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# The Moral Lawyer and the Machiavellian Nature of Law Practice

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# CLEVELAND-MARSHALL COLLEGE OF LAW



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## The Moral Lawyer and the Machiavellian Nature of Law Practice by

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Working Paper

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# 1. THE MORAL LAWYER AND THE MACHIAVELLIAN NATURE OF LAW PRACTICE

*“A man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good.”*<sup>1</sup>

## **Help! I Have a Lawyer On My Back**

Like many others I became a lawyer to pursue ideals of justice, make contributions to society, and to help people. Most people who go to law school do so for positive reasons. They desire to enter a principled profession and gain the knowledge and skills that will allow them to live lives of meaning. There are other legitimate motives, including status and prestige, financial wellbeing, and political advantage. There is nothing wrong with such desires as long as they don't get out of control and overwhelm the ideals of a helping profession committed to concerns of justice, fairness, reform, and the rectification of abuses of power.

While even after years of law practice, many lawyers would still voice such ideals in explaining their conceptions of the functions and responsibility of the legal profession there is a significant gap between the principles and the reality of law practice, the values and behaviors it engenders, and the often critical and even scornful way much of the general public looks at lawyers. People love to engage in "lawyer-bashing" and it is sometimes well deserved. There is no question the legal profession is under enormous critical pressure and there is no sign of the attacks letting up.

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 says to the other: “It's finally over—Frank's lawyer got the apartment, and my lawyer got our two cars and the beach house.”<sup>2</sup>

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<sup>1</sup> Niccolo Machiavelli, *The Prince* (1532), quoted in Daniel Coquillette, *Lawyers and Fundamental Moral Responsibility* 28, (1995).

<sup>2</sup> *Lawyers! Lawyers!, Lawyers!: A CARTOON COLLECTIONS* 1, 11 (S. Gross ed., 1994).

## Advocacy, Rhetoric and Deception

Lawyers work within a culture of deception, manipulation, and power. Aristotle captured this fact more than two millennia ago in describing the role of the advocate: “you must render the audience well-disposed to yourself, and ill-disposed to your opponent; you must magnify and depreciate [make whatever forms your case seem more important and whatever forms his case seem less].”<sup>3</sup> Plato phrased it by saying advocate’s role is inherently deceptive rather than truth-directed and that the advocate “enchants the minds” of the courts of law. Plato remarked, “rhetoric [is] . . . a universal act of enchanting the mind by arguments. . . . [H]e who would be a skillful rhetorician has no need of truth—for that in courts of law men literally care nothing about truth, but only about conviction.”<sup>4</sup>

David Mellinkoff describes Lord Brougham’s description of the role of the advocate. “Henry, Lord Brougham, acting as counsel for Queen Caroline in 1820, described the role of the advocate: An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty. . . .”<sup>5</sup> Yale law professor Anthony Kronman has argued that: “The most important skill the law teacher imparts is the skill of advocacy. . . . [The problem is 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.”<sup>6</sup>

As these observations clearly suggest, manipulation of other humans is an inevitable and inescapable fact of our personal and professional lives. But there are moral limits to manipulation. All lawyers manipulate words, concepts, symbols, people and institutions. So do other people. If you practice law and don’t manipulate the conditions of the environment in which you are operating (and especially other people), you aren’t a very good lawyer. You may like to think of yourself as being a non-manipulative human being who doesn’t take advantage of other people, but, for a lawyer, that is a disingenuous posture. We continually manipulate in our pleadings, interviews, investigations, discovery, and negotiations. We manipulate in trial, or we ought not be there. It is impossible for an effective advocate to avoid manipulating people, but not impossible to make moral choices about the limits of our behavior, and how far we are personally willing to go.

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<sup>3</sup> Aristotle, “The Epilogue”, in *The Rhetoric of Aristotle* 3, 19 (L. Cooper ed. & trans., 1932).

<sup>4</sup> *The Works of Plato* 292, 306 (I. Edman ed., 1928).

<sup>5</sup> David Mellinkoff, *The Conscience of a Lawyer*, at 189 (quoting Lord Brougham).

<sup>6</sup> Anthony Kronman, “Foreword: Legal Scholarship and Moral Education”, 90 *YALE L.J.* 955, 959, 964 (1981).

Even though I have sometimes used the concepts of the warrior lawyer, the general and the Machiavellian to communicate insights into the essence of the legal strategist, this does not signify that “anything goes.”<sup>7</sup> This is particularly important to emphasize because becoming an effective legal strategist gives an individual more power, which for the responsible lawyer also means there is a greater need to be constantly aware of the dangers of going too far. Strategy as practiced by Sun Tzu in *The Art of War* and Musashi in *A Book of Five Rings* evolved in a different era and culture. Sun Tzu reportedly had two women who mocked him executed as his payment for winning the bet that elevated him to prominence with the Chinese emperor. Musashi claims to have killed more than sixty opponents in duels and has often been referred to as “a bloody old man.” In one situation he is reported to have accepted a duel from a challenger and set it up for a small island on the following morning. When the man landed on the island the skulking Musashi won the duel by sneaking up behind him and smashing his head in with an oar. The idea of a “fair fight” was obviously not at the core of the “bushwhacking” Musashi’s system of strategy. A fair number of lawyers most likely see nothing wrong with equivalent tactics in representing their clients and, depending on the circumstances, honesty requires me to include myself in that group.

In Western culture the name Niccolo Machiavelli has become *Machiavellianism*, a pejorative signifying the willingness to do anything to achieve desired ends. While they are obligated by their oaths to try to achieve the best outcomes for their clients American lawyers do have limits, and are expected to operate according to an ethical code intended to prevent the worst abuses. The effectiveness of this ethical code has often been questioned, as have the efforts of the organized bar to enforce its rules, but on the surface it differentiates law practice from hand-to-hand combat and military struggles.<sup>8</sup>

Part of being an effective strategist requires achieving great self-control. Along with this is the need to set ethical and moral controls on one’s conduct. Although some lawyers would disagree, while a lawyer is a “warrior” on a client’s behalf the lawyer is also a principled professional with the obligation to adhere to limited and largely self-evident ethical rules and the personal right to make moral choices about points beyond which he or she will not go on behalf of the client. The problem is created when there are fundamental conflicts between those ethical and moral limits and what the client wants.

William Glaberson reports that insurance companies are attempting to control the private lawyers who do work for them by dictating the outcomes of cases rather than allowing the actual clients to do so. This has long been a hidden problem of who controls the dispute or litigation in which an insurance company is obligated by contract to an insured, but the companies are now coming out and publicly demanding control. Even that simply brings to the fore a situation in which

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<sup>7</sup> See, David Barnhizer, *The Warrior Lawyer* [1997].

<sup>8</sup> See, e.g., David Barnhizer, “Abandoning an Unethical System of Legal Ethics”, 2012 *Mich. St. L. Rev.* 347.

insurers exercised tacit control over a dispute, often to their insured parties' detriment. Glaberson writes:

One legal battleground across the country that is attracting wide interest here is a fight between lawyers and insurance companies over the costs of litigation. Some insurance companies have recently begun to audit the way lawyers handle the cases of the insured clients, sometimes requiring advance approval of decisions that have traditionally been lawyers' alone, like how many depositions to conduct or which expert witnesses to hire. Although malpractice insurers, for example, theoretically save money when they do not have to pay verdicts, some lawyers say insurers sometimes decide that some cases are not worth the investment required to win. That, the lawyers say, puts them in the position of being pressured to forfeit the interests of the person they are defending to satisfy an insurance company that is paying the bills. Insurance companies argue that they have a right to control litigation they are subsidizing.<sup>9</sup>

### **Life is Made of Fear, Greed and Money**

Lest we think criticisms of lawyers are unfair, it may be useful to consider a report of a coup at the venerable New York based law firm of Cadwalader, Wickersham and Taft—a carefully plotted strategy among younger partners to oust some of their seniors. The strategy, designated “Operation Rightsize” by the conspirators, was not cost-free, either to the lawyers who were pushed out or to the firm which ended up on the losing end of several multi-million dollar judgments. The dismissed partners at Cadwalader sued the firm, and the litigation offered a dramatic insight into how far the idea of principled behavior and institutional loyalty has plummeted among some members of the legal profession. The *Wall Street Journal* reported that “[i]n deposition testimony. . . Jack Fritts, a former firm chairman who backed Project Rightsize, observed that ‘life is not made up of love; it is made up of fear and greed and money.’”<sup>10</sup>

Fear, greed and money are not the only generally negative characteristics with which lawyers stand accused. The criticism of lawyers reaches far back into our history. Consider the implications of Plato's observation that: “he [the lawyer] has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and

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<sup>9</sup> William Glaberson, “Lawyers Contend with State and Federal Efforts to Control Their Rising Power”, *New York Times*, Aug. 5, 1999 at A16.

<sup>10</sup> Paul M. Barrett, *Putsch and Shove: A Once-Stodgy Firm Makes a Flashy Return, But at What Cost?*, *WALL ST. J.*, Aug. 17, 1998, at A1 (quoting deposition testimony of Jack Fritts, former chairman of Cadwalader, Wickersham and Taft).

unrighteous ... from the first he has practiced deception and retaliation, and has become stunted and warped. And so he has passed out of youth into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom.”<sup>11</sup>

Nor have law schools been of much help in preparing their students for actual law practice. There is an inevitable disconnect between law school study and the professional and moral cauldrons involved in much of the practice of law. Lawyers do not experience law practice from the safe distance offered law professors, many of whom have run away from the practice of law as soon as they can obtain academic positions. Lawyers in private law practice, and even those working in public sector bureaucracies that operate according to their own policies and agendas, must continually make critical and immediate professional and sometimes moral decisions while subjected to the powerful forces of client interests and the competitive stresses of advocacy.

An important element in the molding of the lawyer is the increasingly difficult economics of law practice. Another dynamic involves the politics of public institutions that operate in ways far different from their ideal or even their legal mandate. Practicing lawyers must live in the real 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. Few lawyers possess a viable flight option even if they want it. Many lawyers thrive on the life of law practice regardless (or because) of its unique Machiavellian dynamics.

One result of a life spent confronting or ignoring difficult moral dilemmas—many of which involve choices between two or more bad options of various intensities and implications rather than between obviously good and evil alternatives—is that the cumulative pressure of the experience alters the nature of who we are. The effects take many forms. Some are manifested in lawyers’ emotional states, their values, and in how they deal with the world. Although the effects are in many ways empowering, it is a problem that lawyers have never been trained to understand the moral implications of what they do. I say this even after having spent several decades teaching ethics and professionalism through clinical programs, traditional courses on the legal profession and others in advocacy, dispute resolution and jurisprudence. Once a lawyer leaves law school and becomes embedded in law practice and institutions that have the power to control one’s career and livelihood the tension between the real and the ideal undermines the ethical and moral strength of many who practice law. They become trapped in a confused environment in which actions and principles are in conflict in ways that can never be made harmonious.<sup>12</sup>

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<sup>11</sup> Plato, quoted in Martin Mayer, *The Lawyers* at 4 (1966).

<sup>12</sup> On such topics, see, Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994); Marc Galanter, “Lawyers in the Mist: The Golden Age of Legal Nostalgia”, 100 *Dickinson L. Rev.* 549 (1996), and Carl T. Bogus, “The Death of an Honorable Profession”, 71 *Ind. L.J.* 911 (1996). See also, David Barnhizer, “Abandoning an “Unethical” System of Legal Ethics”, 2012 *Michigan State L. Rev.* 271 (2014); David Barnhizer,

## Trapped within the Career “Matrix”

One of the striking parallels between military and sword-fighting strategy and legal strategy is reflected in the fact that war and duels to the death inherently operate in a milieu of inflicting and avoiding harm. Those who spend their lives within such an environment are likely to be different from people whose lives and occupations allow them to operate within a context of greater innocence, goodness, or at least moral neutrality. Sun Tzu's general, Musashi's duelist, and the American lawyer in many aspects of the professional role, do not have this luxury.

I don't want to over-intellectualize the phenomena of institutional power over those who work within our economic and political systems but I have long found the analyses of Jacques Ellul, Paul Tournier, and Erich Fromm to be compelling. Paul Tournier offers a description that I think captures what happens to lawyers, observing: “[People] have become merely cogs in the machine of production, tools, functions. All that matters is what they do, not what they think or feel.”<sup>13</sup> The power and scale of institutional structures is part of the phenomenon of *technique*, which Jacques Ellul describes as shaping modern society. Ellul writes: “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.”<sup>14</sup>

For lawyers, this “closed universe” is comprised of the institutions within which we work, the clients whose goals we are responsible for achieving, and the agencies that set the operational rules for the environments in which we function. We are not free and independent individuals who are “masters of our own fates” but agents of interests and institutions who dictate our responsibilities, rewards and punishments, and how we are required to behave. Peter Berger sums it all up in the following words. “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.” Berger adds: “Very potent and simultaneously very subtle mechanisms of control are constantly brought to bear upon the actual or potential deviant. These are the mechanisms of persuasion, ridicule, gossip and

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“The Purposes and Methods of American Legal Education”, 36 *Journal of the Legal Profession* 1 (2012); David Barnhizer, “Lawyer regulation strategies—A personal view from the USA”, 17 *International Journal of the Legal Profession* 181 (2010); David Barnhizer, “Redesigning the American Law School”, 2010 *Michigan State L. Rev.* 251; David Barnhizer, “Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit”, 17 *Georgetown J. of Legal Ethics* (2004).

<sup>13</sup> Paul Tournier, *The Meaning of Persons* (1957).

<sup>14</sup> Jacques Ellul, *The Technological Society* 132 (1964).



opprobrium.”<sup>15</sup>

Erich Fromm describes part of the dilemma as being caused by our search for some kind of anchoring identity in an otherwise faceless state of existence. He writes: “the individual ceases to be himself; he adopts entirely the kind of personality offered to him by cultural patterns; and he therefore becomes exactly as all others are and as they expect him to be. The discrepancy between “I” and the world disappears and with it the conscious fear of aloneness and powerlessness.”<sup>16</sup> Fromm continues: “The person who gives up his individual self and becomes an automaton, identical with millions of other automatons around him, need not feel alone and anxious any more. But the price he pays, however, is high; it is the loss of his self.”<sup>17</sup>

Some might think such dire analyses of the potential impact of law practice on those who spend their lives engaged in its institutions are “over the top” but a former associate in a Los Angeles law firm suggests something about the power of the moral impact he experienced during 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.<sup>18</sup>

From an educational perspective the reality is that law school courses are largely incapable of overcoming the economics, competitive stresses, career ambitions and power conditions of law practice. The terms of operation of actual law practice simply cannot be adequately replicated through law school courses offered at a point in students' development prior to that of full immersion in the cultures of being a lawyer, including dealing with the real costs and benefits of an individual lawyer's choices and behaviors. This does not mean that law courses seeking to deal with issues of professionalism and the harsh realities of law practice shouldn't be offered in law schools. Nor does it mean that simulated and clinical experiences relating to professionalism, skills, ethics and law practice economics cannot offer *something* important to *some* students exposed to law teachers' best efforts to prepare them for what awaits.

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<sup>15</sup> Peter Berger, *Invitation to Sociology* 66 (1963).

<sup>16</sup> Fromm, *The Sane Society* at 208.

<sup>17</sup> Fromm, *The Sane Society* at 209.

<sup>18</sup> Kevin Lyskowski, “Conflicted Liberals and the Lure of Money”, *National Law Journal* 5/2/94 A19.

But we must not delude ourselves into thinking we can shape fledgling lawyers' professional personae through what we do in law school with any predictable degree of consistency. The power of the unforgiving reality of law practice is much greater than even the most eloquent words and insights a law teacher can offer. Part of the problem is that most law students simply lack the experiential base from which an adequate structure can be erected. Another issue is that many law teachers do not have a significant range of experience in law practice and consequently lack the insights and nuance to communicate the issues and material in the ways needed. But the primary challenge is that the power of institutional structures over people whose fates depend on them cannot be made real until the individual is located in that institutional matrix. At that point it is too late.

Alexander Hamilton went so far as to conclude that "[a] power over a man's subsistence amounts to a power over his will."<sup>19</sup> Whether we are speaking of J. H. Hexter writing in *More's Utopia* that a counselor who enters the service of a prince ceases to be able to serve his own principles, or that those who provide one's compensation essentially *own* that individual, we need to understand that law practice is far more powerful and ultimately corrupting than anything we can do in law schools to counter such power. Hexter warned in his excellent work on Thomas More that: "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 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 by being deployed not to support but to subvert the causes closest to their hearts."<sup>20</sup> Lawyers engaged in the representation of rich and powerful clients are vassals of those clients and too easily cross the lines of legitimate advocacy into that of corruption and illegitimacy.

In the midst of all the criticisms of lawyers I admit that when we are acting in our professional roles we lawyers are not necessarily the world's nicest people. But others' less-than-flattering perceptions of the nature of members of the legal profession too often fail to recognize that lawyers are and must be advocates for their clients. While I don't want to overdo it, there is absolutely no question that our first responsibility is to serve the legitimate interests and desires of our clients, with an emphasis on "legitimate". If we fail to do this, there is little justification for the existence of lawyers as being responsible for playing an integral role in the preservation of the Rule of Law.<sup>21</sup>

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<sup>19</sup> *World Treasury of Quotations*, at 748 (quoting THE FEDERALIST NO. 79 (Alexander Hamilton)).

<sup>20</sup> J.H. Hexter, *More's Utopia: The Biography of an Idea* (Harper & Row, N.Y. 1952, 1965).

<sup>21</sup> On such issues see, David Barnhizer and Daniel Barnhizer, *Hypocrisy & Myth: The Hidden Order of the Rule of Law* (2009).

Some might, and in fact are saying that is the point--the legal profession should alter its basic principles and become something else. I challenge this assertion and argue instead that the profession ought to become *more* committed to clients rather than less, and more highly skilled than at present. As I repeatedly emphasize in this book, a lawyer can go too far on behalf of clients and some have done so. But the problem in the performance of the vast proportion of lawyers is that they don't elevate their client into the equivalent of Musashi's warlord to whom the Samurai warrior owed obedience and respect, and don't provide the commitment and quality of service the client has the right to expect and receive. The problem is *not* that lawyers are being *too* zealous in their representation of clients, but that they are being too inept and feeble in their efforts. Clients have a right to be represented by the warrior lawyer committed to their well-being but too often find themselves at the mercy of puffed up pettifoggers who have not done their homework and who lack the skills needed for excellence or fail to apply them to the representation.<sup>22</sup>

If lawyers are to be criticized by the public they should be censured more for what they fail to do rather than for what they do properly within the limits of their professional role. One problem is that among the most important tasks of the lawyer is providing representation to people who have done very bad things but who have the right to representation before the enormous power of government is legitimately authorized to punish them either through incarceration or civil sanctions. This requirement of proof and the balancing of private rights and government power are integral aspects of our system.

This means, however, that effective lawyers will often be representing clients who have behaved in ways that reflect some of the worst aspects of being human, and then want their lawyers to aggressively represent their interests regardless of the consequences to others. This is an unresolvable dilemma of our legal system in which the public will understandably resent anyone who has stood in the way of what is considered public justice. But for the "good" lawyer there is little real choice. The instrumental nature of the practice of law causes lawyers to be blamed for being "good" (i.e., effective) professionals. It is part of the price you pay. "Warriors" are often ignored and even considered immoral by "civil" society until they are needed, then they are feared for a time before being rendered irrelevant once again when no longer needed.

This raises a deep and troubling question about the nature of the conflict involved in the intrinsic tension between being a "moral" lawyer and a "good" or effective lawyer.<sup>23</sup> What does being a good or effective lawyer do to those who practice law over an extended period of time, and how much of our soul does the "law-job" require be sold, surrendered, or eroded as a necessary part of

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<sup>22</sup> On this topic, see, David Barnhizer, "Abandoning an "Unethical" System of Legal Ethics", 2012 *Michigan State L. Rev.* 271 (2014).

<sup>23</sup> On these issues see, David Barnhizer, "Princes of Darkness and Angels of Light: The Soul of the American Lawyer", 14 *Notre Dame J. of Law, Ethics and Policy* 371 (2000).

the professional task? Kevin Lyskowski brings this out in quoting a young lawyer working for a "BigLaw" firm who laments: "I wish I could still commit to an idea or cause with abandon; often I feel I've lost what made my life meaningful."<sup>24</sup>

### **Manipulation, Deception and Ruthlessness**

Gaining the total knowledge and capability of the legal strategist can be much like entering a Faustian pact. At the time he agreed to the exchange, Faust was blinded by his desire to regain his youth and the hope for love and beauty. The trade seemed worth it to him when made, but as his world disintegrated around him he soon discovered one does not win a bargain with Satan. After great anguish, however, his resurgent faith gained Faust redemption in the eyes of God and the chance to recapture his soul. Lawyers to some degree enter a similar bargain, and it poses great risks to their souls.

As did Faust, lawyers seek power and earthly wealth through their bargain. And as with Faust, at the time the oath is taken and the obligation agreed to, the new lawyer has no real sense of its implications or of the demands that will be placed on them by the *Mephistophelian* combination of clients, legal institutions, and employers. Part of the knowledge deficiency is inevitable, because experience is required as a precondition to full understanding. But just as with initiation into any special order, most of the experience can only come after the person is already bound to the obligation.<sup>25</sup>

Few lawyers have been willing to confront the individual effects of *being* a lawyer. People who would have no difficulty accepting the consequences of "*nature v. nurture*" in other contexts are somehow unable to face the extremely powerful "nurture" or cultural effects of law practice. There are many aspects to law practice that are largely free of the worst of these moral dilemmas. But much of what we do as lawyers involves working with situations in which our clients have been harmed, will be harmed, fear being harmed, want to harm, or at least get even in some way with other people they feel have hurt or offended them. Law practice also involves dealing with people who want to come out ahead on a bargain, make more money from a situation than the persons against whom they are negotiating, or are in a conflicted situation in which they are seeking to avoid responsibility for their past, present, or future actions. This doesn't mean a client's goals are unjust or undeserved. But for most lawyers the answer to such questions doesn't matter. Simpson team lawyer Gerald Uelman states:

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<sup>24</sup> Kevin Lyskowski, *Conflicted Liberals and the Lure of Money*, NAT'L L.J., May 2, 1994, at A19.

<sup>25</sup> Johann Wolfgang von Goethe, *Faust*, in 19 *The Harvard Classics* 64, Charles W. Eliot, ed. (P.F. Collier, N.Y. 1909).

Our purpose was to employ every advantage the law permits to enhance the prospects of our client's acquittal. Our purpose was to utilize every device and stratagem the law allows to weaken and discredit the prosecution's case. The vindication of our client was the beginning, the end, and the substance of our every effort. Anything less would have been a violation of our ethical responsibility to faithfully perform the duties of an attorney-at-law.<sup>26</sup>

Uelman's statement as to his duty helps make clear that we are servants of Machiavelli's prince. Our client is our primary sovereign, and we take a solemn oath to work on our sovereign's behalf within the limits of the law. Of course there are other allegiances, including those to self, general society, and the legal system. But those allegiances are of a thinner character than that owed to our client. This fact has become clouded in a dialogue where many are seeking intuitively to avoid the commitment that becoming a lawyer imposes on those who accept the responsibility for a client's wellbeing.

A certain quality of ruthlessness is part of the strategist's life. The price lawyers pay is created in part by the dynamics of the adversary system. Jerold Auerbach warned against the impacts of the adversary system, even while conceding its vital purpose. He argued: "Litigation expresses a chilling, Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling."<sup>27</sup> In two illuminating works Auerbach described some of what he considers the evils of the social system and legal profession and sketched what he considered to be a healthier system of alternative dispute resolution. He still recognized the severe limits of alternative approaches to dispute resolution of the kind now being prescribed as cures for the deficiencies of the adversary process and admitted that the adversary system, while problematic, is a necessary evil in an anonymous and fragmented society which has increased greatly in its scale of operation and lost any real sense of local and tight-knit community.

### **Power, Deception and Manipulating Others Is Not without Cost**

The effective lawyer and strategist is capable of generating fear, respect and also admiration. But the strategist pays a price for the clarity and power strategy gives. One part of the price is that it *is* possible to know too much. We humans rely heavily on our ability to rationalize and being able to deceive ourselves to protect our egos against unpleasant and sometimes even

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<sup>26</sup> In Albert W. Alschuler, "How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team", 29 *McGeorge L. Rev.* 291 (1997-1998).

<sup>27</sup> Jerold Auerbach, *Justice Without Law?* vii (1983); See also Jerold Auerbach, *Unequal Justice* (1976).

destructive knowledge. Lawyers learn to protect themselves by building defenses against the emotional overload and anger their cases can generate. We erect barriers to prevent an important part of our *selves* from being sucked into the maelstrom of others' pain, helplessness, despair, meanness or deceit. Sometimes you give in. I feel a great deal of compassion for a public defender in Utah who was removed from a death penalty appeal because he said his client might deserve the death penalty. Like him and many other lawyers, I have also looked into the eyes of people who have done terrible things to other humans and are totally without remorse for their actions. Some of them are confused. Others are just evil.

When I first began practicing as a lawyer in Colorado my cases included heavy doses of child and spousal brutality, divorce and custody, consumer fraud, racial discrimination, and police brutality. I worked on the kinds of law cases that expose the worst behaviors, tragedies, and failures of humans. There were nights as a young lawyer when I went home and cried at the pain and hopelessness of some clients. There were other times when I wanted to smash things in frustration over a client's or opposing party's stupidity, greed, dishonesty or viciousness. Abused children, violent spouses, dependent women returning again and again to the men who beat them, deceit, theft, greed, official lies and misconduct that was covered up. Such cases take a toll on the lawyers who handle them.

Think about what a lawyer goes through who is defending someone charged with murdering two innocent human beings by brutally slashing them to death. If you were that lawyer and were told by your client that he did it but wants to take his chances at trial, how would you feel? Lawyers in such situations often cope by compartmentalizing their humanity as it applies to their subjective feelings about what the client did. As individual humans, they would be appalled at what the client did. The lawyer doesn't have that luxury. The rest of the world can be horrified. Many lawyers “finesse” this conflict by never asking the client directly whether he did that which he has been charged. Many clients, particularly those who have experience in the legal system, never tell their lawyers the truth because they have learned it changes the way their counsel handles the case. Either way, the lawyer is obligated by oath to try to help their clients escape responsibility for their actions, even if they fully admit to counsel what they did.

The non-judgmental spirit this requires lawyers to possess is obviously a special state of mind that is difficult for most people to attain. If an individual decides he or she can't achieve this state of mind then it is better to practice patent law or tax law or some other specialized legal field where such fundamental moral dilemmas are less frequent. I stopped being involved in criminal litigation at the point where the Public Defender's office where I had created a training program for its lawyers asked me to co-counsel a murder case where I was convinced the defendant had brutally raped and then stabbed to death a young boy. After more than ten years of work on criminal cases I modified the lawyer's professional mantra that “everyone deserves a fair trial” and substituted one of “but not with me as the lawyer”. I still am committed to the

principle of quality representation before someone is imprisoned for life or executed, but I am not going to be the one who helps someone I consider guilty to get off if I am convinced they “did it”.

The point is that anyone who thinks there is not a price paid for integral involvement in such situations is avoiding the obvious truth. The effects may be subtle and cumulative in their impact, but the task does something to us, just as, for example, it does to police officers “on the job” who regularly deal with violence, ignorance, and depravity--or soldiers who have witnessed or themselves done actions that can’t be blocked from one’s mind and have to try to cope with PTSD. One way a profession such as law attempts to deal with the consequences of the professional role is to adopt a set of rules or norms that produces something akin to an almost split personality between the practitioners’ personal and professional selves. The ethics, propriety, or morality of action is defined in terms of the degree of congruence with the role being served.

The rationalizations implicit in role-differentiated morality of the kind described above are more common than we might think. While they do insulate our personal moral systems to some extent, the problem is that in law practice many of the issues with which we are involved are so profoundly central to our deeper senses of right and wrong that there is an inevitable spillover effect between our personal and professional selves. This creates a basic contradiction between the professional and personal *selves* of lawyers. This is a fundamental issue for many lawyers. From the legal strategist’s standpoint the dilemma is that in trying to win for your client you often do things that would seem dishonest, or at least deceptive, if they were done in a non-professional, ordinary human interactive context. There are values involved in the “game” of being a lawyer contrasted with the process of being a human that are in some ways incompatible. The “rules of the game” allow lawyers to lie without lying, hurt without responsibility, and to be paid according to our ability to do these things particularly well.

In my personal life, for example, I take great pains not to lie. I might obfuscate to protect another person from harm or embarrassment, but I try very hard not to lie or be deceptive as a “real” human being. As a lawyer, on the other hand, while I consider myself to be honest and attempt to function at a high level of professional integrity, I have done things I would consider devious or deceitful or even “creepy” if I did them in my personal life. The problem is that deception, illusion, concealment and misdirection are inescapable aspects of being a lawyer and an unavoidable byproduct of the responsibility to represent a client zealously. There is a morally dangerous quality to this behavior, not only if you do it badly but perhaps even more if you do it well.

Attempts to protect the personal self from the less desirable effects of the professional role are relatively common. The dichotomy is not limited to law practice. Many competitive games create rules within which the contest is conducted. Boxing and football glorify savage behavior that would otherwise be criminal. While an individual cannot consent to violent assaults under criminal law, by making the behavior a condition of a socially acceptable game, we convert "bad" behavior into something that rewards the most aggressive and talented of the athletes by giving them all-American status or paying them millions of dollars.

So it is with the competitive "game" reflected in the practice of law. But since law practice deals with fundamental moral issues, the attempted splitting of the personal and professional being is not equally achievable with the sports milieu. Just as football and boxing often injure those who participate, there are consequences to any savagely competitive game. In the practice of law, one consequence is that the "game" can gradually produce a moral acid that etches and corrodes the soul of many lawyers. Some lawyers have little difficulty with this, I suppose because their competitive juices overwhelm everything else. Or perhaps because they are like the mythical soulless *golem* fashioned from sticks and mud by otherwise defenseless Hungarian Jews subjected to a vicious pogrom, and had no soul to begin with.

### **Living Lives of Moral Ambiguity**

A study by Johns Hopkins University concluded that lawyers were the most emotionally depressed group among those studied. One researcher suggested the poor emotional health of many members of the legal profession: *"might be the result of operating in moral ambiguity. They might be representing positions they may not like or believe in."* Another legal commentator identified hypocrisy as the cause of many lawyers' unhappiness, arguing that *"seeing shades of gray may signify intellectual maturity, but it's also somehow impoverishing."*<sup>28</sup> The fascinating aspect of this tentatively worded conclusion is that such moral ambiguity and representation of people or positions with which lawyers might not be in agreement merely restates the essence of much of law practice.

In *The Art of War* Sun Tzu suggests approaches by the strategist that provide a flavor of how the legal strategist must act deceptively and in a manipulative manner to achieve success. "All men can see these tactics whereby I conquer, but what none can see is the strategy out of which victory is evolved." He adds: "In all fighting, the direct method may be used for joining battle, but indirect methods will be needed to secure victory." Indirection and deception are core

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<sup>28</sup> See, "Excerpts: The Betrayal of the Legal Profession", *National Law Journal* 36 (February 28, 1994) [discussing Sol Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994)].



principles of Sun Tzu's system: "By altering his arrangements and changing his plans, he keeps the enemy without definite knowledge. By shifting his camp and taking circuitous routes, he prevents the enemy from anticipating his purpose."

As to the primacy of "truth" in the work of lawyers consider the remarks of lawyer Jerome P. Facher, the defense lawyer in the case that provided the basis for Jonathan Harr's *A Civil Action*.

[I]f a trial aspires to be a search for truth, the student must still ask whose "truth" are we searching for, whose "truth" has been revealed and whose "truth" do we accept? Is it the lawyer's truth? The plaintiff's truth? The defendant's truth? The witness's truth? The judge's truth? The public's truth? The media's truth? Whatever the answers to these philosophical puzzles, a trial confronts us with a real life controversy which must be resolved by presenting evidence, finding facts and applying the law. In light of this reality, a fair trial in a fair adversarial system not only resolves the controversy, but, I believe, comes closest to finding that elusive and undefined concept called "truth.""<sup>29</sup>

The only way to survive the power of the onslaught of law practice and strategy is to identify what you care about as your central core of integrity and to build early warning signals into your awareness. The early warning signals need to begin sounding and flashing soon enough to allow you to avoid behaviors that are unacceptable. If you can keep from being entangled in the many snares of law practice, then you have a chance to avoid the worst impacts on your being. This "bright line" and "early warning signal" approach is necessary because the corruption of practice and manipulation tends to come on you subtly and quietly rather than through a single, obvious, face-to-face situation in which the choices of right or wrong are stark and unquestionable. Corruption and the loss of the center of your being operate in subtle shadings of gray and through rationalizations and demands by employers and clients for things such as institutional loyalty and the need to "behave realistically."

The nature of their clients' acts, power, and social harms can increase the likelihood of an irresolvable moral tension that creates heightened impacts on the lawyers who engage in such representation. This impact is produced in large part because—unlike every other client group in which the lawyer tends to control the client—the financial incentives and enormous power and knowledge of powerful corporate clients increases their ability to corrupt the lawyers and law firms who represent them. Virtually no other client group is capable of exercising the degree of

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<sup>29</sup> Jerome Facher, *The Power of Procedure: Reflections on "A Civil Action"*, in *A DOCUMENTARY COMPANION TO A CIVIL ACTION* xvii (Lewis Grossman & Robert Vaughan eds. 1999).

control that results in buying or stealing the souls of the lawyers who represent them. Part of the problem is that we do become hostages to our careers, our lifestyles and the obligations we owe our families. Obviously, the debt loads law graduates now have when they enter law practice as well as the burden we assume with mortgages, spouses, children and lifestyle costs add significantly to the ability of institutions to own us. But of equal significance is that most people are not groundbreakers or adventurers. Most of us want to settle into a secure niche and have a decent life. We are creatures of comfort, not courage.

Consider the intimidating effect of the blackballing episode reported by Ralph Nader in which an entire industry shut off dealings with a firm that had provided representation for two decades because of the perceived disloyalty of honest testimony provided a Congressional committee. 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. Baker provided written testimony to the Judiciary Committee of the U.S. House of Representatives suggesting that "reform" efforts in California had benefited insurance companies and doctors but harmed people injured by medical malpractice. Baker and his firm were subsequently rejected as counsel by the insurance clients they had represented for years prior to their provision of the written testimony.<sup>30</sup>

The power and values of the corporate culture are overwhelming and the demands of its decision-makers for unquestioning loyalty to the "community" unforgiving for those who deviate. Consider, for example, the situation described by Bennett LeBow, CEO of the Liggett Group, who broke ranks with other tobacco CEOs and testified against them in various stages of the massive tobacco litigation efforts. LeBow described his devolved relationship with the other CEOs as one in which: "They all hate my guts.... They don't write. They don't send cards. And when they see me they just walk away." LeBow said he hired his own lawyers rather than use those typically relied on by the industry, and that his new lawyers discovered that the industry had been lying and hiding information about tobacco concerning its addictiveness, health effects, and the deliberate targeting of young people--all areas about which industry representatives had lied to the public and in the course of Congressional hearings.<sup>31</sup>

The problem is that the money involved is too great for law firms or individual lawyers dependent on the continuation of referrals and retainers on which their economic survival is based to not be controlled by their most powerful clients. In a market economy, values are based on financial considerations. Similarly, the increasingly harsh economics of the private practice of law and its intensifying competitiveness are putting added pressure on many lawyers who have become even more vulnerable to economic considerations. Cutting corners and borderline behavior concerning cases and client interests are among the problems that are making it even

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<sup>30</sup> Nader & Smith, *No Contest*, at 295-298.

<sup>31</sup> James F. McCarty, "Tobacco CEO airs rock-the-boat views", *The Plain Dealer*, Friday, February 26, 1999, at 2-B.

more difficult to be a principled lawyer. This makes questionable professional behavior more likely to occur.

The warning about both the practice of law and the use of strategy is that good lawyering, as well as bad lawyering, imposes a significant cost on the practitioner. It is worth it to hold on to your ideals of justice and contribution to society. Use the power gained through strategy but set your personal limits. Represent your client zealously but adhere to the core principles of professional responsibility and your personal moral sense of right and wrong. Manipulate the plays and the players in the “game”, but do not lose sight of the fact of their humanity as well as your own.

Being an effective lawyer means knowing how to play the game in actual competition and to play it hard and with skill. But the strategist must never forget it is not a video game that is being played but a game of reality with real consequences to those who play it and to the host of people who are used as the pawns and game pieces. The ultimate power of strategy must be responsibly exercised within personal and systemic limits. Forgetting this fact will lead to serious difficulties.

