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PACE LAW REVIEW

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THE PHILIP B. BLANK MEMORIAL LECTURE

"Carpe Diem": An Opportunity to Reclaim Lawyers' Independence

Louis A. Craco*

At the end of January, long after I had accepted the welcome invitation to give this lecture and had sent a synopsis of its content to the Dean's office, Alan Abelson opened one of his usually provocative weekend columns in Barrons with the question, "An epidemic of integrity?" And the answer, "Something seems to have suddenly evoked an urgent awareness of ethics, and in the strangest of places" of which he named the halls of Congress and Corporate America as two.[1]

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1. Alan Abelson, *Fun and Games,* BARRONS, Jan. 30, 2006, at 6.

Abelson's point is mine, too. There has ripened over the last few years, as a result of several forces combining in a fortuitous way, one of those intermittent moments in American public life when a chance to seize and hold the ethical high ground becomes not only morally required, but actually convenient. And in this moment, an opportunity presents itself for lawyers to reinforce and, where necessary, reestablish—against all the stresses that in the last decades have been imposed upon it—an attitude of genuine independence as a central ingredient of their conduct as well as their aspirations.

That attitude, in my view, is indispensable if lawyers, as a group, are to realize fully what it means today to be an American lawyer; and indispensable, too, if lawyers individually are to serve their clients effectively. Seizing this moment and the opportunity it presents, is, I think, crucial to sustaining the legitimate autonomy of our profession over time, and to performing well the individual and collective roles assigned to private practitioners in the peculiarly American experiment.

Allow me to develop some of these thoughts for a few minutes today. First, I shall offer some observations on how the notion of lawyer independence fits into what I believe to be the profession's unique and critical role in American life; then I would like to explore a bit how the long-maintained understanding of lawyer independence came to be under such stress; and finally, I will suggest what it is about this moment that creates the conditions in which we can reclaim that understanding and encourage its practical application in day-to-day practice.

As I do so, I invite you to keep in mind what the stakes of this inquiry are. It is a crucial part of the continuing search for a contemporary sense of purpose and worth in the modern legal profession. And the stakes of *that* enterprise have been well captured by Professor David Wilkins of Harvard, who put the challenge thus: "One does not need to invoke much hyperbole to put forth a credible argument that the legal profession's survival as an independent profession depends on its ability to articulate a persuasive and public-regarding justification for its privileged place in society."

One of the many satisfactions of the job that Chief Judge Kaye assigned me as Chair of the Institute on Professionalism

in the Law has been the chance, and the duty, to think hard about what it means to be an American Lawyer at the dawn of the Twenty-first Century, to begin to formulate an answer to David Wilkins' challenge. That has led me to appreciate, in a way I had not before—and that lawyers in the tumult of daily practice rarely do—how crucial the Rule of Law is to the distinctive American social contract and how indispensable the daily work of lawyers in private practice is to making the Rule of Law a reality. I have been known to hold forth on this core notion for hours, but let me sketch the idea for just a few minutes now, because it is the context that gives meaning to everything else I have to say.

The premise that The Rule of Law is central to the American design of things ought to be axiomatic, but it actually takes a moment's reflection to appreciate it fully. When I speak of the Rule of Law I am not talking about the network of positive laws and the profusion of regulations about which reasonable people can differ and often do. I am talking about something much more fundamental: the necessity in our culture that people, in general, respect and obey the law. It is a value that, like gravity, we usually ignore, but that conditions everything we do and how we do it.

Think of it a minute. The American enterprise is full of deliberately designed tensions. We are a nation built from scratch on proudly proclaimed oxymorons:

We pledge allegiance to a land with "liberty and justice for all." With this pledge, we embrace a scheme of ordered liberty in which justice is conceived of, as Roscoe Pound put it 100 years ago, as "the ideal compromise between the activities of each and the activities of all in a crowded world."[2]

We declare ourselves, both on our Great Seal and in our daily lives, to be "E pluribus unum"—one from many. And this in turn commits us—across all the divides of race and religion and national origin and culture and moral perspective and economic status and ideology and customs and manners and ambitions— to making a coherent nation—one of the very few genuine polyglot democracies in the history of the world.

2. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 29 REPS OF THE A.B.A. 395 (1906).

We affirm that "all persons are created equal" though in nature and nurture they manifestly are not; only in the eye of our law is this so.

We assert that here there is "equal opportunity for all" and we are thus obliged to reconcile this promise with our embrace of free-market capitalism.

There are others, creatures, for example, of our federal system and our government of divided authority; but the point is sufficiently made for present purposes. The one organizing ideal that can reconcile the tensions inherent in this web of self-competing aspirations is the Rule of Law. Lest you doubt this, look at the headlines of your newspaper, and observe these tensions on daily parade. Conflicts like the fraught issues over the authority to detain prisoners without legal process or to intercept domestic communications without warrant are classic clashes of the claims of order and liberty. The Senate's recent reconnaissance of the border between presidential power and judicial authority is fundamentally about whether such vivid clashes, and others less dramatic, will be resolved by law or prerogative. You see it too in the "hot button" skirmishes of the so-called "culture wars" like abortion, gay rights, affirmative action and a host of others; all representing "conflicting ideas of justice" among "diverse groups and classes and interests understanding each other none too well"[3], to borrow again from Pound.

The hegemony of the Rule of Law is evident from the accounts of these struggles you will read, in the fact that all of them are being fought out in the halls of legislatures and the courts. However hard it seems to be, our society has remitted these issues to the law for resolution.

The Rule of Law is, then, the indispensable instrument by which we manage the tensions inherent in our grand national experiment; by which—across all that divides us—we make the adjustments needed to live as one; by which we create the conditions in which a free economy can operate efficiently and fairly, where private plans can be reliably laid and carried out, where disputes can be resolved peacefully and order kept with a rea-

3. *Id.*

sonable approach to justice. In our world of oxymorons, the law is both the glue and the lubricant of our society.

What the law is *not*, however, as Oliver Wendell Holmes once observed, is "a brooding omnipresence in the sky."[4] It is the composite of thousands of cases and matters, laws made and used, advice given and received, day in and day out. If the Rule of Law is crucial to American society, it is equally true that lawyers are crucial to the Rule of Law since they *deliver* it every day in every case or transaction in which they act on a client's behalf. It is not an exhortation, but a description, to say that lawyers in private practice are always engaged in a *public* calling. "They are", as my colleague in the Institute, Paul Saunders, has put it, "where the rubber meets the road."

The public character of private practice is, of course, most obvious in the courtroom, where lawyers play their socially assigned part by advocating their clients' rights and interests in a public peacekeeping system dedicated to resolving conflicts without strife and as fairly as possible.

The very fact that there is so conspicuous a public character to this aspect of private practice, producing the cliché that lawyers are "officers of the court", has led to the tendency identified by Professor Wilkins to think of the lawyer's public role as *only* the advocate's role. "The larger problem," Wilkins went on to point out while giving the Keynote Address at our Institute's inaugural convocation in 2000, "is that most of what goes on in our legal system takes place outside of court. Most lawyering is transactional, advising in the office, structuring. Increasingly what lawyers are doing is working with others to structure complex economic relationships that have a deep effect on what our political and social life is going to be like. And the lawyers who do this work often do not see that they are connected to this public tradition."[5]

But, of course, they inescapably are. Lawyers write instruments that, as Mary Ann Glendon has observed, "aid citizens to live together with a minimum of friction, make reliable plans for the future, and avoid unnecessary disputes." This gives them "extraordinary opportunities to affect for better or worse

4. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916).

5. David B. Wilkins, *A Convocation on the Face of the Profession,* 1 N.Y.S. JUD. INST. ON PROF. IN THE L. 1, at 13 (2001).

the quality of everyday life in our large commercial republic." These are all *public* goods, I submit, delivered every day by private lawyers in private practice papering private arrangements for private clients. And the private ordering of their clients' affairs is effective precisely because they conscript what the Supreme Court in *Shelley v. Kraemer* called "the full coercive power of government"[6] to back and enforce what they write.

And even the most private advice lawyers give, shrouded in the privilege bestowed upon the exchange by a society that sees a public good in enhancing the capacity of lawyers to give wise advice, possesses an intrinsic public character. A few years ago, at a symposium in Minnesota ambitiously entitled, "The Future of Callings—An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium," Stephen Carter of Yale offered an insight into the inherently public aspect of the lawyer as adviser: "The principal lawgivers in America," he said, "are neither the courts nor legislatures, nor administrative agencies, but rather lawyers. This," he continued, "is because most people's principal experience with understanding their legal obligations, and their legal rights, is working with a lawyer. Whether it is a matter of buying a house, defending a lawsuit, or establishing a business, the lawyer becomes, in the life of that person, the lawgiver. It is the lawyer who comes forward to say these are the possibilities of what you may do or not do."[7] So, in the daily counseling practice of lawyers, the adjustments of interests made by the Rule of Law are *delivered* by the lawyer to the client and become, for that client, the law.

It is only because we have the fundamental role I have attempted to sketch thus far that we have a legitimate claim to independence. Independence in both senses that we lawyers use the term: our collective autonomy from supervision by others, and our ability to give disinterested advice to our clients. We are allowed to be independent in the first sense because it is necessary for our independence in the second sense. Thus, we are called on by the professional self-conception I have outlined this afternoon, to be able and willing to speak truth to

6. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

7. Stephen L. Carter, *What is the Source of the Obligation of Public Service for the Professions?*, 25 WM. MITCHELL L. REV. 103, 113 (1999).

power, whether the power is held by the President of the United States, or the CEO of Enron, or by a valued and valuable client. It is truly a case of use it or lose it: our profession's claim to collective autonomy, and the willingness of the society to allow it, depends, over time, on our individual willingness to use that freedom from outside interference to provide to our clients the advice we know they need to hear, whether we think they want to hear it or not. The whole notion of the lawyer as a public actor *delivering* the Rule of Law to clients in private practice—the account that best explains what it means today to be an American lawyer—is forfeit if we fail to deliver the goods in the exchanges we have with our clients.

One of the other satisfactions I have enjoyed in the Institute's work is the encouraging discovery of how often and how well lawyers around this state and elsewhere take for granted and act on this duty. But they and we all realize it has become harder to act this way, and for discernable reasons.

A quarter century ago, as a friend of mine (who is not exactly an ideological soul-mate) recently wrote, the Supreme Court, "in one of its latter-day epiphanies discovered that two centuries of prohibitions against lawyer advertising were unconstitutional."

In *Bates v. State Bar*, the Supreme Court struck down as unconstitutional Arizona's ethical ban on truthful price advertising by lawyers. Justice Blackmun's opinion dismissed the bar's argument "that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth . . . [and] tarnish the dignified public image of the profession."[8] "At its core," Blackmun wrote, "the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that they earn their livelihood at the bar. We expect that few attorneys engage in such self-deception."[9]

Well, the English bar had long done something very like that. English barristers still wear gowns with a vestigial pouch on the outside of their rear skirt. In bygone days, this allowed a client to tuck his fee in, without the barrister knowing it and

8. Bates v. State Bar, 433 U.S. 350, 368 (1977).
9. *Id.*

dealing in tawdry trade. But in America, the lawyer's world had forever changed.

There began first a trickle, then a flow, and finally a flood of information about the business of law and its practitioners that has threatened to reshape lawyers' understandings of themselves and their calling.

The vast amount of this information spans virtually every conceivable medium. There has grown up a whole journalistic industry reporting in a "trade press" (both print and television) the news, gossip and trends of the law business locally, nationally and internationally. Lawyers have become media celebrities, starred in their own television commercials, fastened their images to billboards and bumpers, conducted "beauty contests," seminars, created brochures and homepages and found second careers as talking heads.

The kinds of information available in this deluge are as various as the media by which they are delivered. Who is representing whom, and why, and for how much; who won, who lost, and how; who has moved, who has stayed, who is up, who down; where are the young lawyers going, where are they avoiding, how do they feel; what firm, city, practice area, law school is hot, or cold, or heating up, or cooling down; and always, always, who makes how much money. All these data are sliced and diced and put back together again, made into sound bites and graphs and graphics, then turned into the "buzz" of conference room, corridor, e-mail and bar association chatter from which the next trendy tidbits will emerge.

Where information exists in such volume and variety, comparisons become possible as never before and competition inevitably erupts. It is nonsense, of course, to pretend that competition—sometimes fierce—was absent from the law practice of yesteryear. However the prevalence and openness of the contemporary marketplace for clients and talent is something so different in degree as to be different in kind. While long-term, broad-scale representation of a client by a lawyer or firm has hardly disappeared from the practice, it is no longer—as it once was—the rule rather than the exception.

The rise of client sophistication, fed by readily available banks of comparative knowledge, has led to the rise of transactional practice in which lawyers are hired for a particular task

rather than retained for a continuing relationship. Clients can now discriminate more acutely about quality and price in legal services; the fact that they *can* do so means, in the real world, that they *must* do so. This dissolution of long-term ties between client and lawyer puts not only the lawyer but also the client in play. More lawyerly competition for now-available clientele ensues. None of this, I am convinced is solely an artifact of big-firm, big-business practice. It is echoed in small cities and towns across the country where it is often perceived as the loss of the "collegiality" of the bar of former days.

Whether this is good or bad is beside the point, not so much because the Supreme Court decided as it did, but because that outcome, in one form or another, was inevitable. A professional code substantially based upon keeping abundant knowledge about law practice from the public to whose service the profession is dedicated and at whose sufferance it enjoys its monopoly and self-regulatory authority, could simply not be sustained as legitimate over the long term—especially not in the face of the rise of the information age.

It has always been true that some moral courage was required to do the job of being a wise and candid counselor to a client on whom a lawyer depended to any great extent. It has always been true that all sorts of pressures—from partners, family expectations, and the urge to prosper, for example—have insinuated themselves into the mix of considerations that lawyers weigh in deciding whether to do that job in particular instances. And to be sure, the moral courage and self-respect needed to give tough advice to a tough client has become greater as the pressures of modern commercialism in law practice have become more intense.

I think, however, that the time has arrived when the very market-driven psychology that has produced those intense pressures can be co-opted by skillful and dedicated lawyers to support them in their task of rendering truly independent advice. The risks to clients of bad behavior have become so high, the risks to lawyers of collaboration in client lawlessness have become so high, the possibilities of concerted action among lawyers within practice units and among them with the end and aim of reinforcing professional independence and personal self-respect have become so inviting, that cost-benefit analyses by

both parties to the lawyer-client exchange should recognize the value of giving and receiving the full benefit of a lawyer's discerning and wise judgment. To put it in a crass form I admit I abhor, the nub of the idea is this: circumstances have conspired to make it possible to identify such independent judgment as a *product* that adds value to any transaction on which it is brought to bear, to make it possible, also, to persuade clients that total loyalty to them consists in providing them such advice, not suppressing it, and possible, finally, for a lawyer or firm to achieve a competitive advantage by being recognized as marginally better than others in consistently making that product available to clients.

Cognitive psychologists speak of the "salience effect" by which they mean the tendency of humans to perceive in a disproportionately powerful way phenomena that stand out from their surroundings. When advertisers try to create an appetite in consumers for a product or brand those consumers might not need or especially want, they routinely use salience in their efforts to make their wares attract us and stick in our minds. The whole business of endorsements by celebrities or stars of one kind or another is built on this theory—their prominence and supposed appeal will raise their product above the general clutter of commercials and help us remember our Wheaties, or L'Oreal, or Nike shoe.

Prosecutors instinctively know about this method too. The "perp walk" of shame is meant not only to further humiliate its subject but to display vividly the disgrace that can be expected to follow crime. We speak of "making an example" of someone—the process of elevating the punishment of a particular offender to a degree of salience from the run of sentences, in order to caution all the rest of us not to offend in like manner. And in 1917, beset by mutinies and desertions in the horrific trenches around Verdun, the French Army infamously brought the idea to a grisly nadir by summarily executing randomly selected troops (guilty or innocent) "pour encourager les autres"—"to encourage the others."

Corporate America, according to Abelson's article, has been a pacesetter in discovering honesty. "It did so, alas, under some duress," he goes on, "in the wake of a series of scandals, involving some of its most envied (that is, most lavishly compensated)

executives, a number of whom have wound up enjoying extended vacations at Club Fed."[10] Enron, WorldCom, Global Crossing, Adelphia, Health South, Tyco, Marsh & McLennan, AIG, General Re, Arthur Andersen. The somber list rolls on. The sheer size and audacity of the corporate wrongdoing in just the interval since the peak of the bull market in March 2000 is astounding and riveting. And its consequences for the perpetrators do stand out. Sunday's Times carried a front-page story on the utter financial ruin—spelled out in lurid detail—of Kenneth Lay on the heels of the collapse of Enron, with detours into the similar fates of Bernard Ebbers at WordCom and John Rigas at Adelphia.[11]

If, as I believe, Abelson is right in seeing a revived appetite for corporate rectitude—real and perceived—in reaction to these and other spectacular object lessons, it is the salience effect working to good effect. Not the least of these effects, I submit, is to create a market among businessmen for good, independent, morally discerning legal advice.

The point was made in a somewhat back-handed way in the criticism leveled last year by John Coffee of Columbia, who suggested that the failures of professional "gatekeepers" like lawyers and accountants to do their jobs with independence and fidelity had as much or more to do with corporate governance failures in recent years than did compliant directors. The inverse may be equally if not more true: lawyers doing their jobs with independence and fidelity to their client's authentic interests may have much to do with preventing such troubles in the years ahead.

And, even more to my point, their clients may more fully appreciate that this is so, and be more ready to recognize such service as being of significant corporate and individual value to them. If advertisers can make people buy products they don't need by making people want them anyway, lawyers ought to be able to sell their clients a product they do need and are, it seems, again beginning to want.

They have every reason to try. Last year, at the annual luncheon honoring the Life Members of the American Law In-

10. Abelson, *supra* note 1, at 6.

11. Alexei Barrionuevo and Kurt Eichenwald, *For Ken Lay, Enron's Riches Turning to Ruin*, N.Y. TIMES, Feb. 26, 2006, at 1.

stitute, Bevis Longstreth, formerly of Debevoise & Plimpton, and more recently a Commissioner of the SEC, gave a scorching speech on the topic I am rather more delicately addressing today. He reminded us of the now unhappily familiar story of the opinions rendered by key Justice Department lawyers that provided crucial, if totally unsound, support for the abuse of prisoners taken in the war on terror. The Bybee opinion,[12] as it has come to be known, represented for him an abject abandonment of the duty of lawyer independence in favor of producing a flawed analysis that was "most plausibly explained as necessary to achieve a certain result."[13] And he went on to draw a parallel to our subject today: "The issue," he said, "is one of defining the lawyer's role, be it as government lawyer counseling the President or corporate lawyer counseling the CEO."[14] In both cases, the lawyer will be asked from time to time, "Can we do this?" The client wants to be told "Yes" but needs to be told "No."

If Longstreth can draw a chastening comparison between the Bybee opinion and his perceptions of lawyer failure as seen from his vantage point as an SEC Commissioner, some more recent tales from Washington can offer more hopeful examples. Bybee, it turns out, was not unopposed in his view on torture. A profile in the current issue of The New Yorker recounts the strenuous, continuous, thoroughly conscientious and eventually successful efforts of Alberto Mora, General Counsel of the Navy, first to prevent and then to reverse the "legalization" of prisoner abuse.[15] It is a fascinating narrative of true lawyerly independence in action.

And it must be of special satisfaction to the sponsors of this lecture series to have learned of Deputy Attorney General James Comey's refusal, in the face of enormous pressure, to authorize continued warrantless intercepts of domestic communications under the National Security Administration's secret

12. Available at http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/~doj/bybee80102memo.pdf.

13. Bevis Longstreth, *82nd Annual Meeting: 2005 Proceedings*, 2005 A.L.I. PROC.

14. *Id.*

15. Jane Mayer, *The Memo; Annals of the Pentagon*, THE NEW YORKER, Feb. 27, 2006.

program. The accounts of that episode in the New York Times[16] and Newsweek[17] are edifying, not only because Mr. Comey delivered this lecture a couple of years ago, but because of the salience effect his example can have.

There is, I believe, ample reason to think that the examples afforded by Jim Comey and Alberto Mora are so distinctively attractive that they can help to produce counterpart behavior in the private practice of law with private clients, just as surely—I would contend even more surely—than examples of toadying advice in the government have had their counterpart in dereliction of independence in private practice.

I base this optimistic assessment on two beliefs. First, it seems to me apparent that practicing lawyers understand the threat to the autonomy of the profession that would be created by allowing an impression to become widespread that large numbers of lawyers are shirking their duty to perform as conscientious and independent "lawgivers" to their clients. Lest they are in doubt of this threat, the SEC, armed under the Sarbanes-Oxley law with new authority to regulate the ethics of lawyers involved in advising public companies, will clarify it for them. Longstreth, reminding his audience last year of the experience of the accounting profession at the hands of SEC regulators, said that the implications for the corporate bar of falling short on the delivery of professional service "can be heard in the giant sucking sound" at the SEC, "as the last vestiges of private ordering within an already hollowed out [accounting] profession are taken away."[18]

But it will not come to that, I think, because of the second reason for my optimism. That lies in the fact—not the opinion, I think, but the fact—that lawyers, despite the stresses I outlined earlier, are much more faithful to their duty, day in and day out, than our critics give us credit for. That is true as a matter of personal observation over many years of practice. It is true from what I have learned from practitioners in the work of the Institute. It is especially true in the smaller firms and

16. Eric Lichtblau and James Risen, *Judicial Deputy Resisted Parts of Spy Program,* N.Y. TIMES, Jan. 1, 2006, at 1.

17. Evan Thomas and Daniel Klaidman, *Full Speed Ahead; After 9/11, Bush and Cheney Pressed for More Power-and Got It,* NEWSWEEK, Jan. 9, 2006, at 22.

18. Longstreth, *supra* note 18.

among the sole practitioners who make up the greatest number of practicing lawyers, and whose personal connection to professional values is the more acute for being less bureaucratic in the form of their practices. The fact that this fidelity is routine, privileged, and avoids noisy problems makes it the antithesis of salient; but it is there all the same, and the outbreaks of honor that the Comey and Mora stories exemplify lend such behavior the prominence that it otherwise lacks.

The task of seizing this moment to reassert with vigor the independence of lawyers and the autonomy of the bar does not belong to the practicing bar alone. Longstreth proposed a joint venture between the American Law Institute and the Business Round Table to develop a set of best practices that would strengthen the ability of corporate lawyers—outside lawyers and in-house lawyers both—to provide unencumbered, independent advice. Harvard's David Wilkens has been engaged for a number of years in collaborative research with law firms exploring the structures inside firms that reinforce the ethical performance of lawyers at all levels within them. And the Institute that I have the pleasure of chairing will shortly take up a proposal to develop joint ventures with the law schools and bar associations in New York State to explore still further ways to encourage and nurture the instincts toward independence that, I believe, are native to the breed of lawyers. That is an endeavor in which we are likely to come knocking on your door.

Forgive me, please, for talking in these remarks of legal advice as a product; for talking out loud about ways and means of selling that product. It is more, much more, than that. As I have had occasion to insist in other venues, the qualitative relationship between the advisor/advocate on the one hand and the client on the other is fundamentally different from the nexus that exists between the buyer and seller of goods, and it is a transcendently important function in the American design of things, as I tried to convey this afternoon. But the language of the market can, I think, at this time in our profession's history, be useful to describe and understand the nature of the opportunity before us. And, I hope, provide us with the tools to seize it.

Your invitation to give this lecture has been an honor for me that I greatly appreciate, and I am happy to have had the chance to explore some of these ideas with you this afternoon.