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Three Issues in Legal Ethics

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A court – which is the name given the institution charged with resolving legal disputes at retail – is comprised of three elements: an umpire (judge or jury), disputants, and advocates. The court’s structural purpose is legitimate (which is not the same thing as just) dispute resolution. No part of the court can stand in for the whole; each is only a part. In order for the court to achieve legitimacy, each of its components must pursue partial aims: the umpire must seek truth and justice, the parties must be free to seek advantage, and lawyers must pursue partisan loyalty.

Lawyerly partisanship thus stands against truth and justice – the court’s legitimacy requires this. Although rules of legal ethics might constrain hyper-zeal, the legitimacy of the court requires that lawyers’ ethics avoid imposing general duties to truth and justice as this would conflate advocate and umpire. This requirement of legitimation is a direct consequence of the familiar fact of moral pluralism. There simply exist no regulative principles – including principles of justice – on which all sides of moral and political disputes can agree. Legitimacy depends on affective engagement with a process; it cannot be sustained by argument. Adjudication is part of this process; and adjudication requires partisan lawyers.

Partisanship is thus ineliminable from the lawyer’s life. Legal ethics must take such partisanship into account. To do so, it must take up problems associated with the lawyer’s integrity. Such questions are not mere navel-gazing but are instead entirely appropriate for a profession whose place in the political division of labour renders conflicts between professional obligations and ordinary moral ambitions particularly clear and stark.

Legal ethics thus cannot – for reasons that apply to ethics quite generally – ever be reduced to generic moral or political theory. And in this sense, taking the lawyer’s point of view in legal ethics is not a sop to local interest but an inevitable part of any serious engagement with the legal facts and moral circumstances of the lawyer’s life.

Keywords: legal ethics/partisanship/impartiality/political legitimacy, integrity

1 Introduction

I am grateful for Alice Woolley’s detailed and attentive engagement with some of my (and Tim Dare’s) ideas concerning legal ethics and also to the editors of the University of Toronto Law Journal for publishing Woolley’s work and permitting me this reply. A friend once described the week preceding the publication of a book as ‘the calm before . . . the calm.’ I am delighted that at least some people have noticed A Modern Legal Ethics and cared to respond. I hope that this reply will return the favour.

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Before I take up Woolley’s essay substantively and in earnest, I would like briefly to note that, at least on my reading of the book, I do not say some of the things that she attributes to me. Certainly, I do not believe them. It is always tempting to take back out of one’s mouth words that others have put in. And I am, accordingly, inclined to document in detail the particular differences between the actual argument of *A Modern Legal Ethics* and the account of the argument that appears in Woolley’s essay. But what I have written, and doubly-so what I believe, is a subject more interesting to me than to others. Therefore, yielding to this temptation will not produce a useful, nor perhaps even a readable, exchange.

A better course of action is to identify some key issues that arise out of Woolley’s essay and to address them in terms of the book’s argument. This is what I shall try to do below. At the same time, and for the record, I would like, nevertheless, to say generally that Woolley’s summary seems to me in important respects to misreport my views. With this preliminary out of the way, it is time to get down to business. Woolley’s essay raises at least three important issues, which turn out to be related. I shall take up each in turn, drawing out the relations among them as I go along and then putting them together in a brief conclusion.

II The lawyerly vices

First, Woolley questions just how far the lawyer’s professional obligations – as they appear in the positive law – depart from ordinary morality. I claim that lawyers come under professional obligations to display certain characteristically lawyerly vices – to lie and to cheat.¹ Woolley reminds readers that, in addition to the rules concerning loyalty and zeal that underwrite these vices, the positive law also contains rules that constrain lawyerly partisanship and, indeed, make lawyers officers of the court.² Woolley admits that my account of the lawyerly vices acknowledges these constraints, but she insists that I do not acknowledge them in the right way. Thus, she claims that I ‘fail[] to recognize that the features of the law governing lawyers that [limit lawyerly partisanship] … are not simply qualifications on other things; they are additional and independent legal obligations with which the lawyer must comply.’³ Insofar as I fail to give proper weight to the parts of legal ethics that require lawyers to deal honestly and fairly, Woolley claims, I mischaracterize the

² See Alice Woolley ‘If Philosophical Legal Ethics Is the Answer, What Is the Question?’ (2010) 60 U.T.L.J. 983 at 991 [this issue] [Woolley].
³ See ibid. at 991.
lawyer’s role and hence her distinctive role ethics. More specifically, I attribute to lawyers duties of ‘hyper-zeal,’ whereas lawyers, in fact, have professional obligations to display only ordinary zeal. Although Woolley never quite comes out and says so (and, in fact, says something quite different, which I will take up directly in a moment), I suspect that she thinks this distinction important because mere ordinary zeal does not generate the tensions with conventional first-personal ethics on which my argument concerning lawyerly integrity depends.

I agree with Woolley that lawyers – both under the positive law as it stands in the United States today and certainly under any number of partisanship-limiting reforms that would, nevertheless, retain the distinctively adversary character of the lawyer’s role – must display only ordinary and not ‘hyper’ zeal. In fact, I spend nearly fifty pages of *A Modern Legal Ethics* identifying and cataloguing the rules that limit lawyerly partisanship. I argue there, in substantial doctrinal detail, that the versions of these constraining rules in place in the United States today do not sufficiently constrain lawyerly partisanship to bring the lawyer’s professional obligations into line with ordinary morality. There is no point in rehearsing this detailed argument here. It may be wrong, of course. But I believe it to be right, and Woolley has not answered or, indeed, addressed it in the kind of detail that would be needed to put a dent in this belief. Rather, Woolley has (entirely properly) responded at a higher level of abstraction, asserting that the general principle that lawyers are officers of the court sufficiently ties lawyers’ professional conduct to ordinary morality to undermine my claim that ordinary morality characterizes this conduct as vicious. To answer Woolley’s charge that I have mischaracterized the lawyer’s professional role, I must refute her assertion. The required refutation should proceed at the same level of abstraction as that of Woolley’s claim. I return, therefore, to the structural character of the lawyer’s role – to its place in the division of labour between advocate and tribunal.

While lawyers act as partisan advocates, the tribunals before which they appear – including through the efforts of both judges and juries – pursue truth and justice. This correct perception enables Woolley to

4 See ibid. at 992.
5 Thus, although Chapter 2 of *A Modern Legal Ethics* defends the claims that lawyers have professional obligations to lie and to cheat, most of the chapters’ pages are devoted to identifying the constraints on lying and cheating that lawyers face and to explaining why these constraints do not solve the problem of the lawyer’s underlying obligations to manifest professional vices in her actions. In addition, much of Chapter 3 of the book is similarly devoted to identifying further constraints on lawyers’ partisanship and arguing that these, also, do not render lawyers obligations compatible with ordinary first-personal morality.
6 See Woolley, supra note 2 at 991.
suggest that lawyers’ obligations to support the operations of these tribunals – captured by the idea that they are officers of the court – sufficiently connect them to truth and justice so as eliminate the tensions between their professional obligations and ordinary morality or, at least, to reduce these tensions to tolerable levels. If lawyers are officers of an institution that pursues truth and justice, then surely they cannot be required to lie and to cheat in the manner that I describe.

This simple and appealing argument rests on a confusion, however. In particular, it conflates judge and jury, whom I shall together call the umpire, with the broader structure of adjudication within which they act. The court is constituted by this broader structure, which includes not just the umpire but also the parties and their advocates. (Woolley implicitly accepts this when she characterizes the lawyers’ duties as officers of the court in terms of a duty to ‘maintain[] the process of the adversarial system,’ but she does not draw the appropriate conclusions.) The umpire, to be sure, pursues truth and justice. But the umpire is but a part of the court, and the court writ large pursues, not truth and justice, but something very different, namely legitimacy in the face of ongoing and intractable disputes about what truth and justice require. The court, that is, constitutes a system of dispute resolution that aims to generate agreement about which resolutions of disputes to obey in the face of disagreement about which resolutions to adopt: it aims to generate agreement, moreover, without resolving the disagreement, which the system treats as entrenched. One might even say that the court aims to achieve legitimacy without producing justice. The eighth chapter of A Modern Legal Ethics, entitled ‘Lawyerly Fidelity and Political Legitimacy,’ explains this aim and locates it within the broader project of liberal political thought.

To be sure, the court can achieve legitimacy only if its umpires are perceived to pursue, and indeed do pursue, truth and justice. But the umpires are – just like the parties and their partisan advocates – only a part of the system, and the point of view of the umpire is, therefore, decidedly not the point of view of the system writ large. This observation, which is obvious with respect to advocates, comes less readily to mind with respect to umpires. But it is no less certainly, clearly, or, indeed, necessarily correct. And once it is in place, the insight reveals the conflation behind Woolley’s charge that I exaggerate lawyerly partisanship and, along the way, invent the lawyerly vices. Lawyers are, indeed, officers of the court, but they are precisely this: officers of the court and not of the umpire (recall Woolley’s characterizing the lawyer’s duties in this connection in terms of ‘maintaining the process of the adversarial system’). Woolley’s claim that the lawyerly vices are exaggerated, by contrast,

7 See Woolley, supra note 2 at 992.
8 See Markovits, supra note 1 at 171–211.
conflates the court with the umpire – a conflation that is, perhaps, more natural than conflating the court with the advocate but not any less mistaken.

Accordingly, the advocate’s general duties to support the court merely entail that the advocate not undermine the court’s legitimacy. This does (as the doctrinal sections of _A Modern Legal Ethics_ elaborate in considerable detail) require that lawyers not undermine the umpire’s impartiality. But it does not require, or indeed permit, the advocate to adopt the umpire’s impartial role and abandon her own partisan one. And the positive law’s constraints on advocates’ partisanship, therefore, cannot, as a general matter, possibly make the advocate a direct seeker of truth and justice. This is what I meant, in the book, when I said that the genetic structure of adversary advocacy, which arises in the shadow of the structural division of labour between advocate and tribunal, requires advocates to display the lawyerly vices. The book’s close interpretive engagement with the positive law serves merely to illuminate this general point by displaying it vividly in a particular context. The point, however, stands on its own, as a necessary truth about adversary lawyering.

### III Seeing the world from one’s own point of view

This structural analysis of adjudication and of the advocate’s and the umpire’s respective roles within the adjudicative process emphasizes that no part of the process contains, or can assume, the perspective of the whole. This incompleteness – one might even say partiality – is a necessary consequence of seeking legitimacy in the face of deep and entrenched pluralism. There are simply no regulative principles – not at any level of abstraction – on which all sides of moral and political disputes can agree. Instead, there is only a process with the property that all who participate in it come to accept its results and in a manner that is stable in the face of the critical capacities that the participants do or can come to apply to question the process’s legitimacy. Finally, even here, the process generates universal acceptance of its results without generating a complete or comprehensive shared perspective from which the results are accepted. Rather, every participant comes to the results from her own perspective, and the several participants’ perspectives merge (or, indeed, converge) only on the narrow question concerning the process’s legitimacy.

This deep and entrenched pluralism is often called, for example, by Rawls, a ‘fact.’ But such a characterization risks generating confusion, because it is important to see that the fact has an explanation, and that

the explanation is moral and not epistemic. That is to say, people disagree about practical matters not simply because questions of allocation and justice are so difficult that (universal) error is inevitable but also because, even if the impartial truth were knowable, people could not, as I explain in the third part of *A Modern Legal Ethics*, adopt it to regulate their lives. This thought raises the second point of difference between Woolley’s approach to legal ethics and mine.

Woolley’s suggestion that, insofar as the lawyer’s role is impartially justified (perhaps on the grounds that Dare proposes or perhaps on others), then the actions that this role requires do not contravene ordinary first-personal morality\(^\text{10}\) goes wrong in respect of the fact of pluralism. As I explain in Part Two of *A Modern Legal Ethics* (the part devoted to the idea of integrity),\(^\text{11}\) persons’ deliberative and motivational capacities render them incapable of adopting the pursuit of impartial morality as a first-personal ambition. It is not simply that persons do not as it happens make impartiality their first-personal concern. Rather, it is that they could not possibly do so – that every first-personal moral ideal, even if it is formed in response to impartial concerns – will necessarily be only limited and idiosyncratic with respect to impartiality and therefore will necessarily come, at some point, into conflict with impartiality.

Woolley claims that ordinary morality does not apply directly to the lawyer’s lying and cheating but rather only to this conduct as it is mediated by ‘the lawyer’s institutional role in a democratic system of laws’\(^\text{12}\) and that when morality’s application is mediated in this way, ‘its conclusion is that what lawyers do is good, not bad.’\(^\text{13}\) But, in making this claim, Woolley flatly ignores the central point of my account of integrity, namely that ordinary morality simply cannot apply in this infinitely flexible way – no person can ever do what Woolley supposes, which is to make it her first-personal ambition to do whatever is impartially justified. Instead, all persons’ first-personal ambitions will necessarily sometimes conflict with what impartiality requires: lawyers are not qualitatively but only quantitatively special, in this connection. They are special only in that impartiality, when it is applied to their place in the structures of dispute resolution favoured by modern, egalitarian societies, requires them to contravene ordinary first-personal moral ambitions in particularly stark ways – to lie and to cheat, as I say. They are also special (now, not morally but rather epistemically) in that the formal and highly articulate character of their professional ethics leaves an elaborate paper trail of the conflict.

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10 See Woolley, supra note 2 at 995.
11 See Markovits, supra note 1 at 103–54.
12 See Woolley, supra note 2 at 995.
13 See Woolley, supra note 2 at 995.
Indeed, Bernard Williams’s famous ‘one thought too many’ case,14 which Woolley invokes in support of an alternative to my development of the ethical tensions inherent in adversary lawyering,15 in fact illustrates precisely my claim. The wife, in Williams’s example, wants the husband to save her, not because it is impartially justified to save one’s wife, but rather simply because she is his wife. She wants, that is, a husband who loves her idiosyncratically and not impartially. One consequence of my argument is that the husband could not love his wife – because he could not do anything – in any other way. Indeed, even if he thinks himself to pursue impartiality, he pursues it idiosyncratically rather than impartially. (This idea may itself be illustrated by judges’ ethics, incidentally, as when judges’ commitments to certain kinds of neutrality in fact constitute a kind of idiosyncratic uprightness that prevents them from acting in non-neutral ways even when impartiality properly understood requires it. An example is the judicial enforcement of fugitive slave laws, famously considered in Robert Cover’s Justice Accused,16 on the grounds of their neutral authority and in the face of their actual and discriminatory immorality.)

IV The importance of authenticity

This brings me briefly to my third point. Woolley insists that it is a mistake to focus on the question of whether lawyers can lead lives well lived in the first-personal sense – the sense associated with preserving their integrity and their self-affirmation of authorship over their own lives – to the exclusion of the question of whether lawyers’ conduct may be impartially justified. She suggests that I ‘focus exclusively on the question of whether the lawyer’s life is well lived’17 and, at the very least, neglect the question of whether ‘as a constitutional democracy, we would embrace lawyerly . . . [partisanship] given our moral, constitutional, and legal values.’18 Woolley insists, in other words, that impartial morality must be given a prominent place in legal ethics overall.

I agree that the impartialist question is important. Indeed, much of what I say about adversary advocacy and the authority of adjudication in Part Three of the book is, in fact, an effort to take up the impartialist question in a new way. I seek, in those pages, to cut through the tangle of considerations that has made the effort to connect partisan lawyering to the pursuit of justice both theoretically and practically unsatisfying.

15 See Woolley, supra note 2 at 995.
17 See Woolley, supra note 2 at 995.
18 See Woolley, supra note 2 at 999.
I depart from this tradition to observe that the real point of lawyerly partisanship is not to achieve justice but to sustain legitimacy. This is no mere afterthought in the argument of the book or philosopher’s parlour trick. Rather, my emphasis on legitimacy has practical consequences, which I identify but do not pursue in *A Modern Legal Ethics* and which merit further study. One important issue concerns the distribution of legal services: where conventional justice-based accounts of lawyering suggest that unequal access to lawyers might be counteracted by reducing lawyerly partisanship (and hence rendering advantages in representation less effective), the legitimacy-based account that I develop entails that there can be no substitute for providing partisan counsel to all. Another important question concerns the ethics of government lawyers: insofar as lawyers’ partisanship is justified by the need to sustain the legitimate authority of courts, the grounds of adversary advocacy do not extend to government lawyers; the government, after all, does not need to have the authority of courts legitimated, as it is in authority. This suggests that the ethics of government lawyering must stand on a separate footing from ordinary legal ethics (not just for the special case of criminal prosecutors, but quite generally) and, likely, that the positive law regulating government lawyers should depart much more from the rest of the law of lawyering than is commonly recognized.

At the same time, I insist that questions concerning first-person morality are no mere afterthought. Impartialist justification is *never* enough for an agent’s ethical life. And accordingly, insisting on integrity, authenticity, and similar ethics ideas, even at some cost to impartiality, is not mere self-indulgence or navel-gazing. It is, instead, a practical necessity for human persons and an entirely appropriate concern for a profession whose place in the moral division of labour renders conflicts between professional obligations and ordinary moral ambitions particularly clear and stark.

Legal ethics, thus, cannot – for reasons that apply to ethics quite generally – ever be reduced to generic moral or political theory. And in this sense, taking the lawyer’s point of view in legal ethics is not a sop to local interest but an inevitable part of any serious engagement with the legal facts and moral circumstances of the lawyer’s life.

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19 See Markovits, supra note 1 at 201.