

ARTICLES

DIMENSIONS OF ETHICAL RESPONSIBILITY: RELEVANT OTHERS

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I. INTRODUCTION

I wish to repeat a point and advance a thesis. The point is that analysis of the ethical responsibilities in the practice of law has been seriously hindered by inappropriate comparison with ethics that supposedly govern in everyday life. The thesis is that essentially the same basic dimensions of ethical responsibility may be used to analyze ethics in the practice of law as may be used to analyze ethics in other vocational situations and in everyday life. Because, as I argue, these dimensions are inherent in all ethical problems, they can be used in the comparison of ethical problems arising in the practice of law with those that arise in other settings.

II. LEGAL ETHICS AND EVERYDAY ETHICS

In earlier encounters with the subject of legal ethics, I have tried to show that discussion of legal ethics has suffered from being compared with ethical standards supposedly recognized in the everyday life of people who are not lawyers. One of those discussions explored the idea of "station" in life.¹ Another compared certain familiar problems in legal ethics with counterpart problems in everyday life.² In a lecture recently published, I addressed the lawyer's subjective viewpoint—how the world of practice appears from the moral perspective of the practitioner.³

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1. Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1 (1989).

2. Geoffrey C. Hazard, Jr., *Doing the Right Thing*, 70 WASH. U. L.Q. 691 (1992).

3. Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV.

The concept of "station" in life is taken from the English philosopher F.H. Bradley,⁴ who in turn appropriated it from a much older tradition. In simplest terms the idea is that each of us exists in a world that is personally unique. The structure of our world is determined by such objective or external factors as our sex, age, race, nationality, circumstances of birth and upbringing, education, and family status at any given time. It is also determined by our occupation in life. Thus, it is one thing to be male, another to be female; to be a child, a young aspiring professional, or a person now long in the tooth; to be a caucasian in the Orient or an Asian in the United States; to have had supportive nurturing as a child or to have suffered privation or abuse; and to be married with responsibilities for children or not. Similarly, it is one thing to be a lawyer and another to be a teacher, a business manager or a blue-collar worker. These are of course only some of the aspects of personal identity that may have ethical significance in a specific context.

The world of the unique self is determined by internal factors as well. In aggregate these constitute a person's subjective viewpoint—the world as it appears from inside one's station in life. People having substantially the same background and education, and engaged in essentially the same vocation, respond very differently to different kinds of ethical problems, as anyone knows who has had to participate with other committee members in deliberating upon such a problem. These differences in "personality" can be crudely correlated with various personal background factors. For example, it is commonly asserted, and in many respects true, that men respond to ethically charged situations in ways different from women.⁵ People who are verbally articulate usually respond in different terms than people who express themselves dramatically or in body language. Different nurture also seems to reveal different nature. Sigmund Freud had a theory that all present emotional behavior could be explained in terms of specific autobiographical antecedents. A similar, if less precisely articulated, insight informs our common experience, in which we try to figure out "where someone is coming from" in order to predict and interpret their response to ethically problematic situations.

But more than this, we know that a person is not simply a summation of his or her life experience. Stated one way or another, this is the

4. F.H. Bradley, *My Station and Its Duties*, in *ETHICAL STUDIES* 98 (Ralph G. Ross ed., Liberal Arts Press 1951) (1876).

5. *See, e.g.*, CAROL GILLIGAN, *IN A DIFFERENT VOICE* 24-63 (1982).

problem of free will—the realization that, whoever and whatever one of us may be, there is an element of subjective freedom in every ethically significant decision.⁶ The response to an ethically problematic encounter on the part of one specific person thus is a product of the unique mind and spirit brought to that encounter. Moral principles and affirmations and “rehearsals” of their application to hypothetical moral dilemmas shape what we will do where a real world choice presents itself. Choices in earlier events in our lives develop “practice” that has a similar shaping effect on choices in oncoming moral encounters. Nevertheless, we have all had the experience of not knowing in advance what our response will be to an ethical dilemma. A person cannot “know” what a situation involves until it is upon him, and even then can understand it only imperfectly. The moment of actual choice is a moment of action, which comes after conscious deliberation. There is a way in which the plea, “I didn’t know what I was doing,” is true of every ethically crucial choice. This may have been what Yogi Berra meant when he said, “You can’t think and hit at the same time.”

All these—objective circumstance, personal history and unique occasion for action—are aspects of one’s “station” in life at any given moment. These aspects of ethical problems apply to lawyers and to “real” people. Every lawyer has such a station in every moment of practice. A fundamental fact about a lawyer’s station is that a lawyer is a lawyer. Being a lawyer entails having clients and having clients in turn entails special ethical responsibilities. By the same token, people who are not lawyers—that large faceless population around us that we sometimes call “nonlawyers”—also have stations in life. They are accountants and mechanics, homemakers and breadwinners, parents and children, neighbors and strangers. They combine various personal attributes in infinite variation, each one in his or her own way of life. If lawyers are like everyone else in having a station in life, and a personal subjective viewpoint as well as professional responsibilities, then it follows that comparisons can be made between the ethical problems encountered by lawyers and encountered by people in general.

To recognize station in life and personal subjective viewpoint, and their relevance to ethical choice, is not to reject the notion that there may be general ethical principles having application to all situations in life. In my view there are universal ethical principles, or at least a uni-

6. See generally PRIMO LEVI, *THE DROWNED AND SAVED* (Raymond Rosenthal trans., Summit Books 1988) (discussing the Holocaust and the personal moral decisions made by participants).

versal ethical perspective. The universal perspective is that, in the absence of other considerations, all people should be treated equally. Of course, there are always some other considerations, so that the ethical universal never has unqualified application. But that does not diminish from the ideal of universal. Moreover, if there were not some universal ethical perspective, we could not make ethical comparisons, whether in terms of station in life or personal experience or otherwise. The problem of substantive ethical universals, however, will be left to some other day. The thesis to be developed here concerns some structural dimensions of ethical responsibility that have universal significance in ethical choice. The thesis does not involve simple relativism, although it would not be unfair to describe it as involving complicated relativism.

III. STRUCTURAL DIMENSIONS OF ETHICAL RESPONSIBILITY

By structural dimensions of ethical responsibility, I refer to aspects or parameters of ethically problematic situations, and hence terms in which such problems could be analyzed. One of these dimensions involves the positions of the "relevant others" in an ethically problematic situation. In theatrical terms, these are the *dramatis personae*.

A second dimension I have in mind consists of the established and recognized rules governing the situation; in other words, the rules of the game. A third dimension consists of time, including time past and the future. There is at least one other factor, which modifies these other dimensions. This is the factor of uncertainty. I hope on some other occasion to develop the matter of rules of the game, the significance of time, and the importance of the factor of uncertainty. Suffice it to say here that these dimensions also characterize all real world ethical problems. That is, all real world ethical problems implicate pre-existing rules, including legal rules and accepted conventions of social interaction; all real world ethical problems implicate the dimension of time, including relevant historical background and anticipated future consequences; and all real world ethical problems involve actors functioning under conditions of uncertainty. If these dimensions are taken into account, then real world ethical problems are even more complicated than will be suggested in the analysis that follows. However, my limited purpose here is to examine one of these dimensions: the "relevant others" involved in an ethical dilemma.

IV. THE CONVENTIONAL PLAYERS

Virtually every serious ethical problem involves at least five poten-

tially significant "relevant others." These relevant others will be identified hereinafter. However, I wish to introduce them with a note of criticism addressed to most ethical discourse with which I am familiar. The critical note is that most discussions of ethics consider only two or at most three of these players. I will begin with these three players.

The first player is the actor who is called on to make the ethical choice; the second is the person who may immediately gain or lose according to whether the actor acts beneficently toward that player; a third player sometimes involved is another person who will lose if the actor acts beneficently toward the second player.

These abstractions can be brought down to the situation of a practicing lawyer. The first player—the lawyer, of course—is the person who has to make a choice that has ethical implications. The second player is the client—the person who will gain if the lawyer pursues one course of action and lose if the lawyer pursues some other course. The third player is the opposing party in litigation or negotiation. The ethical problem could be whether the lawyer should disclose to the other party a fact known to the lawyer that would adversely affect the client's position vis-à-vis the third party. Although a lawyer is generally required to give preference to the interests of the client, there are circumstances when legal rules and norms of common decency require otherwise. That is, a lawyer will be required to disclose to the third party facts that are adverse to the lawyer's client.⁷ It is often a judgment call whether these "other regarding" norms apply.

Three players also are involved in standard analysis of ethical dilemmas of people who are not lawyers. These roles are illustrated in a problem situation much addressed in contemporary ethical discussion. This is the case posed by the psychologist Lawrence Kohlberg in studying moral development of children.⁸ The case involves a protagonist who has a sick friend⁹ in need of an expensive drug that can be procured only by stealing it from a druggist. The sick friend is of course the second player and the druggist is the third. The question of ethics is whether the actor should conform to the rule against stealing or should steal to save the sick friend's life. The choice between these two courses

7. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1563-66 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

8. L. KOHLBERG, *THE DEVELOPMENT OF MODES OF THINKING AND CHOICES IN YEARS 10* no. 16 (1958).

9. Kohlberg's example uses a sick spouse. I have changed it to friend to simplify analysis.

of action will have effects on the sick friend (who may die) and the druggist (who may be victimized by theft).

Those who have considered ethical problems of the legal profession will recognize that the sick friend/druggist problem has the same number and kind of participants as standard problems in legal ethics. One such problem is that mentioned earlier, having to do with factual disclosures to a third party. Another is whether to subject a frail witness to hostile cross-examination when the questioner believes that the witness is telling the truth.¹⁰ As actor, the lawyer must decide how to apply the law governing lawyers, which requires that cross-examination be conducted with lawful aggression if it will tend to the client's advantage. The alternative is to give the witness the gift of taking it easy.

More than one lesson can be learned from comparing the sick friend/druggist problem from everyday ethics, with the honest witness/guilty client problem of legal ethics.¹¹ One lesson I wish to suggest is that problems of legal ethics are not structurally different from those arising in other stations in life.

Another lesson is that defining an ethical problem in terms of only three participants results in misleading oversimplification.¹² In both the legal and the everyday ethical problems presented above, there are at least two other players. One is another person (or set of persons) for

10. See M. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* c.8 (1990).

11. Of course, the client is not legally guilty unless so found by the court. But the lawyer, if she suspends disbelief, can have as firm an opinion as to whether a client is guilty as she can have about anything.

12. Limiting an ethical problem to three participants radically and artificially reduces the complexity involved in real world ethical problems. This can be seen by comparing the number of relationships amongst three participants to the number of relationships among five participants. When an ethical problem is limited to three players, there are only three bilateral relationships (between A and B; A and C; and B and C). When an ethical problem is expanded to include, say five participants, there are ten bilateral relationships (between A and each of B, C, D, and E; B and each of C, D, and E; C and both D and E; and D and E).

The complexity is compounded when consideration is given to the number of possible "coalitions" in a three-participant problem to the number of possible "coalitions" in a five-participant problem. In a three-participant problem, there are four possible "coalitions" (A and B may collude against C; A and C may collude against B; B and C may collude against A; and A, B, and C may all work together). In a five-participant problem, there are sixteen possible coalitions. There are five possible coalitions of one against four and there is one coalition of five, in which all participants work together.

Thus, as the number of participants expands, the number of relationships proliferates and the number of potential coalitions explodes to the point where the problem becomes practically incomprehensible unless simplifying rules are introduced. This suggests that real world ethical problems cannot be understood without the aid of simplifying rules. I am indebted to Michael Dawson, Yale Law School Class of 1993, for help in this calculation.

whose benefit the protagonist could have committed his moral concern and practical efforts. Let us call that person the Alternative Beneficiary. The other consists of another person (or set of persons) to whom the protagonist is answerable, apart from the other participants immediately involved. Let us call that person Political Authority. I submit that there are such fourth and fifth players in all real-world ethical dilemmas.

V. THE ALTERNATIVE BENEFICIARY

The existence of a fourth relevant other or set of relevant others is suggested by the story in Christian ethics about the Good Samaritan. As is familiar to all in our culture, including non-Christians, in this story a traveler had been waylaid by robbers and left wounded and unattended. Various passersby during the day continued on their ways without heeding or stopping. Finally, a Samaritan—a member of a despised alien ethnic group—stopped, ministered to the victim, found him a place, gave him money and saw him safely onward. The story of the Good Samaritan is a model of beneficence. According to Christian tradition, it is a model for all human action.

Yet one has to speculate that some of the passersby who did not stop had “good reason” for doing so. Perhaps one of them was bent on important community business, such a warning his tribe of an impending attack by enemies. Perhaps another was hurrying to minister to another victim to whom a greater duty was owed, such as a parent or a child. Indeed, perhaps one of them was acting out Lawrence Kohlberg’s problem about the vital drug, and was carrying a stolen drug to another victim whose life depended on it, the outraged druggist in hot pursuit.¹³

The point of course is that the Good Samaritan, if he was morally responsible, made a calculation that ministering to the victim before him would not unduly interfere with responsibilities owed an alternative beneficiary. Sometimes such a fourth “relevant other” can be immediately present. For example, suppose in the sick friend/druggist problem that there is only one available dosage but the protagonist has two sick friends. This is the familiar “triage” problem, in which a benefaction must be somehow rationed among potential recipients who are

13. Perhaps another of the passersby previously had the experience of being conned by a robber feigning injury and did not want to risk repeating that experience. This introduces another dimension in the problem.

equally deserving from a moral viewpoint.¹⁴ Suppose, in the case of a lawyer, the choice is between preparing oneself adequately for the case now on trial, including cross-examination of the frail witness, and preparing adequately to examine a difficult witness in a second case, in which trial will commence next week. Of course, the rules of ethics say that a lawyer should not have undertaken the second case if doing so would interfere with adequate preparation in the cases she already has. But that solution to the problem looks to a positive rule of priority laid down by external authority, i.e., the rules of professional ethics. The rule of professional ethics is that an existing client is to be given preference over a prospective client, regardless of their relative need for the specific lawyer's services.¹⁵ In the absence of such a "tie-breaker" rule emanating from outside the problem, there is no principle upon which a Good Samaritan lawyer could decide which client to prefer.

Sometimes the alternative beneficiary is out of immediate sight. In principle, the mandate to be a good samaritan covers everyone who could be better off as a result of a protagonist's beneficence. Indeed, the equal treatment of all potential beneficiaries is required by the principle of universal moral equality to which reference has previously been made. Hence, rigorous adherence to the principle of moral equality would require the Good Samaritan to have considered all possible victims in all degrees of need before deciding whether to minister to the needy person immediately before him. If the Good Samaritan had reason to think that a worse off victim lay around the bend of the road, there would at least be a question whether he was right to minister to the victim before him. Moreover, if he knew that the worse off victim was his spouse, we would say that it was perverse for him to minister to the stranger.

Ethically conscious actors are aware that there is a world full of such relevant others.¹⁶ Many of these alternative beneficiaries are much

14. Triage refers to the procedure used by military doctors to allocate their time and energy. All wounded from the battlefield are classified into those who could probably survive without treatment, those who probably would not survive regardless of treatment, and those who apparently could be helped. Treatment is provided to the last group. On triage, see GERALD R. WINSLOW, *TRIAGE AND JUSTICE* (1982). See also the analysis of many similar examples in JON ELSTER, *LOCAL JUSTICE* 90-96, 181-82 (1992) (discussing civilian patient access to intensive care and organ transplants and availability of penicillin to soldiers).

15. See, e.g., *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978).

16. Some ethical conservatives appear to be very distressed by an imperative that might require conferring undeserved beneficence. They indefinitely conserve themselves for some later occasion for intervention in which beneficence will be better deserved.

in need of benefactions, including legal services. The principle of moral equity provides no basis for choosing which of them is most deserving. The triage problem thus plays out in infinite variation.

Explaining the triage problem is the basic insight of economic analysis: Human needs, or at least human wants, forever outrun available resources. Economic principles are not everything there is to ethical analysis. However, ethical analysis that is unmindful of relevant others is incomplete. For example, how is a lawyer to make the choice between putting in billable hours for a corporate client and fifty hours for the indigent, as has been recommended to the American Bar Association as a professional standard?¹⁷ Or, for that matter, to make the choice between committing herself to corporate law practice rather than being a full-time, underpaid public defender?

Contemplation of the economics of taking care of others who cannot afford to pay fees, such as family, soon brings into view relevant others who depend on a lawyer for food and shelter. A lawyer's quest for lucrative fees is not always entirely self-serving and the same is true of a breadwinner in any line of work. A good samaritan may also have to consider the effect that a detour will have on continuation of her employment. This brings us to the problem of answerability to other players.

VI. POLITICAL AUTHORITY

In the sick friend/druggist problem, the protagonist is stipulated to have complete autonomy in deciding whether to steal the drug. That kind of freedom rarely, if ever, exists in the real world. Rather, every protagonist is in some way accountable to someone beyond those whose interests are immediately involved. The person or people to whom one is accountable can be called Political Authority.

If the protagonist in the sick friend/druggist case was someone's employee, and decided to steal from the druggist, he would have to account to his employer, at least to allay suspicion that he would just as likely steal on the job. If the protagonist decided not to steal the drug, and the sick friend had friends or relatives, he would have to account to them, lest they think he had been indifferent to the sick

17. See American Bar Ass'n, *Reports with Recommendations to the House of Delegates*, 1993 Midyear Meeting, Report 8A (recommending that "A lawyer should aspire to render at least [50] hours of pro bono legal services per year").

person's plight. And so with virtually every ethical choice in the real world.

Accountability means having to answer to someone else for what one has done—explaining and justifying the course of action that has been chosen. When contemplating this obligation, the actor must calculate whether the justification will be convincing to the relevant audience. Such a calculation must include an estimate of how the facts will look to that other person—for example, whether those to whom one is accountable will agree that the friend really needed the rare drug or that the druggist was really unwilling to sell the drug on credit. It is familiar that accountability often turns, not on questions about the governing norms, but on questions of fact. Questions of fact can arise whether accountability takes the form of legal responsibility or simply discussion within a family or in dealings between co-workers, among fellow professionals, etc.

In deciding upon any real world course of action, the protagonist has to calculate how these fact issues are likely to be resolved. A calculation must estimate how the balance that was struck by the actor between the competing interests—stealing versus helping a sick friend—will be regarded by those to whom the actor is accountable. It is familiar that some people regard stealing as an inadmissible course under any conditions, whereas others think that property interests should always yield to personal interests. These differences can be found not only in the law courts but in family and community circles and among business people and politicians. Similar problems are involved when a lawyer must exercise professional judgment within the limits imposed by law and the rules of ethics.

One thing can be sure: The problem of choice will not look precisely the same in retrospect when reviewed by the protagonist's reference group as it did to the protagonist at the moment of choice. All forms of review involve an element of second-guessing.

Accountability is the essence of political and managerial responsibility in our modern bureaucratized world. In the case of political and business leaders who are momentarily beyond the reach of retribution, we say that they are accountable to history—the collective memory of the community. In the case of professionals, such as doctors and lawyers, the lines of accountability are looser and designedly so. It is an ethical ideal that such a professional should exercise independent judg-

ment.¹⁸ Nevertheless, a lawyer who is member of a firm is directly accountable to her partners or associates for ethically debatable decisions. More than one law firm has fallen apart when such a decision did not sit well with colleagues. Accountability for a solo practitioner is less direct but nevertheless real. A solo practitioner depends on "reputation" for a continued flow of referrals, and reputation is the community's informal system of accountability. Also, all lawyers in principle must answer to the disciplinary committee. Where a breach of ethics also involves violation of the law, for example, in misappropriation of client funds, lawyers are also accountable to the law.

There is another aspect to accountability to political authority that is especially significant in legal ethics. This is the problem of accountability of an agent acting for a principal. In most forms of law practice a lawyer is an agent for the client.¹⁹ All lawyers understand that, as an agent for a client, a lawyer owes legal and ethical duties to the client. Not all lawyers equally understand that an agent also owes legal and ethical duties to the third person with whom the lawyer deals on behalf of the client.²⁰ The principle of agency accountability is not merely a legal concept; it is an ethical concept as well.

Two things are clear about an agent's accountability. First, an agent may not be fully chargeable with the principal's purposes. Thus, in the sick friend/druggist case, if the protagonist was acting on behalf of the sick friend's parent—who told him to get the drug "whatever it takes"—a more complicated problem of responsibility is presented than if the protagonist were acting on his own. This becomes clear when we recognize that the protagonist would give as a reason for stealing the drug—if that is what he decided to do—that he was under direction from Political Authority. This is essentially the position taken by Oliver North in his well-known foreign exchange dealings. Even if we did not accept this "Nuremberg defense" in a specific case, we would have to

18. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980).

19. An exception, or perhaps only an apparent exception, is a lawyer who also holds authority as a principal. The most common instance is a government attorney who is a legally constituted public official, such as a prosecutor or an attorney general. The merger of the function of lawyer and public official presents a problem often referred to in terms of the question: Who is the client? See GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 729-861 (1990).

20. See generally RESTATEMENT (SECOND) OF AGENCY §§ 343-362 (1958) (tort liability); *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964), cert. denied, 377 U.S. 953 (1964) (criminal liability).

consider it carefully. Under most circumstances we would give it weight and under some circumstances it would exonerate the agent.

For lawyers the matter of Political Authority is essential to the legitimacy of many aspects of our calling. After all, how else could one justify defending a person who, one has every reason to believe, committed a serious crime? In this case, Political Authority is the community's collective judgment that defending those accused of crime, even ones who appear certainly to be guilty, is warranted by constitutional considerations that redound to everyone's benefit. That is, the constitutional concept of due process entails the right to counsel, and the right to counsel entails the right to a lawyer who will give her best lawful effort for the accused, whatever she may think about whether the accused is guilty.

The same principle applies in other social relationships as well. For example, a similar kind of authority undergirds a parent's protective efforts in favor of a guilty child.²¹

The other aspect of agency accountability is that, at some point and degree of involvement, an agent is equally chargeable with the principal for an ethically problematic choice. In legal terms, this is the liability that is described as "aiding and abetting."²² In the practice of law, a similar limitation is expressed in the canon that a lawyer's zeal on behalf of a client must be "within the bounds of the law."²³ In the language of ordinary ethics, the same idea is expressed in the proposition that it is not a defense simply to say "they made me do it." Ethically conscious actors are aware that while political authority is a source of ethical justification and excuse, and often an impetus to doing good, it is also an impetus to complicity in doing evil.

The fact of accountability in all real world relationships thus implicates problems of politics. Politics *is* the allocation of power and authority. Politics in this classical sense is not everything there is to ethics, but ethical analysis unmindful of politics is incomplete. These complications come into view, however, only if we include political authority among the "relevant others" who are involved in real world ethical dilemmas.

21. See Hazard, *supra* note 2, at 695-96.

22. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985).

23. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 7 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1989).

VII. CONCLUSION

I have sought to show that real world ethical problems have unavoidable complications arising from the number of "relevant others" whose interests are involved in resolving such problems. Analytically, there are at least five such players, even in relatively simple situations. In actual life, the number of others whose interests are at stake usually is larger. The resulting complexity would be unmanageable without rules and conventions that impose priorities and give preferred position to various "relevant others." For lawyers, the qualified preference is given to a client, but not in disregard of the interests of "relevant others" who are not clients. For those in other stations in life, such as parent or business manager, there are counterpart rules of qualified preference. This is one of the reasons why we establish and maintain rules, legal and otherwise. Further exploration of that matter will have to await another day, however.