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## THE POOR IMAGE OF THE PROFESSION AND THE ETHICAL PRESSURES ON THE MODERN LAWYER

RODNEY A. SMOLLA\*

### Introduction

In November 1996 I had the great privilege of attending the 22nd Annual Legal Ethics Institute at Washington and Lee University. It was an exceptional weekend of retreat and contemplation. This essay treats a number of the themes that were prominent in our discussions that weekend: the image of the lawyer in modern America, the tension between law and morality, the source of ethical intuitions and rules for lawyers, the currents of contemporary culture, and the ways in which those currents play into the evolving place of lawyers in our society.

### The Cultural Image of the Profession

Lawyers in America often complain about the cultural image of the profession. Movies, novels, public opinion polls, and lawyer jokes reveal a pervasive cultural doubt about whether the legal profession is honorable and the justice system just. At its worst, lawyers are seen as shysters and crooks, and the justice system as a variant of organized crime. Under this view, lawyers routinely bribe juries, manufacture or destroy evidence as their needs require, suborn perjury, force or alter documents, and generally "do what it takes" to win, service their clients, and earn large fees.

But while any sensible person understands that corrupt lawyers and judges certainly do exist, the poor cultural image of lawyers does not stem primarily from a belief that most lawyers and judges are actually criminals. The poor image instead comes from a widely shared sense that there is something *intrinsic* in the American legal system and *intrinsic* in the American concept of what it means to be a lawyer that tends to drain the system and its participants of moral sensibility. The problem with the legal

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profession is not that it is affirmatively immoral, but that it is passively amoral. The problem is not that Americans believe that lawyers are liars, but that they believe lawyers do not tell the truth.

### **The Legal Profession's Defense**

The classic response of the profession to all of this is that the people just do not understand. The American Bar Association attacks the portrayal of lawyers as sharpsters in movies and television programs as cheap, unfair sensationalizing that undermines public confidence in the integrity of the legal system. Even lawyer jokes are seen as corrosive, for they reinforce the false cultural perception that lawyers are mostly scorpions and vipers.

In defending itself, the profession argues that what the movies and lawyer jokes fail to show us are all the attorneys who devote themselves to championing the rights of the poor and oppressed, who dedicate themselves to the preservation of civil rights and civil liberties, who labor tirelessly to ferret out frauds and charlatans, who take on clients and causes for no compensation, all because they believe it is the right thing to do. The legal system is adversarial, and all who attempt to navigate it need and deserve vigorous representation. There are strong ethical rules that govern this adversarial system, and most lawyers strive earnestly to stay within the bounds of those rules. Ethical concerns are prominent within the profession, and disciplinary boards police violations conscientiously. We are a robust people with a robust justice system, but we should not confuse aggressive lawyering with immoral or amoral lawyering. To be sure, most lawyers are trained to pursue the interests of their clients with a certain single-minded focus, but this is a good thing, not a bad one, and ultimately draws from the same competitive ethos that animates all other sectors of the free-enterprise economy.

### **The Curious Failure of the Defense**

The legal profession's defense of itself is, on the face of it, highly credible and seemingly persuasive. But if so, why has it done so poorly in the court of public opinion? The one thing lawyers are supposed to be good at is making a convincing case. Yet lawyers seem to have lost this one. How can this be?

There is a temptation, of course, for lawyers to dismiss their collective bad image as simply that: an image problem. If image is all that

is at stake, the problem may be an annoyance but it is hardly grave; attorneys are presumably tough enough to weather jokes and sleazy dramatic portrayals.

Many, both inside the profession and out, however, may wonder if more is at work. Perhaps in the dissonance between image and reality something is revealed. Perhaps the gap between the noble ideal of the law as an honorable profession and the popular perception of the law as something less is worth plumbing for what it may uncover about the nature of lawyering and the currents of modern culture.

### The Difficulty of “Big Picture” Defenses

A major shortcoming of the legal profession’s defense is that it requires a vision of the big picture and a sense of the long run. “Big picture” and “long run” defenses are never as gripping as the indictment immediately before us. Lawyers often *seem* immoral or amoral because we are focused on behavior in a particular case, in which it appears that the machinations of the lawyer, the clever moves and vigorous advocacy, caused the system to reach the “wrong” result. The profession’s response is structural: we must look not at the result in *this* case, but rather the *system’s* dependance on the adversarial process as the only reliable *long term* test of truth.

### The Adversarial System and How Americans Love a Winner

The weakness of the “big picture” defense exposes an ambivalence many Americans may have about the adversarial system itself. On one level, our adversarial system is quintessentially American. We do not rely on public opinion, conventional wisdom, orthodoxy, or consensus to decide the outcome of legal disputes, but instead employ professionally trained advocates to represent the opposing sides vigorously and battle it out. In defending freedom of speech, Oliver Wendell Holmes wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” The same might be said of how we test for truth in the legal system, placing our reliance on the power of a proffered fact or argument to gain ascendancy in the legal “marketplace” of juries and judges.

No juror or judge can *know* whether O.J. Simpson committed murder. The best we can do is allow the criminal prosecutors (or the

plaintiffs' lawyers in a civil suit) to contest the evidence to the hilt, leaving juries to decide matters after weighing the presentations of both sides. To many this may seem as American as it gets, as American as the old west, presidential debates, or the National Football League. Few would express admiration for a lawyer who is an outright crook, bribing judges and witnesses, but many Americans *do* express admiration, at least with a wink and a nod, for the lawyer who is "sharp" if not an actual sharpster, the lawyer who can bend the rules or stretch the rules or tweak the system to secure a win despite long odds. While many Americans were upset by the jury's acquittal of O.J. Simpson, seeing it as a breakdown of the legal system and a triumph of appeals to racial identity, many others not only delighted in the verdict, but hero-worshiped Simpson's lawyer Johnnie Cochran as someone who truly seemed willing to do whatever was required to secure victory. In a culture that revels in contest, it is only natural that rewards will come to those who win. Vince Lombardi said that winning isn't everything, it's the only thing. And George C. Scott, in his famous film portrayal of General George Patton, exclaimed that "all *real* Americans love a winner, and will not tolerate a loser."

### **The Adversarial System and the Constitutional Faith in the Marketplace**

Holmes wrote of the marketplace of ideas: "It is an experiment, as all life is an experiment." Holmes had no doubt about the wisdom of experiment, and certainly no doubt about its constitutional pedigree; reliance on the open marketplace, he claimed, was "the theory of our Constitution."

Yet this linkage between the adversarial system, the faith in the marketplace, and the Constitution does not solve the mystery of the legal profession's bad image. On the contrary, it serves to deepen it. American lawyers may plausibly contend that their adversarial mode of operating is not just a good idea; it is an idea embedded in the *Constitution* itself. With all this going for them, why do they still do so poorly in defending themselves?

### **Lawyering as a Life of Splits**

Perhaps there are clues to the causes of the poor image of the profession to be found in exploring the recurring conflicts that lawyers

confront within the adversarial system, and the toll exacted by those conflicts on the human struggle to find value and meaning in life. A modern lawyer is constantly forced to engage in “splits” in life, splits that are fully justifiable morally and functionally necessary if a lawyer is to fulfill his or her societal function. But these splits may come at a price. They may take their toll on the psychological well-being of the individual lawyer. They may take their toll on the cultural image of all lawyers.

### *The Split of Representation*

The very act of *representation* can create ethical tensions. When I *represent* another, I speak not entirely in my own voice, for my own reasons, out of my own conviction. I speak *on behalf of* the interests of another. This is, at its core, a perfectly honorable exercise, perfectly natural and functionally necessary; society could not work without it. But doing this all the time—constantly speaking *for others* rather than *for oneself*—has its consequences. On a subtle level, speaking always and only for others tends to slowly corrode *authenticity*. Many of the traditional pejoratives aimed at lawyers capture this. The lawyer is “mouthpiece” or “hired gun.” He or she has no personal moral gyroscope but merely takes on whatever cause is at hand, believing in whatever the client needs to be believed in. A lawyer can become an actor, always playing a role, with no authentic self discernable to others, and at its most destructive, no authentic self discernable to the self.

### *The Split of Doubt*

The split of representation may cause corrosion even when one generally agrees with the interests of one’s clients. Far less subtle, however, is the “split of doubt,” the infamous conflict that arises from being placed in the position of having a duty to energetically advance the interests of a client whom the lawyer, at some inner level, believes is in the wrong. At its most dramatic level, this occurs when a criminal defense lawyer strives with unchecked vigor to secure the acquittal of a defendant whom the lawyer believes to be guilty. Very few practicing lawyers have not been asked the question, at some point in their lives, “How can you lawyers defend people you know are guilty?” It does not matter that the lawyer asked the question specializes in tax, bankruptcy, real estate, or immigration law; it does not matter that he or she may never have

represented a criminal defendant, or may never even have set foot in a courtroom. At certain visceral levels, all lawyers are lawyers, all lawyers are Johnny Cochrane, urging “If it doesn’t fit, you must acquit.” All lawyers are challenged to explain, in cocktail party conversations, in lectures before the Rotary Club, in family gatherings at Thanksgiving, “How can you lawyers represent people you *know* are guilty, and get them off on technicalities?” After a glass of wine or two, the questioning may get sharper and more righteous, with the interrogator invariably adding, “I could never do that!”

Now lawyers, to be sure, are well trained to deal with these questions. They repeat the stock answers, explaining how every person is presumed innocent until proven guilty, how the Constitution guarantees criminal defendants the assistance of counsel, and how there is an important distinction between *factual* guilt (well, yes, he did stab her) and *legal* guilt (it was not proven beyond a reasonable doubt that he stabbed her with premeditation). But these explanations are typically met with snickers and even deeper self-righteousness. These systemic answers do not entirely wash with the non-lawyer public. And indeed there is a general suspicion that they do not so completely wash with lawyers themselves—at least, that they would not wash if lawyers could be given a truth serum and made to say what they really think. Many people just cannot accept that lawyers do not feel at least *some* qualms about defending the clearly guilty. How can they not?

### *Splits in Persona and the Role of Role*

Another important split is the compartmentalization of persona. This is not a phenomenon unique to lawyering, but lawyering implicates a constant and often intense version of it. I call this the “role of role.” The “role of role” is a constant consideration in moral and ethical behavior. A person might say, for example, “Let me offer you this advice. I’m not speaking as your doctor now, but as your friend.” This sentence pattern gets repeated in endless permutations. I am not speaking as your lawyer now, (or your teacher, or as any professional role we might substitute). I am speaking as your friend (or your spouse, or your parent, or some other social or familial role we might substitute).

What are we to make of the role of role? Is it a positive or a negative that we are often tempted to give different answers to questions, or behave differently in resolving ethical conflicts, based on the role we are in at the

time? On one level, the answer must be that these differences in behavior are justified. We must accept the role of role, if roles are to mean anything. The clearest example of this involves confidentiality. One of the defining characteristics of many official roles is that one is made privy to information that one is supposed to keep in confidence. The priest and the penitent, the psychological counselor or medical doctor and patient, the lawyer and client—all have relationships of confidentiality imposed by ethical tradition and legal rules.

Yet even here there is a price to be paid. Sometimes one's intuitive ethical response to a problem will vary dramatically depending on what "hat" one is wearing. If you can look in the mirror and plainly see only one hat on your head, you will usually be fine. But vision may become blurred or doubled by a crisis; it may become difficult to see clearly what hat it is that is on one's head, or even more disorienting, one may seem to see two hats at once. Moving in and out of different personas too quickly can cause a person to get the psychic bends. Lawyers are not immune from this disease; like other professions in which the role of role is dominant, they may get sick from rushed decompression.

### *The Split Between Moral Absolutes and Modern Realism*

The typical practicing lawyer will probably not have the time or disposition to take notice of it, but modern lawyers are also plagued by a split that comes from long-term movements of intellectual history.

During the reign of natural law thought, a reign prior to the positivism of philosophers like John Austin or the realism of thinkers such as Oliver Wendell Holmes, Karl Llewellyn, and Jerome Frank, the legitimacy of law was joined directly to fundamental religious or philosophical absolutes. Natural Law thinkers like Thomas Aquinas tied the legitimacy of human law to God's law. Social Contract thinkers like John Locke and Thomas Hobbes managed to ground human law in concepts of natural law that were still absolute and immutable, though perhaps without requiring a belief in God.

The positivists, however, entirely divorced law from morality, and law from absolutes. John Austin maintained that law was no more and no less than a command from the sovereign enforced through sanction when disobeyed. The existence of law was one thing, its merit or demerit another. Austin's view of law was stark and brutal, and would later be echoed in Chairman Mao's proclamation that all law comes from the mouth of a gun.

As human law became divorced from larger philosophical and religious systems, the place of the lawyer changed. A lawyer was no longer someone who toiled in matters absolute or holy. The “stuff” with which lawyers worked—their constitutions, statutes, and judicial precedents—was now seen as the creature of human hands, not the hand of God or the axioms of the Universe. The positivists taught that law was simply the command of the sovereign. The realists emphasized the highly contingent nature of those commands. Law was now simply the dictate of power, and the business of the lawyer was to predict and influence power struggles. From the perspective of clients, the job of the lawyer was as important as ever. But it lost its mysticism, and much of its majesty.

A second consequence of modern positivism and realism was a divorcing of ordinary principles of legal ethics from any larger system of moral thought. As water cannot rise higher than its source, the ethical rules that governed lawyers could not claim any higher moral plane than the substantive legal principles with which lawyers worked. Ethical rules were simply another species of law itself. They might coincide with religious or moral precepts, just as substantive laws might coincide with such precepts, but ethical rules were still, ultimately, of human manufacture and the result of the same struggles for power that produced the laws of procedure, tort, contract, or civil rights.

One of the beneficial consequences of positivist and realist thought was emancipation. Lawyers were now philosophically free to treat all law as subject to revision. Everything was now *conceivably* in play. Lawyers could constantly “push the envelope,” seeking to modify legal rules, with no qualms that in attempting to change legal precepts they were defying the will of God or upsetting the natural order of the Universe.

The modern lawyer, of course, may well have strong philosophical or religious beliefs, an abiding moral sense of right and wrong that derives from those religious or philosophical beliefs, and a reluctance to advance a legal cause or attempt to modify the law in such a way that would conflict with those beliefs. But many legal issues will not be tied in any clear way to the lawyer’s religious or philosophical views. A lawyer might well feel philosophically comfortable with either side of a legal dispute. In such a case, the lawyer will tend to see the legal dispute as a “game” of sorts, a game of power allocation, a game that may be enormously serious and important, but a game without deep moral implications, at least without any moral implications that are from this lawyer’s perspective readily discernable.

Because ethical rules are *also* a species of law, some lawyers are also likely to see many ethical rules as subject to change and evolution every bit as freely as rules of substantive law. Just as modern American lawyers may feel great freedom to push the envelope of tort or contract, they may feel corresponding freedom to push the envelope of ethical cannons. While some ethical cannons may coincide with lawyers' larger religious or moral beliefs, many may not, just as many principles of substantive law may not, and in such cases there is likely to be a sense of contingency, mutability, and endless contest to ethical principles.

*The Split Between the Lawyer as Warrior  
and the Lawyer as Facilitator*

A new, emerging split within the profession is the divergence between the ideal of the lawyer as a combatant and the ideal of the lawyer as a facilitator of resolution. This is a split that may ultimately prove to be a positive for the profession.

In a fiercely adversarial system, lawyers may come to see their role as that of warriors, trained to seek the unconditional surrender of the adversary. Much of the current momentum toward the exploration of different forms of alternative dispute resolution, however, is animated by a different vision of the lawyer: the lawyer as a mediator, a problem-solver, a facilitator of resolution. Now the goal is not to crush the enemy, but to work with the other side, looking for a settlement that all can live with and that allows the real business of life to move forward.

The skills of reaching resolution are not necessarily the same skills as those that make for dominating an adversary. The ability to see the world from the other side's perspective, to make realistic assessments of one's own needs, to massage disputes in the search for common ground, to maintain lines of communication and dialogue—all help in reaching satisfactory settlements. These talents and affinities do not always co-exist peacefully with such attributes as tenacity and gamesmanship, qualities that are often seen as more likely to produce litigation victory.

As lawyers are called upon increasingly by a restless society to play the role of problem-solvers and dispute resolvers, the intensity of some of the more corrosive splits talked about in this essay may abate somewhat. Lawyers may find themselves engaging in a more holistic version of legal practice, with the side benefit of living less split and more whole professional lives.

### **Conclusion: Thoughts on the Split Between Action and Contemplation**

The final split is the dichotomy between action and contemplation. Law on the street is law in action, law as applied science, law as hustle and bustle and billing, law in which the lawyer is constantly pressed to act, react, move and respond on instinct or instant judgment. Day-in-and-day-out it is not a life for the faint-hearted, nor one that offers much time to develop the inner poet or philosopher.

Ironically, however, the *training* of lawyers is, in its classical form, largely an *intellectual* enterprise, an enterprise designed to broaden the life of the mind. The modern law school heavily emphasizes philosophy and public policy in its curriculum. Indeed, as a general matter, the more elite the law school, the more likely it is that the mode of instruction will heavily integrate discussion of legal doctrine or practical lawyering skills with instruction in economics, sociology, science, history, philosophy, and literature. Elite law schools are very much extensions of traditional liberal arts education.

In *law school*, though not necessarily in *legal practice*, students with a touch of the poet, with a flair for philosophical rigor, will often out-perform students with more pragmatic talents. For many lawyers, this split is easily dealt with. You struggle through law school and all the theory they teach you there, then you take the bar exam, which is largely rote memory and little philosophy, and then you hang your diploma and your license on the wall and you hunker down to actual *legal practice*, leaving all that theory behind in the memory bank where we file rites of passage.

For a surprising number of lawyers, however, the split between the philosophical issues discussed in law school and the press and pressures of practice creates a nagging discontent. Many lawyers feel undernourished by practice; they long for an occasional philosophical interlude, for a respite for contemplation, for the soul-food of poetry and theory. A lawyer lucky enough to occasionally practice in areas of the law where “the great issues” are front and center in legal dispute may not have this problem. But most lawyers do not have this luxury. This accounts for the fact that when Continuing Legal Education Programs offer the occasional program on legal philosophy, or moral conflicts in the law, or law and literature, they quickly tend to become over-subscribed. Lawyers with no time for contemplation or reflec-

tion in their practice may gradually come to feel hollowed out and burned up, needing retreat and contemplation to replenish their inner stores.