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978-1-107-11691-7 - Fighting Fair: Legal Ethics for an Adversarial Age
Allan C. Hutchinson
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An Opening Salvo

It is a common trope that 'litigation is war.'[1] As an adjunct of the general adversarial structure and legal process, litigation is cast as a hostile encounter in which each party through its lawyers is entitled and recommended to use whatever lawful means are at its disposal to achieve victory. Within this bellicose depiction, lawyers are represented as frontline combatants who do battle on behalf of their clients. Championing the causes of their clients, their skill is found in their grasp of the techniques and strategies needed in this most intimidating and rarified of institutional venues. In this professional undertaking, they are licensed and often required to engage in activity that might at best be frowned upon if done in their personal lives and at worst even be condemned as deeply unethical. Although criticism of lawyers is far from new, it seems particularly insistent and widespread today: the extant modes of justification for the model of the 'ethical litigator' have been the subject of enormous criticism from both inside and outside the legal profession. The time is now ripe for change.

OPENING SHOTS

As lawyering (and, therefore, litigation) has become big business, the substantial price of entrepreneurial success has been bought at the perceived cost of reduced social standing. Lawyers are not

[1] As Lord Denning declared, 'in litigation as in war'. *Burmah Oil Co. v. Bank of England* [1979] 1 W.L.R. 473 (C.A.) [484] (Eng. and Wales). *See also* Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 8 (1959).

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only portrayed as skilled at the dubious arts of manipulation and double dealing, but also castigated as moral hypocrites because they defend these practices in the brazen name of 'professional ethics'. Along with used car dealers and telemarketers, lawyers are considered among the least trustworthy and least respected of all professionals. The keen force of considered judgment is that many lawyers have failed to grasp the full ramifications of the crucial distinction between operating as a business and functioning as a profession. Lawyers have acted in ways that either ignore the public aspect of their professional status or, more cleverly, interpreted that public dimension as being consonant with the business interests of the profession. This is an ethical failure of considerable magnitude. In such a climate, it is not surprising that there are increasingly urgent calls for a more ethical practice of law as well as a more compelling theoretical account of legal ethics. In short, the legal profession is being asked to put its ethical money where its professional mouth is.

I will strive to suggest a more promising and less constrained approach to developing a defensible theory and practice of legal ethics. The problem is not simply that lawyers act in ways that are unethical, but that there is a failure to substantiate what it is to be an 'ethical lawyer' in the conditions of today's profession and society. Accordingly, the main thrust of my stance will be to contend that, if lawyers want to receive more professional respect for their work, they will have to earn it by reframing their ethical duties and taking them more seriously. Offering better explanations and more novel justifications for existing practices cannot do this.[2] Instead, it will require a genuine willingness to change what lawyers do and, as important, how lawyers think about what they do. There needs to be a sea change in the theory and practice of legal ethics and professional responsibility. As the 1996 Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar concluded, 'the bottom line is that lawyer professionalism has declined in recent years and increasing the level of professionalism will require significant changes in the way professionalism ideals are taught and structural changes in the way law

[2] *See, for example*, W. Bradley Wendel, *Lawyers and Fidelity to Law* (2010).

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firms operate and legal services are delivered.'[3] To date, that challenge has not been satisfactorily met.

One place to begin is by taking seriously the notion that 'litigation is war.' While this may seem an unpromising location, it has much to recommend it. Although it is often said that 'all's fair in love and war',[4] the fact is that all is not considered fair in war. There is a large and established body of work on military ethics that offers a sophisticated account of what it is to be fair and just in the commencement and prosecution of war. Even though the stakes may be higher on the battlefield than in the courts, it is telling that the discourse around the 'ethics of warfare' is much richer and more resourceful than that around legal ethics. Compared to their legal counterparts, military officers have available to them (and are obliged to comply with) a much more demanding set of ethical imperatives to construe and reflect on when pursuing their chosen profession.[5] Indeed, while it can still be reported that 'some sense of military honor is still the creed of the professional soldier',[6] such a conclusion is difficult to sustain fully in regard to the legal profession. Indeed, although there are many ethical lawyers, the profession as a whole seems not only to have lost much of its ethical luster, but also to have largely forsaken its claim to being an honorable undertaking of ethical integrity. Anthony Kronman is not so wide of the mark when he concludes that the contemporary 'practice of law [has lost] its status as a calling and degenerat[ed] into a tool with no more inherent moral dignity than a hammer or a gun'.[7]

[3] Am. Bar Ass'n, Section of Legal Education and Admission to the Bar, Teaching and Learning Professionalism: Report of the Professionalism Committee 4–5 (1996).

[4] John Lyly, *Euphues: The Anatomy of Wit* (1578).

[5] *See* Peter S. Temes, *The Just War* (2003).

[6] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* XXV (3rd ed. 2000).

[7] Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 364 (1993). *See also* David Barnhizer, *Golem, 'Gollum', Gone: The Lost Honor of the Legal Profession* 10 (Cleveland-Marshall College of Law, Working Paper no. 11–203, 2011), *available at* http://ssrn.com/abstract=1734412 ('There is a widespread impression that the practice of law has become primarily a money-grubbing, profit-maximizing, hustling business, rather than an admired profession.'). This stands in stark contrast to Tocqueville's roseate description of nineteenth-century lawyers. *See* 1 Alexis de Tocqueville, *Democracy in America*, 288 (Alfred A. Knopf ed., 1945) ('If I were asked where I place the American

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Consequently, I want to recommend that it will be helpful to think about legal ethics in a way that is more consistent with and informed by the ethics of warfare.[8] While many lawyers and legal theorists might be tempted to look down their noses at 'military ethics', such an exercise has considerable potential to cast a fresh light on lawyers' professional responsibility and suggest fruitful ways to rethink how lawyers' ethical duties and professional conduct are conceived. Contrary to common wisdom, military engagement in war is a much more ethically regulated activity than litigation. In short, such a comparison between military and legal ethics might not only recommend new answers to old questions, but also stimulate a range of new questions for consideration. As such, this book offers itself as a salvage exercise: it takes foundational aspects of the existing legal system and process as a given (e.g., the adversarial system and the organizational economy of private practice) and then explores ways that the ideal of the ethical lawyer might be reimagined to advance better the best values and ambitions of such a system.

By way of general caveat, I concede that treating litigation as war is neither the best nor the most desirable characterization over the long haul. Litigation's conduct as a mode of guerilla warfare does not benefit the litigating parties and does little credit to lawyers' participation.[9] However, insofar as adversary ethics will continue to frame both litigation and its lawyering ethic in the foreseeable future, there is still much that can be done to improve the ethical quality and performance of litigation. Once it is understood that

aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.').

[8] *See The Price of Peace: Just War in the Twenty-First Century* (Charles Reed & David Ryall eds., 2007). Others have noted the connection between legal ethics and military ethics, but to no great effect, development or influence. *See* David Luban, *Lawyers and Justice* (1988); *The Leader's Imperative* (J. Carl Ficarrotta ed., 2001); Anthony E. Hartle, *Moral Issues in Military Decision Making* (2nd ed. 2004). For more hands-on instruction in how to use military strategy for litigation purposes, *see, for example*, Frederick L. Whitmer, *Litigation Is War* (2007).

[9] The literature on the failings of litigation and the need for a more conciliatory structure and approach is vast. For a good introduction and intervention, *see* Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (2008).

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'war' is not necessarily treated as a free-for-all in which there are no ethical precepts or principles in play, it might become possible for lawyers to take military ethics seriously and to learn from its study. As Walzer puts it, war is 'a world of permissions and prohibitions – a moral world'.[10] Consequently, this book seeks to demonstrate how military ethics can be fruitfully deployed as an analogical source for improving and deepening the theory and practice of legal ethics. Indeed, the sobering truth is that the discursive resources and frameworks for evaluating the ethical merit of military action are much richer and more sustaining than that of legal ethics.

A PLAN OF ATTACK

Throughout this book, my critical focus will be on how best to move forward the debate about the relationship between law, justice and legal ethics in a more rewarding and fulfilling direction. In the second chapter, I will revisit the general debate over the nature of the ethical project and how it plays out in the context of professionals; the focus will be on role differentiation and the demands placed on the legal profession in contemporary society. Third, I will look to the present state of theorizing in legal ethics; I highlight its failure to offer a sustaining or defensible restatement of professional responsibility. In the fourth chapter, I provide a sustained and broad-ranging critique of the hired-hand model of ethical lawyering; I suggest why a different approach drawing on military ethics offers genuine promise. Fifth, I survey the tradition of military ethics and make general comparisons between military officers and legal professionals; the emphasis is on both the strengths and weaknesses of such a comparison. In the sixth chapter, I start to explore the implications for legal ethics of the established principles for demarcating a war as just; this involves reassessing the current thinking on client selection and the decision to litigate. Seventh, I move on to the requirements of utilizing just means to prosecute a just war and recommend their relevance to legal practice; the effects on third parties and

[10] Walzer, *supra* note 6, at 36.

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the role of junior lawyers are at the heart of the analysis. In the eighth chapter, I look to the recent literature on making a just peace and suggest how this might better guide lawyers in negotiating and reaching settlements. By way of conclusion, I drive home the beneficial consequences of viewing and refocusing legal ethics through the lens of military ethics.

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The Professional Project

All societies have a set of moral standards by which they require or urge their members to abide. Although those standards might be more or less exacting in the obligations they impose and more or less observed in actual compliance, they do constitute an important dimension of social life. However, descriptive efforts to map the morality of any particular society are of limited value because they will reveal little about the important question of whether such morality is worthy of approval or adoption. Accordingly, it is necessary to develop a framework within which to evaluate conduct that is claimed to be morally defensible and also to confirm or deny its acceptability. This is the focus of ethical study.[1] At its broadest, ethics involves a meditation on what is wrong and right and, most important, on how such standards are arrived at and validated. Traditionally, the task was to elaborate and justify a set of ethical norms that provided an authoritative code that people could consult and follow in resolving difficult dilemmas. However, faith in the possibility of sketching such a body of enduring and universally valid rules has been waning. There is now the less absolutist and more skeptical acceptance that ethics is a situational practice that cannot claim objective or neutral justification in any genuinely strong or enduring way. As such, what is to count as a good moral reason is a matter of justification and persuasion, not proof and authority.

[1] For good introductory overviews, *see A Companion to Ethics* (Peter Singer ed., 1993); Roger Scruton, *Modern Philosophy* (1994). Throughout, I will give no particular weight to any distinction between the labels 'ethical' and 'moral'.

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THE ETHICAL PROJECT

At bottom, ethics is about putting limits on the unhindered pursuit of self-interest. While there will be some overlap in particular instances between ethical justification and the advancement of self-interest, this is as much by coincidence as by design. The recognition and promotion of self-interest are not entirely inappropriate; people are not expected to be selfless or saintly in achieving ethical approval for all their actions. So, while people are entitled to weigh self-interest in the balance in reaching an ethically defensible line of conduct, they are not permitted to prioritize it without more. As such, an ethical schema that reduces only to the facilitation of individuals' self-interest is really no ethics at all.

Of course, an ethical code is not an exhaustive compendium of right answers and settled guidelines. While it often recommends bounds on acceptable conduct and seeks to distinguish good from bad behavior, it will operate more as a set of resources through which to think about and decide what to do than a corpus of pat answers to moral dilemmas. As such, the development of a sound ethical framework will not be devoted to listing a detailed roster of formulaic answers. Instead, it will be more concerned with generating a series of arguments and considerations – a discourse, if you will – that any person who seeks to act ethically can consult and weigh in deciding on a suitable course of action. Viewed in this way, a proposed ethics poses a series of orienting questions as much as it offers a compendium of authoritative answers. Accordingly, acting ethically is not about adherence to a code resorted to in occasional moments of indecision. Rather, it is about the development of a moral habit of living and acting that encompasses an organic set of attitudes, dispositions, assumptions, markers and values, and that can be incorporated into people's daily routines and regimens.[2]

In developing such an ethical scheme, it is important to appreciate the different phases and components of ethical behavior. These can be helpfully identified in a threefold format consisting of moral

[2] *See* Allan C. Hutchinson, *The Province of Jurisprudence Democratized* (2008). In the legal ethics context, *see* Don Nicolson & Julian Webb, *Professional Legal Ethics* (1999).

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sensitivity, moral judgment and moral conviction.[3] Each of these interconnected stages of ethical deliberation needs to be appreciated by those who wish to understand and pursue an appropriate practice of ethical conduct:

- *Moral sensitivity* is the capacity to recognize that a situation has moral dimensions, that it presents a choice of possible responses and that its resolution may have implications, large and small, for all parties involved, including oneself.
- *Moral judgment* is an ethical assessment about what one ought to do and involves drawing on a rich understanding of role expectations, situational balance, likely consequences and moral integrity to justify a particular line of action.
- *Moral conviction* includes the self-discipline and perseverance to implement the decision by giving priority to the decided-on moral course of action over other values or goals (e.g., career advancement, personal relationships, hedonistic pleasures).

Developing these skills and values is a difficult challenge for most people in most situations. Few people spend a great deal of time understanding these demands or reflecting on their import. However, most people are obliged to negotiate this difficult ethical terrain in one way or another. To be an ethical person is not only about acting ethically, but also about thinking ethically. As T. S. Eliot phrased it, 'the last temptation is the greatest treason:/ To do the right deed for the wrong reason.'[4] While this might be an exacting and perhaps contested standard, it does point up the challenge of being an ethical person. It asks that people not only act ethically, but that they do so for what they or others claim to be the right reason. To be an ethical person is a frequently demanding, often perplexing and always continuing undertaking.

[3] I have borrowed the work of the cognitive psychologist James Rest and given it certain twists to fit the legal context. *See* J. Rest, 'Morality', in *3 Handbook of Child Psychology* 556 (Paul Mussen series ed., John H. Flavell & Ellen M. Markman eds., 4th ed. 1983); James R. Rest, *Moral Development* (1986); Muriel J. Bebeau, James R. Rest & Darcia Narvaez, 'Beyond the Promise: A Perspective for Research in Moral Education', 28(4) *Educ. Researcher* 18 (1999).

[4] T. S. Eliot, *Murder in the Cathedral* in The Complete Poems and Plays of T.S. Eliot 258 (1929). There is, of course, the converse conundrum of whether it is right to do the wrong deed for the right reason.

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But, if developing these ethical qualities is a difficult challenge for ordinary people in their lives, it is doubly difficult for lawyers in their professional lives. Not only do lawyers have to cultivate these qualities and resources in their personal lives, but they also have to determine to what extent these might need to be varied in their professional roles and augmented or modified by a different set of ethical capabilities. If lawyers are to live up to their obligations to act as a morally motivated and morally directed group of respected professionals, they must nurture a mode of practice equal to that task. There has to be an element of reflection and conscientiousness in developing and implementing a professional modus operandi. As professionals and as individuals empowered through that professional status, lawyers must be constantly appreciative of the need to act ethically and responsibly.

Accordingly, unlike most other areas of social behavior, the practice of law needs to develop a sophisticated ethical framework that enables individual legal practitioners to grasp and comprehend the subtlety and sweep of the moral imperatives imposed by virtue of their public and professional lives. This might well be significantly different (or not) from those moral imperatives that might guide them in their private and personal lives. This is not to say that lawyers should or should even attempt to occupy two separate ethical universes, but that they should work to appreciate the competing pushes and pulls between the collective ethos that informs their professional lives and the one that guides their personal lives.

In examining lawyers' present and future efforts to regulate the ethical practices of lawyers, much is rightly made of the fact that legal practice is a professional pursuit; lawyers do not operate as individuals, but as part of a collective enterprise that exists to serve interests other than their own advancement and benefit. What distinguishes the work of lawyers from that of other groups is that not only do they possess a sophisticated structure of organization and a formalized learning process, but also that their efforts are generally claimed to be conditioned by a spirit of public service.[5]

[5] *See* Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (1953); Talcott Parsons, 'A Sociologist Looks at the Legal Profession', in *Essays in Sociological Theory* 370 (rev. ed. 1958); Deborah Rhode, 'The Professionalism Problem', 39 *Wm. & Mary L. Rev.* 283 (1998).

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