TOWARDS A COMPREHENSIVE THEORY OF PROFESSIONAL RESPONSIBILITY

F.C. DeCoste*

We love law, not because reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom, we are responsible.

Paul Carrington

Woe unto you also, ye lawyers. For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.

Luke 11:46

1. Context

By most accounts, the Anglo-American legal community is in crisis. Our lawyers are said to have lost their way, our judges are said not to know their place, our law professors (and their unhappy charges) are said to have abandoned the profession, and the public, it is said, mistrusts the law more than ever before.[1] Whatever else may be said about these claims, three things at least appear certain. Firstly, the legal

* Professor of Law, University of Alberta.

[1] See for example: R.H. Bork, *The Tempting of America: The Political Seduction of American Law* (New York: Simon & Schuster, 1990); C.T. Bogus, "The Death of an Honourable Profession" (1996) 71 *Indiana L. J.* 911; W.E. Burger, "The Decline of Professionalism" (1995) 63 Fordham L. Rev. 949; P.F. Campos, *Jurismania: The Madness of American Law* (New York: Oxford U.P., 1998); H.T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992-93) 91 Mich. L. Rev. 34; D.A. Farber & S. Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (New York: Oxford U.P., 1997); M.A. Glendon, *A Nation Under Lawyers* (Cambridge, MA: Harvard U.P., 1994); D.A. Kessler, "Professional Asphyxiation: Why the Legal Profession is Gasping for Breath" (1997) 10 Geo. J. Legal Ethics 455; R. Knopff & F.L. Morton, eds., *The Charter Revolution and the Court Party* (Peterborough: Broadview P., 2000); A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard U.P., 1993); S.M. Linowitz, *The Betrayed Profession* (New York: Scribner, 1994); K.J. Mackie, *Lawyers in Business: And the Law Business* (London: Macmillan, 1989); M. Papantonio, *In Search of Atticus Finch* (Pensacola: Seville, 1996); R.D. Rotunda, "The Legal Profession and the Public Image of Lawyers" (1998-99) 23 J. Legal Profession 51; "Symposium on Public Mistrust of the Law" (1998) 66 U. Cincinnati L. Rev. 801-900; M.H. Trotter, *Profit and the Practice of Law: What's Happened to the Legal Profession* (Athens, GA: U. Georgia P., 1997); & R. Zitrin & C.M. Langford, *The Moral Compass of the American Lawyer: Truth, Justice, Power, and Greed* (New York: Ballantine, 1999).

The claim that lawyers are in decline as a profession and that they are taking the public good down with them has spawned a literature of riposte. See for example: R.F. Cochran, Jr., "The Rule of Law(yers)" (2000) 65 Missouri L. Rev. 571; M. Galanter, "Lawyers in the Mist: The Golden Age of Legal Nostalgia" (1996) 100 Dickinson L. Rev. 549; C. Silver & F.B. Cross, "What's Not To Like About Being a Lawyer?" (2000) 109 Yale L. J. 1443; & B. Sullivan, "Professions of Law" (1996) 9 Georgetown J. of Legal Ethics 1235. Nor is any of this really new. See for example: J.H. Cohen, *The Law: Business or Profession* (New York: Jennings, 1924); G. Gilmore, "Some Criticisms of Legal Education" (1921) 7 Am. Bar Assoc. J. 227; J.K. Lieberman, *Crisis At The Bar: Lawyers' Unethical Ethics and What To Do About It* (New York: Norton, 1978); K.N. Llewellyn, "Problems of the Legal Profession: Restoration of Our Legal Tradition" (1952) 16 Albany L. Rev. 1.

community—the bar, the bench, and the legal academy—has lost much of its authority. Secondly, lawyers of all sorts and station are experiencing a crisis of faith in their way of life which, even where the battle has not been lost, has produced wide spread anxiety among them.[2] Thirdly, it is now possible to ask, as many have, whether lawyers can be saved and the authority of their community somehow redeemed.[3]

Many have offered answers to these questions.[4] And very often matters are

---

[2] For an instructive take on the "embattled faith" of law, see: Carrington, "An Embattled Faith" in P.D. Carrington, *Stewards of Democracy: Law as a Public Profession* (Boulder, CO: Westview, 1999) at 1. William Simon captures "the experience of ethical disappointment" which infects this "anxious profession" in the following passage:

> No social role encourages such moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations it encourages.
>
> Many young people go to law school in the hope of finding a career in which they can contribute to society. They tend to come out with such hopes diminished, and the hopes often disappear under the pressures of practice. Late in their careers, especially if they achieve worldly success, they often recall their hopes with nostalgia and regret.

See: W.H. Simon, *The Practice of Justice: A Theory of Lawyer's Ethics* (Cambridge, MA: Harvard U.P., 1998) at 1.

[3] See for example: L.E. Gerber, "Can Lawyers Be Saved? The Theological Legal Ethics of Thomas Shaffer" (1993-94) 10 J. L. & Religion 347; J.E. Bickenbach, "The Redemption of the Moral Mandate of the Profession of Law" (1996) 9 Can. J. L. & Juris. 51; & R.W. Gordon & W.H. Simon, "The Redemption of Professionalism" in R.L. Nelson, D.M. Trubek, & R.L. Solomon, eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell U.P., 1992) at 230.

[4] Perhaps the most devastating response is Harold Berman's:

> The crisis of the Western legal tradition is not merely a crisis in legal philosophy but also a crisis in the law itself. Legal philosophers have always debated, and presumably always will debate, whether law is founded in reason and morality or whether it is only the will of the political ruler. It is not necessary to resolve that debate in order to conclude that as a matter of historical fact the legal systems of all the nations that are heirs to the Western legal tradition have been rooted in certain beliefs or postulates; that is, the legal systems themselves have presupposed the validity of those beliefs. Today those beliefs or postulates—such as the structural integrity of law, its continuity, its religious roots, its transcendent qualities—are rapidly disappearing, not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers and other members of the legal profession, but from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency and continuity. Thus the historical soil of the Western legal tradition is being washed away..., and the tradition itself is threatened with collapse.

See: H.J. Berman, "Religious Foundations of Law in the West: An Historical Perspective" (1983) 1 J.L. & Religion 1 at 41-42. Berman's best wish for our legal tradition is that it "will perhaps serve as a kind of ancient history, a new 'corpus juris Romani,'" from which "new forms of legal order" will somewhere, sometime, seek "guidance." *ibid.* at 43.

thought properly to turn on 'legal ethics.'[5] Indeed, for this very reason, in the last twenty or so years, 'legal ethics' has established itself as a "growth industry of the law," at least in America.[6] Yet these initiatives have been a mixed blessing. The critical *Zeitgeist,* which has recorded, if not driven, the turmoil in the profession more generally, has sought out legal ethics and responsibility in particular. The results have complicated efforts to use legal ethics and responsibility as a site for reconstructing professional purpose and authority. Chestnuts like 'officer of the court', invoked with happy satisfaction by generations of lawyers, have been pronounced conceptually empty and without much fanfare interred.[7] Great lawyers have been declared not to have been so great after all.[8] The codes of conduct, once considered the proper sign of professional status, have been ridiculed as aspirational and practical failures which, if they speak to anyone at all, speak to the very lowest denominator of lawyer.[9] The lexicon which lawyers use to describe their moral concerns, and the distinction between 'ethics' and 'responsibility' especially, has been declared at least confused,[10] and the notion of 'professional ethics' is now everywhere

---

[5] See for example: Simon, *supra* note 2; Bickenbach, *supra* note 3; D. Rhode, *In the Interests of Justice* (New York: Oxford U.P., 2000); & T.L Shaffer, *Faith and the Professions* (Provo: Brigham Young U.P., 1987).

[6] See: L. Parley, "A Brief History of Legal Ethics" (1999) 33 Fam. L. Q. 637. For evidence of which see: D.L Rhode, "Annotated Bibliography of Educational Materials on Legal Ethics" (1995) 58(3/4) L. & Contemp. Probs. 361; & A.D. Dickerson, "Ethics on the WEB: An Annotated Bibliography of Legal Ethics Material on the Internet" (1998) 28 Stetson L. Rev. 369. Neither Canada nor England has experienced this growth. See: L. Sheinman, "Looking For Legal Ethics" (1997) 4(1/2) International J. of the Legal Profession 139 (arguing that the English "legal profession has not created or maintained a discourse about legal ethics"); & A.M. Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship" (2000) 50 U.T.L.J. 115 (commenting on "the dearth of interest in legal ethics in this country"). But see with respect to the latter: "Special Issue: The Legal Profession and Ethics" (1995) 33 Alta. L. Rev. 719; "Topic: Legal Ethics" (1996) 11:1 Can. J. L. & Jur. 3; & A.A.J. Esau, "Teaching Professional Legal Ethics and Responsibility at Law School: What, How, and Why?" in R.J. Matas & D.J. McCawley, *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) 308.

[7] See for example: J.A. Cohen, "Lawyer Role, Agency Law, and the Characterization 'Officer of the Court'" (2000) 48 Buffalo L. Rev. 349; & E.R. Gaetke, "Lawyers as Officers of the Court" (1989) 42 Vand. L. Rev. 39.

[8] See for example: M.P. Schutt, "Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity" (1998) 30 Rutgers L. J. 143; and A.W Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: U. Chicago P., 2000). But see: R. Gavison, "Holmes's Heritage: Living Greatly in the Law" (1998) 78 Boston U. L. Rev. 843.

[9] See for example: H.L. Feldman, "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" (1996) 69 S. Cal. L. Rev. 885; D.L. Rhode, "Institutionalizing Ethics" (1994) 44 Case W. Res. L. Rev. 665; S.R. Salbu, "Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics" (1992) 68 Indiana L. J. 101; & M.A. Wilkinson, C. Walker, & P. Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill L. J. 645.

[10] See: P.K. Rofes, "Ethics and the Law School: The Confusion Persists" (1995) 8 Geo. J. Legal Ethics 981.

confessed to be ambiguous.[11]

Anxious and perplexing times these, which this brief essay cannot begin to cure. My purpose is much more modest. I want to proceed from a simple admission, namely, that the criticisms leveled against what we term legal 'ethics' and 'responsibility' and against the profession more generally are on the whole, if not in all of their particulars, telling: legal ethics and responsibility are in a mess, practically and theoretically, and the profession is, in all of its parts, in a most unhappy state indeed. Needless defence thus put aside, I want then to propose a framework of reconstruction for legal ethics. In my view, what troubles legal ethics (or if you prefer, legal responsibility) is what troubles our law and profession more generally. Too often, first principles are not identified; and almost always, in consequence, the derivations and distinctions required for an informed and informing view of matters are not drawn. I can here of course only sketch what I take to be the requirements of an integrated general view of lawyer ethics and morality (we shall turn to this distinction shortly). But if my outline is at all persuasive, then this essay will have contributed to the redemption of lawyer professionalism. For it turns out that those who think professional salvation lies in ethics are right. The authority and ends of the legal community are indeed best articulated in answering the two questions with which legal 'ethics' concerns itself—whom must lawyers *be?* and what must lawyers *do*?

2. Requirements

An adequate view of legal ethics must descend from an acceptable view of the distinctly *political good* which justifies the legal community; it must conceive of community membership as *public office*; it must support a conception of *fitness for office* which distinguishes between *character* and *conduct* and includes and supports prescriptions as regards both matters; and it must apply to the *whole of the legal community* and not just any one of its parts. Failure to satisfy any of these requirements results in a view which is without more inadequately grounded and incomplete in purview, but worse still, a view which most often distorts the goodness of lawyering and misdirects with respect to lawyer practices. Although space prevents my offering a full defence and account of these elements, I can explore each and sketch the relations between them. I shall start with the last since mistaken views of the proper subjects of legal ethics most often lead astray conceptions of lawyer obligation.

a. Inclusivity

Academic lawyers are quick to prescribe with respect to both the bench and the bar.

---

[11] See for example: A. Boon & J. Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart Pub., 1999) at 6 ("'Professional ethics' is a phrase with a multitude of possible meanings"); D. Nicolson & J. Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford: Oxford U.P., 1999) at 4 (contrasting "legal ethical" and "legal morality"); & S. Parker, "Introduction" in S. Parker & C. Sampford, eds., *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford: Clarendon P., 1995) at 1 (on the virtues of not being "prescriptive about the meaning of legal ethics").

Court decisions are routinely scrutinized and criticized, and theories of judicial reasoning and obligation are devoutly constructed by those who think scholarly duty calls for a grander view of matters. The practising bar, in turn, is analyzed and criticized as regards its structure, its membership, and its conduct and, as noted previously, exhorting its members to a finer, more fulsome commitment to law has, in the past number of years, become a veritable growth industry in the legal academy.[12] Academic lawyers, however, seldom connect their musings about the bench and bar or subject themselves to the legal criticism they offer so eagerly to others or associate their own undertakings with those of the bar and the bench.[13] For its part, when it is not occasionally (and properly) criticizing the legal academy,[14] the bar sticks to the business of regulating the conduct of practising lawyers through various codes. Seldom does the bar have anything to say about the wider concerns of the law or the legal community and never, so far as I am aware, has it evinced any understanding of the connections between the legal academy, the bench, and itself. The bench appears to think itself both separate and superior to the academy and the bar and, in Canada at least, it bristles at any hint of criticism.[15]

Legal 'ethics' must proceed from the understanding that its object, at the most fundamental of levels, is the legal community as a whole. Otherwise, not only will many essential matters—and especially, the matter of obligations of bar, bench and

---

[12] The leading efforts are those by Glendon, Kronman, and Linowitz *supra* note 1.

[13] The literature which does exist tends to take the form of fuzzy exhortations which lack the bite and measure of mature self-knowledge and criticism. See for instance: J.L. Sammons, "Professing: Some Thoughts on Professionalism and Classroom Teaching" (1990) 3 Geo. J. Legal Ethics 609; M.L. Swygert, "Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence of Law Teaching" (1989) 30 Boston Coll. L. Rev. 803; & W.E. Oberer, "On Law, Lawyering, and Law Professing: *The Golden Sand*" (1989) 39 J. Legal Education 203. For examples of mature reflection on the place and obligations of academic lawyers, see: P. Carrington, "Of Law and the River" (1984) 34 J. Legal Education 222 and "Butterfly Effects: The Possibilities of Law Teaching in a Democracy" (1992) 41 Duke L. J. 741; & D.A. Barnhizer, "Prophets, Priests and Power Blockers: Three fundamental Roles of Judges and Legal Scholars in America" (1988) 50 U. Pittsburg L. Rev. 127.

The Association of American Law Schools' 'Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities' is perhaps the apotheosis of the legal academy's self-serving urge to reduce ethics to inspiration: see, S. Gillers & R.D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards*, 1994 ed. (Boston: Little Brown, 1994) at 565-571. Even when academic lawyers seek to be more precise as regards their professional obligations, typically they produce prescriptions, and sometimes even codes, which remarkably fail to account, in any at all adequate way, for either the institutional *raison d'etre* of the *professional* law school or its place in the wider legal community. See for example: W.R. Huhn, "A Proposed Code of Ethics for Law Educators" (1988) 6 J. L. & Religion 25; & R.B. McKay, "Ethical Standards for Law Teachers" (1971) 25 Ark. L. Rev. 44. Nor is any of this new: see, for example, J.B. Ames, "The Vocation of the Law Professor" in J.B. Ames, *Lectures on Legal History* (Cambridge, MA: Harvard U.P., 1913) 354. Nor is the academic branch alone in any of this as the Canadian Judicial Council's anodyne Ethical Principles for Judges unhappily proves: see, Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998).

[14] See for instance: the articles by Kessler and Edwards *supra* note 1; & T.P. Terrell, "A Tour of Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students" (1994) 34 Washburn L. J. 1.

[15] For an account of recent expressions of this attitude, see: F.C. DeCoste, "Introduction" to "Special Issue on Judicial Appointments" (2000) 38 Alta. L. Rev. 607-15.

academy to one another—remain illusive, but also the need for a grounding justification for a distinctively legal ethic will either be overlooked or else impossible to satisfy. The legal community, of course, consists of a judicial branch devoted to adjudication, a practising branch devoted to client advice and advocacy, and an academic branch devoted to professional preparation and criticism.[16]

b. Justifying Good

Practising lawyers take it somehow for granted that they belong to a self-governing profession; and judges take it for granted that they are somehow properly independent from other parts of the state which appoints and pays them. For their part, academic lawyers have, especially in recent years,[17] become totally confused about their proper place: do they owe their authority (and independence) to their position in the university or to their membership in the community of lawyers?[18] Both judicial and lawyer complacence and academic confusion point to the matter which concerns us.

Professionals are those who profess "fidelity to a particular good."[19] This good justifies and grounds a profession's institutional existence; and the "solemn covenants" which professionals have necessarily to undertake regarding their good are the source, first, of those ethical commitments which define the professional's very intimate convictions and, only then and derivately, of the complex of moral responsibilities and obligations which constitute the professional's role.[20]

It is the good of law which grounds the existence of the legal community as a whole and each of its branches and which is the source of those standards of character and conduct to which we will come. Now, though I cannot here offer a

---

[16] I take the felicitous term 'branch' from Dean Wright. See: C.A. Wright, "Law and the Law Schools" (1938) 16 Can. Bar Rev. 579 ("the teaching branch of the legal profession"). I will resist the temptation of speculating on how Dean Wright's sure appreciation of the proper place of the professional law school could have become so lost in the intervening years. Nor incidentally is the term 'academic lawyer' mine: see, for example, W.L. Twining, "Goodbye to Lewis Eliot: The Academic Lawyer as Scholar" (1980) 15 J. Society Public Law Teachers 396.

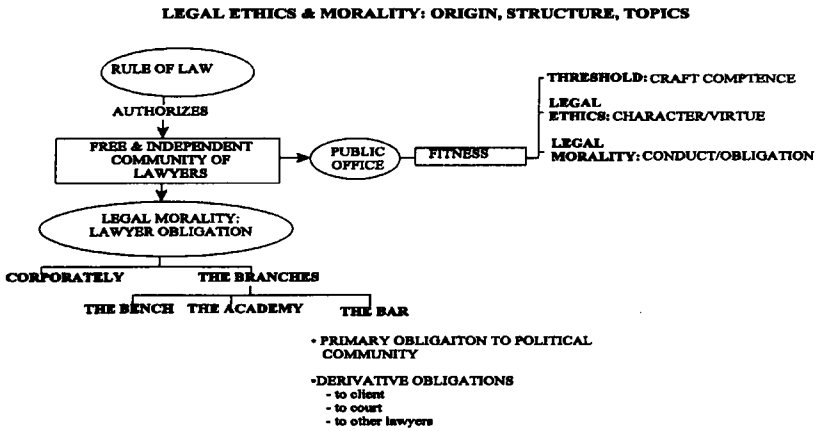
[17] Wright, *ibid.* But see: J.S. Auerbach, "Enmity and Amity: Law Teachers and Practitioners, 1900-1922" in D. Fleming & B. Bailyn, eds., *Law in American History* (Boston: Little Brown, 1971) 551.

[18] About which see: C.W. Brooks & M. Lobban, "Apprenticeship or Academy? The Idea of a Law University, 1830-1860" in J.A. Bush & A. Wiifels, eds., *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900* (London: Hambledon P., 1999) 353; P. Carrington, "The Revolutionary Idea of University Legal Education" (1990) 31 Wm. & Mary L. Rev. 527; & P. Leighton, *et al, Today's Law Teachers: Lawyers or Academics?* (London: Cavendish, 1995).

[19] D. Koehn, *The Ground of Professional Ethics* (London: Routledge, 1994) at 178. For just this reason, Deborah Rhode properly insists on reminding lawyers that "the term 'profession' has its origins in the Latin root 'to profess' and in the European tradition of requiring members to declare their commitment to shared ideals": see, *supra* note 9 at 325. See also: A.H. Goldman, *The Moral Foundations of Professional Ethics* (Totowa, NJ: Rowman & Littlefield, 1980); S.F. Barker, "What is a Profession?" (1992) 1(1/2) Professional Ethics 73; and R. Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul, MN: West, 1953) at 4-10.

[20] Koehn, *ibid.* at 174.

full defence,[21] I want to propose that the justifying good of the legal community—bar, bench, and academy alike—is the Rule of Law. It is the Rule of Law which authorizes the existence and practices of the legal community, which calls on our commitments, and which structures and defines our obligations. This may be illustrated as follows:



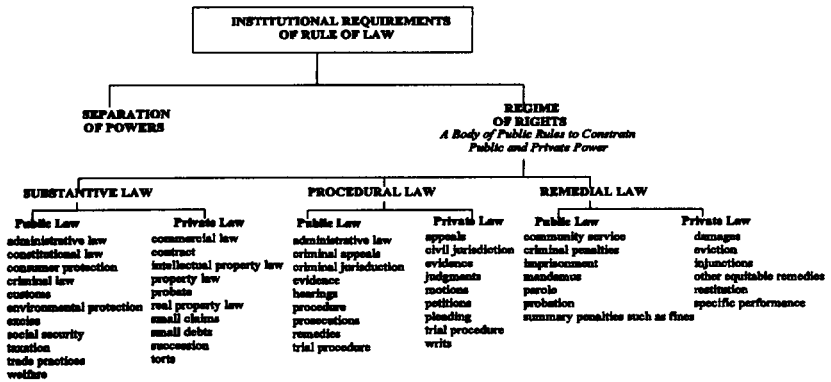
Nor can I here do anything more than summarily define the Rule of Law.[22] The Rule of Law is the core of the political morality of political communities, such as ours, which are devoted to, and founded upon, treating their members with equal care and respect just because they are considered by such communities to be morally equal. That political morality consists of the *institutional practice of constraining power of, and through, the state.*

The Rule of Law alone explains both the institutional origin and independence of the legal community and the nature of its discourse because both are requirements of the Rule of Law. Perhaps another illustration will help:

---

[21] I offer a book-length account in *On Coming to Law* (Toronto: Butterworths, 2001) (forthcoming).

[22] But see *ibid.* chp. 7.



That is, the character and existence of the legal community in all of its parts and the nature of its practices and discourse are each an institutional creation and requirement of the Rule of Law: the separation of powers requires a free and independent community of lawyers and the regime of rights which it also requires authorizes that community to discuss, contest and, finally, to determine the rights of which individuals in societies such as ours are seized, rights as against one another (private law rights) and against political community itself (public law rights).

This proposal has experiential purchase because it explains the independence which lawyers and judges feel is properly theirs and perhaps as well because it both justifies the practices of academic lawyers and gives context to the confusion which nonetheless infects much of legal education. More crucial for present purposes, however, are its implications for professional ethics and responsibility.

c. Public Office

Political moralities concern, and only concern, the institutions of political community and the nature of the offices and practices defined by those institutions and their limitations. In liberal democratic states, the political morality of the Rule of Law creates two institutions for the political life of community, the *political* and the *legal*. The political institution of the liberal state consists of two offices, the *legislative* (rule-making) and the *executive* (law execution and enforcement). The legal institution resides in three different, though intimately related, offices, the *judicial*, the *practising*, and the *academic*.

Now, of course, this view of matters makes everything turn on the nature of 'office.' Justice Robert Jackson of the U.S. Supreme Court once defended his Court's authority in the following terms: "[W]e act in these matters not by authority of our

competence but by force of our commissions."[23] In this, he was invoking the authority of his office. All true professions, including law, create offices. An office is a position of trust and a warrant of authority under constituted authority which has as its purpose *service to others*.[24] The meter of office does not reside in, though it may involve, knowledge or proficiency or expertise. It resides rather in the office holder's fidelity to the trust of which it is composed and to the service which it demands. All offices are public in the sense that they are defined by a concern with others and not by self interest. But not all offices are public in the sense that they concern the affairs of others in political community. The office of lawyer generally, and the offices of the judge, practitioner, and academic lawyer particularly, are public in that special sense, while the offices of doctors and clerics are not. The lawyer, whatever his or her place in the legal community, is society's agent for the protection and transmission of the political culture of equality and liberty.

Lawyerly office does, however, share much with other, private offices. That offices may not be reduced to some function associated with expertise means that holding an office is a *privilege*, and not a right, which must depend on qualifications of some other sort. Justice Cardozo's famous declaration that being a lawyer is "a privilege burdened with conditions" makes sense just because this is so.[25] Those conditions contemplate a *notion of fitness*, that is, the notion that the conferral and continuance of an office properly depends upon a supplicant's *character* and *conduct*. The authority of the legal community is contingent upon its members, individually and corporately, displaying the traits of character and forms of conduct which the Rule of Law requires of them as holders of public office, as servants to others in political community.

d. Fitness

Neither space nor purpose allows me to offer a detailed account of the obligations of service of each of the branches of the legal community. I can however provide an overview of the moral and ethical demands which attach to, and together comprise, the office of lawyer as such.[26]

What follows proceeds from two premises, namely, that the Rule of Law is the animating principle of the lawyer's office, and that the Rule of Law places both moral and ethical demands on lawyers. The second premise relies on a distinction between ethics and morality about which we must be clear. A great many law schools offer courses in legal ethics, and virtually every law society now has a code of ethics. But, according to the view taken here, those courses and codes are misnamed because their concern most often is morality and not ethics. Ethics has to do with character; it asks and attempts to answer a question which each of us at

---

[23] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 at 640 (1943).

[24] See: M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983) chp. 5 ("Office").

[25] *Matter of Rouss*, 221 N.Y. 81 at 84 (1917).

[26] I offer an account of the obligations of each of the branches in Chapter 9 of *On Coming to Law*, *supra* note 21.

some point or another asks ourselves, 'What kind of person should I *be*?' Morality, on the other hand, has to do with conduct; it asks and attempts to answer a question quite different from the first, namely, 'What in any given circumstance (or even overall) should I *do*?'[27]

Now, offices raise both questions. This should not surprise since offices by their very nature concern fitness and fitness requires of office holders, not only that they act in certain ways, but also that they exhibit certain inclinations with respect to their office. Indeed, it is not too much to say that, as regards offices at least, morality and ethics, conduct and character, are interdependent. Offices presume that officers will act as their offices require them to act because they are persons of the sort who wish to act that way. Take for instance the office of priest or rabbi: priests and rabbis are presumed to want to act in priestly and rabbinic ways because, in some important sense, they *are* priests and rabbis. Certainly, no office, including lawyerly office, can proceed on the view that character does not count or that absence of moral transgression is alone enough. To conceive of matters in either fashion would reduce office to empty observance which would sap its animating concern of service to others.

---

[27] This distinction cannot be defended here. Any such defence would, however, have to proceed from a more precise rendering of the distinction along the following lines. Morals are rules or standards for conduct which, in their widest sense, instruct us by calibrating the proper limits of our autonomy from others. Ethics, on the other hand, is about the nature and formation of character necessary for the moral acknowledgment of others. In consequence, while morality is concerned with what we should do, the concern of ethics is what, indeed whom, we should be; and while the meter of moral criticism is the rightness or wrongness of actions, the meter of ethics is the authenticity or inauthenticity of persons.

In my view, this distinction provides the only source for the clarity and direction for the much needed project of reconstructing the theory and practice of professional responsibility in law. And indeed legal scholarship which aims to contribute to that project is very often structured in terms of the distinction. See for example: M.H. Aultman, "Moral Character and Professional Regulation" (1994) 8 Geo. J. Legal Ethics 103; R.O. Brooks, "Ethical Legal Identity and Professional Responsibility" (1990) 4 Geo. J. Legal Ethics 317; T.D. Eisele, "Must Virtue Be Taught?" (1987) 37 J. Legal Education 495; A. Gutmann, "Can Virtue Be Taught To Lawyers?" (1993) 45 Stan. L. Rev. 1759; A.T. Kronman, "Practical Wisdom and Professional Character" in J. Coleman & E.F. Paul, eds., *Philosophy and Law* (Oxford: Basil & Blackwell, 1987) 203, "Living in the Law" (1987) 54 U. Chi. L. Rev. 835, & "The Fault in Legal Ethics" (1996) 100 Dick. L. Rev. 489; S.G. Kupfer, "Authentic Legal Practices" (1996) 10 Geo. J. Legal Ethics 33; C.F. Mooney, "Law: A Vocation to Justice and Love" in F.A. Eigo, ed., *The Professions in Ethical Context* (Philadelphia: Villanova U.P., 1986) 59; R.G. Pearce, "Rediscovering the Republican Origins of the Legal Ethics Codes" (1992) 6 Geo. J. Legal Ethics 241; T.L. Shaffer, *Faith and the Professions, supra* note 5 esp. at 113-72; D.L. Rhode, "Moral Character as a Professional Credential" (1985) 94 Yale L. J. 491; R.L. Simmonds, "Legal Education of Future Professionals in a University" (1991) 9 J. Professional Legal Education 37; & R. Wasserstrom, "Legal Education and the Good Lawyer" (1984) 34 J. Legal Education 155.

For philosophical accounts of the distinction, see: M. Cooke, "Authenticity and Autonomy: Taylor, Habermas, and the Politics of Recognition" (1997) 25 Political Theory 258; & J. Habermas, "Morality and Ethical Life" (1988) 83 Nw. U. L. Rev. 38. For discussions of the importance of the distinction in other contexts, see: A.J. Dawson, "Professional Codes of Practice and Ethical Conduct" (1994) 11(2) J. Applied Philosophy 145; & J. Morse, "The Missing Link between Virtue Theory and Business Ethics" (1999) 16(1) J. Applied Ethics 47.

e. Requirements of Office

To the nuts and bolts then: What character and conduct are required of lawyers by virtue alone of their status as lawyers and independently from their location in the judicial, academic, or practising branches? In my view, which again I may here only sketch, a proper view of professional responsibility would offer a three part reply to this question.

i. Threshold: Craft Competence

I have been suggesting that lawyerly office depends upon fitness and that fitness at law cannot be reduced to legal expertise or knowledge. But law is very much a craft and, if it means anything, being a lawyer means being competent in law's craft.[28] These two understanding are not at odds. Craft competence, rather, is a threshold condition: whatever else is required of lawyers morally and ethically, those things are required of them because they are lawyers first. Charles Fried once put this rather wonderfully: "So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple, The Law."[29] Which is to say, a person is a lawyer at all because he or she is competent in those things which lawyers do, and what lawyers do is practice their craft. In consequence, "no lawyer can fulfil his or her vocation without first achieving a high degree of [craft] competence."[30]

ii. Character

The legal community is an interpretive community which, like other communities of that kind, is defined by its canon and by the conviction of its members that its canon and its interpretive practices are worthwhile. That the legal community is in this sense a community of conviction makes of it as well *a community of character.*

No less than the interpretive communities devoted to Shakespeare and to the bible, lawyers too must believe that their texts and their community's traditions with respect to those texts are somehow fundamentally important. All interpretive communities, law included, for this reason require of their members an act of faith as regards the value of the community's ongoing enterprise. But faith is never blind. One commits oneself to an interpretive enterprise because one understands and appreciates its point. The point of the legal enterprise is the Rule of Law. Lawyers read and interpret and apply legal texts in order to serve the rights of individuals, to

---

[28] I offer a full account of lawyer craft in Chapter 4 of *On Coming to Law*, *supra* note 21. There I argue that, regardless of their place in the legal community, lawyers as such share a distinctly legal craft, which I term the habits of legality, composed of traditions of argument and interpretation and of sense and sensibility. Of course, each of the branches has its own distinct craft traditions, but those more specialized crafts depend upon the more basic craft of lawyering as such. That is, the crafts associated with client counseling and advocacy, with adjudication, and with legal scholarship and teaching presume and require threshold lawyer competence.

[29] C. Fried, "The Artificial Reason of the Law or: What Lawyers Know" (1981) 60 Tex. L. Rev. 35 at 57.

[30] Mooney, *supra* note 27 at 83.

save them safe from arbitrary and hurtful power. To commit oneself to law's enterprise means therefore committing oneself to *the priority of justice over power.*

That law constrains power through the institutionalized practices of the legal community, that those practices oppose and subvert power, means that lawyers, who to avoid bad faith must commit themselves to their offices, must be persons of a certain sort. Simply, they must be persons for whom the law's pledge of saving lives safe from illegitimate power is central to their self-understanding and motivation. They must be lawyers to their very roots, lawyers for whom law is a vocation which guides and informs the whole of their lives. Lawyers of this authentic kind are seized of what has been aptly described a 'protestant' character.[31] They are persons, that is, for whom the way of power in the world is, without more, a matter of much moral moment and of abiding political suspicion. Agnostic of power's right, the lawyer is "the man of justice, the man of law, he who opposes to power, despotism, the abuses and arrogance of wealth, the universality of justice and the equity of an ideal law."[32] *The habits of legality depend finally then upon certain habits of the heart.*

It is those habits of character—born surely of habituated empathy and care for others[33]—which alone permit lawyers to make good their primary obligation of serving as the faithful and partisan stewards of the Rule of Law. But doing so is yet a complicated affair not least because the Rule of Law, and therefore the legal community, is at once a creature of, and a containment to, political community. "It stands in the dual relationship of suspicion towards and dependency upon [political authority]."[34]

If law is in this sense a habit of the heart, of character and not just of conduct, how and when are those habits nurtured? It falls to each of the branches, and to the academic branch especially, to nurture lawyerly character. Quite independently from those corporate practices, it falls to lawyers individually to attend to their ethical growth and maturation. Now, lawyers do this in ways no different from clerics. They read office. This lawyers do by reading the law, not just the texts which in their tradition carry and express the rules of law, but those other texts which articulate the point and requirements of their tradition overall. Included in the latter are legal biographies which recount lives well and fully spent at the law. No less than do clerics, lawyers require exemplars of living the law. Sometimes, happily, exemplars are available in person; but always they are available in legal

---

[31] R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard U.P., 1986) at 190, 252, & 413.

[32] M. Foucault, *Power, Truth, Strategy* eds. M. Morris & P. Patton (Sydney: Feral Publications, 1979) at 43 quoted in C. Douzinas & R. Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law* (Hertfordshire: Harvester Wheatsheaf, 1994) at 15. Foucault's use of the masculine arises from historical context: he was describing the traits of character of "the great civil lawyers of the eighteenth century" who were all men.

[33] Judith Shklar puts this well: "To have no idea of what it means to be treated unjustly is to have no moral knowledge, no moral life." See: J. Shklar, "Giving Injustice Its Due" (1989) 98 Yale L. J. 1135.

[34] F.A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (New York: Oxford U.P., 1996) at 6.

history.

iii. Conduct

To be a lawyer is to be subject to one obligation above and before all others: *judges and academic and practising lawyers are obliged to act as the good faith stewards of the Rule of Law.* All other obligations which attach to lawyers in any of these practices depend upon, and devolve from, this primary obligation. This holds as well, I should stress, for practising lawyers. Yet, it is oftentimes said that the fundamental obligation of private lawyers is to their clients. Indeed, no less an authority than Lord Brougham declared:

> An advocate, by the scared duty which he owes to his client, knows in the discharge of that office but one person in the whole world, that client and no other. To save that client by all expedient means, to protect that client at all hazards and costs, to others, and among others to himself, is the highest and most unquestioned of his duties....[35]

But, though there is much wisdom here, as an overall description of the obligations of private lawyers, this will not do. Firstly, it leaves unattended the obligations of other lawyers, those judges and academic lawyers, who no less than the private practitioner, are members of law's community and officers of its good. Secondly, even as regards private lawyers, it leaves groundless the obligation which it imposes. Why after all is the lawyer's duty to the client scared and primary? To be at all acceptable, views of lawyer morality must identify and defend the grounds from which they proceed. And were we here to make the inquiry, we would discover that the duty which private lawyers owe their clients is indeed grounded on the duty which they owe the public. Thirdly, though it implies further duties, this view would face insurmountable difficulties in identifying, categorizing, and defending those duties. But enough said about that matter.

That lawyers are obliged first to act as the good faith stewards of the Rule of Law is no bromide. Just the contrary, it imposes exact, and exacting, duties. It requires first that lawyers understand and commit themselves to the law. One can faithfully discharge any office, public or private, only if one adopts an *internal point of view* with respect to it.[36] For instance, faithful discharge of a clerical office depends upon priests and rabbis viewing their office as something which is good in itself and not as something which is an instrument for some good external to the office. Were a priest or rabbi to take the latter point of view, say by viewing their office as the best career option in terms of work load, compensation, and prestige otherwise available to them, then members of their congregations would be right to

---

[35] 2 *Trial of Queen Caroline* 8 (J. Nightingale ed., 1821).

[36] About which see: R. Barnett, "The Internal and External Analysis of Concepts" (1990) 11 Cardozo L. Rev. 525; Bickenbach *supra* note 3; D.E. Litowitz, "Internal versus External Perspectives on Law" (1998) 26 Fla. St. U. L. Rev. 127; G.J. Postema, "The Normativity of Law" in R. Gavison, ed., *Issues in Contemporary Legal Philosophy* (Oxford: Oxford U.P., 1987) 81; B.Z. Tamanaha, "The Internal/External Distinction and the Notion of a 'Practice' in Legal Theory and Sociolegal Studies" (1996) 30 L. & Soc. Rev. 163; & J. Raz, "The Problem About the Nature of Law" in J. Raz, *Ethics in the Public Domain* (Oxford: Clarendon P., 1994) 179.

charge them with bad faith and inauthenticity. Likewise lawyers: on the pain otherwise of bad faith, they too must view their office as a practice which is a good and an end in itself.

But there is more here. To profess the law in this way requires lawyers to commit themselves to serving others. Karl Llewellyn once described law as "a service institution: in service lies its soul -service for client or cause or class, or for some dream which embraces all classes and even a world."[37] So viewed, the ideal of law which lawyers profess requires of them *confession to others*, to their needs, to their rights. Service to others resides at the very heart of the Rule of Law, and this service raises another fundamentally important obligation.

The Rule of Law requires that laws be accessible in open, clear, and published rules. But "the accessibility of law ... must mean more than publication of statutes and judicial opinions and their availability in law libraries."[38] It requires as well, indeed especially, that lawyers be accessible and available to others. This is the one matter of distributive justice which falls properly to the legal community. This is so because the Rule of Law commands lawyers—judges and academic and private lawyers once again alike—to serve others, fairly and without distinction, and for the other's sake.

3. Prognosis

In this brief essay, I have attempted to outline what I consider to be a proper general theory of lawyer professional responsibility. I have argued that such a theory must arise from and express an acceptable view of political morality; that it must account for the whole of the legal community and that the responsibilities which it would impose on judges and academic and practising lawyers must devolve from an articulated view of the prior and primary obligations which attach to the office of lawyer as such; and that it must draw and account for the distinction between character and conduct, ethics and morality. I also have claimed that the outline proffered here, were it fully fleshed and accomplished, would contribute to the political redemption of the law and the moral and ethical redemption of lawyers. By way of conclusion, I want to reflect briefly on this claim.

Deborah Rhode argues that "it makes sense to view professionalism not as a fixed ideal, but rather as an ongoing struggle."[39] She is very wise in this. Professionalism resides not in some declaration of aspiration, and still less in some hoped-for epiphany, but rather in the prosaic day-to-day decisions which are the stuff and measure of professional life. I referred earlier to Berman's devastating diagnosis of the state of our law.[40] According to Berman, the crisis of faith in law

---

[37] K.N. Llewellyn, "The Study of Law as a Liberal Art" in K.N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: U. Chicago P., 1962) 375 at 391.

[38] Allen, *supra* note 34 at 17.

[39] D.L. Rhode, "The Professionalism Problem" (1998) 39 Wm. & Mary L. Rev. 283 at 325.

[40] *Supra* note 4.

is now so deep that recuperation is impossible. And if this is so, candour requires of us that we consign our hope to a distant future and that we admit that, for the present, ours is indeed a "jurisprudence of despair."[41]

But Berman is too hasty. There remains in our law, in law offices, in judges chambers, and in the law schools, pockets of devotion. Indeed, in recent years, these pockets have been growing. More and more lawyers are searching for purpose and, in so doing, they have been resurrecting standards of professional conduct and practice. A reconstruction of legal tradition of course cannot solve, all at once, every stubborn problem which faces the legal community. But reconstruction can embolden lawyers to search to reaffirm their faith in the law. Nor can habits of the heart alone rekindle the habits of mind and practice on which our law has forever depended. Those habits of faith can however "provide a basis for hope that ... lawyers will be moved to encompass reinvigoration of the habits of legality within the urgent obligations of professional responsibility."[42]

If our legal tradition for these reasons has not reached Berman's dead end, it has for those same reasons surely reached a "moment of truth."[43] Lawyers have now either to reclaim the goodness of their traditions or to acknowledge that the way of law is ruin. And it is in the context of this decision, with which the present generation of lawyers, individually and corporately, is burdened, that a right understanding of legal ethics and morality is so fundamental.

Rhode offers us wisdom here too. "The problems facing lawyers," she claims, "involve ... personal identity."[44] This is so because the goodness which our law requires of them prevents lawyers from being mere "players of roles."[45] They must instead be "actors who merge with their parts": they must "regard the normative structure of society as *home*."[46] For lawyers, *our law's very public political morality must be personal.* It must inform the whole of their lives and form the core of their selves, their sense of self, their identity. Lawyers, to repeat, must be lawyers to their very roots. On this, and on nothing else, does the goodness of law and the authority of the profession depend.

There are no solomonic solutions to living a life of law. Lawyers rather are condemned to the insecurity of forming themselves, their identities as lawyers and, therefore, as persons, through their day-to-day practices over the wealth of their time at the law. Knowing that "by engaging in the activity of law one makes oneself into a certain kind of person" does not relieve this anxiety, though for good lawyers it

---

[41] I take this wonderful phrase from Mechem. See: P. Mechem, "The Jurisprudence of Despair" (1936-37) 21 Iowa L. Rev. 669.

[42] *Supra* note 34 at 99.

[43] S.M. Linowitz, "Moment of Truth for the Legal Profession" [1997] Wisconsin L. Rev. 1211.

[44] *Supra* note 39 at 325.

[45] R. Dahrendorf, *Law and Order* (Boulder, CO: Westview P., 1985) at 152.

[46] *Ibid.* (emphasis added).

provides the solace of direction.[47]

Whether this generation of lawyers will find itself in the law, whether lawyers will prove themselves right and good for the goodness of their office, remains of course to be seen. But the evidence of their success or failure in this is certain: professionalism will be redeemed to the extent that the experiences of *shame* and *guilt* once more become an ethical and moral possibility among lawyers.

[47] Glendon, *supra* note 1 at 240.