Ten Elements of "Real" Ethics in the Practice of Law (and Life)

David Barnhizer
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Abstract

The legal profession has been “running a game” on its clients and on American society in its claim that it can self-regulate. The system of ethical regulation as practiced by the legal profession and courts is not a “real” system nor can it even be said to be an Ideal system. It is a deceptive pretense and pretension. It is time to stop the deception and to construct a new way of regulating lawyers and holding them to account for deficiencies and neglect. Many lawyers will not accept this interpretation either because of self-interest or to avoid facing the uncomfortable reality of a fatally flawed regulatory system that doesn’t work and was never really intended to work. What I am trying to capture here in offering “Ten Elements of “Real” Ethics in the Practice of Law (and Life)” is that there are reasons we lawyers “are what we are”, behave as we do and protect our “turf” against internal and external threats. Those reasons are the terms of a “real” system of lawyer ethics quite distinct from the existing version of formal ethics and extremely limited potential for civil liability related to ineffective representation and other violations of client responsibility. The undeniable fact is that the existing system of lawyer regulation not only fails to facilitate quality but contradicts our duties to society and to clients. A result is that we lawyers are so much less than we ought to be as “virtuous” and responsible advocates for the advancement of justice in American society and a force against abuse and unfairness.

Part I

How Are Lawyers Viewed?

Liars, Deceivers and Manipulators

Several years ago a UK blog posted a question about whether lawyers are liars. The best answer was voted to be one offered by someone listed as Eartha W. It stated, “Lawyers do not lie. They bend the truth. They avoid the truth. They never let the facts get in the way of a good defence…but they do not lie. They get taught how to do this at University. [I]t’s in a subject called Legal Ethics. An oxymoron if ever there was one!!”

Sarcastic humor at lawyers’ expense does little to conceal the fear and resentment many people feel about dealing with lawyers, including perhaps particularly, lawyers who are supposedly representing their best interests. But at least the jokes are funny and provide

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1 “Are Lawyers Liars or Is It Just a Myth?”, http://uk.answers.yahoo.com/question/index?qid=20090304023419AAjhdXx.
valuable insight into how lawyers are viewed. In one reasonably typical cartoon, a patient is sitting on the edge of a doctor’s examining table with the physician standing thoughtfully behind him. On the patient’s back is an ugly gnome-like creature—complete with miniature suit and briefcase—with its teeth and claws dug into the patient’s back. The doctor offers the following diagnosis: “I can see what’s causing the problem—you’ve got a lawyer on your back.” In another attempt at humor, two women are sharing coffee and one remarks: “It’s finally over—Frank’s lawyer got the apartment, and my lawyer got our two cars and the beach house.”

David Mellinkoff describes one perspective on lawyers. “Thus the classic epitome of the lawyer . . . spreads throughout the western world: a consummate malevolence, callousness to truth the basic vice, hardened with the sin of avarice, and a consequent denial of God’s favored—the downtrodden poor.” This suspicion and distrust of lawyers is ancient, as even Plato could not resist describing lawyers as “keen and shrewd” but with “small and unrighteous” souls who have no mature human soundness and wrongly think themselves masters of wisdom. Lao Tzu pretty much globalized the sentiment in his description of human behavior. He explains: “It is the way of heaven to take from what has in excess in order to make good what is deficient. The way of men is otherwise. It takes from those who are in want in order to offer this to those who already have more than enough.”

I am not claiming such criticisms are fair across the board. But there are reasons many people throughout history have held lawyers in some combination of fear and contempt. Among them are ravenous greed and an extreme self interest that converts everything to money, status and power. Seeing lawyers in an unfavorable light is not inconsistent with the statement of a senior partner of a law firm some of whose lawyers had staged a stealthy “coup” to oust a number of other lawyers at their law firm in order to enhance personal incomes. When the issue was raised about loyalty and trust owed to one’s fellow workers the partner responded: “Life is not made up of love; it is made up of fear and greed and money.” [Deposition testimony of Jack Fritts, former chairman of Cadwalader, Wickersham and Taft].

The “valuing” of money and the acquisition of power beyond all else has important implications for the ordering of social institutions and relations among people. Anthropologist Jules Henry has described what happens to principle when humans convert everything into financial considerations. Henry observed: “Monetization waters down values, wears them out by slow attrition, makes them banal and, in the long run,

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2 The jokes are from Lawyers! Lawyers! Lawyers!: A Cartoon Collection 1, 11 (S. Gross ed., 1994).
5 Lao Tzu, Tao Te Ching.
helps Americans to become indifferent to them and even cynical. Thus the competitive struggle forces the corruption of values.” In the same vein Montesquieu admonished: “When virtue is banished … avarice possesses the whole community.”

Of course, the core issue is from where does the virtue come that Montesquieu and others assume exists as a vital element of our human community? If there is such a defined core of virtue of what does it consist, and what is the connection of that innate system of shared virtue with any principled system of formalized ethics? In trying to answer these questions you might ask whether “virtue” has substantive independent meaning that transcends generations or is simply a malleable term into which each generation pours its unique content? If the latter, with “virtue” being largely an empty vessel to be refilled according to current societal norms regardless of their banality, then perhaps at this point virtue in our culture has come to stand for “fear, greed and money”. In such a system the “most virtuous” among us are those who have the greatest ability to impose fear, demonstrate the most intense greed-driven behaviors, and excel in the “competition” by amassing the largest sums of money. It is as if we have come to see our sense of virtue in the bumper sticker that read: “He who has the most toys when he dies wins!”

One hopes that is not the case and that there is a transcendent and substantive element to virtue that informs our technical ethics and our moral ethics as well as our individual and collective behavior. Certainly it can be argued that ideas of fairness, some variant of “do unto others”, honoring one’s commitments and duties voluntarily undertaken, and the physician’s “first, do no harm” seem to be deeper innate principles that are worthy of consideration in any discussion of transcendent virtue.

Consider, for example, Aristotle’s description of Justice as the greatest human virtue because it was the only one in which a person acted to benefit others rather than only self. Aristotle says about justice that “it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also... For this same reason justice, alone of the virtues, is thought to be “another’s good”, because it is related to our neighbor; for it does what is advantageous to another, either a ruler or a copartner.” Personally, I think Aristotle was a really smart man.

The distinction I am drawing between “technical” and “moral” ethics is intended to capture the sense that a profession such as law can create a set of formal technical rules that has little or nothing to do with principled morality as we tend to understand it but nevertheless purport to impose behavioral rules on its members. Unfortunately, such rules are more likely to be manifestations of a guild mentality in which the members take care to ensure that their power is retained and “outsiders” are kept at arms length while being largely unaware of the real behavior due to the “mysteries” of the profession. The problem is that when the guild is allowed not only to create the rules but is granted the

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7 Jules Henry, *Culture Against Man* 65 (1965).
8 Montesquieu, *The Spirit of the Laws*, Bk. III.

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complete power to determine what violations are, when violations have occurred, as well as being in complete control of the sanctioning and accountability processes the system is questionable to the point of being duplicitous.

The “humor” offered at the beginning suggests that lawyers are afflicted by a combination of greed, manipulation and deception. Jules Henry argues that the value systems and institutions of the twentieth century have reversed the truth-seeking spirit of several millennia—resulting in a culture of lies, concluding: “One of the discoveries of the twentieth century is the enormous variety of ways of compelling language to lie.” He offers the concept of pecuniary pseudo-truth to characterize our age. Henry defines it as “a false statement made as if it were true, but not intended to be believed.” He further applies the idea of pecuniary pseudo-truth to law through his concept of “legally innocent prevarication” which is used to “cover all statements which, though not legally untrue, misrepresent by implication.” The “truth” is that these assertions are “true”. In numerous instances this is what advocacy requires. An important question involves the moral and ethical limits of that responsibility.

The disease of avarice and the crafting of false images designed to fool not only others but ourselves have progressively attacked the values of an entire society. Former Library of Congress director and historian Daniel Boorstin observes: “The making of the illusions which flood our experience has become the business of America, some of its most honest and most necessary and respectable business.” He adds: “I am thinking not only of advertising and public relations and political rhetoric, but of all the activities which purport to inform and comfort and improve and educate and elevate us: the work of our best journalists, our most enterprising book publishers, our most energetic manufacturers and merchandisers, our most successful entertainers, our best guides to world travel, and our most influential leaders in foreign relations.”

This indicates it isn’t only lawyers who are having trouble with principle. As Boorstin and Henry indicate, journalists, business people, politicians, and physicians are all experiencing the dilemma of lacking a system of honor in a deceptive world of telemarketers, public relations, media ratings frenzies, and “spin doctors.” From what I have been reading and seeing the problem has gone considerably farther. In law schools and universities the access to electronic technology and data bases has generated a level of cheating that is mind-seems to be a sort of de rigeur game in which successful actors

10 Henry, Culture against Man, id, .
11 Henry, Culture against Man, supra n. .
13 Boorstin, Image, id.
are admired for their ability to “get away with it” and fool their monitors. How silly it must seem to so many of America’s young people to have to listen to the proclamations of principle voiced by their teachers. Having taught in Russia and elsewhere where attitudes toward honesty and cheating are far different from that of the West (at least historically) I understand it really is a cultural “thing”. Honesty is not a universal value. That being the case the simple fact is that the rules of the culture must be altered to fit the desired ends. If you want honest and principled lawyers you must create a culture conducive to that outcome. Otherwise you are just “blowing smoke”.

Politicians, our democratically elected leaders, lie and distort without conscience or remorse, nor are they made to pay for their deliberate distortions and misrepresentations. It almost seems as if there is an inverse relationship between disciplines and professions that feel compelled to formalize instruction in ethics. This can be said not only of legal ethics but business ethics, journalism ethics, and medical ethics. Secretary of Defense Leon Panetta, faced with apparent misbehavior by several high-ranking officers even stated that perhaps it was time for training in ethical behavior for general officers.¹⁵

The reality of all this is that ethics grounded in principle and morality really isn’t that complex. I tell my law students, for example, that legal ethics is simple. Don’t steal, don’t neglect your work for clients, don’t rob banks, beat your domestic partner, destroy evidence, forge documents, don’t commingle funds, and don’t make obscene gestures to judges in court. Of course there are a few other rules of behavior to abide by but the idea is pretty clear. The things we shouldn’t do are pretty close to “no brainers” but we go ahead and do them anyway. Given the pressures and conditions I describe in this analysis the problem is that for most people “ethics” comes down to detection and accountability.

We already know in most cases what we should or shouldn’t do but without sufficient monitoring, detection and real accountability we succumb to the force of the “real” operational ethics under which we function. Pretending that courses in ethics can make us “ethical” that are disconnected from honest accountability along with substantial penalties for wrong action is little more than seeking to create the appearance of dealing with a problem we are otherwise unwilling to address. “Looking the other way” is ordinary human behavior until it gets to a point we have no other options. But because “we” are so deficient we tolerate behavior we know is fundamentally wrong in order to avoid confronting our own hypocrisy.

While lying and deception have always been part of the human condition, we have taken a quantum leap in the sophistication, extent, intensity, incessancy, presence, and depth of social and institutional penetration of propaganda and half-truths in a system designed to persuade, corrupt and sell. Truth is a casualty in this process—an obstacle to be overcome rather than honored. The problem is not that there is dishonesty because it would be unforgivably naïve to suggest we have not always practiced it to some extent. The critical concern is that there is so much lying and distortion and it has entered all that we do. It is now in everything to the point that we have are largely immune. Deception,

hype, cover ups, misrepresentation and even outright lying have become accepted parts of our cultural values rather than something to be disdained.

As the comments set out in the first few paragraphs of this paper indicate, lawyers have long been targets for contempt and criticism. This is unsurprising when viewed from the perspective of non-lawyers. What we do involves manipulation and deception. In many instances we do this in order to represent our clients but we also do it to our clients in too many instances. Although I suppose some would like to think so, lawyers are not an alien species from an alternate universe even though the law and its mysteries might be argued as such.

Lawyers are drawn from the general culture and are immersed in the values and behaviors of that culture. Given that money, celebrity and power have become dominant surrogates for inner principle and wisdom in American society generally, it is inevitable that those who become lawyers are creatures of that system and possess the same values. De Tocqueville referred to lawyers as America’s aristocracy. But which aristocracy was it? The one that rode roughshod over the rights and fields of French peasants or an aristocracy of merit and commitment that served the highest values? At our moment in history I am forced to opt mainly for the “roughshod” version even while hoping for the more just and socially committed one.

The problem with choosing your “aristocracy” is that there is no law school application “litmus test” that seeks to identify and admit only students who have the “highest” and most noble values. Nor is there any kind of serious attempt in American law schools to inculcate deep values sufficient to buffer against the pressures and incentives of the commercialized and power-driven ethos of competitive law practice.\(^\text{16}\)

Law graduates may well represent an enhanced competitive version of what is found in society generally and comprise a self-selected group of individuals who seek status, power and reward on levels beyond most others. Expecting “good” values (compassion, self-sacrifice to the common good, moral courage to stand against injustice and so forth) to somehow emerge from members of that group is likely to be a delusion. This does not mean there aren’t heroic stalwarts possessed of monumental integrity within the system but that they are few and far between and that the incentives, rewards and disincentives of the legal system undermine integrity and moral courage.

What do we see when we look in a mirror reflecting images of what American culture values most highly? An obsession with money, celebrity and power has captured the soul of Western culture. This includes the legal profession. Even if the image is not as brutally stark as claimed by Jack Fritts, there can be little question that money, celebrity and power have become the primary icons by which we project our power, status and success. They are symbols by which we transmit a sign of our “worth” to others. This value system has been magnified for many lawyers responsible for advancing the interests of clients who are intensely committed to the pursuit and attainment of money and power as well. Such clients prefer to deal with lawyers in their own image because then they can “trust” them to be operating according to the same standards.

Daniel Boorstin’s warning that dishonesty, deception and the degradation of truth-seeking reaches deep into the heart of American society. This is shown by the stunning increase of scientific fraud over the past several decades. Science, of course, is thought to be our most reliable methodology by which the validity of assertions can be tested and truth ascertained in domains where the scientific method applies. Our best and brightest truth-seeking minds are thought to be engaged in the enterprise of science in order to reveal the deepest truths of the physical and social worlds. As we move from clearly empirical or falsifiable disciplines into the more “social” realms there can be no argument that the standards are different. Yet the underlying premise remains—truth, however we honestly define it—is truth according to some legitimate standard.

It is in science where we can expect clear lines to be drawn as to truth and validity of propositions because of the commitment to empirical evidence and testing. It is in science where due to the requirement of evidence, verification and retesting of the proposition by independent researchers aimed at replication in which one might think it professionally insane to falsify data and results in order to be the first to claim to have discovered some new knowledge of consequence. Yet the lure of academic reputation, status, large research grants and the like appear in many instances to have overwhelmed integrity and common sense.

The fact is that we have lost our grounding even in the scientific paradigm. Donald Kennedy, former president of Stanford University, has described his experience with the sharp decline in truth-seeking and integrity he witnessed during his career. Kennedy states: “The change [in attitudes since roughly 1960] illustrates just how serious a threat to the public’s confidence in the value of scholarship is the belief that its pursuit is marred by personal interest, greed, or dishonesty…. The list of scientists publicly tainted by charges that either they or their colleagues have falsified data reads like a Who’s Who of biomedical research. It includes a Nobel laureate, the chairs of two distinguished departments of medicine, the director of an NIH laboratory who is credited with what is perhaps the fundamental discovery on the biology of the AIDS virus, a senior researcher who first showed that lead poisoning leads to intellectual deficits in children, and many others.”

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Nor is the degradation of truth in the service of ambition, the pursuit of research grants and reputation improving. An October 2012 report published in London’s Guardian states that there has been a tenfold increase in scientific papers being withdrawn from submissions to journals due to the detection of fraud on the part of the researchers. My point is that if dishonesty has filtered into the behavior of scientific researchers whose work is subject to verification, replication and methodological critique to the point that it is highly certain that the “cheating” will be exposed sooner rather than later, how likely is it that lawyers whose activity is inherently deceptive, manipulative and invisible will be able to resist the pressures and seductions that lead toward abuses of power and position?

I doubt whether anything or anyone is capable of reversing the drift toward dishonesty and duplicity. Our culture has so corrupted the value of truth due to what has been called “market-morality” that reformist pursuits may be futile efforts. I taught “legal ethics” to law students for years and while I think I did a pretty decent job at it the fact is that it is a required course that most students resent having to take. It is a “dumping place” where the organized bar and the courts assign the responsibilities they are unable or unwilling to assume. Law school is not a solution to the problems of the legal profession nor can the students even come close to fully appreciating the most important messages of courses on the legal profession and its ethics before they actually become lawyers and are forced to confront the ethical and moral dilemmas. But at the point those dilemmas arise they are already caught within the system.

It may simply be too late to alter the ethical equation. In criticizing the effects of market-morality Jules Henry argues that: “The heart of truth in pecuniary philosophy is contained in the following three postulates: Truth is what sells. Truth is what you want people to believe. Truth is that which is not legally false.” Such pronouncements gladden the hearts of too many journalists, lawyers, scientists, politicians and media “hacks” whose careers depend on distortion, innuendo and misconstruction.

But if the ethical rules are not grounded in a deeper understanding and acceptance of principles than is gained simply from their surface language, or are never really monitored or enforced then, as has been said about law not being “real” unless there are sanctions and some substantial probability of detection and accountability, the “technical” ethics system (and here I include the system of lawyer civil malpractice along with formal ethics) such as is found in the rules of the legal profession does not actually

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19 Maxine Greene tells us: “In Plato’s Apology, Socrates compares himself as a teacher with a gadfly and tells the Athenian citizens that he was “always fastening upon you, arousing and persuading and reproaching you.” To remain immobile, to refuse to inquire was to be caught napping, to resist being stirred into life. But it was not enough merely to awaken: an individual had to be brought, on his own initiative, to regard virtue. He had to be stimulated to take an active role in the search for his perfection; he had to be courageous enough to turn toward the Good.” Maxine Greene, Teacher as Stranger 72 (1973). It is intriguing that law teaching in America has long purported to rely on what faculty proclaim is the Socratic method of instruction. The problem is that even if it is in fact done properly as an educational strategy it is a “method” disconnected from its original function of bringing students to consider personal virtue.

An overabundance of discretion on the part of lawyers coupled with a lack of consequences for incompetence, negligence and venality on the part of members of a legal profession who are fully aware that in law the potential for real accountability and consequence for client actions is an essential component of a workable system renders the formal legal ethics and other modes of lawyer accountability a hypocritical and self-serving facade.

If we apply Justice Holmes’ idea of the “bad man’s” perspective on the law as centered on the desire to know under what specific circumstances he can expect to be sanctioned, then we can begin to appreciate the essential connection between lawyers’ ethics and accountability. It is a situation where there is great discretion to act, only a slight chance that one’s actions will be seen or understood by any except other lawyers, and no real accountability except for the most egregious violations. In that context there is no real power in the system to influence the behavior of “bad” lawyers because they will only conform their actions to professional standards if they conclude they will otherwise suffer sanctions on a scale that will produce serious and painful consequences.

Even if many “good” lawyers seek to operate according to a strong set of inner principles of the kind we would consider professionally virtuous, over time the corruption of the system degrades the commitment to professionalism. This is a result of the absence of honest monitoring, limited detection, and no or only slight accountability for bad behavior. Lawyers are actors inside a system driven by a guild mentality similar to the Omerta or code of silence characteristic of the Cosa Nostra. Being a “rat” carries greater consequences for the professional and this attitude toward the “stoolie” or whistleblower is found in the ranks of police, doctors and lawyers. This “standard” corrupts those who would otherwise be committed to higher levels of professionalism.

One of the problems for the lawyer is that it is easy to confuse the legitimate need for power and resources with the potential for going too far in the direction set out by Jack Fritts’ “fear, greed and money” proposition. Rationalization is a constant threat and part of the challenge is produced by the “material” with which lawyers deal, including clients. This material involves power, and the need to engage in advocacy and manipulation along with the fact that lawyers are obligated (in most instances) to engage in a “zero-sum” game in which there are winners and losers--both for clients and their lawyers. Even here the dilemma becomes intense because, paradoxically, a critical dynamic is that for many lawyers the “game” is not zero-sum because, assuming the client has sufficient resources, the client (he, she or it) can lose even while the client’s lawyer wins.

This “victory” is because significant legal fees have been gained for the lawyer or law firm through the process even if the outcome achieved was poor or mediocre. This revenue stream generates the potential for lawyer abuse independent of client interests. It even can be said to cause client abuse in many cases because the lawyer can maximize fees by significant work early in a dispute that quickly exhausts limited client resources with the result that the client either settles below the dispute’s worth, goes deep into debt

For the idea that law is based on sanctions and avoidance of accountability, see Oliver Wendell Holmes, Jr., “The Path of the Law”, 10 Harvard Law Review 457 (1897).
by mortgaging assets, or abandons the case and walks away due to lack of resources. The lawyers win, the clients lose. The corruption of such a process is substantial, as is the effort we make to deceive ourselves about the true nature of our actions.

**Bargaining with the Devil**

Another problem for those who practice law is that advocacy inevitably carries a price. In seeking to achieve the positive outcomes of the greatest power it is easy to pay more than one might intend. In Goethe’s classic work, Faust entered a bargain with Mephistopheles in which he traded his eternal soul in exchange for transient earthly power and in doing so condemned himself to damnation. The terms of the bargain as stated by Mephistopheles were deceptively simple:

I’ll pledge myself to be thy servant here,  
Still at thy back alert and prompt to be;  
But when together yonder we appear,  
Then shalt thou do the same for me. 

I certainly do not want to go so far as to accuse lawyers (including myself) of being “the spawn of the Devil”. But the potential for cooptation exists when anyone deals with power and manipulation for one-sided strategic purposes and operates within what is quite often a secretive process in the service of institutions and clients who desire to have their own behaviors concealed from public view. In such a process it is not surprising that many negotiated settlements of disputes include confidentiality agreements that require the concealment of terms and behavior. The reason is that transparency brings consequences and lawyers and their clients are quite often committed to avoiding those consequences even though it seems clear that it would be in the public interest to know what had occurred.

Regardless of any public interest, lawyers live a Faustian bargain in which deception, manipulation and concealment are paramount. Their “systemic” Mephistopheles is their law firm, the culture of advocacy, the clients they represent, economic and status needs, and the institutions we think of when we talk about the *Justice System* which as any who have worked within it is anything but just. While the effects of that bargain in many ways create significant goods for a society that would otherwise be unable to resolve its fundamental disagreements—it also generates significant bads for the individuals who lose out in the adversary process. The consequences for lawyers who serve the purposes of the adversary system through the inevitable use of the “dark skills” of law practice can be significant. The irony is that the dark side of the lawyer’s life is neither atypical nor exceptional. It reflects a necessary component of being a *good*, i.e., *effective*, lawyer. It is also in many instances integral to being effective in whatever you do in life.

**Just another “Brick in the Wall”**

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Our professed cultural ethos of principled individual growth and the commitment to creating a personalized Existential “self” of deep meaning and quality is actually at odds with the way most humans want to live their lives. While we lawyers lament the decline of professionalism, the truth is that like most people we want little more than to be given direction, provided a reasonable degree of security and live our lives as “cogs in the machine”. We are, in the eloquent language of Pink Floyd, “just another brick in the Wall”. The “fully-realized” principled individual is a false ideal when gauged against our real behavior.

New lawyers fill this role in the machinery and masonry of their employers, whether private or public, and in any event come to those positions with values largely congruent with those of the general society. They are quickly acculturated into the controlling values of their employers and the associated institutions within which they operate whether courts, prosecution, local or other government service, large corporations or other powerful organization. The situation is one Alexander Hamilton warned against when he observed: “A power over a man’s subsistence amounts to a power over his will.”

I don’t know if there is anything we in the legal profession can do to change these conditions. These institutions become the “tribes” or primary reference groups from which we derive rewards and status and as such we serve them far more than they serve us. If we fail to obey and advance the “real” rules and agendas of these entities we quickly find ourselves on the outside looking in. But without a change in the use of institutional power and behavior, the rhetoric of independent professionalism based on the strength of character and values of the individual lawyer rings hollow.

In understanding just how difficult a meaningful return to real values and deep professionalism will be, consider, for example, the following observation:

Most people do the job they have to do regardless of what they want to do; technological driveness [sic] has inexorable requirements, and the average man or woman either meets them or does not work. With a backward glance at the job-dreams of his pre-“labor force” days the young worker enters the occupational system not where he would, but where he can; and his job-dream, so often an expression of his dearest self, is pushed down with all his other unmet needs to churn among them for the rest of his life.

Machiavellian and Proud of It

This brings us to the crux of the dilemma. I am challenging manipulation and deception, illusions and delusions. Yet at the same time I am saying that there is legitimacy to such behavior by some professions, for some people and for some purposes. There is inescapable tension in such a context. But in attempting to answer the issue in some ways I will say that the role of the lawyer operating in the highly artificial construct we call the Rule of Law is unique and special when done well.

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With only a limited fear of self-justification I will add that such behavior and values are considerably more appropriate to the role of the legal advocate than in any other context. For that reason I am willing to say that the distortion and manipulation of truth is not appropriate in science, journalism, honest economic activity or even politics. These domains are distinct from that of the law and that difference is real rather than ephemeral. In the context of the law and client representation I am a Machiavellian and I am proud to serve in that role even while I acknowledge its nature and potential effects.

The fact is that lawyers must be “principled Machiavellians”. Most people have difficulty coping with the language of manipulation and deception. Quite often people recoil from an accusation of practicing Machiavellianism. But to varying degrees and depending on the nature of the practice, the clientele, and the context in which one operates lawyers are Machiavellians. They are manipulators (as are all humans in numerous ways designed to achieve their ends), they are deceptive in their communications and in the impressions they deliberately create to influence others. Lawyers are fundamentally and inalterably goal-oriented on behalf of the clients and institutions they serve—and if they do not do this and do it well then they are not “good” lawyers.

Anyone who thinks this “sacred duty” of the lawyer does not have significant effects on those engaged in the activity does not exist in the real world. Anyone unable to function in this way should either not be a lawyer or should limit themselves to contexts where there are no opponents and the “game” being played is not zero-sum or close to it with winners and losers.

The nature of what the lawyer’s duty means can be seen in a few passages of The Prince. Niccolo Machiavelli admonished that a: “man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good.” He adds: “a prudent ruler cannot, and must not, honour his word when it places him at a disadvantage. . . . If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them.”

Machiavelli continues: “[O]ne must know how to colour one’s actions and to be a great liar and deceiver.” And that the prince, “should appear to be compassionate, faithful to his word, kind, guileless, and devout. And indeed he should be so. But his disposition should be such that, if he needs to be the opposite, he knows how.”

The “Sculpting” and Seduction are Subtle

Moral and ethical conflict creeps up on lawyers rather than appearing conveniently as clear choices. The weight of confused choices and small seductions to which it is easy to say yes tends to accumulate. These easy choices eventually change us. The processes’
subtlety is due in part to our professed obligation to serve others zealously and competently. This means that we assert or defend others’ behaviors and failures and are removed from the actual consequences produced by our clients’ acts. We therefore live our professional lives “at a remove.”

The professional distance lawyers should keep from their clients is an integral part of the dispassionate judgment required of effective advocates. But this creates its own moral risk. The condition is similar to the distinction between bomber pilots who experience very little emotion when dropping bombs from 50,000 feet that cause the deaths of 1,000 people contrasted with the infantry soldier who pays the moral cost of knowing the face of the person he kills. Thomas Shaffer warns, “Professional morals, because they are vicarious, tend to obscure the moral question, ‘What am I up to?’”27 He suggests that when:

The moral question being asked is, “What is the client up to?” The modern, professional moral answer is, “That’s none of my business. I’m just doing my job.” But the moral question can be answered in another way, a way . . . that would interpret the question, “What is the client up to?” as a different and more troubling question. “How is the client, in his association with me, changing? What is she or he becoming because of me?”28

An important question is how the lawyer is being changed through the interactions with clients, through the processes of obtaining clients’ goals, and by the weight of the cumulative experiences of law practice. Thomas Shaffer puts it thus: “professionals find it necessary to protect themselves from their clients. Otherwise we end up asking whether it is moral for us to lie, to kill, to destroy—questions that would be readily answered if one of us professionals was acting only for himself.”29

This dichotomy between our selves as individual persons acting only for us, and the very different obligations and limits to certain kinds of behavior when acting on behalf of another who has put his fate in our hands and to whom we have sworn an oath, is at the heart of professional ethics. At the center of the discussion is what does such a duty do to us, and how do we prevent the lines between the domains from blurring or leaking across the legitimate boundaries.

Maxine Greene warns that slogans and propaganda have replaced intelligent dialogue. She states that slogans are, “rallying symbols” that “in no sense describe what actually exists, yet they are taken—wishfully or desperately—to be generalizations or statements of fact.”30 The shaping of the lawyer is inevitable because lawyers are submerged in the intensity of law practice. They must continually make critical moral decisions while being subjected to the powerful force of client interests and competitive advocacy.

27. SHAFFER at 60.
28. Shaffer. Id.
29. Shaffer. Id.
30 Maxine Greene, Teacher as Stranger 70.
Beyond this but of increasingly great power are the increasingly difficult pressures created by the economics of developing and maintaining a law practice.  

Practicing lawyers must live in the world and work on its front lines while engaging in its conflicts of morality and the exercise of power. Some lawyers thrive on the interplay and take energy and meaning from the conflict. Many others adapt and go through a moral transformation. Others are wounded emotionally and morally, with many resorting to aberrant behavior in an effort to cope.

Few lawyers possess a viable flight option even if they want it and after years of extremely expensive education and law practice there is little space for change. We become conditioned, acculturated and captured by the professional environment and for most people there is little choice but to keep doing the job. Lawyers are not alone in this dilemma. As Peter Berger notes: “One moves within society within carefully defined systems of power and prestige. And once one knows how to locate oneself, one also knows that there is not an awful lot that one can do about this.”

**Self-Denial and Avoidance**

A former associate in a Los Angeles law firm describes the unanticipated moral impact of the lawyer’s bargain that he experienced in law practice:

> I never could absolve myself of culpability for my clients’ misdeeds. I remember holding a farm worker’s baby born without legs, probably because of pesticide sprayings I had helped defend in court. Professional ethics would have had me just wash my hands of complicity. I felt like Pontius Pilate before Christ’s crucifixion. All my life, my family, my teachers, my church had taught me to accept responsibility for the consequences of my actions. Law school lectures on professional responsibility could not undo that instinct. They were too little, too late.

Peter Drucker observes: “Education is for somebody, not for something. The product of education is not knowledge or learning; it is not skills, ability or virtue, jobs or success, dollars or goods. It is always a person...” But what kind of person is it realistic to expect will develop through the combination of the experiences, obligations, and culture of law practice? Consider the observations by Kevin Lyskowski, who described law firm

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33. Lyskowski, (quoting a young lawyer: “I wish I could still commit to an idea or cause with abandon; often I feel I’ve lost what made my life meaningful.”).

34. Peter Drucker, Landmarks of Tomorrow 137 (1965).
associates as “conflicted liberals” whose private values were contradicted by their professional work and as “groveling” before senior partners and clients who held their professional fates in their hands.\textsuperscript{35}

The failure to confront and understand the stresses of using the dark skills of law practice and operating within the culture of law practice has severely undermined the legal profession as a principled activity. We have long ignored and confused the values that provide legitimacy to the profession, and that justify what we do, who we are, and why we act. In part this is because the lawyer’s culture and skills represent an environment and set of behaviors that polite society traditionally used but did not want to admit.\textsuperscript{36}

People avoid facing unpleasant truths, and the avoidance behavior of the legal profession is predictable. Abraham Maslow warns, in terms directly applicable to lawyers and the legal profession:

\begin{quote}
We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful. We protect ourselves and our ideal image of ourselves by repression and similar defenses, which are essentially techniques by which we avoid becoming conscious of unpleasant or dangerous truths.\textsuperscript{37}
\end{quote}

\[\ldots\]

\[\text{T}\]his close relation between knowing and doing can help us to interpret one cause of the fear of knowing as deeply a fear of doing, a fear of the consequences that flow from knowing, a fear of its dangerous responsibilities. Often it is better not to know, because if you did know, then you would have to act and stick your neck out.\textsuperscript{38}

The self-denial in which lawyers engage, and the values conflict that is consuming many members of the legal profession, is created in part by the social myths and unreal assumptions we have made about use of the skills of manipulation and strategy—powers of action I am calling the dark skills. The point made here is that some of what are intuitively thought of as bad ways to act are integral aspects of being a human. The responsibility of the lawyer to the client requires the lawyer to draw upon those abilities to a greater degree and this responsibility imposes a heavy burden.\textsuperscript{39}

The conflict rests in part on what Shaffer and others have termed “task morality” in which “[a] common professional and political view is that a lawyer may do for his client, or an official for his country, or a physician for his patient, what would be immoral if

\begin{footnotes}
35. Lyskowski, supra, n. 31.
36. “[M]any people…find it almost impossible to realize that Socrates, in his precept “know thyself” was urging upon the individual the most difficult challenge of all. And they likewise find it almost impossible to understand what Kierkegaard meant when he proclaimed, “To venture in the highest sense is precisely to become conscious of one’s self.” Rollo May, \textit{Man’s Search for Meaning}, at 55, 56. The problem is that if we want to avoid self-knowledge then we will do whatever is needed to face our deficiencies.
39. \textit{See} McLuhan, supra, n. 15.
\end{footnotes}
either acted in the same way for himself."  

There is a “task morality” that is a core responsibility of the lawyer committed to client representation in our Rule of Law system. There are consequences of this responsibility and there are limits to what one can properly do when performing the professional tasks of the lawyer.

Former Cornell law dean Roger Cramton fears that lawyers have been corrupted by the sense that their sole responsibility is to their clients and that all other considerations pale in comparison. He made these comments almost two decades ago and during that time a change has occurred for many lawyers. But the change is service to their own interests rather than the clients’ and this is not a positive shift. Cramton states: “My thesis … is that … the legal profession has neglected its central moral tradition for the modern heresy, endlessly repeated in multiple settings, that “the client comes first,” meaning “first and only.” Some years ago the fidelity and loyalty owed to clients was balanced by a generally accepted understanding that the lawyer’s primary obligation was to the procedures and institutions of the law.”

The consequences of the lawyer’s Machiavellian role should not be understated because our conflicting systems of personal and professional morality generate moral dissonance. One consequence is impairment. Stephanie Goldberg reported on a survey of thirty-four managing partners of Denver-based law firms. She reports:

[T]he problem of lawyer impairment—one that firms of all sizes are slow to acknowledge and even slower at doing something about—is far from unusual. . . . The causes of impairment were most often alcoholism and marital problems, and the areas of performance most often affected were billable hours (79 percent), the ability to withstand pressure (79 percent) and the quality of work (75 percent).

Part of the problem is moral and psychological burnout related to the many arduous tasks of the involved professional. Susan Davis tells us of the consequences of burnout of the kind many lawyers are experiencing. She also explains that it is a cumulative process rather than one that is starkly obvious. Davis observes: “True burnout doesn’t occur suddenly, as the result of trauma or short-term deadlines, and it doesn’t disappear after a good night’s sleep. Rather, it’s a chronic condition, what one researcher has called “a general erosion of the spirit,” that can have severe consequences: loss of enthusiasm for work or family, trouble concentrating, reduced creativity, depression, alienation, even paranoia or psychosis.”

Janice Gomez and Ron Michaelis consider the relationship of job “burnout” to the human services profession. The two researchers observe: “Leiter (1991) has suggested that

40. SHAFFER, supra n. at 73.
burnout may be inevitable for all personality types, due to the conflict between the idealistic “professional mystique” with which aspiring human service providers are endowed during their training and the harsh realities of working in the human service profession."\(^{44}\) They add: “People who enter the human service profession expect their jobs to be full of challenging experiences. They anticipate many emotionally rewarding interactions with grateful consumers, an air of camaraderie among their coworkers, and an administration that allows them autonomy in decision making and rewards their initiatives. All too often, however, they find that their consumers resent them as yet another authority figure in the bureaucratic leviathan.”\(^{45}\)

Many young people enter law school intent on helping people and “doing justice”. If they also seek a comfortable life financially and a stable career as well then that is fine. But for many lawyers the stresses of law practice, employment, career advancement, time demands, and clients produce an environment quite different from what they hoped to work in. One of the first messages I try to get across to law students and young lawyers is that many people in your cases on all sides will lie to you. They will lie for a variety of reasons, including concealing what they did, increasing the likelihood they will be able to obtain a desired outcome, and rationalizing creepy or criminal behavior to protect from liability or defend their egos and self-images. But the sad part of much of law practice is that one of the most frequent classes of liars to lawyers is clients. Over time, discovering the lies of clients, as well as the things they have done out of ignorance, maliciousness, pettiness or greed erodes many lawyers’ commitment to the undertaking.

Anne Ferguson notes that: “The people most likely to burn out are those who start their careers or jobs filled with idealism and enthusiasm. Most vulnerable are those men and women who spend a large part of their time dealing with other people, whether they are subordinates, clients, customers or patients.” She adds, “When concerned and caring workers find that they can’t live up to their ideals, or help patients or clients as much as they would like, this can trigger burnout, causing people to leave their jobs.” \(^{46}\)

For even the most idealistic graduates there are problems with the reality of the professional experience in contrast with what they anticipated the life of the professional to involve. Cary Cherniss explains:

> People who go into the professions, research has shown, are often motivated by a strong need for autonomy. And they go into a particular field because they think they will be able to call their own tune. But increasingly, professionals work in either public or private organizations where they don’t have that much control over their own destinies.\(^1\)

The idea of having “control over their own destinies” is laughable to associates who describe the conditions of large firm practice as involving “groveling at the feet of clients and senior partners.” Former Yale President Kingman Brewster once described the lawyer in the following words: “The lawyer is not going about his own affairs: he is on a

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\(^{45}\) Gomez and Michaelis, “burnout in human service providers”, *The Journal of Rehabilitation*, id.

mission for someone else. Of all mankind, he is the most removed from being ‘that happiest figure in the law, a servant on a frolic of his own.’”  

Justice Lewis Powell’s 1963 A.B.A. Committee on the Economics of Law Practice surely had no idea of its eventual impact on professionalism. Instead of creating greater professionalism among lawyers, the committee justified a process that has done much to undermine the legal profession. Of course, given the technological and economic changes that took place since that time much of what we have experienced most likely would have occurred in any event. But as an historical insight the striking contrast between the culture and structure of law practice that existed at the time of Justice Powell’s committee and the magnitude of the changes in the conditions of law practice that have taken place since the publication of the Lawyer’s Handbook are is stunning. Perhaps the most dramatic is reflected in the differences in the potential level of feasible “fee-earning” hours the lawyer should take into account in determining possible earnings.

There are only approximately 1300 fee-earning hours per year unless the lawyer works overtime. Many of the 8 hours per day available for office work are consumed in personal, civic, bar, religious and political activities, general office administration and other non-remunerative matters. Either 5 or 6 remunerative hours per day would be realistic, depending on the habits of the individual lawyer or the practices of the particular office.

Compare the 1300 hours with the 2000-2200 billable hours now generally expected from law firm associates. This 2200 figure translates into something like 60 plus hours per week that must actually be worked to achieve the required level of billable hours. This doesn’t even include the need for associates to “show the flag” to senior lawyers by being around the office and seeming to work. Even sixty hours per week of work—which is very conservative—for a period of fifty weeks means the associate is putting in 3000 hours per year of time to achieve 2000 billable hours. Law practice becomes nothing more than a stressful rat race for survival in a Darwinian system.

**The Price of Advocacy**

It has been written, and I think accurately, that the public perception is that: “Lawyers … [take] advantage of ‘loopholes’ and ‘technicalities’ to win. [One response to this perception is that] Persons who make this charge are unaware, or do not understand, that the lawyer is hired to win, and if he does not exercise every legitimate effort in his client’s behalf, then he is betraying a sacred trust.” This orientation to “winning” does, however, have consequences. The “good” lawyer is confronted by the duty to the client, to the legal system, to self and family, and to society and others. These duties may overlap, but in many ways they are inconsistent and even in conflict. Understanding the various duties and balancing their competing demands is something for which we have little advance preparation.

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47 Quoted in Martin Mayer, *Lawyers*, supra n. at 16.
Those who seek cloistered lives of ethereal purity or the pursuit of knowledge for itself should not become lawyers. Anthony Kronman argues “the most important skill the law teacher imparts is the skill of advocacy…” He adds, however, that: “The indifference to truth that all advocacy entails is likely … to affect the character of one who practices the craft for a long time and in a studied way.”

In her book, *Injustice For All*, Anne Strick comments on how many lawyers attempt to falsely justify the adversary system as a mechanism for the effective determination of the truth of controversies. The adversary system is many things—including preserver of power and privilege, occasional righter of wrongs, a mechanism through which we can pretend that justice is done, a callous processor of people who have offended the law, a pressure release valve, and a resoler of disputes through the application of latent societal force. But it is not, has never been, and is unlikely to be a search for truth for a variety of reasons. These of course include the fact that the resources of the adversary process tend to be seriously imbalanced on behalf of one side or the other. But even if the resources were more equal, this would only lead to more deception rather than less. It also includes the fact that juries clearly make decisions—just as do judges—on grounds that have nothing to do with truth but with bias, political considerations, appearance of the parties, emotion, and numerous other factors unrelated to any strict understanding of truth.

Thomas Shaffer emphasizes that the terms of the lawyer’s oath in America have been consistently diluted over the past century. He writes: “Each generation of American lawyers since Judge Jones’s [Alabama Code of 1887] has revised its code of ethics; and each revision says less about morals, and says what it does say about morals less precisely…. The American Bar Association’s ... Rules of Professional Conduct for American lawyers (1983) bring this development to new fullness by avoiding the traditional words of ethical argument--words such as conscience, morality, right, good, and propriety--in favor of the words of mandate and permission that are the stuff of statutes and court orders.”

Compare the Model Code with the altered language of the ABA’s Model Rules of Professional Conduct: Rule 1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” The comment to this rule states: “A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.”

Daniel Boorstin contrasts *celebrity* which can be made into an ongoing and marketable
commodity, with *heroism* which tends to be quickly rendered an historical event rather than an ongoing process which can be exploited for commercial gain. Those who benefit from the sale of celebrity have no regard for heroism. Indeed, our society gives credit for the debunking of the hero—as if we can’t stand the comparison. Boorstin observes: “[T]he growth of the social sciences has given us additional reasons to be sophisticated about the hero and to doubt his essential greatness.” 55 He continues: “We see greatness as an illusion; or, if it does exist, we suspect we know its secret. We look with knowing disillusionment on our admiration for historical figures who used to embody greatness.” 56 What are the deep principles of a society that trivializes and consumes its heroes?

In such a debased culture what does it even mean for a lawyer to be principled? What is the image of the great lawyer? Is it Clarence Darrow, Abraham Lincoln, Thurgood Marshall or is “greatness” measured by the top ten lawyers ranked by *The American Lawyer* based on how much money they earned last year or who won the year’s biggest jury verdict? Martin Buber put the issue eloquently:

> Our age has experienced … paralysis and failure of the human soul … in three realms. The first was the realm of technique. Machines which were invented to serve men in their work, impressed him into their service. They were no longer, like tools, an extension of man’s arm, but man became their extension, an adjunct on their periphery, doing their bidding. 57

For our understanding of the reality of ethics and principled behavior it is important to recognize that the “Machines” to which Buber refers are not simply mechanical entities. They are far larger, more powerful and extensive than physical “machinery” and are the modes by which economic and social behaviors are implemented. The legal profession (or a political party, or a religious sect, or military organization, or educational system) is in fact a kind of “machine”. These “machines” are matrices that catch us up in their structures and associations and provide our rewards and punishments depending on how we fit into their needs and serve their interests. All these systems operate according to fixed rules and purposes. “Our” ethics are really the operating rules of these associations. 58

In the same vein, Paul Tournier suggests that people: “have become merely cogs in the machine of production, tools, functions. All that matters is what they do, not what they

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56. Boorstin, id. at 51.
58. There is a deceptive distinction between real intellectual insight aimed at uncovering truth and critiquing deficiencies and the use of intellect for other purposes. In that sense we are speaking of intellect as a raw mental power that can be used for a variety of purposes—moral, immoral and amoral among them. This is explained by Richard Hofstadter in *Anti-Intellectualism in American Life* (Alfred A. Knopf, New York 1970) at 26 who observes: “In most professions intellect may help, but intelligence will serve well enough without it.” He adds: “The work of lawyers…though vitally dependent upon ideas, is not distinctively intellectual. … The heart of the matter … is that the professional man lives off ideas, not for them. His professional role, his professional skills, do not make him an intellectual. He is a mental worker, a technician.” Hofstadter, at 26, 27. The problem, of course, is that as a technician the lawyer is a servant. As servant the lawyer advances the desires of others and if those desires are questionable in nature the consequences both for the “lawyer-servant” and society can be considerable.
think or feel…. [T]heir thoughts and feelings are similarly moulded by propaganda, press, cinema and radio.” 59 What I am describing is a component of what French philosopher Jacques Ellul defined as the “Technological Society”. The power and scale of institutional structures is part of the pervasive force of the economic and political technique Ellul describes as shaping modern society. Part of its rules of operation embodies the use of propaganda. Rather than being focused on truth and deep awareness, propaganda offers powerful manipulative packages that consist of ideologies, untested assumptions and slogans. These devices nonetheless have great power to shape who we are, what we do and our perception of the world. This includes our sense of right and wrong.

Ellul sums up our dilemma. “[M]odern man is beset by anxiety and a feeling of insecurity. He tries to adapt to changes he cannot comprehend. The conflict of propaganda takes the place of the debate of ideas.”60 He adds: “Technique is of necessity, and as compensation, our universal language. It is the fruit of specialization. But this very specialization prevents mutual understanding. Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world. . . . The man of today is no longer able to understand his neighbor because his profession is his whole life, and the technical specialization of this life has bound him to live in a closed universe.” 61

Part II

Ten Elements of “Real” Ethics

1. Ideal principles as “cover” for who we actually are

Intellectual historian Crane Brinton observes in Ideas and Men: “all interested in man’s fate should study with great care the way men actually behave, the relation between their ideals and their acts, their words and their deeds; finally that this relation is not the simple, direct, causal relation most of us were brought up to believe it is.” 62 We deceive ourselves continually to protect our egos and avoid responsibility for failing to respond to unjust and unfair conditions or confront the fact of our helplessness or cowardice. To the extent we know some of our inadequacies and failings we take pains to appear to be more than we are. Part of this involves generating a public persona that we present to the world and another aspect is to proclaim idealized principles in which we purport to believe, honor and act in accordance even though our real behavior is something else. The profession of false ideals is a basic technique by which a profession such as law masks its actual nature and behavior.

60 Jacques Ellul, The Technological Society at vii.
The gap between professed ideals and reality isn’t always one of cynical hypocrisy. Quite often it is simply because we want to believe in the tenor of those ideals and we assume we act in some rough accordance. We also are not very good at understanding the systems within which we operate because of our subjectivity. In what Ellul calls our “closed universe” we are never fully aware of the power these systems hold over us. To the extent we do sense their power and the extent to which we are subject to it we engage in denial and avoidance. This occurs because we have very little power to do anything about it, because we want the rewards that compliance offers, and because we wish to avoid the consequences of fighting the system.

Our convenient ignorance is made easier because the rhetoric of the system relies on idealized assumptions that make it easy to deceive ourselves. One way for lawyers to deceive ourselves is to concentrate on the Ideal of the specialized technician. The problem is that the kinds of ultra-specialization that characterize modern society result in segmented closed systems that contain their own “ethics” and languages. We become caught inside closed systems where allegiance is required and disloyalty punished severely.

It might be possible to counteract the worst effects of the closed systems if we possessed powerful moral principles that shielded us and mitigated the worst of the cooptation. Arguably, deep religious faith and a real code of honor worked in this way in our history. To the extent this may have been true, we have progressively lost any strong inner core of shared moral values of a kind sufficient to control our darker impulses and resist corruption. Viktor Frankl describes what has occurred: “… man has suffered another loss in his … recent development: the traditions that had buttressed his behavior are now rapidly diminishing. No instinct tells him what he has to do, and no tradition tells him what he ought to do; soon he will not know what he wants to do. More and more he will be governed by what others want him to do, thus increasingly falling prey to conformism.”

Abraham Maslow, the founder of what has been called Third Force psychology or the psychology of the healthy person, pretty much sums up our human dilemma. He observes that: “one aspect of the basic human predicament, [is] that we are simultaneously worms and gods.” He adds: “Even our most fully-human beings are not exempted from the basic human predicament, of being simultaneously merely-creaturely and godlike, strong and weak, limited and unlimited…. fearful and courageous …yearning for perfection and yet afraid of it, being a worm and also a hero.”

False ideals and illusions treated as if they were true may on one level be comforting and allow us to perpetuate our belief of being in control of our fates. But they are nothing more than systemic propaganda and ideological “sound bites”. Jacques Ellul cuts to the heart of the process when he writes, “propaganda seeks to induce action, adherence, and

63 Viktor E. Frankl, *Man’s Search for Meaning* at 168 (1959)
participation—with as little thought as possible.” The combination of propaganda and “technique” manifested through our institutions (employers, universities and other educational institutions, churches and religious sects, media, etc.) shapes our perception and limits the quality of our understanding. And, unfortunately, this is what they aim to do, increasingly rendering the promise of human development an embarrassing delusion.

When this propagandizing and “hive-like” conformism occur (and the process has accelerated and intensified in the five decades since Ellul wrote Propaganda and The Technological Society) it fully supports his warning that: “The intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit for the group…. They will be the servants, the most conformist imaginable, of the instruments of technique.”

It is difficult to imagine what profession functions more as the “servants of technique” than lawyers. This is the challenge we face today and it includes lawyers and judges who are the dispensers and designers of the modes of allocating power and social goods but goes far beyond them to encompass politicians, corporate and financial entities, educational leaders and the shapers of thought and action in society. The problem is that the greatest rewards go to the most loyal and productive servants of the institutional “machines” and there is great risk in seeking to alter the rules of the “game” in ways that seek to challenge their self-interested exercise of power.

If there is to be any hope for reversing our rapid drift toward banality and divisive self-interest some of the energy and wisdom for change must come from our educators, philosophers and “public intellectuals”, leading jurists and lawyers since they deal directly with the institutions of power on a regular basis. These are the people who have the opportunity to perceive abuses and craft solutions. That is, after all, supposedly one of the core responsibilities of educators—providing students with the ability, insights and knowledge to see beyond the illusions that surround us and develop the skills and awareness required to enrich rather than degrade us into a kind of dehumanized and banal functionality.

The responsibility of educators to understand and critique power and prepare their students to do so seems obvious. The dangers of not doing so are significant yet we seem to have increasingly lost the will to question, challenge and lead. Management guru Peter Drucker discussed the role of education in preparing us for serving as principled contributors to society, warning: “Education that does not strive for the “good man” is ignoble and cynical. Anyone as highly equipped with knowledge, with ability to learn, and with ability to do—and with income—as is the educated man of educated society, is equipped with so much power as to be a menace, if not a monster, unless he have virtue.”

One problem is that several decades spent within the academic world lead me to the conclusion that most academics are dedicated mainly to their personal interests and have fled from the world rather than engaged with it in meaningful ways.

2. Keeping your head down to keep it from being “chopped”

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67 Ellul, Technological Society, at 349.
68 Peter Drucker, Landmarks of Tomorrow at 156.
It is not hard to figure out that it is dangerous to come to the attention of people who hold power over your fate and are willing to punish others either because they hold incompatible views or are seen as a competitive threat. As a side note and for different reasons, I have also found it useful as an advocate and strategist to keep a low profile and seem non-threatening unless there was a clear need to project a stronger persona as part of a strategic action. In either context one needs to be aware that “showing off” or simply projecting a kind of strength or true insight is something that has consequences.

Bringing yourself to the attention of others can result in jealous reactions. As Socrates surely understood before drinking the poisoned hemlock following his trial and conviction for corrupting the youth of Athens by educating them into moral virtue through critique and question, challenging the exercises and excesses of power has undesirable consequences. The idea, I guess, is represented in the time-honored adage that “if you are going to try to kill the King you had better succeed.”

In the strategic dimension the point is that much can be learned from listening while others try to impress and that there are times to dominate, control and project. But the skilled advocate and negotiator understand when those moments occur and act only in that context when it is useful. Whether our reasons for this are strategic and tactical or protective the idea was captured well over 2000 years ago by Lao Tzu in his warning that: “One who excels as a warrior does not appear formidable [while] [h]e who is fearless in being bold will meet his death.” 69 This is certainly a valuable insight to take to heart.

Maslow offers another reason why we might prefer to keep a low profile, the deliberate avoidance of knowledge. This is because if a “principled” person knows clearly that something is wrong, unjust, unprofessional or the like in ways that conflict with our espoused principles, this creates a sort of “cognitive dissonance” when we do not take action to challenge the injustice or wrongness. Maslow calls it “a fear of the consequences that flow from knowing, a fear of its dangerous responsibilities. Often it is better not to know, because if you did know, then you would have to act and stick your neck out.” 70

If we do confront amorality, impropriety, negligence and lack of professionalism in what others with whom we are interacting are doing, and we admit it is a basic offense to our idealized standards yet ignore it by doing nothing in response consistent with our espoused values (and we do) we have become abettors of the wrongness. This is a heavy burden if we allow it to become something about which we are fully aware. So we instead ignore questionable behavior, blur standards, and rationalize the situation into “there but for the grace of God” or “everyone is doing it”, and in doing so betray the fundamental principles we claim to believe in.

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69 Lao Tzu, Tao Te Ching.
70 Maslow, Psychology of Being at 66.
In the law firm context Kevin Lyskowski describes the tendency toward rationalization and avoidance. He states, “most [lawyers] deny any paradox exists. Almost every law firm liberal claims there’s no conflict between his conscience and career because of the “role of the lawyer”: At work, a lawyer must simply represent his client (bad actor or not) and not his conscience. Only at home can a lawyer put his conscience first: At home, he’s acting on his own behalf, not his client’s. Law firm liberals must stop drawing this non-existent line between their personal and professional selves and confusing schizophrenia with well-being.”  

I obviously agree with Lyskowski’s conclusion that there is a line between our personal and professional “selves”. How and where to draw that line, however, is something that we fail to provide our young lawyers. Nor do we provide much guidance to others who have important “dualistic” or “multiple personality” roles in society in which our personal and professional “selves” are engaged in incompatible activity from a moral perspective. My drawn “lines” are many. One is that I will not lie affirmatively or overtly as a lawyer, but I will deceive, create false impressions, not correct misinterpretations by others, and conceal my client’s actual behavior.

Others limits are that I will argue in ways that I know do not reflect the reality of what happened, “reconstruct” a case’s reality into a version favorable to my client, and allow another lawyer to operate under assumptions I know to be flawed, and more. I will also not destroy or improperly conceal evidence. But those behaviors are ones consistent with my advocate’s role. On the other side, I will not deceive my client, nor allow my client to offer perjured testimony (although some have argued I should in a criminal case). I will not drag a case out for my own benefit as opposed to my client’s, and I will not do unnecessary work that drives up the costs of the case for my client but will seek to impose costs on an opponent if it is part of a strategy that benefits my client. Are these behaviors questionable? Unquestionably. But they are intrinsic to what I do as a lawyer and therefore almost inevitably involve some variation on lying.

But there are also limits that I impose on the personal “me”. I will not represent a child abuser I believe to be actually responsible. I will not put a witness on the stand that I am strongly convinced is lying. I will not represent a rapist I think “did it”. I stopped working on criminal cases in a murder case I was asked to co-counsel and believed the potential client had murdered a young boy after raping him. I can’t stand “white-collar” criminals who were already well off and still gave in to their greed and opportunity and betrayed their duties to others. Those are a few of my limits as a lawyer.

The situations above are where I draw the line between the two hemispheres of my professional and personal “self” and even divide up the conditions of what I am willing to do as a professional. I am not saying I am “right” in drawing these lines but that I can deal with my personal values and decide to step back from the conflict that is intrinsic to being a lawyer, particularly one engaged in an advocate’s activities. On the other hand, if there were actually a situation where no one else would represent the people I am speaking of above, I would represent even the most horrendous client because of my deep

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belief in the importance of representation in society where the individual is constantly needing to be balanced against the power of the state. That belief would trump my personal preferences and values.

3. Satisfying the requirements of your primary “hive”

We are willing servants of the primary institutions that provide our rewards. It is a delusion (convenient) to decide we are free thinking individuals or that we are helpless creatures caught in the power of enormous faceless institutions. Most of the time we want to be what are. It is comfortable. It is convenient. It allows us the idealized propaganda of “goodness” because, for example, we like to pretend that the “Justice System” is about Justice writ large as opposed to being mainly a processing tool for a society that wants to give lip service to due process and fairness but is unwilling to confront the extent of absolute injustice. After all, what do you do with “these people” who commit crimes and frighten us and don’t know “their place”? One might say “Justice is fine talk for the intelligentsia, but we have to worry about what people really do, eh?”

The fact, dismal as it is, is that we are servants of power and I wish we were more principled servants of the interests we serve but our associational dependencies define us far more than we define them. To a disturbing extent it is like Hermann Hesse wrote a century ago in Beneath the Wheel when he described how an inexorable society (in this case the educational institution) “ground” us down to its terms and we had little option but to be complicit in its service. Again, the idea is that our education is preparing us to be nothing more than “bricks in the wall.”

For lawyers particularly who operate the levers of power and serve the institutions of justice, politics and business it is unfortunately as Peter Berger observes “…most of the time we ourselves desire just that which society expects of us. We want to obey the rules. We want the parts that society has assigned to us.” Albert Schweitzer joined in the criticisms about the effects on our principles and virtues imposed on us by powerful institutions amid the steady degradation of modern society. He explained: “no historical analogy can tell us much. The past has, no doubt, seen the struggle of the free-thinking individual against the fettered spirit of a whole society, but the problem has never presented itself on the scale on which it does to-day, because the fettering of the collective spirit … to-day by modern organizations, modern unreflectiveness, and modern popular passions, is a phenomenon without precedent in history.”

Among the problems is that an obvious thread running through this essay is that most of us do not want to be what Schweitzer called the “free-thinking individual”. We want to

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72 “Today knowledge and power are differentiated functions. When power resorts to knowledge, as it increasingly must, it looks not for intellect, considered as a freely speculative and critical function, but for expertise, for something that will serve its needs.” R. Hofstadter, Anti-Intellectualism in American Life at 428.
73 Hermann Hesse, Beneath the Wheel (1906).
74 PETER BERGER, in INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE at 93 (Doubleday & Co., Garden City, N.Y. 1963).
75 Quoted in, ERICH FROMM, THE SANE SOCIETY 201, 202 (1955).
fit in. We want security, comfort and status. But we also want to think we are better than we are. The last thing people want is to face is their extraordinary personal hypocrisy. The problem is that there are no external rewards for engaging in a quest to be a free-thinking and fully aware individual and there are many negative costs. The “Existentialists” in a sense got it “all wrong”. Like Marx’s idea that we humans were committed to a common community and willing to selflessly share among ourselves, or the Enlightenment’s view that humans were fundamentally “Good”, our strongest impulses are to seek security, comfort, direction and status. Challenging the institutional arrangements that provide these benefits is seen as something to be avoided rather than welcomed. The “thing” we do not seek is true knowledge because true knowledge results in responsibility or a painful awareness of our hypocrisy.

The system we inhabit is far closer to the situation described by J.K. Krishnamurti. He comments: “The world is torn by conflicting beliefs, by caste and class distinctions, by separative nationalities, by every form of stupidity and cruelty—and this is the world you are being educated to fit into. You are encouraged to fit into the framework of this disastrous society; your parents want you to do that, and you also want to fit in.” 76 One of the challenges is that the institutions into which we fit are not self-aware or intelligent. They are human constructs that service certain aspects of society, legal, political, economic, social and tribal. These “frameworks”, “matrices” or institutional “machines” span generations and have their own personalities, identities and rules of operation. They may not be organically sentient, but in a real sense they are “alive”. They also distribute rewards for service and punish behaviors that threaten their norms and expectations.

In Propaganda, Ellul reminds us how the system operates in order to gain our allegiance, distribute rewards and keep us from questioning obvious flaws and injustices when ever it is viewed from a more objective distance. He explains that stereotypes are central to gaining loyalty and preventing true critique of the institution and that: “A stereotype is a seeming value judgment, acquired by belonging to a group, without any intellectual labor …. The stereotype arises from feelings one has for one’s own group, or against the “out-group.” Man attaches himself passionately to the values represented by his group and rejects the cliches of the out-groups …. The stereotype … helps man to avoid thinking, to take a personal position, to form his own opinion.” 77

4. Obeying the operating rules of the system

The opportunity to gain the rewards of service to the system and avoid the penalties of challenging power cannot be overstated in its importance. Viktor Frankl observes: “there are various masks and guises under which the existential vacuum appears. Sometimes the frustrated will to meaning is vicariously compensated for by a will to power, including the most primitive form of the will to power, the will to money.” 78 In a sense this is continued in Arthur Schlesinger’s explanation that: “The contemporary intellectual, in (Han’s Morgenthau’s) view, lived in a world that was distinct from,

76 J. KRISHNAMURTI, THINK ON THESE THINGS 12, D. Rajagopal ed., 1964.
77 Ellul, Technological Society, supra, note .
78 Frankl at 170.
though potentially involved with, that of the politician. The intellectual … seeks truth; the politician, power. And the intellectual … can deal with power in four ways: by retreat into the ivory tower, which makes him irrelevant; by offering expert advice, which makes him a servant; by absorption into the machinery, which makes him an agent and apologist; or by “prophetic confrontation”.” 79

This observation is rather dismal. In this analysis university educators are irrelevant, or are servants of power. If absorbed into the “machinery” they have some relevance but it is as a “servant” or “cog” or “brick”. The sole role Schlesinger admires is “prophetic confrontation” and that is precisely the role most of us run away from with great haste. In a system driven by status, internal power in service to power brokers and money (and at some point they are inter-dependent) the operating rules relate to whether a person is engaged in activities that help or hinder the institutional arrangement. The problem reduces to the fact that the system itself is seductive and dependent on the weaving of illusions. Given what has been said about the power of propaganda, stereotypes, service of power and avoidance of painful self-awareness it should be clear that one can be firmly convinced that you are “doing the Lord’s work” while acting in the service of an institutional “demon”.

Even understanding what is going on is difficult. Deciding what to do about it is an entirely different matter. Because of our lack of courage we have a strong tendency to adopt the expected behaviors. In doing so to surrender our individual humanity. The seductions of money, power and status are immense. One, of course, is the ease of defining quality and success as phenomena of money. If we have “made it big” we must be important, intelligent, sexy, admirable icons of existence. Only “losers lose” and “he who dies with the most toys wins.”

This is in fact the contradiction and the responsibility that lawyers face. Are we to be nothing more than servants of power or are we to be defenders of a critically important (and inevitably flawed) system we call the Rule of Law in which power in its most abusive senses is muted, balanced, mitigated, ameliorated and so forth, or allowed to play out its ends in the worst ways of discrimination and injustice? I opt for the allegiance to the “justice mission” while being entirely realistic about how the system works. This includes the fact that most of us are followers. It is the responsibility of a limited set of systemic advocates to assert and build support for the integrity of the system. This is an unforgiving task because most of us are settling for the “succubi” of power and privilege.

5. Knowing who holds the power and giving them what they value

The “bosses” are in charge, but who are they? It is a complex formula. We in the law have direct bosses and they are quite powerful because they can determine whether someone is talented or troublesome or cooperative or malleable or a total pain in the … to the point that they should be shunted aside. But the reality in law and other fields (but certainly law) is that brilliance is both an advantage and a disadvantage and there are

direct and indirect sources that control or at least have significant influence over your future. Ask yourself, for example, “what does this [law firm, government agency, judge] need or want from me? What is their job and what do I give them or how do I behave that shows them I am a “player” or useful entity in their world?

For the fully principled person the question might be one of, unless the legal system works continually on brilliant insights about defects about which it is more than completely aware and revitalizes itself to serve those critiques [which it does not], then why might it not want to avoid a naif’s views on something it has already decided it cannot achieve? This, I hope, suggests why I want to be completely realistic about what lawyers face. Begin with the need to make money and survive. You cannot underestimate the power of these impulses. Law professors who have been insulated from the realities of what they are doing are for the first time confronting the reality of what new law graduates and neophyte lawyers face on a daily basis. This message is being listened to by law school applicants concerned about incurring $120,000 in debt. A result is that American law schools are in a state of “free fall” and they should be. 80

In the world of financial fraud the mantra is to “follow the money”. This means the power of money and reward, as well as the fact that we serve the interests of money. Money may be an illusion but if you have it money is an illusion that in the practical world has more substance than most of our other illusions and masks. How many times have you heard “follow the dream”, or the “delusion”? Money and debt are concrete. They are an obligation. They are inescapable and they shape decision making for potential lawyers.

Think about what delivers rewards to new law graduates and then interpret your sense of reality based on that insight. If we “follow the money” we need to be aware of some basic assumptions. First of all, I agree completely with the following assertions. Marshall McLuhan tells us: “The Machiavellian mind and the merchant mind are at one in their simple faith in the power of segmental division to rule all—in the dichotomy of power and morals and of money and morals.” 81 Alexander Hamilton observed that “[a] power over a man’s subsistence amounts to a power over his will.” 82 Forget these assertions. Reduce them to the point that we are driven by money, power and status.

6. Satisfying the reward system

Rollo May laments: “the chief reason people refuse to confront the whole issue of power is that if they did, they would have to face their own powerlessness.” 83 He adds: “… man has suffered another loss in his … recent development: the traditions that had buttressed his behavior are now rapidly diminishing. No instinct tells him what he has to do, and no tradition tells him what he ought to do; soon he will not know what he wants to do. More and more he will be governed by what others want him to do, thus

82 The Federalist No. 79 (Alexander Hamilton).
83 ROLLO MAY, POWER AND INNOCENCE 21 (1972).
increasingly falling prey to conformism.”

We are pathetic creatures. We are not powerful. We are not independent. We are not intellectuals. The result is that the ideal of human progression to the better has become a joke. We have little or nothing to hold us together as a belief system. In fact we have had numerous deconstructive “intellectuals” whose mission has been to demonstrate our ignorance even while they ironically demonstrate their own.

A result is that it is difficult to know who to serve. One master is the one who pays your salary. But beyond that there are various illusions about what we stand for and who defines our fundamental principles. The confusion is due to the fact that we are specialized entities focused on the practical issues of technique (micro and macro) rather than the import or the morality of being nothing more than the instruments of technique. In this sense Ellul remarks: “Technique is of necessity, and as compensation, our universal language. It is the fruit of specialization. But this very specialization prevents mutual understanding. Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world…. The man of today is no longer able to understand his neighbor because his profession is his whole life, and the technical specialization of this life has bound him to live in a closed universe.”

7. Figuring out the real accountability system

Real accountability is at the core of any reliable system of ethics. You swear an oath, and if you “mess up” you pay in some meaningful way. That is not what occurs. There is virtually no accountability for what we do as lawyers. There may be some temporary irritation, some very limited fear of potential liability and worry about what might be uncovered about our inadequacies, but the system is rigged against the clients and in our favor.

If we “cut to the chase” the problem with lawyers’ ethics is that the system of “self-regulation” is a hoax. Lawyers are not accountable for their mistakes and malpractice and the system is set up to end up with this result. A year 2000 report by the American Bar Association (ABA) analyzed the rates of lawyer discipline on a state-by-state basis. Arkansas imposed sanctions of some sort on slightly less than two percent of its lawyer population in 2000 while Ohio trailed the field with sanctions on only 0.13 percent of the practicing bar, a total of 50 sanctions on a lawyer population of 38,549. Other examples are Pennsylvania 0.26 percent, Washington, D.C. 0.19 percent and California 0.45 percent.

I can pretty much count on my digits the number of lawyers who didn’t do honest, competent professional work on cases in which I was involved in Ohio. The idea that there were only fifty sanctionable lawyers is ludicrous. This represents an unbelievable degree of irresponsibility by the Ohio Supreme Court and the local bar association grievance committees yet it is one that is allowed to exist as long as the “foxes” are allowed to be in charge of the “henhouse”.

84 VIKTOR E. FRANKL, MAN’S SEARCH FOR MEANING at 168 (1959).
As a lawyer I like that system. I like not being accountable. I like the fact that if I mess up on a case I don’t have to worry about a client’s litigated response—either at all or on motion to dismiss. I like the idea that I can impose costs on a former client that runs up a legal bill and that the standard of what I have done evaluated on the basis of the general level of practice in my area because, frankly, that doesn’t establish a high degree of responsibility. But, as an ethicist, I admit that the system that lets me get away with incompetence is corrupt and irresponsible. This is why, even though I have no real idea of what might replace it (and this is a recurring critique by fellow lawyers) that I want the existing system of lawyers’ ethics and malpractice accountability to be dismantled and something [I am not sure what] put in its place.

8. Crafting a public relations “Avatar”

Image is almost everything to most people. In the world of illusion and imagery are we “worms” or “gods”? This is the challenge to the legal profession. As the comments in the first section of this paper indicate, most people appear to see lawyers more as “worms” than a lawyer might like. Lawyers on the other hand are more likely to define themselves and their profession in more positive terms. I think, although I am still uncertain but hopeful, that lawyers have the ability to define who they are in the most positive sense and to make the choices that dictate that heightened outcome.

I opt for lawyers as “heroes” or “gods” at least in a minimalist sense of that concept and as people who do commit themselves to the aid of others in ways that have integrity and substance. To me that describes people who the power and commitment to shape their world in a positive way. This does not mean they control anything but does suggest that by offering a strongly principled role model for positive values that they have the power to make a difference by example. I will never stop asserting that whatever problems exist with what we “are” that we have the ability to determine what we will be. There is no question the challenge is arduous.

Yet in the America in which I believe, I must remind myself of the words of Alexis de Tocqueville voiced in his 19th Century classic Democracy in America. In that insightful and inspiring work about the new democracy that had arisen to the West of Europe, he observed: “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 is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.”87 de Tocqueville wrote these words in the early 1830s. No one is sufficiently deluded to think they are still applicable in the early stages of the 21st Century. The American aristocracy is now made up of sleazy self-promoting panderers such as Donald Trump, Madonna, Bill (“I never had sex with that woman”) Clinton, Kim (“of course I had sex”) Kardashian, Paris Hilton, and a host of “instant celebrities” to whom we pay homage.

87 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Book 1, ch. 10, at 42 (Alfred A. Knopf, ed. 1945).
We are a confused generation. Celebrity and notoriety define our “heroes” far more than positive deed, sacrifice and substance. With all the incredible powers that have been bestowed on us by technology we have learned to obfuscate and distort far more than illuminate. Arnold Toynbee remarks that: “Mans’ intellectual and technological achievements have been important to him, not in themselves, but only in so far as they have forced him to face, and grapple with, moral issues which otherwise he might have managed to go on shirking.” 88 The problem is that we have re-invented “shirking” as an incredibly sophisticated—although banal and superficial—“spectator sport”. We “spin” everything and have the least bit of embarrassment when we are caught up in our packages of lies. We even have “spin-o-meters” and “lie-o-meters” in which our leaders’ statements are rated according to their degree of falsity. We no longer expect them to be telling us the truth and are no longer embarrassed by our duplicity. In such a context one can legitimately ask the point of dwelling on something called “ethics” in a society where morality has disappeared and “ethics” is a joke.

In speaking to humans’ fear of knowledge, Maslow offers the following insight: “In general this kind of fear is defensive, in the sense that it is a protection of our self-esteem, of our love and respect for ourselves. We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful. We protect ourselves and our ideal image of ourselves by repression and similar defenses, which are essentially techniques by which we avoid becoming conscious of unpleasant or dangerous truths.” 89

At the beginning of a new millennium we have lost our ideals and substituted base material and illusions. When clearly and powerfully articulated, our most central moral principles reflect ideals of the kind we need to keep our society intact. Daniel Boorstin brings this forth.

“ ‘Ideals are like stars,’ observed Carl Schurz on April 18, 1859, the anniversary eve of Lexington and Concord; “you will not succeed in touching them with your hands. But like the seafaring man on the desert of waters, you choose them as your guides, and following them will reach your destiny.” 90 [Boorstin goes on to ask:] “Have we been doomed to make our dreams into illusions? .... An illusion ... is an image we have mistaken for reality. We cannot reach for it, aspire to it, or be exhilarated by it; for we live in it. It is prosaic because we cannot see it is not fact.” 91

9. Never letting “outsiders” know the real system

90 Boorstin, The Image, supra, n. .
91 Boorstin, The Image, supra, n. .
Arthur Brown notes: “Institutions are social systems that shape not only our actions but our values and dispositions…. [T]o the extent that institutions shape our values and dispositions they can make us stupid…and stupidity deprives us of our humanity.”^92 Ellul adds in the educational context: “Education…is becoming oriented toward the specialized end of producing technicians; and, as a consequence, toward the creation of individuals useful only as members of a technical group….^93 Usefulness takes on many forms. For most lawyers it takes on the form of secrecy, loyalty to the client (sometimes) and loyalty to the firm even to the point that if there is a clash between the firm and client loyalties the client loses out.

One example of the practice of law as a self-protective closed guild system occurred in the early days of my law career. A senior partner in a major law firm embezzled a very significant sum from a client’s account. His theft was detected and some of the lawyers in the city where I was practicing soon knew what had happened. But rather than being charged with the crime he was quietly moved to an office in a different state and merrily went about his business. The firm simply wasn’t willing to take the “hit” of clients finding out what had happened. Non-lawyers are not part of “the system” and the legal “guild” handles its “messes” within its own boundaries.

Of course, just like pedophile priests, the “guilds” of law, religion, politics and the like have a primary loyalty to themselves and their business rather than to clients and society. A consequence is that many corrupt, predatory and even criminal people are allowed to operate without conscience, ethics or morality. I have seen a judge who stops at a bar for several drinks in the morning on his way to court where he sentences defendants in DUI cases. I have seen the head of a local bar association who converted a client’s settlement check for his own benefit receive no sanction for his behavior. I have been in a lengthy settlement situation in which an opponent appeared to have insanely dragged out the agreement in the face of an overwhelming body of evidence only to have him admit that he knew his client had engaged in fraud and he thought we would do the same thing to drive up stock prices so that he could make a killing on the increase. The opposing lawyer was counting on us engaging in criminal stock manipulation to make more money on the shares he held as part of his payment. There are many more instances where lawyers and judges have engaged in unethical, corrupt or even criminal behavior and nothing happens to these “virtuous” members of the legal profession.

10. Avoid offending the power-brokers

Courage exacts a price in terms of lost financial opportunities, reputation among colleagues who are threatened by your values, and the potential “dead-ending” of your career. We may write about courageous individuals and “whistle-blowers” uncovering of corruption and injustice and even admire their courage. But we look the other way when they are shunted to an out of the way post or fired for other alleged reasons.

^92 Foreword to DONNA H. KERR’S, BARRIERS TO INTEGRITY: MODERN MODES OF KNOWLEDGE UTILIZATION (Westview Press, Boulder, Colorado 1984)
^93 ELLUL, THE TECHNOLOGICAL SOCIETY 349.
As I have attempted to emphasize throughout this paper, the culture of extreme commercialism, monetization, celebrity and “anti-heroism” and its assault on deeper ethical principles involves not only lawyers but our entire society. This was made strikingly evident by a recent report involving medical ethics and the attempts by companies to prevent the dissemination of research findings that might harm their financial interests. Robert Hotz reports:

When Dr. Nancy Olivieri at the University of Toronto wanted to warn patients about the toxic side effects of a drug she was testing, the company supporting her research tried to quash her findings, citing a nondisclosure agreement. When she alerted her patients anyway, the company suspended the clinical trial and canceled her research contract. Even so, she published her misgivings in the New England Journal of Medicine. The Hospital for Sick Children, where she worked, sided with the company and dismissed her, triggering an international protest earlier this year.” [This situation caused a response] “The commercialization of science has led to a new regimen of secrecy that is of great concern to the scientific community … secrecy of an entirely new scope and scale,” said physicist Irving A. Lerch, who is spearheading an effort by the American Association for the Advancement of Science to combat the trend.” But the situation was not limited to Dr. Olivieri. When Dr. David Kern, an occupational health specialist at Brown University discovered a new and deadly disease at a plant in Rhode Island, the company attempted to suppress his findings through a secrecy agreement. He nonetheless informed a professional conference of the disease as well as the CDC. “Hospital officials announced they would let his contract lapse. His occupational health program was closed. His place on the medical school faculty was eliminated.”

Such “stories” are not unusual. Ralph Nader relates “The Case of the Black-Balled Lawyer,” in which Robert Baker, a medical malpractice defense specialist whose firm had represented the medical insurance establishment for more than twenty years found himself on the outside of the industry he had served. Baker’s “sin” was the provision of written testimony to the Judiciary Committee of the U.S. House of Representatives in which he suggested that “reform” efforts in California had benefited insurance companies and doctors but harmed people injured by medical malpractice. Baker and his firm were then blackballed by insurance companies and Kaiser.

The above two examples are an unfortunate description of how an individual’s independence and integrity are victims in the service of power. J. H. Hexter described the problem in the context of Thomas More’s struggle over whether to remain an external

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95 See Nader, supra note , at 295-98.
critic or become a counselor to the king in the hope he could influence policies. The connection with institutional power tends to seduce the professional—not the institution. We all possess the natural tendency to be attracted to power, and unless we understand and control this it is likely to corrupt us. Hexter discussed the turmoil Thomas More felt in considering whether he should continue to work as an external critic, or become part of the King’s council.  

He explained that intellectuals are always tempted to think themselves able to resist the corruption of the process and instead always end up subordinating themselves to the king’s agenda.

He addresses the rationalization in which we engage in deciding whether to serve power, arguing that those who think they can act as a devil’s advocate is that the innovator are “misconstruing what necessarily happens in a prince’s council and evading the moral implications of that kind of service…. Men are called into a prince’s service only to help the prince work out expeditious ways for getting what he is determined already to have at any cost. Instead of leading him along paths that they believe to be good, they soon find out that they are having their brains picked to ease his way along paths they know to be bad. Such talents as they have end up being deployed not to support but to subvert the causes closest to their hearts.”

Lawyers serving power must struggle with this dilemma whether the source of the power they serve is their law firm, a governmental entity in which they are employed or a court system that depends on plea bargains for poor defendants in a system structured to render inadequate representation to those defendants.

Part III

A Few Thoughts on Mitigating “Reality”

Although much of the above analysis is depressing I have no intention of “leaving you hanging” with nothing more than a negative and destructive critique of lawyers and society. The amazing thing is that I still maintain that humans (and lawyers) must dedicate themselves to higher ends than selfishness, status and economics. In the best sense, lawyers are the leaders by default and circumstance of an American society grounded on the Rule of Law. They must (not might or may) redefine themselves into honest leaders of society. But what does this mean and what duties might it impose?

My son Daniel (who teaches law at Michigan State) and I attempted to explain some of these matters in a book, Hypocrisy & Myth: The Hidden Order of the Rule of Law that was published in 2009. The message is that lawyers are the definers and manipulators of power. The challenge is that power and the ability to manipulate are tools and sources

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97 MORE’S UTOPIA 137, id. “The innovating intellectual who surrenders his freedom to define the problem and ends up by merely giving those in power advice on the handiest way to follow a predetermined course of action cannot evade responsibility for what he is doing.”
98 More’s Utopia, id.
of leverage to get things done. Lawyers possess these tools and dominate the institutions of power and allocation of social goods. The harder question is what are for what ends should lawyers act in the service of legitimate power? For me, there must be a strong connection between a sense of justice and fairness or our exercise of power inevitably drifts toward the darker side of our preferences.

The central message in *Hypocrisy & Myth* is that without a strong inner core of ideals humans will always succumb to the baser aspects of their natures. We see this throughout our system. The only way to resist this corrupting drift is a conscious orientation to matters of social justice and the acknowledgement of a deeper mythology of belief of the kind previously provided for many by religious faith but now lost in a confusing and decaying moral state. The fact that many of our most profound values may be mythic does not render them irrelevant. It is even likely that we need to act as if they are true even while tacitly understanding they are constructs. This is explained by Ernest Becker. He provides a warning it would be wise to heed: “The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man…. Man’s freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.” 100

What many do not seem to understand is that positive ideals as to how a community should function and the nature of helping action do not and never will come from Reason alone. Reason is only a tool and the reality is that Reason must have an underlying “something” to work from. I believe deeply in the set of values underlying the Rule of Law. But I am of an earlier generation that was raised in these values and that automatically connected them to a sense of Justice and “right action”. I strongly conclude that such a set of values and its necessary connection has come to be considered banal. The problem with this is that the deeper value-systems are fading rapidly and there is nothing to replace them.

At this point I wholly adopt the views of Kamenka and Tay who conclude: “The law … is made to make man, to change him, to strengthen one side of his constitution, behaviour and activities against others.” 101 The side of our “constitution” that needs to be strengthened is the moral and ethical because all else drives us in the opposite direction. Of course this is far easier to say than to do. The role of law, however, is to resist unfair and destructive uses of power. Consider the nature of American society if the Rule of Law and the responsibility of lawyers and other key actors were not to preserve and enhance the culture by insisting on a substantial degree of justice and fairness. There is no doubt women and ethnic and racial minorities would still be subordinated in a system where entitlements depended on natural power and aggressiveness and when one group far outnumbered others it is both natural and inevitable that its members would be dominant. That is the way of the world. The Rule of Law is an artificial device rather than an unavoidable element of human society.

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100 Ernest Becker, *The Birth and Death of Meaning* 139 (2d ed. 1971).
A true belief in Justice and the Rule of Law held deep within the hearts and minds of America’s lawyers has historically been an essential element of defining who we are. In the broadest sense this has been described as “civic virtue”.

The power held by lawyers in American society penetrates and permeates all levels of activity. It would therefore seem that lawyers have the highest duty to promote the kinds of values among themselves and in our core institutions than other groups. Yet that responsibility has progressively eroded. It may be a bit “over the top” but one judge, in sentencing a lawyer for theft of $91,000 in client funds observed that lawyers were like “fleas.” The court observed: “there are too many lawyers, too many law schools and too many opportunities for dishonest behavior. There are only so many fleas that can feed on a dog,” the judge said. “We have lawyers coming out of the woodwork. There’s not enough business for all the lawyers out there.” This is not exactly a situation conducive to concerns about civic virtue, professionalism or duty to society.

The irony is that in my experience the transformational shift in opening the channels of opportunity and power over the past 60 or so years of the modern Civil Rights movement has been driven to a great extent by white males who internalized a faith in fairness and justice for all as something that should be done simply because it “was the right thing to do” as a general proposition. Of course there were many others involved in the effort to expand rights and opportunities for minorities and women but in an important sense it represented a unique movement on the part of people who had benefitted from discrimination to counter the very system that helped them and denied opportunity to others.

This generalized belief in fairness and opportunity for all (and this is really what civic virtue is about) has been increasingly submerged in a host of special interests whose main concern is for themselves and those “like them” as opposed to a general belief applicable to all. The intensity of an aggressive and tightly focused “justice for me” and “those like me” has supplanted the open-ended faith in overall fairness. Unfortunately, this is consistent with the kinds of selfishness we now see as dominating our culture at virtually all levels. Peter Drucker described this phenomenon as the “new pluralism”.

102 On this concept see, William Damon, “The Core of Civic Virtue,” Hoover Digest, July 13, 2011. Damon states: “Failure to do so [educate our youth in the values of civic virtue] inevitably will result in societal decadence—literally, a “falling away,” from the Latin decadere. World history has shown us time and again what happens to a society when its citizens no longer prize virtue. Citizens have an obligation to preserve the benefits of their societies for the future as well as the present—which means an obligation to foster virtuous character in the young. Preparing young people for responsible citizenship in a free society is a crucial part of this obligation for adult citizens in the United States. … At present, we are failing to meet this obligation for major sectors of our youth population, to the detriment of their life prospects and those of liberty and democracy in our society.” http://www.hoover.org/publications/hoover-digest/article/84221.


104 Horn, id.

105 Peter Drucker, The New Realities (Harper & Row 1989). Drucker explained: “The new pluralism … focuses on power. It is a pluralism of single-cause, single-interest groups—the “mass movements” of small but highly disciplined minorities. Each of them tries to obtain through power what it could not obtain through numbers or through persuasion. Each is exclusively political.” 76.
The orientation to justice and fairness is a core responsibility of law and lawyers in a system grounded inexorably on the principles of the Rule of Law. I adopt the position of Edwin Garlan as he comments on the connection between law and justice and the lawyers responsibility to advance justice. Garlan explains: “Justice states the fundamental method of law—the method of purposeful activity that is, action directed toward ends. Law is teleological, and justice in its broadest terms is the statement of that fact and is in a sense the instrument which keeps law teleological in its method. Justice expresses and celebrates this purposeful orientation of law; it is formative because its use keeps men sensitive to their responsibility and willing to fight for concrete achievements. It thus is the expression for the motive power of law....”

Such principles are fundamental because minorities, the powerless, and women would otherwise have no chance in the system without the “balancing” principles and ethics of law. We see this dynamic at work throughout the world in areas where there is no real allegiance to law and the final arbiter is the extent of individual power.

There are fundamental conflicts and contradictions between the ideal and the real in the terms of what is involved in the lawyer’s principled professionalism. The ideal dimension the legal profession has traditionally used to describe the nature of principled lawyer professionalism is not correct. There are striking differences between what we are, what we want to be, and what we pretend we want to be. The gap is captured with pathos in the following response by the robot Radius, speaking to Alquist, in Karel Capek’s, R.U.R., a play dealing with the theme of dehumanization caused by technological “progress”.

Radius: “Slaughter and domination are necessary if you want to be like men. Read history, read the human books. You must dominate and murder if you want to be like men. .... We have read books. We have studied science and the arts. The Robots have achieved human culture”.

In many areas of life--and being a lawyer is one of these--a moral system is needed that more fully and honestly incorporates the conditions of human reality, rather than offering a pretty facade erected on a foundation of sand that presents no legitimate standards to guide our decisions. We haven’t sought to develop a real system of professionalism and professional morality because the knowledge would force us to face aspects of ourselves with which we feel uncomfortable and powerless. We lament the decline of professionalism, but the truth may simply be that most people want little more than to be given direction and be cogs in the machine. I tried to bring out these ideas in a series of works. Like most scholars and activists I have no sense that they have made any

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difference but my responsibility is to try. If I say it badly it is my fault. If it makes sense but no one listens the onus is on them. The issues themselves seem clear as does the responsibility of the legal profession.