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In Praise of the Supporting Cast

F.S. Oliver observed almost a century ago that a typical lawyer's professional "experience of human affairs is made up of an infinite number of scraps cut out of other people's lives."¹ Even as the lawyer's professional life is immensely various, it remains at the same time absolutely vicarious—even as she encounters a wide range of clients and problems, she always acts for and through others rather than on her own behalf. This made Oliver a skeptic about lawyers' capacities for true leadership. Lawyers, he wrote, "see too much of life in one way, too little in another, to make them safe guides in practical matters."²

Today, Ben Heineman rejects such self-effacement in favor of a more muscular conception of the lawyer's professional role. Heineman claims that lawyers' professional activities groom them to lead. And he proposes that law schools should "more candidly recognize" lawyers' leadership potential and so change their approach to legal education in order better to develop lawyers' leadership capacities, and indeed to "inspire[] young lawyers to seek roles of ultimate responsibility and accountability" more aggressively than they do today.³

That some lawyers are also leaders is obvious, and Heineman catalogues familiar examples: the Founders, the Abolitionists, the Progressives, the New Dealers, the Cold Warriors, and the activists of the Civil Rights Era did indeed all include lawyers prominently among their numbers. But Heineman is after a stronger conclusion—that exercising leadership should become one of lawyers' *characteristic* social functions rather than just something open to lawyers as to

1. FREDERICK SCOTT OLIVER, *ORDEAL BY BATTLE* 201-02 (1915).

2. *Id.* at 201.

3. Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 *YALE L.J. POCKET PART* 266, 266 (2007), <http://thepocketpart.org/2007/2/16/heineman.html>.

other professionals, and indeed to citizens quite generally.⁴ Heineman believes that “[t]he core competencies of law are as good a foundation for broad leadership as other training” and so proposes that the aspiration to lead should supplant the more traditional advisory role in young lawyers’ ambitions.⁵ Indeed, he confesses a “wish to redefine (or at least to re-emphasize) the concept of ‘lawyer’ to include ‘lawyer as leader.’”⁶

This stronger proposal substantially misunderstands the lawyer’s social role. In making it, Heineman neglects the lawyer’s traditional virtues and promotes a caste of mind that is incompatible with these virtues. Moreover, because the lawyer’s traditional role contributes importantly to the glue that holds political life together, implementing Heineman’s revisionist agenda would have far-reaching, and dangerous, consequences – not just for lawyers but for society quite generally.

I. TWO SPECIES OF LEGITIMATION

One of the core functions of any legal order – and especially of legal orders that regulate complex, pluralist societies – is legitimation. The legal order must give citizens reasons to regard its decrees as authoritative even when they disagree with the substantive policies that the order enacts and the outcomes that it imposes.

This problem is familiar in its wholesale manifestation. How is the lawmaking process to be rendered legitimate even with respect to those citizens who oppose the laws that this process produces? How must lawmaking be

4. Heineman also claims, or at least suggests, that leadership was commoner among lawyers in the past than it is today – for example, when he characterizes the historical examples just listed as reflecting generations of lawyer “leaders.” *Id.* at 268. But the historical record is more complicated in this respect than Heineman credits. At the very least, the lawyer-leaders to whom he refers were exceptions in a bar whose representative members focused on much more mundane matters. And in many cases the organized bar sought actively to preserve the status quo, resisting the efforts of the lawyer-leaders whom Heineman champions. For example, although one segment of the bar was indeed instrumental in conceiving and implementing the administrative state, the balance of the legal profession, including the American Bar Association, resisted and sought to defeat the New Deal. See generally Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics II: The Modern Era*, 15 *GEO. J. LEGAL ETHICS* 205, 218 (2002); Robert W. Gordon, *The Legal Profession*, in *LOOKING BACK AT LAW’S CENTURY* 287, 298 (Austin Sarat et al. eds., 2002).

5. Heineman, *supra* note 3, at 266.

6. *Id.* To be sure, Heineman also says that he does “not intend to diminish the fundamental legal role of providing services to the vast array of institutions and individuals who need them” But the main thrust of Heineman’s proposals nevertheless remains precisely to disparage this traditional conception of the lawyer’s professional role.

managed in order to sustain a general obligation to obey the laws that are made? The solution characteristically adopted by open societies is procedural and participatory. Insofar as the lawmaking process is democratic, even the losers have reason to accept its results, roughly because the process has engaged them and fairly reflects their input.⁷

The problem of legitimation also manifests itself at retail, moreover, in ways that are no less significant even if they are perhaps less commonly remarked. Even after a (democratic) lawmaking process has established an authoritative resolution to conflicts about what general principles should govern collective life, further conflicts will arise about how these general laws should be applied to the specific facts and circumstances of particular cases. A canonical case provides a vivid example: should a law that forbids the importation of foreign laborers apply to prevent a religious congregation from bringing a foreigner to the United States to serve as its pastor?⁸ A mechanism other than lawmaking must resolve these and myriad similar questions of application. And it is essential that this mechanism should produce resolutions that the losers regard as authoritative even as they oppose them on the merits.

As at wholesale, so also at retail legitimation requires procedural and participatory practices. Among the most important of these is adjudication. Like democratic politics, adjudication is a form of commensuration—a process in which the parties to disputes agree about what resolution to live by in practice even as they continue to disagree about which outcome is, in principle, right. Adjudication achieves this legitimacy by bringing disputants into affective engagement with one another—an engagement that, as Lon Fuller once observed, has the “capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”⁹ When it succeeds, adjudication has so deep a transformative effect on participants that “the transformed dispute” that adjudication creates “can actually become *the* dispute”¹⁰ that disputants pursue.

7. This basic idea has been elaborated in many ways. For an initial, and still provisional, account of my own views, see Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897 (2005).

8. See *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

9. Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). Here I am glossing over certain complexities in Fuller’s views of the different kinds of dispute resolution.

10. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC’Y REV. 631, 650 (1980-1981).

Adjudication, in other words, changes disputants' aspirations and reconstructs disputes in ways that ensure the legitimacy of the outcomes that it produces—it eliminates from disputants' minds characterizations that cast their disputes as intractable, replacing them with alternative characterizations that are more benign. Insofar as adjudication achieves this transformation, the legitimacy of the legal process follows, because the reconstructed disputes and the resolutions that the legal process proposes have been tailored to suit each other, so that parties who come (through their affective engagements with the legal process) to see their disputes as the legal process proposes also come to accept the resolutions that the legal process recommends.

Indeed, when it is most successful adjudication intercedes in social conflicts even before they have fully ripened into open disputes, creating in persons a general disposition to conceive of disputes, *ab initio*, on the terms that adjudication recommends—terms that favor their eventual legitimate resolution. Tocqueville long ago identified this possibility, when he observed that Americans tend, even in “their daily controversies,” to “borrow . . . the ideas, and even the language, peculiar to judicial proceedings.”¹¹ The tort system provides a particularly vivid contemporary illustration of this insight. For all its failings, tort law has proved remarkably successful at convincing Americans to re-conceptualize accidents and ensuing injuries—rejecting folk understandings that emphasize personal honor and lost human flourishing in favor of much more tractable ideas about efficient precaution and money damages.

II. LAWYERS AS LEGITIMATORS

Lawyers are essential to adjudication's power to achieve retail legitimation on this model. As Karl Llewellyn said, it is one of the “law-jobs” to sustain authoritative resolutions of “trouble cases”—cases in which general principles do not straightforwardly resolve themselves into consensus outcomes.¹² Lawyers do this job by serving as bridges between the state and its citizens and as buffers between competing citizens. They “objectify” their clients' claims, abstracting from the clients' narrow interests and circumstances, and connecting the claims to broader principles “in terms of which . . . binding solution[s] [to disputes] can be found.”¹³ They “test the reality of the[ir]

11. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357 (F. Bowen ed., 1862).

12. See K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

13. Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 *INT'L J. SOC. L.* 331, 343 (1979).

clien[ts'] perspective[s],”¹⁴ sorting their clients’ claims into reasonable and unreasonable components. And in these ways, lawyers reconstitute their clients’ claims, transforming them from brute demands, which are fundamentally unanswerable, into assertions of right, which invoke public, generally applicable principles and therefore implicitly acknowledge the conditions of their own failure.¹⁵ In short, lawyers translate between disputants’ idiosyncratic native idioms and the intersubjective language of the state, expressed in its laws. And by doing so, lawyers help to recast disputes in terms that allow disputants meaningfully, and effectively, to engage each other in the search for an authoritative resolution. The traditional lawyer-client relation is thus “focused,” as Talcott Parsons observed, on the “smoothing over” of “situations of actual or potential social conflict.”¹⁶

In order successfully to serve in this role, lawyers must avoid rather than assert leadership—living not authentically but vicariously. Whereas leaders promote and indeed indulge their personal judgments, lawyers must instead suppress them in favor of a professional ethic of fidelity to their clients: an ethic that emphasizes deference to clients’ purposes and accuracy in translating these purposes into the language of the law. Lawyers who accept this professional ethic aspire to what I elsewhere call negative capability—they suppress their own and magnify their clients’ perspectives.¹⁷ By contrast, lawyers who fail to achieve negative capability, and judge rather than serve their clients, undermine adjudication’s legitimating ambitions. Such lawyers will be experienced by clients as foreign and hostile, so that they disrupt rather than encourage disputants’ legal engagements with one another. Rather than establishing a form of commensuration, in which clients come to engage one another through the legal process, judgmental lawyers confront clients as an unmediated and alienating part of the process, and they therefore undermine rather than support the legitimacy of adjudication.

This is not to say that fidelity and negative capability require lawyers to act as extreme partisans, willing to do everything that their clients ask. And the question of the proper extent of lawyerly partisanship remains a difficult one

14. Felstiner et al., *supra* note 10, at 646.

15. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 368 (1978). Fuller imagines a baseball player who transforms his brute claim to play catcher into a claim of right based on his being the best catcher available and therefore implicitly acknowledges that he must abandon his claim in case a more skilled catcher appears.

16. Talcott Parsons, *The Law and Social Control*, in LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56, 63 (William M. Evan ed., 1962).

17. I introduce this idea to legal ethics in earlier article. See Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J.L. & HUM. 209 (2003).

(which I take up in great detail in a forthcoming book).¹⁸ But the authority of adjudication depends on lawyers whose first instinct and basic gestalt is to serve rather than to judge their clients. And that is not leadership but rather, at least in one way, its polar opposite.

III. NOT REVOLUTION BUT RENEWAL

To be sure, lawyers can experience their pursuit of negative capability as costly. Heineman is right to observe that “the traditional legal roles of advocate or counselor may have an amorality which is ultimately unfulfilling”¹⁹ and that the “disconnect between personal values and professional life”²⁰ that this form of lawyering demands can be experienced as burdensome by those who practice it. Indeed, I have elsewhere argued in detail that this burden is not just psychological but instead has an important ethical component.²¹ But although Heineman is also right that abandoning negatively capable lawyering in favor of a leadership conception of the lawyer’s role can alleviate these tensions and allow lawyers to “achieve[] convergence between who they [are] and what they [do],”²² the relief for lawyers would be achieved at an unacceptably great cost to the legitimacy of the legal system and indeed of social and political arrangements more generally.

The answer to the ethical dilemma that Heineman correctly identifies therefore simply cannot be to abandon the lawyer’s traditional role as legitimator of the decisions of others in favor of a new role as a lawyer-leader, that is, as herself a decider. Indeed, the political and social need for the services of traditional lawyers has never been greater than it is today. Although Heineman confidently claims that “our society is suffering from a leadership deficit in public, private, and non-profit spheres,”²³ the truth seems more likely the reverse. There are today, as always, plenty of people about who are willing to deploy whatever power they possess in the service of their personal conceptions of what ought to be done. And it is a commonplace of our age that the executory virtues are in the ascendancy and that institutions of all sorts –

18. See DANIEL MARKOVITS, *TRAGIC VILLAINS: LAWYERS AND THEIR ETHICS IN THE MODERN WORLD* (forthcoming 2008).

19. Heineman, *supra* note 3, at 267.

20. *Id.* at 266.

21. See Markovits, *supra* note 17. I develop this ethical argument in greater detail and connect it to the history and sociology of the legal profession in DANIEL MARKOVITS, *TRAGIC VILLAINS: LAWYERS AND THEIR ETHICS IN THE MODERN WORLD* (forthcoming 2008).

22. Heineman, *supra* note 3, at 268.

23. *Id.* at 266.

including a government run by one especially notorious “decider”—are increasingly controlled by strong, and strong-willed, chieftains.

Insofar as there exists a deficit of practical virtue in our society, it is much more likely a deficit in the supporting cast—in the institutions and processes that might provide our leaders with wise counsel and that might manage the “perpetual conflicts between rival impulses and ideals” that Stuart Hampshire once observed arise endemically in every living system.²⁴ These conflicts demand a steward who might “preside[] over the hostilities and find[] sufficient compromises to prevent . . . civil war or war between peoples.”²⁵ The lawyer in her traditional role as wise servant rather than leader, living vicariously as Oliver described, was just such a steward. These reflections may indeed amount to a call for the bar and the law schools who train its members to commit themselves to a new—or at least renewed—mission. And this renewed mission may require a renovation of the bar, particularly given the tensions between the legal profession’s traditional institutions and modern, egalitarian ideals. But these efforts should aim to strengthen the lawyer’s traditional professional role as counselor (adapting that role to the ideological conditions of modern democratic life), and to provide the ethical resources needed to live in that role successfully and with integrity. They should not abandon this role in favor of joining an already over-crowded battle to lead.

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24. STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 189 (1989).

25. *Id.*