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# THE ORDINARY HEROISM OF LAWYERS: A TRIBUTE TO ROGER C. CRAMTON

W. Bradley Wendel†

“One of the consequences of a skeptical age is that all the heroes are killed off one by one. Law is no exception.”<sup>1</sup>

Roger Cramton was a great defender of the rule of law and one of the pioneers in the field of legal ethics, in the best sense. His professional career, as well as his scholarship, demonstrated the qualities of intellectual rigor, courage, and humility that have inspired me since joining Roger on the faculty of Cornell Law School in 2004. Students and faculty joke about the overuse of our school motto, “Lawyers in the Best Sense,” taken from a speech by Cornell founder A.D. White. In all seriousness, Roger spent his career writing about, and setting an example of, what it means to be a lawyer in the best sense. In many ways, large and small, my thinking about legal ethics has been influenced by Roger.

I read and admired Roger’s scholarship long before coming to Cornell, beginning when I was a graduate student trying to work out the right way to understand the relationship between the role of lawyer and the social and political values served by the legal system. I was particularly taken by his influential essay, *The Ordinary Religion of the Law School Classroom*.<sup>2</sup> Despite its modest length, *Ordinary Religion* is a remarkably rich paper—in part an early salvo from the traditionalist camp in the wars over Critical Legal Studies (CLS), but also radical in its own way, warning against an uncritical acceptance of the role of lawyers as “priests of the established order and its mod-

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<sup>1</sup> Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 259 (1978).

<sup>2</sup> Cramton, *supra* note 1. As of June 28, 2018, HeinOnline reports that this paper was cited in 227 other works, by a virtual Who’s Who of the field of legal ethics, including Deborah Rhode, David Wilkins, Susan Koniak, Robert Condlin, Tom Morgan, Steve Pepper, and Carrie Menkel-Meadow. HEINONLINE, <https://www.heinonline.org> [<https://perma.cc/55QA-NJJ4>].

ern dogmas.”<sup>3</sup> In places the essay seems to advocate to replace the values and dispositions inculcated by legal education with the perspective of an actual religion. Roger laments that transcendence and “a sense of wonder or awe at the inexplicable . . . are off limits for law students and lawyers.”<sup>4</sup> But his views on the role of religion in public life are closer to the Christian realism of Reinhold Niebuhr than to the position of a more radical theologian like Stanley Hauerwas, who emphasizes that a calling to serve God may be incompatible with the demands of political liberalism.<sup>5</sup> Roger cautions that “[a] desire for reform is one thing and a good thing: a naive belief in the creation of a heaven on earth is unreal to the demonic potential of [human] nature and runs the risk of idolatry.”<sup>6</sup> Caution and humility are required in public policymaking, because “[s]ocial problems are more intractable than was initially recognized, and an effective attack on them involves conflicts with other values.”<sup>7</sup> No supernatural account of value is required to arrive at the conclusion that human values are complex, conflicts of duties are possible, and human experience reveals “the expectation of unavoidable squalor and imperfection, of necessary disappointments and mixed results, of half success and half failure.”<sup>8</sup>

Roger’s *Ordinary Religion* piece is remembered for its observation about the content of the tacit curriculum of legal education. Contrary to the claim that legal education is evaluatively neutral or amoral, Roger contends that legal education does inculcate values, but does so implicitly, and what’s more, it teaches crummy values. “The development of ethical attitudes is probably more affected by the hidden curriculum than

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<sup>3</sup> Cramton, *supra* note 1, at 263; *see also id.* at 254 (criticizing the tendency of lawyers to see themselves as “apologist[s] and technician[s] for established institutions and things as they are”).

<sup>4</sup> *Id.* at 250.

<sup>5</sup> *See, e.g.*, STANLEY HAUERWAS, AFTER CHRISTENDOM?: HOW THE CHURCH IS TO BEHAVE IF FREEDOM, JUSTICE, AND A CHRISTIAN NATION ARE BAD IDEAS (1991). Hauerwas’s critique of Niebuhr, simply stated, is that he was so eager to render Christian ethics acceptable to the wider society that he was inclined to remove all of the distinctive, peculiar, powerful bits from the Christian message. *See* STANLEY HAUERWAS, *On Keeping Theological Ethics Theological*, in THE HAUERWAS READER 51, 61 (John Berkman & Michael Cartwright eds., 2001).

<sup>6</sup> Cramton, *supra* note 1, at 258. *Cf.* ROBIN W. LOVIN, REINHOLD NIEBUHR AND CHRISTIAN REALISM (1995) (reading Niebuhr as warning Christians in public life about the danger of the love of power, the desire to reward one’s friends and punish one’s enemies, and the limitations of human understanding of universally valid ideals and norms).

<sup>7</sup> Cramton, *supra* note 1, at 258.

<sup>8</sup> STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 170 (1989).

by the formal curriculum," he writes.<sup>9</sup> The hidden curriculum sometimes encourages CLS-style skepticism with its steady diet of borderline cases, the perceived arbitrariness of categories and line-drawing, overemphasis on uncertainty and instability in law, and avoidance of discussions of values.<sup>10</sup> Law teachers also tacitly convey the message that value is a human creation, and subjective—a matter of will or preference, not a discovery about the fabric of the universe. Here the target is not CLS, but law and economics. He writes (referring, I think, to economic accounts of rationality) that what one asserts as a reason is nothing more than a "rationalization[ ] for hidden motives"—brute preferences not subject to rational criticism; "[r]easons . . . become instruments in the service of warring preferences."<sup>11</sup> If there is no genuine reason to prefer one social policy goal over another, if what purport to be reasons are nothing more than tricks to sway others to do what is in the speaker's interests,<sup>12</sup> then the law's claim to have anything to do with justice is appropriately met with "[s]uspicion, distrust, and skepticism."<sup>13</sup> Even in a legal ethics course, which one might expect to blunt this tendency toward nihilism, teachers follow the same tacit curriculum, leading to the charge that law schools teach "legal ethics without the ethics."<sup>14</sup>

As a legal ethics theorist, I think the conclusions Roger draws from this argument are half-right. If law students believe values are purely subjective, the "hired gun" model of lawyering will have some superficial appeal. To the question, "How do you come out on this case?" a student learns to answer, "It depends on what side I'm on."<sup>15</sup> If questions of right and wrong are really up in the air, what could be wrong with advocating for the position of someone willing to pay for that advocacy? But a

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<sup>9</sup> Cramton, *supra* note 1, at 253.

<sup>10</sup> *Id.* at 254–56.

<sup>11</sup> *Id.* at 259; *see also id.* at 250 ("Law is not so much an independent influence on society as a result of social desires and pressures.").

<sup>12</sup> *Id.* at 259. This is, of course, an ancient critique, going back at least to Plato's attack on rhetoric, as practiced by the sophists, as being the skill of making the false seem true and the true false. *See* Plato, *Gorgias*, in *THE COLLECTED DIALOGUES* (Edith Hamilton & Huntington Cairns eds., 1961) (W.D. Woodhead trans.); *see also* James Boyd White, *Heracles' Bow: Persuasion and Community in Sophocles' Philoctetes*, in *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 3, 3–5 (1985) (arguing that classical rhetoricians have gotten a bum rap, and in fact they understood that there was a right way and a wrong way of seeking to persuade others).

<sup>13</sup> Cramton, *supra* note 1, at 259.

<sup>14</sup> Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 *FORDHAM L. REV.* 333, 340 (2003).

<sup>15</sup> Cramton, *supra* note 1, at 260.

moment's reflection on the hired gun model shows not only its instability, but also the implausibility of a theory of values as relative to each individual's preferences. Roger claims that lawyers are forced into seeing themselves as "intellectual prostitute[s]."<sup>16</sup> That's certainly not an attractive self-conception. Lawyers who believe in the traditional ethical obligation of "zealous advocacy within the bounds of the law" accordingly emphasize values such as the fiduciary duty of loyalty to clients, the importance of individual autonomy, or the protection of vulnerable individuals against abuses of state power.<sup>17</sup> A lawyer who resolutely defends a client is not a prostitute, but something noble, such as a champion, a minister, or a friend.<sup>18</sup> Along the way to refuting that claim that they are no better than prostitutes, however, lawyers will inevitably make arguments that presuppose the objectivity, or at least intersubjective intelligibility, of values. People have an interest in acting in ways that can be justified to others.<sup>19</sup> No one wants to be called a prostitute, so they offer justifications for their actions in terms that others can, in principle, accept.<sup>20</sup> The process of constructing and defending ethical conceptions of professionalism is a performative contradiction of the subjectivity of value.

A lawyer might, instead, wish to conceive of herself as a "social engineer," working in the interests of society as a whole. Roger believes this conception of the lawyer's role has a "lifeless, bureaucratic, and technocratic flavor,"<sup>21</sup> but many of the traditional models of lawyer professionalism suffer from a ten-

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<sup>16</sup> *Id.* at 259. William Simon famously criticized the standard conception of legal ethics in which one adopts the interests of another in exchange for money as closer to prostitution than to the classical ideal of friendship. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 108 (1978).

<sup>17</sup> See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010) (setting out the standard conception of legal ethics and defending a modified version of it); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981) (making a complex and subtle argument, influenced by Stanley Hauerwas and John Howard Yoder, that the lawyer's professional role is constituted by values and virtues developed within communities); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) (defending the traditional conception of the lawyer's role with reference to constitutional values and the importance of checking state power); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (relying on autonomy as foundational value in legal ethics).

<sup>18</sup> See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (relying on the value of loyalty and an analogy with friendship).

<sup>19</sup> T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 154 (1998).

<sup>20</sup> *Id.* at 189-94.

<sup>21</sup> Cramton, *supra* note 1, at 260.

dency toward grandiosity. Writing in 1934, Supreme Court Justice Harlan F. Stone urged lawyers to bring to bear their expertise in “understanding . . . complex facts” and to “use those facts to envision a new and better community.”<sup>22</sup> The Brandeisian ideal of the lawyer as “wise counselor” who does not merely manipulate legal rules for the benefit of clients, but nudges powerful individuals and corporations in the direction of socially responsible behavior, remained a staple of the rhetoric of professionalism well into the twentieth century.<sup>23</sup> At any rate, Roger’s principal concern with the social engineer model is not that it is boring, but that it instrumentalizes the law. He criticizes the strand of the tacit curriculum of legal education which holds that “law is an instrument for achieving social goals and nothing else.”<sup>24</sup> It is not immediately clear what “something else,” beyond an instrument for achieving social goals, the law might be. This ambiguity is cleared up later in the article, where Roger worries that reason itself has come to be viewed instrumentally, as a “tool for the control or manipulation of the world.”<sup>25</sup> In other words, the tacit curriculum teaches that the law has no *intrinsic* value.

While he does not say this explicitly, I think Roger’s principal concern is that understanding the value of law in instrumental terms creates a temptation to push the law to one side when it is inconvenient or stands as an obstacle to the realization of one’s social policy goals. Roger was rightly proud of having been fired by Richard Nixon from his position as Assistant Attorney General and head of the Office of Legal Counsel.<sup>26</sup> He subsequently wrote, in language that echoes the critique of *Ordinary Religion*, that one of the lessons of Watergate is that the “glorification of the president as father figure, movie idol, and monarch” can lead to abuses of presidential power.<sup>27</sup> (It is not difficult to imagine what he would have thought about a former reality television star as president.) The classical antidote to abuses of power is reason and the rule of

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<sup>22</sup> Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 660–61 (2016) (citing Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 14 (1934)).

<sup>23</sup> See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 339, 410 (1985).

<sup>24</sup> Cramton, *supra* note 1, at 250.

<sup>25</sup> *Id.* at 261.

<sup>26</sup> See Susan P. Koniak, *To All Government Lawyers, Roger Left You a Note*, 103 CORNELL L. REV. 1329 (2018).

<sup>27</sup> Roger C. Cramton, *Lessons of Watergate*, 2 CORNELL L. SCH. FORUM 6 (1975).

law.<sup>28</sup> In places, Roger's critique of the instrumental perspective on the law is stated too strongly and conflated with a critique of reason itself. He worries that the tacit curriculum of the law school teaches "a faith in reason and democratic processes tending toward mere credulity and idolatry."<sup>29</sup> There can be no effective rule of law without faith in reason and the democratic process. But reading *Ordinary Religion* alongside his short article on the lessons of Watergate shows that the target of his critique is not reason, but the self-importance on the part of government officials, and the need of ordinary citizens for heroic figures in positions of leadership. He writes:

Instead of viewing President Ford as the quite ordinary, unpretentious, working politician he is, the press devoted itself to glorifying the mythical super-president in an avalanche of publicity about dancing parties, poolside picnics, and breakfast muffins. Having created a mythic super-hero, the press then reacted with violent anger when Ford suddenly took an action with which most of them disagreed—the pardon of former President Nixon.

A more down-to-earth view of government and the presidency would not have magnified the euphoria nor been so crushed by a single action.<sup>30</sup>

The epigraph at the beginning of this paper is therefore highly ironic, because Roger would presumably approve of killing off glorified mythical heroes. In order to survive the pressures of a skeptical age, the law must be an ordinary, unpretentious, working concept that serves the needs of the political community, rather than becoming an object of worship and myth-making.

A better, Cramton-inspired "religion" for the law school classroom would accordingly emphasize humility, fallibility, and a kind of good-natured skepticism about all human action that avoids metastasizing into "a corrosive distrust and widespread paranoia that views every public act as the product of deceit, corruption, or malevolence."<sup>31</sup> This is quite a tightrope to walk. We are currently living in a time of widespread distrust caused—or so I would contend—by the actions of a president which are *in fact* the products of deceit, corruption, and malevolence. There is nevertheless evidence that the kind of humble, unpretentious, workaday commitment to the values of legality

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<sup>28</sup> See, e.g., Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

<sup>29</sup> Cramton, *supra* note 1, at 262.

<sup>30</sup> Cramton, *supra* note 27, at 7.

<sup>31</sup> *Id.*

has proven remarkably effective in the face of a concerted assault upon the independence of the judiciary and executive branch officials. As Benjamin Wittes observed in a summary of the first year of Trump's presidency, "the apparatus of democratic rule-of-law governance has held up reasonably well so far," and that is largely due to the unsung work of rank-and-file employees of the Justice Department and the F.B.I. and their commitment to traditional norms.<sup>32</sup> Most line-level government lawyers do not claim to be superheroes; they are just doing a job that happens to be incredibly important at the moment. Maybe that's unglamorous and technocratic, certainly as compared with being someone who claims to have an "absolute right to do what I want to do with the Justice Department,"<sup>33</sup> but the combined effect of an untold number of lawyers and judges who enforce the distinction between power and right is having a vital stabilizing effect at this moment. O.W. Holmes, Jr. wrote, "I don't see why we shouldn't do our job in the station in which we were born without waiting for an angel to assure us that it is the jobbest job in jobdom."<sup>34</sup> That is a sentiment Roger could get behind.

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<sup>32</sup> Benjamin Wittes, *Why Trump's War on the Deep State is Failing—So Far*, LAWFARE (Jan. 1, 2018, 10:00 AM), <https://www.lawfareblog.com/why-trumps-war-deep-state-failing%E2%80%94so-far> [<https://perma.cc/7LVL-MUTC>].

<sup>33</sup> See Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. "Look Very Bad"*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html> [<https://perma.cc/YF2Q-DAK2>].

<sup>34</sup> Letter from Oliver Wendell Holmes to Morris R. Cohen (May 27, 1917), in *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 10 (1948), quoted in David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's "The Path of the Law"*, 72 N.Y.U. L. REV. 1547, 1549 (1997).