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On Teaching Legal Ethics in the Law Office

Thomas L. Shaffer*

Life is a gift of God, Who has ordained how it is to be lived and perfected. All of His laws are designed to assist men and women in the attainment of a supernatural destiny. And that is really something to sing about!

—Edward J. Murphy¹

Edward J. Murphy, my teacher, colleague, and friend, was as devoted as anyone at Notre Dame could be, to a Christian law school on this campus. He announced a personal and institutional claim, and he expressed his hope as well, when he told our graduating law class, in 1994, that this is “a school which publicly and without apology proclaims its religious roots.”²

And he was as interested as anyone could be in identifying those religious roots, and exploring the implications of them for the practice of law at the end of the twentieth century in the United States of America. “If we are able to see everything in the context of the triune God and His activity, the universe is totally real, totally rational, and totally meaningful,” he said.³

To Ed Murphy’s vision for our school, in thanksgiving for his thirty-seven years of brilliant teaching, example, and inspiration, and in his memory, I dedicate this report on one small experiment in the vocation he lived, every day, and offered to the rest of us here.

* * *

Notre Dame’s legal aid clinic is a latter-day venture, not fully established until 1990, when two young mothers turned its student-organization predecessor into a law office.⁴ And Notre Dame’s law school is perhaps more prominent than most law schools in proclaiming an ethical focus.⁵ Those two facts came together in a happy way, to persuade the Keck Foun-

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¹ Edward J. Murphy, *The Sign of the Cross and Jurisprudence*, 69 NOTRE DAME L. REV. 1285, 1289 (1994).

² *Id.* at 1285.

³ *Id.* at 1287.

⁴ Until 1990, students in the law school maintained a Legal Aid and Defender Association with a faculty sponsor. The Notre Dame Legal Aid Clinic was created in 1990 under the direction of Eileen M. Doran and Barbara S. Gasperetti, both of whom came to Indiana from large-firm law practice in other states—Doran in Wisconsin, Gasperetti in Oklahoma and California.

⁵ UNIVERSITY OF NOTRE DAME LAW SCHOOL, BULLETIN OF INFORMATION 2 (1995-1996). The bulletin states:

The Law School draws its inspiration from two ancient traditions. In the tradition of English and American common law, it is a university law school. . . .

The other tradition is the Catholic tradition, the tradition of Sir Thomas More, who was able to say he was “the King’s good servant, but God’s first.”

.....

dition, in 1993, to fund a three year experiment in clinical legal ethics. We have since mounted twelve of these clinic ethics seminars in our law office, winter, summer, and fall, over six semesters and three summers, and we are likely to continue doing so after the Keck support runs out in the summer of 1996.

The Notre Dame experiment in clinical legal ethics has been described elsewhere by two of the seminar teachers, Christine M. Venter and William P. Hoye. This essay, which depends on their descriptions, is a mildly eccentric reflection on what a practice-centered approach to morals in the law office looks like to a law teacher who has been in university legal education for thirty-three years, many of them spent teaching and writing about legal ethics.⁶

Our law faculty quickly approved the clinical ethics seminars and decided students could substitute one of them for the required upper-class course in legal ethics. The notion we presented to the faculty, and to Keck, was that clinical seminar sessions would be like meetings in law firms with morals as the agenda. Our model and our goal has been the law office. The cases and dilemmas we proposed to use—and have used—are current moral problems student lawyers in the clinic and their supervising attorneys *have* to solve or ignore, because they involve real people in real situations—students acting as lawyers under Indiana's student practice rule;⁷ clinical faculty young and old; a supportive local bar and bench; and clients who retain us to represent them in a wide range of civil cases.

I need, by way of introduction, to notice and try to make sense of what seems to me the most dramatic effect from seminar discussions of live, current moral questions within the practice of a single law office: *It pushes past some of the modern barriers to moral discourse.*⁸

Americans in the late twentieth century evade moral discussion of what they are about. My impression is that this is true of law students in "professional responsibility" courses, as it is of law faculties and lawyers in practice. The methods of evasion are diverse but consistently banal. They include resolutions that dig no deeper than rules of practice imposed by

The Notre Dame program 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.

6 Some of this is in three books on legal ethics and two teaching books for courses in legal ethics: THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981) [hereinafter *ON BEING*]; THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* (1987) [hereinafter *FAITH AND THE PROFESSIONS*]; THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* (1991) [hereinafter *AMERICAN LAWYERS*]; THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* (1985) [hereinafter *AMERICAN LEGAL ETHICS*]; and THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994) [hereinafter *SHAFFER & COCHRAN*].

7 Section 4 of IND. A. D. Rule 2.1 (1994) (Indiana Rules for Admission to the Bar and the Discipline of Attorneys) permits law students who qualify to "interview, advise, negotiate for, and represent parties in any judicial or administrative proceeding in this State, provided all activities undertaken are supervised and approved by an attorney who is a member of the Bar of this State."

8 I began my public argument that the practice of law is moral discourse in a lecture at the Osgoode Hall Law School in 1979. That lecture eventually became chapters one through four in *ON BEING*, *supra* note 6. What I mean in the text here, with the phrase "modern barriers to moral discourse," is that there is law practice which chooses not to choose, as there is law practice that chooses to choose and that therefore honors itself as a place of moral discourse as it tries to describe something ethically defensible when it talks about what it does.

courts—rules which virtually everyone identifies as ethically inadequate,⁹ or labels as a superficial moral minimum,¹⁰ or both. As my colleague Christine Venter, one of the clinical seminar teachers, put it:

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 maybe that ensuring "good" lawyers is an impossible task, and that all a law school can do is show 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" then perhaps classes on professional responsibility are adequate. [But] our aim is to produce professionals who are caring and thoughtful people¹¹

Our colleague William P. Hoye, another of the seminar teachers, is a bit more cynical:

Law students . . . must learn to recognize ethical issues in the often subtle context in which they tend to arise in practice. These issues rarely grab a lawyer by the lapels and say: "Here I am. Resolve me." In fact, they are often interwoven into complex fact patterns. They also can be easily colored or shaded, if not entirely obstructed, by valued relationships with clients, judges, colleagues and others, as well as by emotion and greed.¹²

My guess is that the evasion is also related to the common feeling that deep discussion of morals involves religion.¹³ Well educated, upscale Americans—academics more than most—regard religion, to use Steven Carter's telling insight, as a hobby, a matter of taste, a private thing, rather like the practice of sex or an inexplicable preference for a certain brand of beer.¹⁴

The interpersonal tactics of evasion are: (1) silence, on virtually all deep moral questions; or, when discussion is not easily avoidable, (2) responses that go no further than court rules; or—the most common of all moral conclusions in modern America—(3) the dogma that what makes behavior bad or good, right or wrong, is the choice of the moral agent: Every person is her own tyrant.¹⁵

9 See, e.g., Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

10 See SHAFFER & COCHRAN, *supra* note 6, at ch. 1, and sources cited therein. The superficiality of professional rules as sources of moral guidance, accounts, in my assessment, for the profession's recent interest in promulgating statements about civility. See, e.g., STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT (speaking, in a preamble, of "the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.").

11 Christine M. Venter, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, LAW & CONTEMP. PROBS. (forthcoming Nov. 1995) (manuscript at 11, on file with author) (citing Edward A. Dauer & Arthur A. Leff, *The Lawyer as Friend*, 86 YALE L.J. 573, 582 (1977)).

12 William P. Hoye, *A New Approach to Teaching Legal Ethics* 5 (1995) (unpublished manuscript, on file with author). Hoye here alludes, perhaps, to the self-deception of noble motives. As to this point, see AMERICAN LEGAL ETHICS, *supra* note 6, at chs. 6-7.

13 See THE GALLUP REPORT, 259 (April 1987); *More U.S. Adults Attending Church*, NAT'L CATH. REP., Apr. 23, 1993, at 8.

14 STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993).

15 This point is developed more fully in AMERICAN LAWYERS, *supra* note 6, at ch. 1.

We have found, I think, that when a teacher or two and a seminar of student lawyers get past these inhibitions, moral conversation is able to flourish.¹⁶ It does not always flourish, but it is able to flourish, as much as moral conversation did in the academy that gathered around Aristotle in Athens, among the Rabbis who produced the Talmud, around Thomas Aquinas at the University of Paris, in Thomas More's house in Chelsea, or in a congregation of fifteenth century Anabaptists in Zurich.¹⁷

The comparison I imply in saying that considers my own years of teaching classroom, casebook legal ethics courses at Washington and Lee, Boston College, the University of Maine, and Notre Dame. (There is no significant difference between "religious" and "secular" law schools in this respect, nor between religious schools that claim to be serious about their tradition and those that seem to pay no attention to it.)¹⁸ It is not that those classroom sessions from my diverse past were weak, as such things go—they were not.¹⁹ They were often very good indeed, and even more often (even when very bad indeed), occasions where I learned from my students.²⁰

But there is a clear difference between what I did then and what I have been doing in the clinical ethics seminars. Part of the difference is in student-lawyer participation in the seminar sessions—the clinical ones fare better on general, self-centered academic criteria for what is fun about teaching law. Student involvement, intensity, and, often, intellectual content are better. My colleague William Hoye also found that to be true:

Unlike the professional responsibility course I took in Law School, the in-class discussions in Clinical Ethics have been a tremendous success. Virtually all of the students in the class actively participate in the discussions. They tend to stay on task and contribute to the "debate." They also seem genuinely interested in the topics we are discussing. The discussions occasionally grow heated, especially when one student challenges the moral correctness of a colleague's recommended course of action. Nevertheless, the students are surprisingly courteous to one another and respect their differences of opinion on important moral questions.²¹

Christine Venter and I, and Franklin A. Morse II, who also teaches the seminar, would no doubt agree with Hoye's noticing the courtesy. I feel moved to add, though, that courtesy in the clinical seminars is not merely

16 "Flourishing" is described as the goal of the moral life in Aristotelian ethics. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* 307 (Martin Ostwald trans., 1962); JOHN M. COOPER, *ARISTOTLE ON FRIENDSHIP* (1977), reprinted in *ESSAYS ON ARISTOTLE'S ETHICS* at 323, 330 (Amelie O. Rorty ed., 1980).

17 JOHN H. YODER, *THE PRIESTLY KINGDOM* 15-45 (1984).

18 I developed this comparison in Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 *STAN. L. REV.* 1859 (1993).

19 The teacher's manual published by Matthew Bender to accompany *AMERICAN LEGAL ETHICS*, *supra* note 6, for example, is made up almost entirely of essays written by my students at Washington and Lee.

20 Rabbi Judah Ha-Nasi said, "I learned much from my teachers, more from my colleagues, and most of all from my pupils." *DAILY PRAYER BOOK* 483-84 (Phillip Birnbaum ed. & trans., 1977) (quoting *Makkoth* 10a).

21 Hoye, *supra* note 12, at 4.

conventional; civility seems here to come by way of experience in the practice of law, from exercising the skills of well-bred people in a particular and sometimes tragic practice setting. When Deans Ivan Bodensteiner and Clinton Bamberger evaluated our seminars for the Keck Foundation in 1995, Bamberger said:

The students . . . experience the practice of law . . . [and] are attentive to discussions of the ethics of the profession and the moral quandaries of life as a lawyer. They understand that when one of their office mates has represented the "wrong" party in a domestic dispute, they may not help the vulnerable, abused spouse who may not find another advocate. It hurts to say no—and they remember the lesson of the profession's rules that prohibit law partners from acting for conflicting interests. They learn about a lawyer's obligation not to accept work she does not have the time to do well when at an intake conference their plea for the office to represent the destitute client they interviewed is rejected because neither she nor any other student has the time in the press of the competition of law school. She remembers the rule and there is an ache in her conscience when she must call the person and say no.

. . . .

Law practice, even for a time as short as an academic semester, will inevitably raise issues There is always the . . . question of which indigent client does the student turn away And the accompanying personal moral questions that arise because there is no other lawyer in the community who will help the rejected poor client—in a society where law rules the lives of the poor. . . . In other cases clients put to student lawyers the questions of limitations, infancy, or insolvency for which Sharwood gave an ethical answer and the codes give an opposite professional answer. The student's conscience wrestles with advice for her indigent client.²²

* * *

The clinical ethics seminars are, then, often fun to teach, as Hoye said, and sometimes, as Bamberger noticed, open a window on the tragic character of professional life. But most of the difference between them and the regular ethics courses I have taught—and this is a difference Bamberger also noticed and that I did not expect—is what happens outside and around the seminar sessions: The law office becomes a place of moral discourse, virtually any time two or three are gathered together there to practice law. Summer students in our clinic talked for *weeks* about a battered woman who came to us because she was being hectoring by the prosecutor's office after she decided to drop charges against her abusive boyfriend. That case was resolved in these moral conversations, and, because it went on for weeks, it was resolved over and over again.

²² Clinton Bamberger, *Consideration of the Ethics Seminars at Notre Dame Law School 1, 7* (June 17, 1995) (unpublished manuscript, on file with author); see also Ivan E. Bodensteiner, W.M. Keck Foundation Grant, *Clinical Ethics Seminars Evaluation Report* (Apr. 26, 1995) (unpublished manuscript, on file with author).

In another case, another battered woman—this one an elderly woman—decided, with the help of student lawyers from our office, to force her bitter and abusive husband into a nursing home, to take over the family property, to file for divorce, and to petition for a guardianship over her husband. There were half a dozen steps in that case; virtually every student lawyer in the clinic talked about it. They returned to it before every step in our representation. It has become, as if what we did had been worked out by an appellate court and reproduced in casebooks, a leading case in our practice.

Other examples come from our immigration practice, which deals regularly with "illegal" aliens who have forms to fill out. The Immigration and Naturalization Service knows about these people; it knows where they are; it could deport them, but leaves them alone, always for the present, always standing ready to pounce when one of them seeks public assistance, employment, comfort, stability, or the ordinary consequences of being an American taxpayer.

Bodies of opinion gather around these moral conversations. When the obstacles are removed from stating religious reasons for moral choices, most students (sometimes with persuasive reluctance) tend to admit, as I do, that they come into clinical work as a way to live out their trust in God. Some of us have moved radically to the left—perhaps in the way Latin American liberation theologians have²³—as we become involved in the lives of people from the American underclass whom we come to know, and as our clients show us what courage is.²⁴ The cases and the clients clarify our convictions, though, and take some of the academic arrogance out of them: They tend to make us less, rather than more bombastic, as a result, I think, of drawing opinions from the ambiguities of situations, and of talking about our opinions in the seminars and with other lawyers in our office.

What are we doing, for example, when we file a guardianship or an adoption petition for a grandparent who has (for the moment) taken away her child's children? How does that fit into the broader sense of undertaking we have from being lawyers—from being religious people whose work in the law is a ministry (although we tend to avoid the word, because it sounds like hubris)—from being upper to middle-class Americans, trudging in time to a tidy fortune, who get involved with the people whose misery supports upper to middle-class America?²⁵

* * *

One way to notice that regular law-firm meetings on moral questions tend to open up moral conversation throughout the office, throughout the

23 See Robert E. Rodes, Jr., *Law, History, and the Option for the Poor*, 6 LOGOS 61 (1985); Douglas Sturm, *A Liberationist on Ethics*, 43 CHRISTIANITY AND CRISIS 289 (1983); Douglas Sturm, *Praxis and Promise: On the Ethics of Political Theology*, 98 ETHICS 733 (1982).

24 Two indicative examples from popular American lawyer stories are Mrs. Dubose in HARPER LEE, *TO KILL A MOCKINGBIRD* (1960), and Miss Habersham in WILLIAM FAULKNER, *INTRUDER IN THE DUST* (1948). In both cases, children learn about courage from elderly, single women. See Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531 (1994).

25 See Rodes, *supra* note 23; Robert E. Rodes, Jr., *Greatness Thrust Upon Them: Class Biases in American Law*, 28 AM. J. JURIS. 1 (1983).

week, is to identify and consider an issue where that seems not to happen, where the obstacles are still in place, where responses are silence, reference to the rules, or reliance on client autonomy.

The example I think of (there are a few others) is the "advance directives" practice and the possibility that a boiler-plate form for a living will or appointment of a health care agent will come into play in a situation like those that were litigated in the *Quinlan*,²⁶ *Cruzan*,²⁷ and *Lawrance*²⁸ cases. In *Lawrance*, the Indiana Supreme Court held, under the state constitution, that every person has an absolute right to authorize or refuse medical care, from Band-Aids to brain surgery; and that this right may be exercised by surrogates.²⁹ Those legal dogmas were used to justify (with one judge dissenting³⁰) the removal of feeding tubes from a middle-aged woman who had been supported by the tubes for four years and who was, aside from being comatose, healthy.

A few members of our law school community, including two of the student lawyers in the clinic, have been telling us on the side—in memos and in private arguments with the oldest lawyer in the office—that it is immoral for our office to prepare documents that might be used to disconnect artificially provided food and water from a healthy person. They provide us with the ingredients for a first-class moral argument. If we can get the argument going, there are dozens of recent, earnest books, statements, and articles about the issue, from religious leaders, medical ethicists, and journalists, as well as propaganda from pro-choice, pro-life, and pro-euthanasia groups. At Notre Dame, we have had several colloquia, committee meetings, and rump faculty sessions on the issue, and hundreds of memos. But *those who do this work in our law office, for clients, do not find the issue interesting*. We have had only one good moral discussion of it in the seminars, despite a dozen attempts at setting one up.³¹

Why don't the people who are practicing law here find this issue interesting? I have a guess, and, if my guess is right, it teaches me something about teaching ethics. My guess is that the material we have on the issue, on both sides, is too dogmatic. Lawyers who read what the judges and the "thinkers" say about it, on the one hand, and then talk to an elderly widow who is deeply persuaded that she does not want "the tubes" inserted in her body when she is dying, on the other, seem to have nothing interesting to talk about. Our clinic policy (which can always be discussed) is to invite moral conversation with clients about artificially provided nutrition and hydration, as well as about other "life sustaining" medical technology, and to

26 *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

27 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

28 *In re Lawrance*, 579 N.E.2d 32 (Ind. 1991).

29 Notably those specified in the Indiana Health Care Consent Act, IND. CODE § 16-36-1 (1993).

30 *In re Lawrance*, 579 N.E.2d at 44 (DeBruhler, J., dissenting).

31 A task force of student lawyers explored the issue in the 1995-96 academic year. One of them, Daniel Webber, perhaps representing the opinion of our student lawyers and probably offering some hints on why the issue does not develop discussion, wrote: "I think estate-planning lawyers, as part of their routine practice, should (1) make clients aware of various advance-directive alternatives, and (2) draft whatever alternative the client wants." He wrote that he could not approve of a situation in which "the lawyer is simply making a judgment that his position is . . . more moral than his client's."

honor the reluctance of any student lawyer who objects to preparing documents that would lead to withholding or withdrawing these things. But clients, we find, do not want a moral conversation;³² no lawyer in our office has refused to prepare the documents; we see almost no indication that any lawyer in the office is persuaded by the objections of those who question what we are doing.

That tells me something about the ethics of rules and rule makers. Rule makers—and nowhere more advertently than among those who drafted and promulgated the 1983 American Bar Association *Model Rules of Professional Conduct*—do not want moral conversation.³³ This is as true of those who derive what they think are rules from statements of religious leaders, most notably, at Notre Dame, from the “magisterium” of the Roman Catholic Church, as it is of defenders of Dr. Kevorkian.

If you don’t want moral conversation, you have no need for community. All you need is an assembly—voluntary or coerced—of those who must obey. There is then no need for moral discussion in the office, no need for seminars and no need for *ethics*. Rule makers who are also religious leaders apparently see no need for what John Howard Yoder, describing moral deliberation in the church, calls the communal quality of belief.³⁴ At any rate, the rule makers have not asked us Wednesday-afternoon, county-seat, general-practice lawyers what we think. All of which is to say, as an inference from experience and observation, that teaching ethics in the clinic will not work if all we teachers have in mind is analysis of rules. And that is to say, but in a deeper way than what one says when he says that the *Rules of Professional Conduct* are a moral minimum, that ethics is not about rules. It is about how to live with rules.

This does not suggest that ethics in the law office can just ignore professional rules; we would do our students poor service indeed if we encouraged them to be people of conscience, flourishing in their friendships, and neglected the fact that they will not last long in practice if they are constantly being brought before professional grievance committees for violations of the *Rules of Professional Conduct*.

* * *

The principal effect of teaching ethics in the clinic (and, I think, of finding a way to do something similar in any law office) is that it tends to

32 An elderly, single woman, a devout Roman Catholic, asked the student lawyer who had prepared her health care appointment, and me, whether the document conformed to the teachings of her Church. I offered her some bishops’ statements on the question. She said she did not want to read anything; she wanted my opinion. I suggested she might want to talk to her pastor about it. She said she did not want to talk to her pastor; she wanted my opinion. I then told her that, in my opinion (and I am a Roman Catholic), the document was consistent with the teachings of our Church.

33 See Gillers, *supra* note 9; see also Hoye, *supra* note 12, at 1 (recalling his days as a law student):

[M]y professor used the Socratic method and asked us to recite the holdings in disciplinary cases and memorize arcane rules. There was little, if any, discussion of legal ethics or moral questions of right or wrong. We simply discussed what the Rules required or permitted. One could easily have concluded from the experience (and, I suspect, many did) that if the Rules do not prohibit something, then it is permissible.

34 YODER, *supra* note 17, at 22-26.

remove obstacles to moral discourse, so that the practice itself becomes moral discourse, and maybe so that it moves toward being a "practice"—as Alasdair MacIntyre describes that sort of moral association—a school for virtue.³⁵ But the clinical ethics seminar, as we have done it at Notre Dame, is also an academically respectable seminar. Students read books and handouts; they write journals and papers; they are invited to learn from their ethical and professional masters, as they are expected to learn from the clinical faculty how to draft motions and try lawsuits. They are expected to apply their learning in writing about and discussing our cases—to serve God in the tangle of the mind, as Bolt's Thomas More put it³⁶—and to demonstrate in academically respectable ways that they have done so.

The routine difference between the cases and dilemmas used in a classroom professional responsibility course and what we take up in a clinical ethics seminar is that our seminar discussion is not a hike around the woods, a hike that ends where it began: If the law office meeting on the morals of practice, using specific cases, as we do, does not come up with *answers*, it is a waste of time. (And that may tell you something about the weakness of classroom courses in legal ethics—none more than my own, by the way.) The office (seminar) is asked to decide whether to bushwhack the abusive old man into the nursing home. It is asked to decide—*decide*—whether to reveal information to the lawyer on the other side, or the child protective office in the welfare department, or the judge: Revelation or silence may become irrevocable within hours of the time the seminar adjourns. Indecisive discussion after that may be instructive for the future, but it will mean nothing for the case at hand. To fail to decide in the case at hand is—well, to fail.

As Bamberger put it, in evaluating our experiment:

[S]tudents study the canons of professional responsibility and the moral issues of law practice not only *in* the clinical law practice, as at other schools, but in the separate seminars with material *from* that clinical practice. The emphasis is different. Responsibility as a professional and a moral life as a lawyer are the subject and purpose of the [clinical] ethics seminars.³⁷

35 ALASDAIR MACINTYRE, AFTER VIRTUE 175-189 (1981). Ann Juergens, writing in the Clinical Legal Education Association Newsletter, December 1995, at 17, noticed that friendship in a school for virtue is *fun*:

In my 12 years of clinical teaching, it is clear that we in the clinic simply have more fun than do teachers in other areas of the law school. We are not as isolated in our work—we have a community. We have cases we care about, that we laugh and scream and cry about. When the students drive us crazy we have the clients to keep us engaged and caring; when the clients drive us crazy we have the students to keep us there. When we drive ourselves and our colleagues crazy, the clients and the students pull us through. And, with the help of all three groups—clients, students, colleagues—in spite of the tragedies we witness and the social collapse we try to shore up, we can both model and experience the joyful practice of law.

36 ROBERT BOLT, A MAN FOR ALL SEASONS 73 (Vintage Books 1962) ("God made the *angels* to show him splendor—as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind.")

37 Bamberger, *supra* note 22, at 8.

Leading lawyers to do this, and to resolve the issues they talk about, for the guidance of the law office in cases the law office has, turns out—oddly—to be an *easy* challenge. (I did not expect that either; I have, in general, found teaching legal ethics, and writing about it, to be much harder tasks than teaching and writing about, say, the law of wills.) I find that rarely, if ever, do I have to insist on the group coming to a conclusion; the student lawyers understand, as I think a group of lawyers in a downtown law firm would, that the issues are not just for talking about.

* * *

One reason, perhaps, that leading students to resolve dilemmas is an easy duty is that no law office is generic. Each is an association of particular people, in a place, at a time, and among a distinct population. This realization came slowly, like most of what I have learned in five years of clinical work following thirty years of classroom teaching, and it leads me to suggest, with some success, to our student lawyers, that a bit of procedural priority is helpful in deciding what we should do.

It has seemed to me that we practice at the center of a series of concentric circles. Beginning at the outside, we practice in a rust-belt, mid-western, relatively metropolitan community.³⁸ It has a political structure, a persistent culture, an array of agencies for helping our clients, and an array of agencies that oppress them. We are professional members (a regulated public utility), in a civil community—meaning, for one thing, that we have a lot of power, and that we (and all lawyers) routinely exercise power we do *not* have. A letter on our letterhead can sometimes intimidate a creditor or a landlord or a bureaucrat—only that letter and nothing more—and sometimes it can do that when it should not.

We agreed that we should endeavor to live and work in this wide community with some serious gestures of civic virtue, as the best American lawyers do and always have done.³⁹ However difficult that may sometimes be in modern America, most of us have the skills for it, that is, the virtues that lead to and then surpass civic virtue. Aristotle said the state rests on friendship, as he also said that friends have no need of justice.⁴⁰

Within that wider circle, we work in a community of lawyers and judges. It is this lawyers' community of ours that imposes the *Rules of Professional Conduct* on itself,⁴¹ not the civil community (which does not understand many of our Rules, and disapproves of many of those it does understand). The community of lawyers and judges is a source of support for our educational endeavor, and therefore of our work for clients. Ven-

38 We practice for the most part in St. Joseph County, Indiana, which includes several small towns and the cities of South Bend and Mishawaka—an ethnically and economically diverse community of some 200,000 people.

39 I have noticed this in the novels of Louis S. Auchincloss, notably *THE GREAT WORLD AND TIMOTHY COLT* (1956) and *THE EDUCATION OF OSCAR FAIREFAX* (1995).

40 Aristotle, *supra* note 16, at 214-44; COOPER, *supra* note 16; see also Stanley Hauerwas, *Happiness, the Life of Virtue and Friendship: Theological Reflections on Aristotelian Themes*, 45 *ASBURY THEOLOGICAL J.* 5, 59 (1990).

41 The involvement of the Indiana Bar was significant in revising the 1983 A.B.A. proposed Rules prior to their adoption by the Indiana Supreme Court, as *RULES OF PROFESSIONAL CONDUCT* (1987).

ter describes the respect with which she, as a seminar teacher, approaches this second circle:

The Rules and the Code are discussed, but more in the context of defining the conventional parameters within which the problem will be resolved. The Rules are not generally looked to as offering moral insight into the particular situation, but their presence tends to ensure that one is seeking a resolution within the guidelines of what has been determined to be professionally permissible by our professional colleagues.⁴²

The professional circle, like any "practice," or any association that tries to be a practice,⁴³ stands in the shadow of its teachers, of the predecessors who posed, long ago, for the bar-association pictures that are on the courthouse wall; its traditions, few of them in a book, are as much part of what it expects of us, and we of it, as its rules are.

Another surprise for an aging pedagogue, new to the clinic: This professional community has a vigorous, youthful atmosphere and purpose about it. It is not what I thought it would be. Law student lawyers understand it better than an elder like me. The professional ambiance, in itself, is a source of moral conversation for our law office; elders tend to think that changes wrought by the young are mistakes, and those who work in the office with elders tend to think that the young lawyers downtown have a better handle on what is going on than clinical teachers do.

Within the two circles of civil community and profession there is our law office. If, often if not always, issues that relate to the outer circles are resolved with civility and with rules, issues that relate to the way we work together in our office relate to *policies*. And policies, unlike rules (at least unlike *the Rules*), are vulnerable not only to analysis (as the Rules are) but to discussion and change.

Our "intake conferences"⁴⁴ are an example: Student lawyers in our clinic are the ones who meet and interview prospective clients, and who, meeting together, decide what cases to take. Our law office turns down more cases than it takes, so that moral discussions in which these decisions on retainer are made are among the most intense in the clinic, often more intense than discussions in the seminars. We have a frequently debated policy, generated from discussion, against taking "routine" divorces, for example. If we did not have that policy, our office would be swamped with divorce cases and, among other things, education would suffer. That policy has tended to hold, although we often discuss (and make) exceptions.

We have a set of income guidelines: our policy is to stick to them carefully, but the policy is up for discussion, or at least for bending, when one of the student lawyers comes upon a person or a problem she really wants to handle. Exceptions are not easy, though. When we make an ex-

42 Venter, *supra* note 11, at 7.

43 MACINTYRE, *supra* note 35. See the discussion notes inserted after a reprinting of an excerpt from MACINTYRE, *supra* note 35, in my AMERICAN LEGAL ETHICS, *supra* note 6, at 424-33. Compare my essay on "professionalism" in Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism As a Moral Argument*, 26 GONZ. L. REV. 393 (1990-91), with what MacIntyre describes. See also *supra* note 10 and accompanying text.

44 Bamberger, *supra* note 22.

ception, we have to talk about what the professional community, which makes its living from clients who can afford to pay fees, expects of us. In other words, we have to decide whether the policy should hold, or whether an exception to the policy should trump the rules.

We have a policy against giving legal advice to non-clients, especially on the telephone. That policy does not work well; it needs work, as I realize every time I take a half an hour duty of answering the phone. It may need analysis as well as discussion. Referral is not advice, but when is advice implicit in referral? It needs more study under the Rules, which we tend to apply without analysis in this respect. We should hope, I guess, for a policy on casual legal advice that is more than a set of semantic distinctions.

And in the center, the smallest circle, we have the lawyer-client relationship. There, as James Wilson, one of our founding federal judges put it, is where we find the noblest work of God:⁴⁵ Not in the civil community, nor in the state (the law); not in the profession's rules, nor in our law-office policies; but *there*, where the issue is a *person*. This center is where conscience is most clearly at work. This is where the most potent material for discussion in the seminars is—where the moral argument is a person. (This reality is probably why our student lawyers tend not to find the dogmas on advance directives interesting. As the movie title has it, "Whose Life Is It, Anyway?"⁴⁶)

The priority I suggest in this image of concentric circles, and of rules, policies, and conscience, works from the center out. (1) Conscience trumps both policies and rules. (2) Policies trump rules. (3) A lawyer serving God in the tangle of the mind should be able to apply these priorities without getting into trouble with the grievance committee. (Thomas More succeeded at that, until the state began to lie.) If, for an example I draw from an Ohio case rather than from the clinic,⁴⁷ I want to give my client fifty dollars for food, I can probably do it through a donation to one of the agencies in town rather than by handing my client my check. All of this, finally, is material for moral conversation with our clients, in the clinical ethics seminar, and in the law office—material for the communal quality of belief. And it does tend to work that way.

* * *

Christine Venter, after several semesters of work in the clinical ethics seminars, described the sort of moral collegiality I find described in MacIntyre's theory of the practice:⁴⁸

There is often a feeling of solidarity at seminar meetings because most of the students present have experienced their own dilemmas in cases they are handling. In describing a problem that they have encountered, students seek the advice and approbation of their peers who are

45 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462-63 (1792).

46 There is a description of this movie in MICK MARTIN & MARSHA PORTER, VIDEO MOVIE GUIDE 631 (1991).

47 *Cleveland Bar Ass'n v. Mineff*, 652 N.E.2d 968 (Ohio 1995).

48 See MacIntyre, *supra* note 43 and related discussion in notes 6 and 35.

willing to offer both, knowing that they too may find themselves in similar situations.⁴⁹

We have concluded, somewhat to our dismay, that it is very hard to *export* this communal quality of moral discourse. When we applied to the Keck Foundation for support, we proposed to offer two kinds of seminars—one of the sort I have been describing, and another open to all law students. The seminars open to all students would also use clinic cases, and would also seek real answers to real problems, but the participants would not all be members of the law office. Venter, who taught several of the second sort of seminars, was left with reservations:

In my opinion, 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. For another, students who do not work actively with clients do not come to know the realities of clients' lives and problems. Moreover, the [non-clinic] students who participate in these seminars do not feel themselves to be as much a part of the legal profession as their colleagues in the clinic whom we regard (and who come to regard themselves), as practicing lawyers. They therefore do not yet have a vested interest in how the profession is viewed, and what their contribution is to the way in which people generally regard the profession.⁵⁰

We may need another approach. Bamberger, who agreed with Venter, suggested that we think about videotaping clinic-only seminar sessions; admitting only small numbers of non-clinic students to seminars; disguising and then distributing cases for conventional classroom ethics courses and for other law school courses. He suggested that we set up a paralegal corps, for law students not in the clinic, and then involve these "paralegals" (who would fall on the law firm side of rules on confidentiality) in our seminars. He even suggested that we invade the sacred garden of first-year course work: "The discussion of the clinic's cases in the first-year course in legal ethics . . . would serve another paramount purpose of the Notre Dame Law School in fulfillment of its religious heritage and commitment."⁵¹ In any event, he said, "Law students at the very beginning of their study at Notre Dame should be taught the role of law in society and their obligations to the disadvantaged as lawyers."⁵²

We will think about all of this, and not only because anything Clinton Bamberger says deserves respect. I may, though, go into old age thinking that what we have proved with our clinical ethics seminars is that much more of legal education—maybe all of it—should be as "hands on" as our law office ethics discussions are. It could be, too, that the most useful reflection for us is the reflection any of us has after a successful seminar, taught to a small group of law students who come to us as a small minority from one of America's mass-production law schools: We know we can't do

49 Venter, *supra* note 11, at 7.

50 *Id.* at 9-10 (footnote omitted).

51 Bamberger, *supra* note 22, at 12.

52 *Id.*

everything; we know we can do something; and if we do something, maybe we don't have to worry about not doing everything.

Most of all, though, I think we have demonstrated, to our student lawyers and to ourselves, if to no one else, that it is possible to create moral discourse in a law office—something like what I enjoyed, in another era, in a Hoosier law firm in the early 1960s⁵³—and maybe more than that. And I do think more than that. I also think, though, because of that, that the phrase “create moral discourse in a law office” is not quite what I want. As much as I would like to claim great successes as teachers, for me, Venter, Hoye, and Morse, I suspect all of this has been less a matter of creating something than of getting out of the way of something that was there all along.⁵⁴

53 See FAITH AND THE PROFESSIONS, *supra* note 6, at 131-40. Ivan E. Bodensteiner, *supra* note 22, saw the connection I mean to suggest in the text:

After attending two meetings of the Seminar, I was left with the impression that this model would work well in law firms. Weekly or monthly meetings are common in many law firms, usually to discuss either the management and financial aspects of the firm or substantive areas of the law most relevant to their particular practice. But I don't believe it is common to hold such meetings for the specific purpose of discussing the ethical issues facing the attorneys.

54 I am grateful for the assistance of William P. Hoye, Franklin A. Morse II, Nancy J. Shaffer, and Christine Mary Venter.