Introduction

When I was growing up in a middle-class, Midwestern, mid-century family, I knew only one lawyer, my parents' solo-practitioner friend Cyril Gross. Gross joined us for holiday dinners, and every few years my father consulted him professionally on small, uncontentious matters of probate or property. Gross was a genial bachelor with a sense of humor and a sardonic glint in his eye that made him a little intimidating. He kept up with world news and knew what was going on in our city; that made him a welcome guest for my civic-minded and intellectually inclined father. Even as a child, I could tell that Gross was more sophisticated than most of the adults I knew, but he fitted in seamlessly with the civil servants and small business people in our circle of the Milwaukee Jewish community. In fact, he *was* a small business person, nothing more and nothing less, who lunched at Benjy's Delicatessen to shoot the breeze, over corned-beef sandwiches, with the insurance brokers and furniture dealers who were his clients.

This is a book about legal ethics that focuses on the lawyer's role in enhancing or assaulting human dignity. That may sound like an awfully grandiose way to describe professionals like Cyril Gross whose activities are usually pretty mundane, and which have to do with money far more often than dignity. Isn't it only a small handful of lawyers – heroic defenders of the downtrodden – whose job consists of fighting for human dignity?

Not really. Although lawyers who fight for human rights certainly deserve admiration, fighting for dignity is not the only way of enhancing it. Lawyers are the primary administrators of the rule of law, the point of contact between citizens and their legal system. Lawyers like Cyril Gross make law's empire run (or not) on the ground. If the rule of law is a necessary condition for human rights and human dignity, lawyers in all fields will play a vital role in securing these goods. And the ethical character of the legal profession – the commitment of lawyers to the rule of law and the human dignity it helps secure – will determine whether the rule of law is anything more than a slogan.

Who are the lawyers?

Lawyers come in varying shapes and sizes. We may have a distorted image of lawyers, shaped by the hunks and hotties of TV dramas and Hollywood films. Distorted, but not completely false. Dispensing equal parts office sex and moral conundrums, shows like *LA Law* and *The Practice* have done a respectable job of teaching academic legal ethics to television viewers, because many of their plots come straight from actual cases passed along to the scriptwriters by lawyer-consultants. I expect that millions of people now know some fine points about the attorney–client privilege because they watch television. The office sex is probably exaggerated (I wouldn't know), and the climactic courtroom face-offs are absurd. For that matter, real-life clients of urban law firms are mostly businesses, not the individual clients of the TV shows. Basically, though, the shows do a reasonable job of dramatizing law firms and lawyers who are trying to do the right thing, with a few human, all-too-human lapses, in a hard-bitten world. From my vantage point as a law teacher, they are often lawyers I can imagine my students becoming, facing dilemmas straight out of the cases in my ethics textbook. But they bear almost no resemblance to Cyril Gross, or to most other lawyers I know.

We have other images of lawyers as well. There are the flamboyant criminal defense lawyers like Johnnie Cochran, and the rich Southern plaintiffs' lawyers in their custom-made suits, cowboy boots, and private jets – veteran villains of a thousand lawyer-bashing Wall Street Journal editorials. And their poorer cousins trolling for torts on late-night television, with phony-looking shelves of law books as the backdrop; and grandstanding US Attorneys announcing high-profile arrests. Popular culture does not, I think, offer a similarly well-etched stereotype of business lawyers in corporate counsels' offices and high-end law firms. Their practice is too unfamiliar, too invisible, and, for most people, too anesthetic to give rise to stereotypes. Neither do we know the corporate defense bar, except in occasional Hollywood movies that caricature them as robotic teams of interchangeable creeps in suits.

These different kinds of lawyers – visible and invisible, fictional, semi-fictional, and real – seem to have nothing much in common; and it has become a truism among legal sociologists and commentators that today we have many bars, not one bar, segmented by subspecialty and by the wealth and class of their clients.

In fact, however, all these lawyers have a good deal in common. They all went to law school, where they studied nearly identical basic curricula from a more or less uniform set of textbooks. As theorist Melvin Eisenberg observes, these textbooks teach "national law" – a construct that isn't really the law of any specific jurisdiction, but rather combines representative principles into a

kind of legal Esperanto that provides what real Esperanto was supposed to: a common language.[1] All the lawyers learn the same basic techniques of reading legal texts, what law professors call "thinking like a lawyer." All are taught by professors who are, increasingly, drawn from national law schools and who teach national law in roughly the same way. All the lawyers in every state take the same state bar examination, and many states' bar exams test on "national law" as well as the state's specific variant of it. Most states require the same ethics exam (the Multistate Professional Responsibility Examination), which tests national law. And so, beneath their diversity, the lawyers inhabit a single, profession-wide interpretive community, with the same overall understanding of what makes law law. This fact allows us to speak coherently of a single legal profession. To an important extent, the uniformity of legal training is an indispensable material condition for maintaining the rule of law.

The rule of law and human dignity

We often speak about the rule of law as an abstract and highfalutin ideal. But the rule of law is no meaningless abstraction once we spell it out in tangible, everyday terms. When we do, it often turns out to mean something as mundane as the most humdrum cases of ordinary lawyers like Cyril Gross. For example: my neighbor, who came to the United States from Russia in the early 1990s, went back to Russia a few years later to sell her apartment. "The big difference between here and Moscow," she said, "is that in Moscow I can't deal with government offices by telephone. The answer you get to even the simplest question will be completely different depending on who answers the phone and how they feel that day. My sister owns a business. She says it's easier dealing with the mafia than the government, because at least when you pay the mafia protection money, they don't come back the next day saying it wasn't enough." So, among other things, the rule of law means getting questions answered on the telephone without having to worry about it. Or, as we might put it in more general terms, the rule of law presupposes an underlying uniformity and stability of official behavior. Private lawyers who explain the law to clients, and monitor or prod officials, help maintain

[1] Melvin Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 Fla. St. U. L. Rev. 1229 (2002). I borrow the image of Esperanto from Richard Posner, who did not mean it as a compliment. In an influential judicial opinion, Posner criticized a consolidated multi-state class action lawsuit in which "the district judge proposes . . . a single trial before a single jury instructed in accordance with no actual law of any jurisdiction – a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia." In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995). Unlike Posner, I follow Eisenberg in viewing "legal Esperanto" as an important material condition for the rule of law.

uniformity and stability; obviously, so do government lawyers who write the regulations, protocols, and training manuals for officials.

In Kosovo, where one of my legal colleagues went to work for the UN "building rule of law capacity," the rule of law meant something equally mundane: getting municipal judges to take down their provocative Albanian flags from the courtrooms when Serbs were litigants, and teaching the foreign police enough about Kosovar law that they knew what evidence to collect when they investigated crimes.

In the United States, as in other rule-of-law regimes, we take thousands of minor institutional niceties like these for granted. We assume that inflammatory foreign flags will not hang in the courtroom. We assume that officials will answer questions over the telephone and that police will know what evidence to collect. We tend to reserve rule-of-law rhetoric for more exalted issues of due process. We think, for example, of the military lawyers appointed by the Pentagon to represent Guantánamo Bay detainees before military commissions where the rules are a travesty of fairness. These were not docile defenders of government policies. Instead, they challenged every aspect of the military commissions in every court they could find, denouncing their own employer in the press and fighting all the way to the Supreme Court.[2] I have met two of them – career Judge Advocate General's Corps officers facing the ultimate gut check, who rose to the challenge in extraordinary ways, and lost their promotions because they defended their clients too well.

Yet, to observe the rule of law in everyday life, we will do better looking at humdrum real-estate transactions or business contracts – say, a contract between a chain of gas stations and a paper company to provide paper towels for gas station bathrooms (an example used by the legal philosopher Lon Fuller).[3] For Fuller, law is not a body of statutes or doctrines; rather, it is the activity of lawyers as "architects of social structure." Law enhances human dignity by knitting together thousands of details that make it possible for ordinary people to accomplish ordinary business smoothly. Fuller's perspective on what lawyers do strongly pervades many of the arguments that follow. From this perspective, the rule of law depends on how Cyril Gross did his job, not just how heroic human rights lawyers do theirs. In an important sense, the pervasive, inconspicuous work of ordinary lawyers on humdrum cases makes the heroic work possible. It creates the baseline of regularity that allows us to see outrages for what they are. And, of course, it maintains the legal institutions that heroic human rights lawyers rely on for their successes and even for their physical safety.

[2] See Jonathan Mahler, *Commander Swift Objects*, N. Y. Times Mag., June 13, 2004.
[3] Lon L. Fuller, *The Lawyer as Architect of Social Structure*, in The Principles of Social Order: Selected Essays of Lon L. Fuller 265 (Kenneth I. Winston ed., 1981).

Obviously, the connection between the rule of law and the enhancement of human dignity is neither tight nor direct. Legal positivists remind us that there is no necessary connection between legality and morality. Laws and legal systems can be brutal, inhuman, and oppressive. All legal systems have been so at one time or another, and even the most enlightened systems still contain pockets of oppressiveness – and not only among anachronistic statutes left over from yesteryear. In what way, then, does the rule of law enhance human dignity? If the law is bad, won't law's rule be bad as well?

That is the wrong question. No technology of governance provides a magic bullet against brutality and oppression. The right question is how the rule of law stacks up against alternatives. Suppose we ask whether a brutal dictator will prefer to operate under the rule-of-law requirements of regularity, transparency, and constraint, or a regime of arbitrariness, secrecy, and unfettered discretion. I think the answer is obvious. Although no logical inconsistency exists between the rule-of-law virtues and substantively horrible laws, oppression is far more easily accomplished outside the rule of law than within, and it would be puzzling for an oppressor to bind himself to the rule of law.[4] Transparency may itself discourage brutality by exposing it to outside condemnation.

In practical terms, when states institute the rule of law, they transfer power to lawyers. To those who believe we are being smothered under a vast parasitic swarm of lawyers, this may seem like a problem, not a solution. I disagree completely. Historically, an independent bar, like an active and free press, has often formed an important counterweight to arbitrary authority. In his famous discussion of the American legal profession, Tocqueville observed that when a prince entrusts to lawyers "a despotism taking its shape from violence . . . he . . . receives it back from their hands with features of justice and law."[5] Fussy lawyerly formalism may be tedious and exasperating, but it domesticates power. Lawyers are trained to debate and interpret law by looking at its possible rational purposes, and this form of discourse also helps blunt the edges of oppression. As Fuller wrote, "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are."[6] Furthermore, lawyers acting as architects of social structure – by drafting contracts, by incorporating businesses, by writing by-laws for organizations – contribute to the flourishing of civil society

[4] John Finnis makes this point in his exposition of Fuller. Finnis, Natural Law and Natural Rights 273–74 (1980).

[5] 1 Alexis de Tocqueville, Democracy in America 266 (J. P. Mayer ed., George Lawrence trans., Doubleday 1969).

[6] Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 636 (1958).

institutions that are themselves counterweights to oppressive state authority. Although the correlation between the rule of law and human dignity can fail in innumerable instances, human dignity has been better served in nations with mature legal systems and independent legal professions.

One theme of this book, then, is that ordinary law practice by ordinary lawyers deserves attention because it is central to the rule of law. I develop this theme most prominently in chapters 3 and 4. A second theme, developed and argued in chapter 2, is that familiar dilemmas in legal ethics can best be understood as defenses or assaults on human dignity – and, conversely, that one way to give content to the concept of human dignity is to examine how it emerges when people engage with lawyers and the legal system. In chapter 2, I examine four issues of legal ethics – the right to counsel, the duty of confidentiality, lawyers' paternalism toward clients, and the duty of pro bono service – and draw from them a naturalized account of human dignity as a relationship among people in which they are not humiliated. Non-humiliation plays a key role in my understanding of human dignity. Drawing on Avishai Margalit's idea that a decent society is one whose institutions do not humiliate people, I argue that human dignity should best be understood as a kind of conceptual shorthand referring to relations among people, rather than as a metaphysical property of individuals. Agents and institutions violate human dignity when they humiliate people, and so non-humiliation becomes a common-sense proxy for honoring human dignity.[7] This account, I believe, fits well with Fuller's ideas about human dignity and the rule of law that chapter 3 explores.

Chapter 5, by contrast, turns to the dark side of lawyers and human dignity. It examines the work of the "torture lawyers" – US government lawyers whose secret memoranda loopholed the law to provide cover for the torture of War on Terror prisoners. Although this is a much more time-bound, fact- and law-specific topic than the more philosophical subjects treated in the remainder of the book, it seems impossible to write about legal ethics and human dignity without discussing one of the most egregious cases in recent memory of lawyers twisting law to assault human dignity. It demonstrates that fussy lawyerly formalism does not always domesticate power, particularly when the lawyers can keep their handiwork secret. In the same chapter, however, I argue that the torture lawyers reached the results they did only by betraying their own craft values – a backhanded acknowledgment that the connection between legal ethics and human dignity is more than wishful thinking or happenstance.[8]

[7] Avishai Margalit, The Decent Society 1 (Naomi Goldblum trans., 1996). Margalit's idea draws on a traditional theme in Jewish ethics, and I develop it in those terms in chapters 2 and 8.

[8] This discussion draws on a more extended analysis of the most notorious of the torture memos, along with a philosophical examination of what makes torture the ultimate assault on human

Organizational evil

It seems entirely possible that the torture lawyers, sealed up in the echo chambers of the Justice Department and the Pentagon, never visualized the Abu Ghraib photos. For that matter, junior lawyers in the Office of Legal Counsel, told to research particular points of law or draft small bits of the argument in the torture memos, may not have grasped the significance of the entire enterprise. Or they may simply have shut their eyes to it. These possibilities raise the next major theme treated in this book – a theme that has preoccupied me for many years. This is the subject of *organizational evil*: the ways in which organizations – be they law firms, corporations, bureaucracies, or armies – can subdivide moral responsibility out of existence by parceling out tasks and knowledge so that no individual employee owns the action. Organizational evil does not require crooks and thugs. It can be done, as C. S. Lewis says, by "quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice."[9] Hannah Arendt once wrote that where ancient political thought distinguished rule by the one, the few, and the many, modern bureaucracies are "rule by nobody." She added that in rule by nobody, responsibility vanishes, and the outcome can be tyranny without an identifiable tyrant.[10] Obviously, Arendt had in mind the "writing-desk perpetrators" of totalitarian regimes, but the moral problem posed by divided responsibility and fragmented knowledge doesn't require lurid or atrocious examples.[11]

As I now conceptualize it, the problem of divided responsibility actually encompasses at least three distinct moral issues: the responsibility of supervisors who contrive to maintain their own ignorance of what their subordinates are doing; the responsibility of subordinates ordered to do wrong; and the more general problem of complicity, the subtle ways in which

dignity. David Luban, *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate in America 35 (Karen J. Greenberg ed., 2005) – an expanded version of an essay published first in 91 Virginia L. Rev. 1425 (2005), and excerpted in Harper's Magazine, March 2006, at 11–16.

[9] C. S. Lewis, The Screwtape Letters and Screwtape Proposes a Toast, at x (Collier, 1962).

[10] Hannah Arendt, On Violence 81 (1970).

[11] See Luban, *Making Sense of Moral Meltdowns*, which appears in slightly different versions in Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader 355 (Susan D. Carle ed., 2005), and Moral Leadership: The Theory and Practice of Power, Judgment, and Policy 57 (Deborah L. Rhode ed., Stanford University Press 2006). The latter version focuses on business executives, the former on lawyers. I first addressed the problem of divided responsibility in an essay written at the fortieth anniversary of the Nuremberg trials, and then at greater length in a paper co-authored with Alan Strudler and David Wasserman. Luban, *The Legacies of Nuremberg*, 54 Soc. Res. 779 (1987), reprinted in my book Legal Modernism (1994); Luban, Strudler, and Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 Mich. L. Rev. 2348 (1992).

organizational members aid and abet each other in wrongdoing, sometimes simply by providing mutual moral support or encouraging group-think. Chapters 6 and 7 ("Contrived Ignorance" and "The Ethics of Wrongful Obedience") examine the first two of these problems, while chapter 8 considers one aspect of the problem of complicity: the way in which we unconsciously align our own moral compass with the prevailing direction of the people around us, who are watching us and doing exactly the same thing.[12] All three chapters address problems that range far wider than legal ethics, but the examples I use to focus discussion are drawn from law-firm practice, and chapter 8 was originally written for a post-Enron conference on integrity in corporate law and business. A bit perversely, I argue that the quest for integrity might be the problem, not the solution, because – as numerous social psychology experiments suggest – we often harmonize our practices and principles by gerrymandering the principles to rationalize the practices.

At this point, of course, the topic has strayed very far from the modest, constructive contributions to the rule of law of the Cyril Grosses of the world. Significantly, Gross was a solo practitioner, not a stressed-out senior associate in a thousand-lawyer law firm or the general counsel of an aggressive Enron-like corporation whose officers think that laws are just red tape and deadweight. Demographers of the legal profession note that the trend over time has been for firms to get larger, for a higher proportion of lawyers to work in large firms, and for young lawyers to work in large organizations in even higher proportions.[13] While sole practitioners like Gross still compose a third of the profession, their number is diminishing and so is their proportion of total lawyer income. I don't mean to romanticize solo practitioners, who are not all the salt of the earth; and Fuller's praise of lawyers as architects of social structure obviously applies to lawyers in large organizations, perhaps far more than to solo practitioners. Nevertheless, the movement of the legal profession to large and increasingly bureaucratized organizations means that the pathologies of organizational morality become increasingly important. The dark themes of chapters 5 through 8 must counterbalance the rosier picture of the legal profession I paint in chapters 2 through 4.

[12] For a more general treatment of complicity, see Christopher L. Kutz, Complicity: Ethics and Law for a Collective Age (2000). My own thinking about this subject has also been strongly influenced by Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323 (1985).

[13] See Clara N. Carson, The Lawyer Statistical Report: The US Legal Profession in 2000 7–10 (2004); After the JD: First Results of a National Study of Legal Careers 27 (NALP Foundation/ABF 2006).

The adversary system and moral accountability

The most elementary problem of divided responsibility facing lawyers results from the adversarial structure of common-law legal systems. Chapter 1, "The Adversary System Excuse," is the oldest paper in the book (I published it as a working paper in 1980). It was my first significant foray into legal ethics, and formed the core of my first major book on the subject. I include it here because the present book explores different themes and implications of its argument – and also because I have modified the argument significantly.

My target in "The Adversary System Excuse" is a view of legal ethics that in *Lawyers and Justice* I called the "standard conception of the lawyer's role," but that I now call *neutral partisanship*. Neutral partisanship sees lawyers as hired guns, whose duty of loyalty to their clients means they must, if necessary, do everything the law permits to advance their clients' interests – regardless of whether those interests are worthy or base, and regardless of how much collateral damage the lawyer inflicts on third parties. Thomas Babington Macaulay asked rhetorically "whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire."[14] Proponents of neutral partisanship don't regard Macaulay's question as merely rhetorical, and their answer is yes. They see lawyers as agents of their clients, professionally obligated to do whatever the client wants done if the law permits it. After all, the client is entitled to do anything within his legal rights, and a lawyer who agrees to represent him takes on the responsibility of serving as the client's proxy.

Not only are lawyers their clients' partisans and proxies, but professionalism requires that lawyers remain morally neutral toward lawful client ends, refraining from waving a censorious finger at the client or pulling their punches out of moral squeamishness. (Hence the label "neutral partisanship.") If so, lawyers acting in their professional role cannot be held morally accountable for client ends and the means they use to pursue them. Neutral partisanship is non-accountable partisanship.

These are very aggressive claims, and I argue that they are false. As Macaulay suggests, they imply that lawyers have a role morality that can differ dramatically from morality outside the role, what we might call "common morality." How can that be? Moral accountability is not something we can put on and take off like a barrister's wig. If a lawyer acting on a client's behalf ruins innocent people, can she really excuse herself by saying, "It's not my doing, it's my client's doing" or "It's the law's doing"? Excuses like these sound like a hit man's rationalizations.

[14] Thomas Babington Macaulay, *Francis Bacon*, in 2 Critical and Historical Essays 317 (1926).

Often, lawyers say it's the adversary system's doing. The adversary system pits interest against interest and lawyer against lawyer in a contest to determine whose right gets vindicated. As Monroe Freedman pointed out in *Lawyers' Ethics in an Adversary System* – one of the pillars of the modern legal ethics literature – the adversary system requires advocates to hew to their clients and let adversaries and others take care of themselves, even when gross injustice results.

"The Adversary System Excuse" argues that the excuse is only as good as the adversary system itself, and the adversary system is not nearly as good as its defenders believe. Defenders offer an idealized picture of a system designed to elicit maximum input from the contesting parties. In reality, the parties labor prodigiously to keep the bad evidence out, or, better still, to manipulate the system so their adversaries never get their day in court. One issue on which I break decisively from Fuller is his defense of the adversary system, which in my view fails.[15] We ought to retain the adversary system because it isn't demonstrably worse than its alternatives. But if that is the highest praise we can offer, the adversary system cannot underwrite lawyers' blanket disclaimer of moral accountability for the damage they do. Even though I have largely followed Fuller's boosterism about the constructive work that lawyers do, the failure of the adversary system excuse makes my overall account of legal ethics considerably less sunny than Fuller's. Together, the problem of organizational evil and the excessive attachment of the legal profession to neutral partisanship sometimes lead lawyers to assault rather than enhance human dignity.

In one significant respect, however, I have modified the essay's critique of the adversary system. If the weakness of the adversary system lies in the incentives it creates for lawyers to hide or exclude evidence, its strength appears when lawyers argue points of law that do not rely on evidence. Here, the virtues of free and full debate can indeed manifest themselves, and a commitment to rational discussion of law speaks in favor of the adversary system. Stuart Hampshire, in two of the most significant philosophical books in recent years, argues forcefully that we have no image of procedural justice more basic than hearing all sides of arguments, and I accept his argument.[16]

[15] I discussed his defense briefly in the original version of "The Adversary System Excuse," then returned to it in greater depth in *Rediscovering Fuller's Legal Ethics*, published concurrently in 11 Geo. J. Legal Ethics 801 (1998) and Rediscovering Fuller: Essays on Implicit Law and Institutional Design 193 (Willem J. Witteveen and Wibren van der Burg eds., University of Amsterdam Press, 1999). In this book, I have substituted an excerpt from the later paper for the original discussion.

[16] See Hampshire, Justice Is Conflict (2000); Hampshire, Innocence and Experience (1990). I have discussed Hampshire's splendid books in a pair of untitled reviews, one in 88 J. Phil. 317 (1991), the other in 112 Ethics 156 (2001).