

Legal Ethics, Narrative, and Professional Identity: The Story of David Spaulding

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Roger Cramton has called *Spaulding v. Zimmerman*¹ “one of the great gems of law teaching.”² The case is extensively discussed in books and articles dealing with legal ethics and is prominently featured in professional responsibility casebooks and courses.³ According to Professor Cramton, “*Spaulding* teaches important lessons about the law and ethics of lawyering.”⁴ These include “the unwillingness of lawyers, judges and the organized profession to talk openly and seriously about the situations in which threats of harm to third persons justify a breach of one of the lawyer’s most sacred duties, that of confidentiality to client” and “the reality, again shrouded in professional and judicial silence, that the adversary role of the lawyer in litigation arguably permits, and may sometimes require, a lawyer to behave in an amoral or immoral way.”⁵

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1. 116 N.W.2d 704 (Minn. 1962).

2. Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 65 (1998).

3. The case even served as the basis for an episode of *The Practice*. *The Practice: Honor Code* (ABC television broadcast Nov. 18, 2001).

4. Cramton & Knowles, *supra* note 2, at 65.

5. *Id.*

Here, we approach the case of *Spaulding v. Zimmerman*⁶ from a different angle. What follows is a retelling of the story based upon interviews of several of the people associated with the case.⁷ Most importantly, David Spaulding, the central character in this drama, has spoken for the first time about those events.⁸

We do not tell this story simply to add to the body of information we have about a significant case. David Spaulding's story, as presented here with details never before told, is important for the teaching of legal ethics because it is a stark example of how the actions of lawyers and the conventions of the legal system failed in their moral responsibilities to David Spaulding.

In telling the full story of David Spaulding and what happened to him over fifty years ago, we intend to show how narrative can be fruitful, if not crucial, for law students as they develop their professional identity and purpose. More specifically, we examine the teaching and learning of legal ethics from the perspective of *professional identity*.

Educating Lawyers: Preparation for the Profession of Law (the "Carnegie Report"),⁹ the recent report on legal education by the Carnegie Foundation for the Advancement of Teaching, identifies three "apprenticeships" for legal education.¹⁰ The intellectual or cognitive apprenticeship develops what a lawyer knows and how a lawyer thinks; the practical apprenticeship develops the skills that a lawyer must possess; and the normative apprenticeship develops the lawyer's professional identity and purpose.¹¹ This third apprenticeship, the formation of ethical and committed professionals, includes imparting the rules of conduct for lawyers and also the task of inculcating the values and ideals of the profession.¹² The Carnegie Report contends that while

6. 116 N.W.2d 704 (Minn. 1962).

7. Many of the people associated with the case of *Spaulding v. Zimmerman* were interviewed by Professors Cramton and Knowles for their article. Cramton & Knowles, *supra* note 2. We draw upon their excellent work in our own retelling of the story.

8. John Gallagher located David Spaulding and interviewed him at length for this Article. We are tremendously indebted to Mr. Spaulding for his openness, candor, and kindness in cooperating in this effort.

9. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

10. The metaphor of the three apprenticeships for professional education is discussed in WILLIAM SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (2d ed. 2005).

11. SULLIVAN, *supra* note 9, at 28.

12. The focus on the apprenticeship of professional identity is perhaps the most innovative and promising aspect of the Carnegie study. Professor Sullivan discussed legal education and the formation of professional identity during the Mercer Law Review Symposium on November 9, 2007. See William M. Sullivan, *Legal Education: The*

law schools do an excellent job on the cognitive apprenticeship and recently have improved markedly in the skills apprenticeship, law schools should do more to develop and integrate the normative apprenticeship.¹³

Traditional legal analysis, including the use of cases, is focused on the cognitive dimension of lawyering. Cases in law study, including courses on legal ethics, are vehicles for the teaching and the analysis of rules. Stories, on the other hand, open our vision to people and their relationships and to possibilities of meaning, purpose, and identity. Accordingly, they expand our ethical vision and empower the development of professional identity and purpose. In telling the story of David Spaulding—as opposed to analyzing the “case” of *Spaulding v. Zimmerman*—we are able to see what happened very differently.

Ethics is more than rules, principles, and obligations; it's about how we live our lives and the kind of persons we are. As we grapple with fundamental issues of purpose, meaning, and identity, we will likely find stories to be more helpful than rules or principles. Narratives and stories can help lawyers act with wisdom and integrity—virtues that are more central to the moral life and development of professional identity and purpose than is a hearkening to rules and principles.

Over the last generation, many legal scholars have urged the importance of narrative for legal ethics and legal analysis generally.¹⁴ We share that view of the importance of narrative, especially this narrative of David Spaulding.¹⁵

Academy, the Practice, and the Public, 59 MERCER L. REV. ____ (2008).

13. SULLIVAN, *supra* note 9.

14. See, e.g., ROBERT COLES, *THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION* (1989); THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 1-5 (1991); THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985); THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 296-97 (1987); JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1 (1990).

15. The following narrative is based in part upon telephone interviews by John Gallagher with the following persons: David Spaulding, on June 20, 2000; Florian Lederman, on February 28, 2000; and Richard Pemberton, on July 26, 2000.

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David Spaulding was twenty years old in 1956. He lived in Elbow Lake, a town just twenty-two miles west of Brandon, in west-central Minnesota with his parents, his brothers, and his sister. Fifty years later, it's still possible to hear in his voice the neighbor he was reared to be—patient and respectful of others.

When Mr. Spaulding tells about what happened in August of that year and about the years that followed, he steps with caution around the spaces occupied by the other people in his story. In his very quiet, rasping voice, he doesn't blame, he describes. He doesn't harangue, he recounts. David Spaulding works hard at it. He pauses between sentences, as if he is measuring out his thoughts, weighing them before he presents them to his listener. And what he doesn't know for sure, he doesn't try to surmise, leaving intact the privacy of another person's experience.

In those days, David Spaulding, his oldest brother, Alan, and his friend, Howard Lerpas, found work in the small road construction company owned by Ed Zimmerman. For David, this was a summer job. Come fall, he would be returning to the University of North Dakota. He described Ed Zimmerman as a boss who would get his way through intimidation.

"Ed Zimmerman gave my family income, so you do what he says, and if you don't, you're kinda poked fun of. Rush, rush and get it done. Rushing and work came first with him. Safety was hopefully forgotten." But David and Alan were glad for the work.

You have to realize that I came from a family of no money. Much of my life, my dad never had a steady job. He was a farm hand when he was younger. But then he married my mother. My mother's folks owned this farm and they let her and dad get on it if he would farm it and take care of it. He did that for a few years—maybe ten or twelve years. But then he sold the farm and bought a sales pavilion in Elbow Lake, Minnesota. That didn't go over. So I would say, most of his life he didn't have a steady paycheck. There was no money back then.

A half-century ago, Highway 52 was the principal road that ran from Minneapolis all the way up to Moorhead, on the North Dakota border, passing through modest clusters of houses and stores that made up many of the farming towns. To enter a town like Brandon, a town with about 300 post office boxes, mostly held by the farmers in the surrounding countryside, a driver would have to slow to twenty-five miles an hour to pass its barbershop, the tavern, St. Anne's church, and the brand-new hardware store that everyone took pride in. Off the main street was the single consolidated school where children were bused in from the surrounding farms. Looming over everything were the two grain elevators. There was no stop light. In little more than a minute, the driver would have passed completely through Brandon, resumed his or her speed, and been back on 52.

On Friday, August 23, 1956, on a farm outside of Brandon, the Lederman family had plans to go to the county fair about fifteen miles away in Alexandria. All six family members—John, Pauline, and their four kids, Elaine, twelve, her fifteen-year-old brother Florian, and the two younger brothers, Ben and Phil—climbed into their 1950 Ford. County fairs are occasions of expectation, a chance to show off prize livestock, to visit with friends, a kind of pause in the farm year before the children return to school and the long days of corn harvesting begin. Everyone was looking forward to the fair. Florian drove, having recently gotten his farm license. The Ledermans pulled out of their farm and headed south on one of the county roads that sectioned the many farms of Douglas County.

On the other side of the county, a little before seven o'clock, Ed Zimmerman's road construction crew had decided to pack it in. Zimmerman often gave the Spauldings a ride to Elbow Lake before he headed to his own home in Barnett, a few miles away. They typically packed their gear and squeezed themselves into Zimmerman's 1956 Plymouth Fury, six men bone-tired from working under the sun all day long, covered in dust and smelling of macadam.

David Spaulding remembers how hard he had worked that day.

As a grade checker, I would run a lot during the day. I'd run in front of the Caterpillar, pulling these slabs so that they could finish the shoulder. When I got into the car that night, Jack was driving, his father Ed was in the middle, and I was in the ladies', the passenger side of the car.

Behind David was Ed's older son Jimmy, who was twenty-nine years old. Howard Lerpas was in the middle of the back seat, and next to him was David's oldest brother, Alan. David Spaulding recalls how fast nineteen-year-old Jack was driving, how "wide open" they were moving down the highway.

On every side of the flat Minnesota road, corn was planted to the very edge of the fields, rising well above the height of these young men. At that time of day, an hour or so before sunset, there is a sharp contrast between the remaining sunlight and the deep shadows the corn casts on the shoulder of the road. Not many cars on the road. Not much to notice. One corn field looked just like the last. All pretty much the way it was yesterday and will be again tomorrow.

The two cars, one driven by fifteen-year-old Florian Lederman and the other by nineteen-year-old Jack Zimmerman, reached the four-way intersection on Old Highway Number 3, just outside Brandon, at precisely the same moment that evening. Neither driver would have thought to stop at the crossing because there were no stop signs. Neither driver could have easily seen the other approach because of the wall of corn limiting their sight lines.

In that one brief moment, when they did see each other, it must have seemed like an apparition. Another car appearing out of nowhere, as if out of the field of corn. At fifty miles an hour, they struck. The Zimmerman car rolled for 140

feet and finally landed in the cornfield. Its front end was compacted in two feet, and the roof was flattened to the level of the passenger seats.

Nine of the ten passengers were strewn over the road. Zimmerman's oldest son, Jimmy, was killed instantly. David Spaulding recalled, "The Lederman girl, you know, the one that died, my oldest brother said she was out on the road that night picking up billfolds. But the next morning she just keeled over."

John Lederman was in critical condition with a crushed chest and an arm so badly injured that he would never be able to work his farm again. Forty-four years later, Florian Lederman said that his father "did live to the age of eighty-nine, and he had a lot of pain through those years. It is something that's there all the time, the loss of your daughter."

Ed Zimmerman's neck was broken. And young David Spaulding was unconscious for three days with a severe brain concussion, two broken clavicles, multiple rib fractures, and a crushed chest.

Once the dust of the road settled, after the stunning confusion, after the moaning and calling out to family members, and finally after the dreadful realization of their losses, a silence would drape itself over what had happened to these twelve people for many years to come. In that part of the country, people do not easily talk about their troubles.

By the next week, Florian Lederman and his brother, Ben, both of whom had been hospitalized for three days, were sent back to school as if nothing had happened. Their family would rarely speak of the accident again. A disaster like this, no matter the personal losses or feelings, was handled much the same way as a fire or a drought, a situation in which the adversary is fate, not one's neighbors.

David Spaulding's injuries were serious. When his father, Theodore, was presented with the bills for David's hospitalization, the surgeries, the neurological work-ups, and the physical therapy, the cost was staggering for a man of his limited means.

In rural Minnesota in the 1950s, filing lawsuits against friends and neighbors was almost unthinkable. Being a good neighbor was important around Brandon, a kind of measure of a person's worth, where a man would be judged by how his acts affected his community. (The radio station most listened to in those days in rural Minnesota was WCCO, "Your Good Neighbor Station.") A good neighbor minded his own business, worked toward his own self-sufficiency and respected yours, but noticed when you needed help. It made little sense to be adversaries or competitors because they all needed each other to face acts of fate and God: the tractor that wouldn't start, the broken arm at harvest time, a death in the family.

But while suing friends and neighbors went against the grain, reaching into the resources of an insurance company was something else. Although the typical policy limit in those days was \$50,000, and the state law capped a wrongful death award at \$15,000, there was surely enough in the Zimmerman and

Lederman policies to cover the medical bills and funeral costs for all of the families.

David's father hired a young lawyer in Elbow Lake to represent the claim he was making on his son's behalf. Richard "Dick" Roberts was twenty-five years old, recently out of the St. Paul School of Law. David Spaulding remembers Dick Roberts as "an aggressive young lawyer." There was only one other lawyer in town. "An old lawyer. He was a kind of income tax man. And this whipper-snapper Dick Roberts came along, you know, and so I guess I didn't have a question about him."

The situation seemed fairly straightforward, just a matter of filing the appropriate claim forms and sending along the documentation of David's medical bills. David was still in the hospital when the claims were being processed.

Back then Roberts would say to me, "Don't say this. Never tell them that." It was kind of a toughie for me because the claims adjuster would come by the hospital for this workman's compensation, and hell, I was trying to remember what I was supposed to say and not say.

Workman's compensation was a possibility. But Roberts explained to the Spauldings that the award would be less than they needed. He encouraged them to proceed with the claim against the auto insurance company. They were surprised when the insurance company said that it would only cover half of the cost of David's medical treatment. The balance, three thousand dollars, was a major portion of Theodore Spaulding's yearly salary.

Three months after the accident, Dick Roberts brought a suit against Florian Lederman, John Zimmerman, and their parents who owned the vehicles. Under the terms of the Zimmerman and Lederman insurance policies, the insurance companies were required to pay for lawyers to defend the case; the insurance companies also had the right to select those lawyers. The Zimmermans' insurer selected Norman Arveson, an experienced trial lawyer from a Fergus Falls law firm. The Lederman's insurance company chose Chester Rosengren, whose law firm was also located in Fergus Falls.

While the Spauldings hired a familiar (and affordable) face to represent them, the Ledermans and the Zimmermans had no say in their selection of lawyers. In fact, Florian Lederman remembers that his father was reluctant to get involved with the lawsuit at all.

"Sitting in the living room, we asked our family attorney if we had to. He said we needed to defend ourselves or we could lose our farm." What the Ledermans and the Zimmermans didn't realize at the time was that they would also have little say in how their case was being handled; for the next seven years, the lawyers prepared written pleadings and other documents with little or no input from the two families.

In the course of his treatment, David was examined by three doctors: his family physician, a general practitioner from Alexandria, Dr. James H. Cain; an

orthopedist, Dr. John F. Pohl; and a neurologist, Dr. Paul S. Blake. A month after the suit was filed, the Zimmerman defense counsel retained another neurologist to examine David, Dr. Hewlitt Hannah from Minneapolis. Dr. Hannah sent his assessment to Norman Arveson, and Arveson shared this report with Rosengren, the Lederman lawyer. He did not offer it to Dick Roberts, and Roberts negligently failed to request a copy as part of the pretrial discovery.

A day before the trial was scheduled to begin, the three lawyers met to negotiate the claims involving the Zimmerman and Lederman families. They never discussed David's injuries in specific terms. At the end of the conference, the lawyers reached a total settlement of \$40,000 for all the claims that arose out of the accident. David's portion was \$6,500.

One final step was required before David's claim was settled. Because he was still a minor, any settlement had to be reviewed and approved by the court. Roberts filed a petition requesting court approval, listing only the injuries known to David and his lawyer, and sent a copy to the defense lawyers. On May 8, 1957, sixteen days before David turned twenty-one, the court approved the settlement and dismissed the case.

When David left the hospital, he decided to transfer from the University of North Dakota to St. Cloud State College, which was closer to home, to study teaching. Although the doctors had assured him that he was on the mend, twenty-one-year-old David continued to have problems.

I rode Caterpillar tractors with my brothers, and I would get fast striking pains in my chest. They would help me off the tractor and set me by a tree. I went to see Doctor Cain in Alexandria quite a bit about it because I felt something was probably wrong. I was kind of scared, you know.

Two years went by, during which time David continued to suffer the intense chest pains and to seek advice from his family doctor. David was in the midst of student teaching when he went again to see Dr. Cain, who took yet another chest X-ray. At that time, many general practitioners, particularly in rural areas, did not have much training in reading X-rays. So it was common to refer questions to the traveling radiologists who serviced the practices of the general practitioners in the small towns.

In January 1959 Dr. Cain referred David's X-ray to a visiting radiologist. The radiologist discovered the cause of the terrible chest pains: an aneurysm on the main artery leading out from the heart. A sac had formed where the aorta had been injured, billowing out like a balloon. By the time the radiologist identified the aneurysm, it had grown so large and the arterial walls were stretched so thin that blood was seeping through. His aortic wall could have burst at any time.

Dr. Cain sent him down to Minneapolis for immediate surgery. The operation was performed in Mount Sinai Hospital under the direction of five doctors and was originally scheduled to last five hours. Spaulding remembers:

Back in those days, I think it was the second operation of its kind in Minneapolis at Mount Sinai Hospital. They laid me on my side and took my left arm, put it over my head, and cut a rib out. And then they went in from the left side. When they got in there, the aneurysm was so big that they had to sacrifice what they called the recurrent laryngeal nerve.

The original plan was to snip the aorta, remove the damaged section, and then sew it together around a piece of nylon tubing. But after the heart was uncovered, this plan had to be revised. It was decided that the weakened portion had to be removed and sewn up without the benefit of a plastic insert. This far riskier and more difficult procedure lasted almost ten hours. Even more important to David was that, following his surgery, his speech was permanently and irrevocably affected. "After the operation, I always talked with a very high pitch, sounded kind of feminine." David would speak with that voice for another ten years.

The doctors believed that the aneurysm had been caused by the injuries sustained in the car accident, and the Spauldings decided to reopen the suit to recover the medical costs. Dick Roberts went up to Fergus Falls where Norman Arveson was practicing and mentioned to him that they had just found out that one of the boys who had been involved in the accident had an aortic aneurysm. According to David Spaulding, Arveson responded, "Oh hell. We knew that from the very beginning." In the subsequent legal proceedings, it was discovered that in the examination that took place in February 1957, Dr. Hewlitt Hannah, the neurologist who had been retained by Norman Arveson, had seen the aneurysm.

A week prior to the original trial date, Dr. Hannah sent a report to Arveson saying:

The one feature of the case which bothers me more than any other . . . is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm . . . might rupture with further dilatation and this would cause his death.

At the settlement conference in early 1957, the lawyers for the Zimmermans and the Ledermans had known that David's life was in danger. But Dick Roberts, having failed to follow the usual procedure to request the doctor's report, did not know. It happens, though, that Roberts had a report in his files from a different physician, one who had treated David. That report, dated March 1, 1957, recommended that the case not be settled for a year because "the full extent of David's injuries may not be known yet."

Roberts, apparently eager to get the case settled, did not want the other side or the court to see the treating physician's report. Roberts did not request Dr. Hannah's report probably because he did not want to furnish his own report.

The court, therefore, had approved the settlement in ignorance of all the facts, including both the treating physician's report and Dr. Hannah's report.

Roberts filed a motion for the trial court to set aside the earlier settlement, alleging that the defendants had fraudulently concealed the existence of the aneurysm. The trial judge granted the motion and reopened the case. The insurance company appealed the judge's ruling, claiming that nothing improper had taken place in 1957.

The appeal was headed for the Minnesota Supreme Court. Dick Roberts bowed out, suggesting that the Spauldings hire a lawyer with experience appearing in front of the state supreme court. They hired the firm of Gislason, Gislason and O'Brien. David Spaulding remembers that "they had a young lawyer, Bob Gislason, who wanted to argue the case." So they agreed to take on the suit.

Norman Arveson and Chester Rosengren also did not appear. They selected Richard Pemberton, a new young lawyer from Rosengren's law firm to argue the case on their behalf. According to Pemberton, neither Arveson nor Rosengren wanted to face the justices and explain their behavior, having made no attempt to protect the boy.

Pemberton stated,

It was a distasteful case, and I figured that I was going to get buffeted around by the justices. But I think they knew that I had been sent down to do this thing. They could see that my senior partner and Arveson, who were good friends as well as professional colleagues, had sent this young guy to handle this case.

Pemberton, however, had deep misgivings about defending what his senior partner had done.

At the time, I had a year-and-a-half old son, my wife was pregnant or [had] just given birth to our second son. If I had a few more years of maturity, I would have refused to argue this case. I would have said, 'Find somebody else.' Of course, it would have meant that I would have had to find some other place to practice law, too.

In 1962 the Minnesota Supreme Court affirmed the trial court's decision to set aside the earlier settlement.¹⁶ The court stated no view on the law and ethics of the lawyering involved but agreed that because David was a minor at the time of his trial, Arveson and Rosengren had a duty to reveal his medical condition to the court.¹⁷ The court agreed with Judge Rogosheske, the trial judge, that neither Arveson nor Rosengren had committed fraud because they did not lie,

16. *Spaulding*, 116 N.W.2d at 710-11.

17. *Id.* at 710.

they just omitted to tell the court what they knew.¹⁸ The trial court did, however, place responsibility for Spaulding's failure to learn the full scope of his injuries on Roberts, who, due to his "ignorance" or "incompetence," failed "to use available rules of discovery" to obtain Dr. Hannah's report.¹⁹ Because Roberts did not request the defendants' medical findings, Arveson and Rosengren were under no procedural obligation to provide Dr. Hannah's report to the opposing party.²⁰

The trial judge had added that "there is no doubt of the good faith of both defendants' counsel," presumably meaning that the attorneys for the defendants were not morally accountable because they were only doing their job under the adversary system.²¹

The case was remanded to the trial court, and in 1963 it was finally settled. This time David was awarded \$25,000.

"Of course the lawyers got \$12,500. I owed about \$6,500 on the operation, and then my family had a machine business, so they got some of that money."

Before the Minnesota Supreme Court ruling, the insurance company had sent David Spaulding to see Dr. Hannah again. David remembers how Dr. Hannah took him aside and told him that he had known about the aneurysm during the first examination a few months after the accident, saying, "You have to understand that I was loyal to the other lawyers."

Pemberton knew Dr. Hannah as a well-known adverse witness. "He had testified countless times in court and was very defense oriented." Pemberton believed that the law did not regard the independent medical examiner to have any physician-patient relationship because the examination is not for treatment. "Thus, Hannah had no responsibility to tell David about the deadly aneurysm. It's a cause of confusion still for some plaintiffs. They think they are going to see a doctor who's going to figure out what's wrong with them."

It seemed to David Spaulding that all those people who might have saved him from more than two-and-a-half years of severe pain and the permanent loss of his natural voice had betrayed him. All of his assumptions about how decent people behave and how the system might support people's welfare had been dashed. He was young and inexperienced, and although he was overwhelmed with what they had done, David had little idea of what to do. He felt powerless.

I felt I wanted to expose this Arveson in Fergus Falls by writing a letter to the Grand County Herald. It's the paper in Elbow Lake. But I did not. Then I wanted to go up to Fergus Falls and start rumors about him or gossip about him. But I came from a family whereby

18. *Id.* at 709-10.

19. *Id.* at 709 (internal quotation marks omitted).

20. *Id.* at 709, 710.

21. *Id.* at 709 (internal quotation marks omitted).

what we know within the family, though we may have problems, stays there.

In the end, David did none of these things.

After the surgery, David finished up his student teaching and received his teaching certificate. "I began looking for a job, but I didn't have much of a voice for teaching. I talked in a very high pitch." He turned to work as a salesman, selling supplies to schools. Eventually David found a job as a long-term substitute teacher and taught in a consolidated school in Iowa for three years.

With his voice now so thin and reedy, it was nearly impossible for David to command the attention of a group of children. "I just couldn't survive in the classroom."

David used the last of the settlement money to earn his Masters degree in School Psychology from the Emporia State Teachers College in Emporia, Kansas. "I was a school psychologist for about thirty-one years. With this psychology business, it is just one-to-one."

The problems with his voice, however, were not over.

For about ten years, I talked in a very high pitch. Then I read in *The Readers' Digest* that in certain hospitals they were putting Teflon on paralyzed larynxes. That was not for public use as yet. But I went down to the University of Iowa where they put this Teflon on my left larynx, and when they did that, the larynx kind of held out in the middle of the voice box, lowering my speech a lot.

The voice his Teflon-coated larynx now provides, while in the right range, still restricts David Spaulding's ability to express himself. Only when he speaks very quietly, emotionlessly, and with a steady control, can he say what is on his mind.

People do not know what it is like to go through a life without a voice. If I try to shout, nothing comes out. If I talk like this, then I can talk. But if I try to increase my volume, it just comes out in a squeal. You know, we are in a coffee klatsch, and the thing is, I'll start talking, and somebody else will take over the conversation. And there is nothing I can do. So I back away. Even when I am with four or five of my men friends and I will feel it's my turn to come in and start talking, I'll start to talk and then somebody just takes over.

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CROPPING THE PHOTOGRAPH

Most lawyers who have been admitted to the bar in the last twenty-five years are familiar with the case of *Spaulding v. Zimmerman*.²² The case is taught in legal ethics courses as a striking example of how the lawyer's professional duty sometimes runs counter to what most people would consider the "right" thing to do. It demonstrates the lawyer's overriding duty to the client and the concomitant obligation to keep confidential anything he or she learns in the course of representing his or her client, even when those duties cause harm to third parties.

But for those who are only familiar with the case as reported by the Minnesota Supreme Court, there is much that they do not know about David Spaulding and the other people connected with the case. The fact that two people died and three families were changed forever is deemed irrelevant to the issues for which the case is taught. Readers of the opinion, unlike readers of this essay, will not learn that David Spaulding suffered the loss of his natural speaking voice as a result of the delayed treatment of his aneurysm and that the loss of his voice in turn greatly impacted his chosen career. They do not learn that Arveson and Rosengren, attorneys for the defendants, did not consult with their clients about the threat to David Spaulding's life. And they do not learn that Arveson's conduct was considered so distasteful that five years later, he and his partners sent a newly hired young lawyer in their place to face the Minnesota Supreme Court.²³

Law schools take pride in the fact that in virtually every course, students do not read about the law in a legal textbook; they read the actual cases that create the law. According to the Carnegie Report, case study and analysis is the "signature pedagogy" of legal education.²⁴ It is a powerful pedagogy, but it focuses solely on the cognitive dimension of lawyering. Human experience is described in terms of competing duties and principles, legal rules, and binding precedents; the analysis of cases is abstracted from the real people and experiences that gave rise to the case. In the study of *Spaulding*, for example, instead of considering the experience of David Spaulding and the other people associated with the accident, the primary focus is on the conduct of the lawyers and whether they violated the lawyers' rules of professional conduct.

As a case takes shape, the actual events that give rise to a case undergo a surgical process of pruning and shaping. Much of what has

22. 116 N.W.2d 704 (Minn. 1962).

23. See *id.* at 706.

24. See SULLIVAN, *supra* note 9, at 24.

occurred is removed from view, much as one might crop portions of a photograph to present a particular and limited perspective. This process is familiar to those trained in the law. By the time the event in dispute reaches litigation, the legal system weeds out everything it considers legally irrelevant. In the next round of cropping, when the case is appealed, thousands of pages of deposition and trial transcripts are summarized in just a page or two of facts in an appellate court opinion. By the time law students read the case, they are frequently reading a version of facts from the appellate opinion that has been condensed to a single paragraph.

There are good and necessary reasons for this cropping—for honing in on the relevant and discarding the irrelevant. In a legal ethics class, however, the necessary cropping that occurs in a case can have quite harmful consequences. The issue in *Spaulding*, for example, concerns choices made and actions taken by the defense lawyers and whether the principle of nondisclosure of confidential information should be applied. Because the reader is screened off from the effect that such decisions had on people's lives, it is difficult, if not impossible, for students to evaluate the lawyers' choices and the merits of the principles and rules applied in the case.

PEOPLE, RELATIONSHIPS, AND EMOTIONS

When we hear David Spaulding's voice for the first time, we learn the effect that the accident and the litigation had on his life and his career. We also discover how much easier it is to accept Arveson's choices when one has not heard from David Spaulding. When the people connected to the case have been removed from it and the consequences of decisions taken have been excised as irrelevant, it is much easier to analyze *Spaulding v. Zimmerman*²⁵ as the more or less successful hearkening to the application of a powerful principle.

To abstract from people to principles or rules in the name of legal reasoning, to depersonalize clients and their disputes, can cause great harm to both the people and the law itself. The ruinous consequences of keeping this life-saving information from David Spaulding strikes virtually all nonlawyers who encounter this story as central to its ethical heart. Yet many lawyers and law students, trained to abstract from the people to the rule, fail to recognize the moral cost of such a decision.²⁶

25. 116 N.W.2d 704 (Minn. 1962).

26. Sometimes following a principle is necessary even in the face of human costs, but it is crucial that we not blind ourselves to those costs. We should only act in full awareness of the cost to people.

Rather than rely on the sparsely reported appellate opinions, a richer narrative, one that does not hide from view the people concerned and their relationships, has the potential to generate empathy and address this problem of moral blindness. “Stories teach us that every gesture, every act, every choice we make sends ripples of influence into the future.”²⁷

In *Persons and Masks of the Law*,²⁸ Judge Noonan has written eloquently about the neglect of persons in our legal culture; he contends that this neglect “has led to the worst sins for which American lawyers were accountable.”²⁹ American law, including the law of legal ethics, is more concerned with individuals than relationships.³⁰ Yet the people of *Spaulding v. Zimmerman*³¹ are embedded in a web of relationships—of family, of community, of employment, including those of their lawyers—and those relationships are crucial to the story.

In addition, our story treats *emotions* as significant. How the parties feel is rarely relevant to legal issues in litigation, but one could not tell the story of this accident and its impact without discussing feelings. This was an accident involving two teenage drivers, three families, the loss of life, and severe injuries, both physical and emotional. There is fear, anger, guilt, despair, and shame. The story also reveals hope, courage, and remarkable resilience. And it is not only the parties who have emotions—the story shows that the lawyers have feelings about their conduct, such as Richard Pemberton who discussed his own deep misgivings about defending Arveson’s conduct.

MORE COMPLEXITY IN THE ETHICAL ISSUES

Case study necessarily narrows and hones analysis. Although the case is cropped to focus on the issue of confidentiality, telling the story of

27. Scott Russell Sanders, *The Power of Stories*, 51 GA. REV. 113, 123 (1997). Sanders continues:

[S]tories . . . show us the consequences of our actions

. . . .

To act responsibly, we must be able to foresee where our actions might lead; and stories train our sight. They reveal the patterns of human conduct, from motive through action to result. Whether or not a story has a moral purpose, therefore, it cannot help but have a moral effect, for better or worse.

Id. at 119.

28. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976).

29. *Id.* at vii.

30. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

31. 116 N.W.2d 704 (Minn. 1962).

*Spaulding v. Zimmerman*³² reveals that confidentiality is not the only ethical issue in the case.

First, David's narrative exposes deep failures of legal counseling. It is clear that Arveson never consulted his clients, the named defendants in the litigation. They were never told about the aneurysm, much less counseled about whether to reveal it to David. And it is almost unthinkable that they would not have wanted David, their neighbor, friend, and coworker, to learn of this grave risk to his health. It is also unclear whether Arveson ever revealed the information about the aneurysm to the insurance company that retained him. The lawyers certainly should not have assumed that their insurance company clients, acting out of narrow, short-term financial interest, would automatically choose to conceal this information from David Spaulding.

We are not arguing that lawyers should assume some detached moral high ground and simply instruct clients what to do. At a minimum, however, lawyers owe it to clients to help them make the best decisions they can. As Professors Cramton and Knowles stated, lawyers must learn to "take the client seriously as a person, communicate with and advise the *real* client (not a client stereotype), and engage in a moral dialogue in which lawyer and client can learn from each other how to act decently."³³

A second issue of legal ethics revealed in this story is the failure of *competence*. Roberts was grossly incompetent in failing to request the medical report prepared by the doctor retained by the defendants. How did this happen? Roberts was young, inexperienced, and probably unsupervised. He may have been overwhelmed with competing demands in starting a new practice, and he may have been intimidated by the two prominent lawyers for the insurance companies. It is also the case that the rules of civil procedure were relatively new; perhaps Roberts had not kept up with the changes in the law that allowed him to request the report. But whatever the reason, David Spaulding was harmed by the gross incompetence of his own lawyer.

These two issues—failure to counsel clients adequately and failure to act competently—are often the two most significant ethical issues in practice because these are the issues that clients most often complain about. Failures in communication, competence, and diligence are the basis for the overwhelming majority of grievances filed against lawyers and are the conduct most often complained about in legal malpractice cases.

32. 116 N.W.2d 704 (Minn. 1962).

33. Cramton & Knowles, *supra* note 2, at 95-96.

In fact, these two professional failures have much in common: both are symptoms of inadequate commitment to client service. One of the most important lessons new lawyers must learn is how and when to subordinate their own interests to those of their clients. We fear that students who study the case of *Spaulding v. Zimmerman*,³⁴ focusing only on the insurance defense lawyers, will recoil from that experience and draw the lesson that dedication to clients is always problematic. This, unfortunately, is the wrong message about the professional pitfalls that await them in practice. Lawyers must develop the complex ability to remain loyal to clients while also being mindful of the effect on others and on the public good.

STORIES AND LEGAL ETHICS: TOWARD THE FORMATION OF
PROFESSIONAL IDENTITY

Ethics is more than rules, principles, and obligations; it's about how we live our lives and the kind of persons we are. Lawyers, consequently, need a broader and more integrated context with which to view their decisions and the implications of their ethical responsibilities. Through the lens of stories, lawyers can see with deeper significance the complex nature of the problems presented and also how their identities as lawyers fit the overall story of their own lives. Accordingly, stories should be at the heart of the formation of professional identity.

BEYOND RULES—THE IMPORTANCE OF WISDOM

Deciding how to act in difficult situations, especially those fraught with moral complexities, calls not just for intelligence and skill, but for *wisdom*. As Scott Russell Sanders writes:

Skill is knowing how to do something; wisdom is knowing when and why to do it, or to refrain from doing it. While stories may display skill aplenty, in technique or character or plot, what the best of them offer is wisdom. They hold a living reservoir of human possibilities, telling us what has worked before, what has failed, where meaning and purpose and joy might be found. . . . Like so many characters, we are lost in a dark wood, a labyrinth, a swamp, and we need a trail of stories to show us the way back to our true home.³⁵

Traditional approaches to legal ethics rely heavily upon the comforting certitude of rules and obligations. Knowledge of legal rules, however, is no guarantor of ethical conduct. Moreover, acting ethically is a more

34. 116 N.W.2d 704 (Minn. 1962).

35. Sanders, *supra* note 26, at 125.

complex task than applying a body of rules to a given set of facts.³⁶ A rule-based approach to ethics will often fail us when the landscape is exceptional. And if we crop the picture of the landscape to fit the rule, we may leave ourselves blind to a wide range of moral considerations.

In contrast, stories help us see clearly and deeply, the kind of vision that Milner Ball calls “apperception,” that is, “know[ing] something without knowing how one has come to know it.”³⁷ Stories help us develop wisdom, understanding, judgment, “and the enlivening of imagination—the things that carry us through the unstructured places of the world and the heart.”³⁸ Knowledge of the right thing to do is important, but moral motivation is just as important. To that end, stories can encourage and even inspire us.³⁹ Dispositions and virtues such as courage, hope, compassion, creativity, and humility are more important for ethical action than is knowledge of the rules.⁴⁰

A narrative view permits lawyers to know clients in all of their complexity, supports lawyers as they bravely make decisions in situations of uncertainty, and allows them to hold, without becoming cynical, the fallibility of lawyers and judges as a necessary condition of the law and life. Narratives allow us to pass over from our own reasonably known story space to another. When we return, it is with the startling and sometimes tragic conviction that all acts have near and distant consequences.

36. The theologian and moral philosopher H. Richard Niebuhr said that the first task of ethics is to see the world clearly. See H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY* (1962). Before we answer the question, “What shall I do?” we should first ask ourselves, “What is going on?” *Id.* at 60 (internal quotation marks omitted). Niebuhr suggested that asking “[w]hat is going on?” is a more fruitful starting point than asking “[w]hat is my goal or ideal?” or “[w]hat is the law [or principle involved]?” *Id.* The more clearly a person sees what is going on, the more appropriate is that person’s responsive action, and the better fit in the overall moral story of his or her life.

37. MILNER S. BALL, *CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW* 3 (2000) (quoting PAUL LEHMAN, *THE DECALOGUE AND A HUMAN FUTURE* 23 (1994)).

38. *Id.*

39. Literally, from the Latin roots of those words, stories bring heart and soul to our ethical decision-making.

40. Of these virtues, two are particularly important in the formation of professional identity. One is hope; it allows us to see the possibilities of more different and life-affirming options in difficult situations. Hope also keeps us from being stuck in the old ways of seeing and doing. The other is courage; it may be necessary to ask hard questions of the client, to risk losing business, even risk losing the license to practice (if, for example, a defense lawyer chooses to violate client confidentiality to preserve a life). See STANLEY HAUERWAS, *VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION* (Univ. of Notre Dame Press ed. 1981).

Narratives provide a compass, not a metaphorical map. The map, while very comforting, is usually and unnecessarily overdetermined and prescribed, much like the law. The compass, on the other hand, is a guide that places us on a path and keeps us there or brings us back when we stray. It also provides sufficient room to make various decisions appropriate to the different parts of the journey.

*"Finding your way through stories is as easy and as hard as finding your way home. And part of the finding is the getting lost, because when you're lost you have to look around and listen."*⁴¹

INTEGRITY: MEANING, PURPOSE, AND IDENTITY

In addition to wisdom, *integrity* is also crucial to the formation of professional identity as a lawyer. We mean integrity in two senses: as truth-telling, certainly, and also as leading a life that is integrated. Many have expressed concern that lawyers lead divided lives—that their professional roles require them to act in amoral or even immoral ways, acting in ways that they would not act outside of their professional roles. Lawyers, including legal academics, sometimes rationalize this separate-role-morality as a professional necessity.⁴² We are convinced, however, that the separation of the professional role from the person of the lawyer is psychologically destructive and morally dubious. Lawyers should see their responsibilities as lawyers as integral to their identities as persons.⁴³ In other words, professional identity and personal identity must be woven together.

It is essential, then, to form professional identity through the telling and study of stories, rather than an exclusive focus on cases, quandaries, and problems. Many have documented the distress and unhappiness of lawyers.⁴⁴ Losing sight of the purpose and ideals that brought these lawyers to the law is a significant reason for this malaise. Habits of reflection and self-awareness, including reflection on fundamental questions of meaning, purpose, and identity, are a great antidote to this

41. CORY FISCHER, ALBERT GREENBERG & NAOMI NEWMAN, *TRAVELING JEWISH THEATRE, COMING FROM A GREAT DISTANCE* (1979).

42. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

43. If the insurance lawyers in David Spaulding's case had seen their work and actions as lawyers as part of their larger ethical lives as persons, it is difficult to imagine that they would have acted as they did.

44. See, e.g., Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1 (1998).

loss of purpose. And hearing and telling stories can support the habit of self-reflection.⁴⁵

The concept of vocation can be helpful in developing an integrated personal and professional identity. The novelist and Presbyterian minister Frederick Buechner defines vocation as the place “where your deep gladness and the world’s deep hunger meet.”⁴⁶ This definition insists that we can find work that makes a contribution to the world’s needs and also brings deep personal fulfillment.⁴⁷

Consequently, “[t]he deepest vocational question is not ‘What ought I to do with my life?’ It is the more elemental and demanding ‘Who am I? What is my nature?’”⁴⁸ Those questions of core personal identity require us to listen to our inner voice.⁴⁹ For law students, ignoring the inner voice divides their essential selves from their developing professional identity, from how they act and make meaning in the world. Listening to the inner voice, on the other hand, offers the possibility of living “divided no more”—of uniting deepest aspirations with the reality of work, of integrating personal and professional identity.⁵⁰ Having an ear and a voice for stories can be crucial to developing an integrated personal and professional identity.

45. “To be moral . . . is to allow stories to be told through us so that our manifold activities gain a coherence that allows us to claim them for our own. . . . [T]o be ‘moral’ involves learning to see the world in a way that our lives have coherence and unity.” HAUERWAS, *supra* note 39, at 74, 76.

46. FREDERICK BUECHNER, *WISHPFUL THINKING: A SEEKER’S ABC* 119 (rev. & expanded 1993).

47. As Parker Palmer comments on Buechner’s definition of vocation: “[V]ocation begins . . . not in what the world needs (which is everything), but in the nature of the human self, in what brings the self joy, the deep joy of knowing that we are here on earth to be the gifts that God created.” PARKER J. PALMER, *LET YOUR LIFE SPEAK: LISTENING FOR THE VOICE OF VOCATION* 16-17 (2000).

48. *Id.* at 15.

49. Buechner once summarized all that he’d been trying to say, both as a novelist and as a theologian:

Listen to your life. See it for the fathomless mystery that it is. In the boredom and pain of it no less than in the excitement and gladness: touch, taste, smell your way to the holy and hidden heart of it because in the last analysis all moments are key moments, and life itself is grace.

FREDERICK BUECHNER, *LISTENING TO YOUR LIFE* 2 (1992).

50. PALMER, *supra* note 46, at 32 (internal quotation marks omitted). Palmer describes the journey toward wholeness, in which we allow our deepest calling to grow into our own authentic selfhood. “As we do so, we will not only find the joy that every human being seeks—we will also find our path of authentic service in the world. True vocation joins self and service” *Id.* at 16.

CONCLUSION

Confronted with the knowledge of David Spaulding's aneurysm, the priority for most people would be to save David Spaulding, no matter what principle was compromised. So long as the teaching of legal ethics continues to focus exclusively on rules and principles, however, a law student's priority might be to save the principle of confidentiality, despite the cost to a particular person. Ironically, then, a similar outcome for another David Spaulding might be arrived at today, not as a result of a lawyer's lack of ethics, but by a lawyer's commitment to them.