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## Law and Morality: Reflections on the Angela Cardinal Case

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What constrains lawyer conduct? I don't mean in terms of positive law – i.e., the codes of conduct or the decisions of the court. I mean at its source – what is the bottom line restriction on a lawyer's professional role? I've been thinking about this question a great deal following the story of Angela Cardinal– the sexual assault victim who was incarcerated for 5 nights to ensure her testimony in a preliminary inquiry (trial judgment [here](#); media reports [here](#) and [here](#)). If what happened to Angela Cardinal was wrong (and I think it's hard to argue that it wasn't), and if what happened to her involved lawyers (which it did), then how can we identify the constraints on lawyer conduct so as to help them not to do such things?

This question of what constrains lawyer conduct preoccupies and divides scholars who write about theories of legal ethics. Some, including me, emphasize legality itself as the essential constraint. Law exists as a form of social settlement, a way for us to live together peacefully despite our profound disagreements about the right thing to do. It allows us to cooperate, and through its procedures it ensures respect for human dignity. A lawyer helps people to access the social settlement of law, ensures they receive the benefits of the law's procedures, and helps them to pursue their own ideas of what is right within the law. Lawyers may only do so, however, within the constraints of the law's process or substance. A lawyer cannot help a client do more than what the law permits, enables or requires.

Other scholars, most notably David Luban, accept constraints of legality, but also insist that lawyers' actions are limited by the norms of ordinary morality. If the law permits a grave wrong or injustice, it is no ethical excuse for the lawyer who facilitates the commission of that wrong to say "but the law permitted it": "when professional [role] and serious moral obligation conflict, moral obligation takes precedence" (*Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 63). A lawyer cannot justify the infliction of moral harm by saying "my job made me do it".

If Luban's scholarship can be reduced to one ethical preoccupation, it is with the problem of the good bureaucrat, who does his job well but in service of great evil – the Adolf Eichmann who makes the trains run on time to carry Jews to the concentration camps. That is, with what Hannah Arendt famously called the "banality of evil", where the actor seeks to do a good job, not evil, but the good job results in the most enormous evil imaginable. And so with lawyers: Luban fears the lawyer who, in service of his social role, loses sight of the actual moral and ethical dimensions of his conduct; the lawyer who fails to see a wrong he commits when he does the things that lawyers do.

The Angela Cardinal case can be used to support either of these positions. On the one hand, and as I explained in a [letter](#) I wrote to Alberta's Minister of Justice and to the Law Society of

Alberta, there is a reasonable argument that the lawyers and judge failed to observe the boundaries of legality: if the procedural requirements of fundamental justice, the substantive terms of s. 545(1)(b) of the *Criminal Code*, and the lawyers' obligations under the applicable codes of conduct had all been complied with, Ms. Cardinal would not have been incarcerated. That respect for the boundaries of legality would, here, have avoided the wrong that occurred.

On the other hand, it is impossible not to think that part of the problem here was a failure to see Ms. Cardinal in her full humanity. Angela Cardinal (a pseudonym for this brave and resilient young woman) was just over 5 feet tall, and a tiny 109 lb. (Preliminary Inquiry Transcript, p. 602). She sang a hymn to herself – “this little light of mine” – as she tried to sleep in the stairway where she had found shelter (Transcript, p. 565). She appreciated the police who were kind to her, even ones who had arrested her in the past, describing them as “awesome” (Transcript, pp. 745 and p. 835). She kept a poem in her sock – “you look best in a smile so wear that one with pride because it’s always darkest before dawn” so that, if it fell out, it might make someone’s day more beautiful - “little things like that might make life beautiful” (Transcript, pp. 645-646). She often made bannock badly – like a “hockey puck” – but was proud when she made some that turned out well (Transcript p. 734). And, after a serial offender who was nearly 6’8” and 260 lb dragged her from her stairway, she never gave in. She fought him, she bit him and, ultimately, managed to get his phone, call 9-1-1 and throw it across the room, screaming as loudly as she could until the police came (Trial judgment at paras 17-27, account of Ms. Cardinal and accepted by the trial judge).

If the lawyers and judge in that court room had seen Ms. Cardinal in this way, had seen her not as a problem to be solved but as a vulnerable, caring, resilient and brave woman, would they have felt the same way about locking her up? Would it have seemed right? Justifiable? Would they have been more careful?

I can’t help but think that even if we constrain lawyers through the boundaries of legality we make a terrible mistake if we don’t remind lawyers to think about the human consequences of what they are doing. The law’s procedures and rules exist to ensure we do not interfere with human autonomy and dignity except when doing so can be justified; remembering what human dignity looks like will help us know when we must follow those procedures and rules to the letter. And, finally, remembering that human dignity is a quality enjoyed by the homeless and indigenous, as well as by the white and the privileged, is something that legal actors and the legal system have to do, or following the “rules” will never achieve what is right and just.

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