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A polemic on not acting for tobacco companies [and identifying who to act for]

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We all know (and probably accept) the principle that anyone charged with a criminal offence cannot be refused legal representation because their alleged offence may be distasteful or offensive. The 'cab rank' rule¹ needs no great discussion, even though there is a fascination among new lawyers with debates about why they should be ethically compelled to represent, for example, an alleged rapist.

What is far more difficult these days, however, is the strange notion that lawyers have a similar ethical obligation to represent clients (especially wealthy corporations) in civil proceedings – and to 'represent' them to the extent of avoiding or covering up or delaying access to the truth, to protect those corporate interests. The ethical imperative to accept criminal defence briefs has infiltrated the civil arena and some lawyers still have a vague notion that it's also inappropriate to refuse on ethical grounds (even when fees are not an issue), to represent a corporate client in a civil dispute.

Is this why lawyers think it's wrong to consider the nature of their client's business or the subject matter of a dispute, before becoming involved? Putting aside the obvious objection that there are jobs at stake, is it not time for modern lawyers to take ethical stances about the issues they aid and abet?

In answer, lawyers operating all the time in the civil 'defence' of certain anti-social activities - for example, tax avoidance, gaming, armaments and clear-fell logging – have been known to assert that the nature of an adversarial, capitalist community both requires and benefits from lawyers on each side representing their client's interests with enormous vigour, in the expectation that lawyers for the 'other side' will sooner or later balance out this energy and just results will be obtained.

But is this faith in fair outcomes justified, given what we know about the costs of access to justice for small players, common delaying tactics of repeat litigators and even some of those clients' and their lawyers' efforts at hiding the truth? If lawyers' ethics cannot be taken for granted, is there sufficient overall safety for the community in the present civil litigation system?

Reforms to the Victorian civil litigation system (brought in under the former Attorney-General Rob Hulls) require lawyers to consider and comply with 'overriding obligations' that

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¹ See for example, Ysaiah Ross, *Ethics in Law*, 4th Ed, Butterworths, Sydney, 2005, p 219.

are radically ethical.² These changes must be taking us in the right direction, but they are more concerned with actual or imminent litigation than with what goes on day to day in commercial-transactional legal practices.

The issue of actual knowledge of something nefarious happening in a criminal trial, is actually not the big question: far more important are the issues of on-going advice designed to subvert justice, where lawyers' actual knowledge or reasonable suspicions tell them that their client is engaged in law-breaking. It is one thing to support (against all critics) the right to a fair trial³ for someone or a corporation charged with, for example, an industrial 'manslaughter'; it is quite another to say that the corporation is entitled to legal advice to help set up the structure or system which evades tax or actively leads to one death, let alone hundreds of thousands of deaths. When we get to tobacco – perhaps the most obvious product that will kill if used as directed – the justification for acting for these companies - that 'if we don't, someone else will' – allows the appalling moral vacuum in such lawyers to emerge.

When you add in the criminal law dealing with causation of harm, endangerment and homicide;⁴ the ordinary principles of negligence;⁵ trade practices legislation dealing with conduct which is misleading or deceptive⁶ and unconscionable conduct;⁷ and finally the equitable principles that provide relief against the exploitation of people in positions of disadvantage;⁸ who do lawyers think they really are, on the 'inside' that is, when they assist clients such as these?

Distinguishing between rules and principles

I think it's now safe to suggest that most writers on legal ethics distinguish between the *rules* of conduct, that is, the black-letter conduct requirements of the professional organizations and so-called underlying *principles* of ethics.⁹ The distinction is usually made because it seems to be a part of legal training and culture, when we focus on rules alone to guide our behaviour, to analyse the technical limits of a rule to decide whether we can or cannot do something. Principles of ethics,¹⁰ on the other hand, are necessary because they encourage a positive

² See *Report of the Civil Justice Review*, Law Reform Commission, Victoria, March 2008, at <http://www.lrc.vic.gov.au>. Many of the *Report* recommendations were enacted in the *Civil Procedure Act* (Vic) 2010. See in particular ss 10-16.

³ Eg, see C Wolfram, 'A Lawyer's Duty to Represent Clients, Repugnant and Otherwise' in Luban D (ed) *The Good Lawyer: Lawyers' Roles and Lawyers Ethics*, Totowa, NJ, Rowman & Allanheld, 1984

⁴ See the common law offences of murder (where the accused was aware that death was a probable consequence of his or her action: *R v Crabbe* (1985) 156 CLR 464), and manslaughter (where the accused's conduct fell so far short of the standard of care of a reasonable person, and carried such a high risk of death or grievous bodily harm, that the doing of the act merits criminal punishment: *Nydam v R* [1977] VR 430); and the *Crimes Act 1958* (Vic) s. 17 (causing serious injury recklessly), s.18 (causing injury intentionally or recklessly) s. 22 (conduct endangering life), s.23 (conduct endangering persons), and s.24 (negligently causing serious injury).

⁵ See *Donoghue v Stevenson* [1932] AC 562; and *Thompson v. Johnson and Johnson* [1991] 2 V.R. 434.

⁶ *Trade Practices Act 1974* (Cth), s.52.

⁷ *Trade Practices Act 1974* (Cth), ss 51AA and 51AB.

⁸ *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; and *Bridgewater v Leahy* (1998) 194 CLR 457.

⁹ For example the discussions in Stephen Parker, 'Introduction & Ch 4: Change, Responsibility and the Legal Profession' in S Parker and C Sampford (eds.) *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 1.; D Luban, *Lawyers and Justice: An Ethical Study*, New Jersey, 1988); D Rhode, 'Ethical Perspectives on Legal Practice' (1985) 37 *Stanford Law Review* 589; W Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harvard Law Review* 1083; R Wasserstrom 'Lawyers as Professionals: Some Moral Issues' (1975) *Human Rights* 1

¹⁰ See for example, those contained in the (now repealed) *Legal Practice Act 1996* (Vic) s 64.

overview that transcends ‘the rules’, offering a ‘deeper’ guidance that compensates for the positivist and often negative expressions of unacceptable conduct in the rules.

Principles are on the way back. Well before the scandals of *HIH*, *McCabe v BATAS*, *James Hardie* and *AWB*, Stephen Parker, a former Dean of Monash law school had noted

‘...the interesting literature...emerging on the theme that lawyers should retain some ethical discretion so that they might, for example, decline to perform a lawful act on behalf of a client by reason of its immoral consequences’.¹¹

If we are then ‘allowed’ not to act for dodgy corporations, why do we? It’s not just the money; it’s also because we become very adept at rationalising, accepting and minimising our roles in working for all sorts. Systematic ethical denial is not limited to tobacco representatives. Drug traffickers, the trans-national importers of sex-slaves, the large-scale paedophilia rings and international money launderers: all are assisted by some lawyers who are prepared not to ask too many questions and either structure favourable legal regimes or resist their dismemberment. Consider particularly the concept of the tax haven – the ‘legal’ device to limit tax liability. There is still a strong line of authority that allows an Australian taxpayer to avoid tax by all legal means (tax planning), so long as there is no actual evasion.¹² Yet legitimate tax planning intersects with questionable ethical structures on an every-day basis and the vast array of law firm talent working at reducing tax through artificial corporate structures, is contributing to undermining the chief institution of Western economics - the corporate-government relationship. If this criticism appears too strong, consider that Robert Gordon, the well-respected legal ethicist from Yale law school, has described US tax-avoidance lawyers as ‘legal terrorists’.¹³ UK accountant Prem Sikka went down the same path in describing the practice as a ‘threat to democracy’,¹⁴ because ‘unless stopped, the tax avoidance industry will destroy nation states and the very idea of democracy. Without adequate tax revenues no government can deliver its legislative programme, provide public goods or redistribute wealth.’¹⁵ Sikka goes on to assert that tax avoidance (*sic*) is such a social evil because governments are eternally in catch-up mode. For every loophole closed,

¹¹ Stephen Parker, Ch 4: Change, Responsibility and the Legal Profession, in S Parker and C Sampford, *Legal Ethics and Legal Practice: Contemporary Issues*, Clarendon Press, Oxford 1995, pp 81-82, citing D Luban, *Lawyers and Justice: An Ethical Study*, New Jersey, 1988); D Rhode, ‘Ethical Perspectives on Legal Practice’ (1985) 37 *Stanford Law Review* 589; W Simon, ‘Ethical Discretion in Lawyering’ (1988) 101 *Harvard Law Review* 1083; R Wasserstrom ‘Lawyers as Professionals: Some Moral Issues’ (1975) *Human Rights* 1.

¹² See generally, *Commissioner of Taxation v Westrad Pty Ltd* (1980) 144 CLR 55, per Barwick CJ. The Barwick High Court is generally ‘credited’ with legitimising the notion of what is now called tax planning. The ambivalence of the courts is however illustrated by the statements of Viscount Simon LC in *Latilla v Inland Revenue Commissioner* [1943] AC 377 at 381 and Lord MacNaughton in *Commissioner of Stamp Duties v Byrnes* [1911] AC 386 at 392. Referring to tax planning, Viscount Simon said: ‘There is ... no doubt that they are within their legal rights, but that is no reason why their efforts...should be regarded as a commendable exercise of ingenuity... On the contrary, one result of such a method ...is...to increase...the load of tax on the shoulder of the great body of good citizens who do not...adopt these manoeuvres.’ By contrast Lord Macnaughton said that ‘none is bound to leave his property at the mercy of the revenue authority if he can legally escape its grasp.’ The broader issues of morality raised by Lord Simon have been rationalised by placing responsibility, not on the tax lawyer, but on the regulators (rendering acceptable the practitioner’s role as ‘amoral technician’), forgetting that individual lawyers also work for the regulators and have a choice as to the values they will work to in their regulatory positions.

¹³ Professor Robert Gordon, Yale University: Address to 1st International Legal Ethics and Regulation Conference, Exeter University, Exeter, UK, 5 July 2004.

¹⁴ Prem Sikka, ‘Accountants: A Threat to Democracy’ 5 September 2005, *The Guardian*, p 15. Prem Sikka is Professor of Accounting at the University of Essex. He is writing about tax avoidance practitioners as both accountants and lawyers and estimates that up to £100 billion is lost to the public revenue in the UK per annum.

¹⁵ Note 3.

legal ingenuity is employed to open another and the clients of the avoidance practitioners remain perpetually ahead.

A ‘way forward’ via moral philosophy

In 1971, the American philosopher John Rawls published *A Theory of Justice*.¹⁶ His thesis is momentous for the legal profession – even more relevant today than forty years ago – because it continues to offer both a contemporary rationale for and a scheme of belief in justice – ‘justice as fairness’ – that goes beyond explicit religious positions and strengthens humanity.

Rawls’ major message to us as lawyers was to reaffirm the primacy of what is apparently ‘right’, as opposed to what is just efficient practice. The simplicity of his statement is compellingly attractive to younger lawyers – because of its antidote to post-modern influences on the supposed certainty of the Rule of Law – though it seems disarmingly naive to older lawyers. Some experienced practitioners are resigned to what they see as the effective end to the ‘justice dream’; but some consultants to the profession are far more confronting. One law firm management advisor commented recently, in relation to what he sees as a lack of leadership in many law firms:

‘Words like Communication, Respect, Integrity, Excellence. They sound impressive and possibly resemble your own law firm’s values. If so, you should be concerned. These are the corporate values of Enron, as claimed in its 2000 Annual Report. And they’re absolutely meaningless...Firms need to have a set of values that are true and transparent...If [they are] not consistent with those of your employees, then you will never win over their hearts and minds.’¹⁷

Now there are, of course, many legal practices that are getting on top of their culture without some major event as a negative stimulus. Some firms may see this as essentially a public relations exercise, while others, I know, genuinely acknowledge that, while they might continue to make money and be ‘efficient’, they will struggle to *maximise* their financial returns or the wellbeing of their employees, if they do not succeed in recasting their culture.

You may remember in April 10 years ago Clayton Utz’ culture was put under some pressure. In the Supreme Court, Eames J made a number of subsequently-reversed findings about the conduct of a former partner, in the context of British American Tobacco’s defence of a damages claim by the now-deceased Rolah McCabe.¹⁸ The firm announced, after that ruling, that it had appointed former High Court judge Sir Anthony Mason to head a ‘professional excellence committee’ and, although they had no choice, a decision was taken to cease acting for tobacco companies in personal injuries matters.¹⁹

Although the findings against Clayton Utz were reversed in the Court of Appeal later in 2002,²⁰ the firm itself continued to suffer internally for some time afterwards as a whistle-

¹⁶ John Rawls, *A Theory of Justice*, Rev. Ed., 1999, Harvard University Press.

¹⁷ Simon Tupman, ‘Food For the Soul’ *Lawyers Weekly*, 22 November 2002, pp 10-11 at 11.

¹⁸ *McCabe v British American Tobacco* [2002] VSC 73.

¹⁹ Bill Pheasant, ‘Appeal Court to Rule on Landmark Tobacco Case’, 6 December 2002, *The Australian Financial Review*, p 14.

²⁰ *British American Tobacco v McCabe* [2002] VSCA 197.

blower's reverberations found traction in *The Age*.²¹ The professional effects of the saga were magnified because large firms – particularly those in the first and second tiers of the profession – provide cultural leadership to the rest of us. Many managing partners are well aware of this and make strenuous efforts, for example, to compete with each other in their *pro bono* activities.²² Some are attempting 'family friendly' workplaces, accompanied by a very slow but steady trend to promoting female partners as an affirmative strategy. Yet these cultural moves are, with respect, easy in comparison to confronting the ethics of professionalism *v* commercialism.²³ Leading law firms are true leaders only to the extent that this confrontation is occurring. For the moment, there is no more critical demonstration of this imperative than in the conflict between professionalism (the public interest in promoting ethical products) and commercialism (the morality of acting for tobacco companies).

Post-*Enron* and *HIH*, altruism in ethics is a risk-wise strategy.²⁴ Each modern sub-division of Rawls' 'justice as fairness' – communication, respect, integrity and excellence – is a virtue in which the community is now even more vitally interested and on these bases, is now judging our utility and the privilege of relative regulatory independence.

We can look further at another moral philosophical concept – that of *virtue* and its impact in medical practice - in seeking a way out of the moral morass into which many corporate lawyers now find themselves. There is, within medicine, an approach to improving medical practitioners' ethics that relies on simulating as closely as possible what it's like to blow the whistle on an unethical activity in clinical practice and experience the consequences, good and not so good, of that disclosure action.²⁵

The idea is that medical students and practitioners who play the role of whistle-blower in a simulated disclosure of illegal or unethical activity over a period of time will begin to understand what that process will actually cost them if they later feel the need to take such action in reality. This understanding could include feedback from simulated peers about how they (the peers) feel about them as a whistle-blower when their hospital is investigated by, for example, someone from the Medical Practitioners Board and how much it might cost them in legal fees and career interruption. Amazingly, it seems that such simulations do not positively discourage whistle-blower actions but seem to empower those going through the exercise by 'imbu[ing] medical graduates with the resilience they need to resist the influence of negative role models in the workplace'.²⁶

On reading this you're probably thinking: he's nuts, he's *so* naïve, or worse, but consider what there might be to gain if we sidelined our apprehensions and look at all this from a

²¹ William Birnbauer, 'Tobacco Insider Tells of Files "Cull"', *The Age*, Melbourne, 19 July 2003, 1. See also Marcus Priest, 'Clayton Utz Says It's in the Clear on BAT', *The Australian Financial Review*, Sydney, 25 July 2003, 58.

²² In 2008, the then Victorian Attorney-General Rob Hulls introduced a scheme whereby law firms that wished to remain on the panel to receive Victorian government legal work would be required to allocate between 5-15% of their gross fee revenue from that work to *pro bono* activities. This very utilitarian scheme entrenched *pro bono* as a commercial objective of many firms, allowing them to capitalise (*sic*) on the commendable motives of many partners and associates. See Kirsten Hilton and Hugh de Kretser, 'Working Hard for the Needy', 24 June 2008, at www.theage.com.au.

²³ *Professionalism versus Commercialism*, Resolution of the Council of the International Bar Association, adopted 17 September 2000.

²⁴ John Cain, 'Good Ethics Requires Constant Vigilance', (2002) 76 *LJ* 8 at 4.

²⁵ See Justin Oakley, 'Teaching Scientists the Value of Virtue', *Australasian Science*, March 2009, 39.

²⁶ *Ibid*.

therapeutic jurisprudence point of view.²⁷ Consider if this approach might be applied to legal practice, in an effort to encourage appropriate, early reports of document destruction or memo alteration, before they blow up in everyone's face and ruin practitioners' lives, not to mention those of their clients? We are moving into an economic climate where (historically speaking) the pressure on financially vulnerable practitioners is probably rising and with that, the instances of corner cutting and rationalised blindness will also be increasing.

In a real sense, if each of us were able to experience (through simulations, within a CPD module running over several months) what it's like to discuss such concern with the colleague in question; what happens when we *carefully* report them for this or that reason; to see what happens to ourselves and our work relationships if our simulated motives are genuine (or not); to see what happens to our reported colleagues and their families if we do report and to compare those consequences with those that might occur downstream if a report is *not* made: if all this 'fast-forwarding' were possible in a protected CPD context, might it not occur that lawyers, just as with doctors, are able to experience what it feels like to behave ethically and preventatively in the interests of all concerned? Maybe then we could build resilience and even courage into new lawyers' sense of right and wrong behaviour.

Virtue ethics

Ethics – derived from the Greek *ethikos* (or *ethos*, meaning 'nature' or 'disposition'²⁸) – is concerned with moral philosophical questions about personal inclination, choice and eventually judgment in society generally. In the public arena ethics has increasingly focussed on moral choice to the extent that 'ethics' and 'goodness' may now be popularly seen as synonymous.²⁹ However, it is very possible to reach different conclusions as to the good or right thing to do (or at least to 'do no harm'³⁰), depending on the chosen framework. Thus the impact of consequentialism³¹ in the last three centuries, with its enormous emphasis on the 'greatest good for the greatest number', has not by any means overshadowed Kant's insistence on the 'good' that comes from prioritising individual rights. Both these major systems of ethical thought are, for present purposes, toiling in adjacent fields: they both look to champion goodness and rightness, depending on the system chosen.³²

²⁷ See for example, Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice,' (in press) *Melbourne University Law Review*.

²⁸ *The Australian Oxford Dictionary*, Bruce Moore (ed) 2nd edn, Oxford University Press, South Melbourne, 2004, p 430.

²⁹ It might be suggested that ethics and goodness are more synonymous for the consequentialists and teleologists; whereas ethics and duty/right are more synonymous for the deontologists and legal positivists, but we think it clear that deontologists' focus on rights and duties is *instrumental* only and that their objectives (as much as teleologists look towards good outcomes) are always to promote 'good' processes and the 'good' observance of rights.

³⁰ The so-called Hippocratic Oath enjoins members of the medical profession to 'do no harm' when they can do no good and there is an argument that such an obligation should extend also to lawyers. See Julius Rocca, 'Inventing an Ethical Tradition: A Brief History of the Hippocratic Oath' (2008) 11 *Legal Ethics* 23; Kim Economides, 'Symposium: A Hippocratic Oath for Lawyers?' (2008) 11 *Legal Ethics* 41; Adrian Evans, 'First, Do No Harm...' (2008) 82(6) *LJL* 86.

³¹ Note 11, p 177. Consequentialism is not the same as utilitarianism, but a general overarching category which includes utilitarian thinking. A consequentialist will hold that acts which promote a variety of overall dimensions of goodness (for example, happiness, knowledge, achievement, etc) are ethical, while a utilitarian is narrower and will tend to prioritise acts which preference the happiness of sentient beings as more important in determining what is truly ethical. See also J and S Rachels, *The Elements of Moral Philosophy*, n 3, Chs 7 and 8.

³² Dewhurst observes that there is a common distinction between the good and the right. She comments: 'The "good" is often explained in connection with some higher order justification and is more intimately tied to the question of good ends (consequentialism and teleology); whereas the "right" is more codified and has been

But if lawyers are also people of conscience faced with decisions *in role* and not just as citizens, they cannot so easily avoid considering the wider jurisprudential question: what does their acting as tobacco lawyers do to undermine the fabric of the so-called ‘thick’ (as opposed to the ‘thin’³³) version of the Rule of Law? If the thin version of the Rule of Law is credible, then it is much harder for all lawyers to be ‘good’ in the sense proposed here. This broad question of the nature of lawyers’ obligation has received recent major attention in a debate reignited by Daniel Markovits,³⁴ who has in broad terms reasserted not just the right but also the obligation of an advocate in a robust democracy to ‘lie’ and ‘cheat’ when necessary, as some have pointed out.³⁵

Markovits’ championship of a very thin understanding of the Rule of Law comes from his apparent conviction that, since ordinary democratic society is based on egalitarian and impartial ideals, advocates exist (at a ‘genetic’³⁶ level) to argue for individuals faced by this egalitarian impartiality and in doing so must give some weight to client-centred ideals. So stated, these premises are unremarkable, but they do not automatically justify deception and disingenuous interpretations of laws quite outside those intended by their drafters. They must also be balanced against wider overall ideals of the same system to ensure reasonable, fair and effective access. Because of his premised egalitarian and impartial democracy, Markovits does not see the need to prioritise the latter notions of fairness over the former acceptance of the carefully expressed lie, and particularly for present purposes of lawyers’ virtue, does not

given a more rigid conception and focuses on duties either through the dictate of reason or some other religious or moral code. Thus, in many senses, the consequentialists and teleologists are talking about the good and Kant is talking about the right. This debate can however exclude the sense of overriding ‘goodness’ referred to in n 34, above. See the summary of the work of W.D. Ross on the right and good at:

<http://plato.stanford.edu/entries/william-david-ross/#RosDisMorFraRigGoo>. As for Kant, it can be said that he is not particularly concerned about the "good" at all. In the *Fundamental Principles of the Metaphysics of Morals*, Abbott trans. (Buffalo: Prometheus Books, 1987, p. 25) Kant writes, "*Duty is the necessity of acting from respect for the law ... Now an action done from duty must wholly exclude the influence of inclination, and with it every object of the will, so that nothing remains which can determine the will except objectively the law, and subjectively pure respect for this practical law, and consequently the maxim that I should follow this law even to the thwarting of all my inclinations.*" (Comment on file with authors, 25 October 2011). In our view however, it is not necessarily the case that a focus on rightness must be divorced from concern for goodness, at least for TJ practitioners. A TJ lawyer who wishes to see the law observed (rightness) will often believe that that observance is also in the long-term best interests of their client (goodness).

³³ The terms ‘thick’ (or substantive) and ‘thin’ (formal) conceptions of the Rule of Law are used here to denote respectively, the desirability of lawyers’ broad allegiance to law as a general principle of social harmony, with which few would disagree, and the narrower view that lawyers need only seek to comply with precise, confined obligations set out in the clearest of language. A consequence of the different approaches is that laws which are written in principled format and therefore (generally) embody some notions of morality and permit some ambiguity in their interpretation, are not only capable of selection or dismissal by a zealous (‘thin’) lawyer, but also in a sense *contemplate* their own avoidance, if it is accepted that the Rule of law requires only the narrowest (most ‘thin’) of compliance within an economic and social understanding that clearly prioritises individual autonomy (or selfishness) over collective responsibility, or selflessness. See for example, Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory*, CUP, New York, 2004.

³⁴ See Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, Princeton University Press, New York, 2008.

³⁵ Alice Woolley in particular, has pungently identified Markovits’ perspective in these terms. See Alice Woolley, 9 May 2009, at: <http://www.legalethicsforum.com/blog/2009/05/daniel-markovits-responds-to-alice-woolley.html>, accessed 17 June 2011.

³⁶ See Daniel Markovits’ responds to Alice Woolley, 9 May 2009, at: <http://www.legalethicsforum.com/blog/2009/05/daniel-markovits-responds-to-alice-woolley.html>, accessed 17 June 2011.

seem to worry unduly about any consequential effect on their individual psyche or that of others similarly impacted.

As indicated above, the idea of ethics – that is, what seems ‘moral’ to an individual – does not in itself imply propriety. The individual values that underlie ethical constructs are clearly highly variable, leading to moral and immoral ethical positions. Always, there is a choice to *be* moral³⁷ or to be immoral (unethical), but even if that is recognised it is suggested that our ethical behaviour consists not just of what is ‘proper’, but also what is ‘good’, or both. Understanding goodness however, requires further delineation.

A well-known categorisation of ethics has been developed to try to come to grips with the complexities of the correct or best ethical choice. This is the moral philosophical trio of concepts known as *consequentialism*, *deontological theories* (derived from the Greek word for ‘duty’) and *virtue ethics*.

Each of these methods³⁸ provides a notionally separate way forward for everyone, including lawyers, to decide or judge morally complex matters. In highly simplified terms,

‘[Consequentialists] are ...in general prepared to see individuals suffer when there is a greater good ... at stake. They equate ethics with numerical survival of the greatest number [for the greatest good] and their perspective is often described as teleological; Kant is the best known of the alternative ‘deontologists’, who value rights and fairness over consequences. His ‘categorical imperative’³⁹ originally required only benevolence and fidelity but more recently, ‘Kantianism’ has shifted to the ‘moral rights’ of others, so that ... [r]ights rather than ends or consequences... [are the priority]; [and] Transcending both these approaches are *virtue ethics*, an ancient (but increasingly rejuvenated) character-based philosophy derived from Aristotle’s *Nicomachean Ethics*.⁴⁰ Lawyers accustomed to hard-nosed environments will tend to glaze over at the mention of classical scholarship, but ignoring virtue ethics as worthy of understanding would be a costly decision in itself. The virtue ethicist is a ‘good’ person and therefore supposedly makes ‘good’ decisions regardless of rights or consequences. [Their orientation is capable of incorporating other major ethical approaches because they are in]... ‘a state of contentment, a life integrated happily with a sense of purpose, lived out in community.’⁴¹ The qualities that such a person exhibits in order to achieve a proper life are the *virtues*. Together, the virtues: courage; temperance; magnificence; pride; good temper;

³⁷ That is, for the sake of future discussion, to be ethical in the positive sense. However for present purposes, ethics and morality are used as interchangeable terms. See Deborah Rhode and David Luban, *Legal Ethics*, The Foundation Press Inc, Westbury, New York, 2nd ed, 1995, p 4. ‘...we doubt the usefulness of any general distinction between ethics and morality.’ Rhode and Luban observe that others have drawn distinctions between the two concepts, but the authors see the distinction as spurious: thus while Hegel speaks of ethics as the customary norms within a specific society... (GWF Hegel, *The Phenomenology of Spirit*, 266-94 - trans. A Miller, 1977) and others have spoken of a sharp distinction between theory-based morality and a custom-based ethics, ‘...we believe that philosophical theories of morality arise from common sense ethical reflection and in turn, influence it.’ (p 4).

³⁸ See Marcia Baron, Philip Pettit and Michael Slote, *Three Methods of Ethics – A Debate: For and Against Consequences, Maxims and Virtues*, Blackwells, Oxford, 1997.

³⁹ Immanuel Kant, *Foundations of the Metaphysics of Morals*, 1785 (Lewis White Beck trans, 1959, Bobbs-Merrill, Indianapolis, 2nd ed., 1990, 46).

⁴⁰ See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles*, Cambridge, Cambridge University Press, 2001; Tim Dare, ‘Virtue Ethics and Legal Ethics’ in Duncan Webb (ed), *Seven Essays on Professional Ethics*, Victoria University of Wellington, Wellington, 1998, p 141.

⁴¹ *Ibid*, p 58.

friendliness; truthfulness; wittiness; shame and justice; to which Aquinas added faith, hope and charity,⁴² constitute the ethical life.⁴³

If consequential thinking dominates a lawyer's consideration of an ethical problem, then they will focus on the end game and may seek to exclude any doubts about whose interests will have to suffer (denying the Kantian imperative), along the way. For example, a not uncommon approach of a criminal lawyer faced with defending a client who is likely guilty of a serious assault will be to focus on the objective of achieving a 'not guilty' result and refuse to allow their client to tell them 'exactly what happened'.⁴⁴ In other words, if they do not *know* as a matter of fact that their client is guilty because they have in effect warned them not to confess, then the consequential objective of securing an acquittal will not be subverted by the Kantian inconvenience involved in the likely subversion of victims' suffering.⁴⁵

The ethical propriety of their actions as zealous advocate is traditionally the only focus in choosing between consequences and Kantian duty, but propriety in these narrow terms alone (which typically can be limited to rule compliance, particularly rules that exonerate what might otherwise seem doubtful) is not really enough. It is difficult to see how such a lawyer can indefinitely avoid considering their own virtues – their sense of goodness or otherwise – if they are constantly asserting the need for moral behaviour. To do otherwise is likely to provoke psychological disintegration over the long term. An effort might therefore be needed to redefine 'propriety' so that proper (ethical) behaviour is usually also 'good' behaviour, even if that is not always obvious.⁴⁶

Of course, resort to virtue ethics by defence counsel cannot occur on the spur of the moment. It is highly likely that any such instantaneous self-examination, undertaken for the first time in the midst of trial preparation, will achieve nothing except a sense of confusion for the practitioner.⁴⁷ But that need not be the case if, before these challenges arise, effort is put into

⁴² Thomas Aquinas (c. 1224-1274) *Summa Theologiae*, I-II, 62, a. 1.

⁴³ This three paragraph summary is extracted from Adrian Evans, *Assessing Lawyers' Ethics*, CUP, Port Melbourne, 2011, pp 68-69. Dewhurst comments that 'numerical survival of the greatest number' is too bald a statement for some consequentialists. She observes 'Mill did not support this position and thought that there were higher goods. For consequentialists like Mill, you only do harm to a few in favour of the many when harm is inevitable and you must choose one or the other to suffer a negative consequence. It is not a matter of imagining a positive benefit to many and then sacrificing a few to achieve it. For Mill, the goal of utilitarian action is to secure the virtues for all of mankind, the whole of sentient creation; and there are times when the individual must sacrifice for the good of all.' (Comment on file with authors, 25 October 2011).

⁴⁴ It is irrelevant that Professional Conduct Rules usually appear to endorse this 'creative' silence on the part of the advocate, because such rules do not (and could not) proscribe an advocate asking their client 'exactly what happened.' See for example, *Australian Solicitors' Conduct Rules* (forthcoming July 2011).

⁴⁵ Dewhurst adds that the zealous defence justification is also reasonably based upon the argument that in looking after his client's interests alone, the lawyer supports the overall health of the legal system. Comment on file with author.

⁴⁶ Paradoxically, goodness may sometimes require dispensing with a clear rule if its effect is to limit 'good'.

⁴⁷ Dewhurst provides the answer here: 'As Mill stated in *Utilitarianism* (Buffalo: Prometheus Books, 1987, p. 35) "... defenders of utility often find themselves called upon to reply to such objections as this -- that there is not time, previous to action, for calculating and weighing the effects of any line of conduct on the general happiness... The answer to the objection is that there has been ample time, namely, the whole past duration of the human species. During all that time, mankind have been learning by experience the tendencies of actions; on which experience all the prudence, as well as all the morality of life, are dependent... It is truly a whimsical supposition that, if mankind were agreed in considering utility to be the test of morality, they would remain without any agreement as to what *is* useful, and would take no measures for having their notions on the subject taught to the young, and enforced by law and opinion." (Comment on file with author, 25 October 2011).

considering *who I am* as corporate counsel and not just what strategy I can reasonably adopt in representing my client.

The virtuous practitioner will have a range of personally ‘good’ qualities or virtues that ought to provide an edge in determining what to do, so that, ‘if I am good, then so also will my actions be.’ Views will differ as to what should or must be on this list of virtues (and defining this list is not my purpose here), but to put this proposition slightly differently, if self-aware selflessness distinguishes the ethical lawyer, then their impetus to relinquish self-promotion and a paternalistic ‘I know what is good for you’, may be stronger. And the model of the ‘good person’ (not just the ‘good’ person) is an ideal way to think about what one ought to do; so that the questions are – how would the good person think, feel, etc and what would the good person then do?

At the end of the day, the harder question for practitioners who work for tobacco companies and have little functional autonomy (because they devise methods to get around the law at the express or implicit insistence of their clients) is to ask themselves: ‘who am I?’ Am I someone who believes in what I do because my overall confidence in the justice system is strong enough to persuade me that if my actions are not illegal *per se*, they are not ‘bad’? – known as the liberal or ‘zealous advocate’ position on legal ethics⁴⁸ – or am I someone who would like to believe that the justice system is fair and consistent, but nevertheless recognises that while this confidence works for the well-off, it is less and less the reality for those who are just poor, or disabled or mentally ill, or sick with lung cancer?’

If your answer lies in the former direction, then the ‘rules’ will appeal to you as the proper way to conceive legal ethics – the rules of conduct will need to be very precise, constantly in revision and have very severe financial consequences for breach before you are likely to think that you have over-stepped the mark. You will be inclined to be annoyed with the notion that the law is anything more than a business, but will not necessarily want to say so in print.

If, on the other hand, you lean toward the latter view – that law, morality and justice must intersect more often than not, you will probably be extremely impatient, as I am, with the comfort zone surrounding the notion that we simply ‘obey the law’ as it is and all will be peachy. To obey the law implies a bit more than relaxed comfort that law will catch up with social change, that access to the best advocates will always be feasible for both sides and that the courts will always enforce the law promptly and rigorously.

It is possible to consistently argue that as lawyers we can offer moral advice to clients as long as we don’t insist on its acceptance. But if we also know that our clients are nervous of morality, or see it as an impediment to their ambitions, we will need to be clear and confident about our own view of the contrasting approaches to professionalism if we are to continue to practice without adverse emotional and even spiritual consequences, over the long term.

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⁴⁸ See for example, W Bradley Wendel ‘Civil Obedience’ (March 2004) 104 *Columbia LR* 363. Neither Pepper nor Wendel would agree with tax avoidance – they would abhor it – but the liberal position on legal ethics is nevertheless conducive to toleration of artificial structures to avoid paying tax.