

# LAWYERS, THE NEW CLASS, AND THE CONSTITUTION\*

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This article is published by permission of Transaction, Inc. from *The New Class?*, B. Bruce-Briggs, editor, copyright (c) 1979 by Transaction, Inc., and reprinted in paperback by McGraw-Hill. It deals with a topic that is prominent in political and sociological literature, but virtually ignored in legal journals: the role of a "new class" of journalists, teachers, civil servants, and other highly educated people who—although themselves relatively affluent and privileged—tend to favor liberal political and legal causes. The precise composition of this class, and indeed whether it exists at all, are controversial topics that are discussed from several points of view in *The New Class?* Still more controversial is the question whether the growth of such a class is an occasion for celebration or alarm. Although Professor Glazer's thesis is not limited to constitutional law, it obviously pertains to the modern expansion of constitutional rights. We think that readers of all political persuasions will find it interesting, and—because it is the kind of analysis that constitutional specialists rarely see—we are grateful that Professor Glazer and his publisher have allowed us to reprint it. Since the value of the thesis does not turn on statistical details, we have not troubled to bring these up to date.

I had hoped, in analyzing a single occupational group that is generally regarded as a prominent element of the "new class," to escape the conceptual tangle with which many other contributors to this volume have manfully wrestled. After all, if the heart of the "new class" is found among the professional classes and the highly educated, and if the social forces that have helped create a "new class" include the increasingly larger scale of government, the expansion of regulation, and the increasing reach of rights and entitlements, would not lawyers be well qualified to be members of the "new class"? Could not one analyze their role to get a better grasp on the "new class" and what it means for society?<sup>1</sup> No such luck. The conceptual tangle around the "new class" persists when

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1. In a review of Irving Kristol's *Two Cheers for Capitalism*, Albert J. Sommers notes that Kristol places lawyers second among the categories making up the "new class." Sommers, *Kristol clear*, *ACROSS THE BOARD*, June 1978, at 66, 67. But Kristol qualifies their inclusion by specifying lawyers who make their careers in "the expanding public sector." I. KRISTOL, *TWO CHEERS FOR CAPITALISM* 15, 27 (1978). However, to the lawyer David T. Bazelon, lawyers epitomize the "new class."

we try to get a fix on a single occupational stratum; it must be cleared away before we can relate lawyers to the "new class" and its values, views, and role.

Before considering the role that the "new class"—and lawyers among it—might play in producing them, let me first list the social developments that critics of the "new class" regard negatively: the expanding *size* of government; the animus, in parts of the media and among government administrators, against private business; the expanding regulation of business; the increasingly egalitarian taxing policies, particularly the policies limiting funds for investment and rewards for entrepreneurial and investment success; the downgrading of entrepreneurial and business roles as non-creative and useless for society; the bias against the market and in favor of government regulation as a form of control.

Now the problem with this list or any other that might be made up is that in our legal system, a lawyer is inevitably on either side of any dispute. This certainly cannot be said of any other member-category of the "new class." The legal system alone guarantees an occupational division on almost any issue, a situation that is not as likely among intellectuals, professors, government bureaucrats, scientists, social workers, planners, engineers, or what have you. This may explain the traditional antagonism to lawyers (in the old adage, one lawyer in a town will starve, while two will find a good living), but it does not explain why lawyers are uniformly included as members of the "new class."

Aside from this formal problem, more serious difficulties arise when we look at the distribution of lawyers on both sides of issues involving regulation of business and expansion of state power: many more lawyers are on the side of business than on the side of government, and only a tiny fraction are in those numerous but relatively small "public-interest" law firms whose aim is generally to badger government to become more restrictive of business. In a big case dealing with the environment, consumer interests, nondiscrimination or affirmative action in hiring, or some other characteristic issue in which government tries to control business, the resources expended on the side of private business—in legal fees, in numbers of lawyers and researchers employed—are far greater, one can assume, than the resources spent by small public-interest law firms or even by major government agencies. At times, government expenditures do match or exceed those of the private sector—when the target is a relatively small businessman. Generally, on any case regarded as vital to its interests, the big corporation can spend more than government

can or will. One wonders whether business is really getting much more results by employing such expensive legal talent, but it is beyond dispute that business can and does spend more than government or public-interest firms.

At best, only a fraction of lawyers might be considered members of the "new class" because of their roles or attitudes. To begin with, a very substantial number are solo practitioners, about 40% and rising, according to the American Bar Foundation.<sup>2</sup> The solo practitioner is the typical small businessman, clearly the antithesis of the "new class," however it may be characterized. He is antagonistic to what the "new class" has done through government—its leveling taxes, its regulation and protection of employees, its demands for ever more reports and forms, its large plans for urban renewal and urban planning, which may wipe out his place of business. Not only is the solo practitioner a small businessman, but his chief clients are other small businessmen. Another substantial chunk of lawyers is in partnerships and small firms, equally small businesses. Another large group work in large firms employed by larger businesses and corporations and wealthy individuals. Another group are salaried lawyers for large business enterprises. We would certainly not include any of these categories in the neoconservative version of the "new class."

What then remains from the category of lawyers to be considered as part of the "new class"? Two major groups, one quite large, one very small. The large group consists of lawyers who work for government—twenty thousand for the federal government alone.<sup>3</sup> Many more are employed by state and local governments.<sup>4</sup> Perhaps 20% of the lawyers in the nation are employed by government, and since they are engaged in defending its interests, writing its regulations, and negotiating with and prosecuting those who do not comply, and since much of their work does not deal

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2. Klein, *Going It Alone*, Wall St. J., June 2, 1978, at 1, col. 1, 33, col. 3.

3. "At last count, there were 20,000 lawyers in the federal government engaged in the lawyer-like functions [excluding, I presume, employees with law degrees who do not practice law]. Only approximately 4,000 of this group serve in the Department of Justice; the remainder are employed by 28 other federal government units which have or exercise authority to conduct at least some of their litigation." Speech by Assistant U.S. Attorney General Drew Days, III, before the District of Columbia Chapter of the Federal Bar Association (May 1, 1978).

4. The 1970 Census found 277,000 lawyers and judges, while the American Bar Association lists 432,000 in 1977, up from 355,000 in 1971. Klein, *supra* note 2, at 1, col. 1. Clearly, the number of members of the bar is larger than those who identified themselves as lawyers and judges to the census. The census did break down lawyers and judges by employer, and 19.2% worked for government—6.8% for the federal government, and 5.4% for state and 6.9% for local governments. The proportion of lawyers working for government has undoubtedly gone up since 1970.

with ordinary criminal activity (which both the "new class" and the old classes agree should be a concern of government), some government lawyers might be considered part of the "new class."

But when people think of lawyers in the "new class," they have in mind another group: the lawyers who work for nonprofit reform groups or in government and foundation-supported law firms to defend the rights and interests of minorities, the poor, welfare recipients, public-housing tenants, environmentalists, consumers, prisoners, the mentally ill, the mentally retarded, and other groups, and who have contributed mightily to a huge increase in litigation, the expansion of rights, and the increasing requirements for reporting and monitoring that have accompanied the establishment of new rights. These "public-interest" lawyers are the ones naturally regarded as being part of the "new class." They are seen as being particularly antagonistic to big business and business in general, because their pursuit of the interests of minorities, the poor, consumers, and the environment often places them in opposition to business as well as government.<sup>5</sup>

The number of such lawyers, however, is remarkably small. There are 2,000 lawyers supported by the Legal Services Corporation, the heir of the poverty program. While these lawyers have played a substantial role in legal reform, the greater part of their activity is simply devoted to providing legal services to the poor for family, consumer, housing, and welfare problems. One-quarter of their time is devoted to "law reform" work, such as changing regulations, getting new judgments about rights generally, filing class actions and test cases—all the activities that involve not, or not simply, personal legal service but the intent to change the pattern of law and regulation.<sup>6</sup>

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5. I place quotation marks around "public interest" because one cannot take it as a matter of course that their activities are in *the* public interest, even though they have appropriated the term and are generally given the right to use it. But when such lawyers litigate to get more welfare, or to lower rents, or to stop a new development on environmental grounds, or to insist on large investments for safety, a variety of interests are in conflict, all of which have some claim to being considered *public* interests—the defendant is not only soulless corporations or unfeeling governments, but the taxpayers who may pay more in taxes, the workers who may lose jobs, the communities that may be left with a high rate of unemployment. But since no alternative term comes to mind, and an overabundant use of quotations interferes with readability, I will reluctantly drop the quotes.

Further muddying the term is the fact that a new group of public-interest law firms has been set up specifically to oppose the firms that grew out of the civil-rights, antipoverty, and environmental movements. These new firms are also supported by individual and foundation contributions, are nonprofit, have salaried lawyers, contest key cases, and operate principally at the appellate level—but they defend general business and private interests against the expanding reach of governmental regulation. Although they have an equal right to claim that they act in the public interest, I will omit them from my discussion.

6. J. HANDLER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 54-55 (1978).

More important than these lawyers are the public-interest lawyers who spend just about all their time in law-reform work. Their major interest is not a client but a pattern of law, regulation, and judicial interpretation affecting the condition of a class of people or interests they have undertaken to represent. A recent study that attempted to find every lawyer employed full-time by such groups between 1969 and 1973 found only 450 lawyers.<sup>7</sup> Even if we double or triple this number—and missed organizations and expansion since 1973 might permit such a radical upward adjustment—the number of lawyers engaged full-time in public-interest law is less than 1% of the legal profession in the country.

This account omits the substantial number of lawyers who work full-time or part-time for legal-aid societies. But they are primarily engaged in defending people against criminal charges; to my mind, the part of the law dealing with ordinary criminal activity, whether prosecution or defense, is not very relevant to a consideration of lawyers as members of a “new class” engaged in shaping a new society. Crime, alas, is always with us, and while we could examine possible connections between the ideology of the “new class” and crime, they would have less significance for the history of the “new class” than the expanding role of government as the regulator, shaper, and defender of new rights.

This is one possible way of characterizing the legal profession: largely self-employed (53%, according to the 1970 Census) and overwhelmingly engaged in working for businessmen and the wealthy, with less than 20% employed by government, and less than 1% engaged in expanding the rights of minorities, the poor, and the unrepresented. This has been the point of view of most commentators on the legal profession, and has been for some time. Writing on *The Modern Legal Profession* in the 1933 *Encyclopedia of the Social Sciences*, A.A. Berle described the American bar as follows:

The complete commercialization of the American Bar has stripped it of any social functions it might have performed for individuals without wealth. The great law office either does not care to or cannot profitably handle cases which, while of great importance to individuals, have only limited financial significance. The smaller offices and individual practitioners, especially if they are struggling for

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7. *Id.* at 197. This survey, which covered 30 groups, seems to have missed some groups and more have been established since 1973 (and undoubtedly some have gone out of business). The list of organizations does not include, in the field of mental retardation alone, which has grown rapidly since 1973, the Mental Health Law Project, the National Center of Law and the Handicapped, the Disability Law Resource Center, and the Mental Disability Legal Resource Center. The volume is generally valuable for its survey and analysis of the field of public-interest law.

survival, will extract the maximum compensation from their clients, whether the service is worth it or not.

Forty-five years later, Roger Cramton, Dean of the Cornell Law School and chairman of the Legal Services Corporation, gave a similar characterization in a major address to the California state bar in 1976: "The most generous estimates indicate that less than 15% of the legal needs of the poor are being met today. . . . Less than 2,200 lawyers—only about one-half of 1% of the American Bar—are working full-time to meet the legal needs of one-sixth of the population."<sup>8</sup> And President Carter, in a widely reported speech on May 3, 1978, echoed the same complaint about the maldistributed resources of the American bar. Of New York City's 35,000 lawyers, he said, "only a handful are available for service to the city's one million poor—one for every 5,000." He urged the expansion of legal services to the poor, even though, as he pointed out in his talk, the United States already has more lawyers per capita than any nation but Israel. Carter advocated further expanding the resources available to the new interest groups that sprang up in the later 1960's and 1970's to gain new rights: "Overcoming procedural barriers means that groups with distinct interests to defend—in civil rights, economic questions, environmental causes, and others—must be able to defend them fully. We are supporting efforts to broaden the use of class action and to expand the definitions of standing to sue."

And so we have a paradox, or indeed two, if we consider lawyers as part of the "new class." First, there are very few public-interest lawyers, and while there are considerably more lawyers in government who may be advancing the interests of the "new class," the total number cannot be more than a few percent of the American bar. (As I suggested above, most lawyers in government are engaged in prosecuting criminals.) Moreover, most lawyers in public-interest firms see government itself as an enemy, indeed *the* enemy. In what sense, then, could government lawyers be representatives of the "new class"?

Let us consider the second paradox first. The problem with the idea of a "new class," as so many contributors to this volume have pointed out, is that so many elements are mixed up in it. Common to all elements, or almost all, is a rejection of the market as a means of allocating wealth, whether on grounds of justice or efficiency. But this does not mean a unified and favorable attitude to the expansion of governmental powers. This may be the domi-

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8. These quotations are from a valuable syllabus for a course on "The Legal Profession" given by Richard Abel at the U.C.L.A. Law School.

nant orientation of the elements we group under the "new class," but it is obviously combined with a great suspicion of government, as well. Government should be expanded, the "new class" says, but it must also be watched closely and monitored from outside government, for even as it expands to regulate private business, it may be captured by private business. Even if not captured, government might be slack in its enforcement; the energy and enterprise that public-interest lawyers characteristically bring to their task (and that lawyers generally are socialized in law school to expend) might not be found in government servants, including the lawyers among them.

This fear leads to a sharp eye on government regulation. Much litigation undertaken by public-interest lawyers against government does not, of course, demonstrate a fundamental hostility to government expansion as such, since it is designed to increase the power of government, to force it to take on what it does not want to do, to undertake what law or regulation or constitutional interpretation says it should do with more energy and greater resources. If this is the attitude of public-interest law to government, then it basically has no argument against the expansion of governmental powers.

But there is another side to public-interest law that is indeed fundamentally hostile to government. A long tradition of public-interest law generally opposes some governmental action on the ground that it restricts civil liberties. This branch of public-interest law does want government to do less, and so do many of the newer branches dealing with the schools, prisoners, the mentally ill, and the mentally retarded. They will argue that records should not be kept on students, that students should not be disciplined, expelled, or placed in special schools, or that special schools should not exist. Similar arguments are made on behalf of prisoners, or the mentally ill, or the mentally retarded. "Deinstitutionalization," a growing movement strongly assisted by public-interest law, asks government to do less and even promises that the cost of social services may be reduced if new approaches are adopted.

Of course, there is a certain selectivity in the defense of rights. Not all constitutionally protected rights are equally the concern of public-interest groups. For example, consider the right to bear arms (the second amendment), or the right to be compensated for the "taking" of private property (the fifth amendment). But my main point is that the defense of rights, however selective, is often a defense against government doing something—and thus, at first glance, seems to be a bar to governmental expansion.

Another branch of public-interest law is critical of government in a different respect. It opposes the power of government-licensed professions and urges self-help for education, health, and other needs, and urges less dependence on the highly trained professional. Does this branch also warrant inclusion in the "new class"? It is part of the many-faceted revolution of the 1960's, which simultaneously expanded the rights of minorities (and the number of those to be considered minorities), expanded government regulation, and urged radical change in social services. If one branch of public-interest law calls for the expansion of government, and another calls for its withdrawal or its restriction, what happens to the relationship between public-interest law and the "new class"?

There is an answer to this paradox. Both aspects of public-interest law—that which expands governmental power and that which calls for its restriction—emphasize rights, primarily constitutional rights, but also rights grounded in statute and regulation. On the one hand, the right that is asserted requires government to do more; on the other, it requires government to do less. And in emphasizing rights, the two branches share other common elements: for example, the insistence that ever more lawyers are needed to defend and secure these rights. By operating through the courts, even the public-interest lawyers who apparently want government to do less are in effect asking that another branch of government, the courts, do more. The relationship of public-interest law to governmental expansion differs from the liberalism of the New Deal, which saw no problem in expanding government to deal with any problem. At least the legal branch of the "new class" does see problems with this approach, but its chosen solution is to expand another branch of government, the judiciary, to deal with them. Or, as D.P. Moynihan pointed out in the title of a recent address: "An Imperial Presidency leads to an Imperial Legislature leads to an Imperial Judiciary."<sup>9</sup>

Thus, as a result of a lawsuit charging deprivation of the constitutional rights of the inmates, the Willowbrook Developmental Center, a huge center for the retarded on Staten Island in New York City, is to be reduced in population from 5,300 to 250. Government, attacked by public-interest lawyers who were defending the right of patients to good treatment and not to be placed in an institution, was required to reduce one of its monster institutions. But the consent judgment resulting from the suit requires that

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9. Lehman Memorial Lecture by Senator Moynihan (Mar. 28, 1978), *reprinted as* Moynihan, *Imperial Government*, COMMENTARY, June 1978, at 25.

government create hundreds of new mini-institutions to house the retarded and many programs in the community to provide them with work, education, therapy, and other needs; in doing so, it requires not only the expansion of state agencies creating such institutions and programs, but the creation by the judiciary of a new form of government, the Willowbrook Review Panel, to oversee the process. But all this is as nothing compared to the need for new lawyers that the Willowbrook decree causes by creating and specifying a vast array of new rights: the right to community placement, the right to six hours of program, the right to notice before being moved, the right to be fully informed of one's rights, the right to a process of appeal and adjudication if there is disagreement over one's rights. The Willowbrook judgment is enough to keep an army of lawyers busy for many years, and if the army were provided, there would have to be an appropriate increase in judges and court personnel to respond to their efforts.

The passion for rights now knows no bounds. Critical of government, it nevertheless causes an increase in the number of lawyers. "Deinstitutionalization" may reduce the number of those employed in institutions, but it certainly increases the number of lawyers. Lawyers in the field of "deinstitutionalization" are convinced that no benevolence can be expected from those who run institutions for the mentally retarded and the mentally ill. Ideally, each inmate should have a lawyer. The child must be protected not only against the state and the mental-health professionals, but also against his parents—a point of view that is now actually becoming law. A three-judge federal panel in Pennsylvania recently ruled that it was unconstitutional to commit mentally ill and mentally retarded children to institutions "without a hearing and without legal representation." As part of its ruling the court ordered that the 3,390 children now being held in Pennsylvania institutions, both public and private, must be released within the next six months or recommitted under the new procedures.<sup>10</sup>

One of the main arguments against the "new class" is that, seeking good, it finds ways of expanding its own numbers and its own power; despite the rather special role of lawyers within the "new class," in this respect they resemble government employees, social workers, city planners, and all the others who, whatever their differences, see more need for more people with their own training. This process is not cynical; the public-interest lawyers who have created a situation in which ever more of their kind will be needed do not rub their hands in sly delight at what they have

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10. PHILADELPHIA INQUIRER, May 26, 1978, at 1.

wrought. Instead, they are wearied and overcome by what they see as the heaped-up problems around them, which even great victories cannot reduce and even seem to magnify. But it is undeniable to them that an increase in their numbers—whether they are 1/2, or 1, or 2% of the bar—is essential to any progress.

Even when it is critical of government, the public-interest bar generally feels that government should be forced to do more—more regulating, more enforcing, more monitoring.<sup>11</sup> And when it wants to limit government, it is in effect expanding another segment of government—the judiciary. In both cases, it is undoubtedly increasing the need for lawyers, within and without government.

But then we come to the first paradox mentioned above: as a proportion of all lawyers, the public-interest bar and the regulators and the authors of government regulations do not amount to much. Why then are lawyers regarded as *members* of the “new class” rather than *opponents*, considering their interest as small businessmen whose clients are other businessmen, small and large? Because the relatively small group of public-interest lawyers represents an essential thrust of the law itself, something even its opponents within the law grudgingly acknowledge. The law is a matter of due process and of rights, and if lawyers set themselves up to insure due process and to vindicate rights, the bar—whatever the interests of most of its members and most of its clients—will go along. The Bar Association, for example, supported the creation of legal services for the poor under the Office of Economic Opportunity.<sup>12</sup> Some established lawyers might have seen it as competition (though the poor do not provide much legal business); more might have seen it as threatening the interests of their clients—the landlords, employers, manufacturers, and retailers. But the ABA decided that government-supported legal services for the poor should be backed by the bar, regardless of the clash with certain interests, because the law itself incorporates as a key principle the right to representation and due process, which only lawyers can provide. It is interesting that, despite all the opposition that developed among governors, mayors, and others, legal services handily survived the demise of the Office of Economic Opportunity itself, was set up as a separate government corpora-

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11. Indeed, members of this part of the public-interest bar find no problem passing over into the service of government. Those left behind may suspect a weakening in the commitment of their former colleagues, but the easy passage from the outside critical role to the inside regulating role shows the close connection. Cameron, *Nader's Invaders Are Inside the Gates*, FORTUNE, Oct. 1977, at 252.

12. J. HANDLER, *supra* note 6, at 32.

tion, and was able under a Republican administration both to protect itself from political hazards and to continue in very much the same line as it had started.

The bar presents the strange spectacle of having interests that should be quite critical of governmental expansion, of the extension of due process, of the creation and extension of new rights. After all, these harm lawyers as businessmen (but of course they have their own in-house talent to deal with such issues), and harm their clients, who employ them to struggle against the untoward effects of expanded regulations, rights, and due process. But as *lawyers* they see the compelling logic in these new entitlements. How can a lawyer, as a lawyer, resist the demand that everyone needs a lawyer—even if he sees a certain fantastic element in, for example, a case where all parties agree that institutionalization is the best course of action, and yet a lawyer is nevertheless required to certify their agreement?

And because this logic is built into the law itself, it is at its strongest in the faculties of law schools, particularly elite law schools, where we find the most refined elaborations of due process, the most extended implications of a right, and all the various developments within American law that have emphasized its role in reforming and restructuring society. The bar as a whole may be conservative, and its interests suggest that lawyers—if we had polls—would have conservative political opinions. But this is not true of law-school faculties. While not as liberal as social scientists, they are considerably more liberal than professors in general, and the high-status law schools are even more liberal.<sup>13</sup> One can see why, despite the easy and jejune interpretations that simply assume that law professors, linked to a conservative profession serving conservative interests, will obviously be conservative. They are liberal because the nature of the law itself emphasizes many themes that have become the essence of liberalism: due process, a careful consideration of rights, a system of reasoning by analogy, which permits moving from restricted conceptions of due process to more extended ones. They are liberal, too, because law-school faculty are, in very substantial proportions, of Jewish ancestry (25%, as against 17% of social-science faculty, 9% of all faculty, and 3% of the population), and Jews are liberal.<sup>14</sup> The more liberal law schools and the elite law schools (the two categories overlap), which shape new approaches justifying a more in-

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13. S. Lipset & J. Paris, *The Sociology of Law Professors* (1977) (unpublished manuscript).

14. *Id.*

erventionist profession (interventionist, that is, in favor of the kinds of interests the educated elite espouse), attract students inclined toward liberalism and toward creative legal intervention for the rights of such newly defined minorities as prisoners, the mentally ill, and the mentally retarded, and for the protection of the environment and the consumer.

It is true that there has been very little study of the political effect of law school attendance. The overwhelming impression given by the literature, popular and scholarly, is that law school makes law students conservative, interested in making money by helping businessmen make money. After all, their courses deal primarily with law affecting business, and they expect for the most part to work for business. One interesting study of attitudes of law students at one major university, contrasting their attitudes just before beginning their studies in 1973 with their attitudes after almost two years of law school in 1975, did show a modest drift toward a more conservative self-definition. Their interest in doing public-interest law also declined. But the changes were only modest, and could have been attributed to their professors (who, whatever their liberal inclinations, might have been more conservative than their students), or the changing temper of the times, or the fact that their self-image was changing as they approached the time to begin looking for jobs, or the fact that they were getting older, or some other possible cause. But on the evidence of this study, law school prompts no strong shift to conservatism.<sup>15</sup>

Another key part of the bar diverges from the conservative inclinations of most lawyers: the federal judiciary. Federal judges are not by training or social background interventionist. But in recent decades they have supported the expansion of government powers, for varied and complex reasons—among them, the fact that Congress, the presidency, and the bureaucracy have also expanded governmental powers, and judges simply interpret law and regulations. But one reason for this development is that appellate judges depend in large measure for their legal reasoning on elite law-school faculty who analyze and interpret legal trends and point the way to further development, and on the best students of elite law schools, who serve as law clerks. As I wrote recently,

the judges follow the weight of judicial analysis and opinion. . . . [I]n . . . complex cases, they must be guided by what is set before them in lengthy briefs and

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15. H. Erlanger & D. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientation to Public Interest Concerns* (1977) (Institute for Research on Poverty Discussion Paper, Madison).

analyses of complex facts. These analyses are then digested by other lawyers for them, generally the brightest graduates of the law schools. But this entire process is guided by the weight of educated opinion, an educated opinion which is convinced that morality and progress lie on the side of the broadest possible measures of intervention to equalize the employment of minority groups in every sphere and level of employment, and to evenly distribute students and teachers and administrators [by race] through school districts . . . .<sup>16</sup>

Of course, there are other factors that explain judicial interventionism, among them the independence of the judiciary from the opinions of the general public—though not, as I have indicated, from educated public opinion. It is of course possible that a long line of conservative appointments to the Supreme Court and lower courts by a conservative president would moderate the interventionist orientation of the federal judiciary. But the tendency toward interventionism—whether the result of judicial insulation from the pressures of mass public opinion, of the influence of legal commentators or legal clerks, or of the steadily more expansive interpretation of due process and equal rights—is so strong that eight years of Eisenhower appointments did nothing to change it, and eight more years of Nixon and Ford appointments did little more.

At its peak—among elite law-school faculty, students in elite law schools, the federal judiciary—the law is quite different from what a random sample of legal practitioners would show, and much closer to the “new class” in its orientation to government and business. Despite their small numbers, interventionist lawyers—the public-interest lawyers, the government regulators—are not alone. The corporate body that represents the bar, as we have seen, will give them support, even if grudgingly. Distinguished law professors will mark out the path they should take, and justify it before they have entered upon it. Appellate judges will be influenced in various ways by elite law-school faculties. Lawyers are indeed important members of the “new class,” if we consider that its essential character is to call for, to defend, and to benefit from the expansion of government.

Admittedly, there are other traditions within the law that might serve to moderate the expansion of government and the law itself. As neither a lawyer nor a philosopher of law, I would hesitate to say that traditions emphasizing restraint and a limited role for law rather than its endless expansion are any more authentic than traditions that have served the expansion of government and law. And it would take a different and more extended discussion

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16. N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 218 (1975).

to explain why it is that the legal traditions that serve the “new class” rather than those who might oppose it have become dominant—not in the law itself as a profession, but in the law schools, where it is forcefully carried into the courts, with great effects upon our society.