Legal Ethics and Human Dignity

DAVID LUBAN

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Legal Ethics and Human Dignity

David Luban is one of the world's leading scholars of legal ethics. In this collection of his most significant papers from the past twenty-five years, he ranges over such topics as the moral psychology of organizational evil, the strengths and weaknesses of the adversary system, and jurisprudence from the lawyer's point of view. His discussion combines philosophical argument, legal analysis, and many cases drawn from actual law practice, and he defends a theory of legal ethics that focuses on the lawyer's role in enhancing human dignity and human rights. In addition to an analytical introduction, the volume includes two major previously unpublished papers, including a detailed critique of the US government lawyers who produced the notorious "torture memos." It will be of interest to a wide range of readers in both philosophy and law.

David Luban is University Professor and Professor of Law and Philosophy at Georgetown University.

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for
Deborah Rhode

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Chapter 1, "The Adversary System Excuse," was the Catriona Gibbs Memorial Lecture at Queen's University Law School in Kingston, Ontario.

It appeared in my anthology *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, Rowman & Allanheld [now Rowman & Littlefield], 1984. The current version incorporates an excerpt from "Rediscovering Fuller's Legal Ethics," Georgetown Journal of Legal Ethics, vol. 11, no. 4, pp. 801–29 (1998), also in Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999), pp. 193–225.

Chapter 2, "Lawyers as Defenders of Human Dignity (When They Aren't Busy Attacking It)," was the Van Arsdell Lecture on Litigation Ethics at the University of Illinois School of Law. It appeared in University of Illinois Law Review, vol. 2005, no. 3, pp. 815–46 (2005).

Chapter 3, "Natural Law as Professional Ethics: A Reading of Fuller," Social Philosophy and Policy, vol. 18, no. 1, pp. 176–205 (2001), reprinted in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., *Natural Law and Modern Moral Philosophy* (Cambridge University Press, 2001), pp. 176–205.

Chapters 4 and 5 were written for this volume, but include brief excerpts from "Liberalism, Torture, and the Ticking Bomb," in Karen Greenberg, ed., *The Torture Debate in America* (Cambridge University Press, 2005).

Chapter 6, "Contrived Ignorance," was my inaugural lecture as Frederick J. Haas Professor of Law and Philosophy at Georgetown University Law Center. I also delivered it as the Blankenbaker Lecture at the University of Montana School of Law. It appeared in the Georgetown Law Journal, vol. 87, no. 4, pp. 957–80 (1999).

Chapter 7, "The Ethics of Wrongful Obedience," originated as the Keck Foundation Award Lecture to the Fellows of the American Bar Foundation; it was also delivered as the Condon-Faulkner Lecture at the University of Washington School of Law and in the Kennedy School lecture series at Harvard University. It appeared in Deborah L. Rhode, ed., *Ethics in Practice* (Oxford University Press, 2000), pp. 94–120.

Chapter 8, "Integrity: Its Causes and Cures," Fordham Law Review, vol. 72, no. 2, pp. 279–310 (2003). Written for a symposium on integrity in the law in honor of John D. Feerick.

Chapter 9, "A Midrash on Rabbi Shaffer and Rabbi Trollope," Notre Dame Law Review, vol. 77, no. 3 (2002), pp. 889–923. This paper was written for a *Propter Honoris Respectum* for Thomas L. Shaffer.

Contents

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