz v Rosenberg*,[129] private plaintiffs who were sellers of businesses sued the purchaser and his attorneys, alleging, inter alia, fraud and securities law violations. The plaintiffs argued that the lawyers had a duty to disclose the client's misrepresentations on the basis of federal securities cases, Maryland common law, the Maryland Code of Professional Responsibility, and as a matter of public policy, lawyers should have a duty to disclose a client's fraudulent activity to a third party.[130] The Fourth Circuit, located in Richmond, Virginia, rejected these arguments. Applying federal securities law, the Court held "a lawyer or a law firm cannot be held liable under section 10(b) for failing to disclose information about a client to a third party absent some fiduciary or other confidential relationship with the third party."[131]

B. THE SAVINGS AND LOAN IMBROGLIO

Financial disasters have always strained the law, often producing quantum leaps in prevailing doctrine.[132] The South Sea Bubble has left its indelible mark on company or corporation law.[133] The 1980s were a time of financial profligacy; they were also a time of partial deregulation in some financial markets. Unfortunately the steps taken by government to free the market were incomplete in that the government was retained as a guarantor of investors' moneys not only in banks but also in savings and loan or thrift institutions. The

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128 W McLucas, S DeTore and A Colachis "SEC Enforcement: A Look at the Current Program and Thoughts About the 1990s" (1991) 46 *The Business Lawyer* 797 at 845; see also American Bar Association/Bureau of National Affairs, "SEC Official Finds Duty to Report Inside Trades" 7 Lawyer's Manual at 16 (13 February 1991): "Law firms may have an 'ethical obligation' to report employees who engage in insider trading, even though there is no obligation under Securities and Exchange Commission rules to do so, according to SEC Commissioner Philip Lochner."

129 943 F 2d 485 (4th Cir 1991).

130 *Ibid* at 490.

131 *Id.*

132 See *Liquidators of Overend Gurney & Co v Liquidators of the Oriental Finance Corporation* [1874] LR 7 HL 348.

133 T Hadden *Company Law & Capitalism* (1972, 2d ed) pp 16-19.

market was loosened by reducing government supervision but investors free-rode on the federal government's guarantee by the Federal Savings & Loan Insurance Corp. They had no incentive to search for safe havens for their deposits. Thus with minimal governmental or investor supervision the thrift institutions, spending other people's money and without former strictures of avenues of investment, engaged in fraud or cavalier investment. The government's bill in the bailout is staggering. Latest estimates put total cost to taxpayers at about $250 billion (ie $250, 000,000,000).[134]

In order to come to grips with the disaster and to stop the hemorrhaging of public funds, the federal government established the Resolution Trust Corporation ('RTC').[135] Congress also established the Office of Thrift Supervision ('OTS') to oversee the affairs of operating thrifts and prevent a squandering of their resources. The RTC is an American-style 'Quango,'[136] and is affiliated with the Federal Deposit Insurance Corporation ('FDIC'), which prior to 1989 had as its sole function to regulate banking institutions as opposed to savings and loan institutions in the United States. The former regulator of savings and loan institutions, the Federal Savings and Loan Insurance Corporation ('FSLIC') was shut down in 1989 and its apparatus merged into the FDIC. Presently, the FDIC regulates all bank matters and pre-1989 matters involving savings and loan institutions that were once the concern of the FSLIC.[137] The RTC handles all post-1988 thrift insolvencies.[138] An important

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134 NY Times, Nov 19 1991, Sec A, p 25.

135 See *Financial Institutions Reform, Recovery and Enforcement Act* 1989 (FIRREA) Public Law No 101-73, Section 501, 103 Stat 183, 363) 1989 (Codified at 12 United States Code Section 1441a; see also P Clark, B Murtaugh, and C Corcoran "Regulation of Savings Associations under the *Financial Institutions Reform, Recovery and Enforcement Act* of 1989" (1990) 45 *Business Lawyer* 1013 at 1015: "The primary purposes of the Act are to recapitalize the deposit insurance fund for savings associations, to provide for the resolution of outstanding and anticipated failures of savings associations, and to improve the regulation of savings associations so as to prevent future insolvencies. The Act seeks to achieve these purposes by establishing several new entities to manage and finance the resolution of insolvent savings associations, restructuring the regulatory responsibilities of the federal agencies that regulate and insure savings associations, and providing for more stringent regulation of savings associations".)

136 See A Garrett "Goodbye to Quangos, Welcome to Pingons; The Whitehall Revolution" *Financial Times*, 16 August 1990, p 15, col 6.

137 See *Financial Institutions Reform, Recovery and Enforcement Act* 1989 (FIRREA) Public Law No 101-73, Section 501, 103 Stat 183, 363 (1989) (Codified at 12 United States Code Section 1441a); See also R Schmitt "Bank Bailouts Are Bonanza For Lawyers", *Wall Street Journal* (21 November 1991), p B1, col 4.

138 See also P Clark, B Murtaugh, and C Corcoran note 135 *supra* at 1025: "The Act provides for the creation of the office of Thrift supervision ('OTS') as an office within the Department of the Treasury. The OTS is headed by a director ('Director'), who is the primary Federal Regulator of both Federal and State-Chartered savings banks... The Director has general enforcement authority over savings associations and their affiliates. The Director is

aspect of the function of the RTC, in addition to securing and selling assets of failed thrifts, is to initiate criminal and civil actions against persons involved in fraud and negligence in the conduct of thrifts.

Accounting and law firms have been swept up in this litigation.[139] Such firms are generally insured and prove attractive deep pockets once principal actors have been prosecuted and their assets dissipated.[140] More significantly, it is considered that members of these professions were the handmaidens in the scandal. They knew, or should have known, of the nefarious activities but they failed to blow the whistle on their employers. Moreover, their presence and professional skills helped principals to fleece the public.

The litigation that will explode from the savings and loan crisis will test the limits of the representational role.[141] In line with the perception of the integral

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authorized to issue cease and desist orders and to remove officers and directors of savings associations. In addition, the Director has the authority to examine any savings association and its affiliates."

139 K Blumenthal and J Moses "Suit Against S & L's Accountant Is Blocked" *Wall Street Journal* (2 October 1991), p B5, col 1; see also Bureau of National Affairs "FDIC Seeks To Hold Former Partners of Vernon S & L's Counsel Liable and FDIC Seeks $300 Million In Suit Against Law Firm; Alleges Malpractice, Negligence". 54 Banking Report 547 (26 March 1990). (The FDIC suit in the Vernon case alleges a number of instances where the law firm failed to adhere to legal and professional standards, made misrepresentations to and on behalf of the S&L, several illegal practices and patterns not in the S & L's interests. The FDIC further asserts that the law firm failed in its duty of undivided loyalty to the S & L by representing its owner in his personal affairs and by representing the S & L's holding company notwithstanding irreconcilable conflicts of interest); S France "Savings and Loans Lawyers" *American Bar Association Journal* at 52 (May 1991). The first suit brought against professional advisors by the RTC that went to trial reached a verdict on March 2, 1992. The jury found that a brokerage firm was not liable for losses incurred by its client, Commonwealth Savings & Loan Association of Fort Lauderdale, Flordia. See "Commodity Brokerage Firm Wins Verdict in Suit Over Thrift Losses", *Wall Street Journal* (3 March 1992), p B2: "After a three-week trial, the jury found that Commonwealth's treasurer, not the broker, directed the trades in treasury bound futures and options that led to the losses for the thrift. The jury didn't accept the argument that the broker shouldn't have accepted the trades."

140 *FDIC v Mmahat* 907 F 2d 546 (5th Cir 1990) (Court discusses the insurance coverage for attorney malpractice.)

141 See J P Freeman and N M Crystal "Scienter in Professional Liability Cases" (1991) 42 *South Carolina Law Review* 783. The wave of FDIC and RTC lawsuits has only begun recently. One of the first court rulings rejected FDIC claims. See eg K Blumenthal and J Moses note 139 *supra*. US Federal District Judge Barefoot Sanders threw out the suit against Ernst and Young, concluding that Western's sole owner and top officer, Jarrett E Woods Jr knew about the thrift's poor financial condition, a more accurate audit by Ernst and Young's predecessor firm, Arthur Young & Co, would not have affected the actions of the thrift's officers and directors. Thus, the Judge ruled, the Federal Deposit Insurance Corp. couldn't claim that Western's officers and directors relied on the auditor's negligent work or that the thrift was

role of professions in the scandal, it may be argued that these professionals had a watchdog role. As professionals, it may be put, they enjoy privileges via state favour, concomitantly they owe a duty to the public. In normal times this argument would be unpersuasive. The crisis, however, reveals extraordinary greed and massive wrongdoing. The lawyer here is not the protector of the harassed individual exposed to governmental power and she is not the guardian of easily identified civil rights. The argument for the representational model must hold on the much less attractive ground of commercial wrongdoing to the cost of the public.[142] It will be apparent that the neo-corporatist model of the state accommodates the professional's public duty. Such a duty may be seen as supporting the proper governance of society. The duty would restrict the kind of opportunistic behavior of those who would take advantage of the public.

It is probable that the public duty concept will remain a background norm and that much of the argument will be directed to the lawyers' duties to their clients and others affected by their behavior. The concept of public duty or accountability is often called in aid in imposing obligations in tort.[143] The RTC will also submit that lawyers who represented thrifts breached their fiduciary obligations to those thrifts. Often lawyers represented both parent and subsidiary corporations.[144] When arrangements were made transferring funds from subsidiaries to parents, lawyers were involved. The courts will be asked to answer the question: to whom does a lawyer owe his fiduciary obligation? If the obligation is owed to the group of corporations, how does the lawyer balance the interests of the companies within the group? If the obligation is owed only to the individual corporations who retain him, the issue of the corporation's interest that he must faithfully represent is again not easy to resolve. Lastly, the courts will be obliged to resolve the question of how the lawyer may discharge his fiduciary duty. Obviously, it would be fatuous to disclose findings of breaches of trust and the law to a corrupt board of directors. But, if not to the entity to whom the obligation is owed, then to whom? Creative judges against the background norm of professional public responsibility may answer the question by suggesting that the regulatory body with ultimate public responsibility for the industry should be informed of fiduciary breaches in the absence of an independent board of directors. In gauging the development of public duties the thrift imbroglio will bear close observation.

Before leaving this topic, note that the crisis starkly demonstrates the regulators impatience with the lawyers' representational role. On 19 November

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harmed by it. If the decision survives an appeal, some lawyers say, other regulators' suits against accounting firms could be derailed.

142 Similar problems occur in the Constitutional rights of accused criminals in times of high crime. The rights are embattled by perceived needs to deter crime.

143 D Partlett "Roaming in the Gloaming: The Liability of Professionals" (1991) 2 *Sydney Law Review* (forthcoming September 1992).

144 See generally "Developments In The Law, Conflicts of Interest in The Legal Profession" (1981) 94 *Harvard Law Review* 1244 at 1334.

1991, the Office of Thrift Supervision, a federal agency that regulates savings and loan institutions, announced guidelines that limit undercapitalised savings and loans institutions from contracting with lawyers and other professions.[145] The constitutional basis for the agency's actions are extremely suspect because the guidelines apply to institutions that are not yet under government control, but are considered risky operations by government regulators.[146] The guidelines prohibit institutions from contracting with professionals to serve the institution in ways not usually required in the normal course of business, such as pursuing "defense against regulatory actions."[147] An interesting backdrop to these guidelines is that in August, 1991, 36 thrifts were successful in a suit against the OTS in the Federal Court in Virginia.[148]

C. RACKETEERING ACTIVITIES

Both of our countries have been plagued by organised crime. Congress, weary of society's fecklessness in combatting this crime, enacted the *Racketeering Influenced & Corrupt Organisations Act* (RICO).[149] An important aspect of the legislation was to enable persons injured by racqueteering activities to bring civil actions against perpetrators. These actions, like those in the anti-trust arena, were encouraged by awarding treble damages and attorneys fees to successful litigants.[150] The usual prosecutorial apparatus was supplemented by these private attorney general actions. Civil RICO actions recognized the limits of the state in combatting crime in the usual way.

The legislation was drafted broadly. A person injured in his business or property by a 'pattern of racketeering activity' could proceed against a person

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145 Bureau of National Affairs "OTS Restricts Third Party S&L Contracts, Says Macro 4 and 5 Thrifts Need Approval" 57 Banking Report 893, (2 December 1991). The OTS recently utilised, for the first time against a law firm, another governmental power that proved extremely effective. The OTS froze substantial assets of Kaye, Scholer, Fierman, Hays & Handler, a major New York law firm, when it sued the 389 member firm for failing to inform the government of wrongdoing by its client, Lincoln Savings & Loan Association. Kaye, Scholer settled the suit in a matter of days agreeing to pay the government $41 million. See A Stevens & P Thomas "How a Big Law Firm Was Brought to Knees by Zealous Regulators", *Wall Street Journal* (13 March 1992), p A1; S Adler "Kaye Scholer Settles Charges in Lincoln Case", *Wall Street Journal* (9 March 1992), p A3.

146 L Himelstein "OTS Curbs Thrifts' Ability to Hire Help", *Legal Times* (2 December 1991) at p 19 (Keith Fisher, who heads an American Bar Association Task Force on lawyer liability criticises the OTS' action on the basis that it jeopardizes the ability of thrifts to fight the OTS on controversial regulatory matters.)

147 Bureau of National Affairs note 145 *supra.*

148 See C Harlan and S Simon "Judge Rules OTC Can't Renege On Certain Thrift Transactions" *Wall Street Journal* (9 August 1991), p B8, col 1.

149 Public Law 91-425, Title IX, 8451 at 941, 18 United States Code Section 1961-1968.

150 1964(c).

employed by or associated with an enterprise whose affairs were conducted through a pattern of racketeering activity. Racketeering activity was defined by reference to a list of federal crimes called 'predicate acts'. These acts include mail and wire fraud, activities that capture a broad range of illegal activity.

The United States Supreme Court has refused to limit the scope of Civil RICO actions.[151] Consequently, many actions that would have pleaded common law fraud alone are now accompanied by a RICO claim. The bargaining leverage thus gained by aggrieved persons will be apparent. RICO has been employed in respect of activities far beyond the arena of organised crime.[152] It has revolutionalised private litigation and federalized broad areas of the state common law of fraud.[153] Inevitably lawyers and accountants have been swept up in the litigation as persons associated with the pattern of racqueteering activity.

The first case involved the well-known accounting firm of Touche Ross.[154] The firm had audited accounts of International Horizons upon which the plaintiff banks extended credit to International Horizons. Two years later International Horizons went into bankruptcy. The banks lost about $16.7 million, and claimed treble damages under RICO. They alleged that the firm were 'persons' employed by, or associated with, International Horizons and that the plaintiff banks suffered loss as a result of the firm's "direct or indirect participation in the conduct of International Horizon's affairs through a 'pattern of racketeering activities' (i.e. two or more acts of wire or mail fraud)".[155] The Court of Appeals found that the District Court was wrong in dismissing the complaint. All that was necessary was to claim that the firm assisted in the preparation and dissemination of false financial statements. If it could be proved that the firm had known that the mails would be used to send the false reports to the plaintiff banks that would constitute mail fraud.[156]

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151 *Sedima v Imrex*, 473 US 479 (1985).

152 *Northeast Woman's Center v McMonagle*, 868 F 2d 1342 (3d Cir 1989).

153 *H J Inc v Northwestern Bell Telephone*, 109 S Ct 2893 (1989). In Australia, the *Trade Practices Act* 1974 (Cth) s 52, has the same potential of outflanking the common law; see R S French "The Law of Torts and Part V of the *Trade Practices Act*" in *Essays on Torts* (Ed. P D Finn, 1989) p 183.

154 *Bank of National Trust v Touche Ross*, 782 F 2d 966 (11th Cir 1986).

155 *Id.*

156 *Id*; the width of this interpretation is controversial and has caused other Courts of Appeal to differ with the 11th Circuit; for a discussion of the case law see *Yellow Bus Lines v Drivers, Chauffeurs & Helpers Local Union* 639, 913 F.2d 948 (DC Cir 1990) (en banc); the division has prompted the United States Supreme Court to accept certiorari in *Reves v Ernst & Young*, 937 F.2d 1310 (8th Cir 1991) (finding that Arthur Young's "involvement with [the enterprise] did not rise to the level required for a RICO violation). The Supreme Court's view will be critical in the numerous suits involving accountants spawned by the Savings and Loans debacle.

In a second case two dismissed officers of Ashland Oil brought a Civil RICO action against their former employer.[157] It was alleged that they had been dismissed when they blew the whistle on illegal bribes given to officials in Middle Eastern countries. The bribes were prohibited under the *Foreign Corrupt Practices Act*.[158] The plaintiffs claimed that the company was operated by the defendants through a pattern of racketeering activities. The plaintiff's dismissal was, on one view, only an indirect injury of the defendants engaging in the predicate acts making up the racketeering activities. The court found that an indirect injury was sufficient, but even if a *direct* injury was necessary the claim could be sustained because the defendants had engaged in a conspiracy also actionable under RICO. The dismissal was a direct result of the conspiracy. These were acts done in furtherance of the conspiracy to operate Ashland through a pattern of racketeering activity.

The place of lawyers and accountants as advisers in the business affairs of corporations is precarious.[159] If a lawyer acts for a corporation he may stray into the territory of the manifold predicate acts and thus engage in a pattern of racketeering activity. Liability will range to third persons indirectly injured by the lawyer's conduct thus extending beyond the class of persons to whom a duty would be owed at common law.[160] To be sure, the plaintiff will have to prove knowledge on the lawyer's part, but constructive knowledge may suffice.[161]

The long tentacles of Civil RICO and its draconian remedies coerce lawyers and accountants into acting as gatekeepers for the public. Since the activities are far from organized crime it may be asked whether the cost in professional independence is worth the benefit in policing.

Our concern in this type of litigation is that it chills the lawyer's representational role. It is oftentimes difficult for a lawyer to judge in the murky RICO waters, as he steers a course between fidelity to his client and the possibility of heavy damages liability.

D. LAWYER INFORMANTS

An apparent policy of the United States Department of Justice, which prosecutes federal crimes, is to influence lawyers to become informants against

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157 *Williams v Hall, McKay & Ashland Oil*, 683 F Supp 639 (E D Ky 1988).

158 19 United States Code Section 78dd-1.

159 L Bertan "Suits Against CPAs Are More Creative - And More Common" *Wall Street Journal* (8 February 1989), p B7; D Barchard, A Jack and R Lapper "Poly Peck Administrator Sues Accountancy Firm" *Financial Times* (19 December 1991) at p 1 (Touche Ross, one of the administrators to Poly Peck International, the collapsed fruit and electronics groups, has filed a negligence action against Stoy Hayward. This is likely to be one of the biggest liability suits ever to face the accountancy profession.)

160 *Ultramares Corp v Touche*, 255 NY 170, 174 NE 441 (1931) (restricting the common law duty); *Hedley Byrne v Heller* [1964] AC 465 (requiring a special relationship between information giver and recipient for a duty of case in negligence).

161 J P Freeman and N M Crystal note 141 *supra* (arguing for a relaxed scienter requirement).

their clients. The Department has been successful in this regard when the lawyer is also being investigated by the government, and as a result, the government offers an appealing immunity from federal prosecution. Attorney testimony involving client confidence has been found admissible in the courts. The Eleventh Circuit Court of Appeals, that sits in Atlanta, Georgia, called the government's actions "reprehensible" in a case before it, but did not dismiss an indictment against a defendant, even though one of the defendant's attorneys was a government informant and surreptitiously taped conversations with the defendant, Ofshe.[162] The Court found that "the invasion of the attorney-client relationship produced no evidence against Ofshe", and that "Ofshe was not prejudiced in his defense", and therefore under Supreme Court Sixth Amendment and Fifth Amendment jurisprudence, Ofshe's motion to dismiss the indictment would have to be denied.[163] The Court made clear, however, that its "holding was based upon the unique facts of this case", and that it did "not condone the government's use of criminal defense attorneys as informants against their clients."[164]

Most recently, a federal trial court in Houston, Texas, called the government arrangement "highly questionable" but nonetheless went on to rule that tape recordings the lawyer made of meetings with his clients can be used against the clients in their upcoming savings and loan fraud trial.[165] The court found that the lawyer, Rea, was a business partner of the two defendants, Philip and Thomas Noons and therefore no attorney-client privilege attached.[166] The court further found that Rea was assisting the clients in a crime, and therefore, the crime-fraud exception to the privilege took force. The Court specifically stated: "By assisting the brothers in their allegedly illegal activity, which the government has established by a prima facie case, Rea stripped the relationship of its attorney-client status."[167]

Attorneys can prevent disclosure simply by not responding to the government's inducements. The question remains whether the temptation should be allowed to exist. The above courts limited their decisions to the facts of the cases, and expressed reservation over the appropriateness of the government's activity; presumably as they value the continuing vitality of the adversary system. In *Ofshe*, the Eleventh Circuit clearly indicates that it is prepared to exclude lawyer informant evidence and may dismiss an indictment if such information prejudices the defense, which it will consider

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162 *United States v Ofshe*, 817 F 2d 1508 (11th Cir 1987).

163 *Ibid* at 1516.

164 *Id.*

165 *Id.*

166 *United States of America v Noons & Noons*, Criminal No H-89-2. United States District Court for the Southern District of Texas (5 September 1991) unpublished slip op, p 5. (Opinion on attorney-client privilege. On file with authors).

167 *Ibid* at 22. The *Noons* case is unpublished and a copy is on file with the authors, but the case is also discussed in C Harlan "When Lawyers Are Informants Against Clients". *Wall Street Journal* (11 September 1991), p B1.

constitutionally impermissible.[168] It is, however, questionable whether under any set of facts the practice can be tolerated. In *Ofshe*, no prejudicial information was revealed about the defendant, but the case identifies that the attorney was providing information about other individuals, and presumably, some of these other people must have consulted him in his position as a lawyer. If so, then the government is chilling the public's recourse to legal counsel.

On another level, the practice of inducing lawyers to breach confidences by granting immunity from prosecution is subject to potential and considerable abuse. More than a few attorneys may find themselves the subject of far fetched indictments or investigations in order that the government can fish for information. The power attendant to a government accusation is very strong. Certainly, if history is any guide to the future, this problem is very real.[169]

We are not alone in our concern over governmental overreaching. During the Fall of 1991, a federal judge and the assisting federal magistrate judge expressed strong reservations concerning the appropriateness of using professional advisors as informants. As a result, the Justice Department voluntarily dismissed a case of tax fraud it had based on such tactics against a restauranteur whose accountant had dubbed as an undercover informant for the Internal Revenue Service.[170] Since 1979 the informant was paid by the Internal Revenue Service to work undercover in the St. Louis, Missouri area. In a pretrial hearing, Magistrate Judge William S Bahn noted that if the case typified Internal Revenue Service practices, "further internal security and reform would seem to be mandated".[171]

E. INTERNAL REVENUE SERVICE

In 1984, the United States Congress enacted Internal Revenue Code 6050I that requires "[a]ny person ... engaged in a trade or business, and who in the course of such trade or business, receives more than $10,000 in cash in one transaction (or two or more related transactions)" to file a return specified as Form 8300.[172] Taxpayers must report this information as well. The American

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168 *Ofshe* note 162 *supra.*

169 *Application of United Electrical Radio & Machine Workers* 111 F Supp 858 at 868-70 (SDNY 1953) (Court castigates government prosecutors for using Grand Jury to smear Union); Recall also Palmer raids, see C Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* at p 88 (1983).

170 M Geyelin and E J Pollock "US Drops Accountant-Informant Case" *Wall Street Journal* (25 November 1991), p B5 col 1.

171 *Id.*

172 For academic commentary, see S Goode "Identity, Fees, and the Attorney-Client Privilege" (1991) 59 *George Washington Law Review* 307; D Carpa "Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries" (1990) 4 *Georgetown Journal of Legal Ethics* 235; in relevant part, Internal Revenue Code Section 6050I provides:

(a) Cash receipts of more than $10,000

Bar Association immediately attacked 6050I as a serious incursion into the attorney-client relationship, and mounted an organized, but to date unsuccessful, attempt to have lawyers exempted s 6050I's duty to disclose.[173]

In March 1990, the Internal Revenue Service ('IRS') announced that it had begun to use s 6050I as a basis on which to serve summons on lawyers who refused to reveal the names of clients paying legal fees in cash amounts exceeding $10,000.00.[174] The IRS stated that it did not believe it was violating the attorney-client privilege because the information requested is not confidential information. The IRS noted that it had contacted 950 attorneys who failed to provide sufficient information, and was taking legal action against 90 of them who had failed subsequently to cooperate.[175]

Any person -

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, receives more than $10,000 cash in 1 transaction (or 2 or more related transactions), shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) Form and manner of returns

A return is described in this subsection if such return -

(1) is in such form as the Secretary may prescribe,

(2) contains -

(A) the name, address, and TIN of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe

....

(f) Actions by payors

(1) In general

No person shall for the purpose of evading the return requirement of this section --

(A) cause or attempt to cause a trade or business to fail to file a return required under this section,

(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact, or

(C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or business.

(2) Penalties

A person violating paragraph (1) of this subsection shall be subject to the same civil and criminal sanctions applicable to a person which fails to file or completes a false or incorrect return under this section.

173 See S Goode note 172 *supra* at 310 (Professor Goode details efforts by the American Bar Association to seek exemption for attorneys).

174 Bureau of National Affairs "IRS Serves Summonses on Attorneys for Client Transaction Information" 46 *Criminal Law Reporter* 1503 (14 March 1990).

175 *Id.*

Even before the existence of s 6050I, the IRS sought client identity and fee arrangement information from lawyers. The reaction of American courts had been mixed. The starting point is the scope of the attorney-client privilege, but American courts have long been split over the purpose of the privilege. Consequently, the courts have been split over whether the privilege allows an attorney to shield from discovery information regarding fees and client identity.[176] Generally, the fee arrangement is not considered information that the privilege protects, but courts produced exceptions to the no privilege rule.[177] In fact, most of the federal circuit courts of appeals had adopted standards reflecting a general concern that the lawyers release of fee information and client identity may be used by the prosecution as evidence against the client.[178]

The IRS, however, can now compel client fee information in all circumstances. The first and to date only United States Court of Appeals decision on this issue upheld the constitutionality of s 6050I.[179] In *Goldberger*, the Second Circuit, which sits in New York, New York, indicated deference to Congressional and agency action, stating that: "Extensive lobbying efforts to exempt attorneys from the reach of this amendment were unsuccessful. Appellants now seek to secure from the judiciary what their lobbyists were unable to get from Congress."[180] The court ruled that the defendant could not succeed on constitutional claims (the Fourth and Fifth Amendments) because, like other legislation, the reporting requirements target transactions without regard to the purposes underlying them and do not require reporting of information that necessarily would be criminal.[181] The Court also ruled that there was no Sixth Amendment - right to counsel - violation because the defendant did not have to pay in cash and more fundamentally, the defendant did not have a constitutional right to an attorney of choice.[182] As regards professional privilege, the court ruled that "it was not a direct and unmistakable consequence that disclosure would incriminate" and therefore no abuse of the attorney-client relationship could occur.[183]

At the heart of this statute, as it is applied to the attorney, apparently is the effort to preclude a conduit for money laundering.[184] Unfortunately, it causes the attorney to produce incriminating evidence against his own client, which

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176 "Developments in the Law, Privileged Communications" (1985) 98 *Harvard Law Review* 1450 at 1516.

177 *Ibid* at 1518.

178 *Id.*

179 *Id.*

180 *United States of America v Goldberger & Dubin PC* 935 F 2d 501 (2nd Cir 1991).

181 *Ibid* at 503.

182 *Ibid* at 504.

183 *Ibid* at 505.

184 See American Bar Association/Bureau of National Affairs, 1 *Lawyer's Manual on Professional Conduct* pp 988-89 (2 October 1985).

perhaps is also a motivation of its drafters.[185] Like the drug forfeiture statutes, this statute will have the effect of pushing some defendants into having to rely on government appointed attorneys; the other alternative is to surface with the cash and convert it into another form of payment thereby risking producing adverse evidence in another fashion.[186] The government, of course, attempts to have people produce evidence against themselves in many ways, but to force them to forego private representation for a government appointed defense harms a defendant's ability to protect himself.[187]

F. INSOLVENCY DECISIONS

American courts may be at a crossroads. Their perplexity with overwhelming court dockets is great. The public and business community are frustrated with what they perceive as undue delay and needless expense in the administration of justice.[188] The legislative and executive branches of the

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185 In a recent case in Atlanta, Georgia a lawyer resisting the Government's compulsion of client fee information stated: "I do not believe my role as a criminal defense attorney is to be the first witness for the prosecution" see A Woolner, 102 *Fulton County Daily Report*, p 1 (15 November 1991). In this case, *United States of America v Garland*, Civil Action No 1:91-CV-2267-ODE (ND Ga 5 Dec 1991) United States Magistrate Judge William L Harper recommended to the District Court that the summonses be enforced against the attorneys. Magistrate Judge Harper's report and recommendation relied heavily upon the *Goldberger & Dubin* case. (This is an unpublished report and recommendation, but can be obtained from the authors).

186 *Caplin & Drysdale, Chartered v United States*, 109 S Ct 2667 at 2672 (1989).

187 *Ibid* at 2673. Justice Blackmun writing for the dissent in *Caplin* argued that: "Without the Defendant's right to retain counsel, the Government too readily could defeat its adversaries simply by out spending them". Justice Blackmun further noted that: "The right to privately chosen and compensated counsel also serves broader institutional interests. The 'virtual socialization of criminal work in this country' that would be the result of widespread abandonment of the right to retain chosen counsel, Brief for Committees on Criminal Advocacy and Criminal Law of the Association of the Bar of the City of New York, et al, as *Amici Curiae* in no 88-454, p 9, too readily would standardise the provision of criminal-defense services and diminished defense counsel's independence". Justice Blackmun further notes that: "The choice of counsel is the primary means for the defendant to establish the kind of defense he would put forward." And, "Only a healthy, independent defense bar can be expected to meet the demands of the varied circumstances faced by criminal defendants and assure that the interest of the individual defendant are not unduly subordinat[ed] ... to the needs of the system" *ibid* at 2674.

188 Books about the judicial system have reached the mainstream press, see eg W Olsen, *The Litigation Explosion* (1991); P W Huber and R E Litan *The Liability Maze* (1991); in the nation's business paper, the *Wall Street Journal*, lawyers, courts, and congress are routinely attacked. For recent examples of these articles see, eg T Ferguson "Bankrolled Bedrooms, Breadbaskets, Barristers" *Wall Street Journal* (4 February 1992), p A15: "One thing that still grows, is the number of lawyers"; Editorial "It's A Quota Bill" *Wall Street Journal* (22

federal as well as the state governments vent increasing frustration with the judicial system. A plethora of reforms have been adopted and suggested, the common denominator of which is to reduce the autonomy of the courts.[189]

The organised bar, sensitive to criticisms of lawyers as fomentors of problems, such as the rising cost of insurance, has suggested that professionalism be reemphasised.[190] The commercialisation of practice, not for the first time, is identified as the *bete noir*.[191]

The response by the courts may be to seek greater control over the administration of justice in the same way as we have seen executive agencies seek greater regulatory control: enlisting the aid of attorneys. Recent insolvency cases, for example, show that courts are likely to envigorate the concept of the attorney as an officer of the court. In *In re James Contracting Group, Incorporated*[192] and *In re Amstar Ambulance Service, Incorporated*,[193] the courts signalled to attorneys that as officers of the court, they have a duty to disclose to the United States Trustee and to the court that the debtors they represent are not likely to successfully reorganize. Otherwise, the attorneys' fees will be reduced by the court. In *In re James*, the court stated:

> Whenever it becomes obvious during a Chapter 11 that there is little or no hope of a reorganisation, and the debtor's attorney negligently permits the debtor to continue to operate and incur debts to the detriment of the estate and the creditors, then the bankruptcy court has a duty to penalize the attorney; since the attorney is an officer of the court ... the attorney, as an officer of the court, has a duty to notify both the U.S. Trustees and the court whenever it becomes evident that a reorganisation is unlikely to succeed.[194]

November 1991), p A12 (in criticising the civil rights bill of 1991, the *Journal* states: "The 1980s were the Growth Decade, the 1990s will be the Lawyers' Decade."); Editorial "Less Litigation, More Justice" *Wall Street Journal* (14 August 1991) at p A8 (detailing Vice President's Dan Quayle's initial proposals for civil justice reform).

189 See eg Editorial "Less Litigation, More Justice" *Wall Street Journal, id.* (Among the reforms touching upon the autonomy of the courts, is the promotion of alternative dispute resolution techniques, and specific requirements put upon judges in the administration of the case); see also LG Crovitz "Lawyers Seek Senators As Advocates Against Quayle Reforms" *Wall Street Journal* (18 September 1991), p A15. The first tangible step toward law reform in USA by the Executive occurred in October 1991, and became effective on January 21, 1992, President Bush signed Executive Order No 12,778, which requires United States Government attorneys to file a pre-filing notice of impending suits against a private party and mandates that the United States government must engage in a pre-litigation settlement process. The order also directs that government attorneys attempt to limit overburdening discovery.

190 American Bar Association Commission on Professionalism (1986), p 3.

191 See R L Solomon note 68 *supra.*

192 120 Bankruptcy Reporter 868 (Bankr ND Ohio 1990).

193 120 Bankruptcy Reporter 391 (Bankr NDWVa 1990).

194 Note 192 *supra* at pp 873-874.

In *In re Amstar*, the court stated:

> This Court does not wish to establish a standard which mandates that a firm must achieve a successful reorganisation in order to be awarded 100% of its fees in a Chapter 11 case. It does, however, believe that it is necessary to establish a duty of diligence on the part of attorneys representing debtors-in-possession to monitor the progress of each case and make a seasoned determination of whether further rehabilitation efforts are warranted. Consequently, absent a compelling explanation, attorney fees incurred beyond the period where there is no likelihood of a successful reorganisation will be denied.[195]

These cases are significant and demonstrate the inherent conflict in owing duties to more than one party. The cases seek to protect creditors, which as the Maxwell estate's filing in the USA identifies, creditors probably need greater protection under American insolvency laws, but nonetheless, the duties in *James* and *Amstar* significantly alter the role of the attorney.[196] It has always been a fraud for the client to continue in a reorganisation chapter beyond the point at which there was no hope of reorganisation. Under the *Amstar* and *James* duties, however, the attorney now has to make independent business decisions and second-guess, perhaps, the client's decisions regarding the continued feasibility of reorganisation efforts. With the real possibility that courts may, in retrospect, find business continuance as futile, debtor's counsel may take action to notify the court and consequently derail debtor's reorganisation. There is of course a problem with having creditors monitor the debtor's efforts, for the creditors simply do not have the vantage point from which to make judgments. United States Trustees, however, are appointed to help the bankruptcy court evaluate the actions of the debtor. It would seem that strengthening the position and the control of the Trustee or the body of creditors vis-a-vis the debtor would be a sounder alternative than putting the attorney into a conflict-ridden, unmanageable position. The court, however, can only look to the attorney because restructuring the position of the United States Trustee or the body of creditors, vis-a-vis the debtor, can only come from Congress.[197]

V. CONCLUSION

During the 1200s in England, the increasing complexity of the law, chiefly in respect to land, necessitated the birth of an occupation of hired legal counselors.[198] If one thing has been constant in the life of the law, it has been its growth. In order to govern, the regulatory state has criminalised behavior not traditionally viewed as 'criminal'. Government may thus influence behavior that thwarts its goals. Consequently, the need for the representational role of

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195 Note 193 *supra* at 396.

196 See eg L Kallan, *Corporate Welfare: the Mega Bankruptcies of the 80s and 90s* (1991).

197 For further criticism of *James* and *Amstar*, see D Hall "Loss of Attorneys Fees in Failed Chapter 11's" (1991) 8 Norton Bankruptcy Law Adviser, pp 7-8.

198 R Alexander note 47 *supra*, p 9.

the lawyer is greater today than at any other time in history. If the role comes to be defined by and subject to the mercy of the social good, then individual rights over and above the collectivity vanish.[199]

We have demonstrated that the regulatory state has encroached on the traditional representational role of lawyers in a pluralistic state. Is this encroachment permanent and will it become more pervasive? We do not see a speedy end to the regulatory state in either the United States or Australia and thus the pattern elucidated in this article is likely to be repeated. We have noted also that the representational role has staunch supporters. The courts have often maintained its centrality against governmental and agency urging that the public good demanded compromise.

In looking back at the end of this decade we may see the questioning of the representational role of lawyers as a marker in the emergence of the neo-corporatist state.[200] For defenders of traditional liberal pluralism with its confined role of government, the trends ventilated in this article may be disturbing. As noted, the courts have, on occasion, shown an inclination to defend the tradition and thus frustrate government and other actors in forging the neo-corporatist state. Appeal to social responsibility of the legal profession and attendant formal duties can undermine its representational function. The degree to which we are prepared to defend the representational function will turn on our commitment to the liberal pluralistic state and the rule of law.

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199 C Fried "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 *Yale Law Journal* 1060 at 1073.

200 See generally, T C Halliday note 33 *supra.*