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THE TYRRELL WILLIAMS MEMORIAL LECTURE

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913 to 1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's foremost legal scholars, judges, public servants, and practicing attorneys.

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DOING THE RIGHT THING

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A lawyer representing a client should try to "do the right thing." Stated in simplest terms, this is the ideal that inspires the recurrent call for lawyers to be more ethical. In the most recent decade, the call has been expressed in terms of "professionalism." In earlier years, the call was expressed as a demand that lawyers dedicate themselves to "serving the public interest" and in Victorian times it was expressed in terms of the "honor of the legal profession." However expressed, the quest is for greater virtue on the part of lawyers, both individually and as a profession.

The call for greater professional virtue in the legal profession evokes various reactions. Among the public at large, the reaction is one of cynicism, particularly today when the legal profession's public standing is very low, if perhaps not at an all time low. Among members of the legal profession itself, the reaction runs the gamut, from a cynicism equal to or exceeding that of the general public, to frustrated pleas that the profession's responsibilities are misunderstood, to bombastic proclamations that there are only a few bad actors among the noble guardians of constitutional liberties. Law students often react with anxious uncertainty to criticisms of lawyer ethics. They do not know and cannot know what to believe about the ethical condition of the professional life which they have not yet entered, but to which, provisionally at least, they have committed themselves.

At one level, it is easy to describe the ethical standards observed by many lawyers. Quite bluntly, they are terrible. On the other hand, the ethical standards observed by many lawyers are excellent, particularly considering the very difficult and delicate ethical problems with which they must deal. The problem of "bad actors" in the profession is, in my opinion, primarily the weakness of institutions' ability to secure compliance with the profession's official standards. For example, the disciplinary machinery in many jurisdictions has simply been overwhelmed with grievances that cannot be adequately investigated.

However, the focus of the present analysis is not on bad lawyers, but on good lawyers. The central question is whether the nature of legal practice itself, even when conducted with faithful adherence to official standards, is somehow inherently evil. Much criticism of lawyers' ethics is pitched at this level. The essence of this criticism is that lawyers engage, as a vocation, in practices that no moral person would undertake in any circumstance.

Criticism at this level seems to proceed from a metaethical conception that is widely held, at least in this country. In non-technical terms, a metaethical conception is a conception of what ethics is all about. The framework of common assumption to which I refer includes ethics in the American legal profession and, more broadly, ethics in the professions generally, including callings such as medicine, teaching, journalism and business management. Beyond this, the framework of common assumption includes ethics in ordinary life—conceptions of doing the right thing in the life of the family, the neighborhood, the workplace, consumer transactions, and citizenship.

Within this framework of assumption, various premises are established about what is involved in "doing the right thing" in ordinary life. These commonly held premises are the basis on which comparison is made with professional ethics, including legal ethics. By a series of small and often unnoticed steps, therefore, the question of lawyers' ethics—and whether lawyers can ever do the right thing—is compared with the ethics of people in ordinary life. In this comparison lawyers' ethics usually come out poorly. Lawyers appear partisan rather than disinterested, guileful rather than open, grasping rather than generous, and duplicitous rather than truthful. The conclusion follows that lawyers do things as a matter of course—indeed do them as the essence of their vocation—that no right-thinking ordinary person would do under any circumstance.

This conclusion is often put in question form: Can one be a good lawyer and still be a good person?

Stating the conclusion in this manner begs an important underlying question, which concerns the definition of a "good person" in comparison with a "good lawyer." I suggest that the problem lies not with the lawyer's vocation as such, but with the terms of the metaethic of conventionally professed American morality. Simply, that metaethic is simplistic, utterly unrealistic and predicated upon misconceptions about ethical choice. Implicit in the comparison in which the lawyer looks bad is an idealized ordinary person who does not exist. This idealized person has no personal history and therefore acts in problematic situations without constraining commitments to others; she confronts stipulated facts that are perfectly comprehensible at the point of fateful decision; her ethical repertoire is clearly apparent to her and she is readily able to determine the relative priority of her values in whatever circumstances may be presented; and her ethical choices are never subject to being second-guessed.

Such people exist only in the minds of some metaethicists, although by no means all of them. The comparison that is invited is not between a good "person" and a good "lawyer," but between an imaginary good person and a real lawyer, good or otherwise. Such a comparison is inevitably invidious to lawyers, even relatively good ones. The imaginary good person is essentially an angel; no one's ethics compare well with those of an angel.

A sober consideration of the ethics of a good lawyer should begin with a metaethic that contemplates the real world. Unlike angels, people in the real world have personal histories which, among other things, deter-

mine their positions in life at any moment of ethical choice. Having a position in life limits one's options in taking action, and therefore one's ethical options. People in the real world operate in a cat's cradle of commitments to others. Having commitments to others makes one a partisan, whether willingly or otherwise. People in the real world have to deal with fragmentary and often contradictory information that arrives disjointed. Having fragmentary information means that ethical choices are often based on factual assumptions that turn out to be false. This uncertainty often requires decisions modulated by concern that one should, as Oliver Cromwell said, "think it possible that you may be mistaken."[1] So far as competing values are concerned, most people discover that their repertoire of values is not fully apparent to them until the moment of decision, and even then it remains more or less disorganized. Perhaps most important, in the real world, people usually have to answer to others for the consequences of what they have done. Those times often occasion recrimination that they would prefer to avoid.

As a practical matter, in these real-world circumstances the values that we affirm as fundamental in the abstract often turn out to be incompatible in concrete application. The incommensurability of values has been tellingly expounded by Sir Isaiah Berlin in his many writings. In his most recently published book, *The Crooked Timber of Humanity*, he says:

> [S]cientifically minded rationalists declared that conflict and tragedy arose only from ignorance of fact [and] inadequacies of method . . . so that, in principle, at least . . . a harmonious, rationally organized society [can be] established. . . . But if it is the case that not all ultimate human ends are necessarily compatible, there may be no escape from choices governed by no overriding principle, some of them painful, both to the agent and to others.[2]

If Sir Isaiah is correct, and I submit that he is, then the real world of ordinary people offers "no escape from choices governed by no overriding principle."[3] It is the ethics of such real world people that should be compared with the ethics of a real world lawyer. This is not to suggest that lawyers' ethical problems are entirely the same as those of ordinary people. Nor is it to suggest that because ordinary people often fail to do the right thing, there is no reason to expect that lawyers will do the right

1. BARTLETT'S FAMILIAR QUOTATIONS 328 (14th ed. 1968).
2. SIR ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 234-35 (1990).
3. *Id.*

thing. Rather, the point is that in both ordinary life and in the practice of law, the problem of doing the right thing is often deeply difficult, and sometimes anguishing.

To develop the point, I would like to consider three cases drawn from ordinary life that parallel three classic "hard cases" in legal ethics. The first is defending a person that the lawyer knows is guilty. Another classic hard case is pleading the statute of limitations against a person who has a good claim. A third is interjecting the lawyer's own moral and prudential values into advice given to a client.

In these situations, the governing rules of legal ethics are very clear. With regard to defending a person who is guilty, if the client wishes to defend the case, it is the lawyer's ethical duty to defend the client. This duty holds even though the lawyer would conclude, if the matter were left to him, that the client is indeed guilty. With respect to asserting the defense of the statute of limitations, if the client wishes to assert the defense, it is the lawyer's ethical duty to interpose the statute. This duty holds even if the lawyer would not have asserted the defense if the claim had been against the lawyer himself. With regard to interjection of personal, moral and prudential values, under the governing rules of professional ethics the lawyer has authority and at times the duty to be assertive.

I propose three parallel cases drawn from ordinary life. The hypothetical facts involve only slight transformations from real cases that I have experienced. A case from ordinary life paralleling the defense of the guilty client is that in which a parent is confronted by a neighbor who says that his window was broken by a rock thrown by the parent's child. A case from ordinary life paralleling the statute of limitations defense is where one person says to another concerning an old grievance: "Can't we just forget about that?" This type of plea is often invoked in friendships, business relations and marriages. A case from ordinary life paralleling that of the lawyer as moral and prudential adviser is where business or family advice is sought and received. My general thesis is that in confronting such ethical problems in real life, ordinary people have difficulty doing the right thing. Why should it be any easier in legal practice?

Let us begin with the case of the parent confronted with an accusation against her child. This case is something of a standard in discussions of personal ethics, where the question is put: Would you lie to protect your child? The standard alternatives in answering this question usually are

"Yes, I would" and "No, I wouldn't." These alternatives usually are posed as though additional circumstances are irrelevant: either one is willing to lie or one is not. However, in real life, the decision is likely to depend on considerations that include the historical background of the situation and the way in which the problem is presented to the parent. I know, believe me, for I have had several sons with better strength than aim and was involved in similar transactions when I was a child.

Under some circumstances, a reasonable parent would support the child in a denial, even when the parent is convinced that the child had in fact thrown the guilty rock. Most parents would be influenced one way or the other by such facts as the following: the child denied the accusation and was usually truthful in such statements; the child was often untruthful when confronted with accepting responsibility for bad acts; the neighbor was a mean spirited complainer who also was chronically messy with his own garbage; the neighbor was an old friend who had always been nice to the children; the basis for the accusation was wholly circumstantial; the child was going through a terrible period of maladjustment in school and would have difficulty dealing with a new crisis; there was a racial or religious difference involved that has given an ugly subtext to the incident; or, the parent was a minister, judge or policeman.

One could multiply the possibilities indefinitely. The point is that among the possibilities are ones in which sustaining the child in the denial would seem the right thing to do, or so it would seem to most people. Equally, there would be circumstances where it would be the right thing for the parent to insist that the child acknowledge responsibility, or to accept responsibility on behalf of the child if the child adamantly refused to do so. Putting the problem in conclusory terms, the choice would depend on whether, under the circumstances, the right role for the parent was that of protective advocate for the child as a "client," on the one hand, or, on the other hand, that of judge of the child and mediator with the neighbor.

Thus, we can readily visualize circumstances in which a "good person" in ordinary life would defend a "client" that he believed was guilty. Such circumstances arise not only with parent and child, but in other relationships as well. An employer will defend an employee in a conflict with someone outside the firm, for example, and then administer a severe reprimand in private. Fellow employees will protect one of their number against the boss's accusation of foul-up, but berate the misfeasor when the boss has left. These things happen even among members of law

firms. And they happen all the time in marriage and everyday friendship.

The special thing about lawyers is that undertaking the task of defending the guilty is part of their vocation in life. Unless such a specialization of social function is itself evil, the fact that lawyers specialize in defending the guilty is not evil.

As we know it today, the lawyer's vocation derives from a complex political-economic history and is a practical necessity in a modern constitutional regime. Very briefly, the felt necessity for having professional defenders of the guilty results from the fact that constitutional government entails the rule of law; that the rule of law entails exercise of coercion through legal sanctions; that legal sanctions must be administered on the basis of unavoidably uncertain evidence and abstract, ambiguous laws; that the task of dealing with uncertain evidence and ambiguous laws requires special skills; and that a constitutional regime is not prepared to entrust determination of guilt to judges acting as inquisitors. That is to say, the function of an advocate has been found indispensable to the rule of law.

Similarly, acting as a partisan advocate for a person known to be guilty is also an unavoidable incident, although a morally troublesome one, of the ordinary life of a "good person." Briefly again, the felt necessity for an amateur advocate to defend the guilty, as in the case of parent for a child, results from the fact that ordinary life is governed by general norms such as that against throwing stones at neighbors' homes or lying to customers; that enforcement of these norms entails exercise of coercion in the form of such sanctions as disapproval, bad-mouthing and boycott; that such social sanctions are administered and defended on the basis of unavoidably uncertain facts and ambiguous norms; and that life does not cast us in equal relationship with all of our fellow human beings. My child is my child, whatever he or she has done. My fellow worker is my fellow worker, and my friend is my friend.

We have to face the fact that in real life a good person, in many circumstances, would defend someone he knows to be guilty. Hence, according to a realistic metaethic, defending the guilty is not intrinsically wrong. Why, then, should it be wrong for a lawyer to do so?

Defending the guilty could be wrong for a lawyer only because the lawyer takes on this unpleasant responsibility as a way of making a living. Yet it is not clear why partisanship pursued as a vocation incident

to a constitutional government is morally more troublesome than when it is an incident of ordinary life.

Analysis of another classic hard case, that of pleading the statute of limitations, proceeds along essentially similar lines. The rationale for statutes of limitation in the law has often been expressed. A notable exposition is in *United States v. Kubrick*,[4] where the United States Supreme Court said: "These enactments are statutes of repose . . . affording plaintiffs . . . a reasonable time to present their claims [while protecting] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired . . . whether by fading memories . . . or otherwise."[5]

In a larger perspective, statutes of limitation recognize that claims that are not promptly asserted may have dubious merit; that people, for various reasons, forego most of their arguable legal claims in the interest of maintaining peace and stable relationships; that claims once tacitly forgiven should not be resurrected to confound new transactions; and that resurrection of old claims is more often a means of incrimination in a new grievance than a means of rectification of the old one.

These same considerations apply in disputes in ordinary life. Their relevance is brought to mind by such folk sayings as "let bygones be bygones" and "forgive and forget." In common experience we recognize that someone who remembers old injuries is a nuisance and that someone who cannot forget old injuries is usually destructive and perhaps paranoid. As Matthew Arnold stated: "We forget because we must, and not because we will."[6]

Thus, it is a recognized norm of ordinary human relationships that old grievances should be subject to expiration. That being so, it is unclear why the same norm is considered illegitimate when it is transformed into law and given enforcement through lawyers.

Of course, the principle of repose as administered through a statute of limitations often results in arbitrary distinctions. Under a statute of limitations, a legal claim fully valid on one day can become totally worthless the next day. It is also anomalous that one kind of legal claim has a life of twenty years under the statutes of limitation and another kind of legal claim has a life of only one year. However, the law, which acts as the

4. 444 U.S. 111 (1979).

5. *Id.* at 117.

6. BARTLETT'S FAMILIAR QUOTATIONS 712 (14th ed. 1968).

ultimate norm for resolving controversy, requires a formality that is unnecessary in ordinary social relationships. At the margin, formality inevitably involves technicality and technicality inevitably yields arbitrary results. Everyone knows that there is no fundamental difference between parking for an hour and parking for sixty-one minutes, except in the eyes of the parking laws and the officials who enforce them. But similar anomalies occur in everyday life. Everyone who has missed an airplane flight knows that similarly technical chronology determines the difference, in everyday life, between making it and not making it.

My third example is that of giving advice shaped by one's own moral and prudential values. Until recently, lawyers assumed that giving strong advice was an important part of what they were retained to provide. As Elihu Root remarked: "About half the practice of a decent lawyer insists in telling would-be clients that they are damned fools and should stop."[7]

Thinking of a client as a "damned fool" is not exactly formal legal analysis. To the contrary, it involves unashamed interjection of personal and prudential considerations into giving legal advice. The rules of professional ethics recognize the propriety of doing so. As stated in the Rules of Professional Conduct concerning moral factors: "[I]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice." The same Comment concerning prudential factors states: "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to accept."[8]

In recent years, however, attack has been made on the propriety of interjecting the lawyer's own moral and prudential sense into the lawyer-client relationship. It is charged that this puts the lawyer in a parental role that is fraught with potential for exploitation. Implicit in the charge is an assumption that a parental role is inconsistent with ethical principles prevailing in the community at large. The community at large supposedly is committed to a kind of ethical democracy in which interjection of the adviser's moral self is inconsistent with the self-hood and moral autonomy of the person to whom advice is given.

Again, I submit that this ignores experience and practice in everyday life. Most obviously, advice of a parental kind is ubiquitously given by parents themselves. Such advice is often overtly rejected but, if given in

7. 1 PHILLIP JESSE, ELIHU ROOT 133 (1938).

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. (1983).

sincere concern for the child, is rarely ignored. In reflecting on this fact, Mark Twain observed how much his parents had learned between the time he was sixteen years of age and when he became nineteen. Practice in advice-giving at the workplace is the same. How many of us have benefitted from knowing explanations of the lay of the land given by older hands on the job—and have suffered from ignoring such advice? Indeed, providing such quasi-parental advice is the essence of "mentoring," which young aspirants in the world of work have come to appreciate as essential in making one's way. And what married person has not had spousal advice of a similar kind in moments of confusion or distress?

More fundamentally, the notion that advice can be given unshaped by the adviser's own ethical values is absurd in fact and pernicious in consequences. It is absurd in fact because it is impossible to give purely technical advice; it is pernicious in consequences because it requires the very alienation that the notion of democratic ethics seeks to avoid. When someone undertakes to give advice, whether as a lawyer or in ordinary life, it is an act of commitment and affiliation, for better or for worse. What the advice should be in specific circumstances is another question. Anyone who has been engaged as a parent, mentor or spouse knows that the appropriate response is often unclear.

Many other examples beyond these could illustrate the parallel between ethical dilemmas in legal practice and ethical dilemmas in ordinary life. I ask acceptance for the proposition that other examples would reinforce the basic point: the ethical dilemmas regularly encountered in legal practice are simply counterparts of similar dilemmas encountered in ordinary life. People who think otherwise are, in my opinion, taking a rose-colored view of ethics in ordinary life.

The only qualification of this proposition is the fact that lawyers involve themselves in these ethical dilemmas as a vocation, while others do so as an unavoidable incident of ordinary life. However, it is difficult to see how this point has much force once the conditions of modern life are accepted. A fact of modern life is the specialization of skill and function. The beneficial consequences of such specialization are that functions such as health care, the management of enterprises, the teaching of arts and science, and the administration of justice are performed by people who have special knowledge. A less happy consequence of the specialization of skills and functions is that some vocations incur more opprobrium than others. This is certainly true of law practice, which is why, as Sandburg cruelly observed, the "hearse horse snicker[s] hauling a lawyer

away."[9]

I submit that the opprobrium is essentially what the psychiatrists call "projection." Everyone who takes time to work through the problem of constitutional government reaches the conclusion that defending the guilty is simply a price of maintaining the benefits of a constitutional order. Everyone who takes time to work through the problem of statutes of limitation reaches the conclusion that refusing to examine the merits of many grievances is necessary to maintaining the capacity to examine the merits of some of them. Everyone who has given advice knows the difficulties involved in putting one's heart into another person's affairs. The work of lawyers simply embodies these paradoxes and the frustration of idealism that they reflect. The lawyer's vocation is living testimony to the discrepancy between the community's ethical aspirations and its merely human condition. It may also be that the availability of lawyers to deal with some of these discrepancies permits other members of the community to imagine themselves above such unpleasantness and allows them to live in an imaginary world.

Defending the guilty, pleading the statute of limitations, and giving hard advice, are often the right things to do, even if they involve conflicts in values. Trying to do the right thing, when it is impossible to do so without conflicts in values, is one of society's dirty jobs. However, no one is compelled to become a lawyer, and many who have originally chosen the profession find it repugnant and leave. Many people in ordinary life go about confronting adulthood in the same way.

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9. CARL SANDBURG, *The Lawyers Know Too Much*, *in* SELECTED POEMS OF CARL SANDBURG 199 (R. West ed., 1954).

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

Id.