Ethics in Law and Life

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WHEN I WAS FIRST ASKED TO SPEAK on the subject of ethics in law and life, I questioned my authority to address the issue. I still question my authority. Being a judge does not give me any special insight. After all, I am only a lawyer in a robe, and how much attention would one pay to a lawyer speaking about ethics?

Seriously, though, I have thought about issues of values and ethics. I have even ventured to teach on the subject occasionally. And I do have some opinions, which would not surprise anyone who knows me. I do not claim to have answers. But I do hope that I can prompt us to rethink our understanding of some of the ethical issues faced by lawyers. More broadly, I hope that I can induce us to think harder about the ethical issues faced by every person caught between the values of an institution and his or her personal sense of what is right and what is wrong; a description that should include us all at one time or another.

It is commonplace to hear comments about the public's increasing dislike or distrust of lawyers. I think this dislike or distrust is real enough. But it is certainly not new. In the course of preparing this essay, I was struck by how many writers over the past several hundred years have made disparaging comments about lawyers. The source of these feelings seems to remain constant over time and appears to be two-fold.

First, the public dislikes many of those whom lawyers represent, and that dislike is transferred from the client to the lawyer. However real this cause of popular discontent with lawyers, it is not a justifiable grounds for criticizing them. We live in a political society that gives legal rights to each individual, rights that may be asserted against other individuals and against the state. For those rights to be meaningful, the individual must have a means to assert them, and that process is the legal system. A price we all pay for our freedoms is that we must tolerate others asserting their rights against us, individually and collectively, and lawyers do nothing deserving criticism when they provide needed legal assistance in that process.

A second source of public discontent with lawyers is more pertinent

to our discussion of ethics. Members of the public think lawyers do things when representing clients that are inconsistent with the average person's view of how an ethical person should act. This perceived conflict between common ethical standards and what lawyers refer to as "ethics" usually arises when, in the course of representing a client, a lawyer is seen as working against a just result, or assisting in concealing the truth, or engaging in various sharp practices. Now a lawyer so criticized will usually reply that he or she is behaving ethically "for a lawyer," which raises the question, why do lawyers have ethical rules that differ from those that bind other mortals?

Let us first define our terms. What the nonlawyer refers to as "ethics" can be described as standards of right conduct: how one human being *qua* human being ought to act toward another. But the lawyer means something entirely different. "Legal ethics" are more accurately described as the established rules of conduct that one must follow when acting as a lawyer for a client within the legal system. To avoid confusion, when I refer to "ethics" in this essay, I mean personal ethics rather than the professional standards of lawyers.

Moving beyond terminology, there seem to be two categories of things lawyers do in the name of their clients that disturb the average person and that lawyers often justify by reference to their unique role in the legal system. First, on occasion lawyers *must* do things under the command of their professional standards that create a direct and seemingly irreconcilable conflict between their duties as lawyers and their duties as ethical humans. I suspect that these are relatively rare occurrences and do not play a large contributing role in the public's dissatisfaction with lawyers' ethics, although these situations do present some very poignant moral dilemmas.

A second far more common and, in my opinion, legitimate source for the public's criticism is lawyers engaging in conduct that they rather easily assume is required by their role in the legal system but that, in fact, cannot be justified by the standards of professional conduct. I suggest that the principal cause of lawyers' tendency to engage in such conduct is a gradual silencing of their personal ethical voices as a result of lessons learned in law school and in practice. I also suggest that the ethical problems caused by excessive identification with the roles assigned individuals by institutions is not unique to lawyers but is pervasive in society. Although they are not unique, the lawyers' problems provide a useful vehicle for all of us to address the less dramatic but no less important ethical dilemmas each of us faces daily.

Returning to the lawyer's dilemma, and to focus more carefully our thoughts, I would like us to keep the two situations I mentioned earlier in mind. The first is where a lawyer is commanded to do something by the

rules of professional conduct that is ethically questionable. The second is where the lawyer's conduct is not required by the rules but is consistent with what the lawyer understands his or her role to be within the legal system.

Let us start with the first situation: A lawyer is required to do something under the clear command of professional standards that creates seemingly irreconcilable conflict between his duty as a lawyer and his duty as an ethical human. Although I said that this is relatively rare, an example can assist us in understanding the general problem of role-defined behavior. This example is a favorite of mine. It is taken from a reported case that arose in Minnesota in 1962 (*Spaulding v. Zimmerman*, 116 N.W.2d 704 [1962]).

A youth named Spaulding was badly injured in an automobile accident. He sued the driver of the car in which he was riding for damages. The driver's lawyer had a doctor examine Spaulding. The doctor discovered a life-threatening aortic aneurysm, a bulging of the wall of the large artery coming out of the heart, which carries a substantial risk of rupture and sudden death. This aneurysm was apparently caused by the accident. Spaulding's own doctor had not discovered the problem.

Spaulding offered to settle the case for $6,500. The driver's lawyer apparently realized that if Spaulding knew of the aneurysm, he would have demanded much more. The driver's lawyer did not reveal the existence of the aneurysm. The case was settled for $6,500. The driver's lawyer never told Spaulding of the aneurysm, even after the settlement was consummated.

You may be surprised to know that when the driver's lawyer declined to reveal the aneurysm to Spaulding before the case was settled, he was acting properly within his role as an advocate. According to the Minnesota Supreme Court, the lawyer had no professional duty to disclose the existence of the aneurysm, either before or after the settlement, because Spaulding and the driver of the car, the lawyer's client, were adversaries in a lawsuit. This is still true today. Under the current rules of professional conduct, as drafted by the American Bar Association, the lawyer is absolutely obligated "not to reveal information relating to representation of a client," unless his client authorizes its release. In the absence of such authorization, the driver's lawyer could never reveal the existence of the aneurysm.

The *Spaulding* case is quite troubling. It is difficult enough to accept the fact that the driver's lawyer was professionally correct when he did not tell Spaulding of the aneurysm before the settlement. But I suspect for virtually everyone, it is morally inexcusable that the lawyer remained silent after the case had settled, leaving Spaulding's life at serious risk.

We may ask, what possible justification can there be for standards of

professional conduct that permit, indeed command, such silence in the face of a life-threatening condition? And we may further wonder, even if the legal profession's standards mandate such silence, how could the lawyer, as a person, ignore his or her own moral voice, especially after the case was settled, and not contrive a way to inform Spaulding of his condition? The answer to both questions is found in the premises of the adversary system, premises that establish the lawyer's role and that underlie the very detailed rules of professional conduct that the driver's lawyer was found not to have violated.

At the risk of being pedantic, let me describe the conflict resolution model we use in the American judicial system and its assumptions. The model we use—I will term it the "adversary system model"—was taken from the English. This is how, in theory, it is to work.

A dispute arises between two parties. One claims to be legally entitled to some relief against the other. Each party hires a lawyer, because only a lawyer is familiar with the detailed rules that govern court procedures. The lawyer's job is to become the *alter ego* of the client for purposes of the litigation. The lawyer for each side investigates the facts, gathers the evidence favorable to his or her client, and presents it to a neutral third party—either a judge or jury. In so doing, each lawyer strives to persuade the judge or jury that her client's version of the facts is true, that the law favors the client's position, and that the client is entitled to the relief sought.

This is a winner-takes-all system. There is no place in the lawyer's role for the middle ground, although the system may produce such a result. The lawyer's role is limited to being an instrument of the client, and the lawyer's efforts to win are limited only by the bounds of the law and by the standards of professional conduct. Those standards of professional conduct, the same standards at issue in the *Spaulding* case, are written to assure that the fight is fair, that the integrity of the truth-finding process is protected, and that the lawyer zealously serves the interests of the client.

The general position of the profession is that a lawyer is not accountable for acts done within the limits of this role. As summarized by renowned law professor Murray Schwartz, "[W]hen acting as an advocate for a client ... a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."[1] This lack of moral accountability is grounded on the claim that the adversary system itself is morally good, so those serving it may assume that if they fulfill their individual roles according to the rules, the system will produce moral results.

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1. Schwartz, "The Professionalism and Accountability of Lawyers," *California Law Review* 66 (1978): 673.

The scholarly defenders of the system would tell you that the lawyer must advocate his client's ends and not be a judge of their rightness. The argument runs as follows: It is not up to the lawyer to determine if the client should be unsuccessful. If the client is to lose, it should be because the court has found the facts or law against him or her; it should not be because the lawyer declined to press the cause vigorously on grounds that the client's position was morally offensive to that particular lawyer. Individual lawyers, by virtue of their expertise in the law and its procedures, are the gatekeepers to the courts. Their duty is to keep those gates open to all, not to bar from entry those of whom they personally disapprove.

In general outline, this is the adversary system model. It is by this model that the individual lawyer's role in the system is defined. And once we understand this model, it becomes plain why many of the things lawyers must do in their role as advocates may appear hard to understand from an ethics viewpoint.

Let us return to the *Spaulding* case. As I stated, the lawyer for the defendant driver was acting within the requirements of the rules of professional conduct when he declined to reveal the aneurysm to Spaulding. The particular rule in question, which ensures the client of the confidentiality of what the lawyer finds out in the course of the representation, is designed to encourage the client to reveal information to the lawyer and to preserve the lawyer's loyalty to the client. Under the adversary system model, the driver's lawyer owed his duty to his client, not to Spaulding. It was not his fault that Spaulding's doctor failed to discover the aneurysm.

I suspect that even after the explanation of the adversary system model, this answer is not satisfying to many of us. As humans, we still ask why, despite the rules of professional conduct, the lawyer kept the life-threatening information secret when he knew that Spaulding's own doctor and lawyer had not discovered the aneurysm. It seems likely that if that lawyer came upon the same information outside his role as an advocate, he would have felt a moral responsibility to disclose it. What silenced that ethical voice in him? Why did he allow something as abstract as his professional duties to his client to override his personal ethics when death was a possible result? And, at a minimum, once the case settled, why did the lawyer not use all means at his command to get his client to authorize disclosure to Spaulding? Why did he rest on the command of the rules to remain silent?

The answer presents lessons that reach beyond the law. I suggest that the driver's counsel had become so accustomed to the role assigned by the adversary system model that he consciously or, more likely, unconsciously let his role provide him an excuse for amoral inaction, for not

confronting a tough ethical choice between his personal and his professional standards of right conduct.

I hope most lawyers would have made a different choice when faced with the life-and-death issues presented by the *Spaulding* case, that they would be alert to the dramatic conflict between their professional role and their personal morality, and would have found a way to see that Spaulding was told of his aneurysm, either by persuading the client to release the information or by ignoring the rule.

The *Spaulding* case presents the conflict between the lawyer's institutional role as amoral advocate and the broader role as ethical human being in sharp focus. Indeed, it requires the lawyer to honor one at the expense of the other. It is a dramatic situation in which few could miss the difficult choice.

But there are many other, far more common situations that arise in day-to-day law practice where the formal rules of professional conduct are silent as to what a lawyer should do. Here the lure of the adversary system excuse is powerful. The ethic of the lawyer as an amoral instrumentality of the client fits quite comfortably over the shoulders of those faced with the difficult issues and heavy pressures of practice. Often lawyers succumb to these pressures without ever thinking that any larger ethical problems are presented by the situations they face. Soon the lawyer is behaving as an amoral technician in situations where conventional ethical judgments are really called for, situations in which the adversary system excuse is not legitimately available.

A few examples:

* After a loss in the trial court, the lawyer takes an appeal on a non-meritorious point for the purpose of pressuring the successful party to settle for less than the jury award rather than await the outcome of a lengthy appeals process.
* The lawyer receives an interrogatory that he can tell is intended to determine the existence of a damaging piece of evidence the lawyer knows is in his client's possession, evidence that will certainly result in the loss of the case. However, the language of the interrogatory is not drafted with the greatest of care. The lawyer gives it a rather twisted, but arguably legitimate construction, and does not reveal the evidence. The lawyer wins the case.
* The lawyer refuses to stipulate to an extension of time purely for the purpose of forcing the other side to make a motion and run up the costs of the litigation.
* The lawyer browbeats and intimidates another lawyer in hope that she will be cowed into settling a case rather than having to continue to deal with the obnoxious lawyer.

In each of these situations, the adversary system model does not authorize the conduct undertaken. There is nothing in the model that contemplates such behavior. Yet these are common examples of conduct lawyers engage in daily and that, if asked, I am sure they would defend as merely part of the adversary system process and morally justifiable for that reason. I would say that their conduct is only the product of a dulled ethical sensitivity.

What is it that makes the adversary system excuse[2] for amoral conduct so inviting? What leads lawyers to rely on it almost unthinkingly, even where it is not legitimately available under the adversary system model? I suggest that this tendency is a result of subtle pressures that begin in law school and continue throughout a lawyer's career. Let me describe a few sources of these pressures.

First, there is legal education. Law school is designed to make one "think like a lawyer," to, in essence, separate analysis of legal issues from questions of personal values. This is necessary if one is to think coldly and clearly about a client's legal problems and possible legal solutions to those problems. It can, however, leave a graduate with a sense that her personal ethical self was left at the door of the law school, that there is little place for personal ethics in lawyering.

Second, once in practice, the pressures are great, both from clients and from peers. An easy way to avoid the nagging ethical questions that arise from representing some clients is to recite the rhetoric of the adversary system model—the lawyer is only fulfilling a role in the system, the system is morally responsible for the role and the outcome, not the lawyer. This sort of mantra of amorality is a comfortable way to avoid ethical responsibility. It also fits well with the ethical schizophrenia that may have first developed in law school, the split between the legal way of looking at problems and the personal ethical way. Before long, such a way of thinking can become second nature for a practicing lawyer.

There is no easy solution to this conflict between personal ethics and the advocates' assigned role. To a large degree, the adversary system itself requires that those who act as lawyers learn to live with constant ethical conflict. But I do think that the worst manifestations of the adversary system excuse for amoral conduct can be guarded against. To do so requires that law schools and the profession bring forcefully to the attention of students and lawyers the limits of the moral justification for amoral conduct. This adversary system excuse is properly claimable only to the degree it is actually mandated by the adversary system model.

It is heartening to note that this question has been receiving in-

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2. I take this term, and the underlying concept, from the fine work of David Luban, "The Adversary System Excuse," in D. Luban, ed., *The Good Lawyer, Lawyers' Roles and Lawyers' Ethics* (Rowman & Littlefield, 1983).

creased attention in law schools, and that this concern has begun to trickle out to the profession at large. The post-Watergate rules of professional conduct contain language recognizing the limits of the adversary system excuse. They state: "The rules do not ... exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law." I suggest that increased attention to this subject within law schools and the profession is the only way to avoid the sort of ethical numbness that produced the result in *Spaulding* and, probably more importantly, the far more pervasive practices of the type I noted earlier.

Let me shift the focus. I commented earlier that the ethical conflicts that constantly confront lawyers contain a lesson for those outside the law. By virtue of the premises of the adversary system, lawyers are required to set aside their personal views of the desirability or morality of a client's position. But this subordination of personal ethical standards to the values of a larger institution is not unique to lawyers. The human environment is full of similar situations, even if the ethical conflicts are not always so obviously and rigidly institutionalized as they are for lawyers. Wherever this mandated subordination of personal values to institutional ends occurs, it presents a similar potential for inducing ethical insensitivity that soon overreaches its legitimate justification. And, perhaps more insidiously, while the individual lawyer must personally confront these issues, in a large institution an individual can often escape the perception of personal ethical responsibility because of the dispersed decision-making authority and lack of clear institutional standards.

For example, in the business world there is no code of professional conduct agreed to by any governing body that is analogous to the rules that govern lawyers. For that reason, it is often said that as long as one does not engage in activities that are illegal, anything done to maximize profits is ethically proper. In other words, the free market system, like the adversary system, assigns competitors a role they can fulfill without ethical worry. It takes little imagination to see how such thinking can be used by officers or employees of companies to justify suspending their personal ethical judgments about how to go about their jobs. And the results can certainly be just as troubling as anything we see with lawyers.

Let me give some concrete examples that match the *Spaulding* case for ethical insensitivity, situations in which it appears that someone has made a calculation that profits are to come first and has not thought very hard about how far the profit justification runs.

Recently the chief executive officers of all of the major tobacco companies testified before Congress that nicotine is not an addictive drug and that cigarette smoking does not cause cancer. At the same time,

many of the tobacco companies launched a publicity campaign to paint cigarette smoking as a matter of choice. Yet, in stark contrast to the assertions of the tobacco executives, there is almost universal scientific agreement that cigarettes contribute to the deaths of hundreds of thousands of Americans each year. In fact, a recent article in the *Salt Lake Tribune* indicated that by the year 2010, 10 million lives per year would be lost worldwide to tobacco. None of the tobacco executives seem to feel any personal moral responsibility for these lost lives, nor did they see any necessity to confront the medical evidence. The tobacco executives' role as profit producers seems to have provided them with an ethical excuse from the ordinary rules of right conduct toward other human beings.

Another example of such an excuse in action is the decision of Ford Motor Company in the 1970s not to recall Pintos that Ford knew were subject to explosion upon rear-end collision. Although the modifications necessary to make the gas tanks more crash worthy cost in the range of $6.65 per car, Ford calculated that it would be less costly to compensate the families of the victims rather than correct the problem. Again the institutional role of profit maker prevailed over personal morality.

Other examples of an institutional excuse for amoral conduct at work are plentiful, even where the profit motive does not seem to be the driving force behind the conduct. Virtually any institution or structure invites excessive identification with its values and offers a tempting refuge within that identification from difficult ethical choices. The media, the so-called fourth branch of government, is an example.

The first amendment to the Constitution exalts freedom of speech. To further this value, the Supreme Court has held that the media is not liable for misstatements or inaccuracies unless a very high level of malice can be shown. The reason given for this protection from libel actions is that ready exposure to such suits would stifle the free flow of opinion and information.

Moving from this justification for protecting media from easy suit, we encounter the reality of the media's use of this protection. It is not uncommon for reporters or the media institutions they work for, when criticized for some poorly researched story or some biased presentation, to defend by citing the first amendment status the media enjoys. The pious claim is made that the media is only fulfilling its constitutional role when it publishes something that is erroneous or biased, but is not so egregious as to actually expose the media to liability. The public has "a right to know." Thus, within the institution of the media, there has developed what we might refer to as the "First Amendment excuse" for what the rest of us would consider unethical reporting—sloppy, inaccurate, biased coverage that unfairly characterizes persons and positions and that has tremendous potential for mischief. This "First Amendment excuse" ap-

parently permits the one using it to ignore ethical restraints and to do anything for which the law will not find you liable.

I do not suggest that this is the aspirational standard set by reporters or the media in general, any more than the sharp practices in which some lawyers engage is the standard by which lawyers want to be judged. But I do suggest that the institutional values of the media do dull the sensitivities of many and lead them to behave in ways that cannot be justified ethically. The media's First Amendment rights, which are indeed expansive, are not necessarily coextensive with the media's moral obligation to report the news in a fair and accurate fashion.

For instance, in the media frenzy surrounding the O. J. Simpson affair, several news organizations "bought up" the stories of potential witnesses, thereby compromising the credibility of those witnesses in the trial. Many of those same news organizations converted the pre-trial process into a media circus, compromising its basic integrity. In response, many members of the media no doubt exclaim that they are just doing what their job demands. I suggest that, like lawyers or businesspersons, reporters should question whether the institutional role they play really excuses this silencing of their personal ethical voices.

These are dramatic examples. There are any number of others, where individuals permit the values of their institutions, or at least extrapolations of the values of their institutions, to silence their personal ethical voices. Indeed, these are not just examples of individuals silencing their ethical voices, but of individuals seeking refuge from difficult ethical choices in institutional justifications. Perhaps the area that comes most readily to mind, and needs the least explanation of the divergence between the legitimate aims of the institution and the amoral conduct that seeks the institution's justification, is politics. The sins committed in the name of getting elected or remaining in power are countless. And the deep public dissatisfaction with the conduct of elections and elected officials suggests that the institutional justifications offered for such conduct are fundamentally unsatisfactory and unconvincing. Machiavelli may be the father of political action, but those following his counsel are unable to maintain the confidence of those who put them in power, almost certainly because some reference to fundamental moral principles is necessary to maintain that confidence. Hence, the pervasiveness of hypocrisy in politics. After all, hypocrisy is the tribute that vice pays to virtue.

In all walks of life, countless acts are done every day in every institution that reflect decisions made by people who, to one degree or another, permit an institutional value to silence their personal ethical voices. I do not suggest that these institutional standards should be wholly rejected, any more than I suggest that the adversary system should be abandoned and lawyers told to represent their clients only to the extent that they

agree with their clients' ends. However, I do suggest that in any setting where institutional values are dominant, there is a need to systematically encourage ethical alertness, to call into question actions and decisions that are contrary to fundamental human values.

Some may argue that if my suggestions were followed, it would weaken institutions that are essential to society. I would reply that even if enhanced ethical awareness resulted in more people refusing to accept the amoral roles that their institutions' values assign them, that would not be a bad thing. Reforms have occurred in the legal system when a significant number of those concerned agrees that the stated institutional values—the premises of the adversary system model—fail to reflect the reality of how the justice system works. For example, in recent years legal services have been provided to the poor for some purposes in recognition that, without a lawyer, there is not meaningful access to the courts. Currently, efforts are underway to improve the quality of counsel assigned to those facing the death penalty, again, in recognition that, absent effective counsel, the adversary system cannot produce defensible results. Finally, the growth of alternative dispute resolution programs nationwide amounts to recognition that the adversary system model has been found to operate in a fashion that does not satisfy many of its users. Similarly, reforms in other institutions of society occur only when it becomes apparent that the stated values of those institutions do not conform to reality or are socially (read ethically) unacceptable. We should applaud such heightened awareness of the weaknesses of our institutions, because reform lies down that path.

As I noted at the beginning, I claim no special expertise in ethics. Nothing I have written here is particularly original, but I hope it will help us better understand lawyers and the legal system. I also hope we will recognize that the characteristics of lawyers that people often dislike are only heightened manifestations of pervasive problems that we are all subject to in our roles as members of institutions, institutions that may not force our ethical conflicts into the open as often as does the legal system. Our escape is the same as that I prescribed for lawyers: confront conflicts between personal ethics and institutional values and roles and work them through, rather than avert our eyes and blindly trust in the institution.

One of the reasons many lawyers may become numbed to the ethical conflicts presented by their roles is that their education and training place primary emphasis on the acquisition of skills and not enough emphasis on the legitimate ethical limits on their use. The same is true for all people in all fields of endeavor. We spend much time on skills and little on ethics. Each of us needs a heightened awareness of this most fundamental concern—ethics—a concern that reaches across all disciplines and

all courses of study. Each of us should acknowledge that this is not a matter of concern only to those interested in abstract questions, or to those with unusually delicate sensibilities. Rather it is an issue of critical importance to each of us in every aspect of our lives.

Finally, for those who may be wondering, Spaulding did survive. A doctor discovered the aneurysm while Spaulding was undergoing an induction physical and it was surgically treated.