Against Babbitry: What Legal History and Practical Leadership can Tell us about Lawyers' Ethics

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Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 **Stanford L. Rev.** 1731 (2017).

Reading Robert W. Gordon's Essay *The Return of the Lawyer-Statesman?* on Ben W. Heineman Jr.'s book, *The Inside Counsel Revolution* (an introduction and link to the book can be found here) reminded me of three virtues. One is of the review essay, the ability to luxuriate in another's work and allow it to be seen through one's own ideas. This is something I confess I have never attempted, fearing the reflex to critique or the urge to self-publicize would surface too strongly. The second is of the need to return to familiar but central ideas. Gordon has written on the themes in this essay many times before (see for example, *Corporate Law Practice as a Public Calling* and *A New Role for Lawyers: The Corporate Counselor after Enron*). His arguments are the more elegant for it and, importantly, our reading of Heineman is more rewarding too. But the third is the one that struck me most forcefully, which is the wisdom to be gained from well-told legal history.

The central virtue of Gordon's essay is the historical contextualization of Heineman' book. Gordon gives us a taut, rich, and informative narrative on the importance of political context. In seeking to answer whether General Counsel can be both [business] partner and [public] guardian as Heineman puts it, we are reminded how we have been here before: the tensions in the General Counsel role—and their currently high status in corporate affairs – are not peculiarly modern. Most importantly we also see how lawyers' ethics are shaped by far larger forces than law schools and bar associations. So the influence of inter-war industrial relations, Reagonomics, the politics of corporate leaders, and latter day skepticism of the corporation post-financial crash may all play a role.

The starting point is Louis Brandeis's 1905 call for a more independent, judicious, public-interest focused model of corporate representation in his 1905 speech, *The Opportunity in the Law*. We are reminded of Brandeis's call for lawyers to advance democratic citizenship but also that their ability to do this depends on their business clients desiring or permitting such a role. Gordon points too, to some signal successes for one of Heineman's early predecessors as a General Counsel at—and perhaps more importantly as Chairman of—General Electric, Owen Young. Young lived the Brandeisian dream: company unions, company sponsored life insurance, mortgage benefits, employment and wage security and the like were the result. Leaders of large corporates formed the Committee of Economic Development (CED) in 1942 to advance moderate public interest agendas, prefiguring Heneiman's ideas about how corporates should lead. Economic and geopolitical problems of the 1970s, familiar to the World conjured by Brexit or by Donald Trump's rustbelt America, prompted a reversal of a particular kind. The CED was replaced by a Business Roundtable which shifted towards a public program centred on cutting taxes, social spending, labor costs and reducing regulation. By the late 1990s, Gordon puts it like this: "professional management was still connected to a policy program and social vision, though by this time a very conservative one." (P. 1742.)

The benevolent capitalism of Brandeis was replaced with the ideas of business as a mere collection of contracts. Managers were notionally aligned with shareholders and practically freed to promote their own wealth as a priority, "until the bubbles burst and the music stopped." (P. 1743.) This nod to the Financial Crisis is, I think Gordon's way of bringing both his history, and Heineman's book, into the

sharpest social and political focus. The corporate amorality, driven from the 1980s onwards by Milton Friedman amongst others, was mirrored by client-first notions of professionalism: “This orthodox view of the corporation as amoral profit-seeking servant of its stockholders is, I believe, disturbing enough on its own terms. But it becomes positively frightening when coupled with the orthodox view of the lawyer as equally amoral zealous servant of his client….” (P. 1744.) In settling some scores with the shallow ethicality of Friedman’s vision, Gordon sets out the central—if perhaps a *little* exaggerated— role of lawyers in subverting the rule of law through gaming, creative compliance, or what my lawyer informants sometimes refer to as *sharp* or *clever* lawyering. He sees law, as frequently practiced today, as a cost on the business that can be ignored if the rewards are high enough. He sees how corporate amorality does not act as a bar to rent-seeking and right-wing populism. Instead, he writes, “[t]he amoral corporation guided by the amoral zealous advocate is potentially a monster, a powerful engine of destruction, a licensed sociopath” aided and abetted by the ethics of lawyers to “libertarian Babbitry.” (P. 1750.) The critical point here is that a certain kind of business logic (amoral, short term, aggressive) is aided by the professional ethic of zealous advocacy that helpfully absolves the lawyer of professional responsibility. The danger is a mutually reinforcing logic of irresponsibility.

With the language of criticism flowing so freely, and powerfully, Gordon nevertheless sees hope in Heineman’s book. The key, I think, is in Gordon’s observation that, “[e]veryone is, or at least pretends to be, just an agent.” (P. 1763.) The point is that the agents service the amoral, profit drive beast, and feel able to disclaim responsibility because of notions such as amoral zeal. And it is very clear that Heineman takes a very different view. Gordon writes:

Heineman articulates a vision of the general counsel’s role that is in many ways at odds with 1980s-era managers’ and lawyers’ ethics. He emphatically rejects the Jensen-Meckling thesis that the sole task of management is to maximize shareholder value, as measured by short-term share price, and resurrects the managerialist view that the corporation has responsibilities to its many constituencies—including employees, customers, creditors, suppliers, and communities. He also rejects both the “bad man’s” view of law as simply a price on conduct and the view of law as texts to be construed formally and technically rather than in the light of their “real purpose[s]” and likely social consequences. He urges company lawyers to respect the law as embodying norms, or “binding judgments made by a society’s duly authorized legal and political processes,” and argues that “[g]lobal corporations must give deference to the law of the nation in which they choose to operate, even if there is some discretion in determining what is the law of that society.” A general counsel must say “no” to clearly illegal conduct. But the lawyer-statesman must ask what is right as well as what is legal. And more than that, he must ask what the long-term global economic, policy, and cultural tendencies are that may affect the corporation’s future and to develop strategies to anticipate them. Heineman calls for—and his career exemplifies—a powerful and proactive general counsel, not a team of lawyers waiting passively to be consulted by business managers. (Pp. 1754-55.)

Gordon poses a series of well-judged questions about the book. Does Heineman live up to his own counsel? Did he fail or lose some battles in dealing with some of the ethical problems associated with GE? If he did, why did he lose them? Gordon acknowledges the reasons why Heineman would not or could not always prevail: these include the possibility that Heineman’s hands were tied by obligations of professional privilege and confidentiality, a clever example of the way in which legal professional privilege silences error and scandal but allows the promotion of success.

I am a fan of the Heineman book, but Gordon’s criticisms are well made and fair, as is the praise. I want to end with that, because for all that critique is important, the praise is important too and—to my mind—well judged. When someone as experienced and as wise as Gordon says a practitioner’s work is “utopian, in a good way” something is up. (P. 1736.) It is, Gordon says (and I agree), “the most comprehensive and detailed vision of an in-house counsel as lawyer-statesman who promotes public

values and the rule of law as well as self-interest of his client company." (P. 1753.) And "it is full of concrete examples of public-minded activism and pragmatic proposals for the institutionalizing the locus of such action in the general counsel's office." (P. 1762.) To be sure, not everyone will agree with every point Gordon (or, for that matter, Heineman) makes. But with the sweep of history reminding us of the past and its promise, as well as its pitfalls, Gordon, and Heineman's work can help General Counsel chart a different and better course—and their ideas can help law schools, as they redouble their efforts to teach students ethics and impart professional identity, with greater vigour, purpose, and understanding.

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