

January 1985

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Recommended Citation

Thomas Huff, *The Temptations of Creon: Philosophical Reflections on the Ethics of the Lawyer's Professional Role*, 46 Mont. L. Rev. (1985).

Available at: <https://scholarworks.umt.edu/mlr/vol46/iss1/3>

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ESSAY

THE TEMPTATIONS OF CREON: PHILOSOPHICAL REFLECTIONS ON THE ETHICS OF THE LAWYER'S PROFESSIONAL ROLE*

Thomas Huff**

It is certainly more than a little presumptuous for a philosopher to address Montana attorneys on the subject of their professional ethics. You might, understandably, insist that only a practicing attorney would be qualified, through education and personal experience, to offer views on such issues. I must admit I have no ready response to this claim except perhaps to say that there are times when distance allows for perspective, and I hope this is one of those times.

As lawyers, you are subject to a variety of temptations. There are, of course, the usual temptations of private gain manifest in laziness, dishonesty, or thievery. If you succumb to these temptations you will be subject to immediate and thorough censure by your profession and the public. More often, however, if there are moral errors which tempt you, they are errors of professional role rather than errors of private gain. These are more subtle, less easily recognized temptations. They show up as failures of ethical insight and moral sensitivity. It is the kind of moral error which comes from too great an identification with role—what I will call the temptations of Creon—that will be discussed in this brief essay.¹

* An earlier version of Parts I and II of this paper was read at the Continuing Legal Education Conference on Professional Ethics, Law School, University of Montana, October, 1982. Much of the work on this paper was done in preparation for my contribution to the professional responsibility course at the University of Montana Law School. Support was provided by the University of Montana Law School and the Small Grants Program of the University of Montana Research Office.

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1. Though I have synthesized the issues of this essay in what I hope are fresh and enlightening ways, little that I say here is new. I have therefore cited the appropriate cur-

I.

In Sophocles' play *Antigone*, Creon, who had recently been made ruler of Thebes, considers with some care the responsibilities of his new role:

I have nothing but contempt for the kind of Governor who is afraid, for whatever reason, to follow the course that he knows is best for the state, and as for the man who sets private friendship above the public welfare,—I have no use for him either . . . No one values friendship more highly than I; but we must remember that friends made at the risk of wrecking our ship [of state] are no real friends at all.²

The civil war which had befallen Thebes (upon the death of Oedipus) and which had ultimately solidified Creon's position as king had, in a manner typical of civil wars, pitted brother against brother. Eteocles, one of Oedipus' sons, had joined with Creon to put down the rebellion led by Polyneices, Eteocles' brother. Both brothers were ultimately killed. Creon orders a full state funeral for his ally Eteocles, but forbids the burial of the rebellious Polyneices, leaving his body for the scavenging birds and dogs:

As long as I am King, no traitor is going to be honored with the loyal man. But whoever shows by word and deed that he is on the side of the State,—he shall have my respect while he is living, and my reverence when he is dead.³

The remainder of the plot of Sophocles' powerful play can be quickly told. Antigone, Polyneices' sister, argues strenuously with Creon. The gods require burial! You are acting against the gods! She cannot hear Creon's pleas that she respect his authority or the authority of the state. For her there is but one morality—that of the gods. And so, contrary to Creon's command, she buries her brother. Creon, of course, interprets this action as a threat to his authority and thus to the state—in short, as the act of a traitor. As

rent literature on each of the topics I discuss for those wishing to do additional reading. Two writers, however, deserve special credit. I have learned a great deal from Richard Wasserstrom's sensitive treatment of the moral issues raised by role responsibilities, Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975), and from Gerald Postema's enlightened analysis of the psychology and morality of "moral distance." Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U.L. REV. 63 (1980).

2. SOPHOCLES, *THE OEDIPUS CYCLE—ANTIGONE*, 192-93 (D. Fitts & R. Fitzgerald trans. 1939). Compare E.M. Forster's suggestion: "I hate the idea of causes, and if I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country." E.M. Forster, *What I Believe*, in *TWO CHEERS FOR DEMOCRACY* 68 (1939).

3. SOPHOCLES, *supra* note 2, at 193.

punishment, and as an example to all who would defy his commands, he orders her buried alive in a crypt with only a small amount of food.

Creon's son, Haimon, who loves Antigone, pleads with his father. The people of the city, he says, argue that:

[N]o woman has ever, so unreasonably, Died so shameful a death for a generous act: "she covered her brother's body. Is this indecent? She kept him from dogs and vultures. Is this a crime? Death?—She should have all the honor that we can owe her!"⁴

But Creon will have none of it. He cannot hear his son, as he cannot recognize the propriety of Antigone's pleas. "My voice is the one voice giving orders in this City!" he says. "The State is King."⁵

Haimon then goes to the burial vault. He finds that Antigone has killed herself rather than suffer the painful death of starvation. In succeeding scenes Creon, sensing that fate is somehow not with him, especially after he talks to the prophet Teiresias, finally decides to open the vault and free Antigone. He finds, of course, only her body. In a struggle which follows Haimon kills himself. Creon is destroyed by these tragic events and the chorus concludes the play with the following verses:

There is no happiness where there is no wisdom,
No wisdom but in submission to the gods.
Big words are always punished,
And proud men in old age learn to be wise.⁶

II.

You, as a lawyer, are situated much like Creon. You have special responsibilities—to zealous representation of your clients, to confidentiality toward client disclosures, and to the law. These are important responsibilities defined by the role which you are expected to play in our legal system. They are usually taken seriously by your profession, and they are highly touted in law school classes as essential to the fair and effective operation of the adversary system of law. But these special responsibilities, as you know, can lead to situations of considerable moral complexity. There are first, the often discussed complexities internal to the Code of Professional Responsibility—your responsibility to maintain confidential-

4. *Id.* at 213.

5. *Id.* at 215.

6. *Id.* at 238.

ities can conflict with your duty to uphold the law, for example.⁷ This sort of situation is the subject of much consternation, I am told, at state bar ethics committee meetings, and is, I know from first-hand experience, a primary subject of most professional responsibility texts and courses. Fine lines are usually drawn—the duty of confidentiality diminishes as your client approaches commission of a crime.

A second kind of complexity occurs when the responsibilities of your role conflict with what you consider right or fair. This complexity is, however, much less discussed. It requires particularly difficult moral judgments, internal to your life as a lawyer, which are not the subject of much formal notice by the profession. How do you as a sensitive lawyer identify and respond to this latter sort of conflict? This essay will consider two important and related issues of this second kind. The first involves using means or seeking ends which are legally permissible but morally wrong. The second involves the professional relationship between lawyer and client—in particular a morally objectionable form of paternalism which insensitive lawyers may exercise over their client's lives.

III.

Suppose a client arrives at your office seeking help to achieve ends which are unjust or immoral. It is not difficult to imagine examples. A bitter husband seeks custody of his children in a divorce battle simply to hurt his wife, or a debtor wants to escape an honest debt by invoking a legal technicality against the creditor.⁸ How should you respond?⁹ First it should be noted that you must *recognize* that there is a moral conflict in the situation presented by the client. This may not occur if you are sufficiently isolated from moral claims outside your professional role. You, as a lawyer, are particularly vulnerable to this way of missing moral issues because you are constantly called upon in your professional life to act as the agent of your clients—to speak or make arguments on their behalf whether you agree with those arguments or not.¹⁰

To manage this distancing of your moral self from your profes-

7. Postema, *supra* note 1, at 65.

8. *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957) (the statute of limitations used as a defense against a debt based in part on a promise not made in writing, subsequent to a bankruptcy). Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1064 n.13 (1976). Also cited in Postema, *supra* note 1, at 66.

9. This issue is discussed in detail in Wasserstrom, *supra* note 1, at 2-15. See generally Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83-122 (D. Luban ed. 1983).

10. Wasserstrom, *supra* note 1, at 5; Postema, *supra* note 1, at 76-77.

sional action, you may be tempted to identify with the requirements of your role to the exclusion of what you consider morally right.¹¹ The moral risks that such distance entails are, however, substantial. Like Creon, you may fail to see all your responsibilities, or see them too late. It was this sort of blindness from which the Nixon administration lawyers apparently suffered.¹² They were genuinely surprised at the public's moral outrage. They simply had not perceived they were doing anything wrong. In the absence of regular contact with the rich resources of everyday moral experience, brought on by the isolation which professional roles invite, any lawyer's sensitivity to moral issues may fail.¹³

Moreover, seeing yourself as a lawyer, as a professional, and thus as an important person, can be a distracting self-image. As Thomas Nagel notes: "[s]uch a picture disguises the fact that the exercise of power, in whatever role, is one of the most personal forms of individual self-expression, and a rich source of purely personal pleasure."¹⁴ Roles *are* pleasures to play, especially roles with prestige attached to them.¹⁵ Like Creon, you can speak of your professional responsibilities with strong language and in high-minded tones. You can imagine yourself doing important things—like assuring the rule of law. But when you do this you may distance yourself even further from your everyday moral experience and the resources that experience provides for moral judgment;¹⁶ you may fail to recognize the moral issues present in your professional life.

But let's suppose that you are alert and sensitive. You acknowledge explicitly all the moral claims inherent in the situations described. Unlike Creon you recognize the responsibilities both to "private friendship" and "public welfare." At this point you must confront another temptation. Faced with the dilemma of a conflict between your professional responsibilities and what you believe to be morally right, you may want to oversimplify your situation—acting like Antigone rather than Creon. This is what some, more radical, lawyers do. They reject all or most institutional re-

11. Postema, *supra* note 1, at 64-73.

12. Wasserstrom, *supra* note 1, at 3.

13. Postema, *supra* note 1, at 75.

14. Nagel, *Ruthlessness in Public Life*, in PUBLIC AND PRIVATE MORALITY 77 (S. Hampshire ed. 1978).

15. Wasserstrom, *supra* note 1, at 18, states in addition: "It is hard, I think, if not impossible, for a person to emerge from professional training and participate in a profession without the belief that he or she is a special kind of person, both different from and somewhat better than those non-professional members of the social order." See also Postema, *supra* note 1, at 76.

16. Postema, *supra* note 1, at 64.

quirements because of the conflicts caused with morality.¹⁷

If the lawyer who collapses morality into role-responsibility is no moral paradigm, neither is the lawyer who does the reverse. Role responsibilities are necessary and valuable to the social institutions of which they are a part.¹⁸ They provide for moral specialization and a moral division of labor which would not otherwise be possible.¹⁹ Antigone was partly right. We should pay attention to the claims made upon us by the gods. She was wrong, however, when she succumbed to the temptation to believe that the moral life is as simple as just following the requirements of the gods. Social roles are valuable because they help us define and satisfy our shared responsibilities. Creon was wrong to give in to the temptation to see the whole of the moral life in institutional terms, but he was not wrong when he recognized that he had special institutional responsibilities.²⁰

An important fact about the institutional context of the responsibilities of the legal profession needs to be noticed at this point. One of the striking features of the current Montana Code of Professional Responsibility, the newly adopted Model Rules of the ABA, and of professional responsibility courses and texts based upon them, is the lack of serious and detailed consideration of these issues. The Codes treat themselves as bodies of fixed rules. They acknowledge their internal complexity and, indeed, the difficulty of applying their rules to the varied responsibilities of attorneys. They explain in some detail the reasons behind their several rules. They even express some powerful social ideals in their preamble and preliminary statements. But these codes do not offer a developed account of how you are to express your own more general moral principles in meeting your professional responsibilities. There are repeated references to the importance of good moral character and to its place in preserving the rule of law. But almost no attention is given to the interplay between good moral character and institutional role. As a consequence, you are invited to focus on the rules of the profession, acknowledging primarily their re-

17. Postema calls this move "deprofessionalization," *supra* note 1, at 71-73. As Postema recognizes, Wasserstrom seems to treat this idea favorably. Wasserstrom, *supra* note 1, at 12, 23-24.

18. Postema, *supra* note 1, at 72.

19. Nagel, *supra* note 14, at 85.

20. Speaking of the dilemmas of professional roles, Postema notes that: "The problem of responsibility lies in the fact that as the moral distance between private and professional moralities increases, the temptation to adopt one or the other extreme strategy of identification also increases; one either increasingly identifies with the role or seeks resolutely to detach oneself from it." Postema, *supra* note 1, at 75.

quirements, especially in situations of moral conflict, and thus not to take up a principled analysis of the rules themselves. Not surprisingly, professional responsibility texts and the law school courses based upon them follow suit.

What then should you and Creon do? How might you and he, as professionals, avoid the temptations described above? First you should be warned against the simple-minded identification of moral responsibility with role responsibility.²¹ Surely Creon was right. Leadership does require certain firmness of mind and authoritative expression of commands; but it also requires full appreciation of the commands of the gods, what *we* might call the decent treatment of other persons. Such appreciation was there for the taking if Creon had been more sensitive morally. Antigone told him; Haimon told him; even the prophet Teiresias told him; but he couldn't hear them because he was altogether too engaged with what he saw as the important responsibilities of his role. So the advice you and Creon must heed is this: Do not allow yourselves to be seduced by your role! If Creon had not been so blindly dedicated to fulfilling his professional responsibilities, he would surely have heard Antigone's pleas. His normal moral sensitivity would have served him well. Why should it not also serve you well while you are in your special role?

As an attorney, when you remain open to the claims of morality, you will discover that often what you believe instinctively to be morally right is exactly what your role requires, and your moral sensitivity will enrich your action as you meet your role responsibilities. But what if your sense of what is right and what you believe your role requires conflict? In this instance you should be honest! Don't be tempted to deny there is a conflict by reducing your professional responsibilities to your sense of what is morally right or vice versa. Face up to the conflict. Ask for justification of the conflicting principle which the profession seems to require. Does it reflect a legitimate division of moral labor? Is it a morally proper role to ask a professional to play? Very likely it will be, especially if the institution in which your role is defined is basically just. This still may leave you with the obligation to mitigate whatever unfortunate consequences are brought about when you meet your role responsibilities.

What if the role you are called upon to play really is not a proper role, because the institution is flawed in some way? "At this

21. Wasserstrom, *supra* note 1, at 8.

point there is [simply] no substitute for refusal."²² You must not perpetuate institutional wrongs, and you must, where appropriate, seek revisions in the institutional morality.²³ Remember, anyone, king or lawyer, who commits a moral wrong in a professional role still commits a moral wrong.²⁴

IV.

If you, as a lawyer, remain morally alert as you act in your role you will notice and honestly face the moral complexities of your relations with your client's adversaries. You will also treat your clients with whom you have day-to-day business as professionals in a more sensitive and perceptive way. You will acknowledge readily that your clients are human beings who deserve the fullest measure of your respect, and you will avoid seeing yourself as a legal technician simply available to solve legal problems.²⁵

If your moral imagination and sensitivity are intact in this way you will approach your client with two important concerns. First, you will recognize that it is possible, indeed easy, to misunderstand your client's interests and welfare. Lawyers with well developed moral experience have come to recognize the various ways in which their view of the world and their values color the way they understand the values and lives of others. Moral sensitivity requires that you approach others with an interest in seeing things from their point of view. Making a significant contribution to the solution of a client's problem often calls upon both your technical understanding of what is possible and permissible under the law and your wisdom in recognizing and appreciating your client's needs. Creon's professionalism kept him from seeing the world as Antigone saw it—with the passion of a young sister faced with a moral wrong done to her brother. His response to her action was, consequently,

22. Nagel, *supra* note 14, at 90.

23. *Id.* at 75-77, 81. Wasserstrom, *supra* note 1, at 12-13. Unfortunately the old Code of Professional Responsibility and the new Model Rules discourage refusal of this kind except in circumstances in which the attorney's moral scruples diminish his or her capacity to represent the client. Postema observes: "This point of view encourages the lawyer to steel himself [or herself] against such scruples and to view them as strictly personal feelings which have no place in professional behavior—a kind of unbecoming moral squeamishness." Postema, *supra* note 1, at 84-85.

24. Nagel, *supra* note 14, at 90. "Sometimes his [or her] responsibility is partly absorbed by the moral defects of the institution through which he [or she] acts; but the plausibility of that excuse is inversely proportional to the power and independence of the actor." *Id.* at 90-91.

25. Wasserstrom, *supra* note 1, at 16-17. Postema observes that you will also see your clients as moral persons with moral obligations and thus not as mere problems. Postema, *supra* note 1, at 80.

impertinent and harmful. He meant well but he failed to appreciate her conception of the events surrounding her brother's burial. Creon was tempted to make this moral error by his failure to be aware of the limitations of his own point of view.

The second concern with which you as a sensitive lawyer will approach your client acknowledges the strong moral rejection of paternalism. In our moral tradition this rejection of paternalism in all but a few special circumstances (e.g., with children and the incompetent) is based on a sense that persons live better when they self-consciously develop and come to terms with their values and maintain control over their own lives. Engagement in these self-affirming activities is considered distinctively human and it is widely recognized to be essential to the development of human beings. You need only remind yourself of how destructive a highly paternalistic parent or spouse can be, even when well-meaning. Typically, persons victimized by such paternalism exhibit a distressing lack of initiative, are humiliatingly submissive, and are vulnerable to almost any kind of authority. Our ideal of respect for persons reflects a powerful sense of the value of the exercise of these capacities for autonomy in persons. The lawyer who is committed to this ideal protects the choices which flow from such autonomy by trying to improve their scope and quality.

The problem is that you will often recognize your client's needs better than your client does. You may, as a consequence, be tempted to usurp the decision-making autonomy of your client for his or her own benefit.²⁶ Moreover, that purely personal pleasure associated with being an important professional person, needed by others, may reinforce this temptation to do something for your client even without your client's explicit understanding or support.²⁷

The temptation to be paternalistic is, of course, strongest when the capacity for autonomous choice by your client is weakest, or when your client has a limited ability to understand the character or force of your professional advice, but it is always present in some degree.²⁸ Because you are often sought out by your clients in times of personal stress and conflict,²⁹ opportunities to express this concern are common in the lawyer-client relationship. You can provide the most significant help to the distraught mother and wife about to be divorced by appreciating her capacity for misjudg-

26. See generally Luban, *Paternalism and the Legal Profession*, WIS. L. REV. 454 (1981).

27. See *supra*, text accompanying notes 15-17.

28. This issue is discussed in detail in Wasserstrom, *supra* note 1, at 16-24.

29. *Id.* at 22.

ment while avoiding the temptation to "take over" the decision-making process. Options need to be proposed; time needs to be provided for reflection. Your clients need to be encouraged to see the decisions as their own—decisions for which they must take responsibility because these are decisions with which they must live.

Where the capacity for autonomous choice seems severely circumscribed, however, by a lack of foresight or wisdom or by the emotional strain of the situation, you may need to take directive action without becoming paternalistic. Such action in unusual cases protects the welfare of the dependent person while the conditions for autonomous choice are restored. It is almost always easier and less time consuming to take action in someone else's behalf rather than to help them take action themselves. You owe it to your clients to limit and shape the help you provide in a way that encourages their self-critical evaluation and choice.

As good lawyers, you avoid the moral temptations described in this section by fully appreciating the importance of autonomy to your clients. You recognize that you should approach with care your perception of your clients' needs and you should avoid the evils associated with taking over the decision-making process for your clients. Creon failed to do this when he did not listen to his son's intelligent and forcefully presented arguments. Creon was sure he knew what was best for his son. Consequently, he did not respond to his arguments with respect. He thus did not recognize the strength of those arguments, and he did not provide his son with the significant and meaningful response he deserved.

V.

The subtlety and complexity of your life as professional lawyer is difficult to overestimate. George Sharswood recognized this in 1860 in *AN ESSAY ON PROFESSIONAL ETHICS*,³⁰ the forerunner to the modern codes of professional responsibility:

There is, perhaps, no profession, after that of the sacred ministry, in which a high toned morality is more imperatively necessary than that of law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity; in which so many delicate and difficult questions of duty are continually arising.³¹

Like Creon, you are subject to these many temptations. There are the temptations to ignore the claims of morality in favor of the

30. G. SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (2d ed. 1860).

31. *Id.* at 1.

responsibilities of role. There are also the temptations to professionalize the lawyer-client relationship, leading to the failure to recognize responsibilities to the fundamental moral ideal of respect for persons. The key to all of this is moral sensitivity. To Creon we would say: If you are true to yourself as a moral being, you will respond to the complexity of your moral life carefully and forthrightly, and then you will be able to trust that you can meet the expectation of the gods. Would you, as a lawyer, say anything less to yourself?

