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Part I

Lawyers, ethics, and the law

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1 Defining the problem

1.1 Role-differentiated morality

A security guard was murdered and another guard seriously injured during the robbery of a store in a big city – it could be Manchester, Auckland, Calgary, Los Angeles, Johannesburg – anywhere in the common law world.¹ The surviving guard identified two men, Logan and Hope, as the perpetrators. A week later, a man named Wilson was arrested for an unrelated crime, the murder of two police officers in the same city. Hope heard through jailhouse gossip about the arrest of Wilson and told his lawyer that he had committed the robbery with Wilson, not Logan. Hope's lawyer communicated this information to Wilson's lawyers, who went to see Wilson at the jail. Wilson confessed to his lawyers that he had committed the robbery with Hope and that he had in fact shot the security guards. Wilson declined to make a statement to the police, but the lawyers prepared an affidavit (a sworn statement) summarizing his statement, which they kept in a locked safe. Meanwhile, not knowing of Wilson's admission of responsibility, prosecutors filed murder charges against Logan and Hope. Based on the testimony of the surviving guard, both were convicted and sentenced to lengthy prison terms. (Eyewitness identification is notoriously unreliable; the defense lawyer tried to establish this point, but the jury convicted the defendants anyway.) Wilson was convicted in a separate trial of murdering

¹ The actual case took place in Chicago. See, e.g., Fran Spielman, "Chicago to Pay \$10.25 Million in Another Burge Case," *Chicago Sun-Times* (January 14, 2013); "After 26 Years, 2 Lawyers Reveal a Killer's Secret," *USA Today* (April 13, 2008). Logan was released from prison in 2007, after Wilson died and his lawyers disclosed their affidavit. Logan filed a lawsuit claiming that evidence of his innocence had been covered up by state prosecutors. Wilson's lawyers were not charged with any wrongdoing in connection with the case.

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the two police officers and was sentenced to two life sentences without possibility of parole.

Imagine that you are one of the lawyers representing Wilson. What do you do with the knowledge that an innocent person will be spending the rest of his life in prison for a crime committed by your client? Perhaps the answer is to be found in a code of professional ethics, applicable to lawyers representing clients in a situation like this one. You consult the rules in your jurisdiction and read the following:

A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation . . . A lawyer may reveal such information to the extent the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm.²

You have made repeated attempts to convince Wilson to consent to disclosure of the affidavit containing his statement that he committed the restaurant robbery and murders, but he has consistently refused to provide it. Now what do you do?

Students are often keen to “fight the hypothetical” and try to argue that a lawyer’s obligations in this case, as a matter of professional ethics, permit you to disclose the statement by Wilson. Although it would be nice if this were the case, the professional rule of confidentiality and the exception just quoted do not permit disclosure. The communication from Wilson is “information relating to the representation” because you learned it in the course of defending Wilson in the separate murder case; it does not matter that the communication relates to a separate crime. You might argue that Logan’s continued imprisonment constitutes “substantial bodily harm” because he is quite corporeally stuck in prison. That is not a bad argument, but the authority responsible for interpreting the ethical rules in your jurisdiction has rejected it in a similar case. You might then reason that the duty does not apply because disclosing Wilson’s communication cannot possibly harm him because he is already serving two life sentences for the other

² American Bar Association Model Rules of Professional Conduct, Rule 1.6(b). Some version of this rule is in effect in all US jurisdictions. Similar rules can be found in the codes of professional responsibility of other common law jurisdictions. See, e.g., Solicitors Regulation Authority (England and Wales) Code of Conduct 2011, chapter 4; Federation of Law Societies of Canada, Model Code of Professional Conduct, Rule 3.3-3; Australian Solicitors Conduct Rules 2012, Rule 9.1; New Zealand Lawyers Conduct and Client Care Rules 2008, Rule 8.

murders. The rule defining the duty of confidentiality does not make reference to harm to the client, however, and, upon reflection, you realize that there might be harm to Wilson if you disclose. What would happen, for example, if his convictions for the other murders were reversed on appeal? He might then face prosecution for the robbery of the store and the murder of the security guard. In the end, you recognize that the duty of confidentiality is interpreted very strictly, and exceptions are narrowly construed. As a matter of professional ethics, your duty is clear: You must not disclose Wilson's statement even if it would result in freeing an innocent man from prison.

If this seems wrong to you, or if you at least feel a tension between what is required as a lawyer and what otherwise you might believe you ought to do, then you recognize the problem of *role-differentiated morality*. A lawyer is obligated by rules of professional ethics to do something – to keep Wilson's secret even though disclosing it would free an innocent person – that appears unjust from the point of view of ordinary, common, everyday morality. The lawyer occupies a social role with specific obligations attaching to it – hence the term “role-differentiated.” In one way, nothing could be more familiar than duties that vary according to the role one plays. As a parent, I have an obligation to show special care and concern for my own children, above and beyond the duties I owe to children generally (e.g., to refrain from harming them and to help them if they are in distress). As a teacher, I am bound by the ethics of that role to evaluate the performance of students impartially and not be influenced by irrelevant factors. Most of the time, these role-differentiated obligations appear as unproblematic aspects of a life in which one has a variety of relationships of different sorts with friends, family members, strangers, and institutions. Frequently, these special obligations are easily harmonized with duties owed more generally. In most cases, I can show special care and concern for my children without harming anyone else. The wrongful conviction case just described, however, is an instance of a role-based obligation clashing with something we believe to be more basic – namely, the duties that apply to us universally, simply by virtue of our being moral agents. How is it possible that a general moral duty no longer applies just because a person is acting in a professional capacity?

Whether and to what extent moral obligations can vary according to the social role one occupies is one of the major issues in practical ethics

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generally, including the ethics of government officials, law enforcement personnel, soldiers, and business managers.³ Before considering the issue more systematically, however, it may be helpful to begin with some more intuitive and impressionistic reactions to the wrongful conviction case. In the real case, Wilson's lawyers have steadfastly maintained that they did nothing wrong, but there was a massive public outcry when the case was reported in the media. Suppose now that you are not one of the lawyers in the case but an interested observer – a lawyer or law student, let's say – who is participating in a conversation about the case. You are attempting to defend the lawyers' conduct to someone who is outraged by it. What are some of the arguments you might make?

In many years of teaching legal ethics, I have found that these arguments tend to fall into patterns. (At this point, I am not necessarily endorsing any of these arguments, only setting them out.) Some of the most common moral defenses of Wilson's lawyers might include the following.

1.1.1 Division of labor

The legal system is just that – a system – and no one person is solely responsible for its functioning. Rather, different actors play assigned roles: prosecutor, defense lawyer, judge, juror, court clerk, and so on. The system functions best if everyone plays his or her assigned role. In fact, the system may break down if an actor steps out of her role and does something that is within someone else's job description. If defense lawyers took it upon themselves to disclose information that would be helpful to the prosecution, their clients would stop trusting them, and it would be difficult to provide effective representation to defendants. In the wrongful conviction case, Wilson's lawyers played their role by representing him effectively and keeping his secrets. Logan's lawyer had the job of preventing him from being convicted, and the prosecutor had the responsibility to disclose any evidence subsequently discovered indicating that Logan had been wrongfully convicted. If there is some malfunction, it should be blamed on the actor responsible for that aspect of

³ For a lively introduction to the problem of role-differentiated morality in the form of an imagined dialogue between a writer and Charles-Henri Sanson, the executioner who served under Louis XVI and later detached heads during the Reign of Terror, see Arthur Isak Applbaum, "Professional Detachment: The Executioner of Paris," in *Ethics for Adversaries* (Princeton: Princeton University Press 1999), ch. 2.

the system. Because safeguarding against the possibility of wrongful convictions is not the job of a lawyer for a different defendant in a separate case, it is inappropriate to blame Wilson's lawyers for the harm experienced by Logan.

1.1.2 Rules of the game

Wilson's lawyers did nothing wrong according to the rules of evidence and procedure, substantive criminal law, and the code of professional ethics that applies to them. In short, they followed the rules. The system may be flawed and may on occasion result in unjust convictions, but Wilson's lawyers cannot be blamed as long as they stayed within the rules. As the saying goes, don't hate the play[er], hate the game.⁴ This argument is related to the division of labor within a system, but more explicitly it attempts to displace evaluation from individuals to the system as a whole. If the result of a game is lousy, perhaps the rules should be changed, but the only responsibility a player has is to play by those rules. What happened to Logan is an extreme injustice, but rather than blaming the defense lawyers, it would be better in the long run to seek to reform the criminal justice system, perhaps by recognizing heightened duties on the part of prosecutors to investigate when there is evidence of a wrongful conviction.

1.1.3 Hired guns, mouthpieces, instruments, or tools

Lawyers are sometimes called all of these things, and they are not meant as compliments. There is a sense, however, in which lawyers are quite properly regarded as instruments of their clients. In legal terms, lawyers are *agents*. Agency law governs the relationships whereby one person, the agent, has the power to act on behalf of another, the principal. The agent is an extension of the principal, acts to effectuate the principal's instructions, and has power no greater than the principal herself. As an agent of the client, the lawyer speaks for the client, is empowered to enter into binding agreements on behalf of the client, and can commit the client to certain courses of action. In every instance, the lawyer's actions are done *for* the client; the client is the driving force, so to speak. Wilson's lawyers in this case were instruments of Wilson's will – nothing more, nothing less. If

⁴ After the song, "Don't Hate the Playa," by Ice-T.

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Wilson instructed them not to disclose his communication, then they were legally and ethically bound to follow his instructions because ultimately any authority they have is derived from Wilson and from the attorney-client relationship. Furthermore, it is inappropriate to attach moral blame to mere instruments. It may be appropriate to blame the government of a country for starting a war, but, as long as they comply with the laws of war, it is inappropriate to blame soldiers in that country's military for their actions. Similarly, whereas one might blame Wilson for not confessing to the murder of the security guard, one can hardly blame his lawyers for following his lawful instructions to keep his statement confidential.

1.1.4 How do we know?

You might have noticed me trying to slip something past you in the first question asked earlier: "What do you do with the *knowledge* that an innocent person will be spending the rest of his life in prison for a crime committed by your client?" "But wait," you might have said, "Wilson's lawyers do not *know* he committed the crime. Wilson said he did, but he may have been lying, or crazy, or messing around with his lawyers." At most, what the lawyers have is evidence tending to prove that Logan is innocent, not conclusive proof. In a hypothetical invented by an ethics professor, some fact may be specified as true, or an actor may be said to know something. In the real world, however, things are considerably murkier, and real-world norms must be adapted to situations involving uncertainty. There may be good reasons for lawyers not to act on the basis of even well-founded beliefs if they do not rise to the level of actual knowledge. Of course, those of you with a background in philosophy will cite Descartes and ask how we ever know anything with certainty. But one does not have to be a committed Cartesian skeptic to acknowledge that there are many cases in which conflicting evidence, unreliable witnesses, and motivations to lie or tell half-truths can make it difficult for a lawyer to have a firm basis for believing in the truth of some proposition.

1.1.5 Incentive effects

Suppose Wilson's lawyers did disclose the communication – what would happen in future cases? Defendants might worry that their lawyers will "rat them out" and disclose incriminating facts to the prosecutor or the judge.

They will protect themselves by either lying or withholding information that the lawyer might need to know in order to provide an effective defense. The American legal ethicist Monroe Freedman, who is also a practicing criminal defense attorney, tells the story of representing a woman charged with murdering her husband.⁵ At first, she insisted that she had been at her sister's house at the time of the killing, but when Freedman talked to the sister, she did not confirm this alibi, so he asked the client again what had occurred. She stuck with her implausible story until Freedman reassured her, in the strongest possible terms, that nothing she told him would ever be disclosed to anyone, under any circumstances. The client then revealed that her husband had physically and emotionally abused her for years, was a mean drunk, and, on the night of the murder, had come home intoxicated and enraged. He had his hands around her neck and was beginning to strangle her when, in desperation, she grabbed a kitchen knife and stabbed him. This account, of course, constituted a complete defense to the murder charge, but the client would not have revealed it without an ironclad promise of confidentiality. What this story shows is that a result that appears just *ex post*, meaning as between the parties to the case, might create incentives that lead to injustice *ex ante*; that is, in future cases in which the precedent of the prior result is applicable. If disclosing Wilson's communication creates mistrust among defense lawyers and clients in the future (*ex ante*), that should be a reason that counts against disclosure in this case (*ex post*).

Notice something about all of these arguments: They appeal to considerations of ordinary morality and the circumstances of the real world in which professionals practice. They do not simply fall back on the separateness or special quality of professional ethics, but seek to explain why, in moral terms, lawyers have the duties they do. For example, the argument from the *ex ante* point of view appeals to the interests of future clients seeking legal advice who need reassurance that their lawyers can be trusted not to reveal confidential communication. The values of loyalty and trust are certainly moral reasons counting in favor of a conclusion; moreover, they are general reasons, not appeals to the self-interest of lawyers. Here is a metaphor that may be helpful in understanding the issues regarding

⁵ See Monroe Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (New Providence, N.J.: Lexis-Nexis, 4th edn., 2010) § 6.02, at 152.

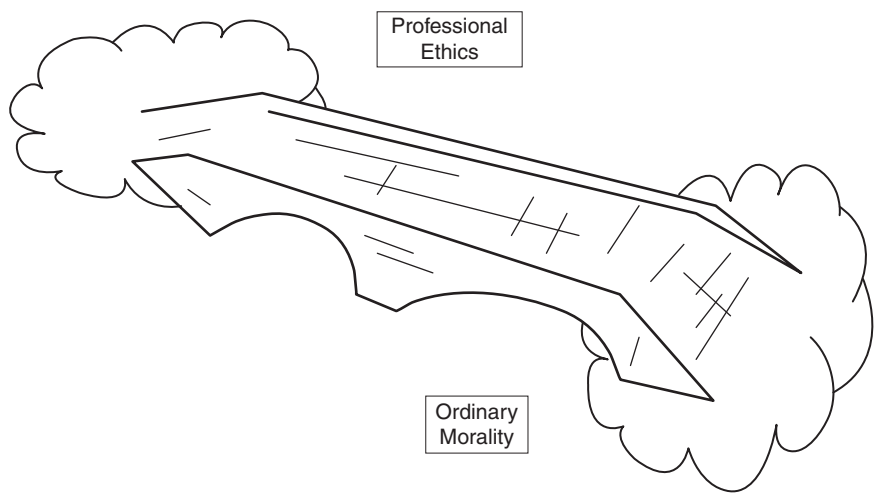


Figure 1.1 The Bridge Between Ordinary Morality and Professional Ethics

role-differentiated morality.⁶ Imagine two different “lands” or domains of value, connected by a bridge, as in Figure 1.1.

This image emphasizes that the lands are separate, but there is – and indeed there must be – a connection between them. The arguments given by defenders of Wilson’s lawyers are about building a bridge between ordinary morality and professional ethics. They reach out from the domain of professional ethics and appeal to considerations that are intelligible within the domain of ordinary morality. If there were no bridge, then these two worlds would be totally separated, normatively speaking. In that case, there would be no reason why society as a whole would tolerate the profession, no matter how rigorously it was governed by a code of “ethics.” Lawyers would be, in essence, repeating the defense forever discredited by the Nuremberg trials, that one may be excused from responsibility for wrongdoing for merely doing his or her job or “only following orders.” The bridge ensures that the principles of ethics by which professionals conduct themselves are acceptable to the wider society of which the profession is a part.

At the risk of overtaxing the metaphor, we can think about some of the issues to be considered in this book as pertaining to how much traffic has to flow across the bridge or how tight or direct the connection has to be

⁶ Thanks to the students in my 2013 legal ethics seminar at Tel Aviv University for helping me come up with this way of representing the basic issue.