Introducing a Dose of Reality: Broadening the Perspective of Legal Ethics to Include Social Science Research

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Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 **Ind. L.J.** (forthcoming 2014), available at SSRN.

Andy Perlman's timing couldn't be better. His new article, *A Behavioral Theory of Legal Ethics*, comes out just as negative reports of lawyers' conduct are front page news again, this time as part of the GM story. The company's lawyers failed to save their business and engineering colleagues from disastrous decisions; in fact, their conduct may have hindered GM from addressing problems systemically. While corporation counsel generally are not the sole check on ethical and competent decision making by company insiders, they certainly are positioned structurally to a framework that is intended to lead to good decision making. But it is not just corporate lawyers who are an issue for ethical conduct, of course. Prosecutors' failure to reveal exculpatory evidence is a continuing concern, tax lawyers' gaming the tax shelter system is the topic of a new book by Mitt Regan and Tanina Rostain (Confidence Games), and there are many more examples.

What makes Perlman's article so timely is not simply the focus on lawyers' failed judgments but his connection of these to a fundamental problem with the theory underlying legal ethics. This connection provides a larger context for considering ethical failures, moving beyond the particular characteristics of an individual to a general framework that spans lawyers' individual differences and practice settings. According to Perlman, the theoretical foundation of legal ethics assumes that lawyers "are simultaneously capable of partisanship on behalf of clients while remaining sufficiently objective to ensure that their own conduct is ethical."(p.6) In fact, the Model Rules of Professional Conduct obligate both partisanship ("in the sense of being aligned with a particular side of a matter" (p.6)) (see, for example, Model Rules of Professional Conduct 1.2) and the ability to consider the consequences of being a partisan in the context of obligations owed to non-clients (see, for example, Model Rules of Professional Conduct, Preamble and Scope ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."). Nevertheless, this tension has not been adequately explored, according to Perlman: "Rarely," he writes, do legal ethicists "discuss[] … whether this assumption relies on an accurate model of human behavior." (p.11) It is just such a disconnect that has been identified as underlying the failings of GM's lawyers according to a New York Times report, which commented that **"**It is not clear whether any of G.M.'s lawyers even recognized there was an issue with how they were representing the company. Nor is it clear that they considered whether they needed to take action to protect it from greater harm." ((Peter J. Henning, "*How G.M.'s Lawyers Failed in Their Duties*," New York Times (Jun. 9, 2014), available at http://dealbook.nytimes.com/2014/06/09/how-g-m-s-lawyers-failed-in-their-duties/.))

In the article, Perlman takes aim at the assumption that "lawyers are capable of acting as partisans—representing one side of a matter—and actually *identifying* the line between permissible and impermissible behavior." (p. 7, emphasis in original) He draws on social science research to do this, which reveals that the assumption is at best overstated; at worst, it is entirely unrealistic. He discusses

"[n]umerous studies [that] demonstrate that our perceptions are easily distorted by the situations in which those perceptions occur and that partisanship can have a particularly strong distorting effect. These studies offer powerful evidence that lawyers will have more difficulty making objective assessments on issues – such as whether a course of conduct is legal, moral, or consistent with conceptions of justice – than most theorists acknowledge." (p.11)

The article also is an important contribution for teaching ethics. On one hand, it often is difficult for law students to relate to the lawyers whose activities result in cases central to professional responsibility casebooks; even the hypotheticals drawn by experts who combine practice and teaching experience in the field often are not taken seriously by students, who overestimate their ability to act independently and perceive the edges of ethical conduct. Perlman addresses these problems directly with suggestions for incorporating lessons on cognitive bias into legal education (p. 37-38). But in addition, the core of the article provides a clear and direct connection between legal ethics and social science research in a way that brings a nuanced reality to the study of ethics. In this way, it adds to existing work (such as Leslie Levin and Lynn Mather's Lawyer's in Practice). that offers meaningful alternatives to focusing exclusively on case law in this important field. The article is worth a close read for these reasons, among others.

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