ETHICS IN THE LAW SCHOOL COMMUNITY

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[I offer this talk, given to entering students during Orientation, with the greatest trepidation. It may seem arrogant to suggest, as this submission may imply, that deans have any special moral role to play in the life of a law school. The most moving and powerful moral statements I have heard came from faculty or administrative colleagues, and this talk does not pretend to any originality. However, ethical statements from a dean are especially visible, and in some cases may convey institutional acceptance of a principle that, from anyone else, might be discounted as merely an individual position or preference. This is, perhaps, the best justification for believing deans to have a role in the moral life of their schools.]

YOU will, after only a few days at the law school, have begun to see it as a community. The law school is, for one thing, a diverse community. You know from the profile of your class given by [the Admissions dean] that we have sought successfully to bring together extremely able people with highly varied backgrounds and experiences. You have also seen that we are an intellectual community, seeking to understand and contribute to the formation, practice, and evaluation of law and legal institutions. You know as well that we are a professional community, which takes contributions to the public good as a principal reason for our existence. I would like to take these few minutes at the end of the orientation program to talk with you about a further aspect of the law school, which is closely related to those I've mentioned: the law school as a just community and as an ethical community.

Let me first talk about the law school as a just community, a principle that is directly related to its diversity. One of the few things on which most moral theories agree is that the first principle of a just community is that of equal respect, and the first obligation of members of such a community is to accord equal respect to all other members. In a *homogeneous* community, that injunction is easy to apply—it is no difficult thing to respect those who think, talk, and act very much as you do. In a *diverse* community, the injunction is more difficult and, for that reason, even more important. You, and all of us, have in this law school colleagues—many colleagues—who have different intellectual orientations, different social experiences and values, different political preferences, different racial and national backgrounds, different sexual orientations, and different religious beliefs from our own. Some will hold opinions or have experiences that diverge greatly from our own. To be disrespectful of colleagues because of their difference from you is both unjust and directly contrary to the principles that led the law school to seek and value the diversity you find here. It is equally unjust to discount others whether your own background, experiences, and beliefs are those of a majority or those of a minority in this community.

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I would also like to talk about ethics in the setting of an intellectual and professional community. Law is a profession that takes its ethics seriously—perhaps even more seriously now that the public questions them—and because the consequences of unethical conduct in law school are typically very severe. Those consequences may include permanent removal from the law school. Even lesser sanctions, such as suspension or reprimand, may become part of our official record and come to the attention of state bar committees, which decide on your fitness to practice law.

In talking about academic ethics, let me begin with a word about the distinction between ethics, rules, and sanctions. We usually think about rules in connection with sanctions in our society. Sanctions suppose the existence of a rule that is violated, and rules in turn usually reflect ethical or moral notions about right conduct. Rules commonly have an ethical component, and it tempting to think that ethical norms, rules, and sanctions are part of a single enterprise.

However, a view of norms or rules that focuses only on the likelihood of sanctions—what we might call a legalistic view—provides only a limited understanding of ethics. This legalistic notion of rules, for one thing, is highly contingent. It supposes the existence of several conditions, among them: (1) identification of specific misconduct by someone in a position to, and willing to, report it; (2) a process of some sort, and (3) the risk of imposition of sanctions.

Ethics—which is what I want to talk about—is a more unconditional understanding of right behavior. It does not depend on identification of misconduct by others. An act is no less wrong because no one sees it. Nor does the rightness of behavior depend on any process, or on the availability or imposition of any sanctions.

Most rules by which we live in communities are, in fact, of this sort. They are addressed not to institutions but to individuals, and their reality depends on the extent to which individuals care about and are willing to engage in right conduct.

Suppose, for example, that you saw a wallet lying on the sidewalk as you came to school this morning. Does this present a problem of legality? As it happens, there is a law that requires you to turn the wallet over to the police, who will try to notify the owner. But what if nobody were nearby to see you take the wallet and there were, accordingly, no practical risk of sanction?

The temptation is to say, then, that you face an ethical dilemma here. The law says to do "X," but you can in fact get away with not doing "X." That is, however, wrong. There surely is no *ethical* dilemma in this instance. The right thing to do is to turn the wallet in, and there is sufficient countervailing value.

How do you know, however, that this is the right course to follow? Would it be right for you to say "but I didn't know that I had to return to wallet or give it to the police? I have not, after all, studied criminal law."

In most cases, people do not learn to distinguish between right and wrong conduct from the law. We do not condemn defendants charged with theft only if they went to law school. You would know what is right in this instance even if you did not know that there was a law governing lost property, or what that law said. You learned what was right when you were growing up—the social rules that say, "Don't take the property of another person." And you know some other things as well. You know that the property does not belong to you, that you had done nothing to

earn the money in the wallet, and that somebody had in all likelihood lost it. You also know how you would feel if you lost your own wallet. Knowing these things, the claim that you did not know what you should do rings hollow. All it really means, if truth be told, is that you were not sure about the sanction that might be imposed—not that you were unsure about what was the right thing to do.

What we ask is that you bring the same ethical framework to law school. We have, for example, a rule—actually, a pretty clear rule—on plagiarism, with which you should be familiar. It is found in the student handbook, with which you should also become familiar. That is a legalistic rule, violation of which, if discovered, involves very severe sanctions. Suppose, however, that you believe that the teacher will not discover that you have copied. While it may be true that the likelihood of sanction seems remote, there are two reasons for not committing plagiarism. The instrumental reason is that doing so is like playing Russian roulette: the costs of losing are so great that the risk is not worth taking. The principled reason is that plagiarism, quite apart from the risk of sanction, is wrong and you know it.

What, you may ask, about what seems to be the "close case." You want to use parts of somebody else's work, but not copy it verbatim. Is this wrong? Here is where ethics becomes crucial. You may be tempted to think about this legalistically: if the rule is not quite clear about the extent of copying that violates the law school disciplinary code, then I will not be punished if I copy up to the point of absolute clarity. You may or may not be right in that practical assessment, but you are not ethical. Ethics requires that you think carefully about what is right behavior, and then asks you to resolve doubts in the direction of, and not against, a social rule. In this case, the norm is simply this: don't use another's work as your own. When in doubt, the answer should be to resolve that doubt in favor of doing your own work and revealing fully when you have used the thoughts or words of someone else.

I must admit at this point that law schools have, in some cases, special rules or rules that are taken far more seriously than you have seen before. For example, daily attendance and preparation may not have been required of you as an undergraduate. As a result, missing class or not preparing was either acceptable conduct or at worst a victimless crime, in which only you (if anyone) suffered. In law school, by contrast, class attendance and participation are normatively expected and important, and not only for your own benefit. There are a number of reasons for these norms. Initially, they are important to the educational enterprise in which you, your fellow students, and your teacher are commonly engaged. For many classes, that enterprise is dialectical, and learning occurs through the joint exploration of cases, theories, and argument. Because there is no one way of interpreting cases, engaging policy, or forming arguments, the absence or unpreparedness of one student diminishes the experience for all and is not, therefore, a victimless crime. In another sense, the norms of attendance and preparation reflect aspects of your professional duty to provide advice and services. This duty includes importantly habits of responsiveness and timeliness. And so we have a norm that expects presence and participation as an introduction to the fiduciary responsibility you will undertake in a few years.

I have been talking about norms in the ethical sense, and here again it is particularly important to remember the difference between norms and sanctions. Our law school rules do allow faculty to invoke sanctions for failure to participate.

Those sanctions include permitting a faculty member, on notice, to exclude a student from the examination for non-attendance. Faculty members differ on their readiness to use that sanction. Some are prepared to invoke the formal sanction; others prefer less formal sanctions, such as comment or informal discussion with students. But whatever their approach to the choice of sanctions, the great majority of faculty do not differ on the norms of attendance and participation or their institutional importance.

Finally, let me say a word about competition and ethics. I would like to tell you that law school is a cooperative rather than a competition-based institution. Indeed, I think that should be the case and believe that, at Cornell, it is true to a very great extent. However, I would be naive and perhaps dishonest to deny the existence of some element of competition in law school, driven largely by market considerations. This is a fact. Is it also an excuse for taking action that will improve your competitive position and, indeed, a qualification on the ethical orientation I have urged? You will have doubtless guessed that my answer is that it is not. That competition is a fact does not give it any ethical status. An insult is a fact, but it does not justify assault; fear is a fact, but it does not justify a preemptive strike. It may well be true that you would improve your position in the class by stealing another student's notes or hiding library books needed for an assignment, but this sort of conduct is plainly wrong even if it yields a competitive advantage. Indeed, it is wrong *just because* it yields such an advantage. The notion of competition—in law school, as in the practice of law—includes a notion of fair competition. While the plaintiff and the defendant in a lawsuit are even more directly in competition than you are with any of your classmates, nobody would think it right to bribe a juror or secrete a witness in order to improve the chances of success. There are, in short, ethics to competition and even conflict. It is important, here as elsewhere, that they be adopted.

I hope that you will consider these observations as an aspect of our introduction to the law school—and understand that this is a community of professionals, which seeks to treat its members with concern and integrity and asks its members to treat each other in the same way. We are proud that our community has these characteristics, and we are very glad to have you join it.