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The Ethics of Making Credibility Judgments

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Noted ethics philosopher and Nobel Laureate Bertrand Russell once was questioned by the Harvard Board of Governors about having an extramarital affair with a student. When faced with the hypocrisy of being an ethics professor engaged in immoral conduct, Russell argued his private affairs had nothing to do with his professional duties. “But you are a Professor of Ethics!” maintained one of the board members. “I was [also] a Professor of Geometry at Cambridge,” Russell rejoined, but “they never asked me why I was not a triangle.” Lecturing on ethics was a job for Russell; it didn’t mean he had to live an ethical life.

Should we listen to someone who chose to teach ethics by day and betray it by night? Should we expect a speaker to vouch for his opinion through his own conduct? The law teaches us to ascribe less weight to an opinion when the speaker suffers from a credibility problem. But what constitutes a credible source? Lawyers who engage in the presentation of evidence devote a lot of mental energy to this question. Whether the trier of fact believes a witness’s testimony about a disputed fact — or, more particularly here, his opinion on a subject on which

he is proffered as an *expert* — is everything to a case.

A good opposing counsel will take to task a non-percipient witness on cross-examination to see if they are who they say they are and they know what they’re talking about, as well as what might lie in their past. If they are reliably preaching about what they practice, they should be able to speak, and the fact finder should listen, to what they have to say. Or so the law tells us.

That’s in a courtroom. How does that translate to real life? Unshackled from the rules of evidence and impeachment, how and when should someone be discredited based on what s/he may have said or done in the past? For lawyers involved in high-profile cases, this question is hardly academic, for they know that a fair trial may only be as fair as the pre-trial press. These lawyers are attuned to the fact of life that people judge others, and credit unreliable sources in the process, all the time. In matters of controversy, people with strong opinions and loud voices, in the courtroom and in life, often garner an audience.

So what’s the problem? Should we as lawyers just accept this, and stop trying to be the arbiter of who has eligibility to speak publicly on issues that

may touch a court case? After all, trying to sanitize credibility judgments from personal value judgments is like trying to herd cats. People are going to say what they want, and make knowledge and information claims about lots of things they shouldn't, and if the charismatic force of their "testimony" is such that others simply find it interesting to hear what they have to say, they are entitled to an audience. Theoretically, at least, it will all come out in the wash, yeah verily, isn't that the beauty and underpinning of the First Amendment?

At some point, however, credibility takes on an ethical stance. If judging information involves judging values, at what point must lawyers themselves stand up and demand that the speaker be scrupulous and practice what they preach? Take, for example, the recent re-emergence of formerly disgraced New York Gov. Eliot Spitzer to the podium, who lectured at a seminar relating to institutional corruption at the Edmond J. Safra Foundation Center for Ethics at Harvard University. Consider Rod "Everything's for Sale" Blagojevich's presentation at Northwestern University entitled "Ethics in Politics: An Evening with Former Governor R. Blagojevich." Or Lynne Stewart's participation in a symposium at Hofstra Law School, entitled "Legal Ethics: Lawyering at the Edge, etc." which was requested after she was sentenced on her conviction for aiding Sheikh Omar Abdel Rahman for terrorist crimes (and which could cost her dearly on resentencing).

Should we care that these people are being given a voice? Are they worthy of a voice? More pointedly, are they credible sources of ethical speech? Spitzer's breezy rationale in a statement to Time magazine was: "When you have nothing to do all day, you eventually start yelling from the rafters." OK, that's understandable. And who are we to judge anyway, at least outside of a courtroom? Just because the former corruption-fighting Eliot

Spitzer reportedly patronized a hooker or maybe tried to dethrone an opposing party politician through allegedly corrupt means, he has nothing worthwhile to say about institutional corruption? Because Blagojevich once was a popular political figure in Illinois but is now under indictment for bribery over the then-vacant Senate seat of Barack Obama, he can't weigh in on the ethics of being a politician? And even though famed trial lawyer Lynne Stewart was convicted over her breathtakingly overzealous defense of her terrorist client, she also doesn't have a First Amendment right to tell her side of the story, under Justice Oliver Wendell Holmes' "marketplace of ideas" theory? Same goes for disgraced securities plaintiffs attorney Bill Lerach, who is now out of jail and lecturing on the perils of securities law loopholes in a post-financial crisis world.

On one view, the catastrophic descent of important public figures shouldn't make them unalterably ineligible to speak on subjects about which they probably have a lot to say, no matter their views, and which it may be worthwhile for listeners to hear. Perhaps they have something especially valuable to contribute to the mix given their defrocked status, and their insider's view of the reason for the defrocking.

But on another view, there's a problem with passing these fallen angels the microphone. And the problem goes far beyond the potential tainting of a future jury pool. The problem is that these individuals have been charged in one way or another — in Spitzer's by his own sort-of admission of extramarital guilt; in Blagojevich's by an impeachment conviction and indictment; in Stewart's by her conviction by a petit jury of her peers; and in Lerach's by a conviction and served jail time — with some kind of wrongdoing relating to conduct that raised significant legal issues, suggesting they are ill-equipped to lecture others.

Now maybe we feel squeamish about silencing these folks, and maybe the media power they com-

mand is too intense for us to even try, when they speak about such lithe subjects as ethics, even legal ethics. Consider if they were skilled in a particularly sophisticated real estate transaction and charged with wrongdoing involving that type of transaction. Should they properly be blackballed from lecturing about the subject to those willing to benefit from their thinking about it, even if they've done their penance? No, here the problem is altogether different because of the subject about which Spitzer/Blagojevich/Stewart were asked to speak. By allowing them a voice, we seem to be implicitly saying there is something sacred about "ethics" that bars all credibility judgments about the bona fides of the dishonored speaker who is being given the podium. In so doing, we have become a post-ethical society that is thoroughly unwilling, and even unequipped, to "judge" others about the functioning of their moral compasses, even when they have committed crimes or at least offensive conduct implicating immorality.

So maybe Chris Brown is correct in what he said when he came to Tiger Woods' defense and told the media that nobody has the right to "place judgment" on anybody else's personal life; the same Chris Brown who beat up his singer girlfriend Rihanna and pled guilty to feloniously assaulting her. Maybe, in our post-ethical world, exclusionary judgments about what others say and do simply aren't proper outside a court of law, even if the alleged acts, like domestic abuse, are illegal. The law will take care of the real crimes, meanwhile, we should let the Spitzer/Blagojevich/Stewart/Browns of the world wax poetic as they spin their stories about ethics and personal actions and what is right or wrong for others to do. No credibility judgments here, we're not cloistered by those harsh evidentiary rules in the real world. The real world doesn't judge, or think about who should be given a voice to judge, or think for itself, really. We just shrug it off and leave the judgments to the legal system. *Really?*

Obviously, tabloids like the *National Enquirer* sell newspapers precisely because the public is interested in the sensationalist pablum they report. One tabloid has even given call girl Ashley Dupre an advice column about relationships. Only in America could the nimbus of fame be used to parlay such a gig. Still, if sales go up the paper will have made a good business move. Sometimes currency is all that is needed to garner a voice.

It is different, though, when institutions of higher learning like Hofstra, Northwestern and Harvard that purportedly rest under the protective mantle of the moral upper hand invite the poster children for bad behavior to lend their supposed "expert" voices to academic exercises. One has to worry that we are no longer talking of First Amendment rights at all, never mind intellectual authenticity. Lynne Stewart doesn't have a First Amendment *right*, especially given her conviction, to say, "I'd do it all over again" to impressionable law students. Blagojevich doesn't have a right to make light of his indictment by continuing his reality road show on educational campuses where discussions of ethics are implicated. Spitzer may be a distinguishable case but many believe he too should be required to do penance, at least for his alleged Troopergate excesses, before he is invited to lectures at Harvard on institutional corruption. Otherwise we will find ourselves hard-pressed to teach anyone about credible sources, let alone moral accountability or a sense of reform as moral calling. There goes the neighborhood.

We are not supporting the erosion of free speech, nor are we telling people how to act. Rather, we are trying to uphold a meaningful standard by which speech may be credibly judged outside a courtroom. Enfants terribles have a talent for absorbing the interest and attention of impressionable minds. Without evidentiary standards to control the admissibility of opinions, someone needs to be the watchdog. The willingness of an

institution of higher learning to extend an invitation to speakers who have demonstrated rogue pasts gives too much “credibility” to their way of thinking. Maybe credibility judgments need to be made *before* invitations are extended. After all, prominent figures whose ethics have failed them can’t really compartmentalize what they’ve done wrong simply by representing, without making any meaningful mea culpa, that their remarks are nonetheless worthwhile even on a subject such as ethics. And if we buy what they are selling, well, that’s just licensed irresponsibility.

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