

Why We Mistrust Lawyers

People sometimes wonder about lawyers. The legal profession enjoys enormous prestige and respect; yet we also view it with suspicion. Folklore says lawyers are smart; but they are sharpers. They are pragmatic, useful, but unprincipled. Every attorney knows he is not a folk hero. Carl Sandburg's lines reflect the popular attitude: "Why is there always a secret singing/ When a lawyer cashes in?/ Why does a hearse horse snicker/ Hauling a lawyer away?"

Attorneys are indignant, justifiably, at the suggestion that their general run of honesty is lower than that of the common run of humanity. Thoughtful lawyers are apt to suggest that the public confuses the morality of a lawyer with that of his or her client; it assumes that a profession that is willing to counsel dishonest and unworthy clients is itself unworthy and dishonest. But the public is wrong, for if lawyers were to do otherwise they would be setting themselves up as private gatekeepers of the legal system, usurping the functions of judge and jury. For this reason it is the essential condition of advocacy that the attorney's morals and the client's are totally distinct.

A lawyer, then, may have a moral duty to assist in an immoral case. Yet we think that no one is morally bound to assist immorality. We may describe this as a conflict between *ordinary morality* and the *role morality* of lawyers. These do not always conflict, of course: for example, both ordinary morality and role morality would condemn a lawyer who swindles a client. But there will be cases in which the conflict is quite pointed, and these entitle us to ask how the demands of a professional role can override ordinary moral requirements that we thought were binding on everybody.

Lawyers' codes of professional responsibility do not always address these problems. They ignore many of the morally problematic situations that lawyers face in the course of their professional lives. This is not surprising, since these codes specify only the role obligations of lawyers. The course of action they dictate may be inappropriate for cases in which these obligations and ordinary morality come into conflict.

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Examples of Conflict

There are examples aplenty of genuine conflicts between ordinary morality and lawyers' role morality:

- (1) The client is the prosperous president of a savings-and-loan association. In leaner days he had borrowed almost \$5000 from a man working for him as a carpenter. He now wishes to avoid repaying the debt by running the statute of limitations. He is sued by the carpenter and calls his lawyer (*Zabella v. Pakel*, 242 F. 2d 452 (1957)).

The ABA Code of Professional Responsibility is unambiguous about the lawyer's duty in this example: "A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law." Role morality demands that the lawyer assist his client in this project. From the point of view of ordinary morality, however, it is morally wrong to assist someone in reneging on his legitimate debt.

- (2) The client has raped a woman, been found guilty by reason of insanity, and institutionalized. He wishes to appeal the decision by asserting a technical defense, namely, that he was denied the right to a speedy trial. (*Langworthy v. State*, 39 Md. App. 559 (1978), *rev'd*, 284 Md. 588 (1979).

In this example, the client is not attempting to do something immoral, but it is, nevertheless, clearly contrary to the general interest to loose a mad rapist on the public. From the point of view of ordinary morality, the lawyer who asserts this defense is acting irresponsibly. As in the previous example, however, the ABA Code specifies an adamant duty to assert the client's legal rights, including the technical defense.

- (3) A youth, badly injured in an automobile wreck, sues the driver responsible for the injury. The driver's defense lawyer has his own doctor examine the youth; the doctor discovers an aortic aneurism, apparently caused by the accident, that the boy's doctor had not found. The aneurism is life-threatening unless operated on. But the defense lawyer realizes that if the youth learns of the aneurism he will demand a much higher settlement. (*Spaulding v. Zimmerman*, 116 N.W. 2d 704 (1962)).

The lawyer's role responsibilities are again unam-

biguous. He must keep the client's secrets unless the client is contemplating commission of a crime. Secrets are, according to the Code, "information gained in the professional relationship . . . the disclosure of which . . . would be likely to be detrimental to the client." Thus, the knowledge of the aneurism is a secret. Nevertheless, it is plain that ordinarily, without the special duty of confidentiality, it would be incumbent on a person to tell the youth. An innocent life is at stake.

One says in discussions of examples like these: the lawyer is free to refuse the case. Indeed, if the lawyer's outrage is great enough to prejudice his judgment, he is required to do so. Now, it must be admitted that refusal or withdrawal from a morally troublesome case may be the most practical method to relieve a lawyer of an otherwise intolerable conflict. But the fact that such a strategy is available does not resolve the moral issue itself, for our adversary system is based on the proposition that *some* lawyer should take the case. If it is morally *obligatory* for the "last lawyer in town" to do so, it must be morally *permissible* for him. But of course, what is permissible for the last lawyer in town is permissible for any lawyer, else legal ethics becomes a matter of musical chairs in which the last lawyer to opt out of the role is the loser. Thus, the possibility of opting out does not yield a strategy for reconciling the lawyer's role with ordinary morality. Nor does it resolve the examples to note that in each the problem arises from a law that permits morally dubious outcomes. It is too simple to blame the law rather than the lawyer, for in every case the lawyer must decide to be the agent who brings about the outcome. It is the lawyer who pushes the red button.

Resolving the Conflict

We may want to resolve conflicts between ordinary morality and role morality by denying that there is any meaningful distinction between the two. If it is morally wrong to harm an innocent person gratuitously, then how can going to law school, being admitted to the bar, and taking money for the action make it right? The distinction might also be denied by defending the universality of role morality. Sociologists suggest that we always act in some social role or other. Every role carries with it its own behavioral norms. By this reasoning, all moralities must accommodate to roles, and we should be skeptical of the notion of an ordinary morality that fails to make these accommodations. Thus, the distinction seems doubly suspect.

If we allow the distinction, we must explain exactly how an appeal to role morality is supposed to justify an action that would otherwise seem morally unacceptable. An obvious move is to claim that (1) moral responsibility for the action falls on the role itself and not on the role agent, and (2) the role itself is morally desirable. The first of these, however, is simply false. We would not allow a torturer to evade moral responsibility by saying, "I personally would never pull out your toenails, but that's my job." If the role is immoral, its immorality accuses, not excuses, the person who holds it. Thus, the whole burden of the argument falls on the claim that the role is a morally good one.

But even the goodness of the role itself may not turn out to matter. In the second example, for instance, we might find ourselves inclined to say, "Who cares about the role? All that matters is that this lawyer is loosing a mad rapist on the city." However

THE LAWYERS KNOW TOO MUCH

The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
a dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided wheras,
Too many doors to go in and out of.

When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers—tell me why a hearse horse snickers
hauling a lawyer's bones.

—Carl Sandburg

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desirable the lawyer's role might generally be, the act it requires in this case certainly leads to an undesirable result. The goodness of the role matters only if we do not evaluate role-derived actions as isolated cases, but think of them instead as instances of policies that are morally good. If we describe what the lawyer is doing as "defending the right of an improperly tried individual to his freedom" rather than "loosing a mad rapist on the city," his act seems to promote the public interest, because the general policy is a beneficial one.

"The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . . In our government of laws and not of men, each member of our society is entitled . . . to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense."

—ABA Code of Professional Responsibility

The question, then, is whether the individual action or the general policy that requires it is the proper subject of moral evaluation. The appeal to role morality assumes that the evaluation of policies rather than individual acts is the right approach—that, for example, if the policy of zealous advocacy is on balance a good one the lawyer should follow it even on occasions when he or she knows it will result in harm. And indeed, there is a good reason for putting policies over acts: it leads to greater predictability and regularity in social behavior. If we could not count on persons occupying certain social roles to act according to the expectations of the roles, we would live in a very capricious society indeed.

A strong case can be made, however, in favor of directing moral evaluation to individual acts instead. An agent confronts his decisions one at a time: if, after balancing the wrong done by breaking role against the wrong done by acting in role, he sees that an action is morally unacceptable, it cannot be correct to sweep this insight under the rug by saying that the individual action is not the proper subject of moral evaluation. But if acts rather than policies are the objects of moral judgments, it may not be possible to justify behavior by appealing to social roles.

An Analogy to Public Officials

The conflict between role obligations and ordinary morality is a familiar one in politics, where the risk of "dirty hands" is especially acute. Moral compromise is the risk if one is to act in the public realm: to try to keep clean hands is self-indulgent. The morality of clean hands is the morality of private life; it is superseded by a role morality when one becomes a

public official because the community interest is more important than one's own private interest, even one's private *moral* interest. That, at any rate, is the most plausible justification of political morality.

Now, the lawyer resembles the public official in certain obvious respects. Like the politician, the lawyer seeks to promote certain interests through verbal and persuasive means, in a situation frequently marked by maneuvering and threats. Most importantly, the lawyer, like the politician, is acting on behalf of someone else; both lawyer and official represent a constituency.

But there's the rub. The conflict between political and ordinary morality is resolved in favor of the former only because of the importance of the public interest. The lawyer, however, typically represents private and not public interests. Even so-called public interest lawyers treat the public interest that they hope to represent through the persons of private clients. How can the attorney claim to be bound by the "dirty hands" morality of public officials when he or she is acting on behalf of a merely private interest? How can a lawyer ever be permitted to do for a private client what neither would be permitted to do for himself?

"Every man is, in an unofficial sense, by being a moral agent, a Judge of right and wrong, and an Advocate of what is right. . . . This general character of moral agent, he cannot put off, by putting on any professional character. . . .

If he mixes up his character as an Advocate, with his character as a Moral Agent, . . . he acts immorally. . . . He sells to his Client, not only his skill and learning, but himself."

—William Whewell, 1844

Conclusions

This is not intended to deny that overriding role obligations may justify otherwise suspect legal practices. But if the notion of a role morality that can at times supplant ordinary morality is to be made coherent, a sophisticated account must be offered of this distinction, an account that spells out exactly how role morality is to be appealed to in offering justifications for action. If the analogy to public officials is to be pressed, similarities between the concept of legal and political representation must be carefully explored.

If such clarification is not forthcoming, it may turn out that role morality grants the lawyer no moral privileges or immunities. It may turn out that anything that is morally wrong for a non-lawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The legal profession may have to find another exculpating plea to offer Sandburg's hearse horse.