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# LAWYERS' DEMOCRATIC DYSFUNCTION

SYMPOSIUM DISCUSSION: LITMAN

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DRAKE UNIVERSITY LAW SCHOOL

**Audience Member:** What solutions would you propose, considering that, at least from my perspective as a current law student, the legal academy seems to really canonize and idealize membership in this elite network at almost any cost?

**Leah Litman:** So, it is hard for me to come up with a concrete solution, and if I did, those would have been the subject of the talk. But what I would say is the problem that you have identified is a serious one, and part of the media structure that Jack has identified as contributing to this dysfunction is, I think, part of a solution. When we're talking about platforms such as Twitter and whatnot, those provide opportunities to get, let's say, a critical mass of voices behind the idea that an elite lawyer is doing something wrong and to get people to support that idea and maybe get that into the public domain in a way that wouldn't have been the case when you just have a more finite group of people with more control over and access to communication and pushing out ideas. But I do think part of what needs to happen is exactly what you suggested, which is rethinking the value of credentials that are now being bestowed on people who are willing to carry out certain policies that we think they shouldn't be or who are willing to pursue various antidemocratic measures that we think are, in the aggregate, a problem for our constitutional system. But that's a general idea that can probably be implemented in a few different ways. I also think it can be implemented in different ways by different people. So, if you are a student who is putting together a student event and you say, "I want to have a debate on this issue," do you want to select a topic for debate that you want to represent is argued by two equally coherent sides and is worth academically debating? Do you want to invite a speaker who, for example, participated in a torture program? These are things that you can think about and that you can implement at various stages of your career, no matter what that is.

**Audience Member:** I struggle with the idea that it is the fundamental dichotomy of being a lawyer that we have to represent our clients to achieve their desired outcomes within the bounds of the law. So, we don't always get to pick the issue, and we don't always get to pick the clients. How do we enforce this if they're not breaking the law? I just don't see an enforcement mechanism for what you're proposing.

**Litman:** So that is certainly going to be the line-drawing problem that I alluded to at the end, but what I would say is as follows. First, the type of enforcement mechanism that I am advocating for is not the kind of enforcement

mechanism where we have this same sort of line-drawing concern that we might have if we are talking about, for example, criminal penalties or about civil sanctions or various other kinds of more aggressive sanctions or enforcement. This is merely a decision about who to promote to future government jobs. And if we are talking a softer enforcement tool, then perhaps winnowing down from the entire set of cases in which lawyers are permitted to represent a client is okay. The second thing is that even though lawyers have an obligation to represent their client, lawyers as a profession also have other obligations as well. Part of the ethos that we have built for our profession is this obligation to defend your clients' interest, but we also have this competing obligation to do justice. We might also think that we have a competing obligation to our constitutional system and ensure that it remains sufficiently democratic. So there are always going to be competing obligations; it just so happens that this norm of just representing a client and advocating for the client zealously has kind of overshadowed what we might think of as competing norms, and we have also kind of drawn lines already for what lawyers can and can't do. So even though lawyers have an obligation to zealously defend their client, we have already said, "Well, the law places out of bounds things such as perjury, concealing evidence, and impeding the truth-finding process and the fact-finding process of the judicial system," so why isn't it the case that we can impose significantly less sanctions for violating other obligations because of competing obligations that we might also have?

**Sanford Levinson:** I think one of the realities of the U.S. legal system, in contrast to, say, the British legal system, is that U.S. lawyers are not obligated to take on any particular clients. We don't have the so-called cab-rank rule, where lawyers in essence become common carriers and so if you show up as a potential client, the lawyer has a duty to represent you. Now, it's different if, let's say, you're a public defender or perhaps if you're a criminal defense lawyer, but we're not really talking about criminal defense lawyers; we're talking about civil lawyers or lawyers for the government. I think this is a very, very tricky and serious problem, that is, the attribution to lawyers and holding them responsible for how they choose to allocate their services. But I think it's simply a mistake in the United States to say that the law governing lawyers requires a lawyer to take on any given client. You can always refuse. You can always resign from representation.

**Jack Balkin:** Well, in the case of a government lawyer, you have to resign.

**Levinson:** That's right, but people do resign. You know, it's an interesting question as to when you ought to hold people responsible for not resigning because they'd rather continue to have their office and their prestige. England is truly different. Great Britain has a tradition of resignation, at least at the political level,

that is, generally speaking, absent in our political culture.

**Franita Tolson:** I think the elite network of lawyers also creates a sense of entitlement that we saw on full display during the Kavanaugh hearings. Regardless of if you believe he's guilty or not, there was this sense that the seat was already his to lose. So I think people are invested in the network because they feel like no matter what they do, they are entitled to the payoff that comes from being in the network. That's something that we really need to revisit as a profession, this sense that just because you're in a network you're entitled to all of the benefits of being in the network. I think there has to be some policing of the behavior of people in the network, and there does have to be some consequence when we make decisions because even as lawyers, I think Leah is right that there are these competing obligations. But also, you have to have an independent sense of right and wrong. It's not just about your clients. It's not just about the obligations that the structure of our system imposes on you. It's also about your independent judgment about whether something is wrong.

**Audience Member:** In the last Gilded Age, where money corrupted the legal system, that was the foundation of the rules of ethics. It seems to me that with the publication of the book *She Said* and the detailing of the role of lawyers in perpetration of sexual predation, we have gone to a level that went beyond what you might describe as criminal defense or what a barrister will do or even what a criminal defense lawyer would do. I think we're perhaps at a point where we need to revisit the rules. You can tell it's unfortunate that we need rules to do this, to define what the role of a lawyer is in such a way that money is not so corrupting to the value of democracy and the Constitution.

**Litman:** I like that example because I think it is analogous to an example I just threw out in the course of talking, which is the White House counsel lawyers who are now involved in figuring out different legal strategies for covering up the whistleblower complaint that was lodged with the Inspector General office and that the Director of National Intelligence is refusing to transmit to Congress. The example that you give about Lisa Bloom and other lawyers coming up with ways to try and discredit the accusers who were bringing forward credible allegations of sexual misconduct is similar. How far do you have to go as a lawyer? Are there certain things that you are unwilling to do, either in your spare time or in government office? This is a White House counsel who is trying to help the President do something that the President initially referred to his personal lawyer. So there are all sorts of decision points that you can imagine us saying, "This is the point at which you should rethink your involvement." I would need to think more about how the analogy between now and the Gilded Age works as far as the corrupting influence of different economic voices.

**Balkin:** I'll present a few hard cases to refine the thesis. As Attorney General, Robert Jackson effectively allowed President Roosevelt to lie to Congress. Should we lawyers have ostracized Jackson? Next, consider all of the lawyers who defended states' Jim Crow laws and segregation practices in the *Brown v. Board of Education* litigation and other civil rights cases. What should have happened to them? Next consider all of the lawyers involved in defending the Reagan Administration's actions in the Iran Contra Scandal. What should have happened to them?

Then of course, there are the judges, who actually decide the cases that produce the terrible outcomes. So imagine a judge who provided the crucial fifth vote in a decision that stripped voting rights over a significant part of the country. [*Shelby County v. Holder*] And imagine a judge who was the fifth vote in a decision that allowed and sanctified the President's decision to exclude Muslims from the United States under a hyped-up travel ban. [*Trump v. Hawaii*] Should that justice be ostracized? I'm referring, of course to Anthony Kennedy. I'm just trying to figure out how we operationalize your thesis.

There's one more issue. There are two words that didn't appear in your talk, and I would like you to integrate them into your thesis. They are *federalist* and *society*. It's not just individual elite liberal and conservative lawyers who are doing things that one might disagree with; there's also a set of self-reinforcing lawyer and policy networks which are part of the story you're telling.

How should we integrate these hard cases into the story you're telling?

**Litman:** I will provide a thought or two about some of the hard cases and then mention *federalist society* and why those terms are not a part of the talk. As to the lawyers in *Brown*, let's imagine that 10 years down the road or, say, 17 years after *Brown*, there's a question about who's going to be nominated to the Supreme Court. And you have a lawyer who is defending the state of Kansas, and you have a lawyer who is not. I tend to think that the lawyer who is not should be chosen over the lawyer who is, assuming they have similar political views to the appointing President. And that is the sort of professional sanction or consequence to professional advancement that I have in mind. Your second example was Iran Contra. That was the example I wanted to talk about because I think this example is instructive because we have a recent story about a lawyer who was involved in Iran Contra being put up again for public office. The question was do we kind of look past his covering up of what the Administration was doing and so on. Of course, that lawyer is Attorney General William Barr, and I think it was okay to hold it against him, the actions that he did during the Iran Contra scandal, and suggest this is not someone who is well-suited to the current climate because we aren't going to trust what this person would do. Given who the President is, we

need to be able to trust the decisions that are being made by the Department of Justice, and now, when we are again in a situation where the DOJ might be backing up the DNI's refusal to turn over the whistleblower information, I think having Bill Barr in there isn't a good thing. I am okay saying these are jobs that are okay to withhold from the relevant people. As to why the Federalist Society was not part of the talk, I think the reason that they weren't is I am more focused on why people who aren't a part of the Federalist Society are willing to go to bat with people who are part of the Federalist Society.