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The Trouble with Legal Ethics

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Legal ethics is a disappointing subject. From afar, it seems exciting; it promises to engage the central normative commitments that make lawyering a profession and that account for much of the nonpecuniary appeal of the lawyer's role. Thus, when people see public spirit among lawyers threatened by commercial self-seeking, they often prescribe increased attention to the teaching and discussion of legal ethics as a remedy.¹

But close up, legal ethics usually turns out to be dull and dispiriting. At most law schools, students find the course in legal ethics or professional responsibility boring and insubstantial, and faculty dread having to teach it. Bar association ethics discussions rarely generate interest over the kind of basic questions of value that the view from afar associates with legal ethics. The reason that legal ethics is so consistently disappointing is that the prevailing conceptions of the subject fail to respond to the aspirations that draw people to it.

There are two prevailing conceptions of legal ethics or professional responsibility. The first conflates legal ethics with the disciplinary rules of the codes—rules promulgated under state-delegated authority and enforced by punitive sanctions. Under this conception, the subject might better be called "Regulation of Lawyers," a name in fact used by one of the legal ethics textbooks,² in the same way that the study of the rules governing the practice of transportation companies is called "Regulation of Common Carriers." The second conception conflates legal ethics with the private or personal moralities of individual lawyers. Here the core concerns are the constraints of role on self-expression and the legitimacy of requiring the individual lawyer to perform actions in role that conflict with her personal values.³

The disciplinary rule conception is the dominant one among lawyers and law teachers. Most law school courses and bar association discussions of legal ethics are devoted largely to such rules. The professional responsibility component of bar exams consists entirely of a test of such rules. The personal morality conception is the dominant one among philosophers and psychologists concerned with lawyering, and it has influenced a minority of

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1. See, e.g., "... In the Spirit of Public Service": Blueprint for the Rekindling of Lawyer Professionalism, ABA Comm. on Professionalism (1986).
law teachers and practitioners as well, including most of those with the more original and ambitious approaches to legal ethics. These people try to help lawyers become more self-conscious and articulate about their personal values and to provide some psychological support for such values against the pressures of role.

Each of these conceptions disappoints an important part of the expectations that lead people to legal ethics or professional responsibility. The trouble with the disciplinary rule conception is that it does not have much to do with ethics or responsibility; the trouble with the personal morality conception is that there is nothing especially legal or professional about it. The first treats legal ethics as merely a set of rules; the second as purely individual values.

But one of the most distinctive and appealing implications of the ideal of professional role is that professional practice is simultaneously a form of social commitment and self-expression. In theory this happens because the practitioner is personally committed to the profession’s norms, but also more fundamentally, because he participates in elaborating them. The most important participation occurs not through the formal organizational processes of the bar but through the lawyer’s day-to-day practice in the form of a distinctive kind of judgment. As the Code of Professional Responsibility puts it, the “essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to the specific legal problem of the client.”

Because the general legal norms do not mechanically apply themselves to specific circumstances, this judgment requires creative effort. Because the general norms express the normative commitments of the legal system and the profession, the effort to apply them to specific circumstances can be experienced as direct participation in the normative life of the community. This type of creative, normatively charged judgment is the distinctive ethical component of the ideal of professionalism. In my view, it accounts for the moral appeal of the lawyering role. The attractive implication of this notion of professionalism is that lawyers, not just in exceptional moments of public service, but in their everyday practice, participate directly in furthering justice.

The idea of professional judgment as a complex and creative effort to apply general values to particular circumstances is more or less taken for granted by lawyers outside the sphere of legal ethics. For example, in legal education, the central focus on the common law and the case method is explicitly premised on the notion that the core legal skills involve complex, creative judgment rather than mechanical rule following.

And most strikingly, the treatment of professional judgment for the purposes of negligence liability to clients presupposes complex, creative judgment. The law of negligence holds professionals to a “standard of care” that represents a set of collectively defined but uncodified and partially unwritten general norms whose application to particular situations is

assumed to require the reflective judgment of a qualified practitioner. In this realm, we do not permit professionals to exonerate themselves simply by pointing to the absence of any formally promulgated rule unambiguously condemning the particular conduct in question.

When we turn to the realm of professional responsibility, however, a different perspective dominates. The field consists predominantly of exegesis of the two disciplinary codes, and these days, primarily the Model Rules. Now one might object that the focus on the codes implies that the lawyer's main concern is avoiding sanctions, which seems inconsistent with the kind of internalized disposition to serve justice that one associates with professionalism. But this is not the most important objection to the disciplinary rule conception, and indeed the criticism is not entirely fair—a considerable portion of both codes is not concerned with norms that are strictly disciplinary rules. The critical objection is that the codes obviate complex, creative judgment and thus subvert the vital aspirations of professionalism.

The codes replicate within themselves the two dominant conceptions described earlier. On the one hand, there are norms designed for disciplinary enforcement prohibiting specified conduct. Although the drafters of the Model Rules describe these norms as "rules of reason,"5 most of them in fact have a rigid, categorical character that leaves little room for judgment, and in fact these norms were designed, as one drafter put it, "to provide a black letter rule for every case."6 On the other hand, we find a set of norms that effectively grant broad, unreviewable autonomy to lawyers to consult their personal values. These norms are typically contentless; they make no effort to suggest how the decisions that fall under them might be made other than in terms of the lawyer's subjective predispositions.

The Code differs from the Model Rules in one interesting respect. It does contain a set of norms called "Ethical Considerations" that are neither mechanical rules nor invitations to consult personal values. These norms do in fact invoke the kind of complex, creative judgment associated with the professional ideal, though their practical effect was severely limited by the rigid commands of the Code's disciplinary rules. The abandonment of such norms in the Model Rules reflects the increasing influence of the disciplinary rule and personal morality conceptions.

Perhaps the two most important norms in the Model Rules are those concerning confidentiality and withdrawal. The first is an example of the rigid, mechanical disciplinary rule. The lawyer is forbidden to disclose adverse client information except in two narrowly specified exceptional situations.7 Outside the exceptions, the lawyer has no authority to balance considerations that favor disclosure against the values of confidentiality, even when confidentiality perpetuates grotesque injustice. The withdrawal

rule is an example of a contentless norm that simply defers to personal values. With a few narrowly specified exceptions, the lawyer is authorized to withdraw whenever he finds the client's objective "repugnant." The lawyer has no obligation to consider the extent to which withdrawal would cause injustice.

(In passing, we should note the political consequences of the *Model Rules* on confidentiality and withdrawal: the general prohibition of disclosure cements the lawyer's subordination to wealthy clients by depriving her of the only effective leverage she has to curb unjust conduct by the client, while the relegation of withdrawal issues to personal morality enables her to dominate poor clients by authorizing the lawyer to condition continued representation on compliance with her wishes.)

Although the confidentiality rule is primarily disciplinary in character, it also incorporates the personal morality perspective. The rigid disciplinary prohibitions are accompanied by two types of exception, one permitting disclosure when necessary for some interest of the lawyer herself and the other permitting it when necessary to save a third person from "death or substantial bodily injury" resulting from a client's criminal act. This second exception, which covers some of the most compelling ethical issues, does not give rise to an obligation to disclose or even to consider doing so. The rules simply give the lawyer permission to disclose; they state that she "may" do so but provide no criteria for such decisions and make clear that the decisions are not subject to disciplinary review.

The rule on organizational clients makes explicit one of the more extreme implications of the permissive, personal perspective: Even when the lawyer is "certain" that the organization's officers are committed to an illegal act that will injure the organization, the lawyer has no obligation to withdraw, much less to disclose; she simply "may" withdraw. Thus, the lawyer's disclosure obligations are defined on the one hand by a rigid, mechanical rule and on the other by a contentless norm deferring to personal concerns.

Now the codes do contain some norms that call for complex, creative judgment. For example, the *Model Rule* on fees provides that "[a] lawyer's fee shall be reasonable" and then sets out a list of illustrative factors to be considered in assessing reasonableness. Such rules, however, do not concern the most intensely debated and challenging issues of legal ethics—that those that turn on questions of justice between the client and third parties or the public. For example, even if accompanied by elaborate explication and illustration, a norm obligating lawyers to make disclosures when "reasonable" in the light of both client and third party interests or when "necessary to avoid substantial injustice" would be hard to imagine within the confines of the current ethical codes, even though such general,

8. Id., Rule 1.16(b)(3).
9. Id., Rule 1.6(b).
10. Id., Rule 1.13(b), (c).
11. Id., Rule 1.5.
open-ended norms typically govern equally important matters in the professional liability area.\textsuperscript{12}

My point is not that the relegation of legal ethical issues to mechanical rules on the one hand and personal morality on the other results in relatively poor decisions on such issues (though in fact I think this is the case). Rather, the point for now is that this practice accounts for the failure of legal ethics to respond to the aspirations people bring to it. For the practice leaves no role in confronting the most compelling issues of legal ethics for the kind of complex, creative judgment that people associate with fulfilling aspects of professionalism.

The important aspect of this judgment is not just that it is demanding or intellectually challenging but that in linking particular technical concerns to broad social values, it enables the practitioner to experience the resolution of particular problems as vindicating universal interests. In contrast, under a regime of alternatively mechanical and subjective norms the practitioner repeatedly experiences his client's and his own concerns as alien from more general social interests.

Now it may be that there are practical reasons why norms encouraging complex, creative judgment are not feasible to govern many issues of legal ethics. Perhaps lawyers lack the aptitude, the information, or the integrity to make judgments of this kind. Perhaps something close to absolute, categorical protection of confidentiality is necessary to give clients adequate inducement to consult lawyers. I do not find such arguments at all plausible, and I am amazed, given how readily lawyers make them, how little systematic investigation or even articulation lawyers have given them.\textsuperscript{13} But my point is that, if such arguments are true, they represent a tragedy that their proponents have failed to acknowledge.

The tragedy is that the professional aspiration to connect directly a commitment to general social values with everyday practical tasks is doomed to disappointment. The ethically ambitious lawyer comes to the profession attracted to the idea that she will contribute to justice in her day-to-day practice but then finds that her practice is governed by norms that frequently oblige her to do things that, if she dares to consider the issue, she believes are unjust. Moreover, even when she has the autonomy to do what she thinks would contribute to justice, the profession often treats her decision as a personal, subjective concern for which it accords her immunity but neither guidance nor support.

The best answer the profession has to the lawyer's disappointment is to adopt the perspective of the long run: however alienating in the particular case, requiring the lawyer to acquiesce in injustice or leaving her to her subjective devices may be a necessary part of the regime that in the long run

\textsuperscript{12} See Harry I. Subin, The Lawyer As Superego: Disclosure of Client Confidences to Prevent Harm, 70 Iowa L. Rev. 1091, 1177–81 (1985) (arguing for ethical norms requiring disclosure "to prevent serious harm").

\textsuperscript{13} For responses to these and other objections to professional responsibility regimes requiring complex, creative judgment, together with illustrations of how such regimes might be elaborated, see William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083 (1988).
produces the most socially desirable or just decisions. But this answer, even if true, is not fully responsive to the disappointment I am discussing. The custodians and designers of virtually every social role can and do claim that ultimately and in the long run the role serves public values. The distinctive ethically appealing feature of professional roles has been a vision of practice that links in a challenging and immediate way public values and the resolution of particular problems. Once the argument shifts to the long run, the professional promise has already been betrayed.