ENCOURAGING PERSONAL RESPONSIBILITY—AN ALTERNATIVE APPROACH TO TEACHING LEGAL ETHICS

CHRISTINE MARY VENTER*

I

INTRODUCTION

Largely as a result of prompting by the American Bar Association ("ABA"), most American law schools now require students to take a class called Professional Responsibility or Legal Ethics before graduation. For some schools, little prompting by the ABA was needed, as ethics was already a central part of their required curriculum. Notre Dame Law School was among this group of law schools. Since the late 1970s, Notre Dame students have been required to take two classes in ethics. In an effort to emphasize the importance that the school attaches to the subject, a two-credit course is taught to the first-year students by the dean of the law school. A second two-credit course may be taken in either the second or third year.[1]

The ABA's campaign for a renewed emphasis on ethics stems from a desire that lawyers return to the "principles of professionalism."[2] How law schools should go about teaching their students these principles has never been as clear, for example, as how to teach students federal taxation. Does one try merely to teach students professional responsibility by covering the rules and tenets contained in the Model Rules and Code, or does one evaluate these professional rules in terms of a more general set of moral criteria? For most ethics classes, students are expected to buy copies of the ABA Code of Professional Responsibility, the ABA Model Rules, or both. These students spend their time

---

* Associate Professional Specialist, Notre Dame Law School; Supervising Attorney, Notre Dame Legal Aid Clinic.

The author thanks the W.M. Keck Foundation for its generous support of the clinical legal ethics seminars at Notre Dame Law School.

1. In the first-year course, the Dean exposes students to what he calls "ethics by example." Students read about and discuss the lives and examples of famous lawyers such as St. Thomas More and receive general exposure to ethics. In the second- or third-year course, students study the Model Rules of Professional Responsibility and the Model Code of Professional Conduct and specific cases involving the discipline of attorneys.

Since Notre Dame Law School received the Keck grant, a new clinical ethics course has been added. Students may take the clinical course as an alternative to the required second- or third-year course.

2. Chief Justice Warren Burger used this phrase in a speech when he urged the ABA to study the issue. *See* ". . . *In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986).

reading opinions by appellate courts and bar association ethics committees involving the discipline of attorneys for violating the Rules or Code. An increasing number of course books or collections of essays by law teachers are being marketed, adding academic opinions to those of judges and bar association lawyers.

This fairly typical approach to the teaching of ethics conveys to the prospective lawyer a sense of the boundaries or limits within which one must conduct oneself if one is to be an "ethical" attorney, or at least if one is to avoid being disciplined. I suspect that this approach is deficient in three areas: (1) it pretends or purports to teach "legal ethics"[3] when all that it is really teaching are legal rules, also known as the "law of lawyering";[4] (2) it does not necessarily encourage students to debate morality in the practice of law, which is necessary if legal education is to produce competent, caring, and thoughtful professionals;[5] and, as a result, (3) students who are required to take the class probably treat it at best as a review course for the Multistate Professional Responsibility Examination ("MPRE"), engaging in little, if any, critical evaluation of the Rules and the Code. Learning ethics for the sake of passing the MPRE trivializes ethics; by merely learning the rules, students learn ethics without the context provided by real clients, real situations, and being part of the profession. Students may learn "professional responsibility,"[6] but the topic of "personal responsibility" is neglected.[7]

---

3. James R. Elkins, *Ethics: Professionalism, Craft and Failure,* 73 KY L.J. 937, 946 (1985) (noting that legal ethics is a "limited, bastardized form of ethics, an ethics culled from the ethos of professionalism"); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism,* 65 TEXAS L.REV. 963, 963 (1985) (noting that "[m]ost of what American lawyers and law teachers call legal ethics is not ethics").

4. David Wilkins of Harvard Law School noted there are different meanings for the term "professional ethics." He also noted that law schools tend to conceptualize professional responsibility as consisting of the premise that "lawyers are professionals with their own unique ideals and practices." Courses in professional responsibility therefore identify these practices and focus on which of them are "legitimate in light of the position that lawyers occupy in society." David Wilkins, Remarks at the Keck Ethics Conference, Duke Law School (Nov. 2-3, 1995).

5. The ABA's Blueprint on Professionalism, *see* note 2 *supra*, urges teachers of professional responsibility to have law students watch videotapes in which "experienced lawyers discuss moral issues in a 'Socratic' fashion." Tom Shaffer responds that "Socrates would be appalled. *None* of that is education. None of it is 'professional.' None of it is ethics. Ethics is talking together about morals. Socrates did not set his students down and make them listen to him; he asked questions and listened to them." Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument,* 26 GONZAGA L. REV. 393, 410 (1990).

6. Richard Wasserstrom argues that the accent on professionalism leads to what he terms "role-differentiated behavior," defined as one's varied responses to situations, depending on whether one is acting in a personal capacity or a professional one. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues,* 5 HUMAN RIGHTS 1, 3 (1975).

7. John T. Noonan and Monroe Freedman have both addressed the issue of personal responsibility in a professional system; Noonan does so in 29 STAN. L. REV. 363 (1977) (reviewing Freedman's book LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975)), and Freedman canvasses the issue in *Personal Responsibility in a Professional System,* 27 CATHOLIC L. REV. 191 (1978).

II

PROFESSIONALISM VERSUS MORAL IMPLICATIONS

If the only ethics taught to law students in legal ethics classes are "professional ethics," we risk creating a profession that engages in some self-deception about the moral choices involved in the practice of law.[8] The very notion of professionalism provides something of a double-edged sword for students. On the one hand, its rules and tenets are designed to keep lawyers honest to some degree, and to protect the profession and the people who have dealings with it. It offers students some measure of security and a sense of tradition to know that rules of appropriate conduct have already been worked out by our honorable forbearers. On the other hand, if students believe that their moral choices have been forestalled by the existence of the Rules and Code, then they engage in self-deception and tend not to critically evaluate the concepts of professionalism or their own actions.

As Anthony Kronman illustrated in *The Lost Lawyer*,[9] lawyers (even those acting in utmost conformity with the tenets of professionalism) contribute to and entrench existing inequalities of wealth and power in numerous ways. Professionalism comes imbued with certain moral values. It is, as Tom Shaffer points out, itself a call to a "particular kind of moral leadership, a particular kind of prominence and power, to the memory we have of the lawyer titans who ruled America . . . ."[10] Shaffer argues that the notion of professionalism advanced by the ABA essentially invokes a class distinction: a notion that a lawyer acts professionally when he or she emulates the American gentleman lawyer, with all of the superior (and elitist) qualities that figure connotes.[11] Professionalism then is not a neutral moral value. It is predicated on a notion of a certain class (and I would argue gender) of people as superior to others not of this class. Teaching students only professional ethics without acknowledging the history and origins of professionalism (and the values these uphold) is not teaching ethics. It is teaching rules. It is encouraging students to engage in self-deception about what a lawyer really does.

If our students buy into the notion of professionalism without any critical evaluation of its moral, social, and historical content, their relationships with

---

8. Tom Shaffer points out that practicing law *is* moral discourse and involves making choices, even if our choice is to choose not to choose. Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, NOTRE DAME L. REV. 2 (forthcoming 1996). Some lawyers take the position that because the details of appropriate and inappropriate conduct have been specified in the Rules and Code, much personal choice has been obviated. Lawyers see themselves as acting amorally rather than immorally or morally. This approach may be dangerous. Richard Wasserstrom notes that the fact that so many of the people who were involved in the Watergate scandal were lawyers was the "likely if not inevitable consequence of their legal acculturation." Wasserstrom, *supra* note 6, at 1.

9. ANTHONY KRONMAN, THE LOST LAWYER (1993).

10. Shaffer, *supra* note 5, at 395.

11. *Id.* at 398 (noting that "the gentlemen's ethic, in and out of the legal profession, has always implied that gentlemen are superior people").

their clients will be influenced only by their adoption of the professional value system.[12] Students need the opportunity—in law school and practice—to explore moral and ethical issues with their colleagues[13] and clients in a way that seeks consistency with the principles of professionalism, but one in which professionalism is not the sole source of guidance. Lawyers, as Monroe Freedman tells us, act both "professionally and morally . . . by counselling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them, and by assisting clients to carry out their lawful decisions."[14] If lawyers are not taught to engage clients in moral conversations about the lawyers' and the clients' moral responsibilities and the moral dimensions of a case, personal responsibility in the practice of law may not turn out to be something that comes naturally.[15] Freedman argues that "[t]hose of us who teach law have a primary professional obligation to explicate the moral implications of the law in general and of lawyers' ethics in particular."[16]

III

PUTTING ETHICAL ISSUES IN A PRACTICAL CONTEXT

Conversations about the ethical and moral dilemmas that one encounters in practice take on more significance for students when the student herself has had some experience in dealing with such problems. The clinical faculty at Notre Dame Law School has been testing that hypothesis with the aid of a generous W.M. Keck Foundation grant in a series of seven clinical ethics seminars over the past two years.[17] We have found that the best environment in which to teach a class on legal ethics is in the law office.[18]

---

12. This is not to say that we do not want lawyers to act "professionally." Clients and the rest of the profession have certain expectations that lawyers will act this way.

13. This is a positive aspect of having a profession; it provides colleagues with common ground with whom to debate ethical issues.

14. Freedman, *supra* note 7, at 204.

15. If students had any natural inclination to engage in moral conversations with clients before they entered law school, this trait is often beaten out of them (as Karl Llewellyn insisted that it should be, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951)), by stressing only professionalism and professional responsibility.

16. Freedman, *supra* note 7, at 205. The practice of neglecting moral issues in classes on professional responsibility is not unique to the United States. Strange though it may seem, when I was in law school in South Africa during the apartheid years, no one ever discussed with me the moral and ethical implications of practicing law in a country with a completely perverted system of justice. The subject of South Africa's pitifully unjust system was discussed in jurisprudence, but from a theoretical point of view. In Legal Ethics, I was taught ethical rules and told that if I abided by them I would be a "good lawyer," in other words, a lawyer who was not subject to disbarment. The issue of whether it was possible to be a moral lawyer while practicing in a patently immoral system was not canvassed.

17. Thomas L. Shaffer, the Robert and Marion Short Professor of Law, was the first to recognize the value of teaching legal ethics in a clinical setting. He was instrumental in persuading the rest of the faculty to adopt this idea, and initiated the grant proposal to the Keck Foundation.

18. We feel fortunate that Notre Dame Law School has two required courses in ethics since this ensures that students who enroll in the clinical ethics class have had a basic grounding in ethics. The clinical class serves to "contextualize" the students' pre-existing knowledge of the subject.

Students enrolled in the clinic are the lawyers on the cases that the clinic takes.[19] The supervising attorneys play an advisory/consultative role, allowing the students as much freedom as possible to work on the cases.[20] Because the students are the lawyers, they feel more a part of the profession than they generally do while in law school. They also have the opportunity to engage in the rough and tumble of legal practice: to encounter the mother who no longer wants custody of her children, and who is willing to hand them over to the drug-addicted father; to represent and counsel the family whose children are being removed by the Welfare Department because the parents do not see the importance of sending their children to school; to cope with landlords and evictions; and to untangle the chaos and mystery of multi-party mortgage foreclosures.[21]

Acting like a lawyer, encountering the dilemmas that lawyers encounter, and thereby feeling they are a part of the legal profession, all aid a student in coming to terms with the issues canvassed in a legal ethics class where ethical and moral questions as well as the Rules and the Code are raised. Our clinical legal ethics classes focus on the problems students have encountered in their cases. Students are encouraged to talk about their cases, and there is often a feeling of solidarity at class meetings because most of the students have experienced their own dilemmas in their cases. In describing problems, students seek the advice and approbation of their peers who are receptive, knowing that they too may find themselves in similar situations.

The Rules and the Code are discussed at class meetings, but more in the context of defining the conventional parameters within which the problem will be resolved. They are not generally looked to for moral insight into the particular situation, but they tend to produce a resolution within the guidelines of what has been determined professionally permissible by our professional colleagues.[22]

Students probe difficult issues such as what happens when one's view of a "good outcome" for a particular case differs from the client's.[23] They thus

---

19. Our practice is that students interview prospective clients and then meet as a group with the supervising attorneys to decide together which cases to accept and which students will be the lawyers on those cases.

20. Indiana has a student practice rule that permits law students who have completed one half of their legal education to appear in court and represent clients under the supervision of an attorney. Our students thus have the opportunity to represent clients in court. We also encourage them to undertake the full gamut of lawyerly functions, such as meeting with, interviewing, and counseling clients, drafting documents, and undertaking negotiations as well as advocacy and court work.

21. Students generally are exposed to a fairly diverse case load in the clinic, although obviously poverty law does not encompass all aspects of practice. Some of the participants in the seminar are also enrolled in the public defender externship, and they bring insight regarding criminal ethical situations to the group. Details regarding corporate practice are supplied by written material, students' summer experiences, and by the instructors.

22. Because we teach "legal ethics" rather than "professional responsibility," it is important to canvass not only the rules but also moral and ethical issues that the rules do not raise.

23. For example, one case involved a client who owed the local housing authority a fairly large amount of unpaid rent. The student working on the case felt that in principle our client should pay at

canvass questions of who directs the representation—the attorney or the client—not necessarily in a "bookish," rule-bound, or scholarly manner,[24] but in a realistic fashion, tempered by experience and by the presence in their lives of troubled and troubling people.

Because the class is offered to the students as a "firm meeting" attended by all of the members of the firm, that is, all of the students enrolled in the Legal Aid Clinic at the time, there are usually no problems with confidentiality or attorney/client privilege. However, because confidentiality is so crucial to professional responsibility, students are reminded to take seriously their ethical obligation to preserve their clients' confidences and ensure that confidentiality within the confines of the clinic. We have found the students form relationships with their clients and are thus diligent about protecting their clients' confidences.

Clients are advised by students at the initial meeting that the Legal Aid Clinic is a teaching clinic as well as a provider of legal services. Clients are thereafter advised that their problems may be discussed for educational purposes at meetings involving groups of students enrolled in the clinic. This knowledge has not often altered the dynamics between the student intern and his or her client.

Engaging students in moral debate about our day-to-day practice in the clinic encourages students, and provides a model for them, to engage in moral conversation with their clients. Notre Dame Law School's mission is to produce "caring and compassionate lawyers," as well as competent ones.[25] Notre Dame is also developing a tradition of an "ethics-centered" curriculum.[26] Students act consistently with this mission, within Notre Dame's tradition, and within the

---

least some if not all of this debt, given the fact that she had lied to the Housing Authority about the amount of income she was receiving. The client's view of the matter was that she had voluntarily vacated her apartment and therefore should not have to pay any of the back rent.

24. The clinical legal ethics classes do have a traditional scholarly dimension, however, because in-class discussion centers on assigned readings. The teachers help the students make the connection between the readings and the topics that arise in seminar discussions. More often than not, however, the students make the connection for themselves. Weekly papers and journals provide another way for students to connect the readings and experience and provides an additional means for them to express their personal feelings.

25. In THOMAS H. MARTINSON, THE BEST LAW SCHOOLS 164-65 (1993), Dean David T. Link, the current Joseph A. Matson Dean and Professor of Law, describes the Notre Dame program as being "one that aims to educate men and women to become lawyers of extraordinary professional competence who possess a partisanship for justice, an ability to respond to human need, and compassion for their clients and colleagues. Therefore . . . the program emphasizes not only skill but service, not only professional ethics but also social and moral ethics."

26. Dean Link is committed to ensuring that the subject is not relegated to the two required classes in ethics, but that ethical issues are explored in every subject in the curriculum. This approach corresponds to the "pervasive method" of teaching ethics. However, it has not been formally institutionalized at Notre Dame; professors are encouraged to raise ethical issues in their classes but are not required to spend a certain amount of time each semester doing so.

tradition of Aristotelian ethics when they bring their whole selves (professional and personal) to an encounter with a client.[27]

Our students know that our clients do not bring us purely legal problems with neat fact patterns but entrust us with stories about their lives, their family relationships, their fears and wishes. To respond to that trust by bringing only our professional selves to the relationship would be an injustice. Our clients often want to engage us in moral conversation about their problems; their expectations form part of our seminar discussions.

For example, many clinic clients are struggling against decisions from government bureaucracies. Their struggles have a profound effect on them. Edward Dauer and Arthur Leff[28] cynically note that "[a] lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people—as non-people. Most lawyers are freelance bureaucrats." As our students see the effects of bureaucracies on their clients' lives, their instinctive moral nature (that is, that which was engendered prior to law school) leads them to counter rather than perpetuate those effects. Bureaucrats rely on rules and regulations when dealing with people, maintaining only professional relationships with those who seek their help. Our mission is to teach students to explore with their clients the issues the bureaucrats often ignore.

IV

EXTENSION TO NON-CLINIC PARTICIPANTS

Because those of us who teach these clinical ethics seminars believe that engaging in moral conversation is crucial to decency in the profession, and is ultimately beneficial for clients, we have tried to "export" our approach to teaching ethics to students who are not enrolled in the clinic.[29] This transplant has not been as successful as the original project. For one thing, the dynamics are altered when facts have to be changed and identities concealed to protect confidentiality.[30] For another, students who do not work actively with clients do not come to know the realities of their clients' lives and problems. Moreover, the non-clinical students who participate in these seminars do not feel as much a part of the legal profession as their colleagues in the clinic whom

---

27. Alasdair MacIntyre deplores the fact that human life in the modern world is compartmentalized or partitioned into a variety of roles, each with its own mode of behavior, with private life being divided from public life, work from leisure, the corporate from the personal. ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984). He sees this compartmentalization as contrary to Aristotelian philosophy which stresses the unity of human life, the virtues, and the concept of a tradition. Given Notre Dame's mission, and its ethics-centered curriculum, we hope to impart to students the value of bringing their whole selves, both personal as well as professional, into their relationships with their clients, and not to compartmentalize their lives into "professional" and "personal."

28. Edward A. Dauer & Arthur Allen Leff, *The Lawyer as Friend,* 86 YALE L.J. 573, 581 (1977).

29. We offer both "intern only" and "non-intern" seminars. In both cases, the seminar satisfies the law school's requirement of an upper-division course in ethics.

30. One of the seminars that I taught to non-interns had more than 30 students enrolled. "Intern only" seminars usually have about 15 to 20 students. With a larger group like the non-intern group, it is more difficult to engage students and involve the whole class in discussion.

we regard (and who come to regard themselves) as practicing lawyers.[31] They, therefore, do not yet have a vested interest in how the profession is viewed and what their contribution is to that appearance.

The cases we discussed were not their cases; they did not know the parties involved; they did not have to tell a client that we would not represent her in trying to win back custody of her children because we do not believe that it is in her or the children's best interests. Also, the mixed class lacked the same feeling of camaraderie that is present when the legal interns meet to help each other come to terms with a difficult situation, knowing that next week they may be the ones confronting the difficult problem. In spite of these drawbacks, I have found that clinical ethics classes are more effective than books and lectures in illustrating to students that there is a personal side to professional responsibility, and in showing them that lawyers who do not engage in moral and ethical conversations with their clients shortchange not only their clients but also themselves.

V

CLINIC SHORTCOMINGS AND DIFFICULTIES

Although teaching ethics in a clinical environment apparently solves the problem of situating or contextualizing ethical problems, it has a number of shortcomings. First, the clinic environment that is provided for students does not duplicate the environment of a law firm and since the majority of our students will practice in firms, it may be open to criticism on those grounds. Despite the fact that we regard ourselves as a firm, our clinic cannot duplicate a law firm's environment inasmuch as our clients, who do not pay for our services, and who, as poor people, have generally come to expect little from the system, often perceive themselves as lacking power in their relationships with their student lawyers. The dynamics of this relationship are different from those that the student may later encounter in practice with a client who is a powerful, established, and paying client of the firm.

Further, the clinic also differs from law firms in that it is probably more supportive of the student's ethical and moral development than any firm is likely to be. Susan Koniak of Boston University has suggested that teachers of ethics ought not to create too safe an environment in which to expose their students to ethical issues, because the world of practice is not a safe world, and while we hope that our students will be lucky enough to find responsible mentors, there are no guarantees that they will.[32] While Professor Koniak's point is well taken, I am still of the opinion that our fledgling lawyers deserve a supportive environment. Clinical practice is not "safe" in that students often find themselves having to turn down cases because they already have a heavy

---

31. The seminar benefits when at least some of the students have some practical experience, for example, from summer jobs or clerkships.

32. Susan Koniak, Remarks at the Keck Ethics Conference, Duke Law School (Nov. 2-3, 1995).

case load, knowing that the applicants for our services have no other legal resources available to them. Rejecting prospective clients who are often desperate and explaining to them that lawyers have an ethical obligation not to undertake more work that they can competently handle is no easy task. Students also occasionally have to confront opposing counsel or clients who are trying to take advantage of them because of the students' relative lack of experience. Students are encouraged to deal with these situations themselves, so they come to learn from these instances, and from other practical summer experience, that the world of practice is not safe. However, while we are exposing them to the "unsafeness" of this world, it makes sense to provide a supportive environment for them in which their personal code of ethics and sense of what is appropriate can be nurtured and developed.

A second shortcoming of teaching legal ethics in the clinical environment is that, as mentioned previously, the clinic does not provide the full range of lawyering services in that it does not accept any criminal cases or corporate work. Our lawyering is done for poor people. However, several participants in the seminars typically have experience in criminal defense work through the law school's public defender program, and many other students have a wide range of non-poverty law experience.

A third limitation of the clinical ethics experience is that it is not a "cost effective" means of teaching ethics because it is best suited to small groups.[33] In addition, because the nature of our clinical work is legal service to the poor, the clinical ethics experience is best suited to those students who have a real interest in doing this type of work. While students need not have an interest in public interest law to enroll in the clinic or the clinical ethics seminar for credit, the students who do have such an interest often participate more keenly in the ethics seminars because they are more interested and engaged in this kind of work.

VI

CONCLUSION

The fact that many law schools teach Professional Responsibility rather than Legal Ethics seems to signify that the prevailing view is that a professional knowledge of the rules is sufficient to ensure "good" lawyers, or that ensuring "good" lawyers is an impossible task, and that all a law school can do is teach them how to keep their licenses. If one accepts Dauer and Leff's definition of a good lawyer as being "professionally no rottener than the generality of people acting, so to speak, as amateurs,"[34] then perhaps classes on professional responsibility are adequate. If our aim is to produce professionals who are

33. I would argue that this consideration is outweighed by the method's extreme effectiveness.
34. Dauer & Leff, *supra* note 28, at 582.

caring and thoughtful people as well as competent professionals, then perhaps an approach similar to the clinical legal ethics class at Notre Dame is warranted.