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Professionalism: The Deep Theory

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PROFESSIONALISM: THE DEEP THEORY

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Recently I went to a little shop in Georgetown to buy my wife a teapot. The owner was a charming old lady with a sweet smile. We started talking, and she asked me what I did.

"Oh," I said, "I'm a law professor."

She smiled again and asked, "Does that mean you train lawyers?"

"Why yes," I replied.

"Well," she said, "perhaps you can help me answer this question: if a litigator, a divorce lawyer, and a corporate counsel all jump at the same time from a ten story window, who hits the ground first?"

"Gosh," I said, "I don't know!"

With the same sweet smile she looked up and said, "Who cares?"

The profession of being a lawyer has been the focus of my academic work as a legal historian and as a specialist in legal ethics. More important, it has been the business of my life, as it has been the business of your lives. I have taught for twelve years in four law schools and have practiced law for ten years. I believe that my profession, and your profession, is in deep trouble today. The question is, "Who cares?"

Notice my choice of words. It is not our "occupation," our "career," or our "vocation" that is in trouble. It is our "profession." There is a big difference among these terms. "Occupation," from the Latin *occupatio*, refers to "means of passing one's time"[1]—simply a way to pass the time each day. I hope we all are doing more than this! "Career" is somewhat more elevated. It comes from the Latin *carraria*, or "vehicle," and refers to a forward motion through life.[2] It shares the same root word as "careen"[3]—the way vehicles are driven in Boston. Some of us are certainly "careening" through life, and yet, there should be more. Finally, there is "vocation," from the Latin *vocare*, meaning "to call."[4] Historically, it refers to a divine call in the sense of being fit for something, talented in something.[5]

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1. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 702 (J.B. Sykes ed., 7th ed. 1982).

2. *Id.* at 139.

3. *Id.*

4. *Id.* at 1202.

5. *Id.*

Simply passing your time in an occupation, or careening through life in a career, or even being called by your talent to a particular job does not require anything from *you*. But being a "professional" most certainly does. Here the root is the Latin *professio*, or "declaration,"[6] referring to a vow, a declaration of belief—an avowal made by *you*. All of you have taken "professional" oaths. These oaths require you to uphold the rule of law and to obey the regulations of the bar. They are not equivocal. You took these oaths in open court. If your word means anything, you are committed to this formal "profession" of obedience and to other "professional" duties.

This obligation is a deeply personal one. It is a delusion of young, inexperienced lawyers to think that they can separate their personal from their professional lives and their personal from their professional morality. The current jargon refers to this dichotomy as "role-defined" ethics. It is true intellectual rubbish. As Aristotle observed:

> The man, then, must be a perfect fool who is unaware that people's characters take their bias from the steady direction of their activities. If a man, well aware of what he is doing, behaves in such a way that he is bound to become unjust, we can only say that he is voluntarily unjust.[7]

You cannot be a bad person and a good lawyer, nor can you be a good person and a lawyer with sharp practices. A lawyer who behaves like a jerk in court is not an "aggressive advocate" with an "assertive strategy," but a jerk.

I was told that W.C. Fields once paused by a tombstone that read, "Here lies a lawyer and an honest man" and remarked, "How did they get two bodies under there?" We can't split ourselves down the middle. Indeed, the word "integrity" itself comes from the Latin root *integritas*, as in "integral" and "integration."[8] It means "wholeness" or "oneness." There is just one of each of us.

This means our professional identity as lawyers is at the center of our personal morality. And where do we get this identity? From our legal education, both at law school and, equally importantly, from the bar itself. Some of the most important lessons I have learned about professional ethics came not from my law professors but from my law partners and, indeed, from my professional adversaries in the heat of trial.

I believe our profession is in crisis today not because the American Bar Association has a bad media strategy, but because we have lost sight of

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6. *Id.* at 821; *see* D.P. SIMPSON, CASSELL'S NEW LATIN DICTIONARY 477 (1959).

7. ARISTOTLE, THE ETHICS OF ARISTOTLE 91 (J.A.K. Thompson trans., Penguin Books 1955) (1953).

8. THE CONCISE OXFORD DICTIONARY, *supra* note 1, at 521.

the "deep theory" of professionalism in the classroom, in the office, and in the courtroom. What is a "deep theory?" Let me explain.

"Deep theory" focuses on our ultimate motivation for obeying rules.[9] There are three common categories: "goal-based," "rights-based," and "duty-based." Goal-based deep theories focus solely on political or economic outcomes. Examples include Marxism, fascism, and utilitarianism. If obedience to a rule promotes your goal, then obey it. If it doesn't, then don't, unless you might get caught. Suppose you obey the *ABA Model Rules* because if you don't, you might get disbarred, and you won't be able to afford that new car. That's a goal-based deep theory. From Marx to Machiavelli, goal-based theories have been easy to understand and implement. Best of all, they require no intrinsic test of the means that you employ to achieve your goal.

Recent developments in legal education, particularly legal realism and critical legal theory, have emphasized the function of law as an "instrument" to achieve particular political, social, or economic ends.[10] This is legal education with a goal-based deep theory. The older ideals of a "neutral" rule of law have been debunked as, at best, a pious myth, and, at worst, a deliberate effort by the powerful to exploit the weak under an illusion of "fairness" of principle. Many students become convinced that professionalism means being willing to pursue the ends of others, irrespective of the means. It ultimately puts the client, for good or bad, in the driver's seat, and the ideal of justice becomes secondary.

This goal-based deep theory of education is very old. Indeed, it goes back to Greek philosophical schools known as the "Pre-Socratics."[11] One of these schools taught that all morality is relative: What's good for you is good for you, and my notion of goodness is entirely personal as well. There is no objective standard of a good person or of good conduct. This school was called the Cynics, from which we derive the pejorative word "cynical." The Pre-Socratics, however, did not treat such notions of moral relativism as inherently bad, and neither do many modern American law teachers.

If you subscribe to the School of Cynics, or moral relativism, your goal in teaching is to equip each student to pursue as ably and effectively as possible her individual view of what is good. The Greek Pre-Socratics called this doctrine the Sophist School. The Sophists taught rhetoric, logic,

9. For a discussion of "goal-based," "rights-based," and "duty-based" "deep theories," see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 172-73 (1977).

10. *See* Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250 (1978).

11. For an engaging, if elementary, introduction to the Pre-Socratics, see BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 3-81 (1945). *See also* ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS 14-25 (1966).

and advocacy. If you used these skills to promote a military dictatorship, such as Sparta, well fine. If you used them to support a democracy, such as Athens, fine again. If your view of the good led you to become a swindler, well, that was your business, too. Cynicism and Sophism, in the classical Greek sense, are alive and well in American law schools today. Moral relativism and its corollary—a theory of "professional" teaching that equips each future lawyer to pursue whatever ends she or her client may choose—may be found everywhere. Thus, moral relativism and goal-based deep theories go hand in hand.

In the final analysis, however, democracies are poor settings for goal-based deep theories. As you may have noticed, democracies have trouble getting anything done efficiently. At least in the short run, totalitarian regimes—even very evil regimes—can pursue some ends better than democracies. Our faith in a democratic rule of law cannot be solely instrumental. Consequently, most democratic systems, including our own, have historically been founded on rights-based deep theories rather than goal-based theories. The focus in a rights-based deep theory is on human freedom. Perhaps the most famous modern rights-based deep theory is that of John Rawls. He asks us to imagine ourselves in an "original position," a kind of meeting before we are born—ignorant of our sex, race, size, health, intelligence, social, or economic class.[12] What ground rules would we all agree to? Rawls postulates at least two. Put roughly by Ronald Dworkin they are "that every person must have the largest political liberty compatible with a like liberty for all" and "that inequalities in power, wealth, income, and other resources must not exist except insofar as they work to the absolute benefit of the worst-off members of society."[13] These so-called "principles of justice" in turn become touchstones to test the validity of all positive laws.

The trouble with rights-based deep theories is that they are excellent for defining the parameters of personal freedoms, but are less helpful in making critical choices within our own area of freedom. We can live an almost totally depraved life in complete accord with the Constitution and laws of the United States. Indeed, one could argue that we have a legal "right" to lead a depraved life. Put bluntly, rights-based deep theories are powerful tools for defending the freedoms of clients and of other people in general. As professionals, however, do not really help us *personally*, because they fail to answer the affirmative questions such as what exactly we must *do* to be a good person and a good lawyer.

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12. *See* DWORKIN, *supra* note 9, at 150-181. Dworkin provides an excellent introduction to John Rawls's great but difficult book, A THEORY OF JUSTICE (1971).

13. DWORKIN, *supra* note 9, at 150.

This leaves us with duty-based deep theories. Many of them have fancy names, like "Neo-Platonism," "Neo-Kantianism," and "Neo-Thomism." In fact, duty-based deep systems are familiar because they are founded on the great classical and religious traditions that we so widely share.[14]

A key tenet of a duty-based system is that good acts do not necessarily lead to good results, at least not in this life. All great religions put us on notice that a good, even holy, life will not necessarily be free from cruel blows and bitter disappointments. If we measure our success by achievement, such as political or economic power, or by glory, we cannot ensure these results by being virtuous. Indeed, goal-based philosophers such as Machiavelli argue that we actually can be rewarded for doing evil, particularly if we pretend to do good in public and do evil in secret.[15]

Here is a true historical irony. If we go back to the origins of our professional traditions in the Inns of Court, or to the foundations of the American legal profession and the first American law schools, we will discover a duty-based deep theory for the formalization of legal education in the Anglo-American tradition. Law was initially taught as a humanistic study in both American and English universities.[16] The Inns of Court—the ultimate source of the "barrister ideal" in English law—strengthened the identification of individual lawyers with the system of justice.[17] Maintain-

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14. *See* F.H. BRADLEY, ETHICAL STUDIES 162-74 (1990); A.C. EWING, ETHICS 49-61 (1965); *cf.* Bernard Williams, *Politics and Moral Character*, *in* PUBLIC AND PRIVATE MORALITY 55, 66-71 (Stuart Hampshire ed., 1978) (discussing the desirability of immoral acts to reach legal or political ends). For an explanation of duty theory from the master himself, see IMMANUEL KANT, *Theory and Practice Concerning the Common Saying: This May Be True in Theory But Does Not Apply in Practice*, *in* THE PHILOSOPHY OF KANT 412, 412-29 (Carl J. Friedrich ed., 1949).

15. *See* NICCOLO MACHIAVELLI, THE PRINCE 43-49 (W.K. Marriott trans., 1958).

16. For a discussion of the role of humanism in early English university study of law, see HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 120-64 (1983); DANIEL R. COQUILLETTE, THE CIVILIAN WRITERS OF DOCTORS' COMMONS, LONDON 24-27 (1988); FRANCIS DE ZULUETA & PETER STEIN, THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200, at xiii-xxvii (1990); ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 185-90 (1965); 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 118-19 (2d ed. 1898).

For a discussion of the role of humanism in early American legal education, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 84-85, 278-82 (1973); Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, *in* LAW IN COLONIAL MASSACHUSETTS 359, 359-418 (Daniel R. Coquillette et al. eds., 1984).

17. For an introduction to the importance of the Inns of Court, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 187, 194-96 (3d ed. 1990); SIR ROBERT MEGARRY, INNS ANCIENT AND MODERN 3-14, 48-50 (1972); E.W. Ives, *The Common Lawyers*, *in* PROFESSION, VOCATION AND CULTURE IN LATER MEDIEVAL ENGLAND 181, 181-217 (Cecil H. Clough ed., 1982). For more detailed studies, see J.H. BAKER, *The Inns of Court in 1388*, *in* THE LEGAL PROFESSION AND THE COMMON LAW 3, 3-6 (1986); J.H. BAKER, *Learning Exercises in the Medieval Inns of Court and Chancery*, *in* THE LEGAL PROFESSION AND THE COMMON LAW, *supra*, at 7, 7-24; E.W. IVES, THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND 7-89 (1983); DAVID S.

ing this identity was seen as a professional duty. The diaries and legal papers of early American lawyers, including John Adams, Thomas Jefferson, and Alexander Hamilton, show that they shared these ideals.

I do not have time here to trace the details of how American legal education left its roots for the more modern emphasis on goal instrumentalism. But I do believe this shift lies at the heart of our identity crisis as a profession. This is not a superficial problem. It cannot be solved by required ethics courses or media consultants. It requires a major reexamination of what we, as lawyers, are doing with our lives every day.

Now here is the good news. While the task of refocusing legal education on its humanistic roots and on the duties of professionalism is a vast one, we, as individual lawyers, can act now.[18] These are, after all, our lives and our profession.

Let me close with a true story. The ABA Ethics Committee usually spends its time wrestling with complex cases of conflict of interest or confidentiality. Last spring, however, we had a case that was simplicity itself. A lawyer's secretary was out sick, and the "temp" erroneously put a top secret client report into an envelope addressed to the opposing attorney. (The demand letter that was supposed to go to the opposing attorney went into the client's envelope.) The lawyer discovered the mistake after the mail had been dispatched but before it had been delivered. He called the lawyer on the other side and asked him to please return the envelope unopened, as it contained privileged, confidential client material. The other attorney refused to return the letter without his client's consent and the client said, "Open it."

The ABA Ethics Committee argued about this case for two days.[19] Twenty years ago, I experienced a similar incident. The senior partner of my firm mistakenly received a top secret report from the opposing side. He took two minutes to return the letter unopened, observing that the integrity of the legal process rested in mutual trust between lawyers and that "we could lose any client, but not our self-respect."

LEMMINGS, GENTLEMEN AND BARRISTERS: THE INNS OF COURT AND THE ENGLISH BAR 1680-1730 (1990); WILFRED R. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 1590-1640 (1972); WILFRED R. PREST, THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR 1590-1640 (1986); J.H. Baker, *Introduction* to 2 READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY at xv, xv-xxxiii (Samuel E. Thorne & J.H. Baker eds., 1990).

18. Let me be clear about one possible point of misunderstanding. No sane legal historian wishes to return to the past. Many aspects of both the early English and American bars were unattractive and unjust. What I wish to do is to revive certain ideals of professional duty. This exercise, by its nature, focuses on the best achievements of the past. It ignores the worst, and even the typical.

19. In the end, the committee decided that the lawyer should return the envelope. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992).

Self-respect demands that we get away from the intellectual tyranny of instrumentalism. We are not just means to someone else's ends. We have a far prouder heritage, which, unfortunately, has been obscured in the classroom. This heritage is founded on our ancient duties: to protect the rule of law as an ideal, to serve the system of justice on which our democracy is based, and to study and promote humanism—the mutual bonds of our humanity on which peace itself ultimately depends.

I will be happy to answer your questions about what I, as a legal educator, am trying to do about this in the law school setting.[20] But there is a more important point. This profession does not belong to the law professors. It belongs to you and me as lawyers. Each day, and each hour, in our own professional lives, we possess the power to return to our profession's fundamental duties and roots. In countless small acts, such as returning envelopes, we can return the dignity. We can return the sense of self-respect. The ultimate answer to the question "Who cares?" has to be, "We do."

20. One step currently underway at Boston College Law School is to require both introductory and advanced courses in legal ethics. The latter are for the third-year students and are taught in relatively small classes with a personal emphasis. I have just completed materials for such a course that applies the classical methodologies of Western ethical philosophy to practical, professional problems. *See* DANIEL R. COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY (forthcoming 1994).