

**RIGHTS, LIBERTIES, THE COMMON GOOD,
AND THE TRANSFORMATION OF
AMERICAN LAW IN RECENT DECADES:
HAS THE LEGAL PROFESSION FAILED IN
ITS ETHICAL OBLIGATION TO IMPROVE
THE LEGAL SYSTEM?**

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INTRODUCTION

In a scene in the play and movie, *A Man for All Seasons*, Thomas More has a memorable exchange with the members of his family, who strongly admonish him for allowing the ambitious scoundrel Richard Rich to freely leave his premises instead of placing him under arrest (More was then Lord Chancellor of England, effectively the highest law enforcement official). More, emphasizing that Rich had broken no law, has his sharpest words for his impetuous son-in-law Will Roper who cannot understand how More would spare even the Devil from arrest in those circumstances and says, to the contrary, that he would destroy all the laws to get at him. More responds by asking him where he would hide in that then-lawless condition when the Devil *turned on him*. How would he “stand upright in the winds that would blow then?”¹ More says that it is for his

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¹ ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (1962).

“own safety’s sake”² that he would “give the Devil benefit of law.”³

This short dialogue instructs us about a few vital points concerning law: law is a protector and source of order; for the sake of the innocent, laws must protect even the guilty and the evildoer; man needs law for an even tolerable level of existence; and law cannot be used arbitrarily to achieve even the best of ends because that arbitrariness will eventually turn on us. More defends the law of his native England even as he is aware that it may be turned on him; indeed, he winds up a victim of the very arbitrariness and result-oriented notion of law that he rebukes Roper for embracing.

Today, we frequently emphasize our commitment to the rule of law as More did, but we have seen disturbing developments in American law in the last few decades, which have eroded traditional legal protections, been increasingly result-oriented (e.g., checking crime regardless of the costs), grown increasingly arbitrary and impervious to guilt or innocence, imposed legal obligations whose mandates are unclear to citizens, and arguably failed to promote the common good. These developments have been ably chronicled by a number of books that have appeared over the last decade and a half, a number of which are discussed in this Article.

These developments have occurred right under the nose of the legal profession, despite its role as the major guardian of the rule of law in American life and its ethical obligation to seek to improve the law. In fact, segments of the profession have encouraged, overseen, and worked to further them.

I. ETHICAL OBLIGATION

Canon 8 of the American Bar Association’s Model Code of Professional Responsibility—a Code that has been adopted in whole or part by most states—says that “A Lawyer Should Assist in Improving the Legal System.”⁴ The various canons have ensuing “Ethical Considerations.” The pertinent Ethical Considerations for Canon 8 are the following:

² *Id.*

³ *Id.*

⁴ MODEL CODE OF PROF’L RESPONSIBILITY Canon 8 (1980).

EC 8-1: Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2: Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed

EC 8-5: Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers

EC 8-7: Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so

EC 8-9: The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.⁵

Some state codes of professional responsibility elaborate even further and more specifically on this ethical requirement. For example, Pennsylvania's code states the following:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a

⁵ *Id.* EC 8-1, 8-2, 8-5, 8-7, 8-9.

member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.⁶

II. LEGAL DEVELOPMENTS IMPERILING RIGHTS, LIBERTIES, AND THE COMMON GOOD

What developments in American law have compromised rights, liberties, and the common good? The following is by no means an exhaustive list:

- The use of the criminal law to address what had previously been understood to be civil matters—especially in tort—or simply matters of ethics or even manners.
- The explosion of vague and technicality-laden government regulations, so that no one—including the enforcers—is really sure of what is legal or illegal.
- The erosion of the requirement of *mens rea* to successfully secure a criminal prosecution.
- The expansion of the reach and scope of such traditionally all-purpose crimes as conspiracy and mail fraud.
- The increased enactment and application of asset forfeiture statutes, so that people can, and have, lost their property if it was in some way used in a crime, even if they did not commit it.⁷
- The growth of the retroactive application of the law—contrary to the spirit, if not the letter, of the constitutional prohibition of *ex post facto* laws—especially in the environmental area.

⁶ 204 PA. CODE § 81.1(6) (2008).

⁷ Sometimes a criminal defendant's assets are even seized before trial to deny the assets necessary to retain legal counsel of choice.

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- The utter explosion of plea bargaining, which has sharply reduced the number of criminal trials, so that they have become the clear exception instead of the rule, with a serious compromising of the right to trial.
- The growth of prosecutions, especially in the white collar area, based on speculation and theorizing instead of evidence, and the routine use of heavy prosecutorial pressure on the accused to get them to plead guilty even if they did not commit a crime.
- The use of loose plea deals with a person to get him to implicate someone else, even if the deals constitute statutory bribery.
- The weakening of attorney-client privilege by prosecutorial pressures, especially in prominent white collar crime cases—including suits against law firms, freezing of firm assets, and even indictments.
- The growth of the practice by prosecutors of using uncorroborated information from prison inmates, often arranged in advance by the prosecutors to more readily secure indictments.
- The growing tendency to turn crime victims into criminals, as with laws that punish people for leaving their keys in their car when a thief steals it or that punish them for using a weapon to defend themselves against an intruder.
- The multiplying of laws that punish action or inaction on the basis of a *speculative* harm.
- The increasing use of the eminent domain power, not for traditional public purposes, but simply to transfer land to developers or private corporations in the anticipation of enhanced tax revenues, given U.S. Supreme Court imprimatur in *Kelo v. City of New London*.⁸
- In the drive to ensure uniformity and supposed fairness, regulatory law has become so rigid that it cannot come to grips with obvious needs, problems, and necessary

⁸ 545 U.S. 469 (2005).

differences, and brings about results that defy common sense.

- In order to secure compliance with law and desirable public policy objectives—such as stopping child abuse and ensuring environmental quality—we are increasingly expecting average citizens to become snoops and snitches, so that people in our supposedly free country are increasingly being watched over by unnamed persons who often report them to authorities for behaviors that by any commonsensical standard are completely innocent.
- Due to the wide use of sting operations, people are routinely being set up for criminal activity that by any serious standard—even though courts give broad leeway to law enforcement authorities—would constitute entrapment.
- By proclaiming all sorts of things as rights and making civil rights claims easy to make, we have created a situation where both private and public authorities are reluctant to make decisions about employees and others, and manipulative individuals can more readily achieve self-serving ends.⁹

We now examine and give examples of a number of these different developments and observe, where possible, how they offend the apparent meaning or spirit of the different Ethical Considerations of Canon 8—or in some cases other canons of the ABA Code.

III. VAGUE LAWS

In an article in the anthology *Go Directly to Jail: The Criminalization of Almost Everything*, James V. DeLong of the Progress and Freedom Foundation writes about the increased use of criminal penalties—all part and parcel of the post-Enron era—against corporate officers for the failure to give a sufficiently accurate account to their companies of their

⁹ As a result, different groups—with a heightened sense of group identity—have become suspicious and in conflict with each other causing the common good to be ignored.

activities. This is happening despite the fact that there are no established standards. As one federal judge put it, the jury in a particular case “invents” the crime. The “law” is applied even if the company suffered no loss or harm.¹⁰

Environmental laws and regulations are another area where civil and criminal penalties are imposed routinely for “offenses” that people are not aware they have committed. Writing in the above volume, Timothy Lynch of the CATO Institute argues that the U.S. Supreme Court has mostly allowed Congress and state legislatures to pass vague environmental legislation. A 1993 survey reported that forty-seven percent of corporate attorneys interviewed said that on environmental matters they spent most of their time trying to determine whether or not their companies were complying with the law. About seventy percent of them said that they did not believe that the environmental laws could be completely complied with, due in part to their complexity and the varying interpretations given to them by regulatory agencies and personnel.¹¹ In addition, enforcement of the vague environmental laws does not target just big corporations. Increasingly, individuals—even if they proceed in accordance with legal advice given to them by government agencies—are being prosecuted, sometimes for things as simple as a leaky septic tank.¹²

It is even more disturbing that such constitutional guarantees as the right against self-incrimination and searches without a warrant are being whittled down by court decisions in environmental cases. Reports made pursuant to compliance requirements, for example, can be the basis for a criminal prosecution of the reporter. In other words, if you fail to report, it is a crime, and if you *do* report, the information that you have given—about yourself—can be used to find you guilty of an environmental crime.¹³

The federal tax laws are another obvious example of vagueness. The result of innumerable compromises and accommodations among different interests and political positions

¹⁰ James V. DeLong, *The New “Criminal” Classes: Legal Sanctions and Business Managers*, in *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* 9, 13 (Gene Healy ed., 2004) [hereinafter *GO DIRECTLY TO JAIL*].

¹¹ Timothy Lynch, *Polluting Our Principles: Environmental Prosecutions and the Bill of Rights*, in *GO DIRECTLY TO JAIL*, *supra* note 10, at 45, 49–50.

¹² See DeLong, *supra* note 10, at 12.

¹³ Lynch, *supra* note 11, at 62–63.

over nearly a century, they contain many provisions that are not only unclear but also essentially contradictory. People frequently have the experience that when they ask the same question about a certain tax provision to different IRS operatives even in the same office, they get different answers. A congressional investigation revealed that in 1999, the IRS gave 9.8 million incorrect answers to phoned-in taxpayer questions; in 2001, it was 17 million.¹⁴ Even tax experts outside the agency have trouble determining the correct answer to certain tax questions.¹⁵ An example of the problem is the way that the IRS classifies workers as opposed to independent contractors. The IRS has sought to minimize the latter classification as much as possible. In 1990, an official IRS advisory group concluded, “the process of classifying workers is confusing, complex, antiquated, and unfair.”¹⁶

Another area of vague laws—an area that involves the most intimate of human associations, the family—involves child abuse, neglect, endangerment, etc. Since passage in 1974 of the federal Child Abuse Prevention and Treatment Act (“CAPTA”), as we discuss below, American parents in large numbers have faced investigations and allegations of abuse and neglect—and in some cases loss of their children temporarily or permanently—for actions that under no reasonable standard could be put into these categories. As Jeanne M. Giovannoni and Rosina M. Becerra’s book *Defining Child Abuse* puts it, “Many assume that since child abuse and neglect are against the law, somewhere there are statutes that make clear distinctions between what is and what is not child abuse and neglect. But this is not the case. Nowhere are there clear-cut definitions of what is encompassed by the terms.”¹⁷ Douglas J. Besharov, one of the leading professional/scholarly authorities on the child protective system, writes that, “Existing standards set no limits on [family]

¹⁴ See CATHERINE CRIER, *THE CASE AGAINST LAWYERS: HOW LAWYERS, POLITICIANS, AND BUREAUCRATS HAVE TURNED THE LAW INTO AN INSTRUMENT OF TYRANNY—AND WHAT WE AS CITIZENS HAVE TO DO ABOUT IT* 84 (2002).

¹⁵ See JAMES BOVARD, *LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY* 275 (1994). Crier also notes how in one year, H&R Block gave the same tax packet to forty-four experts who worked out forty-four different returns. See CRIER, *supra* note 14, at 84.

¹⁶ BOVARD, *supra* note 15, at 260.

¹⁷ JEANNE M. GIOVANNONI & ROSINA M. BECERRA, *DEFINING CHILD ABUSE* 2 (Free Press 1979).

intervention and provide no guidelines for decision-making.”¹⁸ As with environmental regulations and tax law, even the people charged with enforcement do not know what the law requires, as has been shown by different studies of the attitudes of social workers in child protective agencies.¹⁹ It is not surprising that influential, long-time academic child abuse “expert” Murray A. Straus claims that even yelling or screaming at one’s child should be considered abuse as a form of “verbal” or “psychological aggression.”²⁰ Even though overbreadth and vagueness have been grounds for the courts to strike down laws as unconstitutional, when it comes to child abuse, they have been notoriously reluctant to do so.²¹

Consider, as a further sampling, two other regulatory agencies of the federal government. Catherine Crier, a lawyer, media legal correspondent, and former prosecutor and judge, brings to our attention how two-thirds of Department of Agriculture inspectors failed a test that was administered to determine their knowledge of the regulations that they were supposed to enforce to prevent the possibility of food contamination.²² She also writes, “Business owners complain that one [OSHA (“Occupational Safety and Health

¹⁸ Douglas J. Besharov, “*Doing Something*” About Child Abuse: *The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL’Y 539, 570 (1985) [hereinafter Besharov, *Doing Something*]; see also Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 VA. J. SOC. POL’Y & L. 165, 190 (2000) [hereinafter Besharov, *Child Abuse Realities*] (“Many [unfounded reports] involve situations in which a well-intentioned person who reports (in an effort to protect a child) is overreacting to a vague and often misleading possibility that the child may be maltreated.”).

¹⁹ See, e.g., MARY PRIDE, THE CHILD ABUSE INDUSTRY 14–22 (1986); Besharov, *Doing Something*, *supra* note 18, at 569–70.

²⁰ See Lisa Marshall, *Yelling at Kids Harms Them Long Term*, CINCINNATI POST, Mar. 2, 2004, at B3; Christopher Healy, *Because I Said So!!*, SALON.COM, Dec. 11, 2003, <http://archive.salon.com/mwt/feature/2003/12/11/study/index.html> (stating that in the results of the study Straus and a colleague released in 2003, they admitted reluctance to label yelling and screaming or psychological aggression as abuse, but did so in their press release on the study and in the interview Healy did with him for the article). An earlier article co-authored by Straus indicates that among child abuse experts and related professionals, the notion of “verbal abuse” is widely accepted. See Yvonne M. Vissing, Murray A. Straus, Richard J. Gelles & John W. Harrop, *Verbal Aggression by Parents and Psychosocial Problems of Children*, 15 CHILD ABUSE & NEGLECT 223, 223 (1991).

²¹ See, e.g., *State v. Grover*, 437 N.W.2d 60, 61 (Minn. 1989).

²² CRIER, *supra* note 14, at 77.

Administration”)] inspector might tour a company finding no violations while another might write up a dozen.”²³

When lawyer-legislators, prosecutors, and judges—for that matter the entire legal profession—promote, enact, apply, or tolerate such vague laws and regulations with the force of law, they are arguably failing in their ethical obligations under Ethical Consideration 8-2—again, which states “Rules of laws are deficient if they are not . . . understandable”²⁴ If, indeed, the IRS has some regulations that are, as their advisory group said, “antiquated and unfair,” then the lawyers involved run afoul of two other parts of 8-2: “If a lawyer believes that the existence or absence of a rule of law . . . causes or contributes to an unjust result, he should endeavor . . . to obtain . . . changes in the law,”²⁵ and “should encourage . . . the repeal or amendment of laws that are outmoded.”²⁶

IV. OTHER PROBLEMS WITH REGULATORY LAW

Related to the above problems are the next three legal developments: (1) the huge number of regulatory rules; (2) the frequent conflict among laws and regulatory rules; and (3) the unworkability of many regulatory rules. Crier points out that in 1936, in the early years of the administrative state spawned by the New Deal, there were 2,411 pages of regulations in the *Federal Register*. That might seem imposing enough, but today there are about 75,000 pages.²⁷ Political reasons explain much of this explosion of regulatory rules. Congress makes many of the statutes they pass deliberately vague to cut down on strong or direct political opposition. They also want to satisfy interest groups. The lame-duck president’s desire to “go out in a blaze of glory,” to try to enshrine into law his political perspective, and to address what he perceives as lingering problems all have helped increase the number of regulations. In fact, the last fourteen presidents have increased regulations by about seventeen percent in the last part of their administrations.²⁸ Crier also

²³ *Id.* at 80.

²⁴ MODEL CODE OF PROF'L RESPONSIBILITY EC 8-2 (1980).

²⁵ *Id.*

²⁶ *Id.*

²⁷ CRIER, *supra* note 14, at 63.

²⁸ *See id.* at 64.

says that simple bureaucratic audacity and aggressiveness is another reason.²⁹

This multiplication of the number and complexity of regulatory laws—which lawyers routinely have a large role in—also seems to go against Ethical Consideration 8-2, which, to repeat, states that lawyers “should encourage the simplification of laws.”³⁰

Crier gives a striking set of examples that illustrate the conflict among federal regulatory rules:

Pretend for a moment . . . that you know all the rules. Then you're faced with the question of which ones to obey. Throughout the regulatory world, there are major conflicts to sort out. The trucking company that rejects a driver with sight in only one eye is complying with the standard required by the U.S. Department of Transportation, but the EEOC may sue it for discrimination. Watch out if you screen for alcoholism, drug abuse, even criminal records. You may come under fire regardless of the safety considerations that should be paramount. The U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) often butt heads, requiring different standards for the same products. Environmentally conscious businesses can get really confused. Follow the Resource Conservation and Recovery Act to properly dispose of waste and you may violate the Toxic Control Substance Act. The list goes on and on.³¹

If all laws and regulations were enforced with exactitude—especially when one factors in the lack of clarity about what they mean and how they conflict with each other—it would be impossible to meet their requirements. The law would simply be unworkable. Instead of regulating something to protect and aid the public, it would eliminate a needed activity altogether. Crier points to one OSHA report that admits, “If all meat-inspecting regulations were enforced to the letter, no meat-processor in America would be open for business.”³² As it is, OSHA's effectiveness in accomplishing its purpose is questionable. As she puts it, “Despite thirty years of (over)diligent rule making, [OSHA] itself estimates that 80 percent of American workplaces

²⁹ *See id.* at 63–64.

³⁰ MODEL CODE OF PROF'L RESPONSIBILITY EC 8-2 (1980).

³¹ CRIER, *supra* note 14, at 63.

³² *Id.* at 76.

are not in compliance with the law.”³³ Indeed, one of OSHA’s further problems, which is all too typical of American regulatory law and the perspective of regulatory agencies today, is that OSHA has sought to regulate virtually everything in its subject matter area, instead of “clearly identifiable problem[s].”³⁴ This pattern also exists in the child protective system. CAPTA and its progeny—and the attitudes of those manning the child protective agencies—have as their aim, eliminating the very *possibility* of any child abuse or neglect occurring. They, like OSHA, seek not only to address real harms, but speculative or prospective ones as well. Besharov writes how this has proven to be unrealistic and, in fact, has had the effect of agencies getting so caught up in pursuing harmless parental behaviors that genuine cases of abuse are often overlooked or inadequately addressed.³⁵

In a lecture she gave to the Federalist Society in 2003, Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit—sometimes mentioned as a possible Supreme Court nominee—alleged that the rule of law is threatened because governmental “agencies . . . have made the law so complicated that it is difficult to decipher and often contradicts itself.”³⁶ Ethical Consideration 8-9 above, and for that matter, the entire ABA Code, underscores the essential role of lawyers to work to uphold the rule of law.

V. THE ABSOLUTIZATION OF RIGHTS AND FAILURE TO ACCOMMODATE DIFFERENT GROUPS IN SOCIETY: THE CASE OF DISABILITY RIGHTS

Critics such as Crier and Philip K. Howard—the author of the noted books *The Death of Common Sense*³⁷ and *The Collapse of the Common Good*³⁸—have written about the glaring failure of

³³ *Id.* at 80.

³⁴ *Id.*

³⁵ See Besharov, *Child Abuse Realities*, *supra* note 18, at 191–92; Besharov, *Doing Something*, *supra* note 18, at 574–75.

³⁶ Geraldine Hawkins, *American Legal System Is Corrupt Beyond Recognition, Judge Tells Harvard Law School*, MASS. NEWS, Mar. 7, 2003, http://www.massnews.com/2003_Editions/3_March/030703_mn_american_legal_system_corrupt.shtml (quoting Judge Edith Jones).

³⁷ PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994) [hereinafter HOWARD, *DEATH OF COMMON SENSE*].

³⁸ PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA’S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (Ballantine Books 2002) (2001) [hereinafter HOWARD, *COLLAPSE OF THE COMMON GOOD*].

American law in recent years to accommodate the competing needs and rights of different groups of people in society, which is a traditional role of both law and politics. While several areas could be subject to critique, one major area of failure which they point to is disabilities rights. The thrust of statutes such as the Americans with Disabilities Act (“ADA”) has been to establish absolute rights, even if by their nature the matters in question cannot be treated in an absolutist fashion and, instead, cry out for compromise and accommodation. Even though the ADA requires only that “reasonable accommodations” be made for the disabled,³⁹ what the following examples indicate is that this standard is not necessarily followed. We witness, for example, the New York City transit authority having to reduce by ten percent the number of buses it could purchase because under the ADA it had to purchase only buses with wheelchair lifts—which are much more expensive. The extra cost and fewer buses led to an overall service cutback. As Howard puts it, this meant “a grandmother in the Bronx had to wait an extra half hour in the cold in a dangerous neighborhood. Who . . . was defending her rights?”⁴⁰ It is not even that cities like New York are not providing special transit for handicapped persons, but advocacy groups insist that they be “mainstreamed.” So, one New York commuter complains that she no longer can take the bus she had taken to work every day because the wheelchair-bound man who routinely rides it needs twenty extra minutes to get on and off along the way, which makes her late for work. The transit authority has 180 fewer seats available on one of their subway lines because of wheelchair-turning-radius requirements.⁴¹ Crier writes that by law, builders in Pima, Arizona must make the first floor of every new home wheelchair accessible and provide at least one accommodating bathroom—irrespective of whether a wheelchair-bound person will ever live in or visit them.⁴²

In public education, we see perhaps the most acute examples of the lack of compromise—and good sense—in disability law. The New York City Board of Education spends twenty-five

³⁹ See Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(b)(5)(A) (2000) (defining discrimination as including “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability”).

⁴⁰ HOWARD, DEATH OF COMMON SENSE, *supra* note 37, at 144.

⁴¹ See *id.* at 144–45.

⁴² See CRIER, *supra* note 14, at 32.

percent of its total budget on special education, even though this involves only about ten percent of its students.⁴³ The mainstreaming of handicapped school children is given a strong emphasis. The problem is that when mainstreamed into regular classrooms, they face a sixty-one percent failure rate nationwide, as opposed to only a fourteen percent rate in special education classrooms.⁴⁴ This does not factor in the disruption caused by some special needs children in the regular classroom setting. When one reads this, one understands why Howard titled his book *The Death of Common Sense*. The extreme nature of some of the demands on school districts and the taxpayers to meet the educational needs of handicapped children is seen in such cases as these: in New Hampshire, a mother successfully pressed a legal case for her profoundly disabled son who had virtually no cerebral cortex and who various experts agreed could not benefit from educational services; in Georgia, the parents of a child with multiple disabilities were dissatisfied with the district's program and a court forced the district to pay the costs of sending him to a special school in Tokyo, Japan; despite the large special education program in New York City, the dissatisfied grandmother of a severely retarded girl legally forced the district to send her to a top-flight special school in Boston; in another case, one school district was paying \$200,000 per year for one special education student.⁴⁵

Crier states that since the enactment of the ADA in 1990, the number of annual lawsuits has tripled, in part because the statute permits the winner to receive attorney fees. Despite all the stress on wheelchair accommodation, most suits concern not mobility, but bad backs and physiological and neurological problems.⁴⁶ Our personal experience indicates that this is the case in a university setting, too: Most disability accommodations concern not mobility, but learning disabilities and ADD. Crier argues that "the 'victimized' [have] become the 'abusers,'"⁴⁷ and we can understand why Howard says that such laws have made us "a nation of enemies."⁴⁸

⁴³ See HOWARD, DEATH OF COMMON SENSE, *supra* note 37, at 147.

⁴⁴ See *id.* at 149.

⁴⁵ See *id.* at 146–47.

⁴⁶ See CRIER, *supra* note 14, at 34.

⁴⁷ *Id.*

⁴⁸ This is the title of section III of *The Death of Common Sense*. See HOWARD, DEATH OF COMMON SENSE, *supra* note 37, at 111.

It is not unreasonable to say that there are issues of justice and responsiveness to the needs of society in laws such as the above. In addition, the vagueness and unclear standards of laws such as the ADA and the Individuals with Disabilities Education Act raise obvious questions of understandability and arbitrariness. Ethical Consideration 8-2, which insists that laws be simple, understandable, and not likely to contribute to an unjust result,⁴⁹ and Ethical Consideration 8-9, which emphasizes the need to uphold the rule of law—whose very nature is supposed to preclude arbitrariness⁵⁰—seem to be ignored.

VI. DEVELOPMENTS IN CRIMINAL LAW AND EXCESSIVE PROSECUTORIAL POWER

Various authors have written about troubling developments that have occurred in criminal law in the last few decades. One is the seemingly excessive use of the criminal law. We have seen an increasing tendency of legislatures to criminalize matters that historically have been in the realm of tort, or even of manners. Sometimes, even without the sanction of legislative enactment or judicial interpretation, prosecutors have built cases on legal theories. They might base such theories upon torturous interpretations of broadly written statutes. Erik Luna, a former prosecutor and current law professor at the University of Utah, says that “conduct that was once actionable only by civil suit [is] now susceptible to criminal prosecution as well, oftentimes at the sole discretion of the relevant law enforcement agency.”⁵¹ Sometimes, criminal prosecutions even reach into the realm of manners. So, we witness such conduct as eating on the Washington Metro,⁵² the wearing of low-cut pants below the waist when any underwear is shown,⁵³ the use of vulgar words,⁵⁴ and annoying the birds in public parks, turned into or attempted

⁴⁹ See MODEL CODE OF PROF'L RESPONSIBILITY EC 8-2 (1980).

⁵⁰ See *id.* EC 8-9.

⁵¹ Erik Luna, *Overextending the Criminal Law*, in *GO DIRECTLY TO JAIL*, *supra* note 10, at 1, 4.

⁵² This case, which came before Judge John G. Roberts on appeal, involved a twelve-year-old girl who was arrested for eating a French fry in a Metro station. See *id.* at 1.

⁵³ See Gene Healy, *Introduction* to *GO DIRECTLY TO JAIL*, *supra* note 10, at vii, viii–ix [hereinafter Healy, *Introduction*].

⁵⁴ See John Carpenter, *National Briefing Midwest: Michigan: Reversal on Vulgar-Language Law*, N.Y. TIMES, Apr. 2, 2002, at A20.

to be turned into crimes.⁵⁵ Gene Healy of the Cato Institute writes in the introduction to the book *Go Directly to Jail: The Criminalization of Almost Everything* that this signals a “systemic [problem], driven by legislators who are all too willing to turn every social problem into a matter for the criminal law.”⁵⁶ Harvard Law professor William Stuntz contends that we are moving “ever closer to a world in which the law on the books makes everyone a felon.”⁵⁷

One significant way in which we have seen the expansion of the criminal law has been by the inclusion, by Congress, of more and more matters into the federal criminal code—keeping in mind that historically in the United States the criminal law has been a state matter. In 2004, there were more than 4,000 federal crimes, an increase of one-third since 1980. Since 1997, thirty-five percent of the growth of federal crimes has been in the environmental area. They are spread out over 27,000 pages of the U.S. Code and incorporate the regulatory violations discussed above—in 1994, 300,000 federal regulations carried criminal penalties. The result is that it is difficult to ascertain in many cases precisely what federal law prohibits.⁵⁸

Another disturbing development in the criminal law has been the diminishing of *mens rea* requirements, i.e., the traditional requirement that a person have the *intention* to do wrong or to violate the law in order to have the grounds to prosecute. This has been seen in recent years in the environmental and white-collar crimes areas. In their book, *The Tyranny of Good Intentions*, syndicated columnist and economist Paul Craig Roberts and lawyer Lawrence M. Stratton mention several important cases where *mens rea* was essentially abandoned. One was the case of Benjamin Lacy, a small business owner in Virginia, who made honest mistakes in filling out environmental report forms and was prosecuted because the U.S. Justice Department theorized that the mistakes must have meant that he was a polluter—even though the stream in question was free of pollution, which thus meant that there was

⁵⁵ Luna, *supra* note 51, at 2.

⁵⁶ Healy, *Introduction*, *supra* note 53, at xi.

⁵⁷ *Id.* (quoting William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001)).

⁵⁸ See Healy, *Introduction*, *supra* note 53, at xiii; DeLong, *supra* note 10, at 9.

not only no *mens rea*, but also no *actus reus*.⁵⁹ Another case was that of Charles H. Keating, Jr., identified as a prominent figure in the savings and loan crisis of the late 1980s. He was prosecuted in state court in California even though there was no evidence that he had at all been involved with or known about the sale of the “junk” bonds in the case. Prosecutors admitted that they were inventing a crime by trying to transform the tort doctrine of *respondeat superior* into a crime in which Keating would be criminally responsible for the actions of his salesmen-employees—and Judge Lance Ito, who later received much criticism for his handling of the O.J. Simpson case, allowed them to get away with it. Keating, who was long known for his anti-pornography and charitable activities, spent over four years in prison for his “crime,” until a federal court overturned his conviction because of the lack of *mens rea* and the fact that he was prosecuted under what, effectively, was an unconstitutional *ex post facto* law.⁶⁰ Yet another case was the Bank of Credit and Commerce International (“BCCI”) case involving Clark Clifford and Robert A. Altman. These prominent Washington lawyers were charged with bribery and money laundering to cover up supposedly secret financial arrangements they had made with BCCI so as to enrich themselves. The case collapsed quickly once in court because neither the state, nor federal authorities, had either an *actus reus* or *mens rea*; it was another case built on prosecutorial theorizing, this time of a quite speculative nature.⁶¹ The final case that Roberts and Stratton discuss is the Exxon Valdez oil spill case of 1990. Even though the spill was due to an accident and Exxon made a massive, successful clean-up effort, the U.S. Justice Department criminally prosecuted the company. As grounds for the prosecution, the government clearly twisted the meaning of several federal statutes, admitting that its approach was “innovative.” All of the violations required intent to damage the environment in the ways alleged that clearly was not there. Despite the highly problematical charges, Exxon—possibly fearing the damage to the company from the on-going

⁵⁹ PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND BUREAUCRATS ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE 60–61 (2000). *Actus reus* refers to the traditional requirement that there be evidence that a criminal act or omission actually occurred in order to prosecute someone. *See id.*

⁶⁰ *See id.* at 51–54 & n.4.

⁶¹ *See id.* at 56–59.

public scrutiny of a trial—accepted a plea offer from the government and paid a huge fine.⁶²

Roberts and Stratton write that the way was paved for these decisions of the 1990s by a few U.S. Supreme Court decisions in the first sixty years of the twentieth century.⁶³ The Justices expressed the view that abuses would not result from loosening *mens rea* requirements because the American criminal justice system and the government's agents would be fair. For example, Justice Felix Frankfurter spoke of “[t]he good sense of prosecutors, [and] the wise guidance of judges,” and U.S. Attorney General and later Justice Robert Jackson stressed that prosecutors must pursue justice rather than “statistics of success.”⁶⁴ If conditions then provided any justification for this rosy outlook, they certainly have not continued. As Roberts and Stratton state, “attorney general after attorney general, Republican and Democrat, has given countless speeches bragging about success in getting convictions.” They conclude that “[t]he quest for justice and solicitude for fairness toward citizens is a forgotten topic at the Department of Justice.”⁶⁵ Come to think of it, when has one recently heard a local district attorney or a U.S. attorney publicly state that he is primarily focused on the pursuit of justice, even if it means he will get fewer convictions?

We can easily see how provisions of Canon 8 come into play here. Lawyers are not working to make the law understandable or just if people can be charged with and convicted of crimes that are spun from the theories of prosecutors and not respecting of the basic legal principles, deeply ingrained into our law, about the elements needed to have a prosecutable crime. They are obviously countenancing a defective set of legal procedures that would permit such a situation—also in violation of what Ethical Consideration 8-2 expects of them. Indeed, we can see that they are not doing enough to even see that the rule of law is being upheld because administering the criminal law in such a manner is a baby step above arbitrariness. Further, is such behavior by prosecutors very far from the “[f]raudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal . . . [which] is inconsistent with fair administration of

⁶² *See id.* at 47–50.

⁶³ *See id.* at 62–65.

⁶⁴ *Id.* at 63.

⁶⁵ *Id.*

justice” discussed in Ethical Consideration 8-5?⁶⁶ Unwarranted prosecutions bring other parts of the Model Code of Professional Responsibility into focus: Ethical Consideration 7-13 under Canon 7 insists that a prosecutor’s “duty is to seek justice, not merely to convict”⁶⁷—upholding the principles enunciated by Justices Frankfurter and Jackson above. Ethical Consideration 7-13 goes on to stipulate that a prosecutor “should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute,” and that “in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.”⁶⁸ It is evident that in cases such as the above where novel theories are the basis for charges and where such basic requirements as *mens rea* and *actus reus* are ignored, prosecutors are not being faithful to these ethical norms.

Let us say more about the conduct of prosecutors, especially federal prosecutors. If any doubt remains about the serious problem of prosecutorial abuse, one should consider the *Pittsburgh Post-Gazette* series published in late 1998 that Roberts and Stratton discuss in their book.⁶⁹ The newspaper documented hundreds of cases around the country of willful, purposeful, and intentional frame-ups of both innocent people and past criminals against whom evidence was lacking. It reported on cases in which the FBI lost control of informants and for decades protected hardened criminal operatives. It exposed “hundreds of cases” in which federal prosecutors knowingly framed innocent people with false testimony that they had *purchased* from prison inmates—who are not known to be the most honest people around. Sometimes, it discovered that prosecutors and federal agents actually fed the information to inmates themselves. In a practice called “jumping on the bus,” prosecutors then coached the inmate to concoct a story that connects some person with the crime that that person really knows nothing about. The “informing” inmate gets a reduced sentence for his work, and the prosecutor gets credit for a successful prosecution.⁷⁰ Further, the *Post-Gazette* confirmed what careful observers of the criminal justice system have long

⁶⁶ MODEL CODE OF PROF'L RESPONSIBILITY EC 8-5 (1980).

⁶⁷ *Id.* EC 7-13.

⁶⁸ *Id.*

⁶⁹ *See generally* ROBERTS & STRATTON, *supra* note 59, at 150–60.

⁷⁰ *See id.* at 151–53.

known: Prosecutors have almost total control over grand juries, an institution that in theory is supposed to protect the innocent from false charges. Among other things, they can easily manipulate evidence presented to the grand jury—this has been somewhat aided by a 1992 U.S. Supreme Court ruling that prosecutors could withhold exculpatory evidence from grand juries.⁷¹

Roberts and Stratton present comments from people on the inside that give a damning picture of the federal criminal justice system. One assistant U.S. attorney admitted outright that he was not interested in innocence or guilt, but just wanted a high-profile indictment to further his career. Former long-time federal prosecutor, Thomas Dillard, said that for federal prosecutors today, “the ends justify the means.” Former Deputy U.S. Attorney General, Arnold I. Burns, said, “The federal grand jury is no longer a protector of the person who is suspected of a crime.” Former federal prosecutor, and now prominent defense attorney, Plato Cacheris, said, “[T]here are unfortunately enough examples of dishonesty cropping up that it is troubling to anybody in this business.” Robert Merkle, a U.S. attorney from the Reagan era, stated that political pressures today cause prosecutors “to prosecute absolutely bogus cases to get those [conviction] statistics” so they can justify their budgets.⁷²

Such abuse goes on because federal prosecutors by and large are not held accountable either by their superiors or by the courts. It is also almost impossible for a falsely prosecuted person to sue them.⁷³ Roberts and Stratton quote Congressman Joseph McDade, a co-sponsor of the Citizens Protection Act that seeks to address prosecutorial abuse, as saying that among federal prosecutors, “[a] win-at-all-costs attitude blinds them into suppressing exculpatory evidence, falsifying evidence, misleading grand juries, and other misconduct which most of the time goes unpunished.”⁷⁴

The latter resembles the situation of operatives of the child protective system. Despite the fact of massive over-reporting of child abuse and neglect against parents—apparently upwards of

⁷¹ See *id.* at 158. The case referred to by Roberts and Stratton is *United States v. Williams*, 504 U.S. 36, 36 (1992).

⁷² ROBERTS & STRATTON, *supra* note 59, at 151, 157–59.

⁷³ See *id.* at 153, 157–58.

⁷⁴ *Id.* at 137.

two-thirds of the reports are without foundation—with families often wrongly subjected to ongoing monitoring by agencies and children removed without grounds, child protective system personnel are essentially immune from either prosecution or civil liability for such actions—no matter how negligent or unwarranted.⁷⁵

About the criminal justice system's increasing obliviousness to guilt or innocence, Crier reminds us of (1) the success of law school "innocence projects" in finding many cases of persons wrongfully convicted of crimes, (2) former Illinois Governor George Ryan's moratorium on executions after it came to light that too many death row inmates in the state were innocent, and (3) the push in Congress for innocence protective legislation.⁷⁶

Another aspect of prosecutorial misconduct has involved the increasing tendency of, especially by federal prosecutors, to put pressure on lawyers and law firms as a way of getting their clients, mostly in white collar crime cases, to accept a plea bargain. In addition to jeopardizing ethical provisions concerning the promotion of justice, this seems to fly in the face of Canon 7, which states that a lawyer has an ethical obligation to "represent his client zealously within the bounds of the law."⁷⁷ Consider the following well-known cases. Roberts and Stratton tell us about the U.S. Justice Department's action in 1990 against the Wall Street law firm of Kaye Scholer in the Charles Keating case discussed above. Recall that Keating's state conviction was ultimately overturned. The federal government, in addition to the State of California, prosecuted Keating, and used the tactic of pressuring Kaye Scholer, which represented him, to make what it believed would be adverse revelations about his actions by filing a massive civil lawsuit against it and freezing its assets. The tactic motivated the firm, which was now

⁷⁵ See Stephen M. Krason, *A Grave Threat to the Family: American Law and Public Policy on Child Abuse and Neglect*, in *DEFENDING THE FAMILY: A SOURCEBOOK* 235, 235–36, 251–52 (Paul C. Vitz & Stephen M. Krason eds., 1998) [hereinafter Krason, *A Grave Threat*]. The two-thirds figure—based on studies and government statistics—and the immunity question was also mentioned by a number of leading writers on the subject of false child abuse allegations whose work we surveyed in a recent paper. See generally Stephen M. Krason, *The Critics of the Child Abuse Laws and the Child Protective System: A Survey of the Leading Literature*, 12 *CATH. SOC. SCI. REV.* 307 (2007).

⁷⁶ See *CRUER*, *supra* note 14, at 117–18.

⁷⁷ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980).

unable to meet its payroll, to settle with the government, and thereby compromise its legal duty to maintain lawyer-client privilege. Later, the New York State courts exonerated the one Kaye Scholer partner whose actions supposedly prompted the government to go after the firm. The New York City Bar Association also condemned the government's action in the case.⁷⁸

Another outrageous example is the case of Carl Cleveland, a deacon in the New Orleans Catholic Archdiocese, whose daughter is a Franciscan University of Steubenville alumnus—the University where the author teaches, which is known for its strong Catholic character. Federal prosecutors in Louisiana outrightly pressured him to suborn perjury; to lie about public officials who he had represented or his clients had dealt with so as to further their investigation into alleged corruption in the state's video poker operations. They were so intent in getting convictions that they refused to accept Cleveland's offer to waive immunity and even to get his clients to waive attorney-client privilege and tell the grand jury everything he knew—which was nothing incriminating about his clients or anyone else. They prosecuted him and, in spite of presenting an ineffectual case and no evidence, secured a conviction. His law practice was dissolved, most of his assets seized, and he spent more than two years in prison—until his conviction was reversed *unanimously* by the U.S. Supreme Court in the quickest decision in its history. Still, the prosecutors promised to keep hounding him unless he would drop his remaining separate appeal of two minor tax conspiracy convictions even though IRS audits showed that he was innocent of any criminal activity.⁷⁹ It hardly has to be said

⁷⁸ See ROBERTS & STRATTON, *supra* note 59, at 107–10. Keating's federal conviction for fraud, racketeering, and conspiracy was also overturned on appeal because the U.S. appellate court believed that the jurors in that case might have been unduly influenced by the state case. Keating ultimately entered into a plea agreement with federal prosecutors for bankruptcy fraud and sidestepped a pending second federal trial. See Susan P. Konia, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1266 n.104 (2003). It was probably a plea agreement not based on the fact of any actual criminal activity, which this Article argues is a frequent practice today. Keating continued to publicly deny any criminal wrongdoing.

⁷⁹ See generally Carl Cleveland, *My Thorn in the Flesh*, in AMAZING GRACE FOR THOSE WHO SUFFER 31, 31–59 (Jeff Cavins & Matthew Pinto eds., 2002). After discussing the matter with his family, Cleveland decided to plead guilty to the tax convictions—even though he knew he was not guilty—in order to get the

that the conduct of the federal prosecutors in this case—and apparently in the whole video poker dragnet in Louisiana—went against most of the provisions of the ABA Code that we have cited. It also blatantly went against Disciplinary Rule 7-103, which says that “[a] public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause,”⁸⁰ and Ethical Consideration 7-26, which “prohibit[s] the use of fraudulent, false, or perjured testimony”⁸¹ As we said above, federal prosecutors are seldom held accountable for their actions; they were not held accountable here, either.

In the Oliver North Iran-Contra case, which is also discussed by Roberts and Stratton, special prosecutor Lawrence Walsh—who later received strong criticism for his actions overall in the Iran-Contra investigation—subpoenaed North’s attorney, Brendan Sullivan, before a federal grand jury to, essentially, pressure him to testify against his client. Walsh backed off only after Sullivan appeared with pamphlet copies of the Constitution to distribute to the jurors and then refused to testify in light of attorney-client privilege. The North case was not an aberration. Roberts and Stratton point out that since 1980—it is interesting that this started with the “conservative,” anti-government Reagan Administration—the practice of subpoenaing lawyers to testify against their clients has increased. It was rarely done, and such subpoenas routinely held to be unenforceable, before that.⁸²

Was the Brandon Mayfield case another example of the government targeting lawyers? The Mayfield case involved the Muslim convert in Oregon who the FBI accused of complicity with the 2004 train bombings in Madrid on the basis of uncorroborated fingerprint evidence. In his book, *Constitutional Chaos*, Andrew P. Napolitano, Fox News legal analyst and a former judge and law professor, suggests that the FBI may have targeted Mayfield because he had defended one of the Portland Seven terrorist cell defendants in a child custody matter prior to the latter investigation. Their arrest warrant affidavit stressed

government to agree not to further prosecute him.

⁸⁰ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1980).

⁸¹ *Id.* EC 7-26.

⁸² See ROBERTS & STRATTON, *supra* note 59, at 110–11.

his role in their defense, his Islamic faith, and his marriage to an Egyptian.⁸³

Overall, it is not surprising that already by the early 1990s—before most of the sources cited in this Article had appeared—University of Colorado law professor, Kevin Reitz, wrote in a law review article that “[u]nder current law, it could be a serious mistake for a suspect in a criminal case to obtain counsel” because “[o]btaining a lawyer . . . is a bit like inviting a government agent into the defense camp.”⁸⁴

VII. PLEA BARGAINING

Tied in with prosecutorial injustices is the matter of plea bargaining. According to U.S. Department of Justice statistics, ninety to ninety-five percent of all federal, state, and local criminal cases are settled by plea bargaining.⁸⁵ Plea bargaining became common because of the crowded court dockets that resulted from the high crime rate in the United States. It was a way to supposedly meet the Sixth Amendment’s requirements for a “trial”—not a trial as we understand it, but a legal proceeding before a judge that meets due process requirements—while taking account of the criminal justice system’s limited resources. Roberts and Stratton relate a number of problems with plea bargaining that arguably compromise justice. First, truth readily gets shoved aside. The actual facts of the crime—if for sure there was one—tend to be downplayed or ignored. They argue that this has “corrupt[ed] the prosecutorial function by severing it from the discovery of truth.”⁸⁶ This downplaying of the truth, they insist, has “create[d] a culture” that eventually has enabled prosecutors to bring charges in the absence of crimes.⁸⁷ In their book, they recount a number of such cases—the best known of which was the case of the “junk bond king,” Michael Milkin.⁸⁸ Thirdly, “[p]lea bargaining puts a defendant at the mercy of his lawyer’s negotiating skills instead of the

⁸³ See ANDREW P. NAPOLITANO, *CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS* 138–39 (2004).

⁸⁴ Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 *DUKE L.J.* 572, 573, 659 (1991).

⁸⁵ See ROBERTS & STRATTON, *supra* note 59, at 85.

⁸⁶ *Id.* at 87.

⁸⁷ See *id.* at 87.

⁸⁸ See *id.* at 94–99 (discussing the case of Michael Milkin).

judgment of a jury.”⁸⁹ Fourth, since it is known that neither side wants a trial, it creates a situation in which the leverage a defense attorney might have had to aid his client—i.e., the prosecution knowing that it has to prove its case beyond a reasonable doubt and withstand the assault of the defense in a courtroom—is dissipated.⁹⁰ Fifth, plea bargaining has allowed prosecutors to build cases on speculation rather than evidence.⁹¹ This is especially true for white collar crimes, which are often vaguely defined and not clearly understood, where the defendants—who are generally not anything like career criminals—are especially open to plea bargains because they want just to “put[] it all behind them.”⁹² Rudy Giuliani, a master at getting plea bargains in his days as a U.S. Attorney in New York City, commented that white collar defendants are different from the more typical type because they “roll a lot easier.”⁹³ Finally, Roberts and Stratton contend that plea bargaining has simply opened the door to psychological pressure tactics by prosecutors.⁹⁴ They state well how the practice of plea bargaining over time metamorphosed from something that seemed likely to ensure that justice would more easily be done to something that has led to prosecutions of innocent persons:

When the option of plea bargaining first surfaces, it is considered by everyone involved as a way of meting out punishment in a timely way. But with the passage of time, several things happen. As plea bargaining takes over from jury trials, little police work is tested in a courtroom before judge and jury. Prosecutors lose touch with the quality of the police investigative work that is the basis of indictments, and the police learn that their work has no more chance of a courtroom test than one in ten or one in twenty. Gradually the incentive to find a suspect becomes more compelling than the incentive to find the guilty person.⁹⁵

The problem is heightened by the above comments about the increasing imperviousness to guilt or innocence among federal prosecutors—and Roberts and Stratton indicate that it is not

⁸⁹ *See id.* at 87.

⁹⁰ *See id.* at 87–88.

⁹¹ *See id.* at 90.

⁹² *See id.* at 93.

⁹³ *See id.*

⁹⁴ *See id.* at 92–93.

⁹⁵ *Id.* at 89.

much different in state criminal justice systems. Prosecutors come to see that securing convictions instead of “serving justice” is how they are judged by the public and by government officials, and plea bargains constitute convictions.⁹⁶

Lest one is led to think that criticism of plea bargaining is unique to Roberts and Stratton, he should consider the views of a number of other authorities. Columbia University law professor H. Richard Uviller, one of the leading authorities on criminal procedure, says that, “More innocent people are in prison on their own guilty pleas, I suspect, than by false verdicts of conviction.”⁹⁷ In a program focusing on plea bargaining on PBS’s *Frontline*, such legal authorities as Albert Alschuler of the University of Chicago Law School, Stephen Bright of Yale and Harvard law schools, and Stephen Schulhofer of New York University Law School were sharply critical. They and a number of other authorities, even if sympathetic, confirmed many of the problems and injustices in the system that Roberts and Stratton identify.⁹⁸

These problems with plea bargaining raise the same questions of conflict with Ethical Considerations 8-2 (whether rules of law are “just”), 8-5 (“fraudulent, deceptive” conduct), and 7-13 (regarding prosecutorial conduct) as above. In light of the criticism that plea bargaining results in the truly guilty getting off easier, that it creates skepticism about the criminal justice system, and whether considerations of justice actually prevail, plea bargaining raises further questions in light of EC 8-2: The law is “deficient” if it is not “responsive to the needs of society.”⁹⁹ The point that it relies upon the strength of a lawyer’s negotiating skills—which is not the essence of what the lawyering activity is supposed to be about—makes one wonder if it does not also offend EC 8-3, which is not mentioned above: “The fair administration of justice requires the availability of competent lawyers.”¹⁰⁰ This also pertains to Canon 6, which states that “a lawyer should act with competence and proper care in representing clients.”¹⁰¹ While it is true that dispensing with

⁹⁶ *See id.*

⁹⁷ H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 192 (1996).

⁹⁸ *See Frontline: The Plea* (PBS television broadcast June 17, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/>.

⁹⁹ MODEL CODE OF PROF’L RESPONSIBILITY EC 8-2 (1980).

¹⁰⁰ *Id.* EC 8-3.

¹⁰¹ *Id.* EC 6-1.

plea bargaining would require the injection of much more in the way of resources into the legal system, our earlier legal history certainly indicates that such a regime is not necessary. Still, the massive increase of criminal cases that brought about plea bargaining shows what happens when traditional moral restraints and cultural norms and patterns of life are altered, loosened, or break down.

VIII. FORFEITURE LAWS

Another area where we have seen the rise not only of prosecutorial, but also police department, misconduct has been asset forfeiture. As another tool in the federal government's war on drugs—which has stimulated some of the abuses discussed in this Article—Congress passed the Comprehensive Forfeiture Act of 1984, which provided that a full range of personal and real property “used, or intended to be used” in the violation of federal drug laws could be seized by the government. The government's powers under the Act were expanded by revisions in 1986, 1990, and 1992, and permit forfeiture for many more criminal offenses than just those involving drugs. State and local governments have followed suit with their own forfeiture statutes—at least one state permits forfeiture for merely alleged criminal activity. As the 1990s rolled around, the U.S. Justice Department was ordering U.S. attorneys around the country to work to “increase forfeiture income.” The main beneficiaries of forfeiture statutes have been law enforcement agencies and prosecutorial arms, which typically are the designated recipients of the property, although sometimes it also falls into the hands of individuals within those entities.¹⁰²

As Roberts and Stratton wrote, the 1984 Act has produced many “horror stories,” as its wording was so loose and unclear—recall the dangers of vague laws discussed above—that it allowed an owner's property to be seized if, without his knowledge or even against his will, it is used to facilitate the commission of one of the crimes in question.¹⁰³ For example, a retired Army officer in California lost his rental property because one of his tenants was apparently a drug dealer. An elderly woman in Washington, D.C. lost the motel she owned because a prostitute made use of a

¹⁰² ROBERTS & STRATTON, *supra* note 59, at 124–26, 135.

¹⁰³ *See id.* at 125.

room in it, and another woman lost her house because a grandchild once had drugs in it. A man in New Jersey lost his car because he once picked up a hitchhiker who, without his knowledge, had drugs in his possession. Federal authorities seized a Texas motel because motel employees reported possible drug-dealing activity by some of the guests. The U.S. Attorney believed that the motel had tacitly approved the activity because it did not charge enough for its rooms!¹⁰⁴ The list of horror stories could go on and on. The point is that, as Roberts and Stratton put it, “your home and everyone else’s can be confiscated simply by an undercover agent arranging for a drug transaction to take place on your front lawn or in your driveway.”¹⁰⁵ So we can see that the *Kelo* case was not the first recent outrageous example—nor the first upheld by the courts—of the flagrant violation of citizen property rights.

All that the 1984 Act requires for a property seizure—which, recall, is a *civil* action—is not a conviction of someone of a crime, *but mere probable cause*. This has resulted in instances of such flagrant abuse as police setting up routine roadblocks to supposedly stop drug traffickers where they regard motorists carrying cash beyond a certain amount as probable cause of drug activity—and promptly seize it. In the early 1990s, the *Orlando Sentinel* videotaped highway stops in Florida and concluded that police were using numerous pretexts to get motorists’ cash.¹⁰⁶ The abuses have been so great that Congressman Henry Hyde conducted hearings when he was Chairman of the Judiciary Committee in the U.S. House of Representatives. In these hearings, former New York City Police Commissioner Patrick Murphy said that the laws tempted police departments to try to get assets for their own benefit, instead of to stop criminal activity.¹⁰⁷ Is this like the red light cameras in Washington, D.C., where the rationale was traffic safety, but the mayor finally admitted that money was the motivation?¹⁰⁸ It is often difficult for innocent citizens to get their property back and, sometimes when they try, they are threatened with indictment as co-

¹⁰⁴ *See id.* at 4, 127–28.

¹⁰⁵ *Id.* at 128.

¹⁰⁶ *See id.* at 129–30.

¹⁰⁷ *See id.* at 129.

¹⁰⁸ Tarron Lively, *Traffic Cameras Reaping Millions; Violations Way Down*, *City SAYS*, WASH. TIMES, Feb. 2, 2004, at A1.

conspirators in the criminal activity.¹⁰⁹ So far no major reform of the federal statute has occurred. The book, *License to Steal*, by the eminent constitutional scholar Leonard W. Levy, is the best single source about the forfeiture question, from the history of the notion in English and American law, to the recent statutory developments, and to the gross abuses by government that we have been discussing.¹¹⁰

Clearly, these abuses in the forfeiture laws are “deficiencies in the legal system” that lawyers should “initiate corrective measures” about. They seem to be “a rule of law . . . [that] causes or contributes to an unjust result.” It is likely that such practices are not helping the legal system to “function in a manner that commands public respect,” so lawyers should try to change them—or better yet, should have perhaps scrutinized them more closely when they were first proposed.¹¹¹

IX. OTHER TROUBLESOME DEVELOPMENTS IN THE CRIMINAL LAW

There have been other troublesome developments in the criminal law. Statutes of limitation have been eliminated in many jurisdictions in criminal child abuse cases and even in regard to the filing of civil suits in these kinds of cases. We have seen this in the priest sex abuse scandal of the last few years in the Catholic Church in the United States. Most of the alleged abuse occurred in the 1960s and 1970s, and it is not altogether clear that all of the claims are true. Moreover, some of the claims of abuse in these cases come forth after so-called “recovered memory” therapy, which has increasingly been discredited.¹¹²

Also in the child abuse area, we have witnessed the elimination from the law of the traditional common law assumption—seen also in Catholic teaching about culpability for sin—that a child below age seven is not reliable enough to testify in court. The result too often has been a manipulation of children by therapists, counselors, and prosecutorial authorities to secure convictions against innocent alleged perpetrators,

¹⁰⁹ See ROBERTS & STRATTON, *supra* note 59, at 130.

¹¹⁰ See generally LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* (1996).

¹¹¹ See MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1, 8-2 (1980).

¹¹² See, e.g., ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE* 32 (1994).

sometimes their parents. Some of these cases have featured downright fanciful and outrageous claims by children that, unfortunately for the cause of justice, have been taken seriously by prosecutors and courts.¹¹³

In other ways, legal changes have given the State an increasingly controlling and threatening role in the most intimate of human associations, marriage and the family. Those who cried shrilly about proscribing pornography and abortion—“the state should not be in the bedroom”—were among the strongest promoters of marital rape laws that became widespread after the 1970s, despite their difficulty of enforcement and obvious intrusiveness and opportunities for abuse. Have these people opposed the numerous local ordinances around the country that limit the number of people who can sleep in the same bedroom in a dwelling? Domestic violence statutes are another type of law that invites expansive and unreasonable application, like that of the young boy in Ohio who was charged for kicking his mother under the table in a restaurant. Another related example is the trend in some states to hold parents criminally liable for the actions of their children, which of course is fully consistent with the movement to eliminate fault as the basis for successfully prosecuting people.

These kinds of laws have an obvious utilitarian bent—seeking to solve difficult problems regardless of the means—that most fundamentally threatens the notion of the rule of law, grounded as it is on the maintenance of principle regardless of the circumstances and irrespective of whether one is innocent or guilty. Many of these laws have been motivated by ideological objectives as promoted by organized interests. The very commitment to the rule of law means that sound legal principles must be preserved in spite of ideological or pragmatic pressures. So why did lawyers allow such changes to be made in light of the Canon 8 obligations of which we have spoken?

X. MENTAL ILLNESS AND THE CRIMINAL LAW

Ethical Consideration 8-1, again, talks of the need to make “constant efforts to maintain and improve our legal system,” and EC 8-2 calls on lawyers to seek to repeal or amend “outmoded”

¹¹³ See, e.g., Krason, *A Grave Threat*, *supra* note 75, at 240–45.

laws.¹¹⁴ Our criminal law does not seem to have kept up with a changed and clearer understanding of mental illness. By and large, it still subscribes to the old *M'Naughten* rule from the English common law, i.e., that a person is legally insane if at the time of committing the criminal act, he did not know the nature and quality of the act he was doing or, if he did know it, he did not know what he was doing was wrong. Insane or not, however, anyone who has worked with or been around people with various mental illnesses knows that many of them do not fully have the capability to control their actions, and that often they can be set off on a destructive course for reasons we cannot even fathom or in situations we do not expect. It is not surprising that Crier confirms what many of us independently know: "Our prisons are now brimming with the mentally ill."¹¹⁵ She contends, perhaps in light of high-profile cases like that of John Hinckley and the general public revulsion at consistent high amounts of crime, that we keep the *M'Naughten* rule because it is politically popular.¹¹⁶ Just because some defense lawyers try to unreasonably stretch the insanity defense to get their clients off does not mean that some really are not mentally ill and that this caused them or helped cause them to commit a crime.

Crier cites a number of examples that are worth pondering. One was the case of Andrea Yates. She was the Houston woman, apparently an evangelical Christian, who drowned her five children as the result of post-partum depression. Even the State's psychiatrist testified that she was psychotic and possibly schizophrenic, and that just before the crime, doctors had taken her off her medications. Since the *M'Naughten* rule was operational, she was convicted—although not given the death penalty.¹¹⁷ Another was the case of Daniel Colwell in Georgia. He had been diagnosed as schizophrenic and manic-depressive, had warned his sister to tell the police that he wanted to kill someone, and kept telling his doctors and the police to kill him. He finally went out and fatally shot two people so that the

¹¹⁴ See MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1, 8-2.

¹¹⁵ Crier, *supra* note 14, at 113.

¹¹⁶ See *id.* at 112–13.

¹¹⁷ See *id.* at 112. In a retrial in the summer of 2006, Yates was acquitted for reasons of insanity and was sent to a state mental institution. See Brian Doherty, "You Can't See Why on an fMRI": What Science Can, and Can't, Tell Us About the Insanity Defense, REASON, July 2007, at 34, 34, available at <http://www.reason.com/news/show/120266.html>.

authorities would in turn execute him. He was convicted and, on appeal, the Georgia Supreme Court acknowledged that while he was “likely” mentally ill, he was still sane under the *M’Naughten* rule.¹¹⁸ Another case she cites is that of Ricky Ray Rector, who was convicted of murder and had suffered brain damage from a self-inflicted gunshot wound years before. “Accustomed to saving his dessert until bedtime, he carefully set it aside after his last meal” before being escorted to the gas chamber. On that walk, he stated that he would be voting in the fall election.¹¹⁹ He clearly did not even realize that he was about to be executed.

XI. WHY THESE DEVELOPMENTS HAVE OCCURRED

It is submitted that a number of reasons—involving deeper trends in and changing viewpoints about the law, influences from within the legal profession, and social and political considerations—are responsible for the developments discussed. First, as alluded to above, the explosion of crime in recent decades has been a significant factor. People look for an expeditious way to deal with it. This certainly helps to explain the overwhelming reliance on plea bargaining. Second, as identified by Luna, there has been a “slow but certain movement away from common law principles of crime and punishment and toward a larger ambit for the criminal justice system.”¹²⁰ Instead of determining guilt or innocence according to a fault-based framework, the criminal justice system has increasingly reduced its objective to social control. This helps explain, for example, the decline in the importance of *mens rea*. Luna says that this trend has been “exacerbated by the slow disappearance of the line between crime and tort, with conduct that was once actionable only by civil suit now susceptible to criminal prosecution as well, oftentimes at the sole discretion of the relevant law enforcement agency.”¹²¹ We could see this, for example, in the discussion about white collar crime prosecutions solely on the basis of theories of the prosecutors. Third, Luna speaks about the continued force of legal moralism, which has changed its focus from earlier in our history regarding the kinds of moral standards that it tries to impose by law, i.e., if it was prohibition

¹¹⁸ *See id.* at 113.

¹¹⁹ *See id.* at 117.

¹²⁰ Luna, *supra* note 51, at 4.

¹²¹ *Id.*

of alcohol at an earlier time, it is, say, environmentalism today. While certainly there is no problem in principle with the law imposing and enforcing moral perspectives—indeed, when we consider that much of the traditional criminal law that forbade murder, theft, rape, etc. punished primarily grave moral transgressions, we can see that that is inevitable—the particular moralistic positions that our law increasingly embraces today have a secular root. They are thus subject to the shifting sands of a probably untutored public opinion, instead of being based, like our law traditionally was, on time-tested principles, generally with a sound philosophical, to say nothing of religious, foundation. Fourth, Luna mentions the influence of what he calls “the one-way ratchet of law-and-order politics” that gives legislators “every reason to add new crimes and punishments, which make great campaign fodder.” There is, however, “no countervailing political interest in cutting the penal code.”¹²² A lot of interest groups—in an era when politicians are so occupied in satisfying them—want new criminal law provisions to achieve their objectives, and they often encounter no organized resistance. For example, virtually no one opposed the coalition of academics, feminist theorists, activists from the medical community, children’s rights advocates, and child welfare lawyers who helped fashion CAPTA in the 1970s.¹²³ After all, who would be against fighting child abuse, since most did not see the implications that the approach embodied in CAPTA would have for the family? How many opposed the early environmental groups in the 1970s who influenced the basics of U.S. environmental law? After all, who supported pollution? Today, the animal welfare advocates have had an almost clear field in influencing state legislatures to fashion increasingly intrusive—and unwarranted—animal cruelty laws. Fifth, Luna tells us that law enforcement officials contribute to over-criminalization. Once we go down the path of over-criminalization, police and prosecutors can exert more authority in the criminal justice system. They push for new criminal law provisions dealing essentially with the same conduct. This makes it easier for them to get convictions and to put people away for a longer time.¹²⁴

¹²² *Id.* at 5.

¹²³ See Philip Jenkins, *Believe the Children?: Child Abuse and the American Legal System*, *CHRONICLES*, Jan. 1993, at 20, 21–22.

¹²⁴ See Luna, *supra* note 51, at 5–6.

Finally, DeLong tells us that elected officials, courts, and the legal profession all have contributed significantly to over-criminalization and the erosion of legal and constitutional protections. Presidents, members of Congress, state governors, and state legislators—many of whom are lawyers—during the past quarter century have had “the habit of loading criminal provisions and other sanctions into every law.” It “has become a thoughtless reflex.” Further, he says that at the federal level—we would argue that the same thing generally happens at the state level—these elected officials, despite occasional noise-making and posturing, have not made “any serious effort to rein in regulators who use vague statutes backed up by hair-raising penalties to stretch their authority to the utmost.”¹²⁵ In fact, legislators keep passing vague statutes and executives keep signing the legislation. Most judges have not paid attention to the erosion of liberties. As stated above, there was a time when the general good faith of prosecutors—and, DeLong says, regulators as well—could be assumed. In a certain sense, deference to them was understandable—although still not acceptable, as Madison’s warning in his *Memorial and Remonstrance* about the dangers of *any* break in religious liberty suggests—but conditions, as shown above, have long since changed. DeLong insists that judges still have not caught on to what is really happening.¹²⁶

DeLong argues that the legal profession overall is “a primary villain.” He says it has developed a certain mentality that has spawned these conditions: “Its ‘there oughta be a law’ mindset has encouraged government to react to every perceived problem with a new penalty, and to respond to each failure of this approach by making the penalty more severe and redoubling enforcement efforts.”¹²⁷ We can also readily fault the legal profession for failing to accommodate different groups of people in society, ignoring the common good, and “absolutizing” rights.¹²⁸ The legal profession has encouraged all of this by its tendency to view things in a one-dimensional fashion, with everything essentially coming down to a question of rights. This

¹²⁵ DeLong, *supra* note 10, at 38.

¹²⁶ *See id.* at 38–39.

¹²⁷ *Id.* at 38.

¹²⁸ *See supra* notes 38–41 and accompanying text.

does not help the cause of furthering the common good—or even necessarily of achieving just results.

DeLong quotes the eminent constitutional scholar Paul Bator who in 1990 criticized both the courts and the legal profession for failing “in their essential professional tasks of stabilizing, clarifying, and improving the national law, so as to make it useful for its ‘consumers,’” and for their lack of “a sense of decent obligation” to both those who must apply the law and those who are expected to obey it.¹²⁹ That, of course, takes us right back to Canon 8.

The latter view of law helps to explain why the legal profession has allowed the developments discussed to occur. Still, the prosecutorial and other official abuse mentioned above readily makes one recoil in disgust, and it is hard to understand how lawyers have not raised a public cry against it—more so in light of their obligations under Canon 8 and the other provisions mentioned that very directly repudiate some such behaviors. To be sure, some lawyers have strongly objected, such as Stratton, Napolitano, Crier, and Howard. They stand, it seems, as exceptions. Despite the notoriety of their authors, though, not all of their books were bought by mainstream publishers. One reason for the seeming obliviousness of lawyers, I would suggest, is that they are simply too absorbed in their own practices. A study by the ABA’s Commission on Billable Hours traced the growth of time spent on the job over the last forty years. In 1965, it was 1,200–1,600 billable hours per year. In 1980, it was 1,600–1,800. By 2000, for associates in big firms, especially if they wanted to establish themselves, it was 2,000–2,400—*not including* other essential components to building a successful law practice such as administrative and management duties, recruiting and mentoring, pro bono work, continuing legal education (mandatory in most states), client development, and community and bar activities. To compile that many billable hours, approximately forty hours per week, a lawyer has to work twelve hours per day.¹³⁰ Indeed, U.S. Labor Department statistics reveal that thirty-seven percent of all lawyers in the country work *50 hours or more* per week.¹³¹ As U.S. Supreme

¹²⁹ DeLong, *supra* note 10, at 38.

¹³⁰ Seltzer Fontaine Beckwith, Legal Search Consultants, Time Is Money, <http://www.sfbsearch.com/content.cfm/ID/20061> (last visited Jan. 16, 2008).

¹³¹ U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL

Court Justice Stephen Breyer has said, the billable hour system has in “many ways . . . diminished” the practice of law. He goes on, “I can’t think of a more important problem facing the profession . . . than how to maintain a life for a young lawyer that will lead to satisfaction in his or her career, that will produce time for a family, and will produce time for *some form of community and public service . . .*”¹³² The latter, of course, would include attention to what the law needs for improvement.

Still, even if lawyers had more time to focus on public concerns, that does not necessarily mean they would turn their attention to trying to root out the problems discussed above. That is because, we would submit, the focus on public interest within the legal profession in recent decades has perhaps been too narrow. It seems like it comes down primarily to providing legal services, probably pro bono, for those who cannot afford them or otherwise obtain them. As noted above, pro bono work is almost factored in as something the budding successful lawyer needs to do. This is surely a laudable goal, but it is too limited. Lawyers should also be concerned with the entire legal system, which is what Canon 8 points to. In some ways, this limited view is not surprising, since their legal education often gives very little, if any, attention to jurisprudence—the “why” and “what should be” of the law—which is the very concern of Canon 8.

Where has the organized bar been in the midst of these developments? The ABA, in spite of Canon 8, perhaps also has been paying insufficient attention. While the ABA has been concerned about federal legislation—at least in specific matters—that seems to erode attorney-client privilege, the upholding of due process in such areas as anti-terrorist legislation, and ready access to the legal system regardless of income, it has not been able to bring itself to criticize the evident diminution of due process that takes place in plea bargaining. While its Criminal Justice Section’s magazine features articles lamenting about how plea bargaining “discourages vigorous advocacy” and pointing to it as a cause of wrongful convictions, the ABA has not called for its elimination or even for sweeping reform of the system.¹³³

OUTLOOK HANDBOOK: LAWYERS 2 (2008–2009), available at <http://www.bls.gov/oco/ocos053.pdf>.

¹³² Robert Pack, *The Tyranny of the Billable Hour*, WASH. LAW., Jan. 2005, at 19, 22 (emphasis added).

¹³³ See, e.g., Peter A. Joy & Kevin C. McMunigal, *Inadequate Representation*

Moreover, on its web site one does not observe the searching examination of the abundant abuses that appear in, say, the Roberts and Stratton book, even though they go to the very core of the legal system. The ABA has actually tended to *oppose* legal changes that address some of the problems discussed in this Article, such as regulatory reform, medical malpractice reform and general tort reform, changes to affirmative action, and even racial quota systems. The latter two areas concern the lack of accommodation in present American law that Howard speaks of and the “lawsuit culture” that both he and Crier discuss. The ABA has also spent a substantial amount of time on public pronouncements in public policy areas that at best have a tangential relationship to improving the law. For example, the ABA’s public policy positions in recent years have concerned such matters as immigration policy, tax questions, funding for the National Endowment for the Arts, health care programs, use of the revenue generated by the U.S. Patent and Trademark Office, federal student loan forgiveness, the Endangered Species Act, welfare reform, federal regulation of child care facilities, sex education in the schools, U.S. payment of UN dues, campaign finance reform, and gun control. Even its support for the International Criminal Court cannot be said to be exclusively, or perhaps even primarily, a legal question with the heavy foreign policy considerations involved. The ABA has sometimes been accused of promoting an ideological agenda.¹³⁴ At the very least, one can legitimately wonder if, with its attention to “large” public policy questions, it is not missing the very spirit of what its Canon 8 embodies.

The other reasons why the legal profession has allowed these trends to take hold go deeper, to the attitudes and behavior of lawyers and the thinking about law that has sweepingly taken hold of our legal system.

Concerning lawyers’ attitudes and behavior, we turn again to Judge Edith Jones of the Fifth Circuit. She says:

and Wrongful Conviction, CRIM. JUST., Spring 2003, at 57, 57.

¹³⁴ See U.S. HOUSE OF REPRESENTATIVE’S REPUBLICAN POLICY COMM., HOW THE ABA BECAME A LEFT-WING LOBBYING GROUP (1997), <http://www.prodeathpenalty.com/ABA.htm>; *The ABA, the War on Terrorism, and Civil Liberties*, ABA WATCH (Federalist Soc’y, Wash., D.C.), Feb. 2006, at 1, available at <http://www.fed-soc.org/publications/id.78/default.asp>; *Young Lawyers Division Assembly*, BAR WATCH BULL. (Federalist Soc’y, Wash., D.C.), Feb. 10, 2007, available at http://www.fed-soc.org/publications/pubID.45/pub_detail.asp.

Because law has become a self-avowed business, pressure mounts to give clients the advice they want to hear, to pander to the clients' goal through deft manipulation of the law. . . . The legal system has also been wounded by lawyers who themselves no longer respect the rule of law. . . . [Some] seem uninhibited about making misstatements to the court or their opponents or destroying or falsifying evidence.¹³⁵

While Judge Jones may have been speaking primarily about private practice lawyers, what we have said certainly shows that it applies to public prosecutors as well. Indeed, plea bargaining routinely involves false statements in court, e.g., the judge will ask the defendant to affirm that no deal prompted his guilty plea, when of course it did and the judge knows it.¹³⁶

In his book, Napolitano gets right to the crux of the “deeper problems” confronting the system which, more than anything else, have gotten it into its current condition. He says that the problem with our law today is that positivism has gained the upper hand. Natural law jurisprudence, which acknowledges that fundamental rights and human freedom come ultimately from God, who wrote them into our very nature which He is the Author of, no longer carries much sway in American law. The positivists believe, first, that all rights and freedom come from the state and that the state can take them away, so long as the majority wills it—or at least tolerates it. Second, that the law is just and valid merely if it is correctly enacted, i.e., the proper procedures are followed. The positivist is a utilitarian. As Napolitano puts it, for the “positivist, the government’s goal is to bring about the greatest benefit to the greatest number of people.”¹³⁷ It is clearly a result-oriented jurisprudence that the positivist seeks—results that he is sure, in spite of his human limitations, will be desirable.

Picking up on this, Roberts and Stratton say that we have seen in the American legal system the diminishing of the common law tradition, with its legal protections, and the increasing triumph of the utilitarian “Benthamite” perspective. Bentham advocated the elimination of many of the basic, traditional principles of the common law, and it is interesting and uncanny to note how many of the unfortunate developments

¹³⁵ Hawkins, *supra* note 36.

¹³⁶ See ROBERTS & STRATTON, *supra* note 59, at 93.

¹³⁷ Napolitano, *supra* note 83, at xvii.

we have chronicled in this Article were advocated by Bentham as part of his desire to establish a result-oriented jurisprudence grounded upon the notion of the greatest good for the greatest number. He believed, for example, that property rights are merely the legally dispensable creations of government. Today, we have runaway eminent domain and civil forfeiture and crunching, unreasonable regulation of private property. He praised the star chamber where the jury was dispensed with. Today, we witness prosecutors manipulating grand juries, plea bargaining that has taken the place of jury trials, and some commentators who call for the outright elimination of the jury system. He advocated torture as a way to supposedly get to the truth. Today prosecutors employ pressure tactics to motivate pleas, which amount to a kind of psychological torture.¹³⁸ Bentham also opposed the attorney-client privilege—we have seen the recent attempts to undermine that.

What we have witnessed with our increasingly Benthamite-type jurisprudence of today is the typical consequence of a utilitarian philosophy: The individual and his rights are suppressed and the innocent are assailed. As philosopher Daniel J. Sullivan puts it:

“[T]he greatest good of the greatest number” . . . standard fails to recognize that certain values attaching to the individual person belong to an order which towers over that of the general civic welfare. It is wrong, for example, to subject one person to injustice so that the community as a whole can benefit . . .¹³⁹

That takes us right back to Robert Bolt’s *A Man for All Seasons* with which we began. For the sake of getting at the Devil—a good end, if there ever were one—Will Roper would have destroyed all of the human laws set up so that tempted men, or outright corrupt men with power, would be restrained. That restraint is perhaps ultimately for the sake of the innocent, even though the guilty derive the benefit of it, too—or maybe it is for the guilty also because they too are human beings deserving of civilized treatment regardless of what they may have actually done. When those laws—that is, those legal protections—are gone and the Devil—or perhaps wicked men doing his bidding

¹³⁸ See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8 (1978) (“The parallels between the modern American plea bargaining system and the ancient system of judicial torture are many and chilling.”).

¹³⁹ DANIEL J. SULLIVAN, AN INTRODUCTION TO PHILOSOPHY 168 (rev. ed. 1964).

wittingly or not—turn on us, not much is left to protect us. What we said makes clear that Thomas More, a saint to be sure but also a wise old lawyer and observer of men, was right. This development in American law is truly a calamity, but it is even worse that far too many in the legal profession have paid little attention while it has happened.