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Anita L. Allen

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MORALIZING IN PUBLIC

*Anita L. Allen**

I. INTRODUCTION: A LAW OF ETHICS

Chief Justice Earl Warren once remarked: “In civilized life, law floats in a sea of ethics.”¹ There is, in other words, a foundation of ethical values for the law. In performing our legal duties, we are also satisfying our ethical obligations. While in an uncivilized society, enactments of tyranny or barbarism may motivate an obligation to obey the law, in a civilized society, the obligation to act ethically is not a result of this supposed obligation to obey alone, but a result of the binding ethical values that have informed the content of the law.

Chief Justice Warren’s adage is better read as one of aspiration, than as one of fact. It is well known that those nations of the world, which are deemed civilized and well-constrained by the rule of law, may be governed by laws that are not civilized—not ethically sound. Slavery, apartheid, and torture, have been perpetuated pursuant to the laws of some of these so-called “civilized” countries. Moreover, Western liberal regimes of property, contract and tort law include doctrines and principles, the applications of which result in predictable hardship for the poor and the vulnerable. Laws that permit environmental degradation, capital punishment of the innocent, and political corruption are hardly ethical waters for any ship of state.

Yet, as an aspirational idea, a rule of law based on strong moral and ethical values has appeal. The conservative and the very religious may find it appealing because they believe the law should be a tool for moral alignment—it should make us righteous. However, the progressive and

* Henry R. Silverman Professor of Law and Professor of Philosophy, University of Pennsylvania.

1. Earl Warren, Chief Justice, U.S. Supreme Court, Address at the Jewish Theological Seminary of America Annual Awards Dinner (Nov. 11, 1962), *quoted in* Fred J. Cook, *The Corrupt Society: A Journalist’s Guide to the Profit Ethic*, 196 THE NATION 453, 454 (1963).

the secular may find similar appeal in an ethics-based law because they believe the law should further extend freedom, equality and tolerance.

II. MORALIZING IN PUBLIC

Making moral judgments is as human as sleeping and eating. We have the capacity to reason and so we reason about values. We have the capacity to judge and so we make value judgments. We have the capacity to communicate and so we communicate about values. The world needs the best of us—it requires the best of our intellects, and the best of our hearts. It needs us to be morally and ethically engaged.

What is our world like? It is a world of unjust wars, genocide and cruelty to women. It is one of hunger, homeless children, and health care disparities. Dishonesty seems to exist in every sector of society: business, sports and especially, government. The United States is home to widespread ethical failures, bioethical perplexities, and enduring class and ethnic polarities. It is a tough place to grow up good and fair-minded. To battle these pervasive evils, we place a premium on character and emphasize values.

And it is in the perseverance toward this goal that we moralize. According to the Merriam Webster's Collegiate Dictionary, to moralize is "to explain or interpret morally."² We may moralize privately, by conducting ourselves according to our own ethical mores. We may also moralize publicly by broadcasting our ethical frequency to the rest of the world.

Clearly, moralizing in public can be more advantageous because it allows one to reach a much greater audience and expose a wider range of injustices than by moralizing in private. But despite the many problems of the world, it can be embarrassing to moralize in public. Moralizing in public is a little bit like belching in public. Everyone does it at one time or another. But in the wrong situations, it can be considered rude.

Though public expression of moral and ethical ideals is vital, it must be approached with a certain amount of tact. Liberals say, "respect other people's values" and "tolerate differences." For liberals, moralizing in public comes with the risk of imposing one's values upon other people, who have a right to their own opinions and values. Conservatives tend to be a bit more comfortable with moralizing in public than liberals. But American conservatives are as cautious as liberals about doing anything that could be interpreted as unreasonably imposing values on other people.

2. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 756 (10th ed. 2000).

A wide spectrum of people are willing to adopt the ideal of law based on ethics, because “ethics” is such an indeterminate concept. We know that the ethics instinctively determining the context of the law, though, are a function of those who care the most and fight the hardest. The people who vote on election day, communicate with policy-makers and organize like-minded fellow citizens can expect to see more of their values embedded in the law than luckless non-voters and unlucky political minorities. The wealthy individuals, powerful corporations, skilled professional lobbyists, and educated partisans who control major media learn that they can insert their ethical concepts into the law more easily than others. There is a frank, complex political dimension to the “ethics” of our laws.

III. MORALIZING AS A LAWYER

Where do lawyers fit into the picture? Lawyers can have a great impact on the ethical values embodied in the law. Not only do lawyers create the law, serving directly as legislators, but they also serve as interpreters of law. Moreover the law’s ethical values willy-nilly affect the procedures of law, giving, for better or worse, effect and meaning to black letter guarantees.

Because lawyers’ values make a great difference in the context and administration of legal justice, lawyers have special opportunities to inform the ethical content of the law. We can self-consciously infuse our moral and ethical values into our work. We can, and should, refuse to understand our ethical duties narrowly. Viewed narrowly, lawyers need only concern themselves with the modest requirements of the American Bar Association’s promulgated standards,³ and substantive laws like the Sarbanes-Oxley Act,⁴ which tell lawyers working for certain classes of clients what they can do or must not do.

Adherence to what might be called “positive” professional ethics does not exhaust lawyers’ ethical obligations. As influential, well-educated citizens, with specialized knowledge and expertise, lawyers need to concern themselves with infusing moral and ethical values into their work generally. And to have such an obligatory concern at all is to have an obligation to think long and hard about the ethical values on which one believes society ought to float.

3. See, e.g., MODEL RULES OF PROF’L CONDUCT (2004); MODEL CODE OF PROF’L RESPONSIBILITY (1980).

4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C.).

Lawyers serve many different roles in society and take on varied jobs. There is little similarity in the typical day of a court-appointed criminal defense attorney and the typical day of a lawyer working for the Environmental Defense Fund, the Electronic Privacy Information Center or the ACLU. A judge, a law professor and a corporate attorney may have points of intersection in a court case, as adjudicator, expert and counselor, respectively. But the ways in which they are called upon to infuse moral and ethical values into their work differ greatly.

What about the professional work of the lawyer who comments for the media on ethics issues? I am not talking just about lawyers like Nancy Grace or Greta van Susteren, with their own television shows.⁵ Many lawyers and legal academics are being asked to comment on moral and ethical issues for print, television, radio and internet-based media. With these opportunities come chances to self-consciously infuse into a wider, even global, society, the ethical values on which the individual lawyer believes his or her “civilized” society should rest.

Most lawyers have no training in ethics and, as such, are not ethics experts. Yet, the ethical opinions of lawyers may be welcomed by the public and given special weight. The word “lawyer” can denote the adversarial, the sophistical, and the partisan, counting against moral authority. Conversely, it can denote ideas of morality, impartiality, and justice, all grounds for public trust. When lawyers prepare to appear on television or write an op-ed piece, they should understand that they carry both the aura of trustworthiness and the potential stench of suspicion.

For lawyers who regularly represent clients, moralizing in public carries risks. It will be important not to take positions that conflict with current clients’ interests or to divulge client confidences. Care must be taken by all lawyers not to give the general public legal advice or to mistake the law, whether accidentally or intentionally. Lawyers need to be quick-witted and fast on their feet if they often find themselves live on national television or radio speaking about breaking news events. In such settings a careless slip can significantly harm one’s own reputation, and the interests of one’s clients, firm or interest group.

For typical lawyers, the opportunity to moralize in public comes secondary to a request to connect in public on legal issues relating to matters of public concern. But now that “ethics” and “morality” have entered public life, lawyers with ethics expertise and training may be sought out expressly for their moral opinions. For these lawyers

5. See, e.g., CNN.com, Nancy Grace, http://www.cnn.com/CNN/anchors_reporters/grace.nancy.html (last visited Sept. 18, 2006); FoxNews.com, Greta Van Susteren, <http://www.foxnews.com/story/0,2933,44364,00.html> (last visited Sept. 18, 2006).

moralizing in public takes on its purest and most explicit form. These questions then arise: Should one moralize in public? If so, how does one do it well?

IV. MORALIZING IN THE MEDIA

Lawyers should moralize in public. They should take stands on important questions and boldly assert their positions in the appropriate public forums. The place might be a radio show or an internet blog. Or the place might be a newspaper column like the one I write for the *Newark Star Ledger* as “The Moralist.”

Did you hear the one about the priest and the rabbi who teamed up with a law professor on cable television? While this could be the makings of a joke, instead it was the premise of *The Ethical Edge*, an innovative program launched by MSNBC in June 2005. The show lasted a year and consisted of lively, hour-long conversations about contemporary moral and ethical issues, moderated by the brainy MSNBC news anchor Chris Jansing. The show’s guest priest was Father Thomas D. Williams, an American who serves as Dean of Theology at Regina Apostolorum Pontifical University in Rome. The rabbi was Rabbi Edward Paul Cohn who leads the Temple Sinai congregation in New Orleans. And the professor was me.

Television gives lawyers the opportunity to infuse values to a wide audience of varied backgrounds and to the non-reading public. But time pressures and the amount of network censorship and self-censorship that is required in the realm of major mainstream programming are limitations. Good ethics connections are not made by sound bites and off-the-cuff chatter. While newspaper reading audiences may be smaller, the op-ed and column enable lawyers to make points and defend perspectives in more careful detail than television. Editing and editorial standards function as censors, but a great deal can be said on the commentary pages of major papers that would challenge the civility norms of the airways.

In civilized life, law should float on a seat of ethics. Making this so is not solely the responsibility of legal professionals with access to the statehouse, the courthouse and the media. It is a responsibility of everyone. We all have obligations to be morally engaged leaders. We all ought to moralize in public, by which I mean, we all ought to help shape the public policies embodied in public laws. If we don’t, who will? It is pointless to be passionate, but private about your values.

V. CONCLUSION

I once feared that becoming a highly recognizable public-moralizer would take my mind away from the classroom and detract from my teaching. However, if anything, my teaching has improved. My experience in engaging a national audience through live television has translated to my abilities to form a connection with my classroom audience. Further, by taking on the role of a public-moralizer, I add to the synergies of a well-rounded professional life and encounter new materials and perspectives to bring to the classroom.

For example, after commenting on the current U.S. immigration reform debates on television, I did some further research on the topic and decided to add immigration policy to the curriculum of “Law, Justice and Morality,” an undergraduate class I teach at Penn.

After a lecture on immigration reform, I asked my students which of three policy directions they preferred: (1) the 2005 House of Representatives bill that would build 700 miles of fence across the border with Mexico,⁶ criminalize assisting the entry of non-citizens,⁷ and make illegal entry a felony;⁸ (2) a guest worker program for registered immigrants; or (3) a true, full amnesty program enabling aliens to quickly obtain green cards and citizenship. An overwhelming majority favored (2), a guest worker program like the one endorsed by President George W. Bush. My students argued that the full amnesty option I preferred would condone wrongdoing and serve as a slap in the face to legal immigrants who played by the rules to earn their lawful status. I was surprised and challenged by my students. I was moved to write a newspaper column attacking the “slap in the face” argument and defending amnesty. After the column was published in the *Ledger*, I posted it on the class website.

My students’ views of moral justice in immigration differed from my own. I suspect that on a range of issues, the moral values of other people differ from my mine. But I am no less enthusiastic about moral engagement. Together, as communities of difference and similarity, we craft the ethical foundation on which American law will rest. Let’s turn our minds to moral values, reflect on them, refine them, then shout them out, so others can hear; and so that the tide of the sea of ethics will produce new currents, and the law, if need be, can take on new directions.

6. H.R. 4437, 109th Cong. § 1002 (2005).

7. *Id.* § 202(a).

8. *Id.* § 203.