

INDEPENDENT PROFESSIONAL POWER AND THE SEARCH FOR A LEGAL IDEOLOGY WITH A PROGRESSIVE BITE

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There died a myriad,
and of the best, among them,
for an old bitch gone in the teeth,
for a botched civilization.

Charm, smiling at the good mouth,
quick eyes gone under earth's lid,

For two gross of broken statues,
for a few thousand battered books.

—Ezra Pound¹

INTRODUCTION

Politically sensitive individuals, many whom came of age in the Vietnam era, have found their way into law schools and the legal profession without losing their political focus. Liberals like Bruce Ackerman,² “law and economics” conservatives like Frank Easterbrook,³ and Critical Legal Studies radicals like William H. Simon⁴ want their professional legal work to help

* Acting Dean and Professor of Law, Indiana University School of Law, Bloomington. Many colleagues have commented on fragments and drafts of this manuscript. I will spare most of them from this version, which has little in common with some earlier efforts. This work has kept moving because it is above all an exercise to orient my own thinking and account for some of the debates currently alive in the legal profession. I would in any case like to thank my colleagues at the Indiana University School of Law, most of whom have commented on the ideas in this essay; and I have also been helped very much by the observations of Kim Economides, John Flood, Norman Furniss, Jack Getman, and William Simon.

1. E. POUND, E.P. ODE POUR L'ELECTION DE SON SEPULCHRE (1920).

2. See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); *infra* notes 25-37 and accompanying text.

3. See, e.g., Easterbrook, *The Supreme Court 1983 Term, Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984). Easterbrook tries to construct an argument that will enable his ideological and political view to prevail even when federal or state legislation points in a different direction. If, for example, the legislation appears to be the product of special interest lobbying, courts can construe it narrowly. The result would be that the “efficient” common law background would prevail. Unfortunately, the legislative process in the United States is built on interest group lobbying, which means that Easterbrook can question virtually any “regulatory” statute that he finds to be economically inefficient. Progressive legal scholars, like Ackerman and Simon, similarly hope to create institutional mechanisms that will provide protection for their viewpoints even from a legislative attack.

4. See, e.g., Simon, *Legality, Bureaucracy, and Class in the Welfare State*, 92 YALE L.J. 1198 (1983); *infra* notes 38-57 and accompanying text.

them generate and participate in political change.⁵ They are not content with the relatively mechanical work of adaptation to social change that has sustained generations of legal scholars of all political persuasions,⁶ convinced of a divorce between law and politics. While adaptation is passive, merely following social movements, these scholars and many others of their generation want to situate law and the legal profession at the center of social change. They assume that the fight over *legal* ideology matters, and that the power of the legal profession might be harnessed and made to institutionalize a political vision.

Two brief examples can give the idea of institutionalized political commitment some plausibility. The legal profession has taken a strong institutional role, anchored in the traditions of the profession, against major human rights abuses in countries such as Argentina, Chile, and South Africa.⁷ Closer to home, it is easy to document the importance of the American Bar Association in building and protecting the Legal Services Corporation.⁸ Individuals acting within their professional roles and professional organizations in those settings have generated a political power by virtue of a shared professional stance.

These examples point to the existence of the legal profession's "independent" power.⁹ Independence implies the possibility of the legal profession

5. Professor Robert Gordon explains the background of the late 1960's and 1970's as follows:

[U]nder these conditions young lawyers became desperate for a more plausible and less compromised view of the social uses of law; and many of us found it in the emerging vocation of the liberal but antiestablishment, activist reform lawyer, who would deploy the techniques of the system against the system, work for good, substantive rule change, more open and representative procedures, more responsible bureaucracies, and, in general, who would try to make effective and real the law's formal promises of equal justice.

Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 281, 283 (D. Kairys ed. 1982). It is interesting that these lawyers could link their activist principles to promises that could be attributed to "the law." A recent examination of the mood of lawyers in the early 1970's compared to today is Geoghegan, *Warren Court Children*, *NEW REPUBLIC*, May 19, 1986, at 17.

6. See the critique in Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

7. The role of lawyers (and the Church, which has interesting institutional parallels) in Chile, for example, is explored in Frühling, *Repressive Policies and Legal Dissent in Authoritarian Regimes: Chile 1973-1981*, 12 *INT'L J. SOC. LAW* 351 (1984). On South Africa, see, e.g., Note, *Public Interest Law in South Africa*, 22 *STAN. J. INT'L LAW* 153 (1986).

8. According to William French Smith, then-President of the A.B.A., for example, "If as we believe, there is no realistic possibility that the legal needs of the poor will be met absent the Corporation, what possible justification is there for eliminating the program?" *Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 97th Cong., 1st Sess., pt. I, H.R. 2506 and H.R. 3480* (1983). This kind of testimony saved the program from the Reagan attacks. See also Halliday, *The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era*, 1982 *AM. B. FOUND. RES. J.* 913.

9. For useful recent discussions of what is meant by this idea, see E. FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986); T. HALLIDAY, *BEYOND MONOPOLY: THE POLITICS OF EXPERTISE IN A MATURE PROFESSION* (in press); cf. Fish, *Anti-Professionalism*, 7 *CARDOZO L. REV.* 645 (1986).

as a collective force leading or resisting political change that would otherwise take place. In some ways this is an illusory concept. No one can isolate the effect of the profession apart from the society to which it belongs. Moreover, the profession is far from homogeneous and never has been united behind any particular program. Nevertheless, students of professions have located ideological characteristics that tend to unite legal professionals.¹⁰ Indeed, cleavages within the profession may help to produce a progressive ideology promoted by professional elites. As Gordon has noted,¹¹ there has long been a schizophrenia associated with professional activism. Lawyers who feel too close to business, for example, or are concerned with the bad image of some sectors of the bar, may work doubly hard to assert and demonstrate a commitment to improving American society consistent with their professional ideals. Finally, an inquiry into professional power is justified since lawyers and legal academics tend to act as if capturing professional institutions and predominant attitudes one way or another will make a political difference. Participants in legal debates today are working hard to embed their politics in legal principle.

This idea of independent professional power surfaces especially in the United States, due in part to the nature of typical political parties and movements. The lack of a labor party, for example, limits the opportunities for lawyers simply to affiliate themselves with an ideological political institution and its social agenda. The traditional political role of the judiciary in the United States helps to support the notion that change proceeds independently through the courts and related legal strategies.¹² It is not surprising, therefore, that considerable energy in the United States continues to be expended in efforts to link the profession to a particular political agenda. Scholarship in constitutional law, federal courts, or statutory construction, for example, tends to seek neutral sounding principles to convert readers to a more or less explicit political agenda.¹³ As Posner writes with respect to legislation, "[i]t is not an accident that most 'no constructionists' are political liberals and most 'strict constructionists' are political conservatives."¹⁴

10. M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

11. Gordon, "*The Ideal and the Actual in the Law*": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS* 51 (G. Gawalt ed. 1984).

12. According to Lasch, "Failing to create a popular consensus in favor of its policies, the left has relied on the courts, the federal bureaucracy, and the media to achieve its goals of racial integration, affirmative action, and economic equality." Lasch, *What's Wrong with the Right*, 1 *TIKUN* 23 (1986). In some ways we could say the same about the right in the Reagan era.

13. See, e.g., *supra* note 3 and *infra* note 14 (for examples on the right); *infra* note 19; M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); FISS, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982) (for liberal examples). This is what Freeman and Schlegel term "technique with a tilt." Freeman & Schlegel, *Sex, Power and Silliness: An Essay on Ackerman's Reconstructing American Law*, 6 *CARDOZO L. REV.* 847, 854 (1985).

14. R. POSNER, *THE FEDERAL COURTS* 293 (1985).

A series of questions about this project of capturing legal ideology tend not to get asked.¹⁵ The questions are particularly timely with respect to liberal or left politics, since groups on the left are less enthusiastic today about a legal politics of adaptation. First, what factors support the existence of independent professional power to effect political change? Second, what can we do to strengthen the profession's role in fostering progressive reform? Third, what factors undermine the independent professional role? Finally, the ultimate question of political stance: is the independent professional role still worth cultivating, or is the fight over the professional hearts and minds of lawyers better characterized as over what Ezra Pound termed a "botched civilization"?

These questions have surfaced before in analyses of the role of the profession. Weber explored them in his analysis of how the legal profession (as compared, for example, to the Protestant ethic) contributed to the rise of capitalism.¹⁶ To what extent, Weber asked, did the characteristics of the legal profession contribute to the development of Western capitalism? The difficult question today is what the profession offers or might offer in response to the conservative social trends and movements of the past decade. The welfare state ideal has come under increasing attack,¹⁷ especially the notion that the government has an obligation to redistribute wealth to those who have found no way to get by in the labor marketplace. Where does this leave the 60's lawyers? Can they mobilize the profession to do more than adapt their practices to the new social arrangements? Finally, lurking in the background is the conservatives' question for the future: can the profession be captured today such that it will help to resist any tendency in the future toward the revival of a progressive social agenda?

I. LEGAL PROFESSIONAL POWER: THE INSTITUTIONAL BASES

The political power of the legal profession depends on the resources that individuals and groups can muster as professionals. This is not the same as

15. This is not the place to speculate on the intractable question of whether ideology generally is *produced* by economic and social relations or can be molded by education and debate. It will suffice to assume that some impact on ideology can be generated by processes such as legal education and scholarship. A useful recent discussion of legal ideology is in Cotterrell, *Legality and Political Legitimacy in The Sociology of Max Weber*, in *LEGALITY, IDEOLOGY, AND THE STATE* 69, 84 (D. Sugerman ed. 1983).

16. See, e.g., M. WEBER, 2 *ECONOMY AND SOCIETY* 865-900 (G. Roth & C. Wittich eds. 1978); Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 *Wis. L. REV.* 720. An interesting recent analysis of legal practice and ideology from a similar, Weberian standpoint is Dezalay, *From Mediation to Pure Law: Practice and Scholarly Representation within the Legal Sphere*, 14 *INT'L J. SOC. LAW* 89 (1986). Dezalay's analysis, based largely on the French situation, focuses on how legal power is maintained through the ability especially of courts "to regenerate orthodoxy, always at the price of an over-investment in legality that allows disruptive novelty to be digested gradually." *Id.* at 104.

17. See *infra* text accompanying notes 110-18.

the power that comes from a wealthy family background, social connections, or education generally, although all of those factors help give lawyers political power in our society. Putting these factors aside, the concern here is with empowerment from the professional role. A model of such empowerment, based on Weber, could be developed in the following manner.

At the outset, legal professionals gain independent power to the extent that they act within their "legitimate" professional and institutional roles. They operate from a position of advantage within those roles—that is their "expertise," and legal expertise earns them deference from the general public. If they or others undermine those roles, naturally they also undermine the position of privilege. Of course the roles are not fixed categories, and part of the game involves expanding the roles and pushing the limits of what is accepted as legitimate.¹⁸ But legal professionals tend to lose any special power and move toward the power of an ordinary citizen speaking "mere politics" when they are deemed to be acting outside the professional role.

When they follow the conventions of accepted legal arguments, legal professionals are likely to have more impact than when they argue on other bases.¹⁹ Again, that is their claim to expertise and influence. It enables them to have their ideas considered seriously without simply being considered politics. If too many people become convinced, for example, that the lawyers' language of rights is merely a smoke screen for a political position, that language will be taken less seriously. We need not characterize the accepted legal arguments as neutral. What matters is that they are conventional—what lawyers are supposed to argue.

In addition, such conventional arguments gain resources also because they have an audience where those arguments can gain a hearing, again on the assumption that they are not just political but are also grounded in legal principle or convention. Such arguments have a better chance than pure politics in the courts, but conventional arguments also have a power in administrative agencies, the legislature, and in the professional-client relationship. Lawyers get listened to in many forums when they can ground their position in accepted legal doctrines.

This use of convention may serve to entrench certain values in methods of argument that obfuscate their political content.²⁰ The dream of many

18. For a nice case study, see Brigham, *Means Discrimination: An Investigation into the Ideology of Constitutional Equality*, 8 *LAW AND POLICY* 169 (1986).

19. See, e.g., R. DWORKIN, *LAW'S EMPIRE* (1986). This book provides a very sophisticated way to build progressive principles into a model of legal decision-making.

20. Habermas' evolutionary scheme leads to a comparable point:

Naturally, the action orientations that achieve dominance in social movements are, for their part, structured by cultural traditions. If one conceives of social movements as learning processes through which latently available structures of rationality are transposed into social practice—so that in the end they find an institutional embodiment—there is the further task of identifying the rationalization potential of traditions.

Habermas, *Legitimation Problems in the Modern State*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 125 (1979).

legal reformers is to hide their politics so well in legal argument that persons of different political persuasions will be unable or unwilling to try to push for another result. If lawyers agree generally, for instance, that the Constitution should be construed narrowly according to the framers' intent, that inherent limits of federal courts should lead them to reduce their caseloads and their tendencies toward intrusive remedies, and that statutes should be construed narrowly for reasons of separation of powers, many critical political debates can simply be finessed.

Such conventional arguments, however, must be supported by someone other than academic writers. The market must be organized to allow these arguments to be made in the appropriate forums. Progressive lawyers in the past have tended to look to the elite corporate bar and the public interest bar to construct the appropriately sophisticated legal arguments in the interests of progress. Professional power, in Larson's terms, depends on the cultivation of certain "aristocratic values" developed—at least to some extent—in opposition to the forces of the market.²¹ Elite and public interest lawyers have at times succeeded in gaining some insulation from these market forces.

II. STRENGTHENING PROGRESSIVE PROFESSIONAL IDEOLOGY

Independent professional power thus requires an accepted language and expertise and a means to promote professional advocacy. Recent efforts to reconstruct the legal professional ideology assume that there is enough independent professional power to make the fight worthwhile. The challenge to construct an effective professional ideology, however, faces some serious difficulties.

The question of independent professional power has implications for both progressive and conservative reformers, but the focus here will be on those trying to resist the prevailing conservatism. It is first important, therefore, to explore recent innovative contributions to the battles over legal ideology. Subsequent sections of this Article will thus begin by examining carefully two thoughtful efforts to bolster the ideological stance of lawyers and the legal profession in the interests of progressive reform. Leading advocates of new forms of *professionalism*, it will turn out, fall short in their quests to build a progressive legal ideology capable of becoming a serious social force.

The professional visions, however, can be combined with more traditional efforts to strengthen legal doctrines. The domestic substantive doctrine of legal rights—the staple of legal ideology in the 1960's—offers some promise in current debates. Rights based doctrines may seem unimaginative compared to innovative visions of professionalism, but progressives will not get very far without such doctrines. A more innovative doctrinal possibility is to look

21. M. LARSON, *supra* note 10.

for further resources for the independent argument available in the form of international human rights. The logic of today's quest for independent professional power, in short, leads to a package of rights and professionalism fortified by recent trends in legal doctrine and scholarship.

Once the project is refined and made explicit, however, we must examine its limits in addition to its potential. Just how much power can be generated from such a package? The decline in legal formalism makes it difficult indeed to build on the ideology Weber emphasized,²² and ideals of professionalism also look weaker today than in the past. Ultimately we must ask if the professional strategy, despite its plausible claims to independent power, remains worth pursuing. No easy answer will be forthcoming, but the issues raised in this Article should at least highlight the dilemmas.

Bruce Ackerman's *Reconstructing American Law* can be taken as the leading liberal effort to articulate a new professional stance. He defines a legal role, termed "Constructivism," that "will permit us to confront, if not resolve, the basic legal challenges posed by our present form of political and social life."²³ Radical professionalism, on the other hand, is best represented by the work of William H. Simon, especially in his study of "Legality, Bureaucracy, and Class in the Welfare System."²⁴ In this essay, Simon develops the idea of an "opposed vision" of professionalism which can be cultivated and used as the basis for constructive reform. As will become apparent, both efforts have a great deal in common and therefore reveal much about the hopes for a progressive professional role today. Both confront the question of just what that role should be. Neither is limited to the empty advocacy of progressive legal doctrine in the form promoted in recent decades.

A. Ackerman and the Limits of Constructive Professionalism

Ackerman's professional model has a number of attractive features spelled out in *Reconstructing American Law*. He calls for a constructive lawyer who will go beyond the negative critique and "situation sense"²⁵ of the realists and the narrow approaches to law and economics practiced by the Chicago school. Ackerman wishes to promote lawyers valued especially for their

22. See, e.g., Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571-73 (1983). The "Golden Age" of formalism implies that legal ideology mattered more then and was more independent from government and politics, but it is important to remember that the ideology prospered in part because it tended to serve particular interests.

23. B. ACKERMAN, *supra* note 2, at 20.

24. Simon, *supra* note 4. According to Kelman, *Trashing*, 36 STAN. L. REV. 293, 305 n.36 (1984), Simon's essay "perhaps most ideally combines the three major functions" [constructive reform, political education, and explanation] of critical scholarship. Gerald Frug specifically recognizes Simon's approach as a preferred alternative to the liberalism of Ackerman. Frug, *The Language of Power*, 84 COLUM. L. REV. 1881, 1894 (1984).

25. B. ACKERMAN, *supra* note 2, at 73.

ability to "state the facts" in a much more sophisticated fashion than legal formalists or those who have tried to replace them. Constructive lawyers can utilize the latest in legal technology and help to build a society that can realize the potential of the "activist state." The ideal is to put lawyers in a position to lead American society to this socially progressive position. That requires, of course, some possibility of independent professional power.

A first question is what Ackerman assumes will give lawyers any special power to promote this better state? The basic response is that they will help to "construct a new language of power that does justice to the aspirations for justice of our fellow citizens."²⁶ As special custodians of that language, lawyers ostensibly will lead policy debates to higher and more sophisticated levels. Indeed, Ackerman fears that if lawyers do not learn this language, they may bring on "the fall of the American legal mind from the heights of power."²⁷ What Ackerman means by power, however, remains to be clarified.

One possibility is that this power is derived from the power of the client population. As noted before, the lawyers' arguments must be insulated from the marketplace or purchased in it, and paying clients are certainly potential buyers. But not everyone, in the first place, will have lawyers able and willing to speak this new language of power on their behalf. Ackerman does not confront the problem. Lawyers are simply given clients, for whom they must "translate their . . . grievances into a language that powerholders will find persuasive; a new language of power"²⁸ The problem of inequality in the ability to employ these lawyers is thus put aside. Activist lawyering, it turns out, assumes some subsidized advocacy: "the particular arguments advanced by the primary disputants may properly be complemented by others proffered by a bureaucracy concerned with the public interest or by lawyers engaged to represent those groups who would otherwise be unrepresented."²⁹

If no one engages the public interest advocates, it appears that lawyers will have no independent basis to criticize or assert their power on behalf of "otherwise unrepresented" groups. The bureaucracy may assert a view of the public interest that rejects the idea of subsidized advocacy. This prospect is not difficult to imagine given all the fear today about subsidized advocacy even of lawyers for the poor, feared as examples of "funding the left."³⁰ The relative decline of the federally funded legal services program, at the very least, suggests that Ackerman's assumption may not hold up.

Even more serious is the question of what to do if the political leadership turns away generally from activist values—again not an unrealistic fear for

26. *Id.* at 4.

27. *Id.* at 109.

28. *Id.* at 3.

29. *Id.* at 33.

30. Cf. O'Connor & Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J. L. & PUB. POL'Y 483 (1984); sources cited *infra* note 93.

progressives. Ackerman's analysis might lead to two responses. The first is to avoid the question, insisting that there is a sufficient consensus in American society to protect against the abdication of activist principles. To complete the argument, one could even assert that lawyers responsive to the concerns of their clients will necessarily support the fundamental activist values. Thus Ackerman at times treats activism as a kind of given, referring, for example, to "the basic ideals that have led the American people to embrace activism in the first place."³¹ This new language of power is therefore simply assumed to be consistent with activist values.

But activist values are not beyond question. Ackerman also must grapple with the possibility that his liberalism-constructivism will lose in political struggles. Where would that leave constructive lawyers? At one point Ackerman seems to respond to this problem. He says that if that happens, the lawyers can seek change as individuals in the political process. As lawyers, however, they must couch legal arguments in terms of the values favored by the people.³² They must, in the end, fall into line behind the political mandate.

Despite that proposition, Ackerman does not quite mean that lawyers merely adapt to political change. They might still offer an independent progressive voice. The question is whether they *as legal professionals* should help to generate and protect values that they can influence ordinary people to accept.³³ If not, there is no substance to the legal profession's commitment to be constructive. Ackerman, near the end of the book, smuggles in this substance by invoking the idea of our "legal tradition."³⁴ It appears that in Ackerman's world lawyers are charged with protecting fundamental aspects of that legal tradition.

For example, *Brown v. Board of Education*, according to Ackerman, "forces lawyers to come to terms with an affirmative value before they can claim an understanding of the deepest aspirations of our existing legal system."³⁵ Elsewhere he refers to "procedural due process,"³⁶ a value entrenched by "the force of precedent." And in one place he argues that lawyers' "own historical traditions" lead to an "institutional framework that guarantees individual contractors a fair share of economic power no less than political and civil rights."³⁷ Ackerman's constructive lawyers, it

31. B. ACKERMAN, *supra* note 2, at 20.

32. *Id.* at 79.

33. A troubling example concerns landlord-tenant relations, where Ackerman states that "the decisive questions will be whether, *ex ante*, the warranty [of habitability] will benefit slum dwellers as a class; and if so, whether egalitarian redistribution is an affirmative value in our legal system . . ." *Id.* at 74. This implies that Ackerman's lawyers have nothing to say to the question of what affirmative values should be promoted.

34. *Id.* at 96.

35. *Id.* at 91.

36. *Id.* at 98.

37. *Id.* at 94.

appears, do not merely adapt; they have a mission to foster the protection of these values entrenched in their legal tradition.

The progressive or constructive mandate for Ackerman's new generation of lawyers thus moves past "high tech" advocacy. The legal profession acts as a progressive force because of its skills *and* because of its distinctive charge to cultivate and protect values from the professional tradition. If those values include subsidized advocacy and fair shares of economic power, and lawyers promote them as a matter of their professional expertise as individuals and in professional organizations, then we can use Ackerman profitably to cultivate a progressive legal ideology.

B. *Simon and the Limits of Radical Professionalism*

Simon's approach to professionalism, more complicated than Ackerman's, leads to a similar dilemma. Each shares the goal of finding a progressive professional model to replace legal formalism. Both would like a model of professionalism that can be cultivated in the law schools, that seems capable of being taught as method rather than politics, and that will promote progressive reform. While Ackerman embraces professional elitism as a positive value, however, Simon's further ambition is to take the elite value of professionalism and transform it into an egalitarian attack on hierarchy. Ackerman wishes to strengthen the authority of legal professionals, not undermine it. Simon ingeniously tries to have it both ways, and this further dimension of his work requires a somewhat more lengthy treatment here. Again, however, the starting point is the question of where to search for the independent professional power that makes the contest over ideology worthwhile.

I. Competing Visions and the Problem of Welfare Reform

Simon points to the developments in the welfare system over the past twenty years, in particular the "formalization" of substantive rules and requirements of proof, the "bureaucratization" of the system, and the "proletarianization" of the "front-line decisionmakers" who administer the system at the local level, and he considers them a failure of a certain kind of legal professionalism. The critical theme is that low level discretion exercised by caseworkers has increasingly been replaced by a regime of formal requirements and legal rights, administered hierarchically. These developments, according to Simon, have hindered the beneficiaries of social welfare and thus thwarted progressive reform. The failure, it appears, involved a misdirection of the profession's independent power.

In Simon's view, the misuse comes from a lingering legal formalism. This formalism, which Simon terms the "dominant" or Weberian³⁸ vision, con-

38. Simon, *supra* note 4, at 1224 n.75.

trasts with an "opposed vision," which "resembles the program of the social work profession under the old regime of welfare administration."³⁹ The dominant vision seeks to eliminate discretion through specific, formal rules hierarchically enforced according to the will of the sovereign. The opposed view emphasizes standards instead of rules, decentralized administration, and a different style of professionalism as a source of values for front-line decisionmakers.⁴⁰

Welfare reform, in Simon's analysis, became an unfortunate victim of the inadequacies of the dominant vision. "Professional" strategies were pursued in the *courts* by lawyers, who there sought the virtues of flexibility, discretion, and decentralized implementation of standards. But reform of decisionmaking in the *welfare* administrative apparatus pointed in a very different direction; front-line *administrative* decisionmakers increasingly confronted formalization, bureaucratization, and proletarianization. Even judicial decisions based in part on the opposed professional vision contributed in practice to "a proletarian definition of the welfare worker's role."⁴¹ Welfare law became increasingly formal and the welfare system increasingly bureaucratic. The question is whether more attention to the alternative vision could have avoided the situation then and contributed toward a better future as well. Could independent professional power used correctly have made a difference?

Interpreting "the dominant vision as ideology,"⁴² Simon contends that change requires a path to overcome structural obstacles to the realization of the alternative vision and its "downward expansion" to front-line welfare workers.⁴³ The hope is that future legal reformers, properly educated and informed by the critique of the dominant vision, will lead toward the realization of the opposed vision.⁴⁴ Indeed, Simon asserts that relatively prac-

39. *Id.* at 1240.

40. Simon locates both views in the American legal tradition, even if the opposed vision has represented more of a critique. His task, not unlike Ackerman's, is to explain and defend a constructive vision already implicit in many activities of the legal profession.

The Weberian attack on discretion has notable "liberal" adherents, including most of the major welfare reformers of the 1960's. *Id.* at 1223 n.69. Included are Kenneth Culp Davis, Joel Handler, Jerry Mashaw, Charles Reich, and Edward Sparer. Important conservatives, among them Judge Friendly and Justice Rehnquist, take the same approach. The "opposed" or "competing" view, while borrowing some from the dominant vision, looks beyond "undifferentiated legality." *Id.* at 1240. It finds support, according to Simon, in a series of developments in the courts: "theories of reasoned elaboration and irrebuttable presumptions, of due process and process values, of judicial administration, and of federal habeas corpus, class actions, and structural remedies." These developments are in general the same ones that Ackerman celebrates, even if Simon characterizes them rather differently. *Id.* at 1245. The opposed vision, which also has liberal and conservative adherents, presents the image of the concerned professional, able to exercise a responsible discretion at the local level. Formal rules and hierarchical administration are inimical to that discretion.

41. *Id.* at 1255. As the courts established and enforced legal rights, they also attacked the status and discretion of welfare workers.

42. *Id.* at 1260.

43. *Id.*

44. *Id.* at 1265.

tical steps toward welfare reform in the direction of the opposed vision, "at various levels of ambitiousness,"⁴⁵ could be undertaken now. What is needed is the reeducation of professionals away from the dominant vision.

The approach, like Ackerman's, points specifically toward the development of a better society in the United States, and it employs skills that can be developed in the law schools and in legal professional advocacy. Simon's opposed vision promises to make the poor better off while also diffusing professional values beyond the current professional elite. Professionalism thus rises above politics to become an independent force for good.

2. The Political Economy of the Opposed Vision—The Power Analysis

Superior knowledge by professionals appears in Simon's scheme to be the crucial requirement for social change. Ackerman shares the same faith, but his ambitions for change are not so far-reaching. Simon wants liberated individuals, like successful psychiatric patients, to use their education for dramatic change in themselves and in the society. The question remains, however, of how the superior knowledge can be put to use. We must ask again where the profession in Simon's model will gain its power to effect change.⁴⁶

All things, including political power, being equal, reformers might prefer Simon's attractive professional vision to the heartless formalization of the dominant vision. The opposed vision points toward a more humane and responsive welfare system. Simon's approach might be construed as asking for nothing more than that if welfare liberals are ever elected again, they should abandon the ways of thought that trapped them in Weberian formalism. Simon's approach arguably would better "adapt" the welfare system to "society's" desire to help the needy. Law would have implemented better the ideals that were favored by the liberal reformers. This approach, however, goes no farther than Ackerman's "adaptationist" passages. Is the argument then only about whose professional style serves any given society with given clients, even if preferably an activist society? If so, the question of independent power is simply avoided.

Simon's analysis and his model of reform at times do appear predicated on the assumption, found also in Ackerman, that the current alignment of

45. *Id.* at 1267.

46. The importance of this question is shown by Anthony Giddens, who states, "knowledge acquired in the process of 'self-reflection' is not a sufficient condition of social transformation. Knowledgeability plus capability—each is implicated in the continuity or change of social systems." In other words, a model of social change requires some notion that a potential agent of change "could have acted otherwise." As Giddens also points out, "it connects in an immediate way to the significance of *power* in social theory." See A. GIDDENS, PROFILES AND CRITIQUES IN SOCIAL THEORY 15 (1982). One cannot expect social change solely because better knowledge, unconnected to institutions and movements, is produced.

political power will remain constant. A more or less fixed purpose for the welfare program, for example, often seems implicit.⁴⁷ At one point the assumption becomes express in Simon's discussion:

Whatever the resource constraints are, they will limit enforcement options, but at any given level of resources, there will be a spectrum of options that will range from relatively formal, bureaucratic arrangements to relatively informal, decentralized ones. Even at low levels of resources, there is no warrant for presuming that formality and bureaucracy will be more efficient.⁴⁸

The opposed vision, according to this approach, is simply better, but the differences between visions have little to do with the amount of resources that will be committed or the relative political power of the recipients and their allies.

That approach implies the legal tradition of adaptation to "socially given" ends. But the question is whether professionals participate with some degree of power in the enterprise of defining what ought to be given. The challenge is to find a professional lever to promote the interests of welfare recipients, and Simon cannot ignore that challenge. While it is never clearly stated, a response to this problem can be found in Simon's approach: professional power may be both cause and effect in his professional vision. Simon certainly wants to push beyond adaptation.

Simon's approach can be found in his analysis of the effects of certain failed reforms. He emphasizes, for example, how easily the dominant vision could be "co-opted by conservatives concerned with cost-cutting and disciplining the public work force."⁴⁹ Evidently the dominant vision offered little or no resistance. The most explicit statement about the functional relationship between the opposed vision and political power, however, is added parenthetically,

When in fact liberal influence waned and control passed to conservatives relatively indifferent to beneficiary interests and more interested in curbing expenditures, the proletarian strategy was easily co-opted for quite different purposes. (To be sure, the proletarian strategy has some of the same disadvantages as a means of controlling expenditures that it has as a safeguard of beneficiary interests, but the political liabilities of the alternative professionalizing strategy would have seemed even greater to the conservatives than to the liberals.)⁵⁰

This statement requires elaboration, but it suggests a belief that the two visions do affect differentially the political power of the disadvantaged. The alternative vision puts the professionals on the good side and gives them some power to accomplish good.

47. See Simon, *supra* note 4, at 1209, 1253, 1269.

48. *Id.* at 1253.

49. *Id.* at 1223.

50. *Id.*

We can restate Simon's analysis as follows. First, the "poor" are inevitably a weak political force.⁵¹ Unlike major corporations, they do not empower the professionals who support them. At times, however, the poor obtain the support of reformers sympathetic to their interests. To the extent that liberal reformers are in power, as they were in the 1960's, resources for welfare programs and for the delivery of the benefits promised by the programs will be maximized. Several methods for delivering those benefits might of course be selected by the political liberals. Reform consistent with the dominant vision militates toward reforms that grant formal rights to the poor, minimize discretion, and proletarianize the personnel who provide the front-line services. If the reformers lose their position, however, or change their mind about helping the poor, the poor will have nothing but their own resources and a claim to "formal rights." Reducing benefits can be accomplished, according to Simon's interpretation, by an easy co-optation with few "political liabilities." The decision by the policymakers to cut benefits is simply made and implemented hierarchically, while the welfare system remains essentially unchanged.

Reform consistent with the opposed vision, in contrast, puts in place a group that identifies professionally with the goal of helping the needy. Two consequences should follow if conservatives replace the liberal reformers at the top. First, the poor will still have substantial enforcement power in support of welfare for their needs. The enforcement power will have been "diffused" to the front-line professionals instead of controlled by a rigid hierarchy. Second, the intermediate professional group will provide an important political ally on behalf of the needs of the poor. Disadvantaged groups, accordingly, should have more political clout to protect resources for their social programs, and they should also be blessed with a better and warmer effort to distribute those resources.

From this perspective of power, the professionalism sought by Simon in fact strengthens the political power of the needy. The claim is that the better inculcation of professional values will make poor people better off and with greater political power. A better form of professionalism can lead to a better society.

3. Personification of the Opposed Vision

The realization of the opposed vision in welfare reform depends on the development of an intermediate professional group that would handle the

51. The poor are of course an abstract category, defined most often by reference to a somewhat arbitrary poverty line. One cannot treat this category of people as homogeneous or even united by common interests. It is possible, however, to point to social groups that tend more often to be poor, such as blacks, single parent women, and the elderly. It is obvious that issues and programs that link disadvantaged, relatively weak, groups to politically more powerful groups help gain resources for the relatively weak, but that project is difficult to realize in practice. See, e.g., Rosenblatt, *Legal Entitlements and Welfare Benefits*, in *THE POLITICS OF LAW* 262, 274-75 (D. Kairys ed. 1982).

front-line administration of the welfare program. Such individuals would exercise some discretion over the range and extent of benefits provided, and the safeguard would be found in professional values. The front-line workers would become "autonomous, responsible participants in the implementation of a public program designed to alleviate individual need."⁵² There may be problems with this ideal,⁵³ but the more important question here is the contribution that can be expected from the cultivation of this new professional role.

The first problem, seen also with Ackerman, is how these professionals can be made to help weak social groups. One possibility contemplated by Simon is for the professional values to become sufficiently entrenched to persuade professionals to bolster the strength of the client population. A stronger client population can better promote its interests. Now it is unnecessary to assume that activist values will simply continue. This ideal leads to Simon's particular "vision of practice," elaborated in a more recent article.⁵⁴

Simon proposes indeed to "empower" the client, rather than, as has often been the case, building dependency and helplessness: "[T]he lawyer seek[s] to create a client capable of holding her accountable. The check on the lawyer's power lies in the possibility that she will succeed in creating a community in which members are capable of calling each other to account."⁵⁵

That vision responds to the problem as it translates the independent professional role into power for disadvantaged clients. Another problem now arises. How do the independent professional values get communicated? Is there any content to the communication? The content could come from a

52. Simon, *supra* note 4, at 1269. See also *id.* at 1266.

53. The problems with this professional strategy are especially evident in an era of shrinking governmental commitments to welfare. In lieu of solid empirical evidence, the following hypotheses appear very strong. If the budget is expanding, and there is a strong political commitment to helping the poor, then perhaps welfare professionals would be willing and able to fulfill Simon's ambition. A reduced commitment to funding welfare, however, would likely lead also to cuts in the amounts allocated to professional social work. When funds are cut generally, the social work program may appear to be a luxury. Through attrition of caseworkers in the wake of Proposition 13 in California, the reported caseloads of welfare workers went, for example, from 45-65 per caseworker to 75-85, with supervisors overseeing eight line workers rather than four. Terrell, *Adapting to Austerity: Human Services After Proposition 13*, 26 *SOCIAL WORK* 275, 279 (1981). Overworked and underfunded "professionals" in these circumstances cannot possibly sustain the charge Simon has in mind. They will be concerned about their own jobs, and they will be proletarianized regardless of their efforts to cultivate an autonomous professional identity. The legal profession also faces this problem because of greater price competition and a considerable increase in the number of lawyers. See *infra* note 108 and accompanying text. Finally, the pressure of caseloads leads in any event to the development of more or less formal rules for allocating benefits, and these formal working rules, constructed to reduce benefits, could be quite unfavorable to the class of would-be beneficiaries. See, e.g., R. LEMPERS & J. SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE: DESSERT, DISPUTES, AND DISTRIBUTION* (1986). It is very difficult to imagine Simon's professional vision working at all when programs are severely cut back.

54. Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469 (1984).

55. *Id.* at 489.

relatively passive translation of client feelings into an agenda that the professional could help to implement. But that would empty the professional of any mandate to promote good. Where is the independence that leads toward a better society if properly cultivated?

Simon, in fact, does not want the professional to be neutral in the professional-client dialogue: "The lawyer's understanding of the client's interests is derived in substantial part from the lawyer's own moral and political commitments."⁵⁶ The starting point is a rejection of professional neutrality: "the refutation of the professional premise that law practice can be defined and understood apart from fundamental moral and political commitments."⁵⁷

The professional-client dialogue starts with a content generated by the professional's political and moral values. A transformed profession imbued with a political commitment empowers its clients through an open and (to the extent possible) equal dialogue that respects the client's responses to the professional's own commitments. Given *this* professional vision, it is easy to see how the political power of the disadvantaged welfare recipients could be strengthened. Ideally the welfare recipients both escape dependency and gain a political ally for a broader transformative politics.

But now what happens to the independent professional power base? Simon's professionalism embraces a model for change on behalf of the poor, but only if each professional's "fundamental moral and political commitments" will promote that change. Nothing in the alternative professional vision requires that it be employed on behalf of the poor. As with one reading of Ackerman, our neutral professionalism is progressive only if enough people agree on politics, but that tends to make the professionals only adaptationists. To become a more important political force, the professionals need their own intellectual and social power base—a progressive substantive charge. Ackerman finds this charge in the "legal tradition." Simon's vision requires something comparable, a substantive grounding that can be cultivated *within* the professional role. Progressive legal professionals cannot be content with individual political and moral values from outside the professional role.

C. *Rehabilitating Rights?*

Both Ackerman and Simon focus on new forms of professionalism, but both lead us back to the institution of rights. Certainly neither really wants to go in that rather well-worn direction, but rights may be all that we have midway between the truly neutral ideal of adaptation and the decidedly non-neutral one of politics. Indeed, Ackerman's legal tradition and Simon's alternative vision turn out to be connected by a sixties vision of rights. Both

56. *Id.* at 488.

57. *Id.* at 507.

praise a series of innovative, activist cases in the courts as part of the basis for their new professional approaches. What accounted for that judicial novelty? As Eisenberg and Yeazell concluded, "that . . . novelty flow[ed] from the new rights created rather than from the remedies employed."⁵⁸ Efforts to make the rights associated with the welfare state effective promoted the innovation celebrated by Ackerman, Simon and others.⁵⁹ Progressive legal rights must either implicitly or explicitly be factored into our reformed professionalism to give it the kind of grounding that promoted the innovation in the first place.

By rights one can refer to political and civil rights, such as those enshrined in the Bill of Rights, and economic and social rights, such as those in the Preamble to the French Constitution of 1946.⁶⁰ This scheme is an attractive one for a progressive legal project, and it has been acclaimed by numerous authors, perhaps most notably T.H. Marshall,⁶¹ used by Franklin Roosevelt in his famous speech on "four freedoms",⁶² and built into the project for international human rights through the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Cultural, and Social Rights.⁶³ The stream of books and articles on international human rights testifies to the continuing appeal of this ideal.⁶⁴ Indeed, Ackerman's constructive vision of the legal tradition invokes precisely the progressive dimensions of civil, political, and economic rights.⁶⁵ Simon criticizes the idea of welfare rights, focusing his attack on Weberian formalism; but his vision also points to the revival of some comparable—arguably neutral—concept.⁶⁶

58. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 516 (1980). See also *supra* note 40.

59. Cf. M. CAPPELLETTI & B. GARTH, ACCESS TO JUSTICE: A WORLD SURVEY (1978). "Taking rights seriously" favors efforts to "make rights effective." *Id.* at 3-124.

60. The Preamble "reaffirms" the Declaration of Rights of 1789 and "further proclaims as most vital in our time the following political, economic, and social principles," including access to education and "the means to lead a decent existence" for those who cannot work. LA CONSTITUTION [CONST.] preamble (Fr.) (1946, reaffirmed in the Preamble to the 1958 Constitution.) See also, e.g., N. MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY (1982).

61. T. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT (1973). See also K. POLANYI, THE GREAT TRANSFORMATION (1944); R. TAWNEY, EQUALITY (1931).

62. 87 CONG. REC. 44 (1941) (Presidential Address). See, e.g., Good, *Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights*, 6 HUM. RTS. Q. 335 (1984).

63. See, e.g., L. HENKIN, THE RIGHTS OF MAN TODAY (1978); A. ROBERTSON, HUMAN RIGHTS IN THE WORLD (1982); Weston, *Human Rights*, 6 HUM. RTS. Q. 257 (1984).

64. A sample of recent books in the rights tradition would include J. DONNELLY, THE CONCEPT OF HUMAN RIGHTS (1985); L. MACFARLANE, THE THEORY AND PRACTICE OF HUMAN RIGHTS (1985); D. MEYERS, INALIENABLE RIGHTS (1985); C. WELLMAN, A THEORY OF RIGHTS (1985). See also *infra* notes 83-84.

65. ACKERMAN, *supra* note 2, at 93-94.

66. See Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986); Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985); Simon's recent discussions of rights continue to confront some notable weaknesses of the typical rights discourse.

The institution of rights does not depend on having a designated institution of judicial review. Indeed, British writers have pushed the notion of the welfare state as an "attempt to incorporate into the law social and economic rights as fundamental human rights,"⁶⁷ even though Parliament can rewrite the laws any time a majority so votes. Some of the opposition to judicial review in the United Kingdom comes, in fact, from persons who fear that conservative judges will undermine the welfare state through a restrictive interpretation of progressive rights.⁶⁸ As the British well understand, the idea of rights, going back to the Magna Charta, implies entrenchment, but obviously not complete insulation from attack or change. Rights are a venerable institution closely linked to the independent power of the legal profession.

The welfare state language of rights, for example, occupies a kind of high ground that professionals can invoke for progress without politics. It is instructive to see how legal professionals can participate. Critics of aspects of the welfare state, for instance, express a fear of being "engulfed by a rising tide of entitlement."⁶⁹ George Gilder claims that, "[i]n the welfare culture money becomes not something earned by men through hard work, but a right conferred on women by the state."⁷⁰ An apt characterization of this conservative position is the following: "What alarms these intellectuals is the revival and expansion in a new form of the old belief that people have a political right to subsistence."⁷¹

Proponents of a liberalized welfare system also continue to build on the notions of entitlement and social rights.⁷² Piven and Cloward, for example, recently characterized the battles over welfare in precisely those terms:

The political action [in the 1960's] of ordinary men and women had won economic victories; plain people had stayed the awesome movement of the "invisible hand." And they had engraved these victories on the legal structure of the polity through an array of laws and regulations that articulated and formalized economic rights.⁷³

67. L. SCARMAN, *ENGLISH LAW THE NEW DIMENSION* (1974).

68. See, e.g., P. ATIYAH, *LAW AND MODERN SOCIETY* 108-12 (1983); M. ZANDER, *A BILL OF RIGHTS?* 47-52 (3d ed. 1985).

69. F. PIVEN & R. CLOWARD, *THE NEW CLASS WAR* 123 (1982).

70. G. GILDER, *WEALTH AND POVERTY* 115 (1981).

71. F. PIVEN & R. CLOWARD, *supra* note 69, at 124. A recent attack on the whole process of developing new legal rights even sounds like Simon:

[We] are conditioned to identify rationalized, highly articulated decision making as good and nonverbalized, more intuitive decision making is bad—that's where "prejudice" slips in! In fact, what mostly "slips into" such decisions are situationally relevant factors and dimensions too subtle to be captured and provided for in a necessarily crude, abstract set of rules or criteria.

R. MORGAN, *DISABLING AMERICA* 207 (1984).

72. See generally K. FRIEDMAN, *LEGITIMATION OF SOCIAL RIGHTS AND THE WESTERN WELFARE STATE: A WEBERIAN PERSPECTIVE* (1981). Legal academics pushed more for a constitutional right to welfare a few years ago, but the arguments have met no real success. See, e.g., Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *STAN. L. REV.* 877 (1976); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 *WASH. U.L.Q.* 659. There is some evidence of a recent revival of interest. See, e.g., Gutman, *How Liberal is Democracy?*, in *LIBERALISM RECONSIDERED* 25 (D. Maclean & C. Mills eds. 1983).

73. See F. PIVEN & R. CLOWARD, *supra* note 69, at 118.

The apparent power of rights discourse about welfare can be linked to the problem of legitimation in the welfare state. According to Kathi Friedman, who sought to develop one Weberian perspective on the problem,

The dilemma of the Western welfare state, thus, is clear: citizens do expect their government to protect them from falling below a certain standard of living. Yet, Western populaces have inherited political values that make them skeptical . . . of the government's assumption of responsibility to assist them as dependents in complex political economies Western regimes gain legitimacy when they make redistributions in the form of social rights, that is, within the framework of national citizenship, itself protected by the rule of law. By contrast, contemporary Western regimes do not gain legitimacy, and, indeed, suffer "backlashes" as well as other criticisms, when they devolve largess onto the citizenry in any manner that approximates patrimonial or premodern gratuitousness.⁷⁴

Dworkin argues that rights are "trump cards" in political discourse, and conservative legal scholars complain that they create "ratchets" preventing efficient policies.⁷⁵

Political conversation in terms of rights may thus serve to entrench certain kinds of policies, even in a world where rights cannot be grounded firmly outside of a certain political tradition.⁷⁶ A dramatic change in policy regarding rights requires a two-staged argument: first, the public must be convinced that there is no longer a right. If there is no right to welfare, for example, then and only then can the policymaker make choices on grounds of simply cost or convenience. The Reagan administration's various shifts in policy regarding the American "safety net" illustrate the difficulty of cutting costs by eliminating what are widely perceived as rights. In short, as commentators such as Claus Offe point out, there is some force to the new conservative complaint: "state institutions which assign legal entitlement to citizens become relatively 'rigid' or even irreversible."⁷⁷

D. Rights Professionals and Their Resources: A Preliminary Conclusion

New models of professionalism have been wed to the effort to promote progressive legal rights. Otherwise the professionalism is cut off from a vital source of professional power. The quest for independent professional power

74. K. FRIEDMAN, *supra* note 72, at 23.

75. R. DWORKIN, *supra* note 19, at 223; Dworkin, *Liberalism in Public and Private Morality* 113, 136 (S. Hampshire ed. 1978). A related characterization is the following: Law provides the boundary between rights and nonrights The rights associated with citizenship—civil, political, and social—establish different types of boundaries around the individual which the sovereign or other members of the society cannot legitimately transgress.

K. FRIEDMAN, *supra* note 72, at 208.

76. Cf. H. HART, *Essays in Jurisprudence and Philosophy* (1983); M. SANDEL, *Liberalism and the Limits of Justice* (1982).

77. C. OFFE, *Contradictions of the Welfare State* 264 (1984).

oriented progressively thus must continue within the model proposed earlier. If legal professionals can argue in the language of rights, they have a certain power because of their expertise in the legal tradition and what it labels as a right. Ackerman provides the most enlightened ideal of liberal advocacy in support of activist values. Simon develops the most sophisticated professional model for the empowerment of the disadvantaged toward a more egalitarian society. Both wish to cultivate a legal professional ideology that promotes the favored social commitment independently of the politics of the day. To do so, however, each must return to some institution like legal rights.

As custodians of the language and tradition of legal rights, lawyers can argue as experts about the contours of those rights. They can get a hearing on their views in courts, in administrative agencies, and in the public generally. They can participate, in short, *as professionals* in crucial current debates about the future of the welfare state. And if Ackerman and Simon persuade their students that the progressive professional role is the correct one for reasons other than simple political preferences, then their students will also promote change on behalf of those favored by the rights professionals. This form of ideology, as Geertz states, can "make an autonomous politics possible"⁷⁸ if legal professionals continue to assert it and an important audience continues to defer to it.

The quest for independent professional power need not stop with the rights protected in the American legal tradition. Rights professionals can and increasingly are pointing to international human rights as bases for progressive advocacy.⁷⁹ There is even a great concern to encourage more teaching of international human rights in the law schools to place this body of law at the center of legal professional ideology.⁸⁰ Progressive ideals can now be linked to international human rights, perhaps further empowering progressive legal professionals.

A discussion of international human rights may appear unrelated to the issue of professional power. As will be seen, however, the domestic attractiveness of an international standard is that it offers a further means to attempt to transcend politics in favor of an arguably neutral progressivism. The difficulties apparent in Simon and Ackerman's approaches are in part reflected by the recent emphasis on international sources of substantive values. Internationalism can be promoted because of its domestic impact: a way to generate legal power for an activist or welfare state under legal and political attack.

78. C. GEERTZ, *THE INTERPRETATION OF CULTURES* 218 (1973).

79. See, e.g., Garth, *The Ideology of Transnational Legal Practice*, 7 MICH. Y.B. INT'L LEGAL STUD. 1 (1986); *Public Interest on a Global Scale*, PIPELINE, Fall 1984, at 4.

80. See, e.g., Lillich, *The Teaching of International Human Rights in U.S. Law Schools*, 77 AM. J. INT'L LAW 855 (1983).

*E. Building Up Independent Legal Professionalism:
The Power of International Human Rights*

Despite criticisms of the effectiveness of this development in international law,⁸¹ there is considerable evidence of a tremendous increase in the importance of international human rights law. Leaders from countries with very different traditions and priorities all speak increasingly in the language of human rights. Church groups, members of the legal profession, and international human rights groups bolster this approach and give it some power to influence events.⁸² There is enough activity to make internationalism a plausible hope for national reform.

International human rights can be described according to a metaphor of generations of human rights.⁸³ While the origins of the metaphor are in the West, it has the virtue of taking the Western phenomenon of individual rights and mixing it with approaches acceptable to the Socialist countries and the third world proponents of the New International Economic Order. The so-called International Bill of Rights promotes this metaphor by placing civil and political rights in one International Covenant and social, economic, and cultural rights in another. Each Covenant also contains the "third generation" claim to self-determination, and there have been growing efforts by third world countries to promote other third generation rights such as a right to development.⁸⁴

This synthesis is quite attractive to persons who wish for a neutral professional basis to push toward certain social ideals. Simon's concern with the poor and Ackerman's desire to bolster the activist state both are supported strongly by the generational view of international human rights. A recent book on international social justice thus proclaims:

While it has not been easy to produce formulations of economic/social rights on which the world's nations could agree, given their widely differing economic/social systems, this task has in fact been accomplished . . . [to] create a legally binding obligation on governments . . .⁸⁵

81. See, e.g., Watson, *Normativity and Reality in International Human Rights Law*, 13 STETSON L. REV. 221 (1984).

82. See, e.g., sources cited *supra* note 7; Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

83. See, e.g., L. MACFARLANE, *supra* note 64; Sohn, *The New International Law: Protection of The Rights of Individuals Rather than States*, 32 AM. L. REV. 1 (1982); Weston, *supra* note 63.

84. See, e.g., HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (C. Welch & R. Meltzer eds. 1984). "Third World spokesmen have argued that the implementation of the New International Economic Order is central to the attainment of human rights." S. KRASNER, *STRUCTURAL CONFLICT* 280 (1985).

85. A. MOWER, *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE* 5 (1985). See also Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW (T. Meron ed. 1984).

American legal writers have already suggested that international standards can help to overcome United States Supreme Court resistance to the idea of a right to subsistence.⁸⁶

The progressive focus of these rights, except perhaps for the third generation, emanates from their not so startling resemblance to the legal ideology of the welfare state,⁸⁷ similarly developed in the immediate post World War II period. Many legal professionals naturally try to cultivate this human rights tradition to ensure that the United States does not retreat from the activist state and the commitment to satisfy the basic needs for the poor. This approach appears to maximize the independent professional power that Simon and Ackerman try to develop. The legal profession properly educated to these ideals could promote the activist and egalitarian values quite openly as legal rights grounded in basic international documents. While the audience for these arguments needs also to be educated about these rights, the project of education is to some extent already taking place.

The requirements of a constructive and independent professional ideology are therefore not very different than they were in the nineteenth century.⁸⁸ Several models of professionalism can be proposed, but we need also to find some grounding for substantive values. Both Ackerman and Simon pay too little attention to this requirement, and therefore come close to a model that offers no independent professional clout. Fortunately, however, other sources in the legal tradition can help to resist attacks on the activist and egalitarian values they favor. There is still a plausible argument that these values are above politics and indeed within the expertise and domain of legal professionals.

Reformers, then, might try to unite professional ideals to the ideology of progressive legal rights, which can in turn be grounded on an international consensus. If we wish lawyers as legal professionals to promote these social goals, we ought to encourage education and scholarship based on these fundamental human rights and a professional image that takes them seriously. We can therefore maximize the possibility of participating in social debates as lawyers, not merely persons with political ideals. And if enough lawyers are persuaded, convinced that fundamental human rights require social progressivism, the legal profession can make a substantial—independent in terms employed here—commitment to those ideals.

The battle over the appropriate professional legal ideology retains considerable importance in this project. The more lawyers are persuaded to adopt

86. Woodward, *Affirmative Constitutional Overtones: Do Any Still Sound for the Poor?*, 7 HUM. RTS. Q. 268 (1985). Specific efforts to make the connection include Good, *supra* note 62; Woodward, *supra*. A competing economic perspective is Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201. Cf. sources cited *supra* note 72.

87. Interesting connections between the welfare state ideology and international relations are explored in R. TUCKER, *THE INEQUALITY OF NATIONS* 57 (1977).

88. See Gordon, *supra* note 11.

this legal perspective, the more professional voices there will be in support of the progressive agenda. If Ackerman succeeds, activist values will be better entrenched via the independent power of the profession. If Simon succeeds, we will have comparable activist values and an attack on rigid rules and illegitimate hierarchies as well.⁸⁹

III. ANOTHER PERSPECTIVE: THE LIMITS OF INDEPENDENT PROFESSIONAL POWER

We have seen the requirements of independent professional power and the guidelines for efforts to guide and strengthen professional ideology. Ackerman and Simon can be seen as contestants for the hearts and minds of the legal profession. Progressive legal reformers can thus draw on professional resources. But once the terms of the fight for the best professional ideology have been set, we can ask a more troubling question. Is there enough independent professional power to make the fight worth fighting? The legal profession is not the same as it was in the nineteenth century, and rights are not quite the trump cards that they once might have been. The analysis of independent professional power would be incomplete without sketching some limits inherent in the professional quest today.

A. *Problems with International Human Rights*

A second look at international human rights points to a fundamental problem. Unfortunately, the progressive international "synthesis" described earlier suffers from the same weaknesses as does the effort to make welfare a matter of fundamental right in the United States. Despite commentator rhetoric, not many countries or individuals embrace international human rights as simply a formal given. If the synthesis is to be supported, it must be because each country believes that on balance it is in its interest to support the synthesis: the Soviets to favor free speech, for example, the United States to promote social rights, and the third world to promote individual human rights. The United States is not the only country that has worked very hard in recent years to prevent any such consensus, but United States efforts have affected the debate. First, with respect to our own country, "common sense" holds that a right to welfare would be cost prohibitive and undermine economic growth. It is deemed by most educated public opinion to be at best an unrealistic ideal (at least for the present).⁹⁰ Second, our human rights policy in foreign affairs under the Reagan administration has quite explicitly abandoned any conception of human rights that goes beyond political and

89. Of course, there can be other contenders for the redefinition of legal professional ideology. See *infra* notes 110-11 and accompanying text.

90. The change in attitudes is discussed in Siegel, *Socioeconomic Rights: Past and Future*, 7 HUM. RTS. Q. 255 (1985).

civil rights.⁹¹ Again, the argument holds that the realization of the ideal must await better economic circumstances.

Such an approach, which maintains that our economic priorities for a market economy and growth take precedence over "second generation" rights, provides powerful ammunition for those who have other priorities. It is easy, for example, for the Soviet Union to make its own ranking: economic growth under a different economic system as a first priority, with rights of free speech and the like awaiting the perfection of socialism. And third world countries naturally emphasize development as the crucial priority with other rights put in second or third place.⁹² Thus, despite any synthesis proclaimed by human rights enthusiasts, it is generally agreed that countries can rank their priorities according to the economic system that they favor. The choice of one system over another is of course a "political" choice. It is difficult for the professional to participate as a neutral expert.

Human rights law has developed no serious neutral means to make the welfare state an uncontroversial ideal in international human rights. The international instruments construct a picture that looks like the welfare state, but that is because of historical accident rather than any shared vision of what the law requires. We can assert as often as we want that international human rights dictate a progressive platform as a matter of law, but will anyone really listen?

The meaning of international human rights, as a synthesis of diverse traditions, has shifted away from the welfare state ideal. International human rights have evolved into a neutral core,⁹³ but it lacks much of a progressive bite.⁹⁴ Every country agrees in principle that torture, disappearances, genocide, and pervasive racial discrimination are prohibited; in theory they constitute *non-controversial* international human rights. They are dignified, for example, by inclusion in the Restatement of the Law of Foreign Relations.⁹⁵ Unfortunately, these rights do not contain much *domestic* progressive content. The "non-political" core is at the heart of the search for a progressive legal ideology, but the core is rather small indeed. In a curious way,

91. Since 1982, the Reagan administration has specifically excluded "economic and social rights" from their Annual Reports on human rights. The reason, according to the administration, was that such views of human rights were too easily "abused by repressive governments which claim that they promote human rights even though they deny their citizens the basic rights to the integrity of the person, as well as civil and political rights." DEP'T ST., COUNTRY REP. ON HUM. RTS. PRACT. FOR 1982 5 (1983).

92. See sources cited *supra* note 84.

93. A statement of this core is RESTATEMENT OF FOREIGN RELATIONS LAW § 701 (Tent. Draft No. 3). See also D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

94. A useful critique of precisely the non-controversial nature of the work of Amnesty International is C. DESMOND, *PERSECUTION EAST AND WEST: HUMAN RIGHTS, POLITICAL PRISONERS AND AMNESTY* (1983).

95. RESTATEMENT OF FOREIGN RELATIONS *supra* note 93.

the rise of concern for international human rights has occurred simultaneously with its decline. The domestic difficulties in finding a substantive basis for progressive professionalism are echoed in the effort to find an international grounding.

The substantive basis for the independent ideology has therefore become rather small. Certainly it includes the core of international human rights described above. It is also true that a number of the basics of American constitutional law can be placed above or beyond what is defined today as politics. But current debates, and indeed the approach now taken to judicial appointments, suggest a growing willingness to push much of what might once have been defended as "the law" into the contested terrain of "politics." It is increasingly hard even to imagine a Justice Black carrying the Constitution in his pocket and insisting that it *dictates* his position on first amendment jurisprudence. Few arguments can be trumped by that approach, and it fails even worse if one tries to add the social and economic rights favored by Ackerman and Simon but ill-supported by the text or history of the United States Constitution. It would be challenging indeed to enlarge the non-political, professional consensus to a point where it would be helpful to progressive politics. In short, the lawyers' language of rights—the substantive basis for the profession's independent professional power—does not offer very much to the progressive project seen in this negative light.

B. *Constructive Legal Ideology as Homeless*

The second problem goes beyond the limitations of the language of progressive rights. Any effort to revive "rights professionals" as sources of progressive reform must find a place for these professionals in the legal marketplace. Recall that Ackerman simply assumed the existence of public interest law, and Simon's leading examples came from the work of legal services lawyers funded by the federal government. Progressive professionalism must have a home that does not depend on political whims and partisan ideologies. The governmental bureaucracy will not do as a home, since it is bound to carry out the orders of the party in power, progressive or otherwise. Legal services for the poor and the public interest law movement provide a potential source for powerful rights arguments, but unfortunately neither institution can any longer be considered neutral and non-political without provoking controversy.⁹⁶ This has important repercussions for any effort to cultivate legal progressivism.

For a variety of reasons, domestic law schools produce a certain number

96. See, e.g., R. MORGAN, *supra* note 71; W. DONOHUE, *THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION* (1985); Rabkin, *Public Interest Law: Is It Law in the Public Interest?*, 8 HARV. J. L. & PUB. POL'Y 341 (1985).

of what might be termed legal do-gooders. They expect to practice law and at the same time improve our society.⁹⁷ These individuals are found in the groups that went into legal aid in the 1960's and public interest law in the 1970's. Progressive lawyers could comfortably pursue these careers in part because they were subsidized and supported by the legal profession's elite. These legal roles were considered non-political ways to be progressive within the U.S. legal tradition. Such legal careers are not subsidized or supported to the same extent today as they were in the 1960's and 1970's. The non-political domain has shrunk dramatically and with it the opportunities in the "rights industry."⁹⁸

Legal professionals can continue to promote the legal tradition of fundamental rights protected by the vigilance of the profession, and the law schools can continue to produce persons imbued with that tradition. But where can they go today without crossing the line into politics? There are precious few domestic opportunities, whether oriented toward national or international concerns. Even these opportunities offer little to the progressive project; they tend to focus, for example, on torture, disappearances, and apartheid—the limited substantive bases for assertions of independent professional power.

International human rights, construed narrowly, are attracting an unprecedented amount of the attention of the American legal profession. One reason for this transformation is simply that the progressive legal ideology has too few rights today to claim as non-controversial. Legal professionals must look outside the United States given the lack of a domestic market for non-controversial legal do-gooders. Our surplus must be exported. Export helps prevent any crisis that might come if legal do-gooders saw nothing but politics in law, but this form of progressive legal advocacy offers almost nothing toward progressive reform in the United States. Groups like Amnesty International can challenge the death penalty in the United States and focus on police practices in other countries, but no one can look at Amnesty for support for welfare reforms or the activist state. Working for Amnesty can accomplish much that is progressive, but Amnesty draws a line between law and politics that leaves very little on the side of law.⁹⁹ Legal idealists thus tend to have to export their idealism to find places for uncontroversial social improvement.

International human rights therefore not only do little to promote progressive reform according to the welfare state synthesis, but also provide an outlet for progressive energy that was formerly dedicated toward domestic reform. The result, in short, is to make the quest for a legal ideology with a progressive bite appear unrealistic. Public interest law—if defined as a

97. See, e.g., Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM. B. FOUND. RES. J. 83.

98. The term is used derogatively by R. MORGAN, *supra* note 71.

99. See C. DESMOND, *supra* note 94.

non-controversial vision of the domestic public interest—looks very different today than it did in the era of the War on Poverty or the years when the resources of major non-profit foundations were committed toward progressive social causes.¹⁰⁰

One might try another approach, insisting that progressive rights professionals might be developed in another sector of the legal profession, such as among the professional elite. Perhaps progressive professionals might be promoted in an appropriately professionalized, elite, legal practice. The cultivation of rights and professional values, however, appears more remote than ever before. Rights cultivation depends on a certain breathing space—a certain insulation from the market, allowing some attention to “aristocratic” values.¹⁰¹ Lawyers are fond of lamenting the decline of the professional ideal,¹⁰² but the lament contains some truth.

A recent essay by Charles Fried turns the familiar lament into a celebration.¹⁰³ Arguing for the infusion of more business practices into the legal profession, especially through “in-house” counsel, Fried characterizes the crisis in the legal profession as follows:

The problem with lawyers, critics say, is the maldistribution of legal services: Only big businesses and the very rich benefit from the legal system. They say, too, that the only hope for a solution to the lawyer problem lies with crusading public-interest attorneys working not for private clients but for the public good. This is nonsense, too. The rich and the big corporations are more victims than beneficiaries of the legal system. And the hope for a solution lies with business and not outside it; reform of legal practices by corporations has, in fact, already begun.¹⁰⁴

The infusion of business principles would not only defeat the argument for public interest law by legal professionals, but also it would help kill the ideal of a professional breathing space in private law firms. Fried calls for the elimination of the professional belief, which he finds has “some truth,” that elite lawyers have “a kind of distance, judgment and almost academic posture toward the law which allows them to serve clients particularly well.”¹⁰⁵

100. See, e.g., Rabkin, *supra* note 96 (exemplifying the attitude today toward public interest advocacy).

101. See M. LARSON, *supra* note 10.

102. An articulate recent effort is American Bar Association Commission on Professionalism, “*In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*” (1986).

103. Fried, *The Trouble With Lawyers*, N.Y. Times, Feb. 12, 1984, (Magazine) at 56.

104. *Id.* at 57.

105. *Id.* at 61. An example of the idea of breathing space can be taken from a citation in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1979) to the following quotation:

Vital as is the lawyer’s role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law’s aim often takes place in the attorney’s office, where litigation is forestalled by anticipating its outcome, where the lawyer’s quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer

Indeed, he continues by insisting that the idea of "a mediating priesthood between the regulators and the regulated is itself a sign of social illness."¹⁰⁶ Ultimately the change from professional to businessman "will have a profound effect on the self-image of lawyers and thus on the law itself"—a correction "of the legal mind's tendency to exalt its own peculiarities into eternal moral necessities."¹⁰⁷

Fried provides a statement in support of a trend that can be seen in the recent increase in the number of lawyers and in the competition among them for business. The legal professional who becomes committed through competition and economic necessity to the self image of a business provides a poor home for professional values and the cultivation of enduring legal rights.¹⁰⁸

The discipline of the market can be seen here as well as an antidote to the costly virtues of entrenched legal rights and independent professionals. It comes as no surprise that the Reagan administration has enthusiastically embraced this form of antitrust, as opposed to that directed against traditional concentrations of capital:

Stressing the Administration's eagerness to fight restrictions on competition in the professions and other groups that once considered themselves exempt from the antitrust laws, Mr. Muris [Director of the FTC Bureau of Competition] asserted: "This idea that conservatives want to shut down the antitrust laws and don't have an active antitrust agenda is just wrong."¹⁰⁹

The antitrust agenda feeds the trend to eliminate the breathing space for professionals and whatever values they tended to support with the "distance, judgment, and almost academic posture" condemned in favor of a more businesslike approach by Fried.

IV. RIGHTS, ECONOMIC LOGIC, POLITICS, AND POWER: A CONCLUSION

A potential tragedy emerges from the story just told. Ackerman and Simon have sought to mobilize the power of the legal profession to confront a

often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958). The quotation assumes that the lawyer can counsel *good* behavior by pointing to the principles and spirit of the law, even if the letter of the law is ambiguous.

106. Fried, *supra* note 103, at 61.

107. *Id.*

108. See generally Cramton, *Ethical Dilemmas Facing Today's Lawyer*, 11 BAR LEADER 14 (1985); Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985); Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985). It is not clear just how much the ideal of professional autonomy ever resembled everyday practice, but it is clear that today costs and competition are even more central to the life of the large law firm.

critical political decision: the decision whether to build upon or retreat from what Ackerman terms the activist state. If lawyers could somehow be taught a neutral way to fight for the welfare state, they might have much to offer. They would assert political power without being seen as political, which is the most persuasive kind of power to have. International human rights, professionalism, and activist values all could be mustered to defend the welfare state from attack. Unfortunately, the legal profession's ability to trump the debate with its claims of right is rather weak today. The language of rights offers little, and there are few professional places left to cultivate that language.

These conclusions point in several directions. On the one hand, legal professionals may push to develop a progressive legal ideology, seek places to advocate it, and try to bring their views within the range of ideas fostered by the profession's independent power. On the other hand, legal professionals may decide that there is simply too little independent power left to make that fight worthwhile. A re-examination of the current political-legal debate can illustrate the stakes raised by this dilemma and how professionals might or might not participate.

Before proceeding to the current debate, however, another kind of participant from the legal profession should be introduced explicitly. The advocates of a conservatism grounded in "law and economics" are also trying to remake the professional ideology.¹¹⁰ While for the most part content to help adapt to the Reagan agenda, which makes their task easier than that of Ackerman or Simon, long term strategies are also apparent with respect to professional ideology. The principal strategy appears to be to make their analyses of efficiency the test of legitimacy for legal rules. The conservative legal professionals seek to align the independent power of the profession with the forces of the market, which means to minimize the anti-market, aristocratic values that legal progressives have sought to cultivate. As Fried proposed in the passages cited earlier, the profession should do nothing fancier than adopt business values.

A conservative agenda might thus be supported by economic arguments grounded on the market and the needs of business. It is easy to argue, for instance, that profitability "requires" a certain freedom from inhibitions adopted in the name of new public rights, including the inhibitions from relatively high taxes that support social programs. Institutions that were charged with providing certain benefits to the public as a matter of right, such as hospitals, can be redefined in terms of strict profitability, whether or not they are nominally organized as private for profit. Such an institution,

109. Taylor, *Antitrust Policy Shifts to New Arenas*, N.Y. Times, Jan. 20, 1985, at 18.

110. See, e.g., R. MORGAN, *supra* note 71; R. POSNER, *supra* note 14; Easterbrook, *supra* note 3. For a prediction that there might be "excesses of a 'Posner court' in the 1980's and 1990's," see Buchanan, *Good Economics-Bad Law*, 60 VA. L. REV. 483, 491 (1974).

among other things, profits by discouraging strategies to *bring* benefits to the needy. This redefinition of social benefits in terms of market logic, as Neil Gilbert has shown, is already occurring to a notable extent.¹¹¹

These "reprivatizing" developments are of enormous political significance, and they can be battled or supported in terms of prevailing legal discourse. The legal implications abound in debates about the specification of human rights and the appropriate line between public and private domains.¹¹² A recent book by Richard Morgan, for example, entitled *Disabling America*, calls for a firm line between public law and private law, a rejection of "positive rights," and a refusal to support the "rights industry," including the American Civil Liberties Union.¹¹³ As observed by Morgan:

We must face the fact that beginning after World War II, and especially over the past twenty years, the American law of civil rights and liberties has been increasingly manipulated, redefined, and expanded A consequence of this, largely unintended by the rights-and-liberties militants, has been to marginally disable major American institutions, both governmental and private.¹¹⁴

Anyone who surveys the variety of political programs now being offered as means for progressive or even transformative social change will be impressed by the attention paid to the enhancement and protection of legal rights.¹¹⁵ The language of rights is alive and well in political discourse.

There is thus no doubt that debates about rights remain at the center of political controversy today. Critical questions can be phrased and understood in those terms. What, for example, is the domain of the market as opposed to the domain of human rights?¹¹⁶ Are individuals entitled as a matter of

111. N. GILBERT, *CAPITALISM AND THE WELFARE STATE* (1983).

112. An interesting discussion of these approaches is Friedman, *Two Faces of Law*, 1984 *Wis. L. Rev.* 13.

113. See R. MORGAN, *supra* note 71.

114. *Id.* at 3.

115. See, e.g., S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTE LAND* (1984); T. CAMPBELL, *THE LEFT AND RIGHTS* (1983); M. GIBSON, *WORKERS' RIGHTS* (1983); Lynd, *Communal Rights*, 62 *Tex. L. Rev.* 1417 (1984); Unger, *supra* note 22.

In Giddens' words,

Marx tended to take civil rights for granted, criticizing them because they helped to sanction bourgeois rule. I have accepted that Marx was right in the latter respect; but we cannot be content to leave their positive features unanalyzed. The protection and further development of civil rights has to be a major part of a program of democratic socialism in current times. But it is not useful pretending that this can be achieved directly and solely through the traditional avenue of Marxist critique of the liberal democratic state.

A. GIDDENS, *supra* note 46, at 178.

116. See, e.g., Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 *HARV. L. REV.* 592 (1985) (criticizing Easterbrook, *supra* note 3). A thoughtful recent discussion of how contests about language affect the values we associate with social institutions (in this case the corporation) is White, *How Should We Talk About Corporations? The Language of Economics and of Citizenship*, 94 *YALE L.J.* 1416 (1985).

While the point cannot be developed here, the Supreme Court has even mentioned specifically how economic "necessity" affects the approach to certain cases. For example, in *Warth v.*

right to medical care, welfare, housing, education, or legal services; or are such services better changed from public to private control and left to the market?¹¹⁷

This contest clearly matters, but the question is whether it can be won by pretending to be non-political. Progressive legal professionals can argue about what politically *should* be recognized as a matter of right in our society, but the argument is not neutral nor a matter of professional expertise. Legal professionals may choose to speak the language of rights and to promote a particular vision of legal ideology, but such a choice is not the only plausible one.

The dilemma can be summarized fairly simply. Existing legal tradition offers some potential to mobilize independent professional power in a progressive manner. The legal profession can be fairly confident that that power can help in the fight against disappearances, torture, and apartheid. But this confidence is more difficult to sustain if more from the professional ideology is sought. In short, can hard work in legal education and advocacy extend the domain of rights and put the profession behind a broader progressive agenda? Lawyers who want their professional role to stand for progress in terms of the 1960's and 1970's have their work cut out for them. This Article has endeavored to link sophisticated professional visions to the strongest sources for progressive human rights, but problems remain. The fight to

Seldin, 422 U.S. 490 (1975), the Court noted that standing would be denied if the court could not order an effective remedy. It found that it could not because market forces kept poor people from moving into a particular community.

A recent example of the war between economic necessity and claims of human rights is the effort to reform U.S. immigration law. While a permanent guestworker program is pretty clearly at war with the human rights approach of the 1960's and 1970's, economic necessity has forced it to be the centerpiece of "reform" in the 1980's. It is interesting, for example, to compare Walzer, *The Distribution of Membership*, in *BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS I* (P. Brown & H. Shue eds. 1981) and P. GREEN, *RETRIEVING DEMOCRACY: IN SEARCH OF CIVIC EQUALITY* 204-06 (1985) with Briggs, *Foreign Labor Program as an Alternative to Illegal Immigration: A Dissenting View*, in *THE BORDER THAT JOINS* 223 (P. Brown & H. Shue eds. 1983) and *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983). See generally Garth, *Migrant Workers and Rights of Mobility in the European Community and the United States: A Study of Law, Community, and Citizenship in the Welfare State*, in *I INTEGRATION THROUGH LAW (METHODS, TOOLS AND INSTITUTIONS) BOOK THREE: FORCES AND POTENTIAL FOR A EUROPEAN IDENTITY* 85 (M. Cappelletti, M. Secombe, J. Weiler eds. 1986).

It should also be obvious that other professions are participating in this debate with similar dilemmas. A nice example is the controversy over the pastoral letter of the Catholic Bishops, entitled "Economic Justice for All: Catholic Social Teaching and the U.S. Economy." See N.Y. Times, Nov. 14, 1986, at 12, col. 1. The pastoral letter takes a position clearly at odds with the market emphasis of the Reagan administration.

117. Among recent left or liberal commentators who address this problem are: R. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* (1982); A. GIDDENS, *supra* note 46, at 164-80; N. GILBERT, *supra* note 111; and C. OFFE, *supra* note 77. None of them sees the welfare state today as a stable entity defined consistent with the ideals of the 1960's and 1970's. Others who see the current welfare states at a crossroads include F. HIRSCH, *SOCIAL LIMITS TO GROWTH* (1978); Habermas, *supra* note 20. On the problems and achievements of rights in getting to the welfare state, see E. HOBBSBAWM, *WORKERS* 296-316 (1984).

capture legal ideology may be for "two gross of broken statues," "for an old bitch gone in the tooth."

The alternatives to the traditional fight are not necessarily more satisfying. One can hope for social change and be ready with legal arguments and principles to adapt to the change. Such a professional role, however, is that of a follower of trends rather than a promoter of change. Another alternative is to decide simply that the legal-institutional base cannot be won over today and turned toward progressive political commitments. The conclusion might then be that lawyers have a marketable skill, like that of architects or carpenters, and it can be employed profitably consistent with the market or less profitably in support of whatever progressive public values they choose to promote. But the idea would be that lawyers are not the place to look for an institutional progressive force. Lawyers can make whatever political arguments they wish in favor of political goals, conservative or progressive, but, again, these would be political arguments divorced from the institutional claims to power.

Each of us must ask how our professional roles relate to our political and social commitments. Certainly it is increasingly difficult to avoid confronting the connections, even if we might wish to. But when we try to bring our professionalism and our politics together into some accepted professional role, we are bound to run into problems and dilemmas. This Article has sought to make explicit both the possibilities to link the two and the inevitable limitations. No one, of course, has to choose to devote all his or her energy either to winning converts to a new professional approach or to cultivating a political movement that will lead the profession along with it. The relationships between such approaches are subtle and changing. Nevertheless, we cannot ignore the limitations of each of the strategies for developing a political-professional stance. Abandoning the fight over professional ideology might mean the triumph of an ideology that aligns legal professionals against the values we favor. On the other hand, closing our eyes to the limits of the professional strategy may be an easy recipe for political impotence. Our expertise becomes severed from our politics.

However one chooses, finally, a central dilemma remains: a meaningfully progressive legal ideology requires that the accepted language of rights reflects some social consensus toward progressive change and that rights professionals be subsidized to advocate that change. There is no obvious way to arrive at such a point in the near future through either a better form of professionalism, a more sophisticated approach to legal rights, or a straightforward political effort. As Matusow suggests, American liberalism "unravelling" after the 1960's, and the political path—whether termed legal or political—toward a new progressive orientation has not yet been found.¹¹⁸

118. A. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S* (1984).