Alternative Perspectives on Lawyers and Legal Ethics

Reimagining the Profession

Edited by
Francesca Bartlett, **Reid Mortensen** and **Kieran Tranter**

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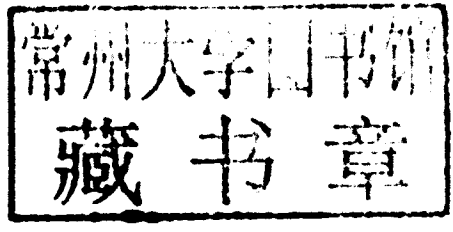
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Preface

This book, the second of three, arises out of papers delivered at the Third International Legal Ethics Conference held on the Gold Coast, Queensland, Australia in July 2008. The conference was hosted jointly by Griffith Law School at Griffith University and the TC Beirne School of Law at the University of Queensland. This conference, building on the successes of the first two in the series – in Exeter, the United Kingdom in 2004 and in Auckland, New Zealand in 2006 – was one of the largest specialist gatherings of legal ethicists in the new millennium.

For us, the privilege of working with the contributors in this book followed from the success of the conference itself. It is fitting that our expressions of thanks extend to colleagues from many countries who assisted in making the conference and this volume possible. We would first like to thank Kim Economides and Julian Webb for their foundational work in establishing the international legal ethics conference series, and for their encouragement in organizing the third conference. We would also acknowledge Tim Dare's role in organizing the second conference, which provided the platform for the third. We owe a particular debt to Brad Wendel, Christine Parker, Adrian Evans and Neil Watt for their help and enthusiasm over the two years of planning for the Gold Coast conference. Our thanks are also due to our respective Deans and others who contributed to the resources needed to run the conference: Charles Rickett and Ross Grantham from the TC Beirne School of Law and Paula Baron and Richard Johnstone from Griffith Law School; and to Teola Marsh from the University of Queensland and Linda Brauns from Griffith University. Substantial financial support for the conference was also given by the College of Law, for which we are especially grateful.

We extend our thanks to the contributors to this volume for their willingness to work with us and for their patience during the editing process. We would also like to thank Katie Carpenter and Khanam Virjee from Routledge for their support and encouragement. And a special mention must go to Griffith Law School student Stevie Martin, who not only worked tirelessly as the administrator for the conference, but also joyfully undertook the task of helping to edit the manuscripts in her final year at law school.

Finally, we wish to express our heartfelt thanks to colleagues, friends and

most importantly to our families for their faith and support over these past few years.

Francesca Bartlett, Reid Mortensen and Kieran Tranter
November 2009

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1 Introduction

Francesca Bartlett, Reid Mortensen and Kieran Tranter

The contributions to this volume are both united by a common, underlying perspective on legal ethics and the legal profession and, somewhat paradoxically, different in the alternative approaches they have taken when adopting it. This perspective is that the established modus through which legal ethics and its professional context have been comprehended is limited and limiting. This reveals two strains that tie the contributors together. The first is the identification of a familiar pattern – of an orthodoxy and its critical reaction. The second concerns the location of this critique in method.

Legal ethics, as a discipline, is a twinned project.[1] One branch of it concerns the law of lawyering – that is, the positive law that formally governs legal practice. As a scholarly enterprise concerned with the law of lawyering, legal ethics has regularly been criticized as methodologically conservative.[2] The instruments through which the law of lawyering has traditionally been examined are predominantly taken from the positivist toolbox. The questions have been concerned, *inter alia*, with what law exists, its clarity and its jurisdictional diversity. The evaluative concerns tended to remain modest, and in general the focus has been on how reform to the law has impacted on existing legal practice. However, parallel to this doctrinal emphasis has been a normative task of constructing moral arguments about the role of the lawyer, particularly concerning the ethics and politics of role morality. For this branch of legal ethics, a different set of intellectual resources has been evident. For the normative task, positivist description has been displaced by moral philosophy. The scholarship that occupies this branch of legal ethics is characterized by an ethical lexicon, reasoned argument and 'proofs' via abstract hypotheticals.

We reaffirm, and have reaffirmed,[3] the importance and efficacy of these established methods of legal ethics. The law of lawyering needs to be known according to traditional measures. Old laws need to be assessed in new contexts, and new laws need to be assessed in old ones. Further, the clarity of moral dissection has been – and continues to be – important to shock a powerful, and often complacent, profession into self-reflection concerning its responsibility to individuals and the body politic. At least one of the contributors to this volume – Elizabeth Gachenga (Chapter 7) – implicitly presents a strong view of the importance of philosophy for resolving questions of legal ethics that other approaches have not

resolved. However, as David Luban notes in his reflection on Max Weber's 'Science as vocation',[4] in the context of legal scholarship, 'legal scholars ... are comfortable' and a deep, dedicated commitment to knowledge 'does not come naturally to people who are comfortable'.[5] There is much of value in scholarship that draws upon the established methods of legal ethics; both the law and lawyering have been, and can be, changed through such scholarship. However, at one level it is a comfortable space. Its perimeters and methods are known and well practised. As Luban's remembering of Weber reminds us, the search for knowledge, for ideas, requires the seeker to go beyond the comfortable: 'a kind of astringent designed to extinguish the ego in the name of knowledge'.[6] For Weber, being a scholar was a vocation to a particularly modern form of asceticism.

The body of research that has grown around understanding the legal professional is not a comfortable space, at least for lawyers. For common lawyers, the archaic self-representation lay within myths of community, unwritten law and artificial reason.[7] Lawyering was a calling to a pre-modern asceticism that mingled symbol, place and law, and now only lies as a faint shadow in some of the architecture and language of legal institutions.[8] As Weber has so keenly observed, in modernity, law moved from the charismatic to the rational, from the informal to the formal.[9] With modernity's emptying of the symbolic realm, lawyers pieced together an impoverished self-representation; to be a lawyer was to be a technician for the law machine.[10] In many respects, the absence of a truly lived self-representation has opened the study of the legal profession up to another of Weber's legacies: the social sciences.[11] As a consequence, the practice of law has come to be understood not just as a technical process of rule application and role performance, but as a complex and contestable social, cultural and economic activity, concerned with power, status, gender, language and exchange.[12] Whereas legal ethics expresses a stable bifurcation – which on the methodological level breaks down to positivism concerning the law of lawyering and moral philosophy concerning the normative task – studies into the legal profession have become subject to the full gamut of contemporary social scientific research methods.

However, the impact on legal ethics of both such findings and the methods of this scholarship has been minimal.[13] Legal ethics remains a field mainly concerned with rule application and role performance, even in the face of ever-growing research that has endeavoured to make sense of lawyering as a social, political and economic activity. This leads to the rationale for this volume: to bring together alternative ways of thinking about legal ethics and the legal profession; about who comprises it, where it operates and how.

For this reason, it is tempting to locate this volume under the label 'interdisciplinarity' or 'interdisciplinary legal scholarship'. Indeed, in a recent article, Carrie Menkel-Meadow has traced the increasing embrace of 'context' by legal theory through the twentieth century, and explored the impact this has had on legal education.[14] Her stated purpose was to 'realize the potential of true interdisciplinary study'.[15] There is a similarity between Menkel-Meadow's appreciation of the insertion of context into the theory of law by the realists, law and economics, law and society, critical legal studies, feminist legal studies, virtue ethics, ethical

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relativism and law and cultural studies, and the scope of this volume. Each contribution in this volume can be seen as drawing foundational concepts and methods from a discipline beyond the legal ethics orthodoxy; there are chapters drawing on law and culture, feminism and empirical legal studies, as well as chapters that challenge the orthodox conception behind the role morality of a lawyer in private practice. We remain agnostic when it comes to the term 'interdisciplinary', with its overtures of 'post-modernity'[16] and 'crumbling of disciplinary fences'.[17] Instead, each of the chapters is located in a recognized discipline. The unity across the contributions is not a performative commitment to an abstract and possibly empty ideal of interdisciplinarity, but a more basic manifestation of the type of scholarship about which Luban was writing. The contributions are not comfortable. Each, in its own way, stretches understanding about legal ethics and the legal profession. Each challenges some of the orthodox conceptions that ground legal ethics scholarship. As such, they are not comfortable reading – for lawyers or legal ethicists. For example, Michelle Sharpe – who, in Chapter 12, discusses an empirical study that reports on the predominance of mental ill-health in the legal profession – directly challenges a foundational representation common to legal ethics and in the ego-ideal of most lawyers: that to be a lawyer is to be a rational decider confidently engaging with the world. Another example is Paula Baron (Chapter 4) who, writing with reference to psychoanalytical theory, questions the desire for the father in the idealization of *To Kill a Mocking Bird*'s Atticus Finch, and offers a subversive alternative in *Boston Legal*'s Denny Crane.

An alternative perspective, and alternative perspectives, on legal ethics and the legal profession mean not being comfortable. In going beyond the orthodox methods of legal ethics, the contributors to this volume are continuing in a spirit of intellectual endeavour championed by Weber. They seek and report ways to know beyond the pragmatics of mainstream scholarship. The primal registry is that of knowledge. But in seeking knowledge they do legal ethics – as a practical task of thinking about, regulating and challenging lawyering – a significant service. In making legal ethics uncomfortable, they challenge it to know and do better.

1.1 Challenging legal ethics

In Chapter 2, Judith Maute undertakes a detailed comparative examination of the changes to the regulation of the legal profession. She notes that the reforms in the eastern states of Australia that led to the establishment of government agencies charged with the regulation of lawyer conduct effectively displaced professional self-regulation and were mirrored by recent reforms in the United Kingdom. This chapter presents two challenges to legal ethics. The first is her contextual approach. She locates the change within social pressures, in Australia and the United Kingdom, to consider lawyering as a service to customers, and as such as something that should be subject to similar consumer protection regulations as other service industries. In this chapter, the law of lawyering is considered in its political and cultural context, and Maute particularly emphasizes how cultural factors in Australia and the UK influenced the reforms. Her second

challenge is directly to the profession in the United States. The end point of the Australian and UK reforms has been the establishment of a co-regulatory regime between the newly established 'Commissioner' and the organized profession, but with the profession playing a minor supporting role. It also has led in Australia to a movement towards a unified national regime for regulation. This is a direct challenge to the 'balkanized' United States: a challenge to state Bars to reform discipline processes and become more responsive to 'consumer concerns' – or else to risk losing self-regulation.

In Chapter 3, Vivien Holmes and Simon Rice argue for an alternative source of values to inform legal ethics. Their challenge is directly to the traditional concepts of moral philosophy that have informed the normative task in legal ethics. Holmes and Rice are not comfortable with the way in which lawyering is conceived, nor with its political impact. Beginning with the pre-eminent global challenges of the present – the global financial crisis and global warming – they argue that lawyers acting as corporate advisers or facilitating trans(even pan)-jurisdictional transactions play an essential role in the activities responsible for these crises. However, they note that the ethical expectations of, and obligations on, these lawyers remain in the realm of role morality – a theory grounded on a traditional vision of the lawyer in private practice, working in a specific jurisdiction and representing human clients. This is not the reality for corporate legal advisers, nor trans-jurisdictional transaction lawyers. Drawing upon calls for contextual ethics that have been heard in legal ethics, Holmes and Rice suggest that lawyers whose work directly relates to global challenges cannot rely upon claims of neutral partisanship to absolve them of moral responsibility. Instead, the context of interconnectedness, and the possibility that corporate actions and trans-jurisdictional transactions can have impacts of global significance, mean a responsibility for consideration, for self-reflection and for self-conscious action.

In Chapter 4, as mentioned above, Paula Baron revisits the law and culture literature that laments an increasingly negative depiction of lawyers in popular imagery, marked especially by the contrast of Atticus Finch in *To Kill a Mockingbird* and Denny Crane in *Boston Legal*. For many, this shows how, in the popular imagination, the lawyer has fallen from grace. It has also led some to call for the profession to wage something of a public relations campaign to counter the negative stereotyping. Baron, however, suggests that there is greater significance in the similarities that Finch and Crane share, and that these are drawn out by psychoanalytical theory. These similarities are manifest in the symbolic role of father: the father who symbolically 'institutes law in the social sense [and] who institutes law in the individual through the exercise of the so-called "paternal function" '. In many respects, lawyers represent that 'paternal function' for their clients, bringing together both our 'love' of the protection that law and fathers represent and our 'fear' of their power. Finch and Crane exemplify both, but Crane also represents the loss of paternal authority and the loss also of the symbolic function it serves. So, while Finch symbolizes the disciplined restraint of that authority – and even that is challenged – Denny Crane 'is obscene enjoyment', the *joisseur* who represents the undermining of symbolic authority. This is disturbing reading for men and

women – not only for what is says about lawyers but, we suggest, for its implications regarding law itself. It has important unresolved implications for women in the legal profession. Baron recalls the continuing symbolic and unconscious confusion of the paternal function and the law, and the resulting inability of popular culture to develop satisfying images of hard-working women lawyers.

In Chapter 5, Rachel Spencer examines legal ethics from the perspective of law and culture (as does Baron in part). Spencer's texts are *The Verdict* (1982) and *Regarding Henry* (1991). For Spencer, the challenge initially presented in both films is what William Simon has termed 'moral pluck'.[18] Both lawyer protagonists end the film as heroes. Frank Galvin (Paul Newman) wins his case, and Henry (Harrison Ford) leaves law practice a better man who has redeemed himself. However, as Spencer makes clear, both are heroes despite the laws of lawyering. Frank does not follow his client's wish to accept the settlement, and Henry discloses confidential documents. The films tell a problematic story concerning public representations of lawyers and ethical conduct: Frank and Henry resonate with audiences not because they are lawyers, but because they are anti-lawyers. The challenges that Spencer's chapter communicates go two ways. The first is the established challenge that law and culture reveals: that popular representations of lawyers exhibit a cultural mistrust and cynicism towards the legal profession.[19] The second challenge lies in Spencer's negation of the moral pluck hypothesis. She argues that both Frank and Henry could have achieved their outcomes without having to break the laws of lawyering – that for actual lawyers in daily practice, the films give the wrong message. It is not a choice between a stark dichotomy of lawyering or doing what is right. Spencer, at one level, affirms that the sophistication within contemporary legal ethics can allow a thoughtful and reflective practitioner to remain a lawyer and do what is right.

In Chapter 6, Lisa Webley challenges legal ethics with both empirical research methods and feminist legal theory. Webley's 'data' are the material produced by the various professional bodies in England and Wales concerning training, accreditation, best practice and professional code requirements in the family law field. She does not read these at face value. Instead, these texts are sources through which she reveals the deep conceptions of what it means to be a lawyer that is being encoded and transmitted. The practical tasks of professional legal training and compliance are not innocent, but construct categories that are gendered. Drawing upon feminist legal theory's identification of gender ideals within law and legal discourse – that there are identifiable masculine and feminine characteristics – Webley argues that the professional bodies construct various gendered images of lawyers who practise in family law. The non-specialist solicitor was identified as possessing the most masculine traits, while the United Kingdom College Family Mediator had the most feminine. This continuum of gender, traits and styles of lawyering represents a direct challenge to legal ethics. Webley reveals not that gender is an important factor in how a specific lawyer might practise law – a point discussed by Gachenga in Chapter 7 (see below) – but that representations of lawyering produced by the organized profession have a gendered commitment.

The implications of gender in the legal profession are also explored in Chapter 7 by Elizabeth Gachenga. Gachenga responds to tensions within an ethics of care and persistent questions about it. To what extent is an ethics of care distinctive of the moral reasoning of women? If it is distinctive of women, why do many women not exemplify an ethics of care, yet some men do? How is care reconciled with justice? The school of care for lawyers' ethics has been dominated by feminist perspectives, with Christian views having been the only alternative ground for an ethics of care presented. It is therefore promising that Gachenga attempts to resolve the inconclusive studies on the extent to which women lawyers bring an ethics of care to legal practice by reference to the thought of the philosopher-nun Edith Stein. Gachenga suggests that the unresolved problems of an ethics of care in the mould of Carol Gilligan's *Different Voice*[20] stem from its grounding in psychology, with the different conclusions that emerge from empirical studies being somewhat inevitable. Drawing from Stein, she then suggests that a more adequate means of dealing with these questions is found in philosophy. Stein's view of empathy as the means by which we move from ourselves and encounter others is that it is a primary way in which we possess others' experience and care for them. But it is nevertheless an act of logic. Stein also concludes that humans are a double species – woman and man – and that the complete human being is characterized by the two. Man and woman are therefore marked by ontological difference, although both have the same basic human traits. As a result, there are qualities that predominate in one sex rather than another (such as care in women), but there are also qualities that predominate in one individual rather than another. Gachenga claims that this addresses the place of gender in an ethics of care: women tend to search for a harmonious development of personal relations, but are still capable of more markedly masculine traits such as abstract analysis. This re-examination of the place of care, and of women, in the legal profession – so dependent on Stein, Aristotle and Aquinas – brings the very distinction of an ethics of care from an account of the virtues into question.[21]

In Chapter 8, Tina Dolgopol provides a rare consideration of a particular lawyering role (and its impact) in the context of international justice: the prosecutorial role in the International Criminal Court (ICC). She contends that, while the ICC has been given the mandate to pursue those crimes that 'violate the conscience of humanity as a whole', it is the specific functioning of the Office of the Prosecutor (OTP) by which this laudable goal is defined and pursued. This perspective illuminates the importance of the role and the necessity for it to be performed within a clearly defined, and publicly known, ethical framework. The OTP 'selects the situations to be investigated, the individuals to be prosecuted and determines the charges to be brought against those individuals'; providing it with a 'broad discretion' and shaping the content of international criminal justice. As such, Dolgopol asserts that, while a discretionary function is necessary, there must be public accountability for a process of ethical decision-making. She asserts that a 'morally reflective' practice that encompasses an obligation to understand the 'social context' in which decisions are made is particularly appropriate for the OTP. This

thesis is dramatically illustrated by her critique of the OTP's current approach to, or lack of consideration of,[22] 'the gender dimensions of victims' concerns'.

In Chapter 9, Rachael Field's consideration of mediator practice in Australia provides another insight into an 'alternative' lawyer role: the mediator. While many mediators in Australia do not have legal training, this emerging vocation is playing an increasingly important role in the administration of justice in this jurisdiction. Field's chapter closely examines the 'complex, nuanced and contextualized nature of mediation practice'. By this characterization, her contention is that an alternative ethical framework for practice is necessary. Her critique is an important one for mediators and ethical precepts applied to the legal profession broadly, as it disputes the logic (and reality) of a legal actor who does not influence the autonomy of the client. Field explains that the generally accepted goal, and thus *good*, to be achieved in mediation is 'is to maximize participants' decision-making'. Thus the mantra in mediation is participant 'self-determination'. It is understood that there must be a concomitant impartiality in the role of the mediator; the mediation must only 'facilitate' the process, not affect the outcome or the will of the parties. However, Field contends that this ideal is 'practically unattainable, unreal and unworkable'. Thus the theory and the practice of the professional role appear to be in conflict. She suggests that the solution is in the practice of a 'contextual ethics' to replace the rule-like standards of mediator impartiality that currently predominate.

In Chapters 10 and 11, Alice Woolley and Duncan Webb provide complementary arguments for the abolition of the character test applied in the admission of lawyers in Canada, Australia and New Zealand. Their contention is that the legal, logical and empirical arguments for such considerations regarding the fitness of a person to perform the legal role are weak, if not hollow. Thus, on a number of bases, they challenge the notion that ethics dictates a certain type of person, or personal conduct, to be necessary in order for someone to be a *good* lawyer.

Webb examines disciplinary body cases in several jurisdictions where personal misconduct has been considered decisive as to whether a person is permitted to continue in legal practice. He shows that certain conclusions about a person's character and future propensities in the practice of law are drawn from types of personal (mis)conduct. Alternatively, he notes a concern that lawyer character is bigger than the person him or herself, and a resulting apprehension that individual personal misconduct will bring the profession as a whole into disrepute. However, Webb contends that 'there is little evidence either that such lawyers harm the reputation of the wider profession, or that the profession needs such reputational protection to discharge its duties'. He also questions whether egregious conduct ought necessarily to preclude the practice of law, especially when the failings of the lawyer bear no direct relationship to the effective discharge of their duties as a lawyer.

Webb's consideration of the history, legislative framework and current application of this regulatory doctrine in Australia, New Zealand and Canada provides the background for his and Woolley's contention about a lack of basis for the standard normative justifications offered by disciplinary authorities for the

relevance of a character test. Woolley argues that the lack of a proper basis for this gatekeeping test seriously undermined the legitimacy of regulation of the legal profession. This thesis is based on what she argues is a lack of foundation for the character requirement. She provides further argument that any proper empirical basis for drawing conclusions as to future professional conduct is lacking.[23] She employs the psychological method to test how reliable these predictions can be, and finds them based on 'empirically doubtful assertions about the existence of ascertainable "moral character"'. Finally, she considers alternative bases for legitimacy of disciplinary bodies' reliance on 'moral character': economic and democratic theories of regulation. Yet again, she considers these unsatisfactory because it cannot be 'normatively justified as necessary to correct for the numerous imperfections in the market for legal services [and] ... fails to achieve the necessary standards of [democratic] legitimacy'.

In Chapter 12, Michelle Sharpe addresses the ever-mounting evidence of mental illness in the legal profession. Focusing on the problem in Victoria, but drawing on empirical evidence gathered elsewhere in Australia and the United States, she responds to consistent findings that lawyers have higher rates of depression than the general population, and that the legal profession is above the norm for professional groups. Lawyers also have high levels of 'self-medication' – trying to deal with depression or anxiety with alcohol or non-prescription drugs. As Sharpe recounts, the problem begins in law school. There are normal levels of psychiatric distress among students before they commence studies in law, but these rise rapidly and never return to normal levels. To some extent, the problem is attributed to characteristic values and personality traits that lawyers demonstrate: one study lists competitiveness and aggression, an orientation towards achievement and thinking (rather than feeling) types of personalities. It is therefore potentially a problem that both stems from values and (given other evidence) compounds lawyers' difficulties with the management of ethical problems and standards. Mental illness is a common feature of disciplinary cases. However, returning to the situation in Victoria, Sharpe refuses to leave the problem at the point of description. She suggests a comprehensive, integrated programme for dealing with mental illness in the profession. Education, counselling, health assessments and implications for the right to practise if a lawyer either avoids or ignores treatment are suggested, with the programme to be funded by levies on practising certificates. Undoubtedly this would be a controversial solution, but Sharpe maintains that it is a profession-wide problem, significantly attributable to the nature of law school and of legal practice, and that it demands a whole-of-profession response.

In summary, all of these chapters offer an alternative perspective on legal ethics and the legal profession. They present a heterogeneity of approaches to understanding both legal ethics and the legal profession. What is challenged is the comfortable orthodoxy that legal ethics concerns the positivism of the law of lawyering and moral philosophizing concerning the normative task. In the alternative view, legal ethics and legal practice can be conceived as complex and contested – concerned with the global, the image, gender, representations, context and well-being. As such, the lasting challenge to legal ethics from this volume is for

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