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THE PROFESSIONAL RESPONSIBILITY OF TEACHERS OF PROFESSIONAL RESPONSIBILITY

Thomas L. Shaffer*

The Agenda

I am making a moral claim: the required law school course called Professional Responsibility should be ethics.¹ It should not be the study of the legal regulation of lawyers. Ethics is not a system of regulation; it is a discipline that studies, debates, and reasons over morals.

It is important to be stubborn about the claim that we should teach legal ethics as ethics and not as law. It is important, first of all, because lawyers in America resist legal ethics. They want and have always wanted to shove ethics off the track and talk about law instead.² The homily therefore tends to become the regulation, even when it is an interesting homily and even when lawyers could benefit from studying the homily as a homily and not as a regulation. Our subject should be good morals in the practice of law.

Our method should be a conversation with our students on good morals. When we talk about morals, we need not speak *ex cathedra* nor need we whisper. We should be able, as Socrates was, to submit morals to reason without coercion. Thus the first part of my claim is to insist on ethics, taught in this non-coercive way, as a legitimate subject in law school.

This claim that legal ethics *be* ethics is fundamentally conservative. It has tradition on its side. American legal ethics began early in the nineteenth century as ethics in an almost pure form. It began as discourse between law teachers and students—not in courts or bar associations, but in law schools.³ As the country's moral consensus disintegrated in the middle of the nineteenth century, legal ethics became a *system* for the collective disapproval, and then the exclusion, of deviants. It then became a subject for bar associations and courts,⁴ but that is not where it started.

The development toward regulation and away from ethics has now reached the point where many American lawyers feel that instruction in professional responsibility ought to be limited to legal regulation—and that the morals of lawyers, as lawyers, should be excluded from what the profession has to say about the responsibility of its members.⁵ That position is, to some extent, a linear development from the founding of bar associations in

the 1870's, but it is also evidence of the dimming in America of a clear idea of what a *lawyer* should *do* or *be*.⁶ If one wants to reason over the development, however, its beginning and its situation are fairly clear:

- Discussion of what a lawyer should do or be, in America, begins in the nineteenth century with admonitions to law students; admonitions that are largely and expressly moral admonitions. Absent from these admonitions is the implicit threat that lawyers who fall short will be brought before the professional fraternity or before the community and adventurously sanctioned for misbehavior.⁷
- Modern proposals on professional responsibility excise such moral admonitions from professional consensus.⁸ Proponents obviously include those who would limit professional responsibility to legal regulation,⁹ and they also include those who phrase their proposals in principles argued in terms of what the profession expects of its members and what the community expects of the profession. Those whose ethical arguments are fraternal or social or civil are talking more about regulation than about ethics.¹⁰ They do not answer, or propose to answer, the question Professor Monroe Freeman once put as whether a good person can be an American lawyer.¹¹

The distinctions behind such modern proposals for what are *called* legal ethics are troublesome in many ways, because there does seem to be a difference between saying to a naughty child, "It is wrong to turn the garden hose on your grandmother," and, "If you turn the garden hose on your grandmother, you're going to be in trouble." I am suggesting a moral argument for the first kind of statement and therefore for legal ethics. We should be talking about:

- What an American lawyer should do.
- What an American lawyer should be.
- And whether it is possible in America to be a good person and a law-

yer—and if so, about how that is possible.¹²

That should be our agenda. Our duty to make it our agenda is the primary moral obligation we have to our students. Law remains relevant material, of course, but the student of legal ethics finds law interesting more as an expression of morals than as an expression of when coercion is appropriate.

The Cultural and Personal Context

The study of legal ethics preserves in university legal education an ancient discipline. It preserves the study of morals as that subject is of interest in philosophy and theology in the university. It aims to locate and weigh the roots of both behavior and admonition, but it is unique among university subjects in that it is both a *cultural* and a *personal* discipline:

- *Cultural* in the sense that it includes virtually every corner in our civilization, from the Greek philosophers to the biblical Hebrews to the Church. It should feel comfortable in consulting thinkers from Augustine to Maimonides, Aquinas to Karl Barth, John Calvin and Martin Luther to the Niebuhrs and Martin Buber, all of these as well as Hoffman, Sharswood, and Drinker.
- *Personal* in the sense that one accounts for himself and examines himself when he studies morals. That is always a necessary part of the ethical agenda. Legal ethics should discuss morals in a personally relevant way, but we should also consider morals as Thomas More said we should consider law, "in the tangle of [the] mind";¹³ that is with the discipline and rigor and civility with which we American lawyers study in law school the rule against perpetuities or the First Amendment. There is no logical or psychological inconsistency in being both personal and rigorous.¹⁴ American law teaching pretends that there is an inconsistency be-

tween compassion and rigor, but American law teaching is wrong—in all senses of wrong.¹⁵

Legal ethics is in part a consideration of the conversation between Socrates and Thrasymachus (in which Socrates told Thrasymachus that the two of them would discover justice in the way they treated one another).¹⁶ Legal ethics is also in part a consideration of such moments as this one between a colleague of mine and me, as we stand before the magazine rack in the faculty lounge:

- Colleague: (pointing to the current *Sports Illustrated*)
You know they give in there, about Earl Campbell, the highest praise you can give a Texan.
- I: Oh? What is that?
- Colleague: They say he had a good mama.

Earl Campbell's good mama is *personal* to Earl Campbell, as each of our mamas is personal to each of us, and she is a major part of what I mean by *culture*. It is our task not to leave her out of account, even if the price of taking her into account is a reduced prominence for cases and codes.¹⁷ I am talking about a large agenda, and I am arrogantly insisting that it is a moral agenda *for us*. I am not analogizing the syllabus here to the syllabus in Property One and to the choice between preferring estates in land to landlord-tenant law. I am talking about a required course having to do with what an American lawyer should do or be. I am claiming that it is morally irresponsible to approach legal ethics in the same way that we approach what to delete from Property One.

Socrates' dialogue on justice provides a better analogy than Property One. Socrates says: (1) We are going to figure out, as thinking people, what justice is; (2) We are going to begin with the assumption that justice is a virtue—something that causes people to give to one another; and (3) We will notice that part of figuring out what justice is will be to notice the way we treat one another as we talk.¹⁸ Justice is both an interesting subject and a gift we give to one another.¹⁹ Therefore, two different moral claims are being made.

The first moral claim, one that applies to all teaching, is that we should treat students as persons. Students are, to use Justice Wilson's phrase in *Chisholm v. Georgia*,²⁰ the noblest work of God. It is immoral to mistreat them, to use Student A as merely the occasion of Student B's learning, or Student B as merely the occasion of a clever joke for the benefit of all present.²¹ This first moral claim has a consequential professional specification:

it is from law teachers that students learn how to treat clients.

The second moral claim is that morals, not law, should be our subject. This second claim is not satisfied by merely treating students with respect as we talk with them about law. The intellectual subject matter of our course should be morals, not law, in that this subject matter will inevitably involve issues of personal significance for us and for our students. One of my students asked, after class, "Hey, are you trying to influence our *behavior*?" The answer was yes. Of course. Nothing less.

There are limits. Legal ethics is only part of ethics, and part of the study of any sub-discipline is to consider it in a discrete way. Our subject involves what a lawyer should do or be as a *lawyer*. This agenda, this jurisdiction, is specific but by no means narrow. It can be claimed, and it has been claimed by American lawyers, that being a lawyer *is a way* to be a good person.²² More often, however, lawyers make the more modest claim that a good person *can be* an American lawyer. The latter moral claim is that the lawyer part of a person does not destroy goodness; for example, the goodness that is there because the lawyer had a good mama.

If you think of the subject in terms of such claims, legal ethics is pure ethics. It asks a *dispositional*²³ question, the sort of pervasive moral question H.R. Niebuhr asked: "What am I up to?"²⁴ It focuses the question professionally. It looks at moral behavior when (a) another person is involved, and (b) that other person is a client. It focuses the general ethical question by asking not only, "What am I up to?" but also, "What am I up to in this other person's life?"²⁵ or, "How is he changing because of me?" These questions have two levels. The immediate level is, for us teachers, "What am I up to in this student's life?" or, "How is this student changing because of me?"

It is because of this *vicarious* focus that professional ethics takes an interest in questions of whether a lawyer should lie, an accountant cheat, a physician kill, or a law teacher abuse one student for the benefit of other students. Those questions are not as interesting when the focus is whether a person should do those things in his own behalf. They are interesting in professional ethics because they are being considered in reference to the welfare or benefit of a client. For example, if I ask you whether I should lie in court, you will very likely tell me that I should not. If I ask you if I should take advantage of the poor and ignorant, cheat widows, or pollute the lake, you will likely tell me that I should not. Professional ethics takes its interest not in questions such as these,

but in questions about being of professional assistance to people who see reasons, often *good* reasons, to do those things.²⁶

Professor Harry W. Jones put the issue this way:

[O]ne of the best men I have ever known, my Sunday School teacher of many years ago, who was at once a vastly successful practicing lawyer and a person of stiffly uncompromising personal rectitude, whom I admired and whose memory I still revere... How could he have accommodated his keen sense of justice to the partisan ethics of the profession he thought of as his life's vocation?²⁷

Professor Jones then finds it interesting to ask whether his Sunday School teacher would have helped a person who had been indicted for violent crime and who had doubtless done what he was charged with doing. If the answer to that is yes, he wonders if the Sunday School teacher would be willing to conceal incriminating evidence or to cast the shadow of guilt on an innocent person. Such questions become interesting *because* they involve a client. They would be less interesting if they involved concealment and false accusation by the Sunday School teacher in his own behalf.

This vicarious or substitutional focus provides two kinds of tension: (a) between (i) the morals a lawyer displays in his life with neighbors and friends and (ii) the morals of his client; and (b) between a lawyer's morals and his sense of public and professional duty. Those tensions are topical in the classroom. Students are aware of them and also feel them. They are evident in the development of American legal ethics as well. Consider, for example, Chief Justice Roger Brooke Taney, who had been Attorney General of Maryland before he became a judge. Taney had argued, as counsel in *Brown v. Maryland*,²⁸ a position he rejected, as judge, in the *License Cases*²⁹ of 1847. There was to his nineteenth century gentleman's conscience an inconsistency between telling a court, as advocate, that the law ought to be one way, and then later deciding, as judge, that it ought to be the other way:

I argued the case in behalf of the State and endeavored to maintain that the law of Maryland, which required the importer, as well as other dealers, to take out a license, before he could sell and for which he was to pay a certain sum to the State, was valid and constitutional and, certainly, I at that time persuaded myself that I was right and thought the de-

cision of the Court restricted the powers of the State, more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one; and perhaps the best that could have been adopted, for preserving the right of the United States, on the one hand, and of the States, on the other, and preventing collision between them. The question, I have already said, was a very difficult one. . . .³⁰

Why difficult? *Why is the inconsistent behavior even noticed?* Would a modern American judge feel so tender about not following as judge a position he has urged as a legal rule when he was employed to be an advocate for a client?³¹ If not, what has changed? If these questions are interesting, it seems important that they be discussed in both of the contexts already suggested, both the *cultural* context and the *personal* context.³²

American-Lawyer Hero Stories as Teaching Tools

My method in looking at legal ethics includes the study of American lawyer-hero stories. This method is a useful way to help students keep track of both the cultural and the personal in the study of morals. I am claiming that we teachers should, as a matter of our own sound morals, use these devices. With these stories, I find it useful, in a familiar academic way, to divide the stories and the points of view in the stories into five overlapping categories.

The Legal Ethics of Gentlemen says that it is possible to be a good person and an American lawyer and that the way to do it is to be a gentleman. A doctrinal focus for that point of view is in the "Resolutions on Professional Department,"³³ written by Baltimore's David Hoffman, the founder of American legal ethics. Hoffman (1774–1854) was a Baltimore lawyer and a colleague at the Bar of Taney. Most of the American lawyer-heroes in fiction are gentlemen who hold this gentleman's point of view; e.g. Atticus Finch of *To Kill a Mockingbird*³⁴ or William Faulkner's lawyer, Gavin Stevens.³⁵ Sometimes they have a certain Jeffersonian bombast about them that seems to say the prosperous are bound to be good, and sometimes they accept the gentleman's advantages of status and wealth as a circumstance that carries moral burdens not borne by those who are not gentlemen. I find that teaching the ethics of gentlemen is indispensable to an adequate account of what an American lawyer is. I also find serious personal

tensions for students in this indispensable moral point of view, especially among women students. American ladies share the moral point of view of American gentlemen but, even so, ladies are not quite gentlemen.³⁶

When I am successful in respecting both the personal and the cultural in legal ethics, I notice a certain tension between the picture of the paternalistic American gentleman-lawyer and our egalitarian ideals. (It was deTocqueville who noticed that the lawyers of America are natural aristocrats.)³⁷ That tension has a cultural cast; Faulkner's Gavin Stevens, lawyer-gentleman from Mississippi, says that he protects the weak, including those who are not even weak.³⁸ It also has a personal cast; our students are, or are not, being treated like children at our hands, and they are, or are not, learning from us how to treat their clients as children.³⁹ These are, at both levels, *moral* questions: they are not matters of taste or of law. Protecting the weak was, among other things, the Southern gentleman-lawyer's way of excusing racism; it is the modern lawyer's way of excusing the fact that his clients become more, not less, competent when they deal with him.

The Legal Ethics of the Two Kingdoms says that it is possible to be a good person and an American lawyer and that the way to do it is to separate one's personal morals from one's professional morals.⁴⁰ This point of view says that it is possible to be a good lawyer *and* a good person too, but rarely the twain shall meet. The purest doctrinal expression of this point of view in American legal ethics is the development of the adversary ethic in the late nineteenth century.⁴¹ The adversary ethic says that it is selfish and immoral to refuse to do for clients what clients want done. Modern lawyer-heroes often represent this point of view (for example George V. Higgins' Boston criminal defense lawyer Jerry Kennedy⁴²), but the moral argument has ancient roots. My way of naming it is borrowed from Martin Luther.⁴³ Students have personal tensions here, too. It is difficult for many of them to figure out a way to live bifurcated moral lives, and it is almost always unsatisfactory to answer that bifurcation is what the legal system requires of them.

The Legal Ethics of Principle says that the way to be a good person and a lawyer is to locate and adhere to sound moral principles, such as Kant's universals, or the Golden Rule, or the principle that says a lawyer should maintain independent professional judgment in working with his client.⁴⁴ Sir Thomas More, an English lawyer, was a man of principle. He gained renown as an American lawyer-hero when Robert Bolt's play "A Man for All Sea-

sons" became popular in this country in the 1960's. Hoffman's Resolutions are almost all moral principles (he was fond of maxims), and so are the greater parts of the earliest codes of legal ethics, such as Judge Thomas Goode Jones' 1887 Alabama code,⁴⁵ and the 1908 American Bar Association Canons.⁴⁶ More did not go to his death saying that martyrdom is a gentleman's lot: he went announcing three principles; the legal principle that silence is not treason, the moral principle that one should not take an oath falsely, and the religious principle that the King of England could not be the head of the Church.⁴⁷ He also went to his death with significant self-deception about what was going on in England.⁴⁸ Part of his self-deception was the notion that principles were an adequate way to describe his moral life.⁴⁹

The comparison of the gentleman-lawyer's ethic and the legal ethics of the two kingdoms suggests an ancient contrast between virtues and principles as being most significant in morals, a contrast between being *good* and being *right*,⁵⁰ a contrast between Aristotle,⁵¹ who did not announce principles, and most modern philosophical ethics and jurisprudence, which rarely announces anything else.⁵² The difference is between accounting for morals with the *Scout Handbook*, which talks about bravery, cheerfulness, honesty, and loyalty, instead of the Code of Professional Responsibility, which is a set of rules.

This difference is subtle at first, but it is real and it is important. When you get going on it in class, you are doing nothing less than putting Earl Campbell's mama back into legal ethics. You are discovering the fact that there is important moral material in our lives that is deeper and more explanatory than principles and that we come to see something as a moral problem *because* of this deeper material. The most interesting moments in ethics deal not with right versus wrong, but with right versus right; not with which moral rules you follow, but with how you *live* with all the moral rules you are supposed to follow.⁵³ Aristotle understood that; so did Atticus Finch; so should teachers of legal ethics.

Professional Legal Ethics finds moral authority in the profession itself. Judge (Dean) George Sharswood's 1854 essay on legal ethics⁵⁴ invoked the morals of the fraternity. Sharswood, who was a magnificently *clubbable* man, told his students that they would not go wrong if they sought in everything the approval of their professional elders. This point of view is prominent in the modern lawyer stories of Louis Auchincloss⁵⁵ and James Gould Cozzens. It is this notion that led to the founding of the first American bar associations. It, too, has ancient roots. The

earliest hero stories in the West are stories of warriors and adventurers who did well with what they were given to do.⁵⁶ Modern students are familiar with the morality that calls on them to imitate their elders, but they are also familiar with Watergate, security frauds, and the murky characters that hang around the police courts looking for legal business. George V. Higgins' Jerry Kennedy is a lucid observer of this contrast. Students who can stand his foul language love him.

The Legal Ethics of the Dissenter, the rebel, is a persistent strain in the American profession; that is noticeable in the "vulgar bar" of urban stories, in the frontier profession in America, and among lawyers who find unbearable elitism in bar associations and among gentlemen. Ephraim Tutt, lawyer-hero of more than a hundred short stories in *The Saturday Evening Post*, is a twentieth century example of this point of view, as are Higgins' Jerry Kennedy and the wonderful, real-life Fanny Holtzmann.⁵⁷ These lawyers seem to believe, and sometimes say, that the way to be a good person and a lawyer is to ignore what prosperous lawyers say to do. In a more positive analysis, their morals are likely to be personal and cultural; they refuse to make a morality out of procedures such as the adversary ethic. They make the useful point that a client is a person before he is a moral problem. Some of them see the law as a means to social change. They talk, as Charles Morgan does, not of law and order but of law *against* order.⁵⁸

Each of these five points of view is embedded deep within American culture and, I think, deep within ourselves. These points of view are not proposed for study as if they were party platforms, each exclusive of the others. I find that lawyers in American stories usually teach us from more than one point of view. Tutt, for example, is both a gentleman and a rebel. Kennedy is both a rebel and a lawyer who tries to separate his profession from the rest of his life.

Quandary Ethics, or "What Would You Do?"

How does one talk about such moral points of view? The most universal method in legal education, and especially in the study of professional responsibility, is to talk in quandaries. Our penchant for the study of cases in law carries over into a preference for cases in morals, and so we present a dilemma and say, "What would you do?" This method is attractive and probably unavoidable, but it is limited.

For one thing, the case method overlooks the fact that a quandary *becomes* a quandary *because* of morals. Morals

may solve quandaries but, before that, they *create* quandaries. Jean-Paul Sartre presents the case of the World War II French patriot who is the sole support of his mother: should he leave home and join the Free French Army, or stay at home and care for his mother?⁵⁹ There would be no quandary if the man in the story had not learned, somewhere, to love his country—and not only his country but a particular view of what his country is. There would be no quandary if he had not learned, somewhere, to love his mother, and not only to love her, but to express his love in a particular way. Sartre uses the story to make the existentialist claim that our morals are the product of our choices; they are morals only because we choose to make them so.

The maternalistic lawyer who has as a client a teenager in trouble in juvenile court may have a quandary between doing for her client what she thinks best for him and doing for her client what her client wants done: her client wants to be restored to his colleagues in the alley. The state boys' school would dry him out and teach him a trade. Procedural notions point in one direction; the wisdom—such as it is—of a culture that imposes values on children, as any culture does, inevitably points in another direction. But the quandary will not be there if mama-knows-best lawyer morality is strong enough to overcome the law school acculturation of free choice and due process. (Atticus Finch, of *To Kill a Mockingbird*, was a remarkably paternalistic lawyer, but Atticus never went to law school.) The quandary would not be there if moral, not legal, notions of civil liberty were strong and the determination to protect the weak were not as strong as the model American-lawyer-gentleman makes it. One who discusses morals in the context of a quandary needs to know what he is doing, and what he is not doing.

For another thing, quandary ethics has in it, and especially in law school, an existentialist bias. It tends to equate one's morals with one's taste in beer.⁶⁰ It tends to make a fetish of tolerance and to avoid intellectual rigor. In a characteristic display of this, one of us presents the case of the maternalistic lawyer and the teenager, and then directs argument over it for a while, and then moves on to the next quandary. We do not *evaluate* the moral arguments our students make. It is not true that every point of view in ethics is as valuable as every other point of view. Part of our moral duty to our students is to make them *think* about morals. If the topic of discussion were covenants-running-with-the-land, we would see that in a moment. The First Resolution in Spencer's Case,⁶¹ that a tenant's covenant to build a bridge cannot benefit a suc-

cessor owner of the land, is a silly rule, and the discussion in property class will not go on long before someone notices and describes the silliness. The general attitude among property teachers is that such judgment and analysis *must* occur or students will never learn to think like lawyers. Quandary ethics in law school is weak primarily because it does not involve the intellectual rigor of our property courses. For some reason, possibly because values are often religious and Americans have the anti-intellectual notion that it is not civil to argue about religion, we do not analyze and debate moral notions with the openness and discipline we bring to legal notions. Quandaries make it too comfortable for us to lead our students on a little hike through a field of moral brambles and to think we have taught them something.

Finally, quandaries hide people. Quandaries are too abstract. It is probably the case that no one would retain his clarity on the answer to an abstract moral quandary, such as Sartre's Free French example or the juvenile court case, after he gets to know the people involved. For this reason, I find it useful to read and think and talk about stories. Stories *display* morals more than announce them. They involve quandaries, but they put quandaries in a narrative, human context. The context cuts the quandary down to size. A story helps give the quandary an appropriate amount of weight, that is, the weight it has in life.

There are no doubt other teaching devices for making the point that clients are the noblest works of God. The best of these devices is to treat students as students should treat clients. The goal in using any such device is to show that in the practice of law, as in any other human activity, the moral life is a life that involves pain and tragedy, which is to say that the moral life is not possible unless we are willing to, as they say, let others suffer for our principles.⁶² Our duty is to teach that good morals among lawyers matter, and that means that good morals among lawyers, and among teachers of lawyers, are expensive.⁶³

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- Comprehensive footnotes prepared by Professor Shaffer contain citations and textual material. They are available on request by writing to the author at Washington and Lee School of Law, Lexington, Virginia 24450.