PART IV: TODAY AND TOMORROW

CHAPTER 14

THE CODE IN TODAY'S WORLD

The treatment in Parts LI and III of this book has been mainly con- fined to expounding the content and philosophy of professional ethics as prevailing in Britain today. The object has been to present in as complete and rounded a form as possible the corpus of professional ethics, giving the professions' reasons and justification for the rules as they exist. Only incidentally have current criticisms of these rules been dealt with.

We turn now to consider this corpus of rules through the eyes of its critics, who are mainly economists. This chapter also has the larger aim of debating whether in present conditions the professional ideal answers the purpose. This leads us to begin by looking again at the basic pro- position given in Chapter 1 (page 15), and arguing the case for private practice as opposed to possible alternatives such as a state salaried service or the provision of professional advice by large commercial corporations. If the defence of private practice succeeds, individual practitioners must, unless they are to walk alone, combine to form pro- fessional institutes. We therefore briefly examine the case for these. This leads us to the concept of the code of ethics, and its modern utility as a system of regulation. We pass then to the content of the code, and in particular to those elements of it dealt with in Part LII. Passing to the question of enforcement of the code, we conclude the chapter with an examination of the charge of monopoly. The Case for Private Practice

The justification of the consultant professions as at present organised depends on a justification of private practice as a vehicle for providing services of the kind under consideration in this book. There would be little point in attempting to defend the professional institutes and their code of ethics if the way of life that brought them into existence were found to be unsuited for present-day conditions. The professions may take some comfort from the fact that very few of their critics are opposed to private practice as such, even though they may advocate a salaried professional service in certain limited spheres. Though criticisms

191 are levelled at many aspects of the current system its advantages, within the crucial field of health, rights and property, over any con- ceivable alternative are generally recognised by those who have studied the matter. Those who have not studied the matter, and this includes many in positions of authority as well as the general public, perhaps regard too lightly the virtues of private practice. In these conditions it might easily be whittled away unthinkingly. It is therefore worth spending some time in considering why this would be a disaster. Some- thing has already been said on this head (pages 10-14, 18-20). Without duplicating that discussion, we proceed to indicate some of the main arguments. Before doing so we will look at evidence that the dangers just mentioned are not illusory.

Lewis and Maude pointed out in 1952 that private practice was becoming an ever smaller part of every profession. (1) The main reason is to be found in the tendency for large users of professional services to set up their own professional departments. Going back even earlier, we can trace the decline to the setting up of new organisations to carry out functions formerly left to private practitioners. The local government service is a prime example of this; before it came into existence in the nineteenth century much of its work was performed by solicitors and others in private practice. Similarly with the Civil Service itself — until the twentieth century most expert advice needed by departments of state was obtained by calling in outside consultants. On another aspect, the introduction of the National Health Service and the Legal Aid and Advice Scheme has involved large inroads by the state on private practice in several of the leading professions, though so far the essential nature of their operations has not been lost. State intervention is more marked in the medical field, and it is significant that recent surveys have shown that even where patients are dissatisfied with their treatment under the National Health Service they show no tendency to turn to private practice. (2) Even more ominous is the indifference of new entrants to the professions themselves. Lewis and Maude thought it "a sad sign that so many young people are content to accept the limit- ations, the frustrations, and the lack of adventure in the Civil Service, instead of taking a risk and hoping for the best". (3) Sir Robert Platt, in his book "Doctor and Patient", remarks that "although private practice can still be rewarding both financially and in experience, the young man of today does not particularly seek it, and often does not want it". (4)

The case for private practice in the field we are discussing mainly rests on the proposition that the qualities discussed in Part II of this book are of great importance, and are best provided on an individual

 basis. This is not susceptible of logical proof and no attempt will be made to provide it. The case must chiefly rest on the arguments in Part II and in general dislike of the British for the bureaucracy attendant upon a state service — which is the likely alternative. In perhaps extreme language, the point was made in a recent article by A.C. Thomas, a chartered surveyor, entitled "The Anger of the Patient Man". Thomas portrays the plight of the victim of bureaucrats, in this case rating officials, and his desire for the human touch: "He clings obstinately to the belief that officialdom could do more for him if it wished. Failing this, he yearns at least for some kind of human contact, for a voice that will say, 'Even if we cannot do anything, we know how you feel.' It is when he is denied this, and finds himself con- fronted with the official mind in all its pedantic, dessicated, impersonal, bureaucratic inadequacy, that the full Kafka-esque nightmare of our time takes hold of him, and he grapples naked with The Monster." (5) The point was made with more subtlety by a medical consultant giving evidence to the Pilkington Commission. Comparing the treatment of patients within and outside the Health Service he said: "The slight difference in the handling is that . . . in an out-patients' session the patient listens to the doctor, whereas in a private practice the con-sultant listens to the patient." (6)

We now turn to consider some of the arguments for private practice additional to those emerging from the treatment in Part II of this book. We begin by saying a little more about clients' preferences. While the qualities discussed in Part II, such as competence, impartiality and integrity are undoubtedly the most

important there are additional factors which should not be entirely dismissed. Only the relationship with a private practitioner can give the client or patient the feeling that his own convenience comes first. Appointments are made at a time to suit him: with a state service appointments are very often not made at all, and the public must await the convenience of the official. Though public service is staffed by many humane and courteous officials, the basis of the relationship is different and that is what counts. Even where the public official is quite free from the constraints normally found in employed service, as is the case with judges for example, the relationship •with members of the public still lays stress on the convenience of the official. This explains the notorious reluctance of judges to institute a proper system of fixing dates and times for court hearings. With honourable exceptions, they tend to regard the waste of

193 their own time which may arise under an appointments system from the unpredictability of court proceedings as much more important than the waste of the time of numerous professional people, witnesses and parties which arises where hearings are not arranged at fixed times. A state service moreover gives the client the feeling that he is one among millions, that his record sheet or dossier is kept available in some bureaucratic archive, and that if he is dissatisfied with his treatment he has no real alternative — even though his papers may be passed from one official to another (doubtless accompanied by a confidential report). A true second opinion becomes virtually impossible to obtain.

There are other, perhaps less worthy, motives behind a preference for private practice. Mencher gives one of the main reasons for the desire of many for private medical attention outside the health service as being a liking for what is believed to be the additional social status of private attention. He finds that the treatment of the private patient by those in the medical profession and in the publicity of provident soci- eties "both subtly and directly caters to status satisfaction". (7) It is a truism that service provided as a right is undervalued by the recipient — particularly where its full economic cost is not represented in the charges (if any) made. Serious problems undoubtedly arise from the fact that many are unable to meet this full economic cost, and these are discussed below.

"Liberty means responsibility" said Bernard Shaw. He might equally have said that responsibility means liberty, and the man who is fully responsible enjoys the greatest freedom. The joys of being one's own 111d~Le1 nave been lauded throughout history. The more professional services are provided in private practice the more people can enjoy these benefits. It is fashionable nowadays to exalt the consumer as sovereign, but the economists and others who do so forget that most consumers are also producers — or at any rate members of the house- hold of a producer. The satisfactions of individuals who are producers are just as important to social wellbeing as those of individuals looked upon as consumers. Indeed they are probably more important, since the work a person does is of more real concern to him than the goods and services he consumes.

Carr-Saunders and Wilson ended their book on the professions with a discussion of this point. After pointing out that the status of the free- lance worker had long been envied, and that it had become customary to express regret for his relative decline in numbers, they went on to argue that it was not inevitable that a sense of dependence should ac- company employed status. This only happened because the organisation (i.e. of the employer) had gained control. They appealed to workers to

 take it into their own hands to destroy the tyranny of these organi- sations, and instead build up the strength of their professional bodies. It is scarcely possible that such an idea could succeed, and it has not succeeded. A more fruitful course is surely for the professional insti- tutes, while certainly not abandoning their members in employed service, to do all in their power to build up private practice so that its advantages become manifest to public and practitioners alike. The Joint Consultants Committee on the National Health Service con- cluded that private consulting practice is a means of attracting to medicine some of the most successful practitioners "who, without opportunities for private practice, might well decide to seek their fortunes elsewhere". (8) The Prices and Incomes Board reported that

the personal and professional independence of a solicitor in private practice is “undoubtedly an important feature and is’ likely to play some part in a young man’s choice of career”. (9) Nevertheless, as mentioned above, there is much evidence that younger people especi- ally are often inclined to eschew risks of private practice in favour of security. Lewis and Maude cite a young medical student who expressed a preference for salaried service on grounds, among others, that he desired regular hours of work. The authors comment: “He did not, in short, realise the deeper significance, or rewards, of general practice .“ They went on to suggest that only youngsters with actual experience of this could form a proper judgment, and that for this reason every medical student ought to spend some time working with a private practitioner. (10) The doctors have shown the way with the setting up of the Fellowship for Freedom in Medicine, which now has a large membership of private practitioners.

Other advantages of private practice which may be noted are as follows. The new entrant, and junior qualified man, has a wide choice of employer. If he falls out with one, and he may do so for good reason, he can find another. Where there is only one employer “an outspoken junior who feels himself frustrated may lose his keenness and fall into the pernicious habit of waiting for dead men’s shoes, or he may seek employment abroad, or even become a “yes-man”.” (11) Private practi- tioners have a flexible approach, and are quick to see openings for new services to be provided. They keep a profession dynamic and on its toes. In this way entire new professions emerge as the need for them arises.

The arguments of freedom and the like might be held by some to go by the board in times of economic stringency if private practice were shown to be wasteful or inefficient as a means of providing professional services. Measured in economic terms, the professions are a substantial

 element in the national life — the solicitors alone receive nearly £200,000,000 a year in gross fees. (12) No evidence has been adduced tending to show that private practice is in itself a wasteful method, as opposed to say a state service. Most experience indicates that the cost of providing any service where the stimulus of personal profit or loss is lacking, and elaborate steps have to be taken to provide staff pensions and other benefits and avoid the slightest risk of abuse,is very high. The risk-taking private practitioner has to be something of a business man, or he will not survive. His counterpart in official employment need not worry about this. Professional firms, unlike industrial concerns, are not capital-intensive and can work efficiently on a small scale and with little equipment.

A vital factor is that the freelance professional, having no subsidy to draw on, is compelled to charge clients (taken as a whole) the full economic cost of services provided. Private practice avoids the distor- tions in the economy involved where true economic cost is heavily dis- guised. A vivid illustration of this is given by current American experi- ments in town planning. The new town of Columbia, Maryland, which will house over a hundred thousand people, was planned in every detail by a private enterprise company without any government aid, finance or powers. As the Estates Gazette remarks, this necessarily means that the city is “firmly based on economic common sense”. The journal goes on to comment that the entrepreneur “has an incentive which statutory planners lack; he pays for his mistakes and reaps the rewards of his success”. (13) Unexpected support for this thesis comes from the Prices Jr anu incomes Board report on architects. Understandably reluctant to state specifically that architectural departments of local authorities were often uneconomic, the Board threw out strong hints to this effect. While not feeling able to say outright that local authorities should give more work to private architects, the Board used a circumlocution which might be thought to bear this meaning: “It remains open to question therefore whether there might not be advantage in placing a greater proportion of public design work with private practice.” (14)

If private practice is indeed able to supply a service more cheaply, recent taxation policy has been devised to offset this. Particularly effective in this respect is Selective Employment Tax, introduced in 1966. This marked the final departure from the old idea that the pro- fessions should be shielded from the full force of tax policies essentially designed for commercial activities.* The Selective Employment Tax

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An cxamplc of this policy was thc exemption of the professions from Excess Profits Tax when it was imposed by the Finance (No. 2) Act, 1939 — see s. 12.

 was specifically aimed at labour-intensive services, and professional ser- vices in particular. As introduced, it imposed on them a weekly tax of 25s. for each employed male, or 1 2/6d. for females. Within 3 years these rates were twice increased, to nearly double. Manufacturing industries not only do not bear the tax, but actually receive a premium out of the proceeds.

Four reasons were advanced by the Government to justify the tax. First, services had hitherto been lightly taxed as compared with manu- factured products. Second, there was a need to restrain consumer demand for services. Third, there was a need to encourage economy in the use of labour in services and thereby make more labour available for the expansion of manufacturing industry. Fourth, services were less advantageous to the economy than manufactured products and were, therefore, to be discouraged. It is worth spending a little time in examin- ing these reasons.

As to the first reason, why should it be assumed that services, especially professional services, should be taxed at all? It is acceptable course that the profit or net income yielded to the supplier of the services should rank for taxation in the ordinary way, and so it always has done. But S.E.T. is not a tax upon profits; it is an extra expense added to the cost of providing the service. Unlike purchase tax, it is not borne directly by the consumer — though of course the consumer has to pay in the end.

The second reason is also puzzling. Professional services are rendered in circumstances where the need for them plainly exists. One may say in relation to motor-cars, refrigerators, and other consumer durables, that people can very often do without them. But professional services are not in this category. Usually a person is compelled to make use of these services by force of circumstance. If he needs legal advice, he needs it, whether he likes the idea or not. If he is ill he needs a doctor. If he has land which is being compulsorily acquired or on which better- ment levy has become payable, he must have professional advice. The idea that the demand for professional services is something which can be increased or damped down at a touch of the economist's finger on the button would be comical were it not so serious.

On the third point, the need to encourage economy in labour, one might have thought that constantly-increasing wage and salary levels were a sufficient inducement to any employer to economise on labour as far as possible. As originally introduced, the tax had the effect of something like a 6% or 7% wage increase for the employer. It did not how- ever save him from a similar real wage increase at the same time. While admittedly reinforcing the encouragement to limiting the labour force, it did so in a way which increased costs in the same way as ordinary

 wage rises but did not have the compensating advantage of encouraging staff to work better.

The last reason for the new tax, namely that manufactured products were to be preferred to services, was again mystifying. Many professional services help to swell invisible exports. Only a relatively small proportion of manufactured products are exported, whereas the tax premium is payable to all manufacturers.

The new tax was a severe blow to private practice. It operated unfairly, since if a manufacturing concern employed its own profes- sional staff, such as accountants, solicitors and doctors, it would receive a tax premium for them and their ancillary workers. If the manufactur- ing company went to a private firm for professional advice however it would have to pay its share of the cost of S.E.T. This was a clear induce- ment to commercial companies to set up their own professional depart- ments.

Finally in this discussion of the virtues of private practice, we deal with two financial aspects. These are the provision of capital and the problem of the client, or would-be client, who cannot afford to pay. These might be taken to represent weaknesses in the private practice system, and corresponding advantages for public provision of consul- tancy services.

Some professional services need expensive capital equipment if they are to be provided in a comprehensive and up-to-date fashion. This is particularly true of medical and dental care and engineering services. We have seen how the partnership system hampers capital formation, and the exceptions that have been made to it for this reason (pages 68, 102). The previous discussion indicates where incorporation can be justified by the need to raise capital for expensive equipment, and to provide a method of withdrawing and transferring shares in the firm (under proper safeguards). There is no objection of substance to incorporation in itself. The real objection is to limitation of liability, but this can be met by requiring firms to maintain adequate professional indemnity insurance. The possible effect on the personal relationship with the client is more serious, and great care is needed to ensure that incorpora- tion does not have this result. It can be done however, and there is no necessity from incorporation in itself for the firm to be any larger or the way it does its business any less personal.

It cannot be said that private practice, in its essentials, cannot exist in corporate form. This is recognised by the Law Society in their sub- mission to the Monopolies Commission, though this still betrays the usual confusion between incorporation and limited liability. The Law Society say that it would clearly be against the interests of the public

 that solicitors should be able to practice through limited companies and thus be able to restrict their liability to their clients. That this is not clear, provided proper insurance safeguards are insisted upon, has already been demonstrated. The Law Society say there would be less objection to allowing practice through unlimited companies, but this would not benefit the public. The implication is that there would be some objection to unlimited companies, but the nature of this is not specified. (15) The professions will need to heed Lord Butler's warning, given in 1968, that at least in technical fields professional teams of specialists will be required in the future, who may "for a number of reasons have just cause to seek incorporation". Lord Butler went on to imply that professional rules preventing incorporation would need to be adapted to meet the challenge of the future. (16)

The social problem of the impoverished client is real, difficult and serious. It applies mainly within the field of individual health or rights — where advice is needed in relation to property funds are usually available to pay for it, often out of the income or proceeds of the property itself. In Britain much has been done since the Second World War to meet the problem of poverty in relation to health and rights — principally in medical and legal services. It has been done furthermore without abandoning the principle of private practice, a most praiseworthy achievement. Both the National Health Service and the Legal Aid and Advice Service proceed upon the basis that the private practitioner con- tinues to advise patients or clients who come to him under the state system in the same way as those who come to him privately. The only difference, in theory at least, is that his fee comes not from the client but the state. In practice, as one might expect, stresses and strains appear in this admirable arrangement.

The Health Service differs from the Legal Service in being universal. There is no means test and the stigma attaching to poverty is avoided. The relationship of patient and practitioner is subtly different under the Health Service and in purely private practice, however, and studies reveal that private patients come mainly from what an American coin- mentator has been pleased to call "the upper income or class range of the socio-economic spectrum". (17) The ethical consequences of this have worried somne members of the medical profession. Either paying patients are to receive better treatment, which involves discrimnination and "queue-jumping", or they are not to receive value for their money. The dilemma is acute. There can be no complete solution, and most people will sympathise with the Guillebaud Committee who in 1956 condoned inequalities provided that they did not get out of hand: "While appreciating the reasons why some have objected to the provision of pay-beds, we do not ourselves

feel that the objections are strong enough to warrant the abohition of pay-beds in the hospitah service. If there is any 'jumping of the queue' it cannot amnount to very much when account is taken of the relatively smahh numnbcr of pay-beds at present provided in hospitals." (18)

More disquiet is felt about the Legal Aid and Advice scheme. The administration of this is more in the hands of the profession than is the case with the Health Service, and its availability depends on hack of capacity to pay. The systemn of partial contributions to legal costs means that charges are to some extent "tailored" to match financial resources. Yet timere are many complaints that the lower-paid section of the com- munity lacks assistance, particularly legal advice, that it should have. The truth is that such advice, if it is to be efficient, is very expensive to produce. The law grows ever more voluminous and complex, with corresponding increases in the skill and time needed to give advice. The problem is being studied by the Law Society and by the Legal Aid Advisory Committee, and research at the London School of Economics is being financed by the Ford Foundation. Inevitably some are advocat- ing the provision of a state salaried legal service, perhaps on the model of the neighbourhood law firms set up in some parts of the United States. The Society of Labour Lawyers produced a report in December 1968 recommending this course, and the Times was misguided enough to suggest that experiments on these lines should be carried out. If however it is accepted that private practice provides the most effective organisation for the provision of advisory services, it is wrong that people should be offered a second-chass service because they are poor. Nor should the grave dangers to the citizen involved in the loss of lawyers' independence be underestimated. The citizen often needs legal protection against the state,. because it is the state which is threatening his rights. How can this be equated with a system under which he would seek advice from another department of the state, staffed by lawyers? The suggestion has only to be raised to be dismissed (one would think), yet there is talk of "experiments". Even if limited experiments appeared to work, this would only be because they were operated by lawyers trained under the present independent system, and were conducted on a small scale. They would certainly not indicate the type of legal service which would be provided in years to come by salaried depart- ments staffed by practitioners who had known no other master but the state. Far better surely is the provision of advisory services by private practitioners paid, so far as necessary, from public funds but otherwise enjoying their traditional independence. To the objection that solicitors are reluctant to set up offices in the poorer areas, the Society of

 Conservative Lawyers has countered with a proposal for state subsidies to encourage them to do so. (19) The University Grants Commnittee has shown that independence and state aid are not incomnpatible. They are difficult to achieve however; and state subsidies should be a last resort for professional people. Institutes and the Code

Going forward on the premise that the system of private practice should be preserved and strengthened, we need spend little time on justifying the existence of professional institutes. No one has suggested that private practitioners should not band together in this way, and the existence of the institutes has not been challenged. Forming a focal point for the teaching, examination, and development of professional expertise, they perform an obviously useful function. In maintaining the tone and spirit of the profession, and providing for social inter- course among its members, they serve a hardly less valuable purpose. Their function in relation to the professional code is more debatable. but before looking further at this aspect we ought to consider the financial viability of the institutes.

The cost of operating professional institutes, even at the current level of activity, is formidable. The R.I.C.S., with a qualified member- ship of less than 20,000, finds it necessary to employ a staff of 120 and maintain a headquarters building on an expensive site in Parliament Square, Westminster. With an annual budget approaching £400,000, it has no financial resources apart from what is provided by its own mem- bers. Other institutes are similarly placed, and the situation is an anxious one. If the professions are to accomplish the tasks expected of them they need an injection of new finance. Development and research in the field of professional techniques, the compiling and use of comprehensive statistics, educating the public in the nature and availability of profes- sional services, and above all coping with the growing flood of Government-inspired activities — all these call for increased funds.

The last-mentioned item alone has in recent years taken up a great deal of the time of institute staffs. The Government rightly looks to the professional bodies for advice and information in the framing of new legislation. Bodies such as the Monopolies Commission and the Prices and Incomes Board conduct enquiries which demand a great deal of time and trouble from the professions. If the professions are unable to make an adequate response to these demands not only does the national interest suffer by the preparation of measures inadequately reflecting the viewpoint of the professions, but the professions themselves may be seriously harmed. What is the remedy? Institutes can be relied on to THE CODE IN TODAY'S WORLD

201 extract as much money from their own members as the latter are able and willing to give. Rises in subscription rates have been very steep in recent years, and alternative sources must be found.

The public purse should pay its share. It would be right for the tax- payer to finance that part of the professional organisation which is called into being to meet demands made by Government and public bodies. If civil servants and others do not find, in dealings with the institutes, officials of equal number and calibre to themselves backed by organisations as effective as their own, their work is inevitably handicapped. The cost of providing these things should be borne by the state out of money raised from the professions themselves through Selective Employment Tax and other imposts. The professions have not asked for this assistance and would perhaps fear loss of independence if it were provided. Adequate safeguards could be found however, and where so much is taken in taxation the arguments against looking to the state for "aid" are inevitably weakened. The neatest solution might be for each institute to put in a bill annually for fees to cover costs incurred in meeting public responsibilities.

The other potential source of financial help is the large business organisation which relies heavily on professional advice. Even if only out of self-interest, industry and commerce ought to see the need for safeguarding and developing the professional institutes who foster the qualities they gladly pay for as employers. They, and others, should bear in mind the wise words of Lord Butler quoted at the beginning of this book. As bulwarks of individualism, the professional institutes deserve the support of all who base their affairs on private initiative.

Having concluded that private practice is desirable, and with it the existence of professional institutes, we turn to the question of whether the concept of a code of conduct can also be supported. The idea of a code, as we have seen, is ancient and universal. Lord Reid, in the 1968 case of Dickson v. Pharmaceutical Society, described the prevalence of the code: "In every profession of which I have any knowledge there is a code of conduct, written or unwritten, which makes it improper for members of the profession to engage in certain activities in which ordinary members of the public are quite entitled to engage. Normally this is regarded as a domestic matter within the profession." (20) This being so, the onus is clearly on those who wish to see the abolition of the practice of laying down rules of conduct to justify their con- tention. Discussion is hampered by the crude and sketchy nature of the

202

PROFESSIONAL ETIIICS arguments brought against the code as a concept. The current stick with which to beat it is that it is "restrictive". Some commentators indeed seem to think it sufficient to damn the code if they point out that it imposes restrictions. Knox and Hennessy, concluding a discussion of the "contractor" rule, argue that mere publicity of the existence of the rule, debate of its damaging consequences (unspecified) and "not least, attempted public defence of the indefensible" would cumulatively discredit restrictions of this kind in the professions. (21) The "con- tractor" rule has in fact been modified, as we have seen, but its essence remains. Since its purpose is solely to safeguard the independence, and therefore the integrity, of professional advisers, talk of "discredit" is indeed strange.

The mere existence of a code, never mind its content, necessarily involves "restrictions". A rule without a restriction is an impossibility, and it is ironic indeed that in an age when governments are loading more and more official restrictions on the citizen (presumably with his consent, or even approbation), the term should be regarded as sufficient in itself to condemnn the professional code.

The professional code expresses the collective mind of the profession. Many of its principles, as we have seen, are not spelt out in written rules but are to be collected fromn pronouncements and rulings of professional bodies. The views professional people have about right and wrong behaviour would not disappear overnight if written formulations of the code disappeared. It follows that the strong influence a body of people have upon individuals in their number, particularly newcomers, would go on operating. The conduct of barristers, for example, is much more affected by what their brethren would think than by what is written in the handbook on etiquette at the Bar. The Bar is small enough for word to get round very quickly of any falling short. Senior members believe in straight speaking on these occasions, and the chambers system helps in this. The head of the chambers will regard himnself and all under his roof as implicated to some extent if the conduct of any member is called in question.

Discussion should therefore turn not on the existence or otherwise of a code, since in some form it must exist, but on the rules comprised in it and the sanctions for their breach. Here the critics are on firmer ground. We do not need to go to enemies of the professions for dis- quieting statements. Millerson, in his measured and objective book The Qualifying Associations, finds it necessary to say: "Associations show greatest concern over competition: firstly, in terms of finding work; secondly, with the method of payment. Very little emphasis appears to centre on service to clients, or on any duty to expose THE CODE IN TODAY'S WORLD

203 professional incompetence." (22) The extent to which this comment is justified varies, but there are few if any professional bodies which can afford to ignore it completely. Another pertinent factor is the extent to which the code is enforced, particularly those aspects of it concerning the public and dealt with mainly in Part II of this book. A Free Grab for Business?

When people talk about the "restrictive practices" of the professions they usually refer to the rules described in Part III of this book, mainly regulating internal relations of professional people. As we have seen, these rules are almost entirely directed to the ways in which new business is sought. Is there any place for these rules in the world today? Before examining the arguments of those who wish to see the rules cut down or abolished let us attempt to summarise the way the professions would defend them.

We start with the position that the rules exist, and presumably exist by the will of at least the majority within each profession — otherwise there would be little difficulty in altering them. If the state considers that they must be altered in the near future it will have to act therefore through parliamentary powers. This will infringe the autonomy of the professions, which has long been respected by the law. It will overturn rules which have been recognised by Government departments, and are observed by many professions in countries overseas as well as at home. Parliamentary repeal of rules against touting, canvassing, advertising and undercutting will overnight expose individual practitioners to the full rigours of cut-throat competition; in self-defence they will be forced hastily to adopt the methods of the commercial world. Distracted from their proper function, they will put at risk the individual qualities which first induced them to take up a profession. Courtesy, modesty, dignity and detachment — these qualities may not survive. Self-respect and peace of mind may be imperilled.

The change may well destroy the solidarity and the fraternal spirit which led to the setting-up of professional institutes, and are fostered by them. Co-operation between professionals, the shouldering of the burden of training new entrants and helping lame dogs, the habit of making the fruits of experience available to colleagues, and striving to keep up the expertise and tone of the profession — all these may be fatally damaged. Some may feel there is no long6r any point in keeping up the expensive equipment of a professional institute at all. The indivi- dual would lose his protection against the powerful client, and the very existence of private practice might be imperilled. All the qualities dis- cussed in Part II of this book on which the client depends would then

PROFESSIONAL ETHICS rely for their continuance not on the vigilance of the professional institutes but on the qualities of individual practitioners. Such qualities could not survive unimpaired in the heat of a battle for business with no holds barred. Inter-professional rivalries would spring up, with those trained in one set of techniques casting longing eyes at areas of other professions where the pickings looked good.

Would public confidence and trust in professional advisers survive this change? Competing bids for their business, with derogation of fellow-practitioners and advantage being taken of the client relationship to seek new business would hardly sustain confidence. To choose a consultant on the basis of the skill of his advertising agency and the amount of his publicity spending, rather than on the advice of a dis- interested, informed third party could scarcely profit the public. It would also diminish the incentive to build up a practice through sheer hard work and the development of professional skills. The costs involved and the loss of revenue due to undercutting, would necessitate a reduc- tion in the quality of service. Ptactitioners might, as in past times, find themselves working for much less than the economic cost of providing the quality of service they were trained, and are accustomed, to provide. In the long run, no one would benefit.

This gloomy picture shows what could happen. It might turn out to be overdrawn, but no one can be sure. Why, say the professions, run the risk? It could only be justified by criticism of such weight and cogency as to compel action, whatever the hazards. Let us now look at the criticisms that are currently being made against the restrictions on methods of seeking business and consider whether they are indeed of this irresistible character. Before doing so however we might spend a moment considering a doctrine familiar to lawyers — onus of proof. Most criticisms seem to assume that the onus is on the professions to justify their rules because they amount to “restrictive practices”. As we have shown however, and as is indeed obvious, there cannot be rules without restrictions, and there can hardly be professional associations without rules. Since the critics do not attack the existence of such associations they are illogical if they attack rules as such. Furthermore these are not merely the rules currently in existence, but rules which have marked the essence of professionalism for a very long time. The presumption is therefore on their side, and the onus is on their critics to prove them wrong. Where a system has been operating for a long time, and grew up under conditions of free enterprise, there must, as the R.I.B.A. point out, be “a strong presumption that it meets society’s needs and that radical change in it might be difficult to achieve”. (23)

It can be confidently stated that the critics have totally failed to discharge the onus of showing this presumption to be false. A straight- forward and effective way of showing it to be false would be to establish, after proper investigation, that professional rules led to practi- tioners being overpaid. Yet, after carrying out investigations in the case of solicitors and architects, the Prices and Incomes Board concluded in 1968 that in neither case was the profession, on balance, receiving greater remuneration than was proper. This must mean that those who seek to drive charges down by making the professions more competitive are seeking to get the work done for less than a fair reward. The only long- term consequence of this would be the disappearance of the independent professions, since their continued operation would become uneconomic. As most criticisms are put forward on economic grounds, this is indeed a strange conclusion.

The basis of economic criticism of the professions is that their rules inhibit competition and therefore deny the public the economic advan- tages which competition is said to bring. The fallacy is that because competition is restricted in one direction, namely the seeking of busi- ness, it is restricted generally. Even in economic terms, unrestrained competition has not always been found beneficial — indeed a large part of the apparatus of government during the past hundred years has been devoted to imposing restraints on capitalist competition for the public advantage. Within the field of sale of goods and property, a host of statutory restrictions now shield the public from the full force of com- petition. Indeed the whole emphasis on protecting the consumer, which is the rationale of most economists attacking the professions, comes down to restraint on what may be permitted of competitive traders striving for business.

The case of the professions in no way depends, however, on attack- ing competition as such. They believe that in the vital realm of health, rights and property what really matters is not price-cutting but adequacy of service. If the practitioner depends solely on the quality of service he renders in order to build up his practice

he has the strongest possible incentive to do the job to the best of his ability. If his ability is insuffi- cient, he will go under. The go-ahead practitioner can devote his skill and energy to improving the service he offers. He may do this by employing staff of good quality, by having offices in a location convenient to clients and ensuring that the appearance, lay-out and equipment of the office are up to date and efficient, and by developing in their full variety the services offered to clients. If he fails to do all these things, the opening will be there for a rival to prosper at his expense, and sooner or later this will happen. Nor is limnitation of competition on the price level a peculiar feature of the professions.

 As Harris and Seldon point out in "Advertising and the Public", there are many commodities such as soap, detergent, cars, chocolates, radios, petrol and cigarettes where competition is vigorous but takes place in quality or other features rather than in price. (24)

When we come to examine in detail the economic criticism of pro- fessional restrictions we find ourselves in a difficulty. The criticisms are made in fragmentary form and consist largely of mere assertion. The points made are ill-selected, and a comprehensive case has to be built up from a number of sources and even then seems incomplete. We give below a summary of the arguments which have recently been put forward by economists supplemented by additional points that seem worthy of inclusion if a complete case is to be presented.

We begin with Professor Lees, since he has been the most vocal of the economist critics. His onslaught takes the form of setting up Aunt Sallies in the shape of arguments said to be used by the professions in defence of their practices and then attempting to knock them down. This is a curious form of attack, dictated by Lees' self-confessed failure to carry out more than a superficial examination. After asking why the professions maintain restrictions on charges, advertising and touting, Lees comments: "There has been no systematic treatment of this question but from the sparse literature and numerous pronounce- ments by the professions themselves, two main justifications seem to be claimed. First, that overtly competitive activities are lnconsistent with the achievement and maintenance of the social status of a professional man. And secondly, that these activities reduce the confidence of the consuming public in the quality of professional services. In technical language, the claim is that restriction of overt competition generates a producer surplus, taken as psychic income in the form of status, and raises the total demand for the services of the group, to the advantage of consumers as well as to members of the group." (25) Lees does not say which professional associations advance these reasons. As can be seen from Part III of this book they amount to a very inadequate statement of the justifications put forward by the profes- sions. Indeed the first or "status" argument is not one which any self- respecting professional body would put forward as a justification in itself. It is not surprising then that Lees finds little difficulty in demolishing it. We may dismiss it here with the simple reminder that it is not necessarily wrong, and is certainly human, for people to mind about whether society shows respect for their work by according it (and them) high prestige.

Lees finds the second justification, that restrictions on competition avoid loss of confidence, "essentially empirical" and "extraordinarily difficult to test against the facts". (26) This difficulty certainly makes itself felt in Lee's discussion of this point, and his argument is somewhat obscure. At one point he seems to be saying that there would be a positive gain to clients if practitioners came to be regarded more like "tradesmen" and less like "professional men", though how this would increase confidence in their advice is not specified. In truth it is not possible for such criticism to go beyond asserting that no harm would come of abolishing the rules. This is mere guesswork, but it can be said, as Lees does, that doctors in Switzerland and dentists in the United States advertise and are not noticeably mistrusted by patients. (27) Again it can be said, as Lees does not, that bodies depending on public confidence, such as banks and insurance companies, advertise in Britain without noticeable damage to that confidence. This argument deserves careful consideration.

Advertising by insurance companies has a long history. The nineteenth- century advertising agent Samuel Deacon was impressed by the vigorous advertising of the Royal Insurance Company. Urging more conservative insurance companies to follow suit, Deacon said that when they did advertise their manner was so apologetic as to recall the impoverished gentleman, reduced to crying fish in the streets, who exclaimned: "I hope to goodness no one hears me". (28) This complaint is still heard today; Harris and Seldon comment that banks and insurance companies "are often inhibited from using advertising at all or on a scale necessary to make it effective, and they use it in a decorous manner that prevents it from attracting much attention". (29) In another recent work, "Advertising in Action", the same authors examine the recent growth of the Eagle Star Insurance Company. They find it to be among the fastest-growing, and most enterprising insurance companies, and add: "What part has current press and television advertising played in all this? The evidence suggests the answer is: 'Not much.'" The company believe that advertising is ineffective in bringing new business. Its recent advertising campaign has not yielded good results. The authors conclude that this is a view shared by other insurance companies, for not many advertise extensively or regularly. (30) Banks have until recently shown a similar disinclination to advertise, assisted no doubt by the fact that Farrow's Bank, which failed in 1920, had before closing its doors engaged in a big press campaign. Harris and Seldon comment: "This indifference or hostility developed no doubt partly because the training

 of bankers emphasised personal service to customers whose affairs were strictly private " (31) Going on to describe the recent burst of bank advertising in Britain, these authors find difficulty in assessing the effectiveness of the various campaigns. They conclude that the drive for business would be much more effective if competition between banks extended to interest rates or opening at more convenient timnes. As it is, banks' services are so simnilar in all respects as to leave the advertiser little to build upon.

Another activity where judicious advertising has not been held to have prejudiced public confidence is the sale of spectacles by opticians. This is of questionable value as an analogy, since it is contrary to true professionalism for the consultant to gain financial benefit from the fact that his advice tends in one direction rather than another. The practice under which the same firm conduct eye testing of patients and promptly sell spectacles to those held to need them is a blot on profes- sionalism and should be discontinued. Baster, writing in the 1930s, criticised opticians' advertising for creating new conventions to increase sales, for example that propriety demands a minimum of four pairs of spectacles per person: "One pair, in tortoiseshell and nickel, for business, one pair framed in gold, for evening wear, gold-mounted pince- nez for full dress, and a fourth pair, framed in pure tortoiseshell, 'for sport or relaxation'." (32) Denys Thompson, also writing in the 1930s, indicts lyrical advertisements from another source with claims to profes- sionalism, advertising agencies. These describe how copywriters, inspired by the merits of Goodyear tyres or Hoover cleaners, work far into the night, and have not finished even on leaving the office: "One of the lay-out men has just left his drawing-board and is going down in the lift. Under his arm he carries a tissue pad. A new idea is stirring in his mind. It will be roughed out in pencil before morning comes. Weeks, may be months from now you will see it in print, a finished advertisement for Hoover." This advertisement was intended to convince prospective clients of the advertising agency that their work would be in dedicated hands. No information about success or otherwise is available. (33) In America this kind of approach has even been tried in a sphere where confidence is all-important, the church. Not content with neon signs flashing an invitation to worship, the publicity adviser offers sage counsel to the minister: "It may be that you have the reputation of having stale goods; maybe you are foolishly stressing side lines. It may be the first assistant sales manager is out of harmony with the Sales Manager, the Holy Spirit, and therefore all the salesmen, the members, are demoralised and don't know what they are selling; or have quit their job and are just hanging around blaming the preacher and their fellow- members for the fact that the church doesn't go." (34) Denys Thompson condemns advertising by religious bodies as leading them to lose sight of spiritual functions: "Advertising in such a case is an inherently unsuitable method; it may rouse some momentary public attention and produce some emotionally-moved converts, but when the emotion has cooled, so will devotion." (35)

We may conclude that the onus of proving the professions wrong in fearing loss of confidence through advertising has not been discharged. Indeed such evidence as there is tends on the whole to the conclusion that there may well be a sound basis for their fears. The Consumer Council, in its evidence to the Monopolies Commission, suggested that where confidence in the practitioner is imnportant — "among doctors and other medical professions, perhaps" — there was a case for banning advertising, at least where it involved claims to medical superiority. The Council felt this might not apply in the case of architects, surveyors or solicitors. This was apparently on the ground that here confidence in the practitioner does not matter — a strange conclusion. (36)

Lees states that two propositions, both "very odd", seem to follow from the argument that professional restrictions on competition improve public confidence. These are that competition necessarily reduces quality, and that prohibiting advertising raises demand. The first of these points is highly important, and must therefore be examined closely. The second is a mere debating point and easily got out of the way. In saying that public confidence would be reduced by the sight of trusted advisers outbidding each other in advertising claims, the profes- sions are not necessarily arguing that this would lead to a reduction in demand for their services. The public cannot do without their services, and the total demand might not lessen. The argument is that the public need advisers they can trust. If these are not available they will have to make do with what is. They can only suffer thereby, even if the suffering is confined to what Professor Lees would no doubt describe as their "psychic income".

In dealing with the question of cheapness and efficiency we enter the heart of the controversy. Lees states that the claim that competition reduces quality is not borne out by what happens to products generally in competitive conditions, citing findings of the Restrictive Practices

 Court in relation to Scottish baking, transformers and linoleum. Are these really analogous to professional services, where the product cannot, at the time of buying, be inspected, tasted, prodded or weighed? If quality is to be maintained and, as seems clear, the current remuneration of the consultant professions is not excessive cheaper services could only come through increased output without corresponding increase in costs. Would uninhibited advertising bring this about? The spur to efficiency is very keen now, and professional firms are continually being squeezed out of business by economic pressures. The Robson Morrow Report on architects' practices in 1956-65 found that productivity in private architects' offices had increased by about 4% per annum over the period. (37) This rate is higher than that of industrial productivity over the same period, and can probably be paralleled in other profes- sions. The only concrete suggestion whereby advertising could improve productivity is made by Knox and Hennessy in their report on restric- tive practices in the building industry, where they say that the ban on advertising accentuates the irregularity of building work by making it impossible for surveyors, engineers and architects to secure a continuous flow of work "instead of alternations of over-full, medium and under- employment". (38) It is not clear that advertising is the best way of dealing with this problem. (39)

We may conclude that if an all-out drive for business does lead to reduced charges for professional services, this will not be against a back- ground of correspondingly reduced costs. On the contrary, costs would rise because of additional expenditure on getting business, particularly of course on advertising. Rival firms mounting opposing advertising campaigns of the same intensity are likely to find at the end of the day that they are still in the same relative position, with their costs heavily increased to pay for the campaign. (40)

Baster gives the possibility of deadlock in competitive advertising as one reason why the professions restrict advertising "and so save them- selves from internecine strife, and their clients from the wastes of mutually-destructive publicity"(41)

Samuel Courtauld once remarked that most competitive advertising was a costly extravagance, and the American advertising world is said to hold the view that some 90% of advertising efforts are failures. The English Gallup Poll director, Dr Durant, recently argued that advertising was becoming less effective,

pointing out that the costs of advertising for each one thousand actual readers had risen by 180% between 1951 and 1961. (42)

If costs then increase, and charges (and therefore income) are reduced, can we really believe, with Ptofessor Lees, that there would be THE CODE IN TODAY'S WORLD

211 no tendency for quality of service to decline? The Ptices and Incomes Board said in one report that "quality in professional work depends on professional standards", and in another that standards depend primarily on the rigour of the tests applied to the granting and taking away of qualifications. (43) If they are insufficiently remunerated, professional people will either be forced out of private practice or will lower their standards to enable costs to meet income. No other conclusion is possible. Some outsiders might gain satisfaction from the former con- tingency. Knox and Hennessy for example find there are "unnecessarily large numbers of firms" in the building professions. (44) But can we be sure that the public will really gain from the loss of individualism and personal service consequent on reduction in the number and inflation in the size of firms? Harris and Seldon point out that reducing the number of firms through advertising leads to "oligopoly" and that in an oligopolistic market there is little price competition "because no pro- ducer can reduce his price without the others following suit, in which cases all would end by charging prices too low to make production profitable". While oligopoly has some advantages in commercial produc- tion where the economics of scale can be fully exploited, there are corresponding disadvantages which alone are operative in the case of the professions. These include "higher costs of management as organisation becomes complex in larger firms, higher selling costs (including those of advertising), higher prices, barriers to the entry of new firms with new ideas and methods because of the high cost of breaking into the market, and a possibly dangerous concentration of economic power". (45)

We conclude this examination of the economics of professional restrictions by looking at certain other objections which can be dealt with more concisely. Ptofessor Lees and others complain that the rules against touting, advertising and undercutting operate in favour of firms already established and prevent newcomers using what are "the normal competitive devices of new entrants". This argument cuts both ways, since if newcomers enter a field where costs are inflated by the need to indulge in large-scale advertising they viill need more initial capital or bridging finance to cover the period before fees begin to flow in. Harris and Seldon point out that in a number of industries "advertising has been used with the intention of stopping or discouraging new competi- tors". The American economist, Gideonse, alleged that advertising entrenched monopoly by setting up a financial barrier to the competi- tion of new and small firms. (47) The Prices and Incomes Board sugges- ted to the R.I.B.A. that young architects might be permitted to charge a lower fee to assist them in starting a practice. After saying that there was a certain sentimental attraction" in the proposal, the R.I.B.A.

212

PROFESSIONAL ETHICS proceeded to demolish it with pitiless logic. The work that ought to be done for a client remains the same, whoever does it, and this would be a court's view if the architect were sued for negligence: "The standard of service he has given will be gauged by the court in terms of what a reasonable architect would have done; not in terms of what a reasonable young architect would have done, nor in terms of what he was paid." The cost of doing the work could only be less if the young architect were more efficient- This is unlikely, and would hardly be a reason for rewarding him with lower fees. (48)

Lees criticises a statement by the Ptesident of the Law Society that new charges proposed were a fair remnuneration for the work involved on the ground that absence of competition prevented us from knowing whether this was so or not. (49) It is an extraordinary illustration of the length to which some present-day economists are prepared to take the regression to laissez-faire principles that it should automatically be assumed that the price level produced by unrestricted competition is necessarily "fair". If this argument were sound the real cause of concern would be the remuneration of those paid from public funds, such as most doctors and dentists. Here, as the Pilkington Commission pointed out, the only standard of comparison possible is with professional people in private practice. (50)

We conclude therefore that there should not be a free grab for busi- ness, or at least that no case has been made out for coercing the profes- sions, against their will, into relaxing current rules. This is not to preserve a monolithic position. Ptofessional bodies reflect very accurately the current feelings and beliefs of their members, and these are influ- enced by general shifts of opinion. There have been considerable relaxa- tions of professional rules in recent times, and there is a strong, and perhaps growing, element within the professions who would like to see further relaxations. This particularly arises where members of profes- sional bodies are in direct competition with unattached practitioners operating without any restriction other than that imposed by the general law, as in the field of estate agency and surveying. There is a natural tendency for the young enthusiastic newcomer to feel impatient of rules which seem to him to operate as a handicap in building up his business. Certain it is that the justification for such rules will have to be clearly and powerfully put across if they are to survive these pressures.

Other factors tending to relaxation of the no-advertising rule are the tax advantages of advertising and the thought that, by becoming free-spending advertisers, the professions could secure a better press. Neither reason is particularly worthy, but for completeness they ought to be described. THE CODE IN TODAY'S WORLD

The tax advantages arises from the fact that advertising expenditure is treated by the Inland Revenue as a trading and not a capital expense. This means it can be allowed against income in computing profits for income tax purposes. It nevertheless, if seriously embarked on, may have an effect in building up a capital asset, namely the goodwill of the business. In other words capital can be built up by payments which are fully allowed for tax purposes — an unusual situation.

As for getting a better press by heavy advertising, Harris and Seldon point out that a firm that advertises often and generously is more likely to receive frequent and favourable mention in the editorial columns than one that does not. "To suppose otherwise would be to doubt the effectiveness of advertising and to deny human nature." (51) Political and Economic Planning have reported that there is undoubtedly a tendency to tone down or suppress news which seems likely to annoy advertisers or potential advertisers. (52) Denys Thompson cites a memo- randum to sub-editors which appeared in a national newspaper office: "Don't pass anything detrimental to Bread. To say that biead is fatten- ing, for instance, is detrimental." (53)

We may conclude that it unless it is fairly proved that the public interest is harmed the professions should be left to govern their own affairs. As Durkheim said in his Professional Ethics and Civic Morals, a system of ethics is not to be improvised. "It is the task of the very group to which they are to apply."(54) The advertising practitioners have themselves testified to the truth of this, by laying down their own code of ethics. Unless this too is to be abolished it makes unrestricted advertising virtually impossible — there are always some rules, and not alone those of the state.

Is the public interest harmed by restrictions on advertising? The only allegation that carries any conviction relates to the inadequacy of information as to professional services.

It is plainly in the interests both of the public and the professions that the former should be fully aware of the variety of professional services available. This is certainly not the case at present, and the pro- fessions must take responsibility. Few people, if any, could give a comprehensive list of the services available from the consultant profes- sions. Some professional bodies, such as the Law Society and the R.I.C.S., have produced explanatory leaflets but these are not generally available. The public is therefore going without advice which it needs to have. One example may be given. A surprisingly large number of people owning substantial property die each year without having made a will, presumably through ignorance of the consequences. The result is that intestacy procedure has to be followed, involving delay and additional

 expense to the relatives. We have seen above that professional institutes are aware of the need to publicise services, but are hampered by lack of funds. A modest attempt to help in this direction will be found in Appendix II to this book, which describes the services available from members of the consultant professions and uses material supplied by the professional bodies themselves.

Having identified a need, and the service required to meet it, the prospective client needs to locate a source from which it may be obtained. lf advertising by firms were unrestricted he might scan the columns of his local paper and pick out the most glowing advertisement. It is unlikely that this would turn out to have been inserted by the most able practitioner. Knox and Hennessy criticise the no-advertising rule on the ground that it "drastically limits specialisation by making it almost impos- sible for architects and surveyors to publicise their specialisms". (55) Is this justified?

Those who would like to see individual firms free to publish adver- tiseinents describing in detail the services they offer argue that such advertisements would be merely informative and could do no harm. Students of advertising have shown however that there is no such thing as a merely informative advertisemnent; even the plainest set of assertions has a persuasive effect. (56) Denys Thompson quotes a blistering page from Baster: "The major part of informative advertising is, and always has been, a campaign of exaggeration, half truths, intended ambiguities, direct lies, and general deception. Amongst all the hundreds of thousands of persons engaged in the business, it may be said about most of them on the informa- tive side of it that their chief function is to deceive buyers as to the real merits and demerits of the commodity being sold." (57) Hartley Withers, in Poverty and Waste, remarked that it was the glory and boast of the skilful advertiser that he could make people buy things they did not want. (58)

If a member of the public needs a run-of-the-mill service which can be adequately rendered by any qualified practitioner, he may be satisfied to seek one out in a directory or even by walking the street till he finds one. This might apply to swearing an affidavit or receiving an inocula- tion, but it hardly extends to affairs in which skill and judgmnent may make all the difference to success. Nevertheless the facihties for finding practitioners to do the more humdrum tasks ought to be improved. Directories might be more elaborate, names of firms perhaps mnore prominently displayed. There is a case for allowing all professions to adopt the "card" advertisement system in local papers which is followed by the "land" professions. If the "card" advertisement is looked on as no more than an extension of the brass plate, and contains a limited amount of strictly factual information, it can do no harm.

For weighty advice on matters of substance there is surely no doubt that the public should use the traditional method, and seek recommenda- tions from those who are in a position to know. It is this system, and only this, which produces the result best both for the public and the profession by securing an expanding connection for the practitioner who, on pure merit, earns it, and denying it to everyone else. Those who doubt this should ponder the words of Walter Raeburn, an experienced barrister, in reviewing Michael Zander's book Lawyers and the Public Interest. Commenting on Zander's advocacy of uninhibited advertising and contingent fees, Raeburn says: "Once the Bar were well and truly in the rat race, few could survive who refrained from coaching witnesses, letting in illicit evidence, concealing vital documents and all the other tricks of the shady advocate. There are some things with which decency cannot compete." (59) In most, if not all, professions the reward of merit is not merely an enlarged practice but the ability to charge higher fees. There is thus no restraint (other than taxation) on the incentive to succeed, and the public benefits. Who Should Fix Charges?

There has been much recent criticism of the way the consultant pro- fessions determine the fees they charge clients. A favourite target is the ad valorem scale, and the relatively few objections to it have been magnified, while its more numerous advantages are played down (see pages 181-185). Criticism is also levelled at professional institutes for promulgating scales, rather than leaving fees to be determined at random by individual practitioners or fixed by some outside body. Complaints have been made about inadequate statistical information, and over all has been the vexed question of how the Government's prices and

incomes policy should operate in relation to the professions. Despite all this questioning, no proof has emerged that the professions are being overpaid — if anything the evidence tends the other way.

Professor Lees attacks the ad valorem basis of charging on a number of grounds, none of them original. The advantage of certainty he dis- misses with the statement, given as usual without supporting evidence,

 that "it is quite clear that consumers choose not to have fixed prices". The advantage of stability, arising from the fact that the scale auto- matically keeps pace with inflation, is also dismissed. Lees regards inflation-free incomes as bad: "At best, they weaken resistance to rising prices and, at worst, positively promote them". How, if the practitioner's income is not to keep pace with inflation, he is to retain his ability to practise is not revealed.

The fact that low-price but costly transactions are "subsidised" is also attacked. With the relentless logic of the academic economist, Lees says that "there is nothing in this argument at all", and that it involves an unjustified interference with economic forces. It amounts to a trans- fer of income from those who are paying more than the economic cost of, say, their conveyances to those who are paying less. No one knows the amount of this "transfer", but it is probably insignificant. Neverthe- less, says Lees, it is no part of the business of lawyers to promote social justice. "That is the task of government." The Consumer Council are also critical, but in less extreme terms. Their's is the language of one who cannot make up his mind: "We are not convinced of the validity of the social arguments for scale fees — that certain transactions would be very expensive if charged according to work done — nor is it clear why the professions should set themselves a social task of this kind." (60) Despite his onslaughts, Lees concludes that ad valorem scales are probably justified on the ground of low administrative costs. He admits that there is no evidence one way or the other about this, and this whole argument therefore peters out in a conclusion that things should probably be left as they are. (61)

The Ptices and Incomes Board report on remuneration of solicitors, issued in 1968, bears out this conclusion. While the Board proposed variations in the amount of the scale fees for conveyancing, and felt that the ad valorem system produced in levels above £20,000 a charge higher than could be justified by the work involved, they concluded that the basic principle had not been shown to be at fault. The effect of their recommendations was to reduce the total revenue of the profession from conveyancing, but to counterbalance this by increasing fees for county court work. The Board repeated criticisms made by the Pilkington Commission in 1959 about the lack of information concerning profes- sional earnings. They recommended that statistics should be compiled by the Government, and kept up to date. No reason was given why such information should not be collected by the professional body concerned, rather than the Government. This is clearly a task the professions would do well to take on — otherwise they will in time find it being done by some state organisation. (62) THE CODE IN TODAY'S WORLD

The criticisms of rules against undercutting have been dealt with in the discussion above on seeking business. The question of undercutting is separable from the general question of how fees should be determined. As currently operated, the restriction on undercutting is of very limited effect, and usually applies only to a fee deliberately reduced in order to attract a new client. We confine ourselves here to the general problem of how, in the interest of the public and the professions, fees ought to be calculated under modern conditions.

The position is complicated by the existence of a "prices and incomes policy", which has been followed by successive Governments (though in somewhat different form) for several years and seems likely to be with us for some time to come. If Governments aim to exercise a close influence, or even control, over all incomes the professions can scarcely hope to be exempt. The most they can do is to ensure that the machinery of the prices and incomes policy, and especially the Prices and Incomes Board itself, is not used as a primary means of determin- ing fees. It is beyond the scope of this book to debate the utility of a prices

and incomes policy, but it can be confidently asserted that it should operate over and above the normal professional machinery for calculating fees. The professions would do well to resist to the utmost the suggestion, made by the Prices and Incomes Board in 1968, that the Board should itself become the body by which fee scales are from time to time revised. (63)

No more will be said here about the best basis of calculation for fees, whether ad valorem, quantum meruit, or any other. Whichever method is used, there is general agreement that it ought to be so operated as to produce a reasonable income for the practitioner. The Prices and Incomes Board describe as reasonable an income which is "sufficient to attract into the business and retain the required human capital and [to secure that] the services of the profession are rendered in the most economical way". (64) One need not quarrel with this criterion, if it be accepted that the standards of the profession must also be maintained. The Bar Council seek an income comparable with that of other profes- sions "having regard to the risks inherent in intense competition and in individual responsibility" and to the need to make provision for retirement. (65)

If these are the guide lines for the level of remuneration, what is required to put them into effect? Some would argue that this should be left to the unrestricted competition of the market. We give reasons below for the rejection of this view. Assuming it is rejected, what remains?

There remains the need of the client for guidance as to the fee he should expect to pay, and the need of the practitioner for guidance as

 to what level of fees would be regarded as reasonable by his colleagues and the public generally. The question is how this guidance ought to be given, and no single answer is possible. We start from the position however that the person or body who is to decide what level of fees is necessary to conform to the desired criteria, and what technique is to be used for calculation, must be one having the fullest knowledge and experience of the factors involved. In other words no one can deter- mine fees properly who lacks a thoroughgoing knowledge of the working of the profession, the current intake of new members and the numbers leaving practice before retiring age, the likely changes in techniques which will affect costs, the opportunities for more efficient perform- ance, and so on. Those best equipped with this knowledge are the members of the profession themselves, and it follows that the profes- sional institute is therefore best able to give the necessary guidance. The only argument that could be produced against leaving the matter to the professional institute is that it could not be trusted to apply the criteria fairly. Or, putting it more mildly, that at least in the case of the "closed" professions the public ought to be allowed some external check on the fairness of guidance given by the professional body. This is the system in the case of solicitors. Their professional body, the Law Society, keeps a watchful eye on fee levels, and when a change is thought neces- sary will make representations to the appropriate Rule Committee. The Bar does not have this system, but the work of a barrister is so variable that little is possible in the way of guidance by the professional body. Most fees are moreover controlled by the system of taxation of costs, and by fee scales laid down for particular courts. The Chairman of the Bar Council complained in November 1968 that the county court scales had not changed since 1956, fees for prosecutions and interlocutory work had remained static and fees for undefended divorces had been effectively reduced by the transfer of this work to the county court. (6th

Can it be said that where the profession is not "closed" there ought to be no interference with recommendations of the professional body, subject always to the overall operation of the prices and incomes policy? The Prices and Incomes Board, at least, may not think so. They have severely criticised the R.I.B.A. for presuming to give guidance to its members and the public generally by laying down fee scales. The Board seems to have confused the issue of whether such scales should be mandatory (which is certainly debatable) with whether they should be issued at all. Because they clearly do not consider it right for observance of the R.I.B.A. scale to be compulsory for members, the Board have suggested that all guidance on fees should be given by a new independent body. The grounds for this suggestion are curious. One is that only a

219 minority of R.I.B.A. members are principals in private practice, and therefore directly concerned with fees. “We see no necessity”, say the Board with breathtaking presumption, “for the power and prestige of the premier professional body to be used in the defence of the interests of a minority of its members”. They go on to suggest that the R.I.B.A.’s functions relating to fees should be surrendered to an external body on which the Government, local authorities, the professions concerned with building and client bodies should be represented. (67) It is not surprising that a sister professional society, the R.I.C.S., should have commented that it seemed extraordinary that any organisation would presume to succeed the professional society as the arbiter of such matters. (68)

While it would be quite wrong, and totally unjustified, to deprive a professional body like the R.I.B.A. of the right to issue guidance about fee levels, there may be a case for setting up an independent body representing clients whose purpose would be to comment on scales recom- mended by the professional institute. The justification for this in the case of the R.I.B.A. would be that, while not a “closed” profession, architecture is so closely identified in the public mind with the R.I.B.A. that the very pre-eminence of that body produces some of the character- istics of such a profession. The need for a “client’s watchdog” is doubt- ful however. The Government, considered as a client, is well able to take care of itself. The local authorities have powerful representative bodies of their own, such as the Association of Municipal Corporations. The smaller client may need some protection but while the Prices and Incomes Board continues it seems pointless to duplicate its operation. Here it is apposite to point out a remarkable discrepancy between two reports of the Prices and Incomes Board issued in the same year, 1968. While the report on solicitors, issued in February, rejected the idea of establishing an independent body to review earnings and charges from timne to timne on the ground that “the multiplication of bodies of this kind cannot be conducive to the establishment of a single coherent prices and incomes policy” (69), the report on architects issued thre.e months later suggested the establishment of just such a review body for architects. (70) This is how the fate of our great professions is nowadays determined.

In the third category of case, where the profession is neither “closed” nor dominated by a single institute, there seems no case for interfering with the normal right of the various professional bodies to make recommendations about fees. Again this is subject to overriding considerations such as the prices and incomes policy, upon the merits of which we can- not embark in this book. It is as well to temind ourselves however that even so extreme a critic of the professions as Professor Lees pauses in his

 attack to point out that: “There are profound objections to the regula- tion of prices by the state, not least that prices may be set wide of the competitive mark and regulation may continue after it has outlived its usefulness.” (71) Blowing off the Dust

The recent spate of criticism of the professions began with an article in The Times on 24th January 1966, headed “Blowing the Dust from the Professions”. This was a summary of Professor Lees’s criticisms. The journal of the Chartered Surveyors quickly came out with a spirited reply under the heading “Into Whose Eyes?”, and other professional journals followed suit. It was indeed all too easy to pick holes in Lees’s analysis, though this did not prevent its having a damaging effect. It is simnple for the uninformed to poke fun at professional rules, and to demand with an injured air that each and every one of them should be solely designed for the benefit of the public. The welfare of the profession itself can easily be shown by demogogic commentators to be an unworthy aimn. That they thus deny human nature troubles them not. It is easy, again, to sneer with the Prices and Incomes Board at “tradition” (72) as though the beliefs and ideals handed down by previous generations were invariably outweighed by the musings of those who only desire to be “forward-looking”.

However justifiable, irritation with its critics should not blind the professions to the need for periodic re-examination of its rules. Nor does it. The Bar Council, for example, began in 1962 a thorough reappraisal of its practices in order to discard those which were no longer justifi- able, and this has led to a number of important changes. The R.I.C.S. speedily responded to the suggestion by the Banwell Committee that the “contractor” rule should be examined (see page 86), and as we have seen the Law Society, the R.I.B.A. and

the Institute of Chartered Accountants have all recently examined and relaxed their rules on advertising. This activity is essential, if expensive in terms of adminis- trative cost. It is furthermore necessary to make known results of such examinations and to be ready with comprehensive defences of rules which are to be retained. Again, expense is involved.

Every reader of this book will have his own ideas about which professional rules constitute "dust" which should be blown off. Some may select the minute rules about the size and lettering of nameplates; others may choose the proliferation of designations in some professions and the misleading nature of some of these. It may be felt that some rules reinforcing the demarcation between THE CODE IN TODAY'S WORLD

221 professions need relaxing. It should be possible, for example, for a lay client to brief a barrister direct where the intervention of a solicitor is obviously unnecessary — as where a company employing a barrister as legal adviser wishes to take counsel's opinion (see page 94). Barristers, it might be thought, should not always insist on clients coming to them for conferences or be regarded as letting the side down if they disregard this rule. Rules against incorporation may, as suggested above (page 106-7), need to be modified. Many more examples could be added, but it is not the purpose of this book to presume to tell the professions what improvements they should make in their rules. What is certain is that no professional body can afford to neglect its defences. If it is not ready with a full and detailed justification, based on historical grounds but also taking account of modern condi- tions, for every so-called restriction which it retains, it is likely to meet continued criticism and ultimate state interference. Keeping up to the Mark

Another point on which the professions need to look to their defences concerns the enforcement of standards. We have discussed this question already (page 50ff.). It partly concerns the content of the code, particul- arly in relation to incompetence by a practitioner, and partly the extent to which its observance is insisted on.

The gravamen of the charge against the professions is undoubtedly that they pay too much attention to rules designed for their own pro- tection and too little to disciplining practitioners who fail in their duty to th& public. This is the constant refrain of commentators, both friendly and hostile.

We have in Part II of this book set out principles of professional practice which the public are entitled to see observed. Where they are not observed the public may justly expect something to be done about it by the profession. This may mean that clients should be encouraged, where they feel a sense of grievance, to put in a com- plaint to the appropriate disciplinary body. They should be told what the standards of conduct are, so that they may see whether they have been transgressed (books on professional ethics published by the institutes have hitherto been designed mainly for the infor- mation of their own members). The titles and addresses of discip- linary bodies should be included in standard works of reference, and the public given information about the procedure for lodging a complaint. The practice under which bodies such as the British Medical Association decline to pass on complaints to the General Medical Council should be discontinued. The institutes should no longer

 use the possibility of court proceedings as a justification for inaction; at least they should ensure that when court proceedings are complete the disciplinary body looks into the matter. Investigation by non- statutory bodies may be hampered by lack of powers available to courts, for example to compel the attendance of witnesses. There might be a case for giving such powers, under appropriate safeguards. The example of the Institute of Chartered Accountants should be fol- lowed in giving full information to members about the nature of charges in disciplinary cases, the results of proceedings and the penalties imposed. Perhaps the practice of the General Medical Council should be imitated, and hearings conducted in public. Certainly the public should be kept informed about disciplinary action. Loss of confidence owing to publica- tion of professional misdemeanours would be outweighed by knowledge that the profession believed in its standards to the extent of enforcing them rigorously.

An increase in the number of investigations and the publicity given to disciplinary proceedings would add to the already burden- some expenses of the institutes. Who should pay? The obvious answer is the erring practitioners themselves, in the form of costs and fines.

So far as concerns keeping practitioners up to the mark by making changes in the code, two points need to be stressed. One concerns the need to make adequate professional indemnity insurance mandatory, and to back this by fully developed accounting rules. The other is the treatment of serious cases of incompetence as misconduct. The profes- sions' oft-repeated claim that their rules operate directly or indirectly for the public's good would be much better received if they were seen to take account of this need of the public's to be protected against incom- petent practitioners. Where instances of widespread incompetence come to light, as for example in the case of some solicitors engaged in legal - aid work whose standards were criticised by the Widgery Committee (73), the professional body needs to take swift and effective action. It is not suggested of course that proceedings for incompetence should be brought in other than clear cases. Practitioners should not be harassed by the threat of proceedings over what amount to genuine differences of pro- fessional judgment, rival theories of some aspect of professional expertise or mere witch-hunting. Much professional advice turns on the attribute of judgment. Only in extreme cases can an error of judgment be held culpable on professional grounds.

Professional rules are unlikely to be obeyed unless they are known and understood by those to whom they apply. Apart from the need, mentioned above, for greater publicity within the profession for THE CODE IN TODAY'S WORLD

223 disciplinary proceedings there is also a vital need for proper training of new entrants in what is expected of them. Other professions might profitably study the R.I.B.A.'s practice of teaching and examining in rules of professional conduct.

Even if all these things were put into effect there would still, on the evidence of current enforcement statistics, be many breaches of rules which would be likely to go unpunished. This may be because the difficulty of securing evidence, and the time and expense of proceed- ings, are held not to justify formal action. Alternatively it may be because formal action has not seemed appropriate anyway. Many breaches of rules against advertising, touting or undercutting go unpunished. Since these primarily concern the profession itself it is for the professional body to take action or not, as it thinks fit. It is never healthy however to have in the rule book injunctions which are allowed to be broken with impunity. This weakens the respect paid to other more essential rules. One answer would be to put rules for which formal sanctions are considered inappropriate into a different category — perhaps regarding them as mere "etiquette". Breaches of etiquette would be visited by informal signs of the profession's displeasure — a rebuke from a senior member, perhaps, or a warning letter from the secretary of the institute. Rules of this kind have the great advantage that they are beyond the reach of outside busybodies, and are wholly in the hands of the profession itself. The Complaint of Monopoly

The consultant professions, or many of them, are accused of mono- poly by their enemies, and not infrequently by their friends. The term is freely employed by economists such as Ptofessor Lees, by students of the professions like Carr-Saunders and Wilson, by the Ptices and Incomes Board, and even by journals catering for the professions. Yet it is nowadays a pejorative expression, raising visions of unscrupulous extortioners preying on society. Lees distinguishes two forms of monopoly. A legal monopoly is said to exist where the state has by law prohibited persons outside the profession from providing the services in question. An effective monopoly exists where, al- though the state has not gone thus far, the profession is in a comparable position for other reasons, for example because the majority of clients, or perhaps a monopoly client, declines to give business to unqualified practitioners. Lees identifies thirteen profes- sions as being either legal or effective monopolies, of which eight are connected with medicine. (74)

Before going further we must ask ourselves whether, notwithstanding

 this wide use of the term monopoly in relation to the professions, it is a correct use of language. Dictionaries define the term as an exclusive right or privilege enjoyed by a particular person or body. By means of this right or privilege, in classical economic theory, the person or body will make profits exceeding those obtainable where there is no monopoly. Where demand is inelastic this may be done simply by raising prices; in other cases the method is to lower quality (and therefore costs) without lowering the price. Either way the public is exploited in a way not now considered justfiable.

Is this the case with the professions or any of them? By a confusion of thought it is supposed to be so. There is a professional body, usually a body corporate, and in the case of the legal "monopoly" at least it will usually be this body which has secured from the state the passing of laws prohibiting outsiders from practising. Is it then a monopolist? A little reflection will show that it is not. The professional services are not provided by the professional body, but by individual practitioners. The body itself cannot exploit the rights it has secured, since remunera- tion for professional services will pass straight to the practitioners. They are a host of individuals whose economic ends are their own and no one else's. Restrained only by the rules and traditions of their profes- sional brotherhood, they are each in active competition with one another. Their resources are not pooled, their work is not carried out in concert and their rewards are not shared. This is individualism, not monopoly.*

What then do Lees and others complain of when they refer to monopoly? Treating a profession as comprising all who are capable of exercising its arts, we can say that the complaint is against the unifica- tion of the profession. Unification, if effective, means that all practi- tioners agree, through an elected council, on what attainments qualify for practice, and what rules members should observe.

What complaints are levelled against unification masquerading as monopoly? Lees makes a halffiearted suggestion that practitioners gain *The Institute of Chartered Accountants showed its understanding of the real meaning of monopoly when defending to the Monopolies Commission the rules against poaching of clients by firms offering management consultancy services. Admitting that the rule protected small firms unable to provide these services themselves, the Institute said that such protection was in the public interest because "the encouragement of the large number of small firms within the pro- fession operates to prevent conditions favouring monopoly from developing".

 the reward of the classical monopolist. But after raising the hypothesis that professional incomes contain an element of monopoly rent, he admits that not only is there no evidence that this is so, but "there is no chance of testing the hypothesis." (75) Owing to absence of information "we cannot even make a start towards an answer". (76) Some pages later we find the professor has forgotten his depression (and indeed his conclusion) and is asserting that as a result of unifica- tion or "monopoly" consumers "lose out in the form of higher costs and prices". (77) A few pages later still we find, without evidence, that "the public are paying barristers too much". (78)

Hopefully, another horse is tried. If the unified group assumes power to control entry, it might artificially restrict the number of entrants in order to give monopoly advantages to those already quali- fied. As we have shown, there is no evidence that this is done, and Lees does not succeed in producing any. That horse won't run. Lees is thus reduced to general grumbles that "monopoly" reduces compe- tition; at one point he says, clearly wrongly, that it eliminates competition. (79) It is not surprising that the professor concludes that the problem of monopoly "seems less serious than is commonly supposed", and that where it exists there appear to be strong safeguards.

Although it is easy to explode such inconsistent and unsupported criticisms of professional unification, their very persistence shows that more is required. The best defence is to demonstrate real and substantial advantages, and not merely repel criticisms. That advantages exist, and are indeed substantial, has been amply demonstrated by Emile Durkheim, founder of the French school of sociologists. In Professional Ethics and Civic Morals, first published in 1950, he explains the social importance of professional groups and their codes. So valuable are they that he would see counterparts established in every field of industry and com- merce: "no reform has greater urgency". (80) Where institutes exist they enjoy a comparative autonomy "since each alone is competent to deal with the relations it is appointed to regulate". (81) They can only be

formed by bringing together individuals of the same profession. Without them there is in the field of morality between workers at the same task a vacuum. A system of morals is always the affair of a group and can operate only if this group protects its constituent members by its authority. Durkheim holds that the state itself is unfitted for this task "and its intervention, when not simply powerless, causes troubles of another kind". (82)

In a remarkable series of passages, Durkheim sets out the claim of professional ethics to rank higher than blind economic forces. They confirm the thesis of this book, and are of such importance as to

 demand extensive quotation. After showing that the moral crisis from which European societies are suffering springs from the growth of econ- omic and industrial activity, he continues: "A form of activity that promises to occupy such a place in society taken as a whole cannot be exempt from all precise moral regulation, without a state of anarchy ensuing. The forces thus released can have no guidance for their normal development, since there is nothing to point out where a halt should be called. There is a head-on clash when the moves of rivals conflict, as they attempt to encroach on another's field or to beat him down or drive him out. Certainly the stronger succeed in crushing the not so strong or at any rate in reducing them to a state of subjection. But since this subjection is only a de facto condition sanctioned by no kind of morals, it is accepted only under duress until the longed-for day of revenge. Peace treaties signed in this fashion are always provisional, forms of truce that do not mean peace to men's minds. This is how these ever- recurring conflicts arise between the different factions of the economic structure. If we put forward this anarchic competition as an ideal we should adhere to — one that should even be put into practice more radically than it is today — then we should be confusing sickness with a condition of good health. On the other hand, we shall not get away from this simply by modifying once and for all the lay-out of economic life; for whatever we contrive, whatever new arrangements be introduced, it will still not become other than it is or change its nature. By its very nature, it cannot be self-sufficing. A state of order or peace amongst men cannot follow of itself from any material causes, from any blind mechanism, however scientific it may be. It is a moral task. From yet another point of view, this amoral character of economic life amounts to a public danger. The functions of this order today absorb the energies of the greater part of the nation. The lives of a host of individuals are passed in the industrial and commercial sphere. Hence, it follows that, as those in this milieu have only a faint impress of morality, the greater part of their existence is passed divorced from any moral influence. How could such a state of affairs fail to be a source of demoralization? If a sense of duty is THE CODE IN TODAY'S WORLD

 to take strong root in us, the very circumstances of our life must serve to keep it always active. There must be a group about us to call it to mind all the time and, as often happens, when we are tempted to turn a deaf ear. A way of behaviour, no matter what it be, is set on a steady course only through habit and exercise. If we live amorally for a good part of the day, how can we keep the springs of morality from going slack in us? We are not naturally inclined to put ourselves out or to use self- restraint; if we are not encouraged at every step to exercise the restraint upon which all morals depend, how should we get the habit of it? If we follow no rule except that of a clear self-interest, in the occupations that take up nearly the whole of our time, how should we acquire a taste for any disinterestedness, or selflessness or sacrifice? . .

It is therefore extremely important that economic life should be regulated, should have its moral standards raised, so that the conflicts that disturb it have an end, and further, that individuals should cease to live thus within a moral vacuum where the life-blood drains away even from indivi- dual morality. For in this order of social functions there is need for professional ethics to be established, nearer the concrete, closer to the facts, with a wider scope than any- thing existing today . . . A system of ethics, however, is not to be improvised. It is the task of the very group to which they are to apply. When they fail, it is because the cohesion of the group is at fault, because as a group its existence is too shadowy and the rudimentary state of its ethics goes to show its lack of integration. Therefore, the true cure for the evil is to give the professional groups in the economic order a stability they so far do not possess." (83)

Durkheim sees the content of the code as a set of rules laying down for each individual what he should do so as not to damage collective interests and so as not to disorganise the society of which he forms a part. “If he allowed himself to follow his bent, there would be no reason why he should not make his way or, at very least, try to make his way, regardless of everyone in his path and without concern for any disturbance he might be causing about him. It is this discipline that curbs him, that marks the boundaries, that tells him what his relations with his associates should be, where illicit encroachments begin,

 and what he must pay in current dues towards the main- tenance of the community.” (84)

Durkheim demonstrates how working groups lacking a system of ethics deprive their members of the guidance needed to prevent anti- social sins. ln a vital passage he dismisses the argument of classical economists that this moral anarchy is a privilege of economic life: “But from what source could it derive such a privilege? How should this particular social function be exempt from a condition which is the most fundamental to any social structure? Clearly, if there has been self-delusion to this degree amongst the classical economists it is because the economic functions were studied as if they were an end in themselves, without considering what further reaction they might have on the whole social order. Judged in this way, productive output seemed to be the sole primary aim in all industrial activity. In some ways it might appear that output, to be intensive, had no need at all to be regulated; that on the contrary, the best thing were to leave individual businesses and enterprises of self-interest to excite and spur on one another in hot competition, instead of our trying to curb and keep them within bounds. But production is not all, and if industry can only bring its output to this pitch by keeping up a chronic state of warfare and endless dis- satisfaction amongst the producers, there is nothing to balance the evil it does. Even from the strictly utilitarian standpoint, what is the purpose of heaping up riches if they do not serve to abate the desires of the greatest number, but, on the contrary, only rouse their impatience for gain? That would be to lose sight of the fact that economic func- tions are not an end in themselves but only a means to an end; that they are one of the organs of social life and that social life is above all a harmonious community of endeavours, when minds and will come together to work for the same aim. Society has no justification if it does not bring a little peace to men — peace in their hearts and peace in their mutual intercourse. If, then, industry can be productive only by disturbing their peace and unleash- ing warfare, it is not worth the cost.” (85)

The same theme is taken up later, in language that must surely remind the most severely practical economist that economic man has other attributes as well. The individual, says Durkheim, finds decided advantage in taking shelter under the roof of a collectivity that ensures peace for him; he knows that anarchy is painful: “He too suffers from the everlasting wranglings and endless friction that occur when relations between an individual and his fellows are not subject to any regulative influence. It is not a good thing for a man to live like this on a war footing amongst his closest comrades and to entrench him- self always as though in the midst of enemies. This sensation of hostility all about him and the nervous strain involved in resisting it, this ceaseless mistrust one of another all this is a source of pain; for though we may like a fight, we also love the joys of peace; we might say that the more highly and the more profoundly men are socialized, that is to say, civilized — for the two are synonomous — the more those joys are prized. That is why, when individuals who share the same interests come together, their purpose is not simply to safeguard those interests or to secure their development in face of rival associations. It is, rather, just to associate, for the sole pleasure of mixing with their fellows and of no longer feeling lost in the midst of adversaries, as well as for the pleasure of communing together, that is, in short, of being able to lead their lives with the same moral aim.” (86)

Pure economic forces are amoral -- the tincture of morality, essential to social wellbeing, can arise only within groups. As religious groups decline, those of the professions assume greater, not less, importance. For many people today professional ideals form the only system of group morality with which they are in contact.

To attack the homogenity of a profession, to accuse if of “mono- poly” because it aims to comprehend all who practise its specialty, is to attack the potent source of social morality which Durkheim would extend throughout the sphere of labour and employment. To break the cohesion of natural groupings in the cause of marginally greater economic effectiveness might well prove one of the social disasters of the twentieth century.