

TO ALL GOVERNMENT LAWYERS,
ROGER LEFT YOU A NOTE

TRIBUTE TO ROGER C. CRAMTON

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Roger's contribution to the field of legal ethics cannot be overstated. A prolific scholar, first class teacher, and energetic participant in many important debates at the ALI, ABA, and other fora on what the law governing lawyers should be, there are few, if any, who have contributed more. But when asked to write about Roger's contribution to the field of legal ethics—a field still much maligned but which Roger did all he could to elevate—I was not lost in a sea of this and that; one article of his immediately came to mind.

It is a short piece: fifteen law review pages, no more. And it is published not in any of the many top-tier law reviews that were Roger's normal stomping grounds, but by invitation in the *John Marshall Law Review*, although you may also find it online at Cornell's Digital Repository of its faculty's work.¹ It is in this all-but-orphan bit of work that I most hear Roger's voice—a voice that elevates him above other scholars as prolific, other teachers as devoted, and other public servants who also sacrifice to serve the state. In this piece Roger bares his character: a spine of steel wrapped in gentility. For Roger was a man of moral courage, as all who aspire to instill virtue in others must be and so few who teach ethics are (a fact Roger bemoaned as do I).² But I digress. The article that leapt to mind was not about teaching ethics, but living them out. It is both a celebration of and missive to all government lawyers. Lawyers who,

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¹ I hasten to add that of the articles I have written, not nearly as many as Roger has, the one I would most like to be remembered for is published in the equally, if not more, obscure *Roger Williams University Law Review*. Susan P. Koniak, *The Other Way Round*, 5 *ROGER WILLIAMS U. L. REV.* 145 (1999). And unlike Cornell, Boston University has no digital repository for its professors' works, which makes it near impossible to find.

² See Cramton and Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 *WM. & MARY L. REV.* 145, 189–98 (discussing who is fit to teach ethics and how the moral quality of a candidate for an ethics job should be questioned in the hiring process, including suggestions on how such inquiries should be made).

Roger reminds us, have a special obligation, not imposed on other lawyers, to see that justice is not undone.

The article describes the actions of some lawyers at the Department of Justice, during Watergate. Roger was head of the Office of Legal Counsel for a brief period in that most trying time, and he speaks directly and candidly to the conduct of lawyers at the Department of Justice, including his own, when confronted by a president who saw the Department of Justice as an instrument to effect not justice, but his own personal and too often corrupt ends. Roger left these words for you, Attorney General Sessions; for you lawyers—all of you—serving at the EPA, Homeland Security, HUD, or any of our many other federal agencies and departments; for all our state Attorneys General, Eric Schneiderman of New York, Pam Bondi of Florida, Ken Paxton of Texas, Xavier Becerra of California, and all your colleagues in all our other states; for all who serve in those state Attorneys General offices; and for all the countless other lawyers that serve in all the other state and local agencies that populate our fifty states, territories, and protectorates.

He left this note for you, for ordinary times and for extraordinary ones, like the times of which Roger wrote. It is the true story about how even good men failed to do justice, what they might have done instead, and about some, or at least one—Roger—rock-ribbed Republican who served Richard Nixon, who did right.

The article is titled “On the Steadfastness and Courage of Government Lawyers.”³ And that choice of title itself reflects much about Roger as a man. Because while the article acknowledges the diligence and dedication to justice that has always characterized most of the many men and women who are government lawyers, then and now, particularly in the Department of Justice, which is the focus of Roger’s piece, Roger does not flinch from noting that among those mostly nameless upstanding lawyers of the bureaucracy, there were and always will be those who fall short and serve not justice, but false gods.

The article begins with Roger describing the overwhelming sense of pride he felt when, during his brief tenure at the Department of Justice, he would walk by these words on the Department’s “massive walls”: “The United States wins its point whenever justice is done its citizens in the courts.”⁴

³ Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 J. MARSHALL L. REV. 165 (1990).

⁴ *Id.* at 165.

Many walk past those words without giving them a thought. Others who toil in the Department of Justice, like Roger, look up at those words and feel a sense of pride. But few, all too few I am afraid, are willing to stand on those words, if so standing puts them at odds with their superiors, interferes with their ambition, or risks losing their job. Roger did that. And this article tells that tale, but not first, and the order of presentation as well as the tone is important because it reveals the humility that is essential to all who dare to stand on principle: an ability to understand that one might be wrong, followed by the fortitude to say after careful reflection “but not this time.” And then to act.

Before Roger describes the stand that he took, which did cost him his job, he does something as rare and in its own way as courageous: he calls out the failure of a man, if not a friend, someone for whom Roger had genuine respect.⁵ Richard Kleindienst, much maligned by the time Roger wrote of his abiding respect for the man—an act of courage in itself—served first as President Nixon’s Deputy Attorney General and then as Attorney General of the United States.

Roger is scrupulously fair to Kleindienst, beginning with a story demonstrating not Kleindienst’s moral weakness but his strength—a story that occurred while John Mitchell was Nixon’s Attorney General and Kleindienst Mitchell’s Deputy. Roger begins by explaining that while it may surprise many readers, Kleindienst brought to the Justice Department a greater willingness to oppose large corporate mergers than had characterized the tenure of his predecessor, Dan Turner, who had served in President Lyndon Johnson’s administration.⁶ Roger did not have to add that he sided with Nixon’s much more narrow view of the antitrust laws than Kleindienst, but always candid, Roger did.⁷

The good Kleindienst story with which Roger begins, explains how Kleindienst handled a direct and improper order (by phone call) from President Nixon to summarily drop an appeal

⁵ Roger describes Richard Kleindienst as “intelligent, energetic, and personable,” and states “I believe Kleindienst was and is a good man” who fell into error. *Id.* at 168, 171.

⁶ *Id.* at 168–69.

⁷ “I believe that Nixon . . . had the better view [than Kleindienst] on the underlying merits of applying the antitrust law to conglomerate mergers. What is the harm in the same company owning both hotels and rental cars provided there is competition in each of the separate industries?” *Id.* at 169–70 (internal citations omitted). While no expert on antitrust laws, I side with Kleindienst and against my Roger and Nixon, but then again, as I explain later, Roger and I had many disagreements on policy.

to the Supreme Court of an antitrust case, involving ITT, a Nixon-friendly company, and to fire Richard McLaren, the head of the Department's Antitrust Division, who was handling the case. Kleindienst did not comply. He enlisted the assistance of Attorney General Mitchell, who convinced the President to back down. And Roger quotes Kleindienst on this matter at some length, as Kleindienst's reflections on this incident exemplify the approach one would hope any Deputy Attorney General would have. Words worth repeating in full, especially in today's trying times:

Simply put, I could not have functioned effectively as deputy attorney general [if I had acceded to the President's request] . . . granted, the President heads the Department of Justice and we are to effect *his* policies. But how these policies are arrived at in the first place, and how they are therefore changed are essential matters. . . . If the attorney general's approach to antitrust enforcement was to be altered, that change should be the result only of thoughtful policy discussions at the highest level, not of impulse.⁸

And that warning about "impulse" was issued well before presidents announced policy in early morning missives of 140 characters each. Good on Kleindienst, as we Brooklynites say.

The greater ITT scandal, which those investigating the wrongdoing of President Nixon did not manage to get enough evidence to establish with certainty, involved not this phone call but the later settlement of the case that was the subject of that call, as well as other antitrust charges then pending against ITT. The suspicion was that the settlement had been bought by a \$400,000 donation from ITT to fund the 1972 Republican National Convention.⁹ More on that in a moment, but first we return to the good Kleindienst story, which did not end well.

As Roger explains, having deftly and appropriately handled Nixon's heavy-handed attempt to interfere with a pending Justice Department case with aplomb, Kleindienst fell down. He lied about that Nixon order call in his confirmation hearing to become Attorney General. He was asked not once, but over and over again, if "anyone"—Roger puts that word in quotation—at the White House had contacted him about the ITT

⁸ *Id.* at 169 (quoting Kleindienst).

⁹ See Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, BRENNAN CTR. JUST. (Mar. 19, 2014), <https://www.brennancenter.org/blog/itt-affair-why-public-financing-matters-political-conventions> [https://perma.cc/6ZGR-9YMW].

matter, and Kleindienst said no. As Roger puts it, this was a good man falling into error by succumbing to his ambition to become Attorney General and to the tug of loyalty to Nixon, a man Kleindienst had known and believed in for a very long time.

Kleindienst would not be my pick of a basically good person falling into error. I watched every moment of the Ervin hearings and the many misleading press statements Kleindienst later made, not to mention my many viewings of *All the President's Men*, which includes a clip of Kleindienst, lying and looking like he is lying to boot. I would have picked John Dean, but Roger knew Kleindienst and that makes me give Kleindienst some benefit of the doubt. More important than who the exemplar is, however, is Roger's point. It is good people doing evil that we must most worry about. There are simply not enough evil people to account for all the wrongs done. We must concentrate on understanding and reaching good people who go, or may go, astray, as truly evil people are not likely to hear or be interested in our words. It is with decent folks that hope must abide. All people, as the Bible teaches, have feet of clay. But on those feet of clay it is nonetheless possible to hold one's ground. And when one falters, to get up again one must understand and admit one's mistake. Kleindienst alas fails that test.

Long after the event, as Roger points out, Kleindienst sought to justify his lie to Congress, and Roger quotes him on this too:

"In the charged political environment that mesmerized my confirmation hearing, if that impulsive call from the President had been revealed, certain segments of the press would have exploded it into a 'scandal' that never in fact existed."¹⁰

Taking Roger's judgment that Kleindienst was not a malevolent actor here, this quote allows us to add to the list of things that led this presumably good man astray. Hubris. For he appointed himself the arbiter of whether there was scandal or not when he had no reason to believe he was privy to all the facts. And as it turns out, there was scandal there, and whether Kleindienst knew that is unclear. Some seven years after Roger published his article, transcripts of tapes were released from the huge Nixon trove, showing there was some back-door deal between Nixon and ITT to settle the antitrust cases in exchange for donations to Nixon or the RNC.¹¹ Upon

¹⁰ Cramton, *supra* note 3, at 171.

¹¹ George Lardner Jr., "On Tape, Nixon Outlines 1971 'Deal' to Settle Antitrust Case Against ITT," WASH. POST, Jan. 4, 1997, at A3. Released at the end of 1996 or

release of those transcripts, Kleindienst continued to maintain that he knew nothing of the apparently corrupt deal and also seemed to scoff at the idea that the settlement was not on the up and up, transcripts notwithstanding. That last bit does not help his credibility, at least in my eyes.¹²

Whatever your ultimate judgment on Kleindienst, Roger explains that the man paid dearly for his dishonesty. For refusing to fully answer questions put to him by a congressional committee, Kleindienst pled guilty in 1974. While this plea was only to a misdemeanor offense, Roger points out that it nonetheless “irreparably damaged Kleindienst’s reputation and future career.”¹³

Roger points out that Kleindienst was not the first, nor surely the last, lawyer to “shade” the truth to protect a client at the risk of a perjury charge, but is clear that the “others do it” excuse—the go-to justification used by “good” folks to justify their wrongful acts—is no excuse at all.

And what of Kleindienst’s loyalty to a client and a friend, which Roger plausibly posits was part of Kleindienst’s motive to lie? Roger takes that on next, showing how loyalty to client or friend is not synonymous with acquiescing to that person’s wishes, no less assisting that person in misguided, wrongful, or corrupt plans. The role of a lawyer as well as a friend is to help another avoid mistakes, however uncomfortable that role may be. This is always an obligation of the good lawyer and the good friend, (and yes, I do realize that those roles are not the same, but in this instance the duties are closer than in most) and this is true whether the intended wrong by the client or friend is great or small. Small wrongs here and there lead almost inevitably to bigger ones. But whether you agree with the need to worry about “small” wrongs, Nixon’s failings were not small. And the nation suffered greatly as a consequence.

As Roger tells the tale, “Richard Kleindienst had the opportunity to save Richard Nixon from the fateful consequences of Nixon’s worst instincts.”¹⁴ Indeed, Roger suggests that if Kleindienst’s loyalty had been worthy of the name and not mere subservience, the easy way, Kleindienst might have even saved Nixon from the disgrace of having to resign the presidency. If

beginning of 1997, these same transcripts also suggest what Roger could not have known in 1990 when he wrote his piece: that Kleindienst might have been more involved in the shadier aspects of the ITT deal. *Id.*

¹² *Id.*

¹³ Cramton, *supra* note 3, at 171.

¹⁴ *Id.*

true, that would have been loyalty. But Kleindienst's form of loyalty, if anything, helped guarantee Nixon's decline. According to Roger, that story is this:

Five days after being sworn-in as Attorney General, Kleindienst learned of the Watergate break-in. That same day, he was told by Gordon Liddy¹⁵ that the Watergate burglars had been working for the reelection committee and that former Attorney General John Mitchell, then heading the reelection committee, wanted the burglars, who had been apprehended, "out of jail at once."¹⁶ Kleindienst exploded, telling Liddy he did not believe this message came from Mitchell, who knew how to reach Kleindienst if he had anything to relay. "What the [expletive deleted] did you people think you were doing in there?" Then he told Liddy to get out of his sight.¹⁷

To paraphrase Roger: so good so far, but not nearly enough. And here Roger suggests a bold move, what Kleindienst, if he were serving justice and had been truly loyal in the deep sense of that word, should have done. He says Kleindienst should have told Liddy to come see him later, arranged to have that conversation (legally) recorded, and asked Liddy, who apparently was willing to spill the beans to Kleindienst, to tell him everything he knew about the break-in, including information about Mitchell's and anyone else's involvement in this illegal act.¹⁸ With that information in hand, Roger says the Justice Department could have secured enough confirming evidence from reelection staffers to have had a complete picture of who did what and when in the Watergate affair well before any cover-up could have gotten underway. The criminal investigation could thus have been substantially completed before the President or his aides had a chance to obstruct the investigation. Kleindienst could early on have presented Nixon with a "fait accompli." "In the face of a steadfast Attorney General, armed with the fruits of a solid criminal investigation, no President could prevent the process from going forward other than by use of the pardon power." Words that echo even louder today.

Kleindienst did none of that. But Roger would have. Of that, I have no doubt. Roger, ever humble, does not state that,

¹⁵ Also a lawyer, now disbarred, who was convicted of conspiracy, burglary, and illegal wiretapping for his role in the Watergate affair. See *Revisiting Watergate*, G. Gordon Liddy, WASH. POST (Apr. 20, 2018), <http://www.washingtonpost.com/wp-srv/onpolitics/watergate/liddy.html> [https://perma.cc/T38U-8R52].

¹⁶ Cramton, *supra* note 3, at 172.

¹⁷ Cramton, *supra* note 3, at 171-72.

¹⁸ *Id.* at 172-73.

but the rest of the article detailing his own brief tenure serving Nixon makes that abundantly clear. Roger served in Nixon's Justice Department as the head of the Office of Legal Counsel (OLC). The ethical struggle Roger faced in that position did not involve Watergate, but a seemingly smaller matter, one that, like all the nefarious acts we bundle into the name Watergate, sounded of abuse of power. The issue was impoundment: the refusal of a president to spend funds appropriated by Congress. A tug-of-war over power and another area in which Nixon overstepped. Roger lays out his legal theory of the case, nuanced and well-reasoned, more open to presidential prerogative than I would be, but fair as fair could be. And Roger, as head of OLC, laid out his position clearly to his superiors at Justice and to the President. Nixon wanted more. In effect, he wanted what amounted to unlimited ability to ignore congressional dictates on spending even when they were expressed by Congress as clear mandates in the strongest and most unequivocal terms. With that position, Roger could not—and did not—go along. Roger stood firm, stood up to the President, and Nixon fired him—a badge of honor in my eyes at least as great as any of the many others Roger received, all richly deserved.

Roger said no to the President. Roger, this model of gentility, this man who laughed so easily and well, this man with a soft and loving heart that all could see reflected in his kind and gentle face. He said no when it mattered. He said no to a president. And then he wrote down what he had done and why and stated the consequence. For to live a life of principle has costs. Costs worth paying for honor, for one's soul, and most of all for justice, which all government lawyers have a special obligation to serve.

To all government lawyers, a great man has passed, but he left you a note.

Let his model inspire all of you who serve today.

ROGER C. CRAMTON AND THE AVAILABILITY OF LEGAL SERVICES

Thomas D. Morgan†

Roger Cramton was unforgettable. My most vivid early memory of him is of him lustily leading the singing of old songs at a Cornell faculty party. It was 1974, during what Cornell euphemistically calls the *Spring Semester*, and I was a young visiting professor teaching Antitrust. Not only was Dean Cramton welcoming and supportive, but he was intellectually rigorous and personally open and charming—a combination that somehow illustrated what lawyers in general should want to be.

Roger Cramton was a 1955 graduate of the University of Chicago Law School, and he started his teaching career there in 1957. It was a golden era at Chicago. Edward H. Levi, later University President and U.S. Attorney General, had become Chicago's Law Dean in 1950, and it was under his leadership that Roger Cramton's personal growth as a lawyer and scholar began.

Chicago had already embarked on the interdisciplinary approach to legal research and education that most law schools now routinely embrace. At its best, interdisciplinary work married traditional legal analysis with an eyes-wide-open willingness to see both the costs and benefits of how legal rules worked in real life. It is perhaps not surprising then that Roger's tenure at the University of Michigan, which began in 1962, included teaching administrative law and regulation.

It is easy to forget today that the Republican administration of Richard Nixon expanded economic regulation as much or more than any administration since the New Deal.¹ And while on leave from Michigan, in 1970, President Nixon made Roger Cramton the second person to chair the Administrative Conference of the United States, an agency devoted to ensuring

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¹ Among the Nixon Administration regulatory initiatives were environmental protection, affirmative action in government contracting, and wage and price controls. See generally, THOMAS D. MORGAN, *ECONOMIC REGULATION OF BUSINESS: CASES & MATERIALS* (1976).

that the administrative process runs as efficiently as possible and does more good than harm.²

The role of lawyers, accordingly, turned out to be part of the larger picture of administrative process operation and fair game for Administrative Conference interest.³ And when he became an Assistant Attorney General at the Department of Justice, Roger presumably saw some ethical issues up close. I did not discuss the Watergate period with him, but it was surely not accidental that questions of personal character and the impact of lawyer conduct on our society became such an important part of his later work.

Roger Cramton became Dean at Cornell Law School in 1973, and in 1975, President Gerald Ford named him the first Chair of the Board of the newly-created Legal Services Corporation (LSC). The LSC was not a darling of the conservative wing of the Republican Party, but Roger kept the new source of financial support for publicly-funded legal services moving forward until he was succeeded in 1978 by President Carter's appointee, Arkansas lawyer Hillary Rodham.⁴

It is interesting, but perhaps not surprising given his personal strength of character, that even with the varied experiences he had, Roger Cramton maintained a focus on the availability and delivery of legal services over the course of his career. One of the places that work is found today is in the casebook which he worked on with Professors Hazard, Cohen, Koniak, and Wendel until the time of his death.⁵

But perhaps his most systematic discussion of the issues was almost a quarter-century ago in his 1994 article, *Delivery*

² At the time he was appointed, being Chair of the Administrative Conference was a major distinction. Roger moved from that position to the Justice Department as Assistant Attorney General, Office of Legal Counsel. He was succeeded at the Administrative Conference by another young law professor, Antonin Scalia.

³ I did two projects on legal ethics for the Administrative Conference, then under the leadership of Cornell professor Robert Anthony, that illustrate the work the agency did. The reports were published as *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1 (1980), and *Public Financial Disclosure by Federal Officials: A Functional Approach*, 3 GEO. J. LEGAL ETHICS 217 (1989).

⁴ For a generous tribute and up-close report of Roger's work in that politically-perilous environment, see Thomas Ehrlich, *Four Cheers for Roger Cramton*, 65 CORNELL L. REV. 739 (1980).

⁵ GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON, GEORGE M. COHEN & W. BRADLEY WENDEL, *THE LAW AND ETHICS OF LAWYERING* (6th ed. 2017). The issues addressed in this essay are found primarily in Chapter 10 on *Law, Lawyers & Justice*.

of *Legal Services to Ordinary Americans*.⁶ The article avoided what I believe is the most fundamental error in discussing that subject, the idea that legal services—important as they may be—are an unvarnished good and that more access to lawyers is the principal goal the legal services movement should seek.

Roger recognized that law and legal processes can make problem-solving more complex and more expensive. Many people can address substantial problems without going to court, and when lawyers get involved, their services often impose substantial costs on participants in the system, including the client, the client's opponent, the lawyer, and any third party who pays the lawyer's fees.

Thus, Roger saw that one fundamental way to address the perceived need for legal services is to reduce the complexity of the legal process, such as simplifying the substantive law.⁷ Or, clients might better be served by letting them pursue legal remedies using standardized plain-language forms and by increasing the use of mediation, arbitration, and informal court processes.⁸ Those alternatives impose their own costs, of course, and they may limit the nature and reduce the amount of relief a client can expect, but the important point to me was Roger Cramton's recognition that improvements in the provision of legal services must be measured by more than counting lawyer hours made available to individual clients.⁹

The focus of his article was "ordinary Americans." Roger relied on the image of lawyers serving two "hemispheres" of society, a view he borrowed from Professors Heinz and Laumann.¹⁰ The hemisphere of the bar serving business clients was effectively meeting the legal needs of those clients in 1994, as it does today, and business clients were able to obtain the amount and quality of services that they wanted. Indeed, as the years since *Ordinary Americans* have revealed, the rapid growth in the number of lawyers since 1970 has been primarily absorbed by the business-focused hemisphere.¹¹

It is in the hemisphere of the bar serving individual clients that the legal services market has broken down. Roger Cram-

⁶ Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994) [hereafter *Ordinary Americans*].

⁷ See Cramton, *supra* note 6, at 562–63.

⁸ See *id.* at 563–64.

⁹ *Id.* at 562–65.

¹⁰ JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 323–33 (1982).

¹¹ See *generally*, THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 80–83 (2010).

ton recognized that legal access problems faced by “ordinary” potential clients in that market arise in the areas of both demand and supply. On the demand side, the major challenges were to provide information that would make consulting a lawyer more appealing and get ordinary people to trust lawyers’ reliability and integrity.

Bates v. State Bar of Arizona,¹² decided in 1977, partially de-regulated lawyer advertising, so the problem was not a legal limit on telling potential clients about lawyer availability. Instead, the problem was a lack of collective action. Buying television time and using other ways of providing information is costly. Individual lawyers who provide information about what they can do for a client tend to be those seeking to attract accident clients to personal injury firms, for example, because the fees in a few good cases can justify the cost of mass advertising. It is much harder to get lawyers to share the expense of explaining the value of preventive measures, on the other hand, because many potential clients will have trouble evaluating the information and the return on the advertising investment will be far less clear.¹³

The trust issue arises from the fact that lawyers for ordinary Americans tend to have a closer personal relationship with their clients than most business lawyers do. Getting a divorce often requires sharing painful personal realities; it is never “just business.” Psychological defenses somehow get stripped away in typical relationships with an individual client, and a client who only rarely consults a lawyer may hesitate to trust that lawyer’s advice. The effect may be that fewer individual clients use lawyers than their real interests might dictate.¹⁴

Looking at legal services from the supply side, Roger Cramton recognized that the cost of becoming a lawyer necessarily reduces the number of lawyers there will be.¹⁵ When lawyers regularly used to get jobs that paid enough to earn a return on their educational investment, such as working for corporate clients, the supply of lawyers seemed never-ending. But the risk is that not many lawyers will be willing to obtain a high-cost education to serve clients whose ability to pay is limited. Without a reduction in the cost of education that makes it possible for lawyers to attract clients at legal fees ordinary

¹² 433 U.S. 350 (1977).

¹³ See generally, Cramton, *supra* note 6, at 551–54.

¹⁴ See *id.* at 554–55.

¹⁵ See *id.* at 550.

Americans can pay, the perceived supply of lawyers available to serve ordinary Americans likely will remain an issue.¹⁶

At the same time, restrictions on how services can be delivered and by whom, only make the problem worse. Following the leadership principally of state bar associations, the ABA Model Rules, as implemented in state law, have prohibited lawyers both from aiding non-lawyers in the unauthorized practice of law and from forming partnerships or other practice organizations if any of the organization's activities involve the practice of law.¹⁷ That principle seems to be less than a century old,¹⁸ but it has effectively limited lawyers' ability to expand the services they deliver to clients and their ability to make those services more affordable.

It is worse than naïve to assert that the line between legal and non-legal services is sharp when dealing with individual clients. A divorce client, for example, may need advice about social services and medical care as much as he or she needs information about how and where to file the necessary legal papers. Roger Cramton was never a zealot about the need to break down limitations on forming interdisciplinary firms in which participants could share fees, but he did give the ideas prominence in *Ordinary Americans*.¹⁹

Document companies like LegalZoom,²⁰ and even compa-

¹⁶ A corollary to the cost of becoming a lawyer is the opportunity cost of continuing to remain a lawyer who will find it attractive to practice on behalf of ordinary Americans instead of use his or her legal education in some other way. Lawyers with a sophisticated education can run businesses, become real estate investors, lead non-profit groups, and the like. And they do so, leaving less lucrative legal work on behalf of individual clients to others.

¹⁷ See ABA MODEL RULES OF PROF'L CONDUCT, r. 5.4(a), 5.4(b), 5.4(d) and 5.5(a) (AM. BAR ASS'N 2013).

¹⁸ The present rules that lawyers may not form a partnership with a non-lawyer (Canon 47) and may not assist a non-lawyer in the unauthorized practice of law (Canon 33) seem to date from their entry into the ABA Canons of Ethics in 1937, although an earlier version of Canon 33 was adopted in 1928. AMERICAN BAR FOUNDATION, AMERICAN BAR ASSOCIATION OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND CANONS OF JUDICIAL ETHICS ANNOTATED 140–41, 193–94 (1967 ed.).

¹⁹ See Cramton, *supra* note 6, at 565–78.

²⁰ Early on, LegalZoom's activities got it into trouble. Some of its employees were accused of illegally practicing law even though their activities were limited to making sure its form documents were printed putting the relevant information in the correct paragraphs; they gave no advice and drew no substantive conclusions about the effectiveness of the documents. See *Jackson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053, 1054–57 (W.D. Mo. 2011). Similar issues were raised in North Carolina. Terry Carter, *LegalZoom Resolves \$10.5M Antitrust Suit Against North Carolina State Bar*, A.B.A. J. (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [https://perma.cc/ZW7N-4SV4]. LegalZoom now advises its cus-

nies who file appeals from parking tickets,²¹ have gained traction among middle-income clientele seeking legal services. Bar associations have been reduced to playing catch-up as they try to provide CLE training to lawyers on how to reduce the costs of running a practice and delivering their services at competitive prices. But Roger Cramton helped to dispel the fallacy that inefficient practice methods are somehow more “professional” than efforts to deliver higher-quality services at lower prices for consumers.

Of course, a vigorous effort to get lawyers to provide more pro bono service has been the fallback position for many who want to bring legal services to ordinary Americans.²² Few lawyers publicly dismiss the objective, but many lawyers do not provide the services voluntarily and requiring lawyers to do so has proved impossible politically.

Although he believed strongly in personal responsibility to others and to the community, Roger Cramton was quite cautious about demanding that lawyers assume duties they were not willing to assume. He believed that forcing people to serve others raises moral problems and practical challenges. Lawyers are specialized today, he argued, and poverty law itself presents a set of challenging issues that lawyers cannot effectively master in their spare time. That will inevitably tend to impose the burden to deliver quality legal services to the poor and middle class on lawyers who already do so more than others. Voluntary provision of legal services is appropriate and can provide a part of the answer to a shortage of help for

tomers to consult a lawyer if they have any questions about their documents, and bar associations seem to have backed off their objections. See www.legalzoom.com [<https://perma.cc/Y9HN-X3MB>] (“We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.”).

²¹ See, e.g., www.ticketclinic.com, [<https://perma.cc/T2BC-RG7X>] and www.appwinit.com, [<https://perma.cc/2ZYA-HHCN>]. See generally, Olga Kharif, *Apps That Fight Your Parking Tickets*, BLOOMBERG BUSINESSWEEK (Dec. 3, 2015) <https://www.bloomberg.com/news/articles/2015-12-03/apps-that-fight-your-parking-tickets> [<https://perma.cc/73RE-W6PD>].

²² While many have espoused this position, the consistently most articulate advocacy has come from Professor Deborah Rhode. E.g., DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485 (2017).

poor clients, he believed, but it is not a long-term model for meeting the legal needs of ordinary Americans.²³

Not surprisingly, given his earlier leadership of the LSC Board, Roger Cramton believed that helping poor Americans navigate the public legal system is ultimately a public responsibility.²⁴ Funding for the LSC is controversial almost every year, but the program has now survived for more than forty years at annual funding levels approaching \$400 million.²⁵

Roger was frustrated by the division among public-funding supporters between those who wanted to stress supporting personal legal services for individual clients and those who wanted to stress obtaining legal changes in the welfare of the poor more generally. In his view, it was the latter kind of class-focused effort that made the prospect of obtaining public provision of legal services much harder. Ordinary Americans should be entitled to “minimal access to justice” in pursuing their individual goals, he said. That may sound unambitious or even churlish, but at the time, the LSC estimated that “only about 20 percent of poor people needing legal help get it.”²⁶ His call for a right to legal services was, when made, and even today, a courageous appeal for a political result that has proved extraordinarily hard to achieve.

My own view is that efforts to provide legal services to ordinary Americans are too often presented as issues of lawyer *noblesse oblige* or finger-wagging at lawyer selfishness. More valuable are serious ideas about how we can make the legal services market work in ways that will be effective for both clients and lawyers. As the number of lawyers continues to exceed the business hemisphere’s demand for their services, more lawyers will strive to make legal services attractive and available to potential clients, only this time the lawyers are likely to have to compete with others for the chance to provide those services.

²³ See Cramton, *supra* note 6, at 581–87. He had addressed many of these issues earlier in Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113 (1991).

²⁴ See Cramton, *supra* note 6, at 587–601.

²⁵ The appropriation for FY 2016 and FY 2017 were each \$385 million. The agency budget request for FY 2018 is \$527.8 million. LEGAL SERVICES CORPORATION, 2018 BUDGET REQUEST 1–2, published at www.lsc.gov/sites/default/files/LSC-FY2018-BudgetRequest.pdf [<https://perma.cc/745Q-6UW9>].

²⁶ Cramton, *supra* note 6, at 591.

Those of us fortunate enough to have known Roger Cramton miss his intelligence, grace, wisdom, and good humor. We are fortunate to have had his insights and his leadership, and we would do well to revisit those insights as we address issues of expanding the delivery of legal services in the years to come.

THE ORDINARY HEROISM OF LAWYERS: A TRIBUTE TO ROGER C. CRAMTON

W. Bradley Wendel†

“One of the consequences of a skeptical age is that all the heroes are killed off one by one. Law is no exception.”¹

Roger Cramton was a great defender of the rule of law and one of the pioneers in the field of legal ethics, in the best sense. His professional career, as well as his scholarship, demonstrated the qualities of intellectual rigor, courage, and humility that have inspired me since joining Roger on the faculty of Cornell Law School in 2004. Students and faculty joke about the overuse of our school motto, “Lawyers in the Best Sense,” taken from a speech by Cornell founder A.D. White. In all seriousness, Roger spent his career writing about, and setting an example of, what it means to be a lawyer in the best sense. In many ways, large and small, my thinking about legal ethics has been influenced by Roger.

I read and admired Roger’s scholarship long before coming to Cornell, beginning when I was a graduate student trying to work out the right way to understand the relationship between the role of lawyer and the social and political values served by the legal system. I was particularly taken by his influential essay, *The Ordinary Religion of the Law School Classroom*.² Despite its modest length, *Ordinary Religion* is a remarkably rich paper—in part an early salvo from the traditionalist camp in the wars over Critical Legal Studies (CLS), but also radical in its own way, warning against an uncritical acceptance of the role of lawyers as “priests of the established order and its mod-

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¹ Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 259 (1978).

² Cramton, *supra* note 1. As of June 28, 2018, HeinOnline reports that this paper was cited in 227 other works, by a virtual Who’s Who of the field of legal ethics, including Deborah Rhode, David Wilkins, Susan Koniak, Robert Condlin, Tom Morgan, Steve Pepper, and Carrie Menkel-Meadow. HEINONLINE, <https://www.heinonline.org> [<https://perma.cc/55QA-NJJ4>].

ern dogmas.”³ In places the essay seems to advocate to replace the values and dispositions inculcated by legal education with the perspective of an actual religion. Roger laments that transcendence and “a sense of wonder or awe at the inexplicable . . . are off limits for law students and lawyers.”⁴ But his views on the role of religion in public life are closer to the Christian realism of Reinhold Niebuhr than to the position of a more radical theologian like Stanley Hauerwas, who emphasizes that a calling to serve God may be incompatible with the demands of political liberalism.⁵ Roger cautions that “[a] desire for reform is one thing and a good thing: a naive belief in the creation of a heaven on earth is unreal to the demonic potential of [human] nature and runs the risk of idolatry.”⁶ Caution and humility are required in public policymaking, because “[s]ocial problems are more intractable than was initially recognized, and an effective attack on them involves conflicts with other values.”⁷ No supernatural account of value is required to arrive at the conclusion that human values are complex, conflicts of duties are possible, and human experience reveals “the expectation of unavoidable squalor and imperfection, of necessary disappointments and mixed results, of half success and half failure.”⁸

Roger’s *Ordinary Religion* piece is remembered for its observation about the content of the tacit curriculum of legal education. Contrary to the claim that legal education is evaluatively neutral or amoral, Roger contends that legal education does inculcate values, but does so implicitly, and what’s more, it teaches crummy values. “The development of ethical attitudes is probably more affected by the hidden curriculum than

³ Cramton, *supra* note 1, at 263; *see also id.* at 254 (criticizing the tendency of lawyers to see themselves as “apologist[s] and technician[s] for established institutions and things as they are”).

⁴ *Id.* at 250.

⁵ *See, e.g.*, STANLEY HAUERWAS, AFTER CHRISTENDOM?: HOW THE CHURCH IS TO BEHAVE IF FREEDOM, JUSTICE, AND A CHRISTIAN NATION ARE BAD IDEAS (1991). Hauerwas’s critique of Niebuhr, simply stated, is that he was so eager to render Christian ethics acceptable to the wider society that he was inclined to remove all of the distinctive, peculiar, powerful bits from the Christian message. *See* STANLEY HAUERWAS, *On Keeping Theological Ethics Theological*, in THE HAUERWAS READER 51, 61 (John Berkman & Michael Cartwright eds., 2001).

⁶ Cramton, *supra* note 1, at 258. *Cf.* ROBIN W. LOVIN, REINHOLD NIEBUHR AND CHRISTIAN REALISM (1995) (reading Niebuhr as warning Christians in public life about the danger of the love of power, the desire to reward one’s friends and punish one’s enemies, and the limitations of human understanding of universally valid ideals and norms).

⁷ Cramton, *supra* note 1, at 258.

⁸ STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 170 (1989).

by the formal curriculum,” he writes.⁹ The hidden curriculum sometimes encourages CLS-style skepticism with its steady diet of borderline cases, the perceived arbitrariness of categories and line-drawing, overemphasis on uncertainty and instability in law, and avoidance of discussions of values.¹⁰ Law teachers also tacitly convey the message that value is a human creation, and subjective—a matter of will or preference, not a discovery about the fabric of the universe. Here the target is not CLS, but law and economics. He writes (referring, I think, to economic accounts of rationality) that what one asserts as a reason is nothing more than a “rationalization[] for hidden motives”—brute preferences not subject to rational criticism; “[r]easons . . . become instruments in the service of warring preferences.”¹¹ If there is no genuine reason to prefer one social policy goal over another, if what purport to be reasons are nothing more than tricks to sway others to do what is in the speaker’s interests,¹² then the law’s claim to have anything to do with justice is appropriately met with “[s]uspicion, distrust, and skepticism.”¹³ Even in a legal ethics course, which one might expect to blunt this tendency toward nihilism, teachers follow the same tacit curriculum, leading to the charge that law schools teach “legal ethics without the ethics.”¹⁴

As a legal ethics theorist, I think the conclusions Roger draws from this argument are half-right. If law students believe values are purely subjective, the “hired gun” model of lawyering will have some superficial appeal. To the question, “How do you come out on this case?” a student learns to answer, “It depends on what side I’m on.”¹⁵ If questions of right and wrong are really up in the air, what could be wrong with advocating for the position of someone willing to pay for that advocacy? But a

⁹ Cramton, *supra* note 1, at 253.

¹⁰ *Id.* at 254–56.

¹¹ *Id.* at 259; *see also id.* at 250 (“Law is not so much an independent influence on society as a result of social desires and pressures.”).

¹² *Id.* at 259. This is, of course, an ancient critique, going back at least to Plato’s attack on rhetoric, as practiced by the sophists, as being the skill of making the false seem true and the true false. *See* Plato, *Gorgias*, in *THE COLLECTED DIALOGUES* (Edith Hamilton & Huntington Cairns eds., 1961) (W.D. Woodhead trans.); *see also* James Boyd White, *Heracles’ Bow: Persuasion and Community in Sophocles’ Philoctetes*, in *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 3, 3–5 (1985) (arguing that classical rhetoricians have gotten a bum rap, and in fact they understood that there was a right way and a wrong way of seeking to persuade others).

¹³ Cramton, *supra* note 1, at 259.

¹⁴ Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 *FORDHAM L. REV.* 333, 340 (2003).

¹⁵ Cramton, *supra* note 1, at 260.

moment's reflection on the hired gun model shows not only its instability, but also the implausibility of a theory of values as relative to each individual's preferences. Roger claims that lawyers are forced into seeing themselves as "intellectual prostitute[s]."¹⁶ That's certainly not an attractive self-conception. Lawyers who believe in the traditional ethical obligation of "zealous advocacy within the bounds of the law" accordingly emphasize values such as the fiduciary duty of loyalty to clients, the importance of individual autonomy, or the protection of vulnerable individuals against abuses of state power.¹⁷ A lawyer who resolutely defends a client is not a prostitute, but something noble, such as a champion, a minister, or a friend.¹⁸ Along the way to refuting that claim that they are no better than prostitutes, however, lawyers will inevitably make arguments that presuppose the objectivity, or at least intersubjective intelligibility, of values. People have an interest in acting in ways that can be justified to others.¹⁹ No one wants to be called a prostitute, so they offer justifications for their actions in terms that others can, in principle, accept.²⁰ The process of constructing and defending ethical conceptions of professionalism is a performative contradiction of the subjectivity of value.

A lawyer might, instead, wish to conceive of herself as a "social engineer," working in the interests of society as a whole. Roger believes this conception of the lawyer's role has a "lifeless, bureaucratic, and technocratic flavor,"²¹ but many of the traditional models of lawyer professionalism suffer from a ten-

¹⁶ *Id.* at 259. William Simon famously criticized the standard conception of legal ethics in which one adopts the interests of another in exchange for money as closer to prostitution than to the classical ideal of friendship. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 108 (1978).

¹⁷ See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010) (setting out the standard conception of legal ethics and defending a modified version of it); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981) (making a complex and subtle argument, influenced by Stanley Hauerwas and John Howard Yoder, that the lawyer's professional role is constituted by values and virtues developed within communities); MONROE H. FREDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) (defending the traditional conception of the lawyer's role with reference to constitutional values and the importance of checking state power); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (relying on autonomy as foundational value in legal ethics).

¹⁸ See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (relying on the value of loyalty and an analogy with friendship).

¹⁹ T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 154 (1998).

²⁰ *Id.* at 189-94.

²¹ Cramton, *supra* note 1, at 260.

dency toward grandiosity. Writing in 1934, Supreme Court Justice Harlan F. Stone urged lawyers to bring to bear their expertise in “understanding . . . complex facts” and to “use those facts to envision a new and better community.”²² The Brandeisian ideal of the lawyer as “wise counselor” who does not merely manipulate legal rules for the benefit of clients, but nudges powerful individuals and corporations in the direction of socially responsible behavior, remained a staple of the rhetoric of professionalism well into the twentieth century.²³ At any rate, Roger’s principal concern with the social engineer model is not that it is boring, but that it instrumentalizes the law. He criticizes the strand of the tacit curriculum of legal education which holds that “law is an instrument for achieving social goals and nothing else.”²⁴ It is not immediately clear what “something else,” beyond an instrument for achieving social goals, the law might be. This ambiguity is cleared up later in the article, where Roger worries that reason itself has come to be viewed instrumentally, as a “tool for the control or manipulation of the world.”²⁵ In other words, the tacit curriculum teaches that the law has no *intrinsic* value.

While he does not say this explicitly, I think Roger’s principal concern is that understanding the value of law in instrumental terms creates a temptation to push the law to one side when it is inconvenient or stands as an obstacle to the realization of one’s social policy goals. Roger was rightly proud of having been fired by Richard Nixon from his position as Assistant Attorney General and head of the Office of Legal Counsel.²⁶ He subsequently wrote, in language that echoes the critique of *Ordinary Religion*, that one of the lessons of Watergate is that the “glorification of the president as father figure, movie idol, and monarch” can lead to abuses of presidential power.²⁷ (It is not difficult to imagine what he would have thought about a former reality television star as president.) The classical antidote to abuses of power is reason and the rule of

²² Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 660–61 (2016) (citing Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 14 (1934)).

²³ See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 339, 410 (1985).

²⁴ Cramton, *supra* note 1, at 250.

²⁵ *Id.* at 261.

²⁶ See Susan P. Koniak, *To All Government Lawyers, Roger Left You a Note*, 103 CORNELL L. REV. 1329 (2018).

²⁷ Roger C. Cramton, *Lessons of Watergate*, 2 CORNELL L. SCH. FORUM 6 (1975).

law.²⁸ In places, Roger's critique of the instrumental perspective on the law is stated too strongly and conflated with a critique of reason itself. He worries that the tacit curriculum of the law school teaches "a faith in reason and democratic processes tending toward mere credulity and idolatry."²⁹ There can be no effective rule of law without faith in reason and the democratic process. But reading *Ordinary Religion* alongside his short article on the lessons of Watergate shows that the target of his critique is not reason, but the self-importance on the part of government officials, and the need of ordinary citizens for heroic figures in positions of leadership. He writes:

Instead of viewing President Ford as the quite ordinary, unpretentious, working politician he is, the press devoted itself to glorifying the mythical super-president in an avalanche of publicity about dancing parties, poolside picnics, and breakfast muffins. Having created a mythic super-hero, the press then reacted with violent anger when Ford suddenly took an action with which most of them disagreed—the pardon of former President Nixon.

A more down-to-earth view of government and the presidency would not have magnified the euphoria nor been so crushed by a single action.³⁰

The epigraph at the beginning of this paper is therefore highly ironic, because Roger would presumably approve of killing off glorified mythical heroes. In order to survive the pressures of a skeptical age, the law must be an ordinary, unpretentious, working concept that serves the needs of the political community, rather than becoming an object of worship and myth-making.

A better, Cramton-inspired "religion" for the law school classroom would accordingly emphasize humility, fallibility, and a kind of good-natured skepticism about all human action that avoids metastasizing into "a corrosive distrust and widespread paranoia that views every public act as the product of deceit, corruption, or malevolence."³¹ This is quite a tightrope to walk. We are currently living in a time of widespread distrust caused—or so I would contend—by the actions of a president which are *in fact* the products of deceit, corruption, and malevolence. There is nevertheless evidence that the kind of humble, unpretentious, workaday commitment to the values of legality

²⁸ See, e.g., Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

²⁹ Cramton, *supra* note 1, at 262.

³⁰ Cramton, *supra* note 27, at 7.

³¹ *Id.*

has proven remarkably effective in the face of a concerted assault upon the independence of the judiciary and executive branch officials. As Benjamin Wittes observed in a summary of the first year of Trump's presidency, "the apparatus of democratic rule-of-law governance has held up reasonably well so far," and that is largely due to the unsung work of rank-and-file employees of the Justice Department and the F.B.I. and their commitment to traditional norms.³² Most line-level government lawyers do not claim to be superheroes; they are just doing a job that happens to be incredibly important at the moment. Maybe that's unglamorous and technocratic, certainly as compared with being someone who claims to have an "absolute right to do what I want to do with the Justice Department,"³³ but the combined effect of an untold number of lawyers and judges who enforce the distinction between power and right is having a vital stabilizing effect at this moment. O.W. Holmes, Jr. wrote, "I don't see why we shouldn't do our job in the station in which we were born without waiting for an angel to assure us that it is the jobbest job in jobdom."³⁴ That is a sentiment Roger could get behind.

³² Benjamin Wittes, *Why Trump's War on the Deep State is Failing—So Far*, LAWFARE (Jan. 1, 2018, 10:00 AM), <https://www.lawfareblog.com/why-trumps-war-deep-state-failing%E2%80%94so-far> [<https://perma.cc/7LVL-MUTC>].

³³ See Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. "Look Very Bad"*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html> [<https://perma.cc/YF2Q-DAK2>].

³⁴ Letter from Oliver Wendell Holmes to Morris R. Cohen (May 27, 1917), in *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 10 (1948), quoted in David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's "The Path of the Law"*, 72 N.Y.U. L. REV. 1547, 1549 (1997).

ROGER C. CRAMTON AND THE LEGAL SERVICES CORPORATION

Charles W. Wolfram†

The passing of my dear friend and former colleague Roger Cramton leaves a void in legal ethics scholarship that will take the skills, energies, and imaginations of many scholars to fill. Legal ethics was the field in which both of us wrote and taught (and, during one memorable semester, co-taught), but Roger was far more than a legal ethics scholar. During his years of active professorial work, his focus stretched beyond issues of lawyer's ethics and professional responsibilities to many important issues in legal education, including administrative law, civil procedure, conflicts of law, torts, and—through his decades of service as one of the most energetic and engaged members of the Council of the American Law Institute—a long list of other evolving legal areas.

Roger was also one of the most active professors-on-loan from the legal academy to government. Among other roles, he served as the first lawyer that Congress confirmed as chairman of the board of directors of the then-recently created national Legal Services Corporation (LSC). It is Roger in that role, to which he was appointed by Republican President Gerald Ford, that I meditate on briefly here.

How that presidential confirmation came about tells much about Roger. Mere months prior to Roger's nomination, then-President Richard Nixon fired Roger as Legal Counsel to the President because of Roger's principled insistence that Nixon's attempt to impound certain funds appropriated by Congress was an unconstitutional infringement of legislative powers.¹ Shortly after firing Roger, Nixon resigned rather than undergo impeachment proceedings in the face of his much more notorious firing of another law professor, Archibald Cox, as the Watergate Special Prosecutor. Within weeks after Nixon fired

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¹ Roger later turned the episode into a law review article. See generally Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 J. MARSHALL L. REV. 165 (1990).

Roger, Nixon's successor Gerald Ford nominated Roger as chairman of the LSC.²

When appointed to head the LSC, and throughout his adult life as far as I know, Roger was unapologetically a Republican, if one of the moderate-Yankee side of that political party. Certainly if measured by our contemporary political assumptions, the prospect would seem unpromising that a Republican appointee would enthusiastically support the work of the LSC. And, as can be testified to by all who knew Roger well enough, he never undertook a task without exuberant enthusiasm. The entire mission of the LSC was (and continues today) that of channeling hundreds of millions in appropriated federal taxpayer dollars to lawyers representing private, individual clients of limited means—in short, the poor. Often those representations involved disputes with corporations, landlords, other private citizens, and obdurate government agencies.

One may wonder how Roger's establishment Republicanism could embrace his enthusiastic furthering of the work of the LSC. The Republican political party has defined itself, at least since the time of Franklin D. Roosevelt and the Great Depression, as opposed to the federal government's efforts to expand welfare and intrude into free markets. Both of those perceived sins plainly seem fit to be laid at the door of the LSC. Politically, Republicans have instead strongly favored corporate constituents and bourgeois political figures such as landlords, creditors, and others who would likely be adverse to LSC's intended, poor clientele. Republicans would accordingly not be expected to support funding for an agency set up to oppose those interests. Moreover, to the extent that LSC clients complained about their treatment by government agencies (one of their chief complaints), Republicans would be expected to object—and they did—that the government should not subsidize lawsuits directed at the government itself.

In part, the apparent anomaly of Republican Roger's championing the cause of the LSC says more about our contempo-

² Roger recounted his LSC rebound in a fascinating living-history video in which he was interviewed by his successor as Cornell's dean Peter W. Martin. See Roger C. Cramton & Peter W. Martin, *Roger C. Cramton – Clip 1*, CORNELL UNIV. L. SCH. HERITAGE PROJECT (June 1, 2004), https://scholarship.law.cornell.edu/lawschool_heritage/15 [<https://perma.cc/VFL9-8WB4>]; Roger C. Cramton & Peter W. Martin, *Roger C. Cramton – Clip 2*, CORNELL UNIV. L. SCH. HERITAGE PROJECT (June 1, 2004), https://scholarship.law.cornell.edu/lawschool_heritage/16 ://perma.cc/CA6N-U2WB). Roger, while serving as LSC chair, also wrote the lead article in a welfare law symposium. Roger C. Cramton, *Promise & Reality in Legal Services*, 61 CORNELL L. REV. 670 (1976).

rary vision of the philosophies of the two major political parties. President Nixon, until he was run out of office for his leading complicity in the Watergate scandal, embraced several political positions that by today's Republican standards would be anathema—such as successfully urging Congress to create the now-Republican-accursed Environmental Protection Agency. Creating the LSC was of a piece with that side of Nixon, suggesting either uncharacteristic softness in that deftly-political figure or, more likely, a bold political maneuver to mollify fellow³ and sister lawyers, whose national organization—the American Bar Association (ABA)—strongly supported the LSC and its predecessor federal agency.⁴ The ABA's support of the LSC has continued unstintingly during succeeding presidencies.

LSC has not been disfavored, of course, only during Republican administrations. For example, during Democrat Bill Clinton's second term as president, the control of the Congress by "Contract with America" Republicans led to an effort in Congress to slash LSC funding.⁵ Among lawyer opponents of the

³ Nixon was himself a lawyer, as were dozens of his lieutenants and political operatives who were officially implicated in Watergate-related crimes. See *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337 (1976) (reporting on the the National Organization of Bar Counsel's study indicating that twenty-seven lawyers were named as defendants or unindicted co-conspirators in criminal proceedings arising out of Watergate and two others were the subject of public bar discipline). Cramton briefly traced Nixon's pre-Watergate political conversion from opposition to the proposed LSC to support for its creation in his article *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 525 (1981).

⁴ The ABA's support of publicly-funded legal service for the poor is politically convenient. Among other considerations, LSC's lawyers have always been prohibited from charging any fee to clients, which eliminates the prospect that they would compete with private practitioners for fee-paying clients. The availability of thousands of new lawyer jobs funded by LSC has proven beneficial during times of low demand for newly graduated lawyers. Significantly, the presence of LSC lawyers in any controversy ensures that those opposing LSC clients will themselves need lawyers in controversies that would otherwise be highly unlikely to exist.

⁵ See, e.g., ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 96-399 (1996) (providing advice to LSC-funded lawyers on how to deal with ethical issues raised by pending federal legislation that would cut LSC funding by at least twenty-five per cent and further limit LSC's services); David Barringer, *Downsized Justice: With a Scaled-Down Legal Services Corp., Low-Income Clients Are Facing the Cutbacks in Lawyers to Help Them On . . .*, A.B.A. J., July 1996, at 60, 61 ("Although legal services have successfully run the gauntlets of previous government threats, most notably under the Nixon and Reagan administrations, this time the future is bleak and the mood funereal."). Among other restrictions, in 1996, Congress passed a prohibition against the use of LSC funds to "amend or otherwise challenge existing law," including Congress's own welfare laws. A 5-4 Supreme Court subsequently struck that down as an unconstitutional limitation on the free-speech rights of lawyers and their clients and, because it threatened to impair advocacy before federal courts, as inconsistent with the constitutional

proposal were lawyers who were self-declared Republicans, such as former state judge Bruce W. Kauffman.⁶

Roger's own take on the politics and political theory justifying his work promoting the LSC was expressed in his heartfelt 1981 law review article entitled *Crisis in Legal Services for the Poor*.⁷ The "crisis" to which Roger referred involved the efforts of President Ronald Reagan to eliminate LSC entirely or at least severely restrict it. Reagan was no lawyer and thus did not personally share whatever sympathies Nixon might have harbored for fellow and sister lawyers. Quite the contrary, Reagan as governor of California had waged a long public battle against the California Rural Legal Assistance program (CRLA), which supported migrant farmworkers in their labor struggles with growers and with Reagan as California's governor.⁸ The CRLA program had been funded in part by the LSC's forerunner, the Legal Services Program (LSP). The LSP in turn was housed within the Office of Economic Opportunity⁹—a major component of President Lyndon Johnson's Great Society project.¹⁰ The mere change of names—from LSP to LSC—did nothing to deflect Reagan from attempting to exact political vengeance by vanquishing the LSC. Moreover, influential conservative groups that supported Reagan such as the Heritage Foundation¹¹ and the Conservative Caucus¹² also agitated to cut off LSC's federal funding.

principle of separation of powers. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2000).

⁶ *E.g.*, Bruce W. Kauffman, *A Conservative Plea to Save LSC*, NAT'L L. J., April 10, 1995, at A19. A few years later, another effort by conservative Republicans (and the Republican leadership of the House of Representatives) to slash LSC funding was rejected by a substantial majority in the House of Representatives, with the opposing vote including fifty-seven Republicans. See David Rogers, *House Votes Not to Slash Legal Services*, WALL ST. J., Aug. 5, 1998, at A4, available at <https://www.wsj.com/articles/SB902277499948462000> [<https://perma.cc/3W4F-KRT9>].

⁷ Cramton, *supra* note 3.

⁸ *E.g.*, Jerome B. Falk, Jr. & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973); Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 683–87 (1976).

⁹ President Nixon had abolished the OEO by executive order in 1973, leaving the Office of Legal Services (renamed the Legal Services Program) as its only vestige. See George, *supra* note 8, at 695–96.

¹⁰ See generally A. Kenneth Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROBS. 211 (1966).

¹¹ Cramton, *supra* note 3, at 522 n.3 (citing HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP – PROJECT TEAM REPORT ON THE POVERTY AGENCIES (Oct. 22, 1980)).

¹² Cramton, *supra* note 3, at 532.

Roger's *Crisis* article was characteristic of most of his work—robust, committed, enthusiastic, and yet fair-minded. In light of continued presidential efforts to defund LSC,¹³ the piece warrants rereading. For the most part, Roger is at pains in the *Crisis* article to refute or at least deflect political arguments launched from many conservative Republican sources and a few from the left. Among the latter, Cramton convincingly argues that the LSC cannot effectively redistribute wealth to the poor through litigation and court rulings; rather, he argues one should pursue wealth redistribution through the political process.¹⁴

Near the conclusion of his *Crisis* article, Roger turns to what he considered to be the three major theoretical underpinnings supporting the concept of an LSC for poor clients in light of enduring American values of justice.¹⁵ First, LSC provides fair access to justice as it is practiced in the United States, and in doing so, vindicates the system's aspiration to provide equal justice to all.¹⁶ In that light, access to the courts may be as fundamental a right for the poor as the right of access to the ballot box.¹⁷ Second, LSC serves to correct an inevitable bias in the law against the unrepresented poor.¹⁸ That bias exists because in general most law is made in the direct presence and subject to the immense political pressure of those sufficiently well-funded to achieve their political goals. Harkening back to the law-reform aspirations of LSC, Roger believes that LSC provides the important capability to change or limit laws that would otherwise systematically disfavor the poor.¹⁹ Third, and providing what Roger believed to be its "basic justification," LSC upholds the dignity of the individual by helping the poor to help themselves.²⁰ Or, as Roger puts it in the article, "[w]hat further justification is required other than: 'Because [the poor] need [legal representation] and they are important?'"²¹

Roger did not live long enough to witness—with rekindled outrage, we can be sure—the current threats of the newly installed Trump Administration to reprise earlier Republican at-

¹³ See *infra* p. 6.

¹⁴ See Cramton, *supra* note 3, at 551–53

¹⁵ *Id.* at 553.

¹⁶ *Id.* at 553–54.

¹⁷ *Id.* at 554.

¹⁸ *Id.* at 554–55.

¹⁹ *Id.* at 555.

²⁰ *Id.*

²¹ *Id.*

tempts to limit or extinguish the work of LSC.²² As it did during prior political attacks on the LSC, the organized bar has joined the fray in its defense.²³ Whether the 2017 attacks on the LSC prove to be successful or not over the remainder of the current term of Congress,²⁴ they indicate that the survival and work of LSC will remain problematical, as has been its fraught state almost since its founding over forty years ago. Whatever the strength of arguments, such as Roger's, for LSC's existence and the worth of its work, the LSC seems inevitably to be fated to remain mired in partisan politics. Candidly, one has to say that Roger's enthusiasm for the LSC was a political aberration, representing the public-spiritedness and compassion of one remarkable man, and not anything that could become a committed principle of the political party to which on many other issues he at least nominally aligned himself.

²² E.g., Jeanne Sahadi, *Lawyers Fear Trump May Kill Legal Aid Funding for the Poor*, CNN MONEY (Mar. 9, 2017, 6:44 PM), <http://money.cnn.com/2017/03/09/news/economy/trump-budget-cuts/index.html> [<https://perma.cc/94K7-RRN9>] (reporting on a letter signed by over 150 law firms to White House Budget Director Mick Mulvaney opposing proposed elimination of federal funding for LSC).

²³ E.g., Lee Rawles, *The Fight for Legal Services*, A.B.A. J., June 2017, at 64 (recounting multiple ways in which the ABA has opposed the Trump Administration's intent to defund the LSC, including joint letters of support by heads of more than 150 U.S. law firms, the deans of 166 law schools, and general counsels of 185 companies).

²⁴ The outcome, at least for one fiscal year, was a success for the LSC. Despite the Trump Administration's attempt to defund the LSC, Congress ultimately voted (and Trump was politically constrained to sign) legislation that provided an additional \$25 million in funding, bringing the total for fiscal year 2018 to \$410 million. See Rhonda McMillion, *A Capitol Effort*, A.B.A. J., June 2018, at 67.