

Some Truths about the Law and Lawyers

A homily by Geoff Gomery

21 June 2015 at the Unitarian Church of Vancouver, BC

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My name is Geoff and I am a lawyer. I'm afraid that it doesn't end there. I am the son of a lawyer, and the brother to two lawyers, though one of them has found better things to do with her life. I spend most of my waking hours – they are long hours – in private practice as a member of a law firm in the company of other lawyers. I like what I do. I am probably a lost cause.

This homily has a slightly transgressive feel for me, and the reason won't be obvious. I spend a great deal of my life being a lawyer and the fact that it's not necessarily so when I'm here is one of the many things that makes this place special for me. It's not exactly a secret, of course, nor is my professional persona one that I can abandon or ignore so terribly easily. I can try though. So there's a sense in which I'm putting that enterprise – the enterprise of sometimes not being a lawyer – at risk by putting on my lawyer hat as I stand here today. Nevertheless, this is what I want to do, for reasons that I will try to at least hint at.

Shortly before I started law school at the University of Toronto in 1980, I travelled there by bus from Kingston, or it may have been from Montreal, to find a place to live. I had made arrangements through a friend from Mississauga, Toronto's answer to Richmond, to be put up at her mother's house while I was looking. In chatting with the fellow in the seat beside me on the bus, of course I let it fall that I was going to Toronto to start law school. He was delighted and spent the rest of the trip regaling me with his truly extensive assortment of lawyer jokes. They were jokes like: did you hear about the tragic marine accident in the Red Sea? A cruise ship capsized in shark-infested waters and the only person who escaped the feeding frenzy was a lawyer. It was professional courtesy. I found it a long bus ride.

I'd not encountered this genre of jocular humor before and I found it a little distressing, or at least puzzling, to be a butt of stereotypical humor even before I'd started classes. My friend's mother was a lovely woman who listened sympathetically when I told her how unnerved I was to learn that I was joining a

detested profession and had thereby apparently become detestable overnight. She reassured me that the dislike of lawyers is not universal. ‘I like my lawyer’, she said. Most people do.

I’m here to offer you some truths about lawyers and the law and the truth about lawyers I want to begin with is not that lawyers are disliked, but that even people who dislike lawyers in general, or most of us, will make an exception for the lawyer who gives them advice and representation when they need it, who guides them through a maze of rules and obscure practices, or who speaks for them, hopefully eloquently, in their hour of need. It is the reciprocal acknowledgement of my profession’s high calling: that we stand up for our clients even against overwhelming public opinion, powerful private opposition and the coercive power of the state. It is Atticus Finch in *To Kill a Mockingbird*, although Atticus lost his case, as he knew from the beginning that he would. Or as Edward Greenspan put it, in a speech that gets quoted in court from time to time:¹

No person is required to stand alone against the awesome power of the government. Rather, every criminal defendant is guaranteed an advocate – a “champion” against a “hostile world”, the “single voice on which he must rely with confidence that his interest will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct.

Standing up against the state as criminal defence counsel is only the starkest manifestation of our role as advocates. We advocate in civil suits, before administrative tribunals, and in private negotiations. As lawyers, we don’t always live up to our ideals and we are not always loved by the persons for whom we have acted, but the ideal of loyalty and unstinting advocacy is understood on both sides and the bond between lawyer and client is a very real one.

Another truth is that, for the most part, we lawyers do not choose our clients. Our clients choose us. When a client calls me up to ask about retaining me, I address myself to the client’s problem and whether I am professionally competent to help with it. There are areas of legal practice I avoid, quite a few of them actually, including tax law, family law, criminal law, drafting of wills and commercial agreements. I sort out how and whether the client can pay me, because, while the private practice of law

¹ *R v Delchev* 2015 ONCA 381 at [58].

is a high calling, it is also a business that supports me and my family. What I do not address is whether the client's cause is just. I act for people who are in the wrong just as I act for people who are in the right. It is often those who are in the wrong who are in particular need of competent advice and representation.

This truth about lawyers contributes, of course, to the perception founding some of the lawyer jokes that lawyers are hypocrites and dishonest. How can you trust my arguments for my client when I would have been just as willing to make opposing arguments had the client's adversary retained me first? The answer to this is that you should look to the substance of my arguments, and not the fact that I am making them. My job as an advocate is to come up with the best that can be said in favour of my client's position. My advocacy is constrained by, as Mr Greenspan put it, 'standards of professional conduct'. One of these is an obligation not to misstate established facts and legal doctrines. Lawyers worry a great deal about honesty of presentation, because it is so important to what we do and because this obligation sits in tension to our obligation of loyalty to our clients, many of whom would rather win.

This answer is, of course, a kind of a side-step, akin to my telling you to look at what I say rather than what I do. In further answer to the accusation that I sell my services, that is, my arguments, my abilities and the deep commitment I have described, to whoever may come along, I can only answer: do you really believe that there are those who don't deserve representation? Or that, having taken that job on, I should give it less than my all?

This brings me to a further important truth, that my job as an advocate and negotiator is only a part of what I do for my clients. The other part is that I advise them and that advice is private. Conversely, clients tell lawyers private stuff and the lawyers maintain the confidentiality of what we are told, unless the client says otherwise. I won't tell you what I told the client about the argument I am advancing on her behalf and whether it is likely to succeed. In the long run, then, I am sometimes bound to take positions that I think are likely to fail, not to tell anyone except the client what I think, and to bear the likely loss with good grace.

One of the important things lawyers do for a client in a bad position is to lay out all the awful things that are likely to happen together with a strategy to mitigate the damage. The lawyer may urge the client to

settle a dispute on the best terms the client can get. Clients will often take this advice from their lawyer precisely because the lawyer is working for them and the advice is confidential. Telling clients truths they don't want to hear is another high calling, though far from a comfortable one.

Having done our best to get the client out of a bad spot, with some success, we cannot brag of our accomplishment. Privacy is the essence of it.

So I've offered you three truths about lawyers and what lawyers do: that we stand for our clients though all the world may be against them, that we advocate for them honestly, without reference to our personal views, and that we advise them candidly and privately, and so help them to understand their positions and make the best of what is sometimes an awful position. All of this is, from a lawyer's point of view, pretty basic stuff that is taught in law school as part of a course on professional responsibility. Much of it may have already been obvious to you, though I am frankly not too sure how well it is understood outside the legal profession.

Having given you a sense of where I am coming from, I want to explore with you some deeper truths about the law. Specifically, I want to say a little bit about the rule of law and its relationship with the search for 'justice, equity and compassion in human relations'. This is one of the principles Canadian Universalists covenant to affirm and promote. We sing about justice and many members of this congregation dedicate much of their time and energy to the pursuit of social justice. Nobody really doubts that justice is a good thing, though its pairing with equity and compassion suggests that it is far from the only thing we should pursue.

The law is a little bit more difficult. Most of us have some sense that there are or can be bad laws, laws that we might not want to obey on principled grounds, even laws that we might feel compelled to disobey on principled grounds. Nevertheless, there seems to be general acceptance that the rule of law is a good thing. The preamble to the Canadian Charter of Rights and Freedoms identifies Canada as a country founded upon the supremacy of God and the rule of law and it is a signal feature of our time that the former is controversial and the latter is not. But maybe the conventional wisdom is wrong.

To cut into this, in true lawyerly fashion, let's begin by articulating a case against the rule of law. It begins with the observation that judges are lawyers. Judges have gone to law school, practised as lawyers, and they still think like lawyers, albeit from the other end of the courtroom. Judges are lawyers who have received a promotion of sorts. Lawyers propose and judges dispose. Judges are lawyers who have been freed of client commitments. No one tells them how they must decide a case, and no one can fire them. People defer to them, sometimes ostentatiously. They have, at least in theory, the power to punish people who annoy them at work by sending them to jail for contempt of court. The pay is pretty good and the pension is great. It's a good gig.

Judges embody authority and exercise power. They exercise huge power over the lives of individuals who come before them: couples and their children in the throes of a difficult divorce, business people faced with financial ruin, persons charged with criminal offences, persons testifying at a trial confronted with probing questions into personal and private matters. They exercise even more consequential authority over social and political institutions. In just the past 12 months, judges have struck down the provisions of the *Criminal Code* banning assisted suicide,² upheld legislation invalidating terms of collective agreements negotiated by the BC Teachers' Federation,³ invalidated the practice of commencing municipal council meetings with a prayer,⁴ and upheld the aboriginal title of the Tsilhqot'in First Nation giving this first nation 'the right to proactively use and manage the land'.⁵ Just these few decisions have had social consequences, political consequences and, not incidentally, huge financial consequences. It is no exaggeration to say that the Canadian society of our day is shaped by decisions made by judges, that is to say, lawyers, to an unprecedented degree.

Judges are unelected officials. They exercise their powers in the name of the law. They claim that the law tells them what to do or, at the least, what they must decide. Is this legitimate? Or is the law little or nothing more than a fig leaf to conceal the exercise of personal authority by an autonomous cabal of lawyers and judges, who indulge in legal jargon and think they know best?

² *Carter v Canada* 2015 SCC 5

³ *British Columbia Teachers' Federation v British Columbia* 2015 BCCA 184.

⁴ *Mouvement laïque québécois v Saguenay* 2015 SCC 16

⁵ *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 at [94].

This particular critique even has its adherents within the legal profession. It is associated with a school of American legal philosophers called the ‘legal realists’ who made a splash in the 1920s, as well as with a more recent movement called ‘critical legal studies’. I’m going to deal with it quite dismissively. The critique builds on the observations that lawyers often disagree on what the law is and that the law sometimes seems to be changed by judges’ decisions. Also, there is the suspicion that judges are sometimes using the excuse, the law made me to it, to justify decisions that could have been made differently.

Lawyers and judges sometimes talk about ‘hard cases’. You may have heard the saying, ‘hard cases make bad law’. The notion is that a ‘hard case’ is one where the law is unclear. No one doubts that judges make law in hard cases. Somebody has to. Incidentally, the point of the saying for most lawyers is not that judges are incompetent, that when they make law they do it badly. The point is that hard cases are hard for a reason, because there is a good case to be made on both sides, and it is therefore dangerous to try to draw sweeping conclusion from them. Hard cases often exemplify a point where two or more broad principles seem to apply but point in conflicting directions.

The criticism that we’re discussing – that of the legal realists and the critical legal studies people – amounts to an assertion that all cases are hard cases. The law is never so clear that it tells the judge what to do. But this is untrue. There are lots of clear answers to legal questions. Am I allowed to drive my car down the left hand side of a 2 way street in Vancouver? No. Though the answer would be yes, if I were driving in the UK. Can a 15 year-old resident of British Columbia make a will to dispose of her property in British Columbia on death? No.⁶ Can two competent adult males who are not close blood relatives marry one another in British Columbia? Yes. Is Steven Harper the Prime Minister and a member of Her Majesty’s Privy Council for Canada? Yes. If a judge is faced with a case whose determination depends on the answer to one of these questions, among thousands of others like them, there will be no room for argument. Everyone will agree that the law tells the judge what to do.

That is not to say that there may not be room for argument in the case. Often there is argument about the facts. Had I swerved over the centre line when I struck an oncoming vehicle in my car? Had the other driver? How old was the testator when she made the will, and was she of sound mind? Very

⁶ *Wills, Estates and Succession Act* SBC 2009, c 13, s 36(2).

often, the law directs the judge or jury as to what facts are important, leaving them to hear disputed evidence and draw contested inference as to who did what to whom, and when, and why.

The nuanced version of the realist critique is that hard cases are much more common than lawyers and judges let on. This is not a question that can be addressed in the abstract. It is fair to say that judges sometimes talk about hard cases as though they were easy cases, that is, as though the law required them to decide the case in a certain way even though it was really an open question. This is partly because judges are sensitive to the accusation that they are exercising unfettered power over peoples' lives, and partly because they are parties to an ongoing debate about what the law is and what it should be, and the rhetoric of 'error' and 'obligation' is a part of that debate.

I can sum it up in this way. Judges are constrained. The law is more than a fig leaf. The emperor's clothes are real. Whether the law covers as much as it claims, or whether the naked exercise of authority is sometimes to be seen, only half-hidden by the legal language, and the extent to which that is a bad thing, are different questions. Even half an outfit is better than none.

I'm not going to take this point any further. I hope I've reassured you, if you were momentarily in doubt, that there is such a thing as the law and that the notion of the rule of law, of deciding cases and exercising authority according to requirements and limits imposed by law, is a meaningful one.

But is the rule of law a good thing? What if the law in question is a bad law? What if it authorizes government or corporations to behave in ways that some of us think are immoral, to spy on our private communications, lock up a former child soldier named Omar Khadr, or build pipelines? Of course, others among us will disagree with these moral judgments. Still, I daresay that we can all think of some laws that seem to us to be wrong-headed or worse.

Are we morally obliged to obey bad laws, just because they are laws? Oxford Professor of Jurisprudence, John Gardner, says that it depends on the role we are playing. He says that ordinary people are not morally bound by law.⁷ They may have to abide by the consequences of their civil

⁷ *Law as a Leap of Faith* (2012: OUP, Oxford), pp 211-218.

disobedience, and accept the risk their morally motivated conduct may be misunderstood, but that is as far as it goes. On the other hand, says Gardner, judges are bound. By virtue of the fact that they are afforded authority by the law, they are morally bound to uphold it. Gardner's analysis applies as well to police officers and civil servants.

There is a nice and subtle argument about civil disobedience and the law in its application to ordinary people here, and I don't want to get into it. We don't have the time today. Even if Professor Gardner is wrong in asserting that ordinary people are not morally bound by law, he may be right that judges, police officers and civil servants are held to a stricter standard. Assuming that proposition, the question is: what about lawyers? Are lawyers morally bound to uphold the law?

On being called to the bar, lawyers in British Columbia must swear or affirm the following oath:⁸

... that you will diligently, faithfully and to the best of your ability execute the offices of Barrister and Solicitor; that you will not promote suits upon frivolous pretences; that you will not pervert the law to favour or prejudice anyone; but in all things conduct yourselves truly and with integrity; and that you will uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia.

This is unequivocal. So is the Code of Professional Conduct adopted by the Law Society of British Columbia, our regulator, which states:⁹

A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

A lawyer, acting in her professional capacity, is bound to uphold even bad laws. She may disagree with them privately. She may defend a person charged with the breach of a bad law, and struggle mightily to avoid a conviction. She may work to have the law changed. She may challenge its constitutionality. She may urge lawmakers and judges that a law so clearly wrong-headed cannot mean what it apparently

⁸ Law Society Rule 2-51(2), and <http://www.lawsociety.bc.ca/docs/publications/mmm/oath.pdf> (downloaded 6 June 2015)

⁹ Code of Professional Conduct for BC, c. 2, s 2.1-1(a).

says. She may do all these things, but she is required not to counsel people to disobey this law. She has promised not to do that.

A judge who cannot in good conscience give effect to the law he has sworn to uphold should resign. While the burden is much lighter, the same is true of a lawyer. Lawyers and judges don't get to pick and choose.

So why swear the oath? Why be a lawyer, or a judge for that matter, if the moral cost is so high? Lawyers' answers will vary.

One answer, perhaps the most common, will be that the issue is more theoretical than real because there are not that many truly bad laws out there. Certainly the law is not a good profession for persons who believe that our system of laws is a shell game – the Marxist term is 'superstructure' – that serves only to conceal underlying economic or social injustice. Such ideologies give rise to too much cognitive dissonance, and lawyering is hard enough as it is.

Many of us, I think, fall somewhere in the middle, viewing the rule of law and our system of laws as a good thing overall, recognizing that it is far from perfect, and dealing with competing moral and ethical perspectives as they arise. We do our best to distinguish between our professional roles as lawyers and our roles as citizens. I talked about the importance of sometimes not being a lawyer from time to time at the beginning of this homily, and this is a part of the reason why. We try to live principled lives. When confronted with a conflict of principle that cannot be avoided, we choose, and abide the consequences. In this, lawyers are the same as everyone else, it is just that the conflicts arise differently, sometimes in ways that are less than obvious.

As I said at the beginning, I like what I do. I especially like it when I am able to help my clients with a problem they are unable to solve themselves. It is even better when we can get to a result or through a process that seems not just legally but essentially correct, that embodies justice, equity and compassion in human relations. No human institution works perfectly. We can never hope to get it right all the time. But we do try. That is what I'd like to think all lawyers aspire to. May it always be so.

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