

Responsibility, Professional and Otherwise

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It is a welcome opportunity to be back in Connecticut and an honor to make this presentation.

My topic today is responsibility, professional and otherwise. My presentation is what should be called a meditation. That is, I will think aloud with you about the characteristics of responsibility as a preface to perhaps saying something more definite on some other occasion. One of the problems we have in scholarship, certainly so in legal scholarship, is a tendency to arrive at conclusions without having thought circumspectly about the difficulties in supporting them, or the implications of our conclusions once we have embraced them.

The concept of responsibility is very salient in discussions within our profession these days. The contemporary legal profession confronts the paradox of having more pervasive influence and higher visibility but also lower esteem than perhaps it has at any previous time, at least since the turn of the century. In dealing with our loss of public esteem, a phrase that is used, both of lamentation and of exhortation, is: "There ought to be more attention to professional responsibility." One of the criticisms of the American Bar Association Model Rules of Professional Conduct, with which I was associated as draftsman, was that we abandoned the term "Code of Professional Responsibility" and in place of that adopted the term "Rules of Professional Conduct."¹ Critics said that something was lost in the title and something more was lost in abandoning the effort in the Code to express what were called the Ethical Considerations.

I have no regret about that choice, which I think was clearly correct. I thought then and think now that we should write rules when we are talking about legal rules and do something else when we are talking about moral or

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1. See James H. Stark, *The Model Rules of Professional Conduct*, 12 CONN. L. REV. 948, 958-64 (1980) (favoring the concept of "aspirations" as opposed to "rules").

ethical considerations beyond legal rules.² To say that if one is writing legal rules, one should write them as seriously intended legal rules is not to say that there is nothing beyond legal rules. It is certainly not to say that there are no standards of conduct or important elements of conduct that cannot be captured in legal rules. On the contrary, to recognize that there is more to good conduct than can be prescribed in legal rules is to recognize that the law is subject to important limitations on what it can do in the way of regulation or inculcation of virtue. Such is the theme I wish to develop today.

I venture this theme partly in protest against people who recurrently call on the legal profession to go further than we already have in rewriting the rules to make the profession better and more worthy. As you may know, there is a group called Ethics 2000, a special committee of the American Bar Association, of which I am a member. The Ethics 2000 Committee is charged with reexamining the Model Rules to see whether we can improve them, perhaps to produce rules that make lawyers better.

The Ethics 2000 Committee in its first cycle of deliberations, now over a year in duration, has concluded that there are relatively few changes that could be made which would be useful and prudent. Accordingly, we are getting criticism that we have no imagination. I believe that the Ethics 2000 Committee does have imagination. However, we also are constrained by a sense of realism. I challenge people who say that the rules ought to be made better to suggest specific changes that could be made in the Model Rules and ask whether they would really want to adopt these changes.

For example, we could make it a rule that a person holding out himself or herself as a lawyer should be prohibited from engaging in any other activity except passive investment, such as owning a stock portfolio or real estate. That rule would put directly the question about whether the profession has become too "commercialized" by prohibiting all commercialization. I think such a rule would be very foolish, for reasons that were implicated in a dispute a few years ago about whether lawyers should be permitted to engage in "affiliated enterprises."³ Another change could be that an advocate in civil litigation be required to disclose to opposing parties all adverse evidence except material covered by the attorney/client privilege. That is, there would be a duty to disclose everything that the lawyer considered relevant except privileged matter. I do not think such a disclosure rule is quite so foolish. However, I think such a change certainly would

2. See Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 77, 85-90 (1981) (arguing that the Code's division into "Ethical Considerations" and "Disciplinary Rules" creates ambiguity and undermines the rules themselves).

3. See generally Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739 (1992).

incur great distress if it were adopted, judging by the reaction to a similar rule proposed for the Federal Rules a few years ago.⁴

Another change I can imagine—I doubt that it could be adopted, but I nevertheless can imagine such a rule—is to require that transaction lawyers present a disclosure statement in connection with every proposed final draft contract, explaining the risks to the other side as he would explain corresponding risks to the lawyer's client. That kind of disclosure probably would be very provocative of discord rather than clarity in trying to reach agreements. If such a rule were adopted, I am inclined to think that clients would find other advisors.

And so on and so on.

My point is that if we are to be serious about the job of improving the caliber of the profession by rules of ethics, we should consider seriously what rules might have that effect. My own estimate is that we cannot do a lot in that regard. We can do a little here and there and I hope the Ethics 2000 Committee will do it. But it is a chastening experience to contemplate about the possibilities of rule-making as a means of inculcating virtue. One comes to realize that there are very severe limits on what can be done. That recognition in turn leads to recognition that there are important differences between the concept of responsibility in a more general sense, and the concept of legal responsibility.

I think lawyers tend to equate those two ideas, that is, we tend to think that responsibility entails liability. I think that this is a misconception. To develop that argument I will address other spheres of human activity in which we use the term "responsibility." This path of thought is what I had in mind with the title of this lecture, "Responsibility, Professional and Otherwise."

There are at least three spheres of modern activity that are useful to contemplate when we think about responsibility. The first is the responsibility of professionals generally, not only lawyers, but also doctors, accountants, teachers, and others. All of these vocations are professions and we would say that all of these professions have responsibilities, even if we were not entirely clear what we meant by that term.

A second sphere of responsibility, one about which I have learned a great deal from Professor Phillip Blumberg, is that of corporate managerial responsibility.⁵ As many of you may know, the American Law Institute a few years ago was involved in a project on the principles of corporate governance.⁶ In that project we were concerned particularly with the legal definition of the functions of corporate directors and officers. A key idea

4. See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992) (criticizing new mandatory disclosure rule).

5. See PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS* (1987).

6. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE* (1994).

in that definition is that of responsibility. The task for the draftsman and the analyst was to specify what we meant by responsibility of managers of organizations. We had in mind of course business corporations, but the same kinds of problems are encountered in the concept of responsibility in the management of non-profit organizations such as universities, research institutes such as the ALI, and the now enormously expanding health care organizations, many of which are non-profits. What is meant in saying that someone has managerial responsibility in such an organization?

A third area to bring to mind in the comparison is the family, particularly parental responsibility. The idea of parental responsibility is connoted in the term of "family values." That term has been much bandied about recently particularly by certain conservative voices in the political domain.⁷ The proposition is that parents should be responsible, or are responsible. One could say, "Sure, but what does that mean? Do you mean that if a child is found guilty of possession of drugs that the parents should, simply because they are parents, be considered themselves to be an accessory to possession of drugs? Or that in such a case, the parents should forfeit their home if the child was thoughtless enough to bring the drugs home, where they then were found by the police?"

It is easy to engage in loose talk about parental responsibility, as long as we do not define it in particulars. It is different, however, if we get into the details by asking, "Yes, responsible, but for what and under what conditions?" The idea turns out to be rather elusive in some contexts and I submit that it is elusive in the contexts to which I have referred.

Thus the idea of responsibility is highly ambiguous: What exactly is a responsible lawyer? What exactly is a responsible doctor, for example, when confronting an aging patient who for all that can be told very much wishes to end life's journey? What is "responsibility" in the context of assisted suicide? What is the responsibility, indeed, of the nurses who are in as good a position as the doctor to see what the situation is—often a better one—but who are in subordinate positions in the hierarchy of authority in the medical regime? In thinking about their responsibility, we are immediately led to the realization that, in most organizations in which responsibility is exercised, there is a more or less well-defined hierarchy of authority through which collective responsibility is exercised.

Concerning these three social roles involving responsibility—professional, managerial, and parental—it is useful to think of them as more or less in parallel. Thus, we can ask, "Well, what are the similarities and what are the differences?"

Perhaps there is a clue connoted by the term "fiduciary." We say that a lawyer or a surgeon for that matter is a fiduciary, at least in some sense.

7. See WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* (1993).

The same is certainly said of corporate directors and officers. The same term or its equivalent is used regarding parents in some contexts. Using the term "fiduciary" may simply restate the problem of defining responsibility. However, to say that persons burdened with responsibility are fiduciaries reminds us that a position of responsibility entails a strong element of authority and obligation. That is, a person exercising responsibility has effective authority over the welfare of others and possession of that power entails the element of obligation. We accordingly understand that the lawyer or doctor, the director or officer, or the parent, is in a position to exercise authority concerning the welfare of someone else—the client, the company, or the child, as the case may be—and has obligations in the undertaking.

A person exercising responsibility ordinarily has not only legal authority but also what we might call political and economic powers—powers to persuade and induce, powers to marshal resources. These powers ordinarily are quite superior to those of the person on whose behalf they are supposed to be brought to bear. That asymmetric power relationship is a stark fact. Such an imbalance is difficult to deal with in an era when much of our analysis of ethics and virtue is predicated on a premise of equality among people. Lest mistake be made and misunderstanding result, I believe in moral equality of persons. I certainly believe that discrimination on account of race and gender and religion, and so on, are morally wrong and inappropriate. But to recognize equality in those terms is not to commit to the notion that all human relations should be judged in terms of equality. Put differently, the fact that there is inequality in a relationship is not a basis for concluding that there is something wrong with the relationship. If a notion of "pure" equality is simply incompatible with the idea of responsibility, then we are required to assess the performance or virtue of those exercising responsibility in terms other than the currently ubiquitous conception of equality.

The powers of a lawyer to make recommendations to a client often are effectively decisions for the client. So also are recommendations by directors or officers of a company effectively the decisions for the shareholders. That is, decisions of this kind generate courses of action from which there will be no turning back after the pathway is chosen. So also the decisions of parents concerning the effort and resources that are put into the nurture of their children, or their education or training or religious inculcation.

Having responsibility virtually by definition entails broad discretion in exercising the powers conferred. In the professions, this range is called professional judgment.⁸ In corporation law, it is referred to by the business

8. See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (3d ed. 1996) (referring to "the lawyer's independence of professional judgment").

judgment rule, which allows decisions to be made that will not be re-examined on their merits so long as they are within a very broadly defined range of the permissible.⁹ So also if we look at the law's attitude towards parents in providing tutelage for their children. Some forms of parental tutelage strike us as aberrant, if not wacky: On one hand, parents who insist on educating their children at home or insist upon what some secularists would consider an over-intensive religious experience or who, on the other hand, exhibit what some religious people would think is indifference to knowledge of God. We encounter the extreme case of parents who think it wrong to be subjected to medical treatment and apply that regimen to their children. There have been famous cases involving the question of the responsibility of the parents as against society when the parents make that kind of decision. The law accords parents a wide range of discretion with results that many of us would consider to be irresponsible, if not irrational.¹⁰

The common characteristics of "responsibility," therefore, are a broad range of discretion concerning political and economic powers that are exercised authoritatively and determinatively, with irreversible effect on the welfare of others.

A critical variable in assessing exercise of these powers is what is called "good faith." Those familiar with corporation law well know that the business judgment rule provides that if the directors or the officers have made a decision in good faith, then the decision will not be judicially re-examined unless it is outside the terrain of the plausible. On the other hand, decisions resulting in personal profit for a director or officer are subject to much closer scrutiny.¹¹ So also with lawyers' professional judgment. Lawyers have broad discretion in conducting negotiations, conducting litigation, and framing advice for their clients. It is one thing when a lawyer makes a recommendation that in retrospect was misguided or disastrous if the lawyer was unconstrained by conflict of interest. It is quite different if we observe that the lawyer was at the same time trying to protect the interest of another client and hence subject to a conflict of interest. The orientation to the problem immediately shifts, and the question becomes not whether the choice was within the bounds of rationality, but whether the choice was really impelled by the lawyer's commitment to the

9. See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 6, § 4.01(a) ("A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.").

10. See LESLIE J. HARRIS ET AL., FAMILY LAW 982 (1996) (citing cases refusing to order medical treatment of a child over a parent's religious objections where the child did not face a risk of imminent death or serious injury; noting that courts have split on the issue).

11. See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 6, § 5.01 (duty of fair dealing).

other client. That radical reversal of the basis of assessment is often likely also to reverse the conclusion to be reached about the propriety of the lawyer's advice.¹²

The same problem arises in the family setting, as we discovered in an ALI project on family law. Decisions made by parents in a post-divorce situation are usually to be taken as conclusive, however unorthodox. The legal standard in any case is vague—the best interests of the child.¹³ We normally assume parents are guided by that consideration. However, for example, if there is evidence that a parent is manipulating the custody of the child in order to facilitate some personal purpose, different considerations are presented. If the parent is really serving his or her own interests, then assessment of the decision changes immediately and radically.¹⁴ A requirement of good faith thus qualifies the notion of parental discretion as well.

In other words, legal standards governing various exercises of responsibility ordinarily permit effective challenge only to decisions that are irrational or that were impelled by conflict of interest. The range of choices that we could say are irrational is not very broad. Hence, the range of effective challenge generally reduces itself to situations of conflict of interest. A conflict of interest can adversely affect a judgment made in the exercise of responsibility.

Although the student members of this audience are on their way to becoming lawyers, other members of the audience are already there and have been for many years. These more senior members of the audience know the tough judgment calls that must be made in exercise of professional and parental responsibility. The more junior members, who are going into practice, know—perhaps with some apprehension—that you are going to have to make tough judgment calls. I hope you can appreciate that, for practical purposes, those judgment calls will not be reconsidered or reopened unless they are irrational or there is provable bad faith, which typically must be based on conflict of interest.

Conflict of interest aside, legal controls on exercise of responsibility are largely illusory. That is a difficult conclusion to accept in the modern era in which we have come to equate controls with formal procedures and legal liability. Nevertheless, I think that conclusion is inevitable.

It follows that exercise of responsibility is effectively governed only through the dynamic of reputation. Reputation is simply a community's

12. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 *THE LAW OF LAWYERING* 18.2 (Supp. 1998) (noting that representation of conflicting interests is not itself *per se* malpractice, but might readily become the basis for a malpractice claim).

13. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* § 2.02 (Tentative Draft No. 3, 1998).

14. See *id.* § 2.07 cmt. c (manipulation or coercion).

small talk and gossip and accumulated lore about someone within the community. It is not something that can be formalized or regularized. Reputation is the consequence of uncontrolled, back-channel communications that are casually gathered, loosely held, and beyond documentation. Such is the stuff of the reputations of lawyers, the reputations of good business people, the reputations of good parents—folks that you would consider to be Den Mother or Scout leader. Reputation is nevertheless a real thing even if we cannot fathom or define it. Indeed, to try to define it is to ignore its reality. Reputation is generated through the patterns of decisions that we make over time and across circumstance. Reputation is of course a matter of collective conjecture by third party observers. It is impossible to be entirely sure whether another person is acting in good faith or is simply making a display of good faith. However, the collective conjectures of which reputation is constituted have the force of probability. As Abraham Lincoln said, “You can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all of the time.”¹⁵

The quality expressed in the pattern of decisions is called integrity. Integrity is the most elusive of virtues. The term refers to a person’s inner mind, his or her subjectivity. It is a phenomenon about which we can only make surmises when occurring in someone else. A person’s subjectivity cumulates in what is called character—a person’s basic predispositions and tendencies in responding to the contingencies and challenges of life. “Character” thus corresponds to integrity and results in reputation.

I am inclined to doubt that one can understand one’s own subjectivity, hence one’s own character—that is, fully understand one’s own basic predispositions and tendencies. An important choice is a rapid synthesis of matters in one’s mind but whose significance is often unconscious. For myself, I believe most of my decisions in life have been the result of an unexaminable resolution of competing considerations whose precise balance I could feel but not explain to myself, let alone to others. The issues at stake in important decisions were sometimes clear after the decision but nevertheless are usually opaque at the moment of decision. There is a limit in the extent to which one can make discovery by self-examination.

This in turn means that there is an unavoidable loneliness or “alienation” in exercising responsibility, professional or otherwise. It is loneliness from others because others cannot know what considerations one is actually weighing in decision. But the exercise of responsibility also entails alienation from one’s self, if I can put it that way. What is “real” in responsibility is known only to each of us alone, and that only incompletely.

Of course, exercises of responsibility can be judged by others. All

15. THE OXFORD DICTIONARY OF QUOTATIONS 314 (3d ed. 1980).

professionals, all managers, all persons exercising parental responsibility are held to account, not only legally but also in the community's processes of evaluation expressed in reputation. But within that limit those of us exercising responsibility are beyond effective formal review by others.

To recognize that exercise of responsibility—professional or otherwise—is to a large extent beyond scrutiny through legal procedures is frustrating for those of us committed to the use of law. That conclusion also is perhaps frightening to the larger community. American society in particular has wanted to “legalize” virtue and to make decision-making by those in authority wholly transparent. In the words of Woodrow Wilson in another context, we have wanted to abolish all secret deliberation and to require that all important decisions be “open covenants, openly arrived at.”¹⁶ If I am correct in the present analysis, however, that is a profoundly foolish aspiration. On the contrary, the basis on which we carry out responsibilities generally will be beyond effective scrutiny. The burden of responsibility simply rests upon us.

16. Point One of Fourteen-Point Program, 56 CONG. REC. 680 (1918).