

1998

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Michael B. Brennan

Alexander Dushku

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Repository Citation

Michael B. Brennan and Alexander Dushku, *Each Lawyer's Crisis*, 81 Marq. L. Rev. 831 (1998).
Available at: <https://scholarship.law.marquette.edu/mulr/vol81/iss3/6>

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EACH LAWYER'S CRISIS

MICHAEL B. BRENNAN*

ALEXANDER DUSHKU**

In recent decades, more than the economics of law practice has changed. Who lawyers think they should be has changed. In the past, lawyers saw themselves as professional advocates, officers of the law, detached from personal reward. But along with the profession's economic changes, this idealistic view of a lawyer has been replaced by one where the lawyer makes whatever arguments or takes whatever actions to achieve his client's desired result.

In this short essay, we take issue with this change. We submit that the loss of (or more particularly, the relativization of) the ideal of who a lawyer ought to be places each lawyer in a crisis. Each lawyer must choose for himself the image to which he should aspire: How will I practice law, and for what ends?

I. CRISIS IN THE PROFESSION

The legal profession has hit hard times. Beyond bad public relations—lawyer jokes—America has a widespread and growing disapproval of lawyers.¹ Much of the public believes (perhaps rightly) that lawyers are driven primarily by the desire to attain profits for themselves and for their firms. This meshes with lawyers' laments of the commercialization of their profession. Marketing directors, consultants, and headhunters often hold sway over senior partners focused on revenue-per-attorney. Law firm economics shift from downsizing to mergers or the acquisition of partners, practice groups, and even whole law firms.

The commodification of the legal profession, where the product is the labor of fungible associates (and partners), is a given today. Judge

* B.A. Notre Dame 1986, J.D. Northwestern 1989. Mr. Brennan is an Assistant District Attorney for Milwaukee County, Wisconsin.

** B.A. Brigham Young 1990, J.D. Brigham Young 1993. Mr. Dushku practices constitutional litigation with Kirton & McConkie in Salt Lake City, Utah. The authors thank Judge Daniel A. Manion, United States Court of Appeals for the Seventh Circuit, in whose employ they met as law clerks. For his mentorship, this article is dedicated to him.

1. See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 663-68 (1994).

Richard Posner has outlined the economic transformation of law practice from medieval craft guild, to professional cartel, to industrial factory.² Market forces continue the devolution of law practice into a trade: purely an application of specialized knowledge for hire. One commentator has lamented:

Noblesse oblige is dead. We have a free-for-all; the market has taken over, whether one is a legal services office or in the largest bastion of Wall Street. . . . Law firms come and go; amoeba-like they merge and diverge; associates are but chaff; and even less-than-successful partners can expect little quarter.³

With the industrialization of law practice, ethics among attorneys have decayed. Bemoaning the decline of lawyers' ethics has become common; the law review literature doing so is enormous.⁴ And deteriorating legal ethics further erode public opinion.

Not unexpectedly, yet tragically, many lawyers no longer take pride in their profession and many would abandon the law altogether if given the chance. John Grisham recently noted: "For lawyers, the main dream of escape is to get out of the profession. They dream about a big settlement, a home run, so that they can use the money to do something else."⁵

II. IDEALS OF THE LEGAL PROFESSION

Contrast this contemporary view of law with our profession's noble past. In his widely-read monograph *The Lost Lawyer: Failing Ideals of the Legal Profession*,⁶ Anthony Kronman, dean of Yale's law school, recalls when law practice was a secular calling with its own end: the attainment of a wisdom that lies beyond technique, "A wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess."⁷ This practical wisdom, or pru-

2. RICHARD A. POSNER, *OVERCOMING LAW* 33-80 (1995).

3. Robert P. Stevens, Book Review, 44 J. LEGAL EDUC. 152, 154-55 (1994) (reviewing ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

4. See Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION* 1, 1-27 (Robert L. Nelson et al. eds., 1992).

5. Mel Gussow, *Grisham's Escape Into Legal Thrillers*, N.Y. TIMES, Mar. 31, 1997, at C11.

6. See generally ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

7. *Id.* at 2.

dence, is the exercise of good judgment, particularly about the goals or ends of proposed actions, whether for the client or the polity. The lawyer-statesman, as Kronman calls him, understood this wisdom to be a character trait "that one acquires only by becoming a person of good judgment, and not just an expert in the law."⁸ Joined with this practical wisdom was public-spiritedness, a devotion to the public good reflected in an active involvement in public affairs. This civic-mindedness came from an understanding that defense of the common good was a higher calling than pursuit of mere private gain.

Alexis de Tocqueville advanced a seminal—and exalted—view of the American lawyer. For Tocqueville, attorneys brought stability to a turbulent society. Lawyers had a higher calling than commercialism. They mediated between the government and the people. Lawyers assumed a responsibility for the common good through public life, for which they were particularly suited by training and cast of mind.⁹ "In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that . . . it occupies the judicial bench and bar."¹⁰ For Tocqueville, an aristocrat himself, there was no higher compliment.

Obvious persons in our legal history exemplify these ideals. Consider this description of Abraham Lincoln by Judge David Davis, who sat on the bench in Decatur, Illinois when Lincoln practiced there in the late 1850's:

He seized the strong points of a cause, and presented them with clearness and great compactness. His mind was logical and direct, and he did not indulge in extraneous discussion. Generalities and platitudes had no charm for him. An unfailing vein of humor never deserted him; and he was always able to chain the attention of court and jury, when the cause was the most uninteresting, by the appropriateness of his anecdotes.

His power of comparison was large, and he rarely failed in a legal discussion to use that mode of reasoning. The framework of his mental and moral being was honesty, and a wrong cause was poorly defended by him. In order to bring into full activity his

8. *Id.* at 14-16.

9. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 276 (Henry Reeve trans.) (Alfred A. Knopf, 1945).

10. *Id.* at 278.

great powers, it was necessary that he be convinced of the right and justice of the matter which he advocated. When so convinced, whether the cause was great or small, he was usually successful. . . .

Mr. Lincoln was the fairest and most accommodating of practitioners, granting all favors which he could do consistently with his duty to his client, and rarely availing himself of an unwary oversight of his adversary. . . . To his honor be it said, that he never took from a client, even when the cause was gained, more than he thought the service was worth and the client could reasonably afford to pay. The people where he practiced law were not rich, and his charges were always small. . . . He was not fond of controversy, and would compromise a lawsuit whenever practicable.¹¹

Rex E. Lee, Solicitor General of the United States from 1981-85, law school dean, university president, and perhaps his generation's finest appellate advocate, exemplified this ideal. Lee was the consummate legal artisan: For four years he argued at least one case per month before the Supreme Court, sometimes twice in one sitting, all the while making pivotal strategic decisions and approving briefs with extraordinary speed and insight.¹² Yet he never lost sight of the fundamentally human character of his professional calling. One of Lee's colleagues relates this anecdote about briefing a case before the Supreme Court in which there were serious differences among government attorneys on a controversial affirmative action issue. Note Lee's focus on what was truly important:

[T]he night before the government's brief . . . was filed, Rex and I had been involved in negotiating with others in the [Justice] department and with the Equal Employment Opportunity Commission for more than a week as to the best way to brief the case. I had been in the office until well after midnight every one of those days and, not surprisingly, was quite tired and somewhat frustrated. After midnight, the participants in the brief-writing process reached a final accord on how to proceed, and all that was left was physically to implement the changes.

As I trudged back to my office to complete the task, Rex stopped me and told me to go home. He said that he personally would

11. OTTO R. KYLE, ABRAHAM LINCOLN IN DECATUR 61 (1957).

12. Carter Phillips, *Remembering Rex Lee: At the End of the Day*, LEGAL TIMES (D.C.), Mar. 18, 1996, at 22.

make the final changes on the brief. When I protested that it was no job for the SG, he insisted. He knew that I had not seen my family in days, and he knew that my son, Ryan, was just about two years old. He said Ryan needed me a whole lot more than the Justice Department and forced me to go home. He then stayed in the office until almost dawn finishing the brief that was filed the next day.¹³

III. WHAT IS; WHAT WAS

Viewing the past through the shimmer of time masks many of its blemishes. We acknowledge the danger of sentimental reverence for a legal age that in some ways was not as good as lawyers have it today. But this contrast between what is and what was should evoke more than nostalgia. The contrast is not just between past and present realities, but past and present ideals. The transformation of our profession affects more than our take home pay, or whether we will have a job next year. Who we think we should be as lawyers—and thus what we strive for—is different.

In *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*,¹⁴ Harvard law professor Mary Ann Glendon offers a look at life in the modern law firm and how it has changed over the past generation. She notes the ambivalence of lawyers in discussions about the law and ethics today, and how unadulterated self-interest prevails. If self-interest reigns, Glendon argues, a lawyer has little left in which to vest personal pride. When pure self-interest is a lawyer's compass, whatever argument will achieve a certain result—and fee—is made, and sometimes wins. Along with the industrialization of law practice, the ideal of the public spirited lawyer-statesman has lost ground. Perhaps there still is an ideal, but it tends to be relativistic, solely concerned with a client's end or law practice as a commodity.

Relativizing who a lawyer ought to be—by practicing law purely for private ends, whether of the lawyer or of the client—transforms the law into an instrument of private power and manipulation. This means that no act is intrinsically wrong; no decision completely correct. For a relativistic lawyer without a legal or ethical ground-zero, any and all arguments will be made to achieve a client's desired result, often purely for financial reward. When a relativistic judge "interprets" the law, there is

13. *Id.*

14. See generally MARY ANN GLENDON, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1994.

no sure reference point from which to discern a controlling principle. Whichever rationale will produce the result the judge wants is employed.

This differs drastically from the way lawyers used to think about themselves. The lawyer-statesman gives counsel with practical wisdom and civic-mindedness. These are qualities of special importance to lawyers, Kronman reflects, because they are indispensable to what a lawyer is—and should be.¹⁵ To sever the lawyer-statesman from these qualities would leave him rendering advice purely for private gain at the expense (literally and figuratively) of his client and society. Having abdicated his higher calling, the lawyer becomes merely a paid dispenser of legal information and tactical advice; a player of legal chess, nothing more. By contrast, even commercial success could not alter the role Tocqueville saw for American lawyers as stewards of the common good. Lincoln argued a case, and charged a fee, independent of his needs or desires. He lawyered honestly, which was “the framework of his mental and moral being.”¹⁶ Lincoln advised famously:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.”¹⁷

Lawyer as peace-maker—not a common description these days, but a poignant reminder of our deeper calling.

The ideal lawyer tries to think objectively about his role in practicing law—objectively in the sense of without bias or prejudice, detached from personal reward. Admittedly, this is difficult. His duty to client is ever present. But just the effort helps to make him a wise deliberator, allowing him to perceive the precise contours of the legal and factual disagreements, the current state of the law, and the outlines of potential resolutions to the dispute. The boundaries to his advice—the limits to the possibilities he will consider, the options he will present—come from understanding not only the facts and the law, but more importantly, his higher role as counselor, steward of the law, and peacemaker. With distance from a problem, he can counsel in the best interests of his client as well as the law. His conduct is based upon traditional virtues of truth,

15. KRONMAN, *supra* note 6, at 364-81.

16. KYLE, *supra* note 11, at 61.

17. ABRAHAM LINCOLN, *Notes for a Law Lecture, in THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 328, 329 (Philip Van Doren Stern ed., 1942).

honesty, and trust. Those virtues, and thus his ethics, do not change based upon circumstances. His role as an officer or steward of the law is just as important as his role as advocate.¹⁸ In the ideal, an attorney is a professional (rather than just a zealous) advocate for his client. The ideal lawyer, in a significant sense, is a good man or woman.

This is not to ignore that law practice, at times, presents tough questions. When the principles of loyalty to client, honesty, civility, and adherence to the law compete, even the best lawyer may be at a loss; the correct answer may not seem possible to reach. The only way to reconcile and balance these principles justly is to be guided by the ideal. The ideal of the lawyer-statesman limits the range of possible decisions and advice and, more importantly, illuminates wise and just possibilities. The goal is to act honorably as defined by the ideal. Although in some situations there may be a diversity of honorable actions, each conforms to the ideal. The power of an ideal lies in its challenge and in its reminder of where we are and for what we at least ought to be striving. As such, it limits the range of possible conduct on the negative side and points toward affirmative actions that we should be taking.

IV. EACH LAWYER'S CRISIS

Law practice has slipped from this objective (and yes, somewhat romantic) ideal. As a consequence, lawyers are left not knowing who they should be. When, as is often the case, there are powerful strategic advantages to sharp, hired-gun style practices, without the anchor of the image of the ideal lawyer, the profession gravitates to the lowest common denominator. Because who they ought to be and how they ought to act are in flux, lawyers tend to act relativistically: whatever conduct will achieve the client's (or lawyer's) ends, or however the law can be changed to benefit the client (or the lawyer), wins out. In Tocqueville's quote above, he distinguishes between the wealthy and lawyers. For him, the professions were never intended to be a path to wealth. As lawyers sought to rise above the upper middle class (where their profession had placed them) by using their privileged position to charge ever more for their services, they progressively lost the capacity to view their profession as something other than the pursuit of economic interests. Cartel power was used for financial ends. The capacity to resist unjust

18. See Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 326-61 (1991). DR 7-102 of the American Bar Association's Model Code of Professional Responsibility explicitly limits the lawyer's representation to behavior "within the bounds of the law."

client demands was necessarily weakened. Lawyers began to become hired guns.

We ignore the lawyerly ideal at our own peril. The stakes are as high as the progressive loss of our souls, of that moral and human center that makes us more than the sum of our client's financial interests. At present, the dilemma is that our ideals have become mostly negative constraints, not positive goals. And only the weakest constraints remain: don't steal, don't aid your client in committing fraud, etc. To a disturbing extent, law practice rests on the bare-bones ethics of "as long as you don't do this, you're OK." Codes have become the dominant form in which lawyers formulate their ethics. But an ethics code was never supposed to be a sufficient basis for a professional life, only a necessary one. An ethics-code morality tells lawyers what we can get away with, rather than challenges us to think of who we can be. The vision of the possibilities of our profession lost, there is little pride in being a lawyer.

Our professional lives should be more than a matter of economic expedience. When law is only a consuming business (instead of a calling), the life of the lawyer also becomes increasingly abstract and detached from everyday life. If the law is just a mental exercise done at a desk, the lawyer and the law lose their connection with custom and the patterns of ordinary life. When a lawyer lives ever more in the office and less with people, his capacity to deliberate wisely about real-life problems is weakened. A lawyer cannot be a good steward of the law without such a grounding.

The practice of law is also more than the practice of making any argument that will win. One important aspect of legal training is neutrality—teaching the lawyer to analyze legal problems and present arguments from all sides. Dean Kronman advances the idea of a lawyer practicing with detachment as a prerequisite to wisdom.¹⁹ Yet legal education can also leave us with a relativistic sense of law, ethics, and the work of lawyers; a sense that any argument, any position, is legitimate and must be advanced. Law students are often taught that the rule of law is a fiction, indistinguishable from the actor's will. Such teaching can breed indifference to, or worse, cynicism about, the rule of law. It destroys the motive to practice according to the ideal, for if law is a fiction, it is just a mask for power, even tyranny.

Present circumstances beg us to evaluate whether the standard

19. KRONMAN, *supra* note 6, at 66-74.

against which we practice law has been relativized. Is my citation to and characterization of a case in a brief incorrectly shaded to my client's ends, or an honest, correct recitation of precedent?²⁰ Is my argument made or motion filed in good faith? or to harass, to cause delay, or to needlessly increase the cost of litigation for my client's advantage?²¹ Have I handled a matter as cost-efficiently as my client's best interests allow, or churned it to increase profits? Has the drive to win with its resulting financial rewards compromised my production of documents or objects relevant to the case? Have I indirectly encouraged a relevant witness not to tell all that he knows as truthfully as he can? Instead of lending a needed perspective to a controversy by arguing a certain interpretation or implication of a fact or a law, have I blocked or distorted its true nature? Have I stretched a legal text, or dodged a bothersome precedent, in the name of a "greater" good?

Is my ambition, my aim in practicing law to achieve my client's goals within the bounds of justice? Or to make more money? If I do not view these two ends as mutually exclusive, do they come into conflict? If so, which wins? If the latter wins, is it at the "expense" of the former? Or does the latter win by pursuing the former outside the bounds?

V. CHANGED THINKING

Given the contemporary realities of the American legal profession, is it possible to reclaim the lawyerly ideal? The better question is, can we afford not to? This is not a call for new professional rules, or codes of civility, or to increase the required ethics credits in continuing legal education. Modification of rules is secondary to getting the central idea of lawyering correct in the first place.

Professor Glendon argues convincingly that for much of American history the best lawyers exercised an important public trust as stewards of the law. Although not all lawyers filled such a noble role, the ideal was proclaimed in law schools and at the bench and bar. By its very existence it elevated the practice of law, for it served as a standard against which lawyers' actions could be judged.

Each of us graduated from law school. Teaching the ideal there again is a start. Emphasizing the ideal will challenge law students to

20. See MODEL RULE OF PROFESSIONAL CONDUCT 3.3(a)(1) & (3); see also *Montgomery v. City of Chicago*, 763 F. Supp. 301, 307 (N.D. Ill. 1991) (holding that "selective omission of relevant information exceeds the bounds of zealous advocacy and is wholly inappropriate").

21. See FED. R. CIV. P. 11(b); MODEL RULE OF PROFESSIONAL CONDUCT 3.1.

take stock of why they chose the law and how they should practice it. A connection may be formed again between how the law is taught in school and the everyday experience of practicing lawyers. Alumni active at their law schools through adjunct teaching and an alumni association could exemplify and teach the lawyerly ideal.

Another path is through mentoring. If surveys of associates are in any way accurate, mentoring has evaporated from most firms, replaced by economic pressures to bill more hours and do so more efficiently. This is more than senior partners not passing on clients, as may have happened in the past. Ask an associate in any medium- to large-sized firm to name a chief deficiency in his professional life. Almost assuredly the reply will not be pay or prestige, but feedback or teaching. When professional elders practice and teach the ideal, generations will follow. As it once was, the model will be handed down and a noble heritage preserved. (The Wisconsin State Bar's "Bridging the Gap" program, and the American Inns of Court, modeled after the British legal system, are excellent vehicles for this.²²) Rex Lee's colleague said: "I am the luckiest lawyer in America. I have a wonderful legal practice that I would not trade with anyone. I know that Rex is 90 percent responsible for who I am today. I also know that I am a better husband and father because of Rex. I only hope that I can influence someone else's life in any way near as positively as Rex has influenced mine."²³ The lawyer-statesman is mentor, preserving the ideal.

Education, training, and experience shape one's professional character; character is not genetically inherited. From learning the ideal, the limits and possibilities of advocacy become clearer. By emphasizing what a lawyer should be, certain arguments would not be made, nor certain actions taken, while others would. Attention to lawyers as officers of the law would allow us to graduate from zealous to professional advocates. Systemic incentives for this change would do more good than just penalizing over-zealousness, as we do now. Judges play a large role in changing lawyers' thinking. In many ways, they determine whether narrowly self-interested advocacy prevails. Where honor is respected and rewarded, it is more likely to flourish.

The pressure to bill hours will continue, perhaps grow worse. But lawyers' approach to these tensions could change. Rather than a singular chase for dollars, attorneys could adjust the means and ends of their

22. See, e.g., Dianne Molvig, *Mentoring: Reaching Out, Giving Back*, 71 WIS. LAW. 10 (Mar. 1998).

23. Phillips, *supra* note 12, at 26.

professional lives. Practice law self-conscious to the ideal's virtues and its professional call. Make your goal to practice according to the ideal as much as for financial reward. If at some point the two conflict, choose the former.

Finally, one cannot practice as an ideal lawyer without living grandly in all areas of one's life. The testimonial of Rex Lee's colleague points this out. It is not so much about who Rex Lee was in court, but who he was in life. The ideal lawyer is not just a way of practicing law, but a way of living.

VI. CONSEQUENCES FOR THE COMMUNITY: IMPROVED CITIZENS

Our profession lost strength as we lost sight of the objective ideal of a lawyer. But relearning who a lawyer should be and practicing with that ideal in mind can revitalize the profession. This would benefit lawyers, of course, making law practice more fulfilling. But more importantly, the revitalization will improve citizens and our society. For Justice Louis Brandeis, the combination of abstract reasoning and empirical keenness, coupled with the necessity of reaching realistic and timely conclusions, perfectly suits the lawyer for public life.²⁴ Lawyers create and interpret laws which affect politics, economics, and the culture at large. More than any other profession, lawyers are essential to preserving the tradition of sound civil institutions which pass along moral ideals to youth and to adults. They can also be fonts of practical wisdom. Cicero said, "For the house of a great lawyer is assuredly the oracular seat of the whole community."²⁵ This can again be true.

Law is no better than our lawyers. Judges are no better than our lawyers. And lawyers are no better than who they think they should be. What lawyers think about themselves and their profession matters. The relativization of the professional ideal can make lawyers doubt their calling. But self-confidence and pride come from practicing our profession as did Lincoln: with legal artistry, as well as with honesty, fairness, and honor.

24. LOUIS BRANDEIS, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* 329, 331-33 (Hale, Cushman & Flint, 1933) (1914).

25. CICERO, *DE ORATORE*.

