

Inaugural Seegers Lecture

Is One Ethic Enough?

Dale G. Lasky

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Dale G. Lasky, *Is One Ethic Enough?*, 17 Val. U. L. Rev. 43 (1983).
Available at: <https://scholar.valpo.edu/vulr/vol17/iss1/5>

This Commentary is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

COMMENTS

Comment:
IS ONE ETHIC ENOUGH?
Dale G. Lasky

About the Commentator: DALE G. LASKY

Dale G. Lasky is a Professor of Theology at Valparaiso University where he has taught for the past twenty-one years. He received his M. Div. degree from Concordia Seminary, St. Louis; his S.T.M. from Yale Divinity School; and his M.A. and Ph.D. from the University of Chicago.

Professor Lasky's graduate studies were in the area of ethics and society. His M.A. work focused on the doctrine of the two kingdoms in contemporary Lutheran theology and his doctoral work investigated the problem of ideology. His book reviews and published articles include a translation of Wolfhart Pannenberg's "Toward a Theology of Law", for the ANGLICAN THEOLOGICAL REVIEW. He served as the founding director of the Center for the Study of Campus Ministry at Valparaiso University.

"IS ONE ETHIC ENOUGH?"

Dale G. Lasky

In his lectures "The Legal Ethics of the Two Kingdoms", Thomas Shaffer persuasively articulates his conviction that moral concerns belong to the essence of the practice of law. This does not mean simply that lawyers conscientiously follow their moral convictions, but that ethical reflection should be an integral element in legal education and legal practice. Although this paper will take issue with his lectures at several points, this fundamental conviction is affirmed.

But Shaffer seeks to do more than restore ethical reflection to the center of legal thought. He also argues for a necessary unity between personal moral conviction and professional practice. Little attempt is made to outline a unitary ethic in the lecture, but arguments are marshalled to demonstrate the inadequacy of the alternative and to lay a foundation on which such an ethic could be constructed. The antagonist of his trenchant arguments is the adversary ethic, which Shaffer believes has become dominant in American legal thought and practice. In its most blatant form, it is difficult to term it an ethic, since the adversary concept justifies the exclusion of moral concerns.

Something more than historical or theoretical interest thus motivates the attention given in the lectures to the two kingdoms ethic. In Shaffer's judgment the adversary ethic represents a secularized version of the two kingdoms ethic.¹ He finds in this tradition a rationale for separating public and private morality which today often ends up in the exclusion of moral concerns and ethical reflection from the practice of law.

Shaffer introduces his discussion with a series of examples intended to illustrate the disappearance of personal moral conviction from public and professional practice. But the point of the examples is confusing. They are introduced as Shaffer addresses the question whether there is a special morality for professional life. When the last example has been narrated, however, we are told that the illustrations may only demonstrate the lack of any morality in the lives of the professionals cited. These are clearly two different issues: whether public responsibility requires or allows different kinds of action than private morality and whether moral concerns are at all appropriate to public action.

1. Thomas L. Shaffer, "The Legal Ethics of the Two Kingdoms", 15

In each case, rigorous criticism could be levelled at the examples without requiring the identification of personal and public morality. The recognition that truthfulness is essential to community life would condemn the practice of the Wall Street lawyer who employed bribery to win his client's case.² An exponent of the just war theory would censure Churchill's decision to bomb Dresden because it served no tactical purpose, indiscriminately killed non-combatants and employed an excessive use of force.³ Even the example of abortion is problematic, since people who agree on the sanctity of life and on the moral and legal right of innocent, defenseless life to protection disagree on the status of fetal life.

What is more, the inability of the hawks and doves to engage in principled ethical discussion during the Vietnam crisis provides a strong case for distinguishing between personal and public morality. The very lack of a living tradition on the basis of which to discuss publicly the morality of the war compelled people to refer purely to private moral opinions. Opponents of the war found it necessary to appeal to private conscience, which is appropriate to pacifist convictions but not directly relevant to determining the justifiability of the war. The supporters of official policy, on the other hand, possessed no criteria by which to evaluate how to wage a war they considered justified.⁴

The case of Atticus Finch, to whom Shaffer returns repeatedly in the lectures and to which he devotes an extended footnote, is the most interesting. Finch was the fictional gentleman for whom there could be no separate morality in his public life. But in the incident related, Atticus does not struggle to make his public action conform to his private morality. Instead, he is tempted to employ a lower standard of morality in his family affairs than in his public career.

When he turns to the more substantive treatment of the two kindgoms ethic, Shaffer chooses Martin Luther as its primary exponent. There appear to be two reasons for this choice. The first is

2. See S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE. (1979), *Note especially* ch. 12.

3. M. WALZER, JUST AND UNJUST WARS 160, 261, 283 (1977).

4. Walzer confesses that it was this sense of the lack of a vital tradition that he experienced during his involvement in resistance to the Vietnam war. This experience motivated the study which resulted in his book. It should be noted that the term "just war" often leaves the impression that a war can be good. The just war doctrine assumes that war is always evil and argues that only under particular circumstances a war be justified. But even a war which has been justified (*ius ad bellum*) has to be waged justly (*ius in bello*).

historical, the fact that the two kingdoms ethic has often ascribed to Luther. The second is contextual, the fact that the lectures were presented at a law school situated in a university that operates self-consciously in the Lutheran tradition. Later in the lectures, Shaffer expresses second thoughts as to whether Luther really represents a two kingdom ethic. Further, he recognizes that the theory he criticizes may belong more to the tradition of Lutheran orthodoxy than to Luther himself.⁵

To broach the topic of the two kingdoms means to enter into a complex and highly controversial topic. Sharply divergent and even contradictory interpretations can be found all of which appeal to Luther for their validation. Intensive studies of the Reformer's teaching began with the Luther renaissance of the 1920's. And the historical study became highly existential and directly practical during the crisis of German Protestantism in the period of the Third Reich. Sufficient consensus has emerged from this study to raise basic questions to Shaffer's interpretation of Luther.⁶ The purpose of raising these questions, however, is not simply a matter of historical interest. For the questions are germane to what is meant by a unitary ethic and the relation between private and public morality.

Shaffer's ambivalent attitude toward Luther, first using him as paradigm for a two kingdoms ethic and later questioning whether his own "one kingdom" ethic really conflicts with the Reformer, stems from his interpretation of Luther's two kingdom teaching. It is the thesis of this paper that although Luther clearly emphasized a two kingdoms doctrine, he did not develop a two kingdoms ethic. Not only does Luther's two kingdom doctrine not formulate an ethic, it was not primarily constructed in order to provide a theological basis for ethics nor to define the relation of the church and the state. Rather, from his earliest mention of the two kingdoms in lectures on the Psalms to his mature formulation, Luther employed this teaching to describe the human relation to God.⁷

When Luther spoke of the human person as a "private person" and as the "inner man", he referred to this religious relationship. This

5. Shaffer, note 59.

6. An extended bibliography on current literature is available in U. DUCHROW, *CHRISTENHEIT UND WELTVERANTWORTUNG*. (1970). In his work, Duchrow traces the two kingdom doctrine from Paul to Luther including a comprehensive study of Augustine and an overview of medieval thought. An anthology of contemporary perspectives is available in KARL HERTZ, ed., *TWO KINGDOMS AND ONE WORLD* (1976).

7. U. DUCHROW, *supra* note 6, at 461f., 475f.

he described as the kingdom of the Gospel and as the life of faith. Our modern usage of the term "faith", however, makes it difficult to understand Luther's thought. For him, faith was not primarily a term for the human side of the God-man relationship, that is, man's response to God's action. It was a term for the total relationship. God is the subject of the life of faith, not simply the answer to human needs.⁸ The person of faith, however, is not an isolated individual, nor does she simply live out her private life of faith in a social order. The human person has his being in his calling, his location in the world. The calling, not an inward, existential "moment," was for Luther the place of decision in the life of faith.

The terms "public" and "private" have a sharply different meaning in Luther's thought from the way in which Shaffer employs the terms. For the former, the terms are neither sociological or psychological, but theological. The term "private" refers to the relation to God which is the ultimate source of human dignity, and the term "public" refers to the entire life of action in the world.⁹ This means that for Luther all the moral life belongs to the public realm, including both what Shaffer, following common usage, terms personal and public morality. Luther's two kingdoms doctrine really entails a one kingdom ethic.

The primary substantive issue Shaffer raises with respect to the two kingdoms ethic is its implied sharp distinction between an ethic of law and an ethic of love. The figure which dominates this discussion is Reinhold Niebuhr.¹⁰ In his effort to articulate a political ethic rooted in the Christian faith, Niebuhr distinguished clearly between love and justice, or law, and assigned them to the private and public spheres of life respectively.

For Niebuhr, love in its essential form refers to a self-sacrificial disposition which is not only non-violent, but non-resistant. This love rejects all use of force, overt or covert, in influencing the action of another person. Throughout his writings love always represents for

8. H. OSTERGAARD-NIELSEN, *SCRIPTURA SACRA ET VIVA VOX* 136 (1957).

9. U. DUCHROW, *supra* note 6, at 547f., 585. Because of the purpose of this paper, it has not seemed appropriate to develop at length Luther's thought at this point. Luther's understanding of human nature and his conception of faith corresponds closely to what John Macmurray terms our "objective nature", that is that humans understand themselves in terms of the nature of reality external to themselves. J. MACMURRAY, *PERSONS IN RELATION* (1961), *passim*.

10. Shaffer cites Niebuhr along with Paul Tillich and Harvey Cox. It is difficult to understand the inclusion of Tillich, since he understood love to be related to justice in a much more integral sense.

Niebuhr an ideal embodied in the life of Jesus. In political relationships, however, this ideal always proves ineffective since politics by definition entails the use of coercion. Love may inform political action, but the latter never fully embodies the former.

In contrast to Niebuhr, Luther understood love, the natural law and just civil law to be identical. Love does not simply influence law or the polity of the state, but is the normative content of just civil action. The content, however, is not defined either simply by intuition or by religious tradition. Instead it depends upon the exercise of human reason, which finds its highest expression in the principle of equity. In the world the Christian as moral subject acts as an autonomous person who bears responsibility for her decisions. And precisely as this autonomous subject the human is the co-worker with God, who is finally the subject of his work and action. By the use of reason, all humans know the material and formal causes of law and love, even though the efficient and final causes may remain hidden.¹¹

The difference between these two points of view is complex and sometimes appears more terminological than substantive. For Niebuhr, however, love can find expression fully only in the forms appropriate to intimate personal relationships. Justice depends upon the achievement of a balance between freedom and order in power relations and finally depends upon the use of coercion. The tension between love and justice arises in this framework because love is defined as an ideal. And the ideal has to be compromised in order to be effective under the actual conditions of human existence. It is a question, however, whether love has to be defined in such ideal terms.

Love can be defined as recognition of another human being as a person, which implies concern for the other person for his own sake. In the language of Gene Outka, love implies both a declaration of policy by an agent and a viewpoint concerning another person as a neighbor. The agent commitment implies regard for another's well-being which is independent of the person's moral actions and character traits and which is unalterable in that it persists in this attitude even though the other person's behavior must be evaluated negatively. Love also implies a viewpoint of other people as irreducibly valuable prior to their doing anything in particular, and this valuation is made of the person *qua* existent. Thus, it is the basis for the equality of persons.¹² Obviously both these elements, which Outka terms agent-commitment

11. *See supra* note 10.

12. G. OUTKA, *AGAPE* 9f (1972).

and recipient evaluation belong to a full definition of love. The differences between the traditions represented by Niebuhr and Luther can in part be explained by their different emphasis on one of the two elements of this full definition. Niebuhr focuses more on the agent commitment and defines this in terms of action which avoids the use of force and is willing to sacrifice self-interest for the sake of the other. Luther focuses more on the valuation of the recipient as a person and thus, considers the need for different kinds of action depending upon the socially defined relationship between persons.

The definition of love as recognition of another as a person seems to accord with the foundation principle of Shaffer's one-kingdom ethic illustrated by a series of examples in his final lecture. Shaffer evaluates each of these examples of law practice positively because regard for the person is normative. The fictional Daniel Webster demonstrated that it is good for Jabez Stone simply to be a human, Terminello was recognized as a human being who needs to communicate with other people, as we all do, and finally a slave is not a chattel but a human being.

The fundamental value of the human being as a person provides for Shaffer a basic moral principle that can be valid as the primary norm for all moral action.¹³ It provides a continuity between personal and public morality. And this continuity provides the basis for a one kingdom ethic. A continuity of principle, however, does not demonstrate that the same rules of action are binding in both public and private morality. And this seems to be the question at the center of Shaffer's lectures.

Shaffer expresses his argument for a unified ethic most forcefully in his assertion that a moral agent cannot be a person one moment and the doer of jobs the next. "In morals . . . only a person acts, always a person, always and only a person."¹⁴ Immediately the question arises whether Shaffer is making a descriptive or a normative statement. A strong case could be made for both interpretations, but the general context of the lecture points to understanding this as a normative judgment. The moral requirement that a person express himself fully in his action, however, does not logically imply that the activity itself or its product expresses the fullness of his or her personhood. This distinction can be illustrated in both the work and theoretical reflection of Max Weber. Weber dedicated much of his

13. Shaffer, at 35.

14. Shaffer, at 25.

scholarly activity to developing a value-free methodology for the social sciences. The impulse for his quest of an "objective" sociology, however, stemmed from his observation that Prussian policy with respect to the Polish peasants often achieved the opposite of its intended purpose. An effective political policy required more objective knowledge. In carrying out such study it was necessary to bracket values and personal interests. But Weber was quite aware that his quest was informed by values which were broader than single-minded dedication to value-free objectivity. In this sense, he invested the whole of himself in his academic work, but the academic work itself did not express his total person.¹⁵

In a similar fashion an individual may invest himself totally in a moral action without that moral action expressing the whole of her moral concern. The danger, against which Shaffer wants to guard, is that the activity may become so demanding and so engaging that the individual loses awareness of the larger dimensions of the self. The example of Albert Speer portrays an individual who so single-mindedly pursued the goal of being an architect that finally his entire life and person was reduced to nothing other than being an architect.¹⁶ This is the danger Shaffer sees in single-minded pursuit of the adversary system of justice.

What is to be the relation between a person and the tasks he performs? Shaffer treats this problem in terms of the relation between a person and social institutions. If there is a difference between Shaffer and the tradition represented by Luther, it would seem to lie at this point in the discussion. Luther employed the language of calling and office to speak of this institutional aspect of life. And it is here that the question of the relation of private and public morality surfaces more clearly than in relation to the doctrine of the two kingdoms.

The language of the lectures speaks of institutions as something which people use or which they serve. The implied independence of people from institutions voices an understanding of persons and community which Shaffer himself apparently repudiates. A long tradition in the West has assumed that the freedom of the individual depends upon liberation from institutions. From the Enlightenment through the 20th century, progress, reason and freedom were considered dependent upon autonomous, self-sufficient individuals. The concern for the freedom and autonomy of the individual was often equated with a

15. M. Weber, "*Science as a Vocation*" in H. H. GERTH AND C. WRIGHT MILLS, ed., *FROM MAX WEBER* 129f (1958).

16. Shaffer, note 78.

negative valuation of institutions. As a result, there emerged an individualism which combined an implicit psychology and a theory about the relation between persons and institutions with the emphasis on the ethical centrality of the person.¹⁷ It was often assumed that the individual human being possesses a given human nature to be nourished and developed in society. Thus, the source and norm of personal freedom and integrity were located in the human individual. Today this conception is, to say the least, considered questionable.¹⁸

This tradition produced a constricted conception of institutions, which has had broad implications for understanding human freedom and moral responsibility. In everyday usage, the term "institution" has come to denote organized groupings of actions carried on in a somewhat established and expected way—a factory, a church, or a club. The lectures cite similar examples. These social forms, which are also frequently termed organizations or associations, are characterized by a structure which is voluntary, organized in terms of promotional and administrative offices, and tend to have a known membership. But the term "institution" has a broader meaning. It refers to any habitualized action and meaning shared by two or more people. Perhaps the best example of such a social institution is language, which provides the basic instrument for sharing a common world and a common life.¹⁹

An important difference in perspective results from these two different conceptions of institutions. For the latter, broader usage, institutions are fundamental to human community. Community arises

17. R. NISBET, *COMMUNITY AND POWER* chs. 9 and 10 (1962).

18. One of the most widely cited contemporary works articulating an alternative theoretical framework for understanding human nature is that of P. BERGER AND T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966). Their position is stated most succinctly as follows:

There is only human nature in the sense of anthropological constants (for example, world-openness and plasticity of instinctual structure) that delimit and permit man's socio-cultural formations. But the specific shape into which this humanness is molded is determined by those socio-cultural formations and is relative to their numerous variations. While it is possible to say that man has a nature, it is more significant to say that man constructs his own nature, or more simply, that man produces himself.

Id. at 47.

19. In a sense, language can be termed a metainstitution because it has the unique characteristic that an individual cannot withdraw from it and because all other institutions find their justification and obligating character through the binding medium of meaningful discourse. The primary resource for developing the conception of institutions here presented is the interdisciplinary work edited by H. SCHELSKY, *ZUR THEORIE DER INSTITUTION* (1970)

in and through institutions and becomes identical with them. And the difference between broad, informal institutions and the narrower, more highly organized forms is quantitative, not qualitative. The more narrow perspective views institutions as tools or instruments which a group, or even an individual, uses for its own purposes and in accord with its own values. For the latter, social institutions provide the context in which we live out our personal lives, while for the former we carry in ourselves the social forms which define our moral responsibility.

Institutions are thus, both an unavoidable necessity of human existence and also, forms of life for which human beings bear responsibility. When Luther spoke of the Christian life in terms of "callings" or "vocations", he affirmed that the individual person does not exist apart from such an institutional context. A great distance, however, separates us from the medieval Luther. Acquaintance with diverse cultures, the rapid pace of social change which results in the alteration of fundamental institutions such as marriage and family, the reflective distance provided by anthropological and sociological studies supplies people with a new sense of the plasticity of institutional life. But the difference seems to be one of degree, not a qualitative difference. The individual still depends upon shared and coherent institutions to achieve stability and responsibility for life, even though we are aware that the institutional forms are "chosen" from a variety of possibilities.

The modern phenomenon of reflective awareness in our relation to social institutions produces a new dimension to our moral reflection. Ethical reflection has to consider both what actions a responsible participant has to perform as tasks are defined by existing institutions and also to consider how institutions need to be changed in order to encourage and sustain a fuller individual and communal life. A good example of the struggle to deal with both dimensions can be found in contemporary efforts to define what it means to be a woman in modern Western culture.

The question of the relation of institutions to moral responsibility surfaces in two concerns of Shaffer in his lectures. One is the particular decision regarding truth-telling made by Atticus Finch. The life of Atticus Finch was that of a "gentleman", and the life and character of the gentleman was an institution of southern American culture. The values and attitudes embodied in this institution required that Atticus maintain a unity between his personal and public life. It produced an individual of high personal integrity and a strong sense of personal autonomy. At the same time, this institutional form pro-

duced an elitist mentality which considered as weak persons who were not weak at all. The example demonstrates the ambiguity of all institutional forms and the need for their constant modification in the light of new moral insight.

In particular, Shaffer has a problem with Atticus' resolution of the problem of truth-telling when he decides not to expose Boon Radley's act of homicide. Truth-telling is a fundamental moral principle that should be followed even though it causes suffering. From this perspective, it is clear what truth-telling means and the moral problem is finding the will-power to speak truthfully. For ethical thinkers who hold a different view of how responsibility is related to social institutions, the problem often appears the reverse. The difficulty is not that of finding the power to speak truthfully, but that of determining what it means to be truthful in a particular situation.²⁰ Being truthful means more than speaking the facts as one best understands them. It is also necessary to determine the right of another person to the information in question, the appropriateness of the time and place to relating the information, and who is entitled to speak as well as what to say. The factual accuracy of statements made by muckrakers, cynics and gossips does not warrant the judgment that they have spoken truthfully. The decision of Atticus Finch has to be evaluated in terms of institutional arrangements within which he lived, not simply in terms of what we today might consider better institutional arrangements. This does not imply that truth is arbitrarily relative nor does it excuse manipulating the facts, but only that truth-telling cannot be abstracted from a relational setting. It makes the responsibility for truth-telling even more demanding, and in no way diminishes Shaffer's insistence that the truth be told even though it may cause suffering.

The institutional perspective outlined above affirms Shaffer's argument for a one kingdom ethic, but it also implies a modification that may only be an elaboration of his theory. It is possible to define fundamental moral principles applicable to the most disparate situations: the dignity of the human person, the sanctity of life, and basic human rights. To affirm the continuity of fundamental principles, however, does not imply a unitary ethic in terms of rules of action. And here the language of personal and public morality proves inadequate. For there are a great variety of institutionally defined relationships that allow and demand different kinds of actions by the person who seeks to act responsibly. This does not imply that the clichés

20. D. Bonhoeffer, *What is Meant by 'Telling the Truth'?* in *ETHICS* 326f (1949).

"business is business" or "that's politics" provide a moral justification for commonly accepted practices. But a critical examination of current practice may still recognize the need for a variety of differing definitions of moral obligation.

The institutional perspective also has relevance for Shaffer's enduring interaction with the contemporary practice of adversary law. The adversary system of law is a highly formalized institution. In contemporary practice, however, the adversary system is often understood in terms of an adversary ethic, an anomalous ethic from which moral concerns are often excluded. The adversary ethic tends to reduce the relation between persons to nothing other than arbitrating and reconciling conflicting interests. But here Shaffer puts his finger on a larger social problem. Lacking any value consensus and sense of community, people in contemporary American society tend to understand persons primarily, sometimes almost exclusively, in terms of their interests. Even individuals view personal life as simply "doing one's own thing" and consider community as simply a means to enable individuals to pursue their own private interests.

Highly formalized institutions depend, for their stability and efficacy, upon the moral web nurtured and embodied in more primary human institutions. The state depends on social and communal values which it cannot itself create. In the words of Reinhold Niebuhr, a people can decide what form of government they desire, but they cannot so easily decide to be a people. Without a more fundamental and more comprehensive source of community and values, the formal institutions may eventually collapse or produce alienated persons.

Shaffer's concern can be understood as an urgent commitment to enlivening that larger social context. As a Christian, he can only consider this essential. At the same time he rehearses the many resources in our national and cultural traditions which can vitalize and invigorate a basic moral sense. The immediate audience of his lectures and most of his work is members of the legal profession. To this audience he poses the question whether a lawyer can function within the adversary system without becoming captive to the dominant adversary ethic. The question remains open for him whether the adversary ethic may become so dominant that a person dedicated to the value of the human person could no longer engage in the practice of law.²¹

In conclusion, it must be made clear where the final issue lies

21. T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER, 34, 175 (1981).

in Shaffer's argument. The lecture is posed in terms of the contrast between the two kingdoms and a one kingdom ethic. On these terms it might be tempting to characterize the theme as an example of what James Gustafson termed the "misplaced debate" between people who want to emphasize moral principles and rules over against those who want to emphasize the relational and situational context of moral decisions. But the issue is really focused on more fundamental dimensions of social life and legal practice. The question is whether or not basic moral concerns are to inform the day to day practice of law and the relationships between lawyers and clients. Here it is necessary to move beyond the private concerns of personal conscience to actual ethical interaction. On this point even those who would argue that one ethic is not enough can wholeheartedly agree with Thomas Shaffer.

DALE G. LASKY