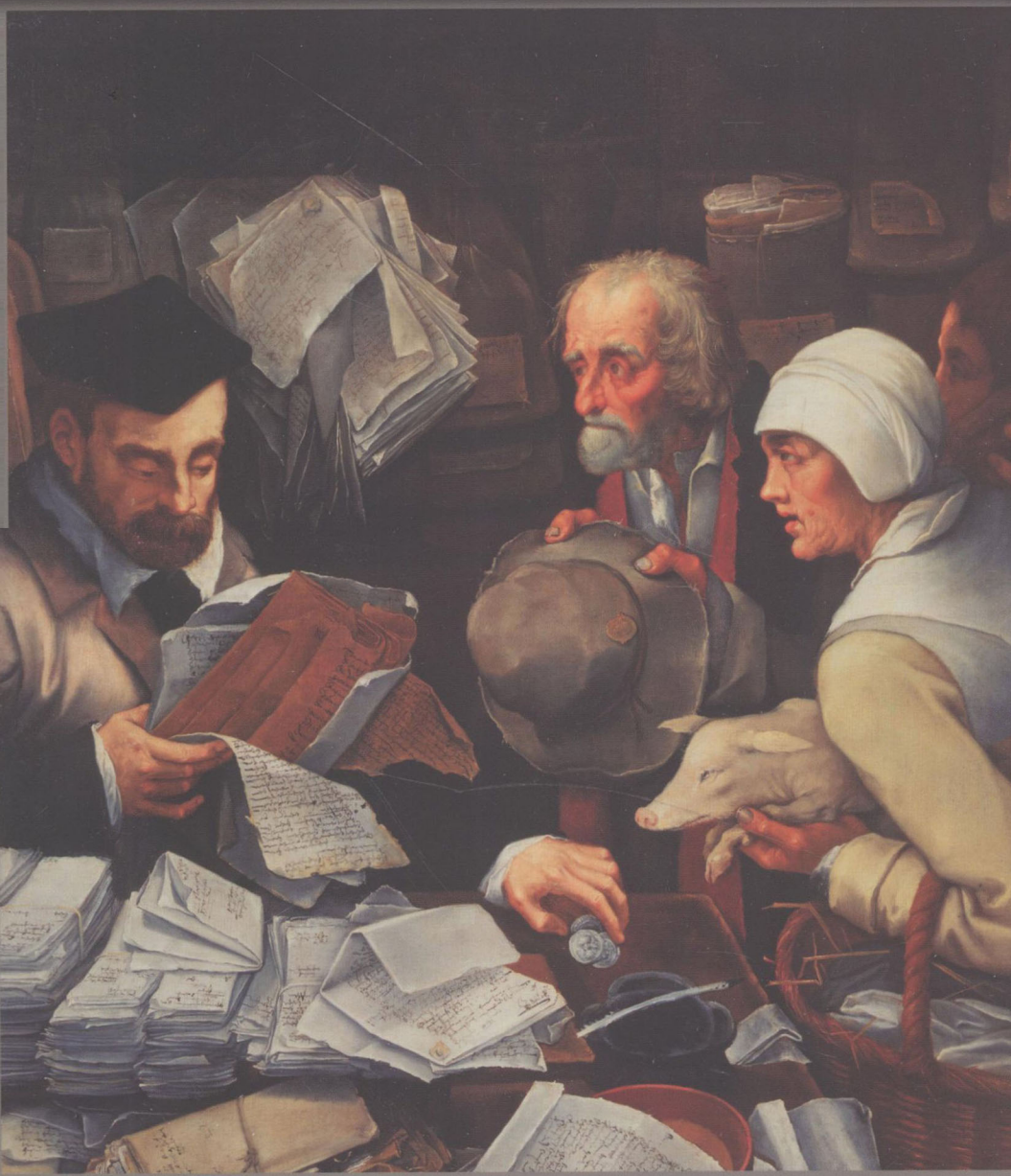
LAWYERS AND FIDELITY TO LAW



W. Bradley Wendel

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For Liz

Acknowledgments

Many of the ideas in this book can be traced back to the time spent working toward a J.S.D. degree with a concentration in legal philosophy at Columbia Law School, where I was extremely fortunate to have Kent Greenawalt, Jeremy Waldron, and Bill Sage as advisors. Their intellectual guidance and support made my time at Columbia a real watershed in my development as a scholar. Some of the arguments put forward here can be traced to my doctoral dissertation, but the main outlines of this work developed later. However, I am certain I would not have thought about these issues in the same way without their suggestions and criticism, and I am greatly indebted to the feedback they offered on drafts of my dissertation.

Early in the process of writing this book, I decided to proceed by presenting draft chapters at law school faculty work-in-progress workshops. One practical result is that much of the book ended up being written in hotels, airport departure lounges, airplane seats (thank goodness for elite frequent flier status), and visitor offices at various schools. I am substantially indebted to my family for putting up with my frequent absences as I took this project on the road. More substantively, the writing process was one that truly benefited from the existence of a community of scholars. I tried out early versions of arguments, presented half-baked ideas, and learned from the engaged criticism of specialists and nonspecialists on literally dozens of occasions. As I was working on this book, I kept a piece of sage advice taped to the wall above my computer, from Anne Lamott's wonderful book of advice for writers, *Bird by Bird*: "For me and most of the other writers I know, writing is not rapturous. In fact, the only way I can get anything written at all is to write really, really shitty first drafts." Collectively, I owe a great deal of gratitude for tolerating, and helping me improve, those drafts to the organizers of and participants in workshops at Akron, Arizona, Boston College, Cornell, Denver, Duke, Georgetown, Houston, St. John's, St. Louis, San Diego, Suffolk, Texas, Villanova, Washington and Lee, Washington University, Willamette, and at the Australian National University Research School of Social Sciences. Bits of the argument that ended up in the book were also presented as freestanding papers in workshops at Dalhousie, Nevada–Las Vegas, Queen's (Ontario), a Cornell Law School faculty retreat, the Yale Legal Theory Workshop, legal ethics conferences at the Universities of Auckland, Canterbury (New Zealand), Exeter (UK), Ford-

ham and Hofstra Law Schools, the 100th anniversary celebration of the Law Society of Alberta, and the first "legal ethics shmooze," held at Fordham Law School. I also presented an overview of the argument in the book as a keynote address at the Third Annual Legal Ethics Conference on the Gold Coast in Australia; considerable thanks are due to the organizers of that conference for their kind invitation, and to Deborah Rhode and David Luban for a vigorous public debate at the conference.

While the workshopping process as a whole was essential to the evolution of the arguments in this book, I have to single out a number of people for special thanks. These scholars made particularly valuable suggestions and clarifications, engaged in extended discussions of these ideas, pressed objections, insisted that I deal with problems, and refused to let me get away with saying silly things. Although any enumeration risks omission, I can recall particularly valuable contributions made by Greg Alexander, John Bogert, Jules Coleman, Roger Cramton, Sarah Cravens, Dave Caudill, Tim Dare, Mark Drumbl, Bob Gordon, Jim Henderson, Kate Kruse, Doug Kysar, David Luban, David McGowan, Yasutomo Morigiwa, Trevor Morrison, Donald Nicolson, Christine Parker, Gerald Postema, Jeff Rachlinski, Deborah Rhode, Tanina Rostain, Ted Schneyer, Emily Sherwin, Steve Shiffrin, Pat Shin, Bill Simon, M.B.E. Smith, Jane Stapleton, Mark Suchman, Dennis Tuchler, Duncan Webb, Chris Whelan, Jack Wilson, David Zaring, and Ben Zipursky. Special gratitude is due to Steve Pepper for detailed written comments on the legal interpretation materials and extended spirited conversations about this problem. Alice Woolley must be singled out for extra-special thanks for slogging through drafts of each chapter in near-final form, providing uncompromising but always constructive criticism, and insisting that I improve numerous arguments. Many of the attempts to answer objections raised by these colleagues became lengthy discussions here, and I am confident I would not have appreciated the importance of these issues if they had not been pressed so effectively. Of course, none of these can be held responsible for any remaining errors, which no doubt are legion.

A substantial intellectual debt, accrued starting from the very beginning of this project, is owed to my friend, former colleague, and international boondoggle companion Greg Cooper, with whom I co-taught a seminar on legal ethics at Washington and Lee for four years. It is not much of an exaggeration to say that this book would not exist if we hadn't had so much fun teaching that class, participating in the annual Legal Ethics Institute at W&L, and thinking about these issues. Many of the central ideas in this book have their origins in seminar readings and class discussions, and were refined through

hours of discussions, sometimes in preparation for class, sometimes in the Palms in Lexington or in a pub in some foreign country, with the accompaniment of quality local beer. I also learned a great deal from the students in our seminar, who had a knack for zeroing in on the weak parts of arguments and refusing to accept simplistic answers. Finally, I am grateful to the distinguished scholars—William Simon, David Luban, Arthur Applbaum, Steven Lubet, Daniel Markovits, Tim Dare, Gerald Postema, and Bob Gordon—who have agreed to serve as keynote participants in the Legal Ethics Institute over the years. The Institute truly is a unique experience, bringing together practicing lawyers and judges, academics, and undergraduate and law students for an intensive weekend-long workshop, and my thinking about legal ethics has been profoundly influenced by my participation in it. Students in my legal ethics seminar at Cornell have been similarly helpful in their persistent questioning of the arguments in many classic legal ethics papers and in my own work.

I am most fortunate to have benefited from the support of the administration at Cornell Law School, particularly Dean Stewart Schwab. In addition to permitting me to take a research leave in the fall of 2007 for the purpose of completing the first draft of this book, Stewart has also been extraordinarily generous with travel funding, enabling me to present many of the arguments in the book at academic conferences around the world. I also appreciate the research assistance provided by our outstanding librarian, Claire Germain, my library liaison Matt Morrison, and the staff of the Cornell Law Library.

I am grateful to a number of people at Princeton University Press who helped this book become a reality. Ian Malcolm's early enthusiasm and continued patience and good humor were invaluable assets to this project. Mike McGee provided excellent editorial suggestions and Heath Renfroe expertly managed the prodution process. It is customary to thank one's anonymous referees, but in this case both Daniel Markovits and Arthur Applbaum identified themselves, and it is to them I owe considerable thanks for their extensive feedback, which improved the book immeasurably as compared with the penultimate draft manuscript. Arthur Applbaum's report in particular contained an abundance of the kind of sympathetic but rigorous tough-love criticism that was needed to motivate a final revision, resulting in a much tighter and more rigorous finished product. All authors should be so fortunate to have such a dedicated reader. I know both reviewers continue to disagree with much in the book, but I hope these points of contention do not obscure the extent to which I have been assisted by their criticism.

The most important debt of all is owed to my wife, Elizabeth Peck, who has encouraged and believed in me, not only during work on this project, but going all the way back to when I was a lowly graduate student and, before then, a lawyer with the crazy idea of going into legal academia. Without her constant presence, support, and love, I cannot imagine having accomplished anything of importance over the last 18 years. This book is but a small sign of Liz's significance in my life, and it is an honor to dedicate it to her.

LAWYERS AND FIDELITY TO LAW

Contents

Introduction

In the United States it is hard to commit large-scale wrongs without the involvement of lawyers. Sure, you can rob a bank or shoot someone, but the really big stuff—accounting gimmickry leading to the collapse of Fortune 50 companies, fraudulent schemes to defraud the Treasury out of billions of dollars in tax revenue, and the defiance of human rights exhibited by the United States in the aftermath of the September 11th attacks—almost always occurs with either the active involvement or the acquiescence of intelligent, sophisticated, elite lawyers. When these scandals become publicly known, commentators on newspaper op-ed pages, television news programs, and weblogs ask with genuine or mock surprise: "Where were the lawyers?"[1] The answer is of course that they were right in the thick of things, so the next question that inevitably follows is, "What is wrong with lawyers' ethics?" A tacit assumption often underlying this question is that lawyers' ethics is a branch of ordinary, common, everyday morality—ethics for people *as people*, not as occupants of defined social roles. Occasionally defenders of lawyers do try to argue that the ethics of lawyers is different, but this has a way of coming off as elitist, as if the bar is demanding special privileges to violate the rights of others without coming in for moral criticism as a result. When two law professors defended the advice given by executive branch lawyers on the treatment of detainees, which apparently had the effect of permitting torture in some circumstances, they called the memos outlining the legal case for torture "standard fare, routine lawyerly stuff."[2] Not surprisingly, this did not sit well with people who believed that lawyers' ethics ought to closely track ordinary-person ethics. Since we know, as regular decent folks, that torture is a grave moral evil, surely there must be something terribly wrong with a system of professional ethics that regards advising on the permissibility of torture as routine.

One way to reach this conclusion is to rely on the horribleness of torture, in the same moral terms that any sensible human being would recognize. If it is a moral failure of the highest order to inflict suffering on a helpless person, then it is at least a serious secondary wrong to provide legal advice to a government that is contemplating the use of torture. Lawyers can be faulted for advising their clients that torture is legally permissible, without attempting to dissuade them on moral grounds. Alternatively, they may be faulted for concluding that anything so plainly a violation of moral norms could ever be legally permitted. Similar arguments could be raised against lawyers who

helped Enron structure transactions that concealed the true financial condition of the company, leading to its collapse and the losses of thousand of jobs and hundreds of millions of dollars of investors' wealth. For any high-profile legal ethics scandal, there seems to be a way to describe the lawyers' conduct straightforwardly in moral terms, leading ineluctably to the conclusion that lawyers deserve the labels of liars, cheats, and even torturers. Having worked within a professional role is no excuse—lawyers can be blamed for the harm they assist in because they remain persons, bound by ordinary morality, even when acting in a professional capacity. Critics of the legal profession thus urge lawyers to take personal moral responsibility for their actions, or to aim directly at achieving justice, when they represent clients, either in litigation or in transactional or advising matters.[3]

This book approaches this problem in a very different way. It is about political legitimacy, not justice or ordinary morality. Political legitimacy is the property that political arrangements have when they deserve the respect and allegiance of citizens, even if citizens disagree with particular laws or regard them as unjust. Legitimacy is a normative notion, having to do with the relationship between state power and citizens. The aim of this book is to ground the duties of lawyers on considerations relating to democratic law-making and the rule of law, so that the ethical value of lawyering is located in the domain of politics, not ordinary morality. This book defends an ethical position that should be familiar to practicing lawyers, with one important difference. Practicing lawyers, and many legal scholars claim there are good moral reasons why a lawyer is justified in acting on the lawful interests of her client, notwithstanding the interests of nonclients that would otherwise give someone a reason for acting in another way. The theory of legal ethics I will set out here places fidelity to law, not pursuit of clients' interests, at the center of lawyers' obligations. Law deserves respect because of its capacity to underwrite a distinction between raw power and lawful power, so that it becomes possible for the proverbial little guy to stand up to the big guy, and say, "Hey—you can't do that to me!" Law enables a particular kind of reason-giving, one that is independent of power or preferences. Citizens can appeal to legal entitlements, which are different from mere interests or desires, because they have been conferred by the society as a whole in some fair manner, collectively, in the name of the political community. This is an appeal to the political legitimacy of entitlements, and only indirectly to morality, because citizens accept for moral reasons the legitimacy of laws enacted through fair procedures. Unlike the dominant tradition in academic legal ethics, it is not an appeal directly to ordinary morality, justice, or the public interest.[4]

Popular discourse about the law includes a significant strand of approval of law-breaking, if done in the service of justice. This is true even of lawyers, who are often portrayed in novels and films as morally bankrupt to the extent they comply formalistically with the law, and heroic to the extent they are willing to bend the rules in pursuit of substantive justice.[5] Lawyers know that people who deal with the law often experience it as an irritant or an obstacle in the way of something the client would very much like to do. Business lawyers in particular are accustomed to being criticized as deal-breakers, impediments to exploiting some lucrative opportunity. "So what if the law technically says we can't do such-and-such," clients sometimes say. "Your job is to figure out ways to do what we want."[6] Implicit in this stance is the idea that the law is not entitled to respect *as such*, but has only instrumental value for citizens. If there is some possibility of getting caught and punished, then a prudent person will follow the law, but if clever lawyers can figure out a way to escape detection, gum up the enforcement process, or otherwise avoid legal penalties, then legality alone does not supply a sufficient reason not to engage in this evasion.

A similar attitude toward lawyers and legality has been evident in the defense of the Bush Administration's conduct of the so-called war on terror by lawyers accused of wrongdoing. When one of the principal legal architects of the Administration's response, John Yoo, said that the U.S. Supreme Court's *Hamdan* decision "made the legal system part of the problem, rather than part of the solution to the challenges of the war on terrorism,"[7] he was reflecting the attitude that the law is only instrumentally valuable, and if it stands in the way of accomplishing some important policy goal, then it should be nullified. Yoo is actually quite candid about this, saying that "law is not the end of a matter; indeed, it is often the beginning."[8] In his view, lawyers should be blamed for making a fetish of legality—"look[ing] to the law as if it were a religion or a fully articulated ethical code ... relieving us of the difficult job of making a choice."[9]

Although it is true that law does not end debate in moral terms about a matter, and people may engage in public criticism, protests, civil disobedience, and other acts designed to change the law, Yoo's stance cannot be the ethics of *lawyers*. If the concept of legality means anything, it is that there is a difference between the law and what someone—a citizen, judge, or lawyer—thinks ought to be done about something, as a matter of policy, morality, prudence, or common sense. While citizens may resent the law and resist its application in some cases, lawyers are charged with an obligation to treat the law with respect, not merely as an inconvenient obstacle to be planned around. The observation that one can make a fetish of legality tends to resonate because

it may appear that in calling upon lawyers to respect the law, I am defending an ethical system suitable only for sheep, not autonomous moral agents who are expected to take responsibility for their actions. In a reasonably well-functioning democratic political order, however, the law is not the imposition of some alien power, but a collective achievement by people who share an interest in living alongside one another in conditions of relative peace and stability. It is the product of procedures that enable citizens to resolve disagreements that otherwise would remain intractable, making it impossible to work together on common projects. To use John Yoo's example, the September 11th terrorist attacks created a host of major policy-making challenges, such as: how privacy concerns should be weighed against the need for law enforcement officials to acquire information (reflected in the Patriot Act and the NSA's warrantless wiretapping program); whether detainees alleged to have been associates of al Qaeda should be treated as prisoners of war for the purposes of applying the Geneva Conventions; and what kinds of interrogation techniques could be used by the military, the CIA, and law enforcement personnel, particularly where there was some possibility of learning information that could prevent future terrorist attacks. The important thing, as I will argue, is that these questions be resolved through public, reasonably accessible procedures that enable citizens to reach a provisional settlement of these controversies, to enable cooperative action in response to some collective need.* Relying on autonomous moral reasoning and deliberation will only perpetuate an intractable debate. This claim stands in contrast with the assumption (sometimes explicit, sometimes unstated) that a theory of lawyers' ethics must be based on an obligation to pursue substantive justice. One of the aims of this book is to rehabilitate the idea of legitimacy as a normative ideal for lawyers, and to direct lawyers to work within a system that is designed, to a large extent, to supersede disagreements over what substantive justice requires.

The effect of shifting the evaluative frame of reference from ordinary morality and justice to considerations of political legitimacy is to change the terms of the normative criticism of lawyers. In the case of lawyers advising on the

* Settlement of society-wide or relatively more local normative controversy is not the same thing as the resolution of litigated disputes, whether by trial or agreement of the parties (which, somewhat confusingly, American lawyers refer to as "settlement" of the litigation). One of the functions of law is to resolve particular controversies between specific parties through judicial or administrative proceedings. Two citizens may disagree over whether a contract for the delivery of chicken refers to broiling chickens or stewing chickens, whether a barge company was at fault in an accident for not employing additional crew members, or whether an employer's conduct constitutes sexual harassment. The settlement function I appeal to here is a larger-scale phenomenon. It supersedes diffuse disagreement over normative issues by replacing the contested individual moral and political beliefs of citizens with a shared social position.

law regulating torture, the perspective shifts from that of ordinary morality, in which the grave evil of torture is the primary consideration, to a political perspective in which we can understand the applicable law as an attempt by domestic and international lawmakers to balance competing interests in humanitarian values and the need for national security. The criticism of Bush administration lawyers who advised on the permissibility of torture is therefore not that they are accomplices to the moral wrong of torture, but that they are primarily liable for unethical conduct as abusers of the law. This would be a hollow criticism if there were no moral reasons to respect the institutions, procedures, and professional roles that constitute the legal system. One of the central tasks of this book is therefore to establish that the legal system is worthy of our respect.[10]

The strategy for doing so is to rely on political normative considerations relating to the ethics of citizenship in a liberal democracy. At its foundation, the argument rests on what John Rawls calls the burdens of judgment—that is, the indeterminacy in practice of our evaluative concepts, due to empirical uncertainty and moral pluralism.[11] Recognition of the burdens of judgment is long overdue in legal ethics, which has tended to assume unwarranted clarity in moral reasoning and to avoid facing up to the problems of pluralism and disagreement.

Ethical pluralism is not the same thing as skepticism or relativism; rather, it is a claim about what is objectively true, concerning the structure of value.[12] Ethical reasons are not arbitrary or subjective. They are related to the sorts of interests, capacities, and needs that people have, the bad consequences they try to avoid, and the ends they seek.[13] These interests, capacities, and ends are diverse, and not susceptible of being reduced to some kind of overarching master-value that specifies what it means to lead a fulfilling, ethical life. Value conflicts may occur within a single conception of the good life or they may represent opposition between rival visions of human flourishing. Entire cultures may be differentiated in part on the basis of how they prioritize competing values.[14] These different rankings of value are one of the things that sets cultures apart, even though they may be concerned with the same sorts of normative considerations at a high level of abstraction, such as life, health, honest, loyalty, and so on. (Note, too, that diverse cultures can coexist within a single polity, as in the contemporary United States.) In a society characterized by value pluralism, reasonable citizens in a democracy must be prepared to propose and accept fair terms of cooperation, but they may have deep and intractable disagreements at the level of comprehensive moral doctrines. One may hope, as Rawls does, for an overlapping consensus on certain public reasons,[15] but one of the principal arguments offered here is that we