

The Fault in Legal Ethics*

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Two old and antagonistic traditions of thought shape the modern field of legal ethics. One of these has its beginnings in Aristotle's political philosophy, and the other in the contractarian theories of Hobbes and Locke. Both traditions influenced the design of the American republic, whose founders combined elements from each in a new and volatile synthesis marked by tensions that have been a part of our public life ever since. Our view of the legal profession — of what lawyers do and ought to do — is the product of a similarly unstable combination of elements drawn from these two traditions, and many of the most familiar and seemingly intractable disagreements within the field of legal ethics, the fault lines along which opinion seems forever to divide, are a consequence of the effort to join, in a single view of the lawyer's role, such strikingly different conceptions of political morality.

At different moments in our history, one of these traditions has been more influential than the other. In the early years of the republic, it was the Aristotelian conception of the lawyer's role — the republican conception — that dominated the discussion of professional ethics. In the last half century, the contractarian conception has achieved a comparable intellectual and moral dominance. There are signs that this may now be changing, that the influence of republican ideas is once again growing within the field of legal ethics. I shall have more to say about this later in my talk. But first I need to define my terms, to tell you what I mean by the republican and contractarian traditions, and to explain how these traditions and the conflict between them have shaped our complex and unstable understanding of what lawyers do.

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** This article was originally prepared for a conference on legal ethics that was held at Hofstra University from March 10-12, 1996. I am grateful to Professors Roy Simon and Monroe Freedman for their invitation to speak at the conference, and for their permission to publish my remarks here.

At the beginning of his treatise on politics, from which the whole tradition of republican political philosophy derives, Aristotle makes a famous claim about the value of political action. To lead a complete human life, he says, a person must participate in the political affairs of his city; he must play an active role in its government and in the administration of its laws. Someone who devotes himself entirely to the private affairs of his household and to the business of making money — to economic life, which Aristotle considered merely an extension of household activity — misses out, he says, on an experience that is essential to human fulfillment, the experience of sharing the responsibilities of political rule with a group of fellow citizens who, unlike the other members of one's household — the women and children and slaves — possess a capacity for independent action equal to one's own. For Aristotle, this experience is unique to human beings — animals are incapable of political rule and the gods possess too much independence for it. The life of a man who has no share in the government of his city thus lacks a defining human element. It is a life either of beastly necessity (as it is for those who spend all their time on household matters) or one of divine independence (which only heroes with godlike powers ever experience) but in neither case is it a life of a distinctly human kind, with the sort of fulfillment that human beings alone enjoy.

To this first claim Aristotle joins a second. A city, he says, is more than a group of people living together for their mutual material advantage. It is a system of laws that embodies a conception of right living, a shared view of the most appropriate way for human beings to conduct themselves in their relations with one another and with the gods. A city is an association held together by a set of laws that embodies, as we would say today, a conception of the good, and if any such association is to outlast its foundation, if it is to endure for a meaningful length of time, some among its members (a sufficient number, however many that may be) must feel an allegiance to it and be prepared to sacrifice themselves on its behalf. If a city is to survive, some of its citizens must possess the self-sacrificing habit of devotion that we commonly call the habit of patriotism. A city without patriots can never be anything but a confederacy of convenience with no more permanence than the changeable economic interests that hold it together. It is therefore essential, in Aristotle's view, that the founders of a city, and every generation of citizens that follows, take care to ensure

that their successors possess the proper patriotic spirit, which cannot be expected to develop spontaneously but requires a long process of education, of soul shaping, that must be closely supervised from the start. This is why Aristotle's account of politics leads naturally to a discussion of education, a topic that in fact receives more attention than any other in his treatise.

For Aristotle, then, the human soul needs civic life and without it remains unfulfilled and incomplete. And civic life, in turn, needs properly trained souls that have acquired, through their education, the habit of patriotism or political love. These two ideas are central to Aristotle's political philosophy and to the long tradition of republican thought that is founded upon it. But in the seventeenth century a new tradition of thought arose that deliberately challenged these ideas. Often called the "contractarian" tradition because it seeks to defend the political arrangements of human beings as the outcome, real or imagined, of a pre-political agreement among those living under these arrangements, this new line of thought starts with Hobbes and Locke and has had distinguished defenders in every subsequent period, including our own.

The contractarian view of politics, which fit so well the emergent system of nation states in early modern Europe and the dynamic forms of capitalist enterprise that were simultaneously transforming Europe's age-old economic order, repudiates the republican conception of politics in two crucial respects. First, contractarianism depicts the whole realm of politics in purely instrumental terms, as a device for pacifying the world so that its human inhabitants can continue to pursue, as safely and cheaply as possible, the truly important, non-political activities in which they are engaged. Political life, on the contractarian view, is not an arena of self-fulfillment in which essential human powers are developed and deployed; it is not, as it is for Aristotle, a source of intrinsic satisfaction in a complete human life. It is merely a condition, albeit a necessary one, for achieving such satisfaction, which is only to be found in activities, material or spiritual, of a non-political kind. The claim that politics is of instrumental value only, that it is merely a means to an end and not an end in itself, marks the first great point of conflict between the contractarian and republican traditions of thought.

The second concerns the nature of political cohesion, the force that holds political communities together. A city will survive, on Aristotle's view, only if some of its citizens are devoted to it, only

if they love it and are prepared to sacrifice themselves on its behalf. The great contractarian philosophers of the seventeenth century claimed, by contrast, that commonwealths are held together by self-interest, not patriotic love. Individuals, they said, can see the advantages of forming commonwealths and of remaining in them once established by looking to their private welfare alone; no other motive is needed to produce a widespread habit of law-abidingness and the political cohesion that flows from it, and no other, they insisted, is sufficiently powerful to achieve this result. On a contractarian view, states are held together not because their citizens care most intensely about something other than themselves, but precisely because they care so exclusively about their own well-being and recognize that it is best secured by behaving as the law requires. It follows, as Hobbes openly conceded, that when a political association asks its members to risk their lives in order to protect it, their motives for law-abidingness come to an end and they have no duty to comply, which is to say they have no duty to be patriots, for the willingness to take such risks is the standard by which all patriotism must finally be measured. And it also follows from the contractarian view of political cohesion that no scheme of education is required to achieve it since the passion of self-interest that holds states together is a natural feeling anterior to any educational experience and not, like the habit of patriotic love, an affect acquired only through a process of long and careful cultivation. It is revealing, in this regard, that while Aristotle devotes a large portion of his treatise on politics to the topic of education, there is virtually no mention of the subject in Hobbes's *Leviathan*.

These two traditions of thought, the republican and the contractarian express deeply different, indeed antithetical, views of political order. Both were alive in the culture of the eighteenth century which the founders of the American republic inhabited and both played an important role in the design of the new government they fashioned. For some time now historians have debated the question of which tradition dominated the thinking of the founders and the constitutional scheme they invented. In the last generation, the prevailing view was that of Louis Hartz, who saw the American constitution as an embodiment of Lockean liberalism. In our generation, the balance of historical judgment has shifted, and scholars like Bailyn and Pocock and Wood, who emphasize the republican spirit of the founding, enjoy, for the moment, a greater prestige than their rivals. But this rivalry can never be settled, and

there will always be defenders of each view, because our constitution is a composite of elements drawn from different traditions and joined in a permanently volatile mix.

Just as the view we take of our political system oscillates between republican and contractarian extremes, so too does our view of the legal profession. There are, in fact, two opposing ways of describing the American lawyer's role and responsibilities, one that starts from republican and the other from contractarian premises. Each description yields a sharply different view of what lawyers do and ought to do, of their function and duties in the American political system. Though each pretends to be a complete account, neither, in the end, can be, for the nature of the American legal profession, like that of the larger society it serves, has from the start been defined, with a kind of moral schizophrenia, partly in republican and partly in contractarian terms. This schizophrenia is the source of a permanent division in our thinking about the legal profession, and many of the most familiar dilemmas of legal ethics, which can be restated with endless variety but never really solved, trace their origins to it.

The republican conception of the American legal profession might be said to begin with Madison's celebrated solution to the problem of factionalism, a solution he famously described as "a republican cure for a republican disease." The problem of political factions was a central difficulty for classical republicanism and Madison proposed to solve it, in effect, not by limiting its scope (as earlier writers had proposed) but by broadening it instead, by encouraging a wider range and a greater variety of factions, in the belief that their competition would prevent the dominance of any one faction over all the others — the chief evil to be avoided. In Madison's view, a continental republic, instead of being an oxymoron as others had insisted, offered, in fact, the key to solving one of republicanism's most challenging problems. At the same time, however, it created a new difficulty that anyone committed to the republican tradition had to take quite seriously. For the very broadening of the political realm that reduced the dangers of factionalism was bound simultaneously to lengthen the cord by which each citizen was attached to the republic and thereby to weaken the spirit of patriotic devotion on which, all republican thinkers agreed, the survival of every political association depends. In a Madisonian republic of continental scale, there might be, perhaps, episodic bursts of patriotic feeling, but these, he guessed,

would likely be as thin as they were wide, and a source less of stability than disorder. Where, in such a republic, might a stable repository of such feeling be found? No true republican could rely on the interplay of factions to provide a complete substitute for patriotism, but where, in a continental republic, might a spirit of patriotism, of selfless public-spiritedness, be nurtured and conveyed from one generation to the next?

One answer to this question, which gained currency during the first half-century after the founding, portrayed lawyers as a particularly important source of public-spiritedness in a large and fractious republic. The groups classically associated with a special devotion to the public good had always been defined in hereditary or pecuniary terms, as an aristocratic or oligarchic class. The idea that patriotism might be linked to a person's professional role rather than his parentage or wealth was a new one, but in a country without an aristocracy and rapid fluctuations of wealth, the notion of such a linkage held out the only hope of securing what, on a republican view, still seemed a vital condition of political life. Tocqueville, Durkheim and others have since made this idea familiar, but it was to begin with a republican invention, adapted to American conditions, and its first and most natural application was to the profession of law.

The training lawyers receive, and the role they play in administering the law, give them, republican writers argued, a respect for the law and a devotion to it that other pursuits do not encourage to the same degree. Because of this, it was claimed, lawyers are particularly likely to possess an attitude of public-spiritedness and uniquely well-positioned to carry this attitude into the wider sphere of private, and especially commercial, life, where self-interest is strongest and contractarian norms are widely embraced. According to this view, which still has many defenders today, lawyers are both well-suited and temperamentally inclined on account of their professional experience to play a leading role in the affairs of their community, forming its most reliable class of patriots and sharing a devotion to the public good that serves as a counterweight to more widespread habits of self-interest whose dominance is always a threat to political stability as republican theory conceives it.

There is, of course, another view of the legal profession, one that starts from contractarian premises. For the contractarian, the legal order is merely a *modus vivendi* and no one's self-sacrificing

devotion is required to sustain it. All citizens are private individuals seeking merely to advance their own self-interest within the limits of the law, which they respect solely for reasons of self-interest too. In any even moderately developed legal system, however, the number and complexity of norms quickly outgrows the capacity of most citizens to comprehend. A need therefore arises, even in a strictly contractarian community, for a class of experts, well-versed in the law, who can assist their fellow citizens in navigating the shoals and channels of the legal order. This is the role that lawyers play on a contractarian view of their function. Lawyers help clients pursue their self-interest by providing the legal expertise that clients lack. They do not bring to this task a devotion to the public good, much less force it upon their clients. From time to time, a lawyer may remind his client that he must obey the law, but only because it is in the client's interest to do so. In this respect, as in all others, a lawyer takes his client's self-interest for granted, treating it in the same way the client does, as the sole basis of his value judgments, and merely supplying the expertise which the client needs in order to pursue his self-interest as effectively as possible within a complex legal system. On this contractarian view of the lawyer's function, lawyers are no more public-spirited than their clients. They possess a greater knowledge of the law's requirements, but no greater devotion to the legal order. Seen in this light, lawyers are instruments, pure and simple, whose only commitment is to advance their clients' interests within the limits of the law, a commitment that in turn is founded upon their own commercial interest in a satisfied clientele. This view of the legal profession, inspired by the contractarian tradition and drawing moral strength from it, has always had supporters and, like its republican counterpart, remains influential today.

All that I have just said is well-known, certainly to this audience. What is less often noticed, perhaps, is that the central problems of legal ethics are likely to appear in a different light depending on which view of the profession one takes, republican or contractarian. Different ethical issues tend to stand out from these two points of view — so much so, in fact, that the whole field of professional responsibility may appear to have an entirely distinct subject-matter when seen from one perspective than it does when surveyed from the other.

Consider, first, the contractarian view of the lawyer's role. From this vantage point, questions of permissibility are almost

certain to seem the most pressing in any discussion of legal ethics. The principal ethical challenge for lawyers will be to determine the limits of what they are permitted to do on their clients' behalf. On a contractarian view, lawyers are assumed to embrace their clients' own self-interest, and to exert a maximum of zeal in its pursuit. The only real issue concerns the boundaries of what is allowable in this endeavor. Of course, that is the paramount ethical issue for the client as well, whose goal is to advance his interest as far as he is able within the limits of the law, so that in this respect the lawyer's ethical situation is likely to appear, from a contractarian perspective, essentially identical to the client's.

In any contractarian scheme of legal ethics, there will also be a strong tendency to reduce the notion of public-spiritedness to the idea of self-interest by relying heavily on the concept of adversarial justice and the invisible hand arguments that are commonly offered to support it. A lawyer serves the public good, these arguments all claim, by serving his client as zealously as possible, just as, in Adam Smith's famous image, the baker serves society by looking to the profits of his business. In each case, it is said, the public good is promoted not by seeking to advance it directly, but through indirection, by many individuals separately pursuing their own self-interest instead. The great attraction of all such arguments, from a contractarian point of view, is that they effectively eliminate the tension between public-spiritedness and private interest that republicanism takes for granted and from which it derives much of its appeal as a conception of government and law. For a contractarian, the idea of adversarial justice, of a system of laws in which the universal pursuit of self-interest, by clients and lawyers alike, produces a collective good that no one needs to think about, much less to actively pursue, is likely to seem a compelling response to the republican's insistence on the need for a patriotic class, and a brilliant device for transmuting public actions into private ones. Traditionally, this idea has been most often invoked, and most forcefully defended, in the field of criminal law, so that contractarians tend naturally to take criminal lawyers — and criminal defense lawyers in particular — as their model in thinking about legal ethics, and to view the dilemmas that all lawyers face, and the meaning of public-spiritedness in the profession generally, in this light.

Even though a contractarian view of the lawyer's role sharply reduces the conflict between zealous representation of clients, on

the one hand, and promotion of the public good, on the other, two other sorts of conflict remain and within a system of legal ethics founded upon contractarian principles these become dominant concerns whose centrality gives this system its distinctive character. The first of these arises because most lawyers have more than one client. The idea that a lawyer serves the public good by promoting his clients' interests with maximum zeal does not eliminate — if anything, it exaggerates — conflicts among these interests themselves. Even within a contractarian model of law practice, a lawyer will have multiple allegiances to the interests of his clients, and it becomes an important task of legal ethics, on this model, to help lawyers settle conflicts among these allegiances when they arise. Today, in many law firms, this is all that legal ethics means.

A second conflict arises, even for the contractarian, from the fact that a lawyer's own self-interest is linked to, but also, in one crucial way at least, distinct from his client's. A lawyer steps into his client's shoes and makes the client's interests his own, but he does not do this from love. He does it for a fee. The lawyer is in the business of being a friend, and from the vantage point of his own self-interest, zealous promotion of the client's welfare has only instrumental value, whereas for the client this is of course an end in itself. Because the lawyer's self-interest is thus parasitic upon, but separate from, the client's own — in the same way that the baker's self-interest is parasitic upon but separate from his customers' — there is always a danger, from the client's point of view, that the lawyer he has hired will give him less than has been bargained for. In every contractual relationship, this one included, the parties have an incentive to cheat or skimp if they can do it without detection. All of the rules dealing with lawyers' fees (from the simple prohibition against theft to the more complicated rules regarding contingent compensation) are addressed to this problem, which remains — which indeed becomes especially severe — in a contractarian system of legal ethics that gives so much weight to the notion of self-interest. Within such a system, the regulation of fees is thus likely to be a particularly prominent topic, along with the resolution of conflicting commitments to clients.

What are the main features of the conception of legal ethics that emerges from a republican point of view? First, it will tend to have a more aspirational tone. The leading question here will not be, "what is the maximum that a lawyer is permitted to do within a system of laws?", but rather, "what are the ideals toward which

lawyers should aspire and how can these be achieved?" A republican legal ethics will emphasize the obligation of lawyers to be an improving force, and this in two different ways. It will stress that lawyers have a duty not merely to advance their clients' self-interest, to mechanically execute their orders no matter how confused or inattentive to the needs of others these orders may be, but to help their clients toward a better understanding of what their interest includes and in particular to see that it includes an other-regarding moral component whose presence is essential to the clients' own happiness and fulfillment as members of their community. And it will stress, too, that lawyers have a duty not merely to accept the law as a given framework of rules that imposes limits on their clients' conduct and their own, but also to work actively to improve these rules so that they better serve the good of the community as a whole. In these respects, a republican legal ethics will tend to be aspirational and communitarian in character.

Because of this it will also tend to take the counselling relation as a norm in law practice generally, and to give particular emphasis to the problems that counselling presents (the problem, for example, of deciding how far a lawyer may legitimately go in attempting to persuade his client to abandon a course of action which, though legal, is harmful to others). Indeed, those who see legal ethics from a republican point of view will be likely to insist that most adversarial relations can in fact be better understood as fitting the counselling model instead, thereby narrowing the domain of adversarial justice, just as contractarians seek to expand it. Brandeis's famous description of himself as "a lawyer for the situation" expresses this thought nicely.

A third characteristic of republican legal ethics is its emphasis on what, for lack of a better phrase, I shall call the importance of the unrepresented. To have an interest is to see things from a point of view. It is to have a partial and perspectival outlook on things. A lawyer's clients have different interests and therefore see the world from different perspectives. This raises the question of how a lawyer's commitments to his clients should be adjusted when they conflict. For a contractarian, this is an important problem. It is, in fact, the only real conflict of allegiances that he acknowledges. But for a republican, law practice presents another and more serious sort of conflict: the conflict between the interest of one's client and the good of the community as a whole. This is not a

conflict between two different interests, however, for the latter — the good of the community — is not, strictly speaking, an interest at all. It is not a perspectival claim or partial attachment to be weighed alongside others, but, in theory at least, a comprehensive and impartial value that transcends all limited points of view. It is a comprehensive good that transcends private interests. But from this it follows that the public good, unlike private interests, cannot be represented, since every representation, whether of the public good or anything else, is made — and indeed can only be made — from a point of view, which is just what appeals to the public good claim to overcome. The concept of the public good is therefore an unrepresentable ideal. For a strict contractarian, the only conflict lawyers ever face is the conflict between representable interests. Republicans insist that lawyers also face a conflict between interests of this kind, on the one hand, and the unrepresentable idea of the public good on the other. This does not by itself make appeals to the public good incoherent, but it means that a republican system of legal ethics must recognize a duty, on every lawyer's part, to promote a good that no set of interests, however diverse, can ever fully capture (Brandeis's "situation"). In a contractarian scheme this duty has no place. In a republican ethics, by contrast, it has central importance and serves as a constant reminder of what is missing in every legal representation, of the all-inclusive public good that cannot be represented at all.

Just as it is impossible to assign one tradition of thought, the republican or contractarian, a decisive priority in the political system our founders created, it is likewise impossible to say which of these contains the truth about legal ethics. Each has considerable force, and can never be discounted completely. One sign of this is the ease with which the proponents of each view can be ridiculed by defenders of the other. To the contractarian, a republican conception of the legal profession is bound to seem undemocratic, disrespectful of the equality and independence of persons, the conception of self-important busybodies who are forever meddling in their clients' business, and who, failing to recognize that most people want simply to pursue their own private interests, are seduced by communitarian dreams, which they then proceed, with aristocratic *hauteur*, to shove down everyone else's throat. To a republican, of course, the contractarian view of the lawyer's role looks equally pernicious: a demeaning and small-minded view that turns lawyers into servile tools, protectors of

wealth whose work aggravates the perennial tensions between rich and poor and makes the social order as a whole more oligarchic and less stable. Each of these familiar caricatures strikes a responsive chord, and the fact that it does suggests that neither view contains the whole truth about lawyers.

One obvious reason for this is that lawyers do a wide range of things, some of which fit more easily within one model than the other. Lawyers are counselors, advocates, prosecutors, government agents and judges. They are protectors, defenders, watchdogs and inventors. In certain of these roles they must act as a contractarian view as the legal profession requires, and act irresponsibly if they do not. But other roles demand a degree of republican civic-mindedness and cannot be properly performed without it. Proponents of each view will of course emphasize the importance of those roles that fit its assumptions and expectations best, and minimize or neglect those that do not, but the range and variety of tasks that lawyers legitimately perform make it impossible, in the end, for one camp to sweep the other from the field.

A second and even more important reason why this cannot be done is that republicanism and contractarianism are both founded upon moral and political values which, though deeply opposed, possess a permanent appeal. Contractarianism celebrates the freedom of the individual and the entirely legitimate wish to be left alone, to be allowed to pursue undisturbed one's own private conception of fulfillment. It honors the entrepreneurial spirit and expresses a healthy mistrust of public movements with their zealotry and conformism. Republicanism, by contrast, speaks to the human desire for community, the wish to be connected to a larger public life that goes beyond, and outlasts, each person's private enterprise. And it recognizes that citizenship involves more than voting, that it requires a concern for the public good and the willingness to make sacrifices on its behalf, and affirms that there can be no citizenship worthy of the name without education.

We are not prepared to abandon either of these opposing sets of values. Each contains important moral truths, however contradictory they seem. At certain times, and in certain circumstances, one set of values may predominate, but never in the long run and across the board. Our moral commitments are just too complex for that. This complexity is a feature of our political system, which fuses two traditions whose opposing claims have been pulling us in different directions from the earliest days of the republic. And it

is also a feature of the professional self-image of American lawyers, whose vocational ideals are formed by a similar fusion of these same two traditions. When we look in the mirror we see a hybrid whose values are drawn partly from one tradition and partly from the other, and whose moral contradictoriness can never be resolved by eliminating either set of values or even by assigning each to a particular range of law-jobs in a definitive division of labor. We would have to be a different people, and a different profession, for that to happen, and the fact that each tradition continues to be so easily caricatured by the supporters of the other is a sure indication that it won't happen soon.

Still, though both traditions will always have their place in legal ethics, and though the tension between them can never be finally settled, each has enjoyed periods of dominance in the history of the profession, and it may be that we are now at the end of one such period, and the beginning of another. I want to conclude by offering a few remarks about the prospects for transition in our field, and by suggesting one reason why the change that appears to be taking place may take longer and be less thorough than its advocates might wish.

Throughout the nineteenth century, and into the early decades of this one, republican ideals held center stage in the field of legal ethics. These ideals underwent many subtle permutations, as Bob Gordon, in particular, has helped us understand, but, broadly speaking, they retained their centrality in the thinking of the profession up through the Progressive Era and a bit beyond. In the second half of the twentieth century, however, the influence of contractarian ideas has increased dramatically. One symptom of this is the changing *form* of legal ethics, its evolution from an aspirational "canon" to a "code" and then an even more sharply drawn set of "rules," concerned mainly with questions of permissibility and the limits on zealous representation. Another is the increased prominence of arguments based on an invisible-hand model of adversarial justice. Whether there is any causal relation or not, it is interesting to note that the influence of contractarianism has similarly increased in the field of moral philosophy during this same period, through the work, especially, of John Rawls, but also of Nozick, Scanlon, Gauthier and others.

In the last ten years, however, there has been what might fairly be described as a republican revival in legal ethics. This follows, by a decade, the renewal of interest in republican ideas among

professional historians that I mentioned earlier, and it coincides with the neo-republicanism that has acquired such currency in the field of public law through the writing of Frank Michelman, Cass Sunstein, Suzanna Sherry and others. Bob Gordon's work clearly belongs to this revival, as does Bill Simon's and Mary Ann Glendon's. In different ways, David Luban, Michael Kelley, and David Wilkins have contributed to it, and my own work puts me in their company. Some in this group have been most interested in theory, others in problems of law practice. Some have drawn inspiration from history, others from philosophy. And no two see eye-to-eye on the meaning of republicanism or its political implications. But still they form a recognizable group, held together by the conviction that public-spiritedness is not a hobby for lawyers but an essential component of their work without which they cannot do their jobs in an effective and responsible way, and by the belief that the model of adversarial justice, however valid in certain respects, is often misleading and always incomplete. These ideas have been making headway in our field, whose central problems are today conceived, to a limited but meaningful degree, in more republican terms than they were ten years ago. Legal ethics is moving back toward a view of the lawyer's role in which republican ideas have a larger place than they have had during the long dominance, in this century, of contractarian thought.

How far will this movement go, and how quickly will it proceed? My own view is that the republican revival in legal ethics is unlikely to move very fast, for the following reason. By far the most powerful intellectual current in American law teaching today is the law and economics movement. Law and economics has steadily increased in influence over the past thirty years, and though it is not without competitors, no other movement can claim a similar breadth of support, or show results of a comparably lasting kind. Today, law and economics has a foothold in every area of law, and wherever it has acquired significant prestige, republican ideas have had a harder time winning acceptance, for the economic approach to law rests on deeply contractarian assumptions. Even in fields like legal ethics, where law and economics has made only a modest showing, its successes elsewhere tend to retard the development of republican thinking. That is because legal ethics is not taught in isolation. It is taught to students who are also studying other subjects, and their view of the lawyer's role is importantly shaped by what they learn in contracts

and torts and criminal law even though it may not be an explicit topic of discussion in these courses. There is a debate within the field of legal ethics concerning the wisdom of the so-called “pervasive” method of instruction. But this is in some ways a false debate, for to paraphrase Holmes, the pervasive method is not a duty, it is merely a necessity. The views that students form of legal ethics cannot help but be influenced by what they learn in their other classes. What seems morally plausible to them as students of legal ethics is necessarily a function of what seems morally plausible to them as students, period. And because of this, their views of what is sound in legal ethics is bound to be influenced by the norms of legitimation employed by law and economics, which remains today the most potent force in American academic law, as it has been for more than a quarter-century. So long as this continues to be true, any revival of republican thought within our own field is likely to be tentative and weak, given the powerful boost that law and economics imparts to contractarianism generally. Whether the law and economics movement retains its present influence or is, instead, unhorsed by a counter-movement that effectively challenges its foundational assumptions — feminism perhaps, or law and literature perhaps, or neorepublicanism perhaps, or perhaps, most promising of all, a united front comprising all three — will therefore have a large effect on the direction of teaching in our field, and on our ability to restore some measure of balance between the opposing traditions of thought that we have joined in our wonderfully contradictory American venture.

