

1990

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## Recommended Citation

Brown, David Malcolm (1990) "The Ethical Lawyer—Contradiction in Terms or Reality?," *William Mitchell Law Review*: Vol. 16: Iss. 5, Article 12.

Available at: <http://open.mitchellhamline.edu/wmlr/vol16/iss5/12>

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## THE ETHICAL LAWYER—CONTRADICTION IN TERMS OR REALITY?

DAVID MALCOLM BROWN†

What is all this to my soul . . . what have you said to show that I can reach my own spiritual possibilities through such a door as this? How can the laborious study of a dry and technical system, the greedy watch for clients . . . the mannerless conflicts over often sordid interest, make out a life?

Oliver Wendell Holmes, Jr.<sup>1</sup>

Unfortunately, when members of the legal profession envision an “ideal lawyer,” they often conjure up some kind of legal machine. This idealized lawyer is emotionally removed from the judicial process, and thus able to utilize every ounce of intellect, legal skill, and talent to advocate for a client no matter what the ramifications to society. But is this ideal lawyer also an ethical lawyer? Is a lawyer who is an advocate first and foremost also a seeker of truth and justice? As lawyers, we trust that “truth and justice” will inevitably flow from vigorous, dispassionate advocacy. But common sense and experience tell us this is not always the case.

Every lawyer brings with him or her a set of ethical values into the real world of law. These values are formed by a life time of experiences, by upbringing, by religion, by politics, and by countless other influences. Can a person of conscience, an ethical person, also be an effective lawyer? There is no doubt that the lawyer who strives to integrate personal ethics into the law will experience frustration. I think there are at least two basic reasons why this happens.

First, it is impossible to act ethically when emotionally detached from a decision concerning “right” and “wrong” or “good” and “evil.” This is because ethics require a conscious decision to act in a “right” way to attain a “good” result.

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1. DVORKIN, HIMMELSTEIN & LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 47 (1981) (quoting O.W. HOLMES, JR., *THE PROFESSION OF THE LAW*).

Human beings can only judge if an action is right or wrong based on the way their conscience and emotions feel after weighing the outcome of an action. It is impossible to be an ethical person without considering the ultimate outcome one's actions will have. However, our legal training has taught us that the outcome or ramifications are not within the realm of our personal concern because those issues are left to the judge, jury, or some other group or individual.

Second, to act ethically, lawyers must take responsibility for their actions. For a lawyer to blindly advocate to the best of his or her ability without considering the ramifications of his or her representation, is to go into battle for the sake of the fight with no regard for what good may come of it. Obviously, it is inconsistent with ethical behavior to irresponsibly exercise ones intellect, legal training, and adversarial skills. However, it is often difficult to decide what is a responsible action.

By itself, a legal education is a poor preparation for making ethical decisions. Ethical lawyers must look beyond the narrow confines of their legal training for answers to these difficult questions. When doing this, the ethical lawyer must keep in mind that wherever he or she looks, the ultimate objective is social justice based on truth and fairness. The outside search for answers is often extremely difficult.

Ethical people, who also happen to be lawyers, cannot help but feel frustrated by the limitations that legal training imposes on their power to act ethically in their chosen profession. Hamlet says it best: "Sir, there is in my breast a kind of fighting that will not let me sleep."<sup>2</sup> At the core of this dilemma is the lawyer's obligation to society, to the profession, to colleagues, and to the client.

A lawyer may think to look to the lessons taught in various religions and faiths. Unfortunately, many of mankind's worst atrocities have been perpetrated in the name of religion. This is not to say that religion is always a bad thing. Indeed, religious leaders and the teachings of almost every major religion of the world have contributed greatly to the positive development of all people. The Framers of our Constitution knew religion was an important part of society, but believed its positive spiritual and human goals could not be achieved unless reli-

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2. W. SHAKESPEARE, *HAMLET*, act V, sc. 11, l.4.

gion were separated from government. For the attorney who is seeking social justice based on truth and fairness, religious teachings can only provide partial answers to complex problems.

Can we find more complete answers from the great repositories of ideas, the universities? Actually, institutions of higher learning, where experiments and research are carried out in a vacuum, will be even less satisfactory in helping the attorney find guidance in making ethical decisions. Professors, students and philosophers are merely curious observers and thinkers, not doers in the real world. Without diminishing the importance of higher learning—which serves as an incubator for future leaders, scientists, doctors and lawyers—a practicing attorney has already been “hatched” and will find no framework on which to build an internal ethics structure by turning to institutions of learning.

At this point, you might well ask if our legal training is inadequate to provide guidance for making ethical decisions, if religion can provide only partial answers to complex issues, and if institutions of higher learning are merely think tanks operating in a social vacuum; then where can lawyers find guidance in solving complex ethical questions they encounter in the practice of law? The answer is not found on the outside but only on the inside.

Oliver Wendell Holmes in his classic statement has told us that “the life of the law has not been logic: it has been experience.”<sup>3</sup> This idea suggests that attorneys, as an integral part of the legal system, can rely on their life perceptions and experiences in the practice of law. Within every individual attorney, the ethical guidelines which we either choose to follow or disobey are a combination of our accumulated life experiences. These ethical guidelines are within every single individual human being but not every individual is able to access this “inner strength” or “inner goodness,” if you will. As lawyers, we are obligated to work as hard as we can to be the best we can be in order to meet the responsibility we have accepted in becoming lawyers.

We are trustees of the law. By our practice of law, we are expected to advance the cause of social justice based on fair-

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3. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33 (1949) (quoting O.W. HOLMES, JR., *THE COMMON LAW*).

ness and truth. The beneficiary is society at large. We know that a trustee is in a fiduciary relationship between the trust and the beneficiaries. A fiduciary relationship mandates that the trustee be held to a higher standard of care and behavior. As lawyers, the trust of justice which we have accepted requires that we work towards finding our inner-feelings and conscience so when ethical dilemmas arise, we will be able to act "right" to achieve a "good" outcome.

Lawyers can only take the right actions if they have developed within themselves a sense of "propriety." In its broadest context, propriety means doing the proper thing at the right time. However, for our purposes, propriety means that as attorneys we are aware that the action we take must facilitate social justice based on truth and fairness. Thus, two lawyers could conceivably come to two completely different conclusions which may have different outcomes. As long as both attorneys were aware of propriety by doing their best to facilitate social justice, they both have acted ethically.

As trustees, lawyers must in addition to propriety, work towards developing "virtue" within themselves. This is the single most critical element a lawyer must have in order to make ethical decisions when difficult issues and dilemmas arise. The word virtue usually implies a kind of moral chastity. However, for our purposes, virtue refers to the excellence we must all strive for in practicing the law. Because excellence in legal practice will enable us to advance the cause of social justice, the virtue also engenders feelings of worth and value in the legal profession. These higher ideals are linked to the job satisfaction and personal satisfaction we as attorneys have always sought by entering this profession in the first place.

The ethical attorney is a person whose efforts to maintain "propriety" and attain "virtue" have forged a solid character. Chief Justice E. Hickman of the Supreme Court of Texas in his address to a large class of men and women upon their admission to the Texas Bar stated:

Character can be developed only by constant vigilance. A temporary letting down of one's high standard may permanently weaken his character. Character cannot be built in a year or a decade; it is the product of a lifetime of high thinking and purposeful living that includes . . . culture, breadth of view, sympathy, clean living, vital interest in the welfare of others, as well as strict integrity . . . and a serenity which

is the product of a sustaining faith.<sup>4</sup>

An ethical lawyer's character is synonymous with strength, courage, excellence, merit and worth. These are the ingredients which men and women in the legal profession can develop within themselves if they are willing to make a lifetime commitment to their calling. This commitment starts with every lawyer's own internal search to think about ethics and foster a genuine concern for society's welfare. The best way we can strengthen our professional image is by individually internalizing high ethical standards and later actively fighting for justice in society based on truth and fairness.

The famous sociologist Abraham Maslow insightfully observed that: "A musician must make music, an artist must paint, a poet must write, if he is to be ultimately at peace with himself."<sup>5</sup> I might add, a lawyer must do some good. As lawyers we must view ourselves as more than just highly educated professionals. We are men and women concerned with fairness and truth. We are people who are in a unique position to make positive changes in our communities. This positive effect on society will happen not only in the court room. As Abraham Lincoln pointed out in a law lecture:

Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person. There will be business enough.<sup>6</sup>

Sadly, many attorneys are unable to view their role in society as trustees of truth and fairness, and their vocation as a calling to work for justice. Many of these morally unfortunate lawyers are also extremely successful financially. But they are losers in other ways. They have failed to view their chosen profession as a calling and have lost sight of the ultimate goal all lawyers must strive for, that is social justice. These men and women of the legal profession may never experience a feeling of peace with themselves as professionals. One of the consequences of this lack of inner peace is the sad fact that substance abuse in

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4. Address by Chief Justice E. Hickman of the Supreme Court of Texas (Apr. 20, 1955).

5. A. ROBBINS, *UNLIMITED POWER* 343 (1986) (quoting Abraham Maslow).

6. R. HAYDOCK, D. HERR & J. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 624 (1985) (quoting Abraham Lincoln).

the legal profession has risen at an alarming rate. As many as fifteen to even twenty percent of all lawyers may be suffering from some form of chemical dependency.<sup>7</sup> In our ethical quest, we must search inside ourselves not only for the sake of society as a whole, but also for our own survival and happiness as professionals. In order for us to effectively “do good,” we must first be at peace with ourselves.

I think I have argued that an attorney *must* be an ethical attorney in order to be an effective one. There is a kind of “professional symbiosis” at work here. By advancing the cause of social justice in his or her advocacy, the attorney helps society. By helping society, the attorney also enhances his or her own sense of self-worth and well-being. This enhanced self-worth also makes a better, more effective attorney, one who is able to be of service to the community in many roles. This is my ideal attorney, my ethical attorney, my ethical citizen. This is who I hope to be.

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7. Lindgren, *Counting the Costs; Substance Abuse in the Legal Profession*, BENCH & BAR OF MINNESOTA, Mar. 1990, at 22, 22.