Legal Ethics After Liberalism

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Allan Hutchinson, Fighting Fair: Legal Ethics for an Adversarial Age (2015).

David Luban and I just finished a paper celebrating the 30th anniversary of the Georgetown Journal of Legal Ethics. It recounts the history of the subfield of philosophical legal ethics, organized around two generations of scholarship.[1] The first generation located legal ethics within moral philosophy, seeking to connect the lawyer's role with values such as autonomy, loyalty, and human dignity. First-generation scholars tended to agree with Arthur Applbaum that conventional and institutional considerations, such as social roles and rules of professional conduct regulating professions, did not relieve lawyers of the burden of articulating a justification, in ordinary moral terms, for their actions.[2] The second generation, by contrast, regarded legal ethics as a branch of political philosophy, and the central problem not being individual moral agency, but the fact of a society characterized by a plurality of reasonable moral, religious, and political beliefs. A commentator challenged us to anticipate what themes the third generation of legal ethics scholarship would develop, and it occurred to us that we should add a fourth possibility, namely a radical position that is critical of the apparatus of positive law and liberal rights, perhaps as a kind of throwback to Critical Legal Studies.

Canadian legal theorist Allan Hutchinson's recent book, **Fighting Fair: Legal Ethics for an Adversarial Age**, is just such a contribution to the debate. It is a fascinating combination of radical and old-school, with its reliance on virtue ethics and traditional conceptions of professionalism. Hutchinson rightly points out that the justification for the so-called standard conception of legal ethics, with its familiar tripartite structure of partisanship, neutrality, and non-accountability, is borrowed from liberal political and legal theory. (P. 43.) The problem with it, in a nutshell, is that the standard conception gives priority to the interests of clients over the public interest. (P. 53.) Of course, calling upon lawyers to pay more attention to the public interest has long been a staple of anguished reflections by lawyers and academics on the woeful state of the legal profession. Consider much-discussed books such as Mary Ann Glendon's *A Nation Under Lawyers* and *The Betrayed Profession* by Sol Linowitz from the 1990's, and more recent work such as Deborah Rhode's *The Trouble with Lawyers*. What is distinctive about Hutchinson's proposed reform of the standard conception is his analogy with the ethics of warfare. He anticipates that readers may blanch at that comparison. Doesn't the legal profession need *less* adversarialness, not encouragement to think of litigation as war? Readers old enough to remember Sylvester Stallone action movies from the Reagan years will recall that an unethical style of practice was often referred to a "Rambo lawyering." The so-called professionalism movement, which was active in the 1990's, sought to restrain adversarial excesses and restore a spirit of cooperativeness and civility to litigation. Moreover, most lawyers are not litigators, and while it is true that transactional practice can be adversarial, in business practice there is at least the theoretical possibility of obtaining a good deal for all the parties. And what about lawyers who advise clients and bring them into compliance with the law? The warrior ethos central to Hutchinson's book seems an inexact analogy for what many lawyers do in practice.

Hutchinson is fine with the adversary system. The distinction he really wants to hold onto *within* an adversarial arena is between soldiers—members of the armed forces of a state—and mercenaries. The contrast is one of motivation. Mercenaries are just in it for the money, while soldiers "are knowledgeable about war in both its operational and reflective dimensions, they respect the value of human life, and

they are self-conscious of their moral responsibilities as soldiers." (P. 61.) Modern lawyers, Hutchinson argues, are more like mercenaries than soldiers. Why? Because they are indifferent to their clients' ends and committed only to a thin conception of the rule of law as procedural justice, unconcerned with substantive ends such as human rights. (P. 63.) By contrast warriors, after whom Hutchinson would prefer to model lawyers, "are as much concerned with honor and moral worth in how they go about their tasks as anything else." (P. 65.) This contrast rings true for someone who has read extensively about the Bush Administration's response to the September 11th terrorist attacks. The strongest opponents of the use of torture by the CIA and the uniformed services were military officers and lawyers.[3] The warrior ethos proved to be one of the few ethical visions capable of resisting the relentless pressure from Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and other high-level political officials who wanted to take off the gloves when dealing with suspected terrorists.

The contrast between mercenaries and warriors suggests some openness on Hutchinson's part to a return to virtue ethics. What distinguishes virtue ethics from more familiar consequentialist and deontological is the emphasis within the former on the dispositions of the agent to act, think, or feel in particular ways. A mercenary and a warrior both fight, kill, and risk death in combat, so the action in either case is the same; the difference is that a warrior goes into battle for the right reasons. Military ethicists have made serious attempts to grapple with emerging technologies such as remotely-piloted aircraft and unarmed aerial vehicles by using the techniques of virtue ethics. For example, a recent book by a U.S. Air Force colonel and F-16 pilot argues that fighter pilots engage in combat with "heart," while stateside drone operators occupy a morally ambiguous position.[4] The warrior ethos emphasizes the equality of combatants, as manifested in their mutual exposure to the danger of violent death. Of course, mercenaries also put themselves at risk—perhaps even greater risk if they serve in relatively less cohesive and well-trained units than regular soldiers—so that is not the distinction Hutchinson needs to ground his moral disapproval of lawyers as mercenaries. Hutchinson does follow Col. Riza in thinking that something like equality of combatants is a distinguishing feature of the warrior ethos, although he puts it more in terms of fighting fairly and refraining from humiliation. (Pp. 66, 91, 102.) The influence of virtue ethics comes through more clearly in Hutchinson's repeated reference to fighting with honor and respect for one's enemies, which is an addition to the body of just war theory from which he draws much of his argument. Standard *jus in bello* analysis looks at proportionality and the protection of civilians, but Hutchinson's concern is also with whether soldiers act with virtues such as self-control, courage, and persistence. (P. 92.)

Hutchinson is a severe critic of what he calls traditionalists about legal ethics (p. 37), but ironically his position is, if anything, even more deeply rooted in the tradition of professionalism. Sociologists from Émile Durkheim in the Nineteenth Century to Talcott Parsons in the Twentieth have maintained that lawyers are intermediaries between citizens and the state, whose professional judgment can be exercised to meld disputatious individuals and groups into a common social order. Like Rousseau, who distinguished between private interests and the general will, lawyers understood their role as pursuing the private interests of clients within the constraints of the public good. Or, to use the term associated with the civic republican tradition, lawyers are in a better position than their clients, or for that matter official legal institutions like legislatures and courts, to exercise civic virtue – that is, an impartiality among private interests, with due concern for the public good or general welfare of society.[5] In the Twentieth Century this ideal was expressed in Harvard Law School Dean Roscoe Pound's definition of a profession as a group "pursuing a learned art as a common calling in the spirit of public service."[6] While neo-classical economists understood society as nothing more than an arena of competition for atomistic individuals pursuing their own interests, constrained only by the deterrent effect of sanctions for unlawful conduct, lawyers who subscribed to this ideal of professionalism sought to discern, internalize, and act on the general moral norms of their society.

The ideal of professions as custodians of the public interest was regarded with increasing skepticism

throughout the second half of the Twentieth Century, and is now all but a dead letter. As Rebecca Roiphe shows in a recent brilliant synthesis, intellectual pressure on the traditional professional ideal came from two directions: public-choice theory, which understood laws as nothing more than something offered for sale on a market, in exchange for votes or financial support by organized interest groups, and the moral pluralism associated with Isaiah Berlin and the later Rawls, which emphasized the existence of multiple, incompatible reasonable conceptions of the public interest.[7] After the collapse of the traditional professional ideal, legal ethics scholars sought to reconstruct the discipline as described above – in the first generation, as responsive to ordinary moral considerations such as dignity and autonomy, and in the second generation, as responsive to political ends such as procedural justice and the rule of law. Neither of these responses appeals much to Hutchinson. He finds the second generation barren and technocratic, and has surprisingly little to say about the first generation. (Canonical scholars like Luban, Postema, and Wasserstrom are not cited at all.) There is tension in Hutchinson's book between radicalism and traditionalism, but in the end what wins out is a kind of nostalgia for a lost era of chivalrous combat between knights-errant, combined with an almost eschatological vision of "a future situation in which war will no longer be possible between the parties." (P. 113.)

I'm all in favor of awaiting the coming of the peaceable kingdom, but in the present circumstances of comprehensive and pervasive disagreement about matters of public policy, I'll stick with political liberalism and the rule of law as the starting points for legal ethics. However, I am more sympathetic than many within legal ethics to the revival of virtue ethics. I'm not sure the warrior archetype is the right analogy for what most lawyers do, most of the time, in practice. But I do think Hutchinson is right to focus attention on the idea of acting for the right reasons. I also worry quite a bit about the thinness of political liberalism as a basis for social solidarity. Atomistic individualism and rights-talk can lead to political polarization and paralysis of democratic institutions, and the result may be that professions become increasingly important as conservators of public values. Fairness is a value that is relatively less important in American political culture as compared with other English settler nations such as New Zealand.[8] Hutchinson's call to the legal profession to reorient its ethical norms around the idea of fighting fair is one possible response to the dysfunction of American political culture.

1. David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 **Geo. J. Legal Ethics** __ (2017).
2. Arthur Isak Applbaum, **Ethics for Adversaries** (1999).
3. See Jane Mayer, **The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals** 214-33 (2008).
4. M. Shane Riza, **Killing without Heart: Limits on Robotic Warfare in an Age of Persistent Conflict** (2013).
5. Charles-Louis de Secondat, Baron de Montesquieu, **The Spirit of the Laws** § 4.5 (Thomas Nugent, trans., 1949).
6. Roscoe Pound, **The Lawyer from Antiquity to Modern Times** 5 (1953).
7. Rebecca Roiphe, *The Decline of Professionalism*, 29 **Geo. J. Legal Ethics** 649 (2016), available at SSRN.
8. David Hackett Fischer, **Fairness and Freedom—A History of Two Open Societies: New Zealand and the United States** (2012).

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