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LORD BROUGHAM'S BROMIDE: GOOD LAWYERS AS BAD CITIZENS

*Gerald F. Uelmen**

Shortly after Johnnie Cochran's spell-binding final summation in the case of *People v. Simpson*,¹ nationally syndicated columnist George Will wrote that Cochran was a "good lawyer" but a "bad citizen."² In context, he was reflecting upon Cochran's argument that Detective Mark Fuhrman should be disbelieved because of his virulent racist attitudes. He was asserting that the argument would stir up racial resentments and set back race relations in the United States, as well as diminish respect for the police.

Will's criticism called to mind the criticism heaped upon another great advocate more than a century ago. Henry Lord Brougham was representing Queen Caroline of England in proceedings before Parliament.³ King George IV, who had just succeeded to the Crown, was seeking to divorce his wife, Queen Caroline, on grounds of her adultery.⁴ Parliament was considering a special bill that would deprive the Queen of her title.⁵ At that time English law permitted a "right of recrimination" as a defense to a divorce action.⁶ If Lord Brougham could show that the King himself had engaged in adulterous affairs, grounds for a divorce would disappear. It was certainly the British "trial of the century" for 1820. Lord Brougham not only had substantial evidence of the King's affairs with numerous women, he could also show that, while Prince of Wales, George had secretly married one of his mis-

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1. No. BA097211 (Cal. Super. Ct. L.A. County 1995).

2. George F. Will, *Circus of the Century*, WASH. POST, Oct. 4, 1995, at A25.

3. See DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188 (1973).

4. *Id.*

5. See Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 960 n.27 (1991).

6. See MELLINKOFF, *supra* note 3, at 188.

tresses, a Roman Catholic widow named Maria Fitzherbert.⁷ At that time marriage to a Catholic meant forfeiture of the Crown for a British sovereign.⁸ By invoking the right of recrimination for his client, Lord Brougham provoked a constitutional crisis of the greatest magnitude. His advocacy on behalf of his client threatened to bring the reign of King George IV to an ignominious end before the king had even been crowned.⁹ Many suggested to Lord Brougham that his duty to be a good citizen and promote the welfare of his country required him to “pull his punches,” and not assert the right of recrimination against the king.¹⁰ Generations of lawyers who followed after Lord Brougham have pointed to his response as the quintessential definition of the appropriate role of a defense lawyer:

‘[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.’¹¹

Today, there are many who argue that Lord Brougham was guilty of overstating the case. Prominent British barrister David Pannick, in his highly regarded book, *Advocates*, suggests that “[s]uch a conception of the role of the advocate would not now be widely shared. [An advocate] has important responsibilities to the court as well as to his client.”¹² The late Chief Justice Warren Burger, also critical of Lord Brougham’s model, rebuked “cynics who view the lawyer much as the ‘hired gun’ of the Old West.”¹³

I do not believe that either Mr. Pannick or Chief Justice Burger would suggest that Lord Brougham should not have asserted

7. *Id.*

8. *Id.*

9. See Lanctot, *supra* note 5, at 960 n.27.

10. See MELLINKOFF, *supra* note 3, at 189.

11. *Id.* (quoting 2 *Trial of Queen Caroline* 8 (London, J. Robins & Co. Albion Press 1820-21)).

12. DAVID PANNICK, *ADVOCATES* 105 (1992).

13. *In Re Griffiths*, 413 U.S. 717, 731 (1973) (Burger, C.J., dissenting).

the right of recrimination in *Queen Caroline's Case*,¹⁴ despite the national confusion it engendered. Nor do I believe any knowledgeable lawyer would suggest that Johnnie Cochran should not have utilized the evidence of Detective Mark Fuhrman's racism to challenge his credibility because it would increase racial tensions in the United States.¹⁵ The critiques of Lord Brougham's bromide generally focus on his suggestion that saving one's client is the lawyer's *only* duty.

Clearly, a lawyer has duties to others as well. A lawyer's duties to the court preclude the knowing presentation of perjured testimony¹⁶ and the intentional nondisclosure of controlling authority rejecting a legal position one is arguing.¹⁷ A California lawyer also has substantial duties imposed by the reciprocal discovery law to provide opposing counsel with evidence in advance of its presentation at trial.¹⁸ But do the lawyer's duties to others include a duty to be a "good citizen" and not assert arguments or present evidence that will "involve the country in confusion"?

It seems fair to say that the successful defense of O.J. Simpson has, indeed, "involved our country in confusion." The trial has been credited with setting back race relations, lowering public esteem for the legal profession, diminishing respect for the police, and destroying public confidence in the criminal justice system.¹⁹ While some of these effects might reasonably have been anticipated, should they have been considered and weighed by the lawyers in assessing what tactical options to pursue? Should lawyers

14. See MELLINKOFF, *supra* note 3, at 188.

15. As I understand Robert Shapiro's criticism of Cochran for "playing the race card from the bottom of the deck," it is not a suggestion that Fuhrman's racism should not have been argued, but rather that it should not have been used to argue that the credibility of the entire Los Angeles Police Department was at stake. See ROBERT L. SHAPIRO & LARKIN WARREN, *THE SEARCH FOR JUSTICE* 355 (1996). That is a tactical call I strongly disagree with. I think the evidence at trial supported a strong inference that the Los Angeles Police Department was covering up and protecting Fuhrman with full knowledge of his racist tendencies and that Cochran's argument regarding the credibility of the entire investigation was fully justified. In any event, I do not understand Shapiro's position to suggest that a lawyer should refrain from making an argument because it will create racial tension in the community if such argument is supported by the evidence and the lawyer concludes a jury will find the argument persuasive.

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994).

17. CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-200 (1994).

18. CAL. PENAL CODE, §§ 1054-1054.7 (West Supp. 1996).

19. Cathleen Decker, *Faith in Justice System Drops*, L.A. TIMES, Oct. 8, 1995, at S2.

ever abandon an argument or fail to present evidence that will help their client because it will hurt their country?

The suggestion that lawyers owe a higher duty to their country than to their client is inconsistent with our adversary system, although it was quite commonly heard in communist countries that rejected the adversary system. In such communist systems lawyers are seen as servants of the state, rather than as advocates for their clients. The premise of the adversary system is that the goal of fair adjudication is more likely to be served if lawyers function as zealous advocates for their clients and leave judgments about what is good for the "system" for another time and place. Thus, lawyers who serve their clients are, by definition, serving their country as well. The duty of lawyers to their clients and their country is the same: "to represent [the] client zealously within the bounds of the law."²⁰

I would take this position a step beyond simply rejecting the suggestion that lawyers owe some higher duty to their country. I would argue that it would be unethical for a lawyer who *felt* some higher duty to act upon it to the detriment of the client. Any lawyer who decides what evidence to offer or what positions to assert based upon considerations such as, "Will this advance the goal of racial equality?" or "Will this lessen public confidence in the justice system?" is cheating the client. In effect, the lawyer has created a conflict of interest. The lawyer who has personal objections to asserting the cause of the client because of a perception that the cause of the nation is more important has only one choice: to resign.

This is not to say that such considerations are irrelevant to the client. A lawyer can, and probably should, advise a client that a particular position or argument may hurt the best interests of the country. The choice of whether to forego the advantage, however, must be left to the client. In a criminal case, where the life or liberty of the client is at stake, it will be a rather unusual client who will say, "I'd rather go to jail—or be gassed or electrocuted—than imperil the interests of my country."

Thus, calling a good lawyer a bad citizen is internally inconsistent. By being a good lawyer who zealously represents the interests of a client, the lawyer is being a good citizen who preserves the tenets of our adversary system of justice.

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1981).

Obviously, this is not a proposition that the public understands or applauds. When Lord Brougham referred to the hazards and costs to oneself that a lawyer may incur, he certainly included the hazard and cost of public unpopularity. A lawyer who, in pursuit of the obligation to zealously represent a client, asserts positions that are publicly perceived as disturbing to the nation's tranquillity will receive the opprobrium of fellow citizens. In the eyes of the public, it will not be accepted as an excuse or justification that the lawyer was only doing the job ethically required. That is simply a risk a lawyer must accept when choosing to represent the client. The lawyers who represented O.J. Simpson have all been treated to public castigation with a steady diet of "hate mail" and personal threats to their safety.²¹

The real problem is not the role of the lawyer but rather the public misunderstanding of that role. One of the duties of good citizens should be to promote public understanding, rather than to promote public confusion. In that respect, it can truly be said that George Will is a good columnist, but a bad citizen.

21. See Janet Gilmore, *Cochran to Stay Active in Courtroom, for Now*, L.A. DAILY NEWS, Oct. 29, 1995, at A16; Jim Newton et al., *Jury Urged to Free Simpson as Act of Courage, Social Justice*, L.A. TIMES, Sept. 29, 1995, at A1, A27.

