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Commentary

THE RADICAL ETHICS OF LEGAL RHETORICIANS

JACK L. SAMMONS*

I want to take seriously a claim that legal practitioners frequently made some twenty years ago, but one that fell into disrepute when academic legal ethicists took over the subject of legal ethics. The claim is that good lawyering *is* good ethics. This claim makes ethics a descriptive task, the description in question being a description of good lawyering. Of course, such a description of lawyering must come from, or at least start within, the practice.¹ Thus far I mean to say nothing more than that the excellences of lawyering, similar to the excellences of baseball, must be defined within the practice. Through the playing of baseball, we come to know that disciplined attention by a fielder to each batter is an excellence of the sport requiring certain knowledge, skills, and virtues, some of which are the abilities to maintain a calm temperament, to forget prior bad plays quickly, to avoid criticism of teammates for mistakes, and so forth. For lawyers, specific excellences of textual analysis, attention to detail, consideration of opposing arguments, sympathetic detachment, and general excellences of counseling, of persuasion, and of a particular form of practical wisdom are much the same.

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1. Here I am using the word "practice" both in its ordinary sense, as in the practice of law, and in the more formal sense of a MacIntyrean practice. "By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." ALASDAIR MACINTYRE, *AFTER VIRTUE* 187 (2d ed. 1984).

The excellences of a practice, however, are not necessarily those things currently admired within it. A current practice can be badly corrupted and the current practitioners of it badly mistaken. What this need for judgment of the current practice tells us is that the practice itself must be located within the tradition that defines it as an ongoing matter with an ongoing inquiry into the ends of the practice. In fact, an essential requirement of any practice will be maintenance of the inquiry in which it is defined and by which current practice can be judged. Baseball, to continue with the analogy, is a practice located within the ancient tradition of sports, and it is within that tradition that we pass judgment upon the current practice of baseball.

Naming the tradition of a practice is, on this understanding of professional ethics, extremely important. If we did not think of the practice of baseball as within the tradition of sport, we would be confused about its activities, rules, excellences, and, therefore, we would be *very* confused about the ethics of it. All of this should be clear to you when you try to think of baseball, as major league team owners but few players do, as a business—an expression that confuses one particular institution of baseball with the practice itself.

It is part of my claim, something to be taken up later in elaboration upon the theme announced here, that many of the problems of the practice of law, including issues of professionalism, legal ethics, and community, are the product of lawyers having forgotten the tradition of which they are a part. In other words, I think that we can use what has and is happening to the practice of law to substantiate Stanley Hauerwas' bold claim that the first ethical question is: of what story are we a part?²

For lawyers, the forgotten tradition, within which the practice of lawyering is appropriately located, is the ancient tradition of rhetoric.³ Implied by what I have said, and now made explicit, is that *legal* rhetoric is a particular form of rhetoric located within a particular rhetorical community with its own particular culture. Thus, lawyering is a particular rhetorical practice with its own unique set of excellences just as baseball is a particular sport located within a particular sport community with its own particular culture. Good lawyering then is those excellences of performance within the practice located within this particular rhetorical community that are true to the tradition of the rhetorician.

2. See generally STANLEY HAUERWAS, TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS IN CHRISTIAN ETHICS (1977).

3. Once again, the proof of this, if it is not obvious to you now, will have to await later elaboration.

At this point, my guess is that you may be willing to join me in saying that the ethics within lawyering, like the ethics within baseball, may be best understood in this descriptive way. For example, a pitcher who is a true pitcher, that is, one who seeks primarily the internal goods that can be enjoyed only through the excellences of pitching, would not scuff the baseball, bribe the umpire, doctor the opponents' bats, keep the opposing batters up all night by playing loud music, and so forth. To do so would deny him the internal goods that pitching provides. For the same reason, a true lawyer, seeking primarily the internal goods unique to lawyering, would not surreptitiously introduce inadmissible evidence, bribe the judge, destroy discoverable materials, or take advantage of an opposing attorney's alcoholism.

My use of the term *ethics*, in the claim that good lawyering is good ethics, appears to be this narrow, internal one. The questions that seem to remain, then, are questions about the ethics of the practice of law as located within some broader social or moral context or community. If you are like most people, and certainly most legal ethicists, you are thinking that, once I take these remaining questions into account, I will have to reevaluate the claim that good lawyering is good ethics from these broader, and therefore more important, perspectives.

This is, however, exactly what I wish to deny. I want to insist that any good ethical evaluation of the ethics of lawyering must remain internal to it. To paraphrase the title of a famous article by Stanley Fish, I am insisting that the practice of law has a formal *moral* existence.⁴

In arguing a formal moral existence for lawyering, I am faced with two very formidable and closely related opposing positions: (1) universal moral agency; and (2) antiprofessionalism. To illustrate these opposing positions, I would like to use a recent article, "The Ethics of Advocacy,"⁵ by the well-known philosopher Robert Audi, my philosophic mentor, for illustration. In this article, Audi makes it quite clear that he, along with most legal ethicists, believes that an ethic exists outside of the particular local practices that constitute our lives; that is, one that must stand in ethical judgment of these practices at least to some degree. For Audi, this "outside" ethic can be

4. STANLEY FISH, *The Law Wishes to Have a Formal Existence*, in *THERE IS NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 141 (1994).

5. Robert Audi, *The Ethics of Advocacy*, 1 *LEGAL THEORY* 251 (1995). This article works well for my purposes in presenting the opposing positions because of its great clarity.

fairly described as Kantian.⁶ Advocacy is to be constrained by certain *threshold principles* derived from the moral requirements that we not harm others and that we tell the truth.⁷ Beyond these threshold principles, advocacy can be morally criticized, if not condemned, by certain *desirability principles* such that in advocating any position one should have, be genuinely motivated by, and offer good reasons.⁸ These three desirability principles are based upon respect for persons, Kant's consideration of moral motivations in evaluating conduct, forthrightness, social utility, and truth.⁹

It is obviously very tricky to apply these desirability principles to representative advocacy such as lawyering, especially the principle requiring that one be genuinely motivated by the arguments one offers. Audi, however, finds a thoughtfully hedged way of doing so. The heart of the matter for Audi is that you should not put forward a reason as good enough to carry a conviction, if it is not good enough to carry your own.¹⁰ This then implies an ethical stance, outside of the context of any particular local practice of advocacy, by which we should judge the advocacy within any local practice. And this is exactly the way Audi proceeds in the article.

The second position against my claim is anti-professionalism. Audi, again along with most legal ethicists, is a true anti-professional. Stanley Fish has defined anti-professionalism for us as follows: Anti-professionalism is "any attitude or argument that enforces a distinction between professional labors on the one hand and the identification and promotion of what is true or valuable on the other."¹¹ In "The Ethics of Advocacy," Audi displays his anti-professionalism in ways too numerous to recount here, but most clearly in his discussion of the role of the representative advocate.¹² He contrasts the moral responsibilities of roles (professional labors) with the dominant moral responsibilities of the moral agent (which are true and valuable).

6. Audi's article has the great virtue of being clear about the grounds he stands upon in judgment of advocacy. What I am more accustomed to seeing within the discipline of legal ethics are similar stands based upon vaguely expressed notions of personal morality, personal integrity, social responsibility, other social roles such as officer of the court, or upon some universal hierarchy of values by which a lawyer is to balance his or her tripartite obligations to client, court, and public. Audi's work, through its clarity, advances the discussion substantially.

7. Audi, *supra* note 5, at 257-59.

8. *Id.* at 260-61.

9. *Id.* at 261-63.

10. *Id.* at 265.

11. STANLEY FISH, *Anti-Professionalism, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 215 (1989).

12. Audi, *supra* note 5, at 270-71.

Unless the professional subordinates her role within a hierarchy that places her "real self" (my term, but implied by Audi) at the top, she is at great moral risk.¹³

These, then, are the two positions countering my now apparently radicalized claim that good ethics is good lawyering. Stanley Fish also tells us, however, that both these positions are nothing more and nothing less than philosophy's ageless attack on rhetoric seen in modern garb.¹⁴ In fact, Audi is at pains in "The Ethics of Advocacy" to man philosophy's barricades. Consistent with the two positions I have ascribed to him and with Fish's observation, Audi rejects role "playing" (his term and part of his anti-professionalism) because it permits a disassociation of the speaker from his arguments (thereby jeopardizing the Kantian resort to the consistency of the moral agent who stands outside of all practices) which would lead to the harm of unbridled rhetoric.¹⁵

Audi's attempt to return the representative advocate, such as the lawyer, to personal moral responsibility for her arguments by insisting that she only advocate positions that would move her is an attempt to eliminate rhetorical intentions that would, according to Audi, reflect baser motives, namely, the motive to win by any method including evil rhetorical tricks.¹⁶

If Fish is right about the collapse of these two positions into one, and I believe he is, then we should expect Audi's real concern in "The Ethic of Advocacy" to be that judgments that are subject to rhetorical persuasion may not be truly based upon the available evidence. Thus, constraints upon rhetoric are needed, and this does, in fact, turn out to be the case.¹⁷ However, if we wonder for a moment, what is meant by "truly based" and by "available evidence," we will soon see that the standard Audi is using in judgment of rhetoric is, as Fish suggests, the philosophic conversation.¹⁸

In another excellent article entitled "Argument as Character," Professor Jerry Frug notes, "Concentrating on the author's intentions[, as Audi does,]

13. *Id.* at 270.

14. FISH, *supra* note 11, at 219.

15. Audi, *supra* note 5, at 264-69. We have an easier time seeing this in Audi's article because it is an article about advocacy, but the same analysis, I believe, is true of most articles written about professional ethics.

16. It is not surprising then, at least to this reader, that Audi's threshold and desirability principles begin to resemble components of a Habermasian ideal speech situation, for this would more closely align Audi with his real fellow combatant against rhetoric, Plato.

17. Audi, *supra* note 5, at 260-71.

18. More specifically, the standard being applied is a particular understanding of the philosophic conversation as a form of dialectic set in opposition to rhetoric.

rather than the argument itself is simply one more way of treating what lies underneath language, rather than language itself, as real.”¹⁹ I mention this common post-modern observation as a way of reminding us that Audi’s defense of philosophy, as I am sure he has spelled out in other contexts, is based upon a certain epistemology, a certain theory of values, and a certain conception of the real self—all of which are at odds with rhetoric and all of which are foundational to the conversation that has been philosophy, the conversation, as I have said, that is the external standard by which Audi evaluates all advocacy.

What am I then, poor rhetorician that I am, to do, now that I am condemned by my philosophic mentor, and with these formidable positions—universal moral agency, anti-professionalism, and the philosophic conversation—all arrayed against me. I do not agree with any of the foundations upon which Audi builds his attack on rhetoric. Of course, I could call upon many philosophers for support.²⁰ In fact, it has become fashionable among philosophers, post-Nietzsche, to attack the citadel of philosophy rather than man its barricades. The first thing I learned in my studies with Robert Audi, however, was that it would be truly foolish of me to try to take him on in his own dialectical game rather than in my rhetorical one. So what is a poor rhetorician to do when faced with such opposition? Why, use sneaky rhetorical tricks of course! You will, I hope, at the end of this let me know if you felt manipulated so that I can claim appropriate credit.

My rhetorical insights tell me that all the positions arrayed against my claim that good lawyering is good ethics are prompted by exaggerated fears of what might happen should a rhetorical conception of legal ethics carry the day. Rather than responding directly to the arguments, I will attempt to assuage some of these fears, so that I can soften you, my audience, for a subsequent emotional appeal.

Why is a rhetorical conception of the practice of law not to be so feared? In the present limited context, I can only list the reasons, some of which, unfortunately, truly cry out for examples and further explanation. To begin, legal advocacy is not unbridled rhetoric. (I am not sure that rhetoric is ever

19. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 881 (1988).

20. It may surprise you, but in this I am with Audi. Upon what grounds could philosophers refuse to play the game of philosophy other than grounds that are the province of philosophy itself? The modern and post-modern attacks upon philosophy can only be correctly understood, I believe, as part of the ongoing inquiry about the practice of philosophy that is an essential part of the tradition of philosophy, just as it is an essential part of any healthy tradition. To claim that it is something else seems foolish to me.

unbridled.) It is not unbridled because this particular form of rhetoric is located, as I have said, within a particular rhetorical community with a particular rhetorical culture. If you think of lawyering as a game, as I have been tempting you to do throughout, you will know that the objective of lawyering is not winning per se, but "winning" in a way consistent with the playing of the game and the maintenance of it. After all, "[i]t is impossible to win a game and at the same time to break one of its rules."²¹ In this practice, understood as a game, the rules, the prescribed and proscribed methods of advocacy, and other ethical constraints are inefficiencies as to winning, but they are inefficiencies that are constitutive of the game.

The game of lawyering is a particular conversation about certain social disputes. If lawyers are to continue to play this game, that is, if they are to continue to be lawyers, if they are to continue to enjoy the internal goods of their practice, and if they are to be moved toward the excellences of it, they must accept the responsibility, as all game players must, of maintaining the game. Thus, maintenance of the legal conversation, and the quality of the conversation, is an internal ethic of the practice of law.

Accordingly, I am always obligated, as a lawyer, to speak as persuasively as I can, but I am also obligated to maintain the legal conversation and the quality of it. Part of this constraint is that I can only utilize the means of persuasion available within this particular rhetorical culture, just as a baseball player can only use a bat within a certain size and weight range. My ethical obligation, then, as a good rhetorician, my integrity as a lawyer, if you will, is that I always present myself as honestly offering the best means of persuasion available within this particular rhetorical culture on behalf of my client.²²

Many of the fears that motivate attacks on rhetoric, such as Audi's, and that seem to make my position that good lawyering is good ethics so untenable, are greatly reduced when we understand the ethics of lawyering this way. By way of a few examples, none of the following will do for the lawyer as rhetorician: lying, certain forms of deception, perjured testimony, preventing opposing arguments, misstating the law, tempting the judge to make decisions based upon means of persuasion that are not part of the rhetorical culture, and any other conduct that can fairly be described as "not playing the game."

21. BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE, AND UTOPIA* 20-21 (1978).

22. See generally JAMES BOYD WHITE, *Plato's Gorgias and the Modern Lawyer: A Dialogue on the Ethics of Argument*, in HERACLES' BOW: *ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 215 (1985).

Of course, what is and what is not “not playing the game” is never fully known in advance of the game itself. Once again, baseball provides a clear example. Stealing bases became acceptable in baseball only after someone tried it, thus forcing the community to consider whether stealing was part of baseball or not.²³ As I have said, one part of any healthy practice will be an ongoing inquiry into the nature of the practice itself so that “playing the game” can be continually redefined.

There are also constraints that arise from this inquiry, for such an inquiry requires from practitioners discernment and then judgment about the practice itself. Discernment and judgment are necessary for at least two reasons: (1) so that the practice knows its own ends; and (2) so that the goods that are internal to the practice are goods that are, in fact, at that time and in that place, internal to the practice. The character required for this good discernment and good judgment is broader than the practice, but still required by it. This is, I believe, the way in which our professional roles are integrated with the rest of our lives.

Closely related to this idea, that the rhetorician must maintain the rhetorical conversation, is something James Boyd White has written about extensively: the rhetorician is responsible for the creation and the preservation of the language of the conversation.²⁴ I must leave you to White’s beautiful work to spell out the implications of this. Most of these will be clear to you, if you think that lawyers, like baseball players, must leave fit for the next game the field upon which they play.

I could go on with the list of constraints. For example, there are great constraints on rhetoric found in the efficiencies of the forms of persuasion most successful within this particular rhetorical community; great constraints on rhetoric in the nature of the particular audiences—judge, jury, and opposing counsel—addressed; great constraints in the particular casuistical and interpretive requirements of legal decision-making; great constraints in the necessary imposition of this rhetorical game upon the clients who enter it; great constraints in the representative nature of the advocacy with its requirement that the lawyer speak well for others, and the counseling and

23. See GEOFFREY C. WARD & KEN BURNS, *BASEBALL: AN ILLUSTRATED HISTORY* 14 (1994).

24. See generally JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* (1994); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990); JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984). This is, oddly enough, why deconstruction is not an ethical approach to legal texts.

relationship essential to this speaking. For the practice to be an ethical enterprise, all these constraints, of course, leave us completely dependent on the actors within the rhetorical community doing their jobs well, but to return to Thomas Kuhn's famous statement, "What better criterion . . . could there be?"²⁵ Such dependency is surely implicit in the uncertainties and frailties of all human affairs.

Rather than going on with my list, however, I want to return briefly to Audi's article. As a legal rhetorician, as a representative advocate, I often do what Audi says is ethically undesirable. I offer as "good reasons," reasons that I do not believe are good reasons. They are reasons that would not move me and, in my opinion, should not move the audience, be it the judge or the jury, to whom they are directed. In fact, in my analysis of my client's cause, I do not examine the facts, precedents, presumptions, and principles dialectically in terms of how they support the argument's conclusion, as Audi would have me do, but rhetorically in terms of how they form attitudes or induce actions in my particular audience. I do this because, as a rhetorician, I understand that the arguments I make are not mine, and not really my client's, but are part of a particular social argument about who we are as a people. These arguments, the "good reasons" I find unpersuasive, are just as much a part of the means of persuasion that the legal culture makes available to me as any other. To refuse to use them based on my personal assessment of their merit would be equivalent, in my ongoing baseball analogy, to taking the ball and going home—a pretentious assertion of self in what is supposed to be a communal activity. I must instead leave such arguments to the judge or the jury for their consideration consistent with their particular roles within the legal conversation. These men and women may not be the measure of all things, but, for the lawyer as rhetorician, they are and must remain the measure of all things within the legal conversation.

Finally, what are we to say about this rhetorical conversation on which my legal ethics rest? In other words, what is its social value? If you pressed me hard, I would say something Aristotelian-like: maintaining a good conversation about our disputes is central to what it means to be human in community. The practice that has the most knowledge of and experience with such conversations is the practice of law. Perhaps then society should listen more to lawyers about this rather than the other way around. Or, if pressed too hard, I would likely say something terribly defensive. I might suggest to you that the current legal conversation, despite its flaws, is the most intelligent social conversation left in the world, asking you to compare it with any other conversation of which you could think. How else—in what

25. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 170 (2d ed. 1970).

conversation and in what language—would you have us talk about the things that so seriously divide us? How else should we consider what we are actually to do with abortion, same-sex marriages, racial divisions, governmental misconduct, and social blaming? How else should we determine what responsibilities we have to each other for the harms we do, what we are to consider as harms, and so forth? Imagine these conversations among politicians, or, God forbid, at a conference on professional ethics, or even at home. Better yet, don't try this at home. These people are professionals.

If pressed, I would say all this, and you might find it persuasive. But these arguments are not the ones that move me.²⁶ They are too ripe with potential confusion, too much of a temptation to think that lawyering is “about” the social goods it provides—peacemaking, political stability, political fraternity on some accounts,²⁷ and so forth. Instead of these arguments, try asking this same “what-good-is-it” question of baseball. The only answers you will be able to give will be the kind you would argue before a city council if you were trying to get a new stadium built to attract a major league team. These answers would have almost nothing to do with the practice of baseball. In fact, as I hope this example makes clear, going beyond the practice itself in search of a justification is to risk corruption of the practice you are seeking to justify. Thinking about baseball, as somehow about those things that would appeal to a city council member, radically changes what baseball is about, and, in doing so, risks its destruction. If it is about those things, then there is no reason those things could not be done in other, more effective ways than those permitted by the constitutive rules of baseball.

This is what I find important in the claim that good lawyering is good ethics. It permits my practice, the practice of law, to continue to bear witness to the virtues it both requires and defines. It is not just fortuitous that the practice of the legal rhetorician works as I have described it here, for

26. By offering my “real” position, behind my rhetorical one, am I now siding with Audi? No, for I am not arguing now within the context of legal argument. Of course, my telling you that the arguments to follow are, for me, better than the preceding ones may be my way as a rhetorician of trying to make them more persuasive to you. If so, I would be attempting to use the character I have created through the rhetoric of this paper. As a rhetorician, I want you, the audience, to see this possibility and to take it into consideration in the same way that a good baseball player wants the other team to be healthy and to have its best players available for the game.

27. See, e.g., ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). I have criticized Kronman for this resort to political fraternity as an external justification of lawyering. See Jack L. Sammons, *A Sixth Semester Conversation*, 100 DICK. L. REV. 625 (1996).

surely practices like this one are the true bearers of the virtues. Such practices are the only way in which we can come to understand what virtue means; the only way in which we can come to understand our own excellences as human beings. It is true that we generalize from our practices to describe *the* virtues, but these generalizations do not then have some sort of moral priority over the examples from which they were derived. After all, there is no “context-less” practice of living in which *the* virtues reside—that must remain God’s business. When we return our ethical thinking to context, as we must, when we take seriously who we are and what we do, we must inevitably return to the ethics of the practices that constitute our lives.

