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Commencement Address - Boalt Hall, May 1986

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Berkeley Law

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In recent years I have been struck by what seems to be a paradox in people's attitudes toward the law and the legal profession. A couple of years ago I served on Boalt's admissions committee. In applicants' statements about why they wanted to become lawyers, idealism was the most prominent theme. Seventy-five to eighty percent spoke of their desire to serve society, to help those less fortunate than themselves. They envisioned law and lawyers, in a word, as "doing good." Even if you impose a hefty discount for those you think may just have been trying to impress, and even if you offset further for the alluring but sometimes uninformed optimism of youth, the collective voice of these applicants still makes a sizable statement about one image of the legal profession.

Juxtaposed against this idealism, however, is another attitude about the profession. Two out of three attorneys practicing in the world practice in this country.[1] Ninety-four out of one hundred people live elsewhere.[2] Are we as a nation ten times more just? Do we experience ourselves as having ten times more "good done" by our so numerous attorneys? Many people don't seem to see the profession with the same eyes as Boalt's pool of applicants. The jokes about lawyers are legion. Milt Moskowitz is one of many to taunt us about our wordiness. Quotes he:

> When an ordinary man wants to give an orange to another, he would merely say, "I give you this orange." But when a lawyer does it, he says it this way: "Know all men by these presents that I hereby give, grant, release, convey, transfer, and quitclaim all my right, title, interest, benefit, and use whatever in . . . this chattel, otherwise known as an orange or citrus orantium, together with all the appurtenances thereto of skin, pulp, pip, rind, seeds, and juice . . . with full power to bite, cut, suck, or otherwise eat the said orange or to give away the same with or without its skin,

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[1] L.A. Daily J., Feb. 29, 1984, at 4, col. 3.

[2] *Id.*

pulp, pip, rind, seeds, or juice."[3]

Well, wordiness may be embarrassing, but it's a relatively mild sort of vice. More biting are the jokes about lawyers being the only ones to survive a shipwreck because the sharks show professional courtesy; the witticism about billing $100 for "crossing the street to speak to you and discovering it wasn't you."[4] Then there's the wry observation that "an apple a day keeps the doctor away; now, if we could just find something for the lawyers." And always there is the repetition of the quote from Shakespeare: "[L]et's kill all the lawyers."[5] The variations on the theme are endless.

Nor is the cynicism about our profession just "out there" among laypersons who "don't understand." Several years ago my students did a "dictionary" spoofing my — shall we say creative — use of language. They teased me about my invention of words like "schmurgled." But they also included in the catechism their own sardonic definition of "lawyer" as "one skilled in circumvention of the law; one who earns a living by the sweat of brow-beating others; a person who writes a 10,000 word document and calls it a brief."

How should we explain these ambivalent attitudes toward our profession? Does the students' definition of a lawyer represent progress by comparison to the applicants' comparatively untutored views about our chosen profession? Maybe the students' quip just reflects that they are keeping a sense of humor even in the darkest hour of contract law. Or perhaps they are simply defusing the stress and responsibility of their role, the way medical students joke about death and corpses. Even so, humor is a way of releasing anxiety about truths that worry us.

A couple of weeks ago I asked students in this graduating class to talk with me about their expectations of the future. Some spoke of challenge and excitement. But they spoke, too, of fears about boredom, and paper shuffling, and money grubbing. They expressed concern that they would not recognize ethical issues when they arose. They spoke about what one called "a lack of heart connection" to one's work, of "alienated labor." That last echoes another era, another construct, yet it remains strangely apt, chillingly illuminating.

Maybe cynicism about the profession you are about to enter is progress — a process of growing up, maturing, of reality setting in. But if so, who needs maturity? The image is one I can neither settle for nor dismiss. If this is realism and maturity perhaps May Sarton was right when she said, "one must think like a hero to behave like a merely decent

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[3] San Francisco Chron., Dec. 2, 1978, at 35, col. 4 (quoting Robert H. Mundheim, General Counsel of the U.S. Treasury Department).

[4] Wall St. J., March 1, 1978, at 20, col. 6.

[5] W. SHAKESPEARE, II HENRY VI, Act 4, Scene 2, line 86.

human being."[6] Why, then, does the loss of idealism persist, a loss that for some extends almost to a loss of hope for meaning in one's professional life? I have a hunch I'd like to share. Let me begin with a recollection.

One of my earliest memories of this class — those of you who graduate today — is of an encounter that was rather painful to both sides. I'm sure many of you remember, too . . . I took over a large contracts class mid-year. For students, it is hard to change teachers; there are different expectations and norms to be accommodated. For a teacher, it's hard to take a class already in progress and shape it to one's own pedagogical aspirations and style. In starting a class, one of the first things I establish is that I expect careful and regular preparation. Preparation helps students to maintain an attitude of potential participation rather than to adopt a passive norm of "spectatorism." In this class, several days in a row several people in a row were unprepared. I became flustered, annoyed. This had never happened to me before. I spoke sharply about the issue to the class, assuming that would settle it once and for all. Yet it happened again. I stopped the class, unwilling to continue without student involvement, yet unwilling also to leave in a huff as the classical role might have suggested would be the appropriate response to unprepared students. Instead I burst out, "I can't do this without you." And I stood . . .

I learned that day that it's neither easy, nor necessarily wise, to run a T-group with 140 people. All of us were uncomfortable. Various explanations for the lack of preparation were advanced — moot court, too much reading. Finally, one brave student said, "It's not your business whether we're prepared." I registered my shock, "Of course it's my business!" With great indignation, I sputtered on, "We're in this together. I share responsibility for your learning. A student's 'bad' response may be the product of my badly drawn question; your understanding or lack of it is partly a reflection of the clarity of my thought and presentation. And the opposite is also true: you share responsibility for the class's effectiveness and for my teaching." As I began to calm down, I recognized and expressed my bottom line: "If the model you suggest prevailed, I wouldn't want to teach."

That student and I have become good friends. In conversations with him and others regarding that explosive incident in class, I learned some things about my own short fuse on the issue, about the presumptuousness of my interpretations of the students' behavior. And the students learned, too, that I fired back so fast and so hard because that notion of disengagement, of separateness, of autonomy as *distance*, offended something very fundamental in my self-definition, in my notion

[6] M. SARTON, JOURNAL OF A SOLITUDE 101 (1973).

of professionalism and personhood. Yet that very model — of disengagement — is prevalent in the realm of law.

Law is replete with the norm and the imagery of detachment. Judging is defined as requiring dispassionateness, abstraction from feeling, from meaning and consequence for individuals. Both practically and symbolically, the judge's bench is raised and distanced from the parties. The robe, the titles, the ritual reinforce detachment and impersonality. Moreover, we are a government of laws and not of men. (I won't even bother to gender-neutralize that term as we are most definitely not a government of women.) The articulated goals for the legal professional invoke principles over persons, objective over subjective, logic rather than feeling, detachment rather than connection, control rather than spontaneity, analysis rather than empathy. Indeed, Justice herself is blindfolded . . . *blind* — signifying neutrality, yet expressing, too, the posture of disengagement.

The imagery of detachment and distance is reflected in the law school classroom. To be sure, legal analysis demands careful attention to the particular as well as the general, to the entwinement of facts with abstract holdings. But, still, analysis also insists upon ruthlessly narrow notions of relevance that force the exclusion of much that seems humanly or even morally significant regarding the facts, the context, the human impact of a given dispute. One of the first cases encountered in a contracts course is *Batsakis v. Demotsis*.[7] In that case, the trial court, in effect, dismissed as *irrelevant* an assortment of facts about the financial straits that led a family stranded in a war-torn setting to agree to rather arduous repayment terms in exchange for an immediate loan. We are familiar with the accusation about our profession that is implicit in this example. Once again, our response has been a good-natured shrug, and a less good-natured internalization of the resulting sarcasm. As Professor Thomas Powell of Harvard sardonically observed: "If you can think of something which is connected with something without thinking of the something it is connected to, you have a 'legal mind.' "[8]

Much about the presumed stance of the professional is taught in the classroom. The first stage of your education in law involved bombarding you with the awareness that things aren't simple, that you *don't know*. The initial task was to immerse you in the limits of your own viewpoint, experience, and bias. The very healthy result was to force your awareness of relativity, of the fact that conclusion and judgment depend greatly upon point of reference. Once you saw that, you came to understand that point of reference is often supplied by which side of a question you're on, by who's the client. And so, early in law school, you learned

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[7] 226 S.W.2d 673 (Tex. 1949).

[8] M.D. GREEN, IT'S LEGAL TO LAUGH: A COLLECTION OF HUMOR ABOUT THE LEGAL PROFESSION 25 (1984).

to "make arguments." But the phrase itself underscored the growing detachment of you, the arguer. The "hired gun" mentality that is so much a part of the negative image that others hold and that we hold of ourselves, was actively taught to you. Many students come out of this process with the conviction that not only descriptions and arguments, but also judgments, associations, beliefs are nothing but temporarily adopted masks. A budding lawyer learns that you *lend* yourself, rather than *commit* yourself — to ideas, to conclusions, to persons.

In some of its guises this norm of detachment has enormously important professional functions. At its best, and if the process "takes," it initiates an enhanced understanding of complexity. It inculcates a healthy skepticism about one's own viewpoint. It removes or softens the easy arrogance of "I'm right." It prepares us as advocates to stand outside ourselves, enables us more truly to *represent* someone else. It allows us both strategically to anticipate and constructively to take account of other persons' views. It builds institutional correctives against the more egregious kinds of bias that are so destructive when coupled with the power that lawyers and judges wield. It sets crucial aspirations about fairness, about principled resolution of disputes, about treating like cases alike.

Yet one suspects that the very energy with which the ideology of detachment is insisted upon in our profession bespeaks more than the importance of the norm itself. Perhaps it also signals resistance to feeling involved and responsible, and being *seen* to be involved and responsible, for so very much more. There is inherent implausibility in any notion that those who are the keepers of justice, those who are the arbiters of so much of the wealth, power, privilege, and freedom in society, can or should want to describe themselves (depending on the era) as *merely* implementers of scientific truth, of neutral principles, or of economic efficiency. The difficulty arises, in my view, not from the effort to articulate and achieve legitimate goals that inhere in neutrality or detachment, but from our tendency to embrace that important but limited goal as an ultimate aspiration. The idealization of detachment, the quest for dispassion, is a flawed vision, tragically incomplete. It misconceives crucial elements of the human condition, of the nature of work, and of the nature of persons.

A number of years ago I encountered a poem by Adrienne Rich that has had continuing significance for me. I'd like to share with you the insight it brings to this problem. The poem is called, appropriately enough:

Power.

Living in the earth-deposits of our history

Today a backhoe divulged out of a crumbling flank of earth
one bottle amber perfect a hundred-year-old
cure for fever or melancholy a tonic
for living on this earth in the winters of this climate

Today I was reading about Marie Curie:
she must have known she suffered from radiation sickness
her body bombarded for years by the element
she had purified
It seems she denied to the end
the source of the cataracts on her eyes
the cracked and suppurating skin of her finger-ends
till she could no longer hold a test-tube or a pencil

She died a famous woman denying
her wounds
denying
her wounds came from the same source as her power.[9]

Do our wounds as a profession come from the same source as our power? What are *our* sores? What cataracts limit *our* vision? Is it partly the excessive purification of our element? Detachment as an antidote to bias or myopia is a moral good. But taken as a steady diet, any antidote becomes itself a poison.

A couple of years ago, Carol Gilligan wrote an enormously perceptive book called *In a Different Voice*.[10] In that work, she tracks the way influential concepts have omitted the experiences and perceptions of women, taking male experience and perception as central and sufficient to define all of humankind.[11] Paralleling a crucial lesson of first-year law school, Gilligan demonstrates how concepts reflect and depend upon point of view. Her example is drawn from theories of moral development.[12] Physics, with its Heisenberg Principle, understood this same idea years ago. Law understands it, too, at least as an artifact of teaching law students about reasoning and advocacy. We may, however, have been slower to digest the same lesson in the domains of our most cherished images and aspirations for ourselves. Yet these, too, are matters of perception, preference, and judgment rather than of *Truth*.

Gilligan's theme is that where men's developmental path values individuation, separation, abstraction, and a hierarchy of principles as

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[9] A. RICH, THE FACT OF A DOORFRAME, POEMS SELECTED AND NEW, 1950-1984, at 225 (1985).

[10] C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[11] *Id.* at 6-23.

[12] *Id.*

the ultimates of moral and ethical evolution, women place interconnection and relationship above all else.[13] Women's highest aspiration is an ethic of care, an ethic that places primacy on not hurting, an ethic that remains rooted within the concrete, shared human context.[14] The feminine notion of moral maturity is, then, one of empathy rather than detachment, of *engagement* rather than *distance*.

Gilligan compares the underlying Greek ideal of knowledge as correspondence between mind and form with the Biblical conception of knowing as a process of connection.[15] The Biblical idea of knowing is relational, even intimate, involving participation, giving of oneself, engagement with the other. Gilligan notes important limits in an ideal of moral development that is defined solely through masculine experience and male aspirations. She speaks of its "blind willingness to sacrifice people to truth."[16] She contrasts Abraham, who prepared to sacrifice the life of his son in order to demonstrate the integrity of his faith, with the woman who came before Solomon and verified her motherhood by relinquishing truth in order to save the life of her child.[17] Too often, men's ethic of moral maturation exalts abstract principle at the expense of caring.

One could derive from all of this that if women share such a distinctively feminine pattern, they are somehow not fit for the legal profession because they are at war with some of its central norms — the norms of detachment, of neutrality, of distance, of abstraction. Or one could conclude — as I prefer to do — that the norm of the law and of the legal profession needs to be enlarged. Anne Sexton's rendition of Ruth's Biblical injunction, "enlarge the place of thy tent," comes to mind.[18]

Thomas Kuhn has described how science progresses through revolution-like shifts in the shared assumptions, or paradigms, that undergird scientific work and thought. A prevailing paradigm organizes and stimulates research, but it also resists, recharacterizes, or ignores nonconfirming data and theories. Only non-fundamental amendments to the reigning paradigm are made until, finally, sufficient pressure from competing theories produces a crisis, and the old paradigm is swept away by a new one.[19]

Perhaps in our profession, too, a paradigm shift is needed, is coming. Years ago, Karl Jung observed that, "One does not become enlightened by imagining figures of light but by making the darkness

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[13] *See, e.g., id.* at 21-22.
[14] *Id.* at 30.
[15] *Id.* at 173.
[16] *Id.* at 104.
[17] *Id.*
[18] A. SEXTON, WORDS FOR DR. Y.: UNCOLLECTED POEMS WITH THREE STORIES 26 (1978).
[19] *See generally*, T.S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

conscious."[20] We need not draw our skirts away from the reality of human experience and passion. We need not abstract and distance ourselves from the feared "darkness" of genuine engagement and connection. Our professional vision need not be so truncated and unidimensional.

The legal realists of several decades ago taught us that detachment was not *possible*. But I think they conceived the truth they preached as a fall from grace. Conceding their point tends to breed cynicism and resigned mutterings about the inevitability of human failing. By contrast, the feminine ethic is an *affirmation* — an affirmation that caring connectedness is a good, positively to be sought. I believe that connectedness, and the accountability that connectedness demands, has the potential to rescue us from the aridity, the coldness, the emptiness — and ultimately the *self-mockery* — that detachment unleavened by engagement has brought to our sense of our professional selves.

The engagement of which I speak is not just a matter of remaining a "real person" outside the office, nor of any other peripheral, subsidiary, spare-time notion of humanity. It is a matter of engagement in the midst of — at the core of — one's work and one's self. It is a recognition that the claim to detachment can become an excuse for non-caring, the search for neutrality a shield from responsibility — no longer an antidote, but now a poison, an excuse to blind ourselves to the cutting of the baby in half. Just as each new life is birthed by the combination of male and female principles, just as each of us has both masculine and feminine traits, we need as professionals to join within ourselves both neutrality and caring, both detachment and connection, both principled standards and compassionate nurturance. I hope for each of you the richness, the meaning, and the *balance* of this kind of professional wholeness.

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[20] M. SARTON, *supra* note 6, at 110.