

On Tending to the Ethics in Legal Ethics: Two Pedagogical Experiments

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INTRODUCTION

I have been teaching law on a full-time basis for almost forty years, including courses in legal ethics for thirty of those forty years. As any ageing teacher does, I suppose, I like to think of my teaching as effective. With a few exceptions, the teaching techniques I have appropriated or invented for classes in legal ethics have worked reasonably well. Within that, there are two techniques that have worked well enough to justify suggesting them to other teachers. One of these is the use of daily (or at least weekly) writing by students. The other is teaching in and from the clinic, with stories told and “dilemmas” described by students about their real clients.

THE PREMISE: ETHICS IN LEGAL ETHICS

Halfway through “A Man for All Seasons” the play finds Thomas More on the road back from one of his torturous sessions with Thomas Cromwell. As More leaves the meeting, Cromwell tells Rich that the King wants More destroyed. Outside, on the road, More meets his friend the Duke of Norfolk. He picks a fight with Norfolk, so that Norfolk will not be seen to sympathise with More and be himself destroyed. Norfolk accuses More of not behaving like a gentleman; friendship, he says, means nothing to More. There are many ways, I suppose, to consider the virtue of friendship; this one is probably more provocative than Aristotle’s startling observation that friends have no need of justice. Or

perhaps Norfolk's accusation is a way to understand Aristotle. Either way, the matter is open to teaching devices, if the presiding officer in a legal ethics class wants to see if friendship has anything to do with being a lawyer. Since friendship is a virtue, the subject would involve ethics in legal ethics.

Back to the play. As Norfolk stalks away, More's daughter Margaret and her husband William Roper come on the scene to tell More that Parliament has passed the Act of Succession. It is now treason, they say, to refuse to take the oath recognising the King as head of the church.

More says, "What is the wording?"

Roper says the wording doesn't matter; everybody knows what it means. And More says, "It will mean what the words say! An oath is made of words. It may be possible to take it. Or avoid it."

"God made the *angels* to show him splendour – as he made animals for innocence and plants for their simplicity," he says. "But Man he made to serve him wittily, in the tangle of his mind."

That is a general and workable definition of what ethics is – deliberation, discernment, giving words to our morals. And if our purpose in one of these courses is ethics, as understood by Socrates, Rabbi Hillel, Aquinas, and John Calvin, this is what we are up to: serving God in the tangle of our minds.¹

I suggest, then, that ethics is the purpose of our courses. Notice five implications of that understanding of our purpose. First, ethics is about what is *interesting* in morals. In the second scene from the play, More had just finished an argument with Norfolk with the caustic suggestion that what concerned Norfolk was the pedigree of water spaniels. That argument was not ethics because More did not find water spaniels interesting. He met Norfolk as he had walked away from a session with Cromwell, the purpose of which was to destroy More. That was not interesting for ethics either; ethics does not regard lethal power as a way to discern morals, at least not since Thrasyarchus' concession to Socrates.

Second, ethics is about what is *important* in morals. In the play, it is a matter of life and death. So also for Socrates in the *Crito*. So also in the stories of clients that lawyers tell one another in one of our seminars in law-office ethics, of which I discuss more below.

Third, ethics aims at *resolution*. Discernment comes up with answers. It is not like a television debate between politicians – sound bites repeated and repeated, as the newscaster watches the

clock; a conversation that never gets anywhere. Ethics gets somewhere. In one of the models I will suggest here, it tends to a consensus on the insight and argument of the members of a group. In the other model of law-office ethics, it gets to a course of action for the lawyer who tells the client's story to her colleagues – and to a course of action for the case.

Fourth, ethics is *communal*. It depends on insight explained and on persuasion practiced without coercion. It demonstrates a communal process in which, as Glenn Tinder puts it, people wait for one another.² Communal ethics demonstrates communal anthropology – that is, an implicit understanding that we human beings have a natural stake in one another; we are connected; we belong together as we do ethics.

And, finally, ethics seeks to learn from *consensus*. It seeks what John Howard Yoder calls the communal quality of belief.³ The product of deliberation will be greater than the sum of its parts.

ON WRITING BY STUDENTS

The first device I dredge up from my past is to suggest to students an array of topics for discussion and then ask them to write about one of the topics for class discussion. In fact, and virtually without exception, when I have prepared for class using these student papers, my students' written work has used up all of the time available for discussion.

My teaching book, *American Legal Ethics*,⁴ is organized in sections to fit individual class sessions; each includes one or more series of "discussion topics" that are meant to invite (and usually do invite) each student to reflect on sources of ethics, with the hope that each student will find a source that strikes her or him as fitting the reading for that day. The reading for one such session is about the adversary ethic; inserted in that reading are four discussion topics: (i) on the morality of preferring one's client even to the extent of causing harm to others (with material from: CG Jung; from Richard Wasserstrom on victims of rape; and from Canon Eight of the US Code of Professional Responsibility); (ii) an eloquent little tirade from a trial lawyer on how academics do not understand the situations of trial lawyers;⁵ (iii) Judge George Sharswood's discussion of the Courvoisier case;⁶ and (iv) thought on the dynamics of self-deception (drawing on Dorothy Sayers's

Gaudy Night, among other sources).⁷

Students give me their papers the morning of the class; that allows two or three hours for me to read them, write my thoughts in the margins, and make an outline for class discussion. I return the papers at the beginning of class – and we are off and running. When the class is large, I divide it into three or four writing groups and receive papers from a third or a fourth of the class each class day. The outside limit of this adjustment to class size is that each student write for the class at least once a week.

These papers are always interesting and often impressive. I find that I never fail to have enough material from them for the class – usually far more than enough – and I find that it is not hard to arrange the agenda so that everyone in the class gets to discuss her or his paper with classmates; even in a large class I can get around to each student three or four times a semester.

When it came time to submit to the publisher a teacher's manual to go with my teaching book, I described this system and submitted an array of student papers to fit each section of the book. My aim was only partly to suggest substance for discussion. What I was really after was conversion of teachers to my method – so that each teacher could work with her own student papers.

The benefits of this writing device are, I think, at least three.

First, it is *ethics* as well as morals. Ethics is thinking about morals and, beyond that, explaining one's thought to others in an effort to learn from and to persuade others. Ethics is about insight and argument. It is about *explaining* one's reaction to a moral impulse and listening to the reactions of others.

Second, it is often the prelude to a group exercise in *communal discernment*. When I am clever enough – or even restrained enough – to allow the writer of a paper to present her thoughts to her classmates, rather than to me, discussion comes about in a mutually supportive way. Students try to understand one another in a way that never occurred in the classes I once tried to manage with "Socratic" devices.

Third, discussion of colleagues' papers tends to *resolution* or consensus more often than is the case with discussion of appellate-court literature, or bar-association ethics opinions, or professorial lectures. I suspect this is because students come to listen to one another in this sort of class, possibly as a result of the fact that the presiding officer seems clearly to respect each student's opinion. I

feel – or try to feel – that it is not so important for me to *evaluate* a student’s thought as it is for me to *present it for consideration by the other students*.

IN AND FROM THE CLINIC

Clinical legal ethics is an enterprise in which law students deal with lawyers’ moral issues in a community that is, and that is like, a law firm, with the difference that the lawyers in the firm systematically set aside time to seek from one another understanding of the moral quality of their cases.

Almost all of the time at every meeting of a clinical ethics seminar is taken up with discussion of the cases the student-lawyers are working on – not only the “ethical dilemmas” each student-lawyer sees, but what in the client’s situation is compelling and what in the plan she and her client have for the case is puzzling or stressful or interesting in some other way. That is, we go after the *moral quality* of the case. Ethics – to repeat myself – is about what is interesting in morals.

This approach is as much about how to run a law office as it is about how to run a law-school course. The alternative models in law offices are: (i) not to talk at all, in the community of practitioners, about what members of the community are doing; or (ii) to ordain an expert on ethics to whom “ethical dilemmas” can be submitted for resolution.

I come to this experiment from four decades of classroom teaching. What I at first compare is how this works as compared with how it works when I read and discuss rules and disciplinary cases with students. I have noticed four big differences between the traditional classroom scene and the clinical seminars.

First, *resolution is an imperative* in the Clinic. These are real cases. The student-lawyers have to proceed with them, often within hours of our discussion. We cannot just take statements and move on to the next case: we feel we have to help one another out. To use a word from moral theology, we have to, as a community, *discern* a moral resolution of our colleague’s question.

Second, this way of talking about morals tends to *overcome obstacles* to moral discourse in law school – obstacles I have poked at and wrestled with in decades of teaching in the classroom. One such obstacle is the trade unionism and moral evasion that is built

into the professional rules. Young people in law school never like the rules, for those two reasons and others. I find in the Clinic that I need not struggle with their dislike; I can take advantage of it.

For example, members of the seminar rather quickly come to agree that a lawyer should follow her conscience. And then, as lawyers in training, they come to see that, if conscience is followed, and if resolving a situation in conscience presents a problem under the rules, we are clever enough to find a way to handle the rules. One rule no one ever likes, and that I find uniquely disgusting, is the rule that says I cannot give anything to my client – cannot, for example, hand him ten dollars so that he can eat for a day. Conscience bids me break that rule. Lawyer skill bids me find a way to keep my license when I evade it.

The third difference I notice between the clinical approach and the classroom approach is that the clinical approach tends to create a receptive atmosphere for discussion *throughout the law office*. I notice that the student lawyers continue to talk about the cases we have talked about in the seminar. More importantly, they talk with one another about what they are doing in the law office, *as* they do it.

I have pondered for years a “battered-woman” case one of the student-lawyers had. The woman, our client, had taken her cuts and bruises to the police, who arrested her violent boyfriend. The prosecutor got the boyfriend indicted and listed our client as prosecuting witness. Our client then changed her mind about testifying against her boyfriend. The prosecutor threatened criminal action for obstruction of justice (etc) against our client, who then came to us. Our student lawyer knew (maybe from her elders in the firm) that she could push back, probably get the prosecutor to desist (and, as a consequence, to drop the prosecution of the batterer). But this young lawyer also knew that someone needed to do something about a brute who seemed to enjoy hurting women. We resolved the case by pushing back until the prosecutor relented. But we talked about the case for weeks. We still talk about it. We are lawyers who talk about such things.

Finally – the fourth difference – I notice a halting tendency toward deeper moral reflection, a tendency in which this communal receptivity to moral discourse leads to consideration of:

- faith, and particularly the religious motivation that causes many students to come to our law school and then to enrol in

our Clinic;⁸

- the morals a person brings to the law, so that the moral formation a person has from family, town, religious congregation, and friends is not separate from the practice of law; and
- what Ralph Waldo Emerson would have called self reliance. Or, as Miss Manners put it, “like most professions, the law is . . . tough. Miss Manners would think that anyone practicing it successfully would have the strength to set her own standards and not give in to bullies.”

Rabbi Judah Ha-Nasi, talmudic sage, said, “I have learned much from my teachers, more from my colleagues, and most of all from my pupils.” What have I, a teacher, learned from several years of teaching methods that are, more than anything else, matters of getting out of my students’ way?

Two things: first, as Father Dan Berrigan once said, “Don’t just do something. Stand there.” These learning sessions are generated from the feelings and concerns of the students and from the fact that they are friends working together. These pedagogical techniques are matters of restraint – never easy for a law teacher. That means that the American “professionalism” movement, which calls on us law teachers to *instil professionalism* in our students, is both wrong and wrong-headed.

And, second, there is something in human nature that makes two heads better than one, and ten better than two. There is such a thing as what the theologians call *communal discernment* in the moral life, what Yoder spoke of as “the communal quality of belief.” You can explain it from anthropology: human beings are made to be together and to work together, to think together and to solve together. Or you can be more modest and look at the law office and say to yourself, there was a reason why these lawyers got together, and it is not only economic (or, in the law-school clinic, not only to have something for the resume). The discussion of student writing and clinical seminars tap into that something.

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¹ In the play, the ethical deliberation for the day was the morals of martyrdom: “If

[God] suffers us to fall to such a case that there is no escaping,” More said, “then we may stand to our tackle as best we can, and yes, Will, then we may clamour like champions . . . if we have the spittle for it. And no doubt it delights God to see splendour where he only looked for complexity. But it’s God’s part, not our own, to bring ourselves to that extremity! Our natural business lies in escaping – so let’s get home and study this Bill.”

- 2 Glenn E Tinder, (rev ed) *Tolerance and Community* (Columbia Missouri: University of Missouri Press, 1995).
- 3 John Howard Yoder, *The Priestly Kingdom: Social Ethics as Gospel* 24 (Notre Dame Indiana: University of Notre Dame Press, 1984).
- 4 Thomas L Shaffer, *American Legal Ethics* (New York: Matthew Bender, 1985).
- 5 Richard W Nahstoll, Esquire, of the Portland Oregon Bar, in Shaffer, *supra* note 4, at 196-197 (otherwise not published).
- 6 The *Courvoisier* case was a celebrated trial for murder, in London, in the middle of the 19th century. Judge George Sharswood, Chief Justice of Pennsylvania and founder of the University of Pennsylvania Law School, discussed the behaviour of defence counsel, Charles Phillips, Esquire, in his *Essay on Professional Ethics* (1954). This part of Sharswood’s essay is reprinted in Shaffer, *supra* note 4, at 177-178.
- 7 Dorothy L Sayers, *Gaudy Night* (New York: Harper & Row, 1936), discussed in Shaffer *supra* note 4, at 207-208. This is a mystery story. The detective in the case, Harriet Vane, identifies the limits of her own dynamics of self-deception by saying that she can be polite about everything “except saying that somebody’s beastly book is good when it isn’t. I can’t do that.” The invitation in the teaching book has to do with saying what seems to be called for in carrying out the adversary ethic.
- 8 The University of Notre Dame is a mid-western American Roman Catholic institution, founded by French missionaries in 1841. Its law school became active after the Civil War in the United States (about 1869) and today claims attention to the English common-law heritage and to the moral theology of the Catholic tradition. The law school’s Legal Aid Clinic is conscious of service in this faith tradition, notably so in reference to service to the poor.