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Ethics in Law and Politics

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U.S. Senator

FOREWORD

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I. INTRODUCTION

I am pleased to introduce *Loyola University of Chicago Law Journal*'s special symposium issue on Legal Ethics. I may not be the obvious choice for this honor since I am not a lawyer. I am, however, the husband of an attorney and the father of another; moreover, I work everyday with lawyers and have drafted far more legislation than most attorneys in the profession.

My years in state and federal politics have also provided me with empathy for the legal profession. After all, politicians and lawyers share at least one unenviable distinction—they are both roundly criticized in America today for their ethical shortcomings. The public's distrust of lawyers and politicians can be traced to a common cause—to a perception that both professions have failed to live up to the full range of their responsibilities, and particularly to a sense that both too often see their obligations in terms of temporarily pleasing constituents or clients and not enough in terms of serving the national interest and the public good. This pervasive attitude is harmful, not only to the public standing of lawyers and politicians, but—more importantly—to the well-being and moral strength of the nation itself.

II. PUBLIC TRUST AND POLITICAL ETHICS

For many years, I have warned of the increasing influence of public opinion polls, focus groups, and political consultants in Washington. Office-holders have become too quick, when faced with issues of

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immense public importance, to stick their finger to the wind to see which way the public passions are blowing. It is easy to understand this temptation. As a Senator, I know how appealing it is to do the popular thing. Most elected officials enjoy their jobs. We are treated with respect; we are listened to and applauded; and we make decisions about matters which affect the lives of thousands, if not millions, of people. Naturally, we dislike casting votes that might jeopardize our positions. And so political self-interest makes the office-holder excessively sensitive to his constituents' desires.

Certainly, the desire to please one's constituents is not a bad thing in and of itself. Public accountability and constituent service are a vital part of the democratic process. But the legislator's duty is greater than simply serving his or her constituents' immediate interests. A representative also has an obligation, as James Madison wrote, to "refine and enlarge the public views," to use independent judgment, and to serve the public good.[1] Edmund Burke declared, in his famous speech to the electors at Bristol, that "[y]our representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."[2]

Burke sometimes spoke as if he believed elected officials should concern themselves solely with the national interest and not at all with local affairs.[3] I certainly would not go that far. Rather, I believe representatives have two principal obligations—one to their constituents and one to the broader public good. Fortunately, those obligations do not generally conflict, and especially in matters of vital national significance, they are often closely aligned. Nonetheless, when they diverge, as they inevitably do at times, conscientious politicians face an ethical dilemma—how to balance the voice of their constituents with the call of their conscience.

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1. THE FEDERALIST NO. 10 (James Madison).

2. Edmund Burke, Election Speech at Bristol (Nov. 3, 1774), *reprinted in* BURKE'S POLITICS 115 (Ross J.S. Hoffman et. al. eds., Alfred A. Knopf, Inc. 1949).

3. For example, Burke also declared in his election speech at Bristol that:

> Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole—where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of Parliament. If the local constituent should have an interest or should form a hasty opinion evidently opposite to the real good of the community, the member for that place ought to be as far as any other from any endeavor to give it effect.

Id. at 116 (emphasis in original).

Representatives must resolve this tension as best as they can. It is reasonable, in my opinion, for representatives to defer to their constituents' desires when an issue is not clear-cut and the stakes are not vital. But in fundamental cases where justice is clear, politicians must have the courage to vote their conscience. The lawmaker must recognize this simple truth—that some things are more important than being reelected.

The obligation to exercise independent judgment—rather than to blindly follow public opinion—is strong in cases affecting citizens marginalized by society, such as the poor or minorities. These are people whom the general public is prone to ignore; they are often powerless to defend themselves in the "court" of public opinion. Frequently, the legislator's independent sense of justice is all that protects the underprivileged members of society from neglect or isolation. If representatives are to be worthy of their positions, they must have the courage to fight for the least fortunate, even when doing so is unpopular.

The passage of the new welfare bill is only the most recent and egregious illustration of Congress' increasing tendency to choose expediency over principle. To be sure, the political calculus in favor of the bill was clear. Welfare has become a dirty word in America today. Proportionately few welfare recipients vote, and the cases where welfare is abused are highly publicized. President Clinton certainly knew which way the political winds were blowing when he signed the bill.

But "ending welfare as we know it" is not a noble goal. "Ending poverty as we know it" is, and the latter goal requires *genuine* welfare reform. But that cannot be achieved without jobs for people with limited skill, without day care for single mothers with small children, and without job training for those who need it. We are pursuing "welfare reform on the cheap"—but the next generation will find it very expensive. *Real* welfare reform will take an additional initial investment but, in the long term, will save money, reduce crime, and make America a more productive society.

The dangerous consequences of the "welfare reform" measure have been well publicized. According to the Urban Institute's estimates, the bill will push a million more children into poverty. It will cut food stamps—basic nutrition for the poor—by nearly 20% from already low levels.[4] This is an unconscionable act, a failure by Congress to

4. DAVID SUPER, ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, THE NEW WELFARE BILL 17-23 (1996).

meet its essential obligation to protect those who are neglected by society.

Candidates who yield to public passions and vote for this kind of measure may gain some temporary increase in popularity. But in the long run, citizens perceive the truth. They come to view Washington as an arena for dividing spoils among powerful factions and interest groups rather than as a proper forum for deliberating over the common good. When elected officials follow public opinion at the expense of justice, they ultimately discredit themselves and their own institutions.

By contrast, candidates who act against public opinion may find themselves penalized in the polls. But my experience is that over time the public comes to respect those men and women of principle who vote their conscience. These politicians gain an unexpected reward: a deep kind of public respect. I had a small taste of this type of reaction in 1990, when I was running for reelection to the Senate. Although I voted against the death penalty and spoke about the need to raise revenues—two very unpopular positions—I won the election by the largest margin of any seriously contested campaign for Senator or Governor. Once, in Chicago, a man approached me and said, "Senator Simon, I don't think I agree with you on anything. But I trust you, and I'm going to vote for you." Citizens yearn for candor and for officials they can trust. If all we can give them is blind obedience to current polls, we as public officials have failed our public duties.

Politicians should be distinguished by their willingness to meet the full ethical obligations of their position—to exercise independent judgment in matters of justice and to act on that judgment, even when it leads to unpopular decisions. Walter Lippmann once wrote that a statesman emerges whenever a politician

> stops trying merely to satisfy or obfuscate the momentary wishes of his constituents, and sets out to make them realize and assent to those hidden interests of theirs which are permanent . . . . When a statesman is successful in converting his constituents from a childlike pursuit of what seems interesting to a realistic view of their interests, he receives a kind of support which the ordinary glib politician can never hope for . . . . [O]nce a man becomes established in the public mind as a person who deals habitually and successfully with real things, he acquires an eminence of a wholly different quality from that of even the most celebrated caterer of the popular favor. . . .[5]

5. WALTER LIPPMANN, THE ESSENTIAL LIPPMANN 457 (1963).

Ultimately, the political profession will not redeem itself in the public's eyes until a larger number of its representatives begin to heed the call of their conscience over the call of the polls.

III. ETHICS AND THE LEGAL PROFESSION

Unlike the political realm, the legal profession has not always been viewed with the scorn reserved for it today. In words that may seem strange to us now, Alexis de Tocqueville wrote that "people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation because they do not attribute to them any sinister designs."[6] During the last century, however, this picture of the legal profession has too often been replaced by an entirely different one—a picture of lawyers as parasites, hired-guns of large corporations or grasping clients, motivated by greed and neglectful of the public good. The legal industry—and it is an industry—has become increasingly commercialized, with too much emphasis on profits and the bottom line.

Paralleling this development has been the growth of a new idéology within the legal culture itself, which one observer has called the "ideology of adversarial zeal."[7] It is more prevalent than it should be. This ideology tells lawyers that they need not concern themselves with the public good or the ordinary obligations of justice. Rather, their ethical obligations are simply to serve their clients' desires and commands.

When unrestrained, this ideology puts few ethical burdens on the legal profession. Simply stated, it affirms that:

> [l]awyers should not commit crimes or help clients to plan crimes. They should obey only such ethical instructions as are clearly expressed in rules and ignore vague standards. Finally, they should not tell outright lies to judges or fabricate evidence. Otherwise, they may, and if it will serve their clients' interest must, exploit any gap, ambiguity, technicality, or loophole, any not-obviously-and-totally-implausible interpretation of the law or facts.[8]

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6. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275-76 (Phillips Bradley ed., 1987) (1835).

7. *See* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 57 (1995) (stating that "the ideology of adversarial zeal—the professional religion of a great many lawyers—tells them that they are morally required to push the edge of the envelope").

8. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 20 (1988).

Like the norm of constituent service through polling in the political realm, the ideology of adversarial zeal panders to the lawyer's own self-interest. It enables lawyers to ignore the effects of their work on the rest of society—considerations that may detract from their profits but should bother their conscience.

To be fair, the ideology of adversarial zeal may have value in some contexts. For example, in criminal trials, there is a strong temptation to pre-judge a defendant who stands before the court of law, who often is a marginalized member of our society, and who faces the awesome power of the state's legal machinery. Public norms that encourage a fervent defense may help to counteract this pressure and ensure that the defendant has at least one committed defender. That defender may be all that stands between the innocent individual and the loss of his or her liberty.[9]

The finest legal traditions are followed when attorneys use their zeal and skills in *pro bono* work, but today the combination of federally assisted legal aid and *pro bono* work still leaves far too many unserved or under served. In all cases, there is a strong ethical argument for encouraging lawyers to weigh the broader implications of their work for society. Just as the politician must balance his constituent's interests with the public interest, so too must a lawyer balance client service with public service.

I do not know precisely how that balance should be drawn today in the legal profession. But it certainly means that lawyers—like candidates and office-holders—should hold themselves to a higher standard of conduct than they sometimes do now. It often means that lawyers should resist the temptation to exploit loopholes in the law and instead seek to ensure compliance with the spirit of the law. It certainly means that a lawyer should not engage in a scorched earth approach to discovery in order to overwhelm a less resourceful opponent, even if that means sacrificing a strategic edge in litigation. And it surely means working with the political branches to improve and strengthen our legal system, even if that effort may temporarily work to the detriment of existing clients or the attorney's pocketbook. Self-restraint is essential for a free society to function effectively. We as a society should set our ethical goals high, given the likelihood that many will inevitably fall short.

We need, in other words, to revive an old ideology that once permeated the legal profession, which Dean Kronman of Yale Law

9. For a broadly similar point about the ethics of criminal defense work, see DANIEL LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 62-63 (1988).

School called the ideology of the "lawyer statesman."[10] The lawyer statesman understands that professional obligations extend far beyond the client's interests to those of the nation at large, and that the Bar's enormous power in American society comes with a great responsibility to protect the common good. This is vital, in part, because the legal profession plays such a basic role in maintaining the nation's ideals. Professor George Anastaplo has rightly spoken of the Bar's obligation: "to mediate between popular passions and informed and principled men, thereby upholding republican government. Unless there is this mediation, intelligent and responsible government is unlikely . . . . The bar is, in short, in a position to train and lead by precept and example the American people."[11] Similarly, Justice Louis Brandeis, who lived the noble ideal of the lawyer statesman in his own life, spoke of lawyers "holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either."[12]

Not least of all, a resurgence in the ideal of the lawyer statesman is important to our nation's future because, in the United States, the legal profession has traditionally been a training ground for many political aspirants. We will have little hope of finding statesmen in the political arena, if we are unable to cultivate statesmen in the legal sphere.

This is an extraordinarily difficult challenge. To change the culture of the legal and political professions will require a partnership among law schools, bar leaders, schools of political science, and the public at large. But before we can begin this task, we need to understand the reasons an ideology of self-interest has too extensively replaced a commitment to the public interest in both of our professions. We need creative suggestions about how to reverse that trend. For this reason, a symposium issue such as this one is so timely and important to our national welfare. I congratulate the *Loyola University of Chicago Law Journal* for taking on this fundamental issue.

10. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 11 (1993) (quoting Chief Justice Rehnquist).

11. In re Anastaplo, 366 U.S. 82, 110 (1961) (Black, J., dissenting) (quoting Anastaplo's statement to the Bar Committee).

12. L. Brandeis, *The Opportunity in the Lands* in BUSINESS—A PROFESSION 329, 337-39 (1933), *quoted in* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 3 (1988).