

# The Jurisprudence of a Good Lawyer

Walter Probert\*

"Now, you're a Baptist," Nixon would say to him before arriving at one decision or another, "this is right, isn't it." And Buzhardt, balking, would say he didn't think it was his job to give moral advice—he was a lawyer.<sup>1</sup>

Notions of what it means to be a good lawyer vary, but any person's views on the matter are intimately tied to his implicit jurisprudence. Like everyone else, the potential lawyer's jurisprudence—his law view—actually begins to form quite early in life. Then it is specially shaped by professional education and practical experience.<sup>2</sup> Chances are professionalization will so skew his notions of good lawyering that moral rules and principles will take a back seat to the general expectation that the important restraints are to be found in the power potentials of the legal process. The equation is simple: What the client wants within the limits of what the legal process will permit or facilitate so long as the lawyer himself will not run afoul of that process and the sanctions of the *ABA Code of Professional Responsibility*.

Watergate has brought at least a temporarily heightened interest in what it means to be a good lawyer under the *Code*, and maybe a little more. If this interest is to be any more than temporary and even more than superficial, it would stand stimulation from the domain of theory known as jurisprudential, particularly that dimension related to moral (or ethical) philosophy.<sup>3</sup> Yet that stimulus is extraordinarily hard to provide because the implicit jurisprudence of the vast majority of the profession provides an almost impenetrable barrier.

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\* Professor of Law, Holland Law Center, University of Florida, B.S., 1948; J.D., 1951, University of Oregon; J.S.D., 1957, Yale University.

1. WOODWARD & BERNSTEIN, *THE FINAL DAYS*, 4 (Avon paperback, 1977).

2. See generally, Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 *STAN. L. REV.* 1 (1974).

3. J. Breshnahan makes the case for the need of input from professional "ethicists" which would include persons educated in ethical philosophy. See his "*Ethics*" and *the Study and Practice of Law: The Problem of Being Professional in a Fuller Sense*, 28 *J. LEG. EDUC.* 189 (1976). He draws the parallel to the considerable enrichment coming to discussion of moral problems in medical care from such input.

This is certainly not to say that most lawyers are bad people. Nor is it to say that they should be trained in one moral dogma or another. Yet it does seem to be true that even those who enter law school with moral principles or imperatives learn to put them on the back burner in the process of learning to be a good lawyer. Those who may continue to confuse morality with lawyers' law unto graduation soon find the pressures even greater in the courtyards of good practice. Being a good lawyer is just not the same as being a good person because of the professional understanding of the lawyer-client relationships and the mutual reinforcements between those role-perceptions and client pressures. Of course those who enter law school with few moral scruples are comfortable because the subliminal jurisprudential message places a premium on perception not of moral issues but of legal power. Moral arguments are often eschewed. Moral values do appear here and there, perhaps cleansed a bit in the aura of "policy," then sterilized into legal issues and arguments. It is not law and morality, it is law and politics or law as politics of a special kind.

The upshot of it all is that many lawyers are rather naive in their perception of moral issues and values. The working assumption is that if you will know law you must learn to make a sharp distinction between what is truly law and those arguments and views passing as moral because the latter are purely personal and subjective. This is a naive view of the domain of moral analysis. While it is not quite correct to say it is also a naive law-view, some experts in jurisprudential theory would count it as badly mistaken.<sup>4</sup> The purpose here is not to demean this generally prevailing legal theory of lawyers but to wonder if it might be bettered. May it be that a good lawyer should be as expert in moral analysis as he tends to be in what today is counted as good legal analysis? The answer to the question turns on exploring how it is that one's implicit jurisprudence or law-view tends to monopolize the marketplace of ideas on what it means to be a good lawyer.

There are numerous instructive examples. We may assume, for instance, that lawyers would agree that it is not good to participate with a client in committing a felony. They would most likely agree it is not good to counsel a client on the ways and means of evading prosecution for a future felony. On the other hand, the scales of lawyer thinking may well shift on the question whether it is good

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4. FULLER, *THE MORALITY OF LAW* (Yale Press 1964).

lawyering to counsel a client on the ways and means of avoiding payment of compensation for the commission of a tort or a breach of contract. Few lawyers would lose sleep from advising a client to suffer damages rather than perform a contract which has become an unwanted burden.

Our criminal code makes it legally wrong for lawyers and everyone else to commit a crime. The *Code of Professional Responsibility* also makes it professionally wrong to counsel a client in a projected crime.<sup>5</sup> That *Code* has no sanctions or even aspirational advice for the lawyer confronted with the contractual breakdown. It thus reflects in a significant way the basic professional paradigm of law. It is a law-view which in jurisprudential parlance is styled as legal positivism. Under this view, law is a domain sharply distinguished and separate from morality. Lawyers and their clients as well may practice or act in this vein without knowing it, so to speak, without confrontation with or immersion in the ideas and literature of jurisprudential writers. Lawyers find the view reinforced in their schooling and practice. A "good practical lawyer" is basically positivistic. There is a vital difference between the positivism of lawyers and that of legal philosophers, however. The philosopher may regard moral sensitivity and expertise an essential to his legal positivism, while the lawyer-practitioner is neither required nor apt to be schooled in the moral considerations that relate to his roles as a lawyer.

Moreover, his schooling and experience may actually alter his moral conceptions. For instance, it is part of our general moral upbringing that it is wrong to lie and break a promise. Yet why might it be regarded as sound and even good lawyering to advise a client that *legally* he has an option either to perform his contract or to pay damages for breach? Such advice embodies a jurisprudential view that contract rules are binding in a different way from moral rules. There is no ultimate truth in such a view, although it is practical. It would be practical in some instances to take that same sort of jurisprudential view toward criminal laws, but it would not be generally good or desirable. The profession tends to view criminal laws as imposing distinctive kinds of obligations, not dependent on fine or imprisonment for their bindingness. A contract promise does have an obligatory facet for a lawyer, but clearly weaker than that imposed by criminal laws, perhaps even morally weaker for some

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5. ABA, CODE OF PROFESSIONALS RESPONSIBILITY DISCIPLINARY RULE 7-102 (A)(7).

lawyers than a "mere" promise where no effort was made to contract. May it even be that an attempted contract that fails, say for lack of consideration, is considered not only legally empty but morally as well?

The positivist lawyer who excludes moral considerations from his analysis and counsel may have subtle influence on the client's moral views. Suppose a client has a Blackstonian kind of implicit law-view, one whose basic premise is that law orders what is right and prohibits what is wrong. So then, if law's ultimate command in our contract illustration is only payment of damages, that could in the client's mind become his moral option as well. More generally, since a pronouncement or analysis of law is almost inherently ambiguous as to its moral implications when cast in the positivistic vein,<sup>6</sup> the lawyer who wishes to communicate with full candor the weight and relevance of his opinions to his client needs to do at least some articulate jurisprudence in the counseling process. Quite opposite from the widespread view among lawyers that moral analysis is proffered merely to manipulate or intimidate, there are times when the moral dimension needs to be discussed in order to avoid a manipulative relationship to the client. The legalistic approach to the contract breach often will be manipulative.

No doubt in some business contexts the legalistic view of contracts may also be the ethic of business, where the principal function of the contract is to provide some sort of financial security. If the parties have understood it in that way, well and good, for it is not then a morally binding promise. However, not all contracts are of that kind. Similarly, while not all torts are violations of moral rules, some are. We currently so busy ourselves with the legal dimensions of personal injuries and how with no-fault that we quite forget there are times when one person hurts another such that the morally correct thing may be for the wrongdoer to provide a measure of compensation to the victim. Yet who of us would advise a tortfeasor, say in a medical malpractice situation, to offer compensation to his victim who is unaware of the source of his hurt? It is interesting to note that more and more doctors are coming to this sort of moral anarchy in their outrage with the tort compensation system, in a kind of legal positivistic paranoia which blinds them from

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6. Discussed as "normative ambiguity" in MacDougal, *Law as a Process of Decision*, 1 NAT. L.F. 53, 59-60 (1956) and as a pervasive theme in PROBERT, *LAW, LANGUAGE AND COMMUNICATION* (Thomas & Co., 1972).



seeing the moral dimensions of patients' rights to expect quality care *and*, in the event of deviation, financial responsibility.

### *The Code and the Moral Counselor*

Under the ABA *Code of Professional Responsibility*, a lawyer is not much encouraged to explore with the client the moral involvements or bases of legal norms or official decisions.<sup>7</sup> He is under a duty not to do so if it would weigh against a criminal law to the point of amounting to advice to "break the law." Otherwise he is free to give moral advice,<sup>8</sup> but not straight on required to do so. This is pretty much in line with legal positivism in keeping law and morality separate out front but smuggling morality in under the guise of law where it is thought most important, even slipping into the Blackstonian dogma that law is right because it is law, *i.e.*, when it is a criminal law.

If the *Code* were a full moral instrument, it would require or at least strongly urge the lawyer to give moral analyses. One can imagine such an instrument urging lawyers to support clients in refusing to abide by iniquitous laws, say of the kind that debased the Nazi era. Lawyers could be disciplined for ignoring clear moral norms, for counseling a client to "break the law" by tortious conduct or breaches of contract, for instance.<sup>9</sup> Such imaginings merely help to point up the political ideology of the *Code*, one usually found intertwined with legal positivism.

Under this view morality finds its way into law through the political process that produces legislation. The law-makers worry about values, the police merely enforce, courts interpret, and so on. The courts are not to try to control human behavior by sitting in moral judgment. Similarly, under the *Code* lawyers are to call the

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7. The more general complaint about the *Code* is that it takes little account of the lawyer's counseling role as opposed to that of advocacy. *E.g.*, L. Brown & H. Brown, *What Counsels the Counselor*, 10 VAL. L. REV. 453 (1976). There are many dimensions to the lawyer-client relationship raising a variety of moral questions. For instance, Wasserstrom in *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975), discusses the morality of lawyer paternalism toward clients, whereas we are exploring the potential of the lawyer's providing moral counsel to the client.

8. ABA, CODE OF PROFESSIONAL RESPONSIBILITY ETHICAL CONSIDERATION 7-8.

9. It is quite significant that we do not speak of a tort or breach of contract as "breaking the law," because it comes out of the implicit jurisprudence being discussed in the text.

“have-to’s” and the “oughts” as the legislators see them. The *Code* really is saying that a lawyer is unethical, *i.e.*, *bad*, if he counsels against the criminal law, that it is morally necessary that criminal laws be obeyed.

The legal realism of the thirties came from a different ideology and demonstrated how morality does or might play a significant part in judicial decision-making.<sup>10</sup> It is just as possible to see court engendered rules as having a moral component<sup>11</sup> as it is important to feel that many criminal laws carry a moral obligation. Just because there is no fine or imprisonment sanction for most breaches of contract, it does not follow that contract law is without moral basis. Where specific performance will not be ordered it is because that remedy is not feasible or practical. The damage remedy is a sanction too, providing a degree of legal coercion to motivate parties to do what they are morally expected to do, keep their promises.

So, the *Code* should hardly be seen as the full model or limit of professional responsibility. The social forces which helped produce legal realism have produced a view that courts are responsible to the general values of society, not just to history. The social forces that helped us view Watergate as symptomatic of extreme abuses of power, as politically bad, may well lead to a stronger vision of the lawyers’ roles to include a responsibility to society to help—not coerce—their clients to appreciate the social implications of their actions.

### *Good Counsel*

A good person does more than merely conform to the constraints of duty. He influences others to follow his lead, either by example or persuasion. A lawyer is often in a good position to educate his clients on the moral dimensions or bases of law, as indicated in the simple contract illustration. Another instructive example follows from the area of tort law, one again well showing that the *Code of Professional Responsibility* does not define the limits of a lawyer’s moral concerns. Every field of law has many examples.

Suppose a lawyer has been retained as a general consultant by a doctor. One day the doctor seeks advice concerning his responsibilities to a patient with a lower back problem. The doctor is confi-

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10. The most articulate spokesman for this point of view was Felix Cohen as demonstrated in his writings collected in *THE LEGAL CONSCIENCE* (Yale Press 1960).

11. CAHN, *THE MORAL DECISION* (INDIANA PRESS 1955).

dent that a certain operation will cure the patient. Medical reports indicate that eighty per cent of such operations have been successful. Aside from negligence, there have been instances of no change in condition and some of worsening of condition, including a history of five per cent lower torso paralysis. However, the doctor has performed the operation many times with no such misfortunes and is confident of his techniques. He believes the patient is in need of this cure because his present life style is far from happy. However, he fears the patient would decline the operation should he hear the experiences that other doctors have had. Suppose finally that the advice is sought in a jurisdiction following the most "liberal" tort approach: If a doctor unreasonably fails to inform a patient of substantial risks under the circumstances where the patient probably would have declined treatment had he been informed, the doctor is subject to liability if there is resultant injury.<sup>12</sup>

What would a good lawyer advise? He has a number of alternatives. Whether they are all at his beck and call depends upon his familiarity with this particular area of judicial dynamics, his implicit jurisprudence, his personal values, and his general moral sensitivity. Also subtly involved is his conception of his role in this situation. Thus he might assume he knows the doctor's preferences from the presentation and then identify his own role as one of promoting that preference, much in the manner of an advocate, stating the law purely in its liability potentials, with no discussion of obligation or exploration of doctor-patient relationships. The chances are that he would not be aware of or concerned about the moral aspects of the situation.

On the other hand this is the sort of situation which might strike an emotional chord. In a Blackstonian kind of lawyer, this chord is apt to sound forth in a statement of law to the effect that doctors are legally obligated to provide patients with information concerning substantial risks. Even if the analysis were to persuade the doctor to act in an ethically correct fashion and as well to minimize his risks of liability, it is manipulative, even if unconsciously so, because it oversimplifies the situation just as much as the approach which speaks only to liability. It is this sort of legal analysis, particularly if the analyst's personal values vary from general moral conception which brings about the positivists' urge to make a sharp

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12. Discussed generally in D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* §22.01 (1973).

distinction between law and morality. Even so, positivism itself can push personal value preferences underground to come out in just such a legalistic analysis. Even more manipulative and questionable is the approach of the lawyer who is well aware that he is shaping his legal analysis to further his own value conceptions. Of course, we may worry less about doctors than other sorts of clients in less advantageous social positions. Ideally, however, all clients should be given as full a base of understanding as possible. It would be better for a lawyer to give a hornbook sort of analysis of potential liability and then to add as clearly his own value notions of the way he thinks the doctor ought to proceed. If the doctor is willing to listen and discuss, quite conceivably the lawyer will end up with an acceptable performance of his counseling role, one in which the doctor is encouraged to explore at least a little his own conceptions of the doctor-patient relationship as placed against those of his lawyer.

The best approach requires an understanding of tort law generally, including its functions; of the influence of moral conceptions, particularly in the area of informed consent; and of the moral aspects of the doctor-patient relationship. Given that sort of understanding—no small prerequisite—it becomes of less concern whether the lawyer speaks of legal obligation or moral obligation or in some different vein of changing social expectations and patients' rights generally. He should inform the doctor that he cannot go to jail for failing to inform his patient, but that he may take the risk of liability. He might indicate ways to minimize that risk, such as consultation with other doctors, or even discussion with the patient as to whether he really wants to know what risks may be entailed. Most important, however, is the effort by the lawyer to promote discussion with the doctor of the moral aspects of the situation and of the ways in which the moral considerations have influenced the courts in the particular area. Many doctors cannot understand what they believe to be outside interference with medical practices that comes about by virtue of malpractice decisions, especially those involving lack of informed consent. What needs to be explained is that moral sensitivity involves at least a willingness to perceive "outside" values, to listen to the arguments, to realize, for instance, that patients are no longer regarded as mere charges of doctors. Democratic concepts of what it means to be a person increasingly include the value of individual autonomy, the right to decide for one's self what will happen to one's body, to weigh the pros and cons. Such personal choices require a full base of information. Increasingly it is felt that doctors owe a moral duty to provide that



information. That is a sufficient base upon which to impose liability if damage is caused by violation. Malpractice law, like much of tort law, serves among other functions, to provide a pressure toward moral behavior in the professions.<sup>13</sup> The lawyer may choose in such a situation to promote social values, not by manipulating, but with as full and open a discussion as circumstances allow.

The illustration has more instructive value than might at first appear. The lawyer who acts poorly in this situation might himself be subject to a suit for malpractice. Discipline of the legal profession by this means is just beginning to mount.<sup>14</sup> The lawyer who fails to file his motions, pleadings, or appeals within procedural time limits is not doing a good job and is subject to liability. How about lawyers who are naive about the nature of law or who misinform their clients in some significant way? The illustrative case provides an example. If, for instance, the situation occurred in a jurisdiction that had not yet adopted the "liberal" approach, the lawyer who in effect told his doctor client that he was free to do as he wished, so long as he did not violate some established medical standard, might himself take the risk of liability. He should have advised his client that there was a judicial risk given the trends in tort law around the country. Ignorance of such trends is not a professional excuse for lawyers any more than it is for doctors who ignore advancing medical knowledge. The more subtle point here is that a lawyer with moral sensitivity will have a sense about a case like this, even if he is not an expert in tort law, and will know enough to consult or refer. The morally sensitive lawyer will very likely not get into trouble, as good lawyers generally do not.

### *Conclusion*

A good lawyer must know the rules, principles, and policies of law relevant to his practice. He should be able to discern his own jurisprudential perspectives and to explore those of his clients. He will then be able to discuss with his client the norms and sanctions

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13. A good discussion of the moral basis of malpractice concepts, including informed consent, in the medical area is contained in Brody, *The Physician-Patient Contract: Legal and Ethical Aspects*, 4 J. LEG. MED. 25 (1976).

14. N.Y. TIMES, February 28, 1977, p. 1 (noting burgeoning malpractice insurance premiums for lawyers, drawing a parallel to the evolution in the medical area, and noting that a significant happening is that standards of lawyer research are coming under scrutiny).

of law as they relate to other significant social norms and expectations, including those called moral or ethical. In order to carry out this important aspect of the counseling role, he himself should be sensitive to the moral dimensions of the client's situation.

The lawyer who eschews the giving of moral advice is only fooling himself. He may often be right in disdaining an authoritarian effort to impose his personal preferences onto the client's choice, although there will be times when he will lay them on the line to save his own principles. But moral priorities are not always just a matter of personal preference. Moral advice (counsel) involves a sufficient articulation of the value choices actually available in a given situation to enable the client to make a personally and socially responsible decision. If they are not articulated, some set of values will be chosen anyway as earlier illustrations demonstrate; e.g., the lawyer who says it is legally permissible to break a contract may be encouraging a socially irresponsible choice by giving an incomplete and misleading value analysis.

There is no inevitable magic in the words "moral" or "ethical," but there is an unfortunate tendency to give unjustifiably narrow scope to their meanings. Legal education could be of considerable aid in restoring the cultural, analytical, and *practical* significance of moral terminology and analysis. An unfortunate tendency of legal education has been implicit in its jurisprudence, to promote the attitude that law is somehow objectively knowable—if not in rules or laws "on the books," then in patterns of official behavior—but that morality is not. Actually law is more subjective than commonly believed and morality less so.<sup>15</sup> It is not just a matter of knowing law, right or wrong, and not knowing for sure what is right or wrong. It is a matter of conscientious exploration of the range of values at stake to the extent circumstances permit. These are matters that can be demonstrated. There is no better theatre for it than the law schools in the education of those would be and those who are lawyers.

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15. Bambrough, *A Proof of the Objectivity of Morals*, 14 AM. J. OF JURIS. 37 (1969).