

Legal Ethics In General Legal Practice—Commentary

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Let me begin this commentary with a disclaimer similar to that of Professor Rickett at the start of his paper. I cannot claim any knowledge of, or experience in, the law (unless being married to a recently qualified lawyer counts!). I am trained in ethics, but I have applied this training to the dilemmas provoked in medical practice and in health care delivery generally. Thus what I have to offer must be seen as providing a perspective from outside the legal profession on some of the puzzles and problems of legal ethics, so comprehensively and persuasively delineated in Professor Rickett's paper. I find myself amplifying some of his comments about the "death throes" of the vision of the ethical professional; and then taking up the argument where he leaves it in his concluding section, by exploring more fully the idea of ethics as a *critical* discipline, one which leads practitioners to reflect on the adequacy of their practice from a moral point of view and which calls for justifications which are wider than mere professional consensus.

My commentary falls into four parts: first, I consider why the "vision" of the ethical professional is appropriately subject to moral criticism; next I reflect on the lessons which might be learned from the revolution in the medical profession's understanding of "medical ethics" over the past three decades; this leads me to explore the meaning of the term "ethics" itself; and finally, I make some tentative suggestions about what such a redefinition might mean for legal ethics not only within the profession but more widely in society as a whole.

The professional ideal: rhetoric and reality

Professor Rickett has documented the rapid erosion of the vision of the "ethical professional" through the emergence in our age of a powerful monetarism which elevates business efficiency to a predominant position in the scale of social values. I agree with this observation, but to it we must add the rapid disenchantment with the professional ideal provoked by recent sociological and political analyses of professional power. I have in mind the writings of Eliot Freidson (*Profession of Medicine* (1975)), Paul Wilding (*Professional Power and Social Welfare* (1982)) and Ivan Illich (*Disabling Professions* (1977)). For these social theorists professionalism is to be seen largely as a way of gaining social power and so maintaining competitive advantage. Their conclusions are well summed up by Wilding in his description of professional codes of ethics as "campaign documents in a search for privilege and power."¹ Thus, if these analyses are accurate, it is not just that monetarism is submerging a hitherto disinterested ideal of service, but rather that the claim to such a high moral ground was always of dubious worth. How much of the vision of the ethical professional was the rhetoric of self-advancement and how much a genuine commitment to ethical values?

1 Cit op, p 5.

From medical ethics to bioethics

In this regard much can be learned from the history of medical ethics over the past three decades. This area of professional ethics has seen a whole series of radical transformations which have been well documented by Edmund Pellegrino in a recent essay.² Pellegrino starts his account as follows:

When I entered medical school 50 years ago, medical ethics was, as it had been for centuries, solely the domain of the profession, protected from the mainstream of cultural change and framed in seemingly immutable moral precepts.

Pellegrino describes how, since 1960, this profession-dominated subject area has gone through a succession of radical changes. The rapid changes in medical practice, the emergence of health bureaucracies and the ever changing dilemmas of medical treatment have forced the profession to look outside its own ranks for guidance. The old ideas of a code of conduct agreed to by professional colleagues alone and of rules of behaviour as much concerned with etiquette as with morality could no longer meet the demands put upon the profession. Thus there came the philosophical critique of traditional ethics and the search for a new set of principles more suited to modern practice. This Pellegrino calls the “period of principlism”, since at this stage doctors looked to moral philosophers for the needed general ethical principles. Medical ethics thus became an interdisciplinary subject, and the transition towards “bioethics” began (that is, a more general account of ethics in the context of the life sciences as a whole, rather than an exclusive focus on medicine). But this change introduced into medical ethics all the debate about the nature and grounding of ethics itself, which has always characterized the history of philosophy. Thus there followed a period of “antiprinciplism” when new voices were heard (many of them coming from the rapidly expanding area of feminist ethics). In this period (still upon us at the present time) different voices vie for a hearing — narrative ethics, virtue ethics, the ethics of care, casuistry, to name the most prominent ones. Pellegrino foresees a new period ahead, a period of crisis, when medical ethics or bioethics may lose its bearings entirely in a sea of relativism.

What bearing might this recent transformation of medical ethics have for legal ethics? It would appear that legal ethics is still in the equivalent of what Pellegrino calls the “quiescent period” of medical ethics when a code based morality derived from intraprofessional sources prevailed. For the medical profession in New Zealand the Cartwright enquiry was a watershed. Since 1988 it has been impossible to suppose that doctors alone know what is ethical or unethical in their practice. Perhaps it is quite ironical that a judicial enquiry should have this effect on the medical profession, while the legal profession continues to see ethics as a matter of internal regulation! I suspect that, in truth, the era of quiescence is all but past. Professor Rickett has pointed to numerous practical pressures which will shift the loyalty of the lawyer towards corporate and monetary goals and which will take to an absurd extreme the notion of advocacy for the client above all other considerations of ethical value. It can only be a matter of time before the self-regulation of the legal profession comes under similar scrutiny to that now commonplace

2 “The Metamorphosis of Medical Ethics: A 30-Year Perspective” JAMA March 3, 1993, Vol 269, No 9, 1158–1162.

for the medical profession. Where then will the profession turn to put its ethical house in better order?

“Ethics”—a word for all seasons

Perhaps, like the doctors, the lawyers will look first to moral philosophy for the kind of fresh analysis needed. Professor Rickett seems to favour this approach when he writes of law school education requiring “systematic exposure to the forms of moral reasoning, and thereby the teaching of ethical decision-making” (p 56). There is merit in this reaching out to such a new perspective on the dilemmas of legal practice, but (as the history of medical ethics/bioethics suggests) a move in this direction may bring confusion as well as clarity, and it will certainly not provide final answers to the questions of the definition of ethical and unethical practice. The problem lies in the ambiguity of the word “ethics” itself. Professor Rickett drops in, as a passing phrase, reference to “the science of morals”. That is useful so far as it goes, but what is the significance of the term “science” in such a description? Here the controversy begins. Most theorists of ethics would accept that we have to make some kind of distinction between the moral beliefs and practices of a particular culture or subgroup within a culture and the critical evaluation of these culturally determined beliefs and practices. We can reserve the term “ethics” for such a critical exercise, leaving “morals” to describe that which ethics studies. (This is deliberately to ignore their root similarity in *ethos* (Greek for “custom”) and *mores* (the Latin equivalent).) But what kind of critical study is to be classed as the “science” of morals? An appeal might be made to the rules of logic. Moral beliefs could be scrutinized for their internal coherence and for their consistency of application to practical situations. But this leaves the normative questions unanswered: the values enshrined in Nazism or apartheid were quite internally coherent and were consistently applied, yet we would surely wish to question their acceptability as moral values. Ethics has always sought a normative base from which rival claims of moral value can be evaluated. Just what that normative base is remains fraught with ambiguity, with numerous rival theories of ethics competing for first place. A natural reaction to this inconclusiveness is to abandon the quest for an authoritative “ought” and resort to some form of positivism. But then why should the profession bother looking outside its ranks at all, if there is nothing to be gained? Legal ethics may just as well remain as the shared ethos of one’s legal colleagues. If one is to have unfounded moral beliefs they may as well be those that promote collegial loyalty and the strength of a unified profession.

An alternative, however, is to accept the inconclusiveness of the quest for ethical foundations, yet still see it as a quest worth undertaking. Here “ethics” is seen as a process rather than a solution, a commitment to open enquiry and to radical self-criticism, which requires a plurality of points of view in order to be properly pursued. On this account of ethics a profession which keeps discussion of ethical practice within its own enclave can never be seen as an ethical profession, since it must inevitably be prone to partiality of opinion and narrowness of vision. Equally there can be no academic imperialism about the method of ethical enquiry, whether this be philosophical imperialism, or any other. Rather a diversity of methods will be encouraged, as it now is in the teaching of bioethics. For example, a multi-disciplinary or multi-professional approach to difficult case examples might be encouraged. (The doctors have long since abandoned the excuse that

their subject is too technical for outsiders to understand the nature of their dilemmas.) There could be a search for general ethical principles which apply to legal practice, with particular attention to those situations where two or more general principles are in conflict. There could be a “narrative” approach, looking to the lawyer in literature, or to the diverse approaches of experienced practitioners, or (better still) to the stories of clients in their encounters with the profession. All these are possible avenues into a supra-professional legal ethics and, more importantly, represent the willingness of the professional group to be morally accountable to the society within which it earns its livelihood. With this approach, “professional ethics”, in the old sense, is in its death throes, but no one need mourn its passing!

Law, ethics and morality

I come finally to the most tentative part of my commentary. In the previous section I was looking at what might be summed up as the dependence of legal ethics on a wider and more inclusive approach to ethics than the profession can itself achieve. But this is to ignore certain distinctive features of the academic disciplines of law itself, and thus to fail to do justice to what is uniquely available from internal resources and not to be found outside. Another way of putting this point is to say that the increasing commercialization of the legal relationship detracts not only from the profession but from the intrinsic value of the law itself. This is suggested in several places in Professor Rickett’s paper, particularly when he writes of the danger of lawyers becoming “technicians, without moral accountability” (p 13). Can we argue that there is such a thing as betrayal of the ethical foundations of law, even when, in a technical sense, the lawyer is acting within the confines of legally permitted practice? To answer this question fully would require a detailed discussion of the relationship between law and morality, and would *inter alia* take us down some of the more interesting byways of jurisprudence. I have neither the time nor the competence to make such a journey, but I would like to focus for a moment on one issue: what happens to our social morality when a radical disjunction is drawn between law and morality?

In this regard I have been greatly impressed by a paper by Tony Honoré entitled “The Dependence of Morality on Law”.³ Honoré accepts the fundamental point that morality is distinct from law and that all laws are subject to moral criticism. But he also argues for the dependence of morality on the exercise of law, in two senses. Firstly, law can give a specific determination to the more general and abstract requirements of morality. For example, the moral requirement to protect the vulnerable can be given some precision in trust law, or in child protection determinations. Secondly, in areas of moral conflict or uncertainty the law specifies the limits of toleration of conflicting views. Examples would be laws relating to abortion or to the use and sale of drugs. In these instances law functions as an indispensable part of social morality. It provides the specifications which morality alone cannot give: it represents a social consensus on what our shared morality requires us to permit, to enforce or to prohibit. Honoré concludes:⁴ “... morality is not separate in the sense of being self-sufficient. On the contrary, morality and law intermesh in complex ways....”

3 (1993) 13 *Oxford Journal of Legal Studies* 1–17.

4 *Ibid*, p 17.

This observation seems to me to be crucial for any consideration of legal ethics, whether in general practice or in the practice of the courts. When the profession of law is reduced merely to business efficiency or to clever manipulations on one's client's behalf, then something is lost, not only to the practitioner thus patronized by her client, but to the society in which such lawyers practice. The law can help us reflect more deeply and concretely on our obligations to one another or it can help to strengthen the Hobbesian perception of society as a state of constant and barely restrained enmity. For this reason, if for none other, it matters to more than the legal profession what the future of legal ethics will be. Despite the plurality of moral beliefs in our age, we can still look for a law which implements our shared moral vision and hope for lawyers who (in Kant's phrase) act not merely *in conformity* with the law, but *out of respect* for it.