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LEGAL ETHICS AFTER BABEL

THOMAS L. SHAFFER*

Legal ethics owes as much to Richard M. Nixon as it does to philosophy. The rebirth of legal ethics in the last decade is one of many consequences, although possibly the most obscure, of the burglary at the Watergate Hotel in 1972. The criminal politics that destroyed Mr. Nixon's presidency summoned American lawyers to a serious, systematic examination of the morals of their craft.

A distressing number of the Watergate villains, including the President, were lawyers: Dean, Erlichman, Colson, Mitchell, and McGruder. The bar association committees that tend professional image were not consoled by the fact that many of the Watergate heroes were also lawyers: Senator Sam Ervin, Representatives Barbara Jordan and Caldwell Butler, Cox, St. Clair, and Judge Sirica.

At about the time the Watergate lawyers were being paroled from their relatively comfortable cells in minimum security federal prisons, the American Bar Association established a committee of eminent lawyers and law teachers to prepare a new statement of legal ethics for the American legal profession. The Association's accreditation standards for law schools had by then been amended to require instruction in ethics as a condition for the license to practice law. "Law Day" ceremonies for a few years sounded less triumphant than they had in the glory days of the Cold War. Speakers spoke less of the menaces of communism and more of the home-grown menaces of hubris and greed. They asked, or hinted at sympathy with those who asked, "What is the matter with lawyers?"

The answer when it came was no more triumphant than the Law Day speeches: there is nothing the matter with lawyers that is not the matter with everybody else. The "problem" of the Watergate lawyers was not their failure to be noble but that questions about legal ethics assume that lawyers claim to be noble. This answer (and I intentionally lapse here into the present tense) seems calculated to make the question go away, as if the profession's concern for morals had found its way out of Watergate.

* This is the first draft of a chapter in a book that is tentatively titled LAWYERS AND THEIR COMMUNITIES and that will, if all goes well, be published in 1991 by the State University of New York Press. It was presented at a symposium on Legal Ethics at the Capital University Law and Graduate Center, Columbus, Ohio on February 12, 1990.
Calculated or not, the "lawyers-are-not-noble" answer has given comfort to law students over the last decade and it probably explains why law professors no longer fuss over Watergate very much. By and large, American lawyers in the making see no reason to be morally distinct. The distinction they think lawyers should have is in knowledge and craftsmanship, and that distinction is understood to be technical, not moral. There is nothing new in this. It is the way 19th century American lawyers came to terms with taking fees from the Robber Barons. In both cases, skill at manipulating an esoteric access to coercive power over-shadowed a "republican" tradition of civic virtue.1

There is a remnant from Watergate as there was a remnant from the Babylonian Captivity. Some hearts and some few minds see possibilities in the two ethical propositions that are involved in a post-Watergate assessment of legal ethics:

(i) there is nothing particularly wrong with lawyers; they are still, as the old saw has it, good people to drink with; few of them would steal your wallet, but
(ii) lawyers should be persons of heightened moral sensitivity (as elders in the profession often still claim they are).

The realization that evil among the lawyers in the Nixon White House was as banal as evil anywhere else did not entirely dampen the speculative curiosity the Watergate lawyers raised. A remnant keeps the curiosity alive and from the curiosity has come a revival of legal ethics. The parent of legal ethics is the questions the Watergate lawyers raised for the profession and an answer that seemed calculated to cause the question to go away.

I do not claim, of course, that American lawyers were not curious about their morals before 1973. Our popular American lawyer stories are stories of moral lives in the profession: Faulkner's Gavin Stevens is the protagonist through a generation of stories of southern gentlemen; Harper Lee's "To Kill a Mockingbird," published in 1960, is still better known to the average American twenty-year-old than the Bible. Network television was, before 1973, as it is now, never without its popular series of lawyer stories. America is steadily interested in the morals of lawyers, even though most lawyers were, before 1973, and are, and always have been, indifferent to the quaint rhetoric that comes from the study and teaching of academic ethics.

Nor do I mean to say that there was not, before Watergate, a subject of study and practice called legal ethics. Since the early

nineteenth century, lawyers in America have had both a normative tradition and a set of procedures for casting out the morally unfit. At least since the middle of the 19th century the normative tradition has been called legal ethics. It proved interesting to some, and led to study, generalization, bits of teaching, and some slight sequential discussion that was not about procedure nor about law. The Philadelphia lawyer Henry Drinker was deservedly eminent for his efforts to give intellectual substance to the profession's exclusion procedures. In 1953, supported by a foundation grant, he published the only treatise on legal ethics that was available when I was a law student. He no doubt developed a speculative curiosity about what made a person morally unfit to practice law.

There was thus a tradition of scholarship and discussion on the morals of American lawyers, but it was a small and unimportant thing. Drinker was the only lawyer thought to be an expert in the subject. He was not employed by a university, and his work in legal ethics was a part-time endeavor. No one I went to law school with read Drinker. I, like most law students of the fifties and sixties, was not given formal instruction in legal ethics, and was not examined on the subject by either university or court. The extent of my consideration even of the profession's regulatory tradition was a required, handwritten paragraph on my application to be admitted to the Indiana Bar. I was told to explain what the Code of Professional Responsibility meant to me. I don't remember what I wrote. I doubt that anyone read it.

Before Watergate, a few law schools offered elective courses in which students could study appellate opinions in cases where someone who had been denied admission to the profession pointed to a legal argument against exclusion, or in which an ex-lawyer claimed he had been thrown out unlawfully. Those casebooks served as the ancestor of a different and now vigorously positivistic discipline but it was not ethics. It was, until Watergate, a rationale for sanctions that good lawyers imposed on bad lawyers. The broader subject, as Henry Drinker presented it, conveyed conventional notions of professional propriety and, in places, hinted at moral aspiration but the moral aspiration was equally conventional. It was what lawyers brought from home, family and religious congregation. There was no evidence in Drinker's discipline of a community of thinkers whose common concern was to ask how a good person goes about being a lawyer, or a lawyer goes about being a good person. Watergate brought a body of law on lawyers into relief, as it gave us lawyer after lawyer who, faced with the public fact that he had done something manifestly disgusting, said, "I did not break the law." It seems to have become necessary, after Watergate, to separate the law on lawyers from legal ethics as ethics. I will use these two phrases as they would be thus separated.

Most of the legal profession's effort in the last decade has been to clarify and enforce the law on lawyers. I am interested in legal
ethics, the lesser part of the separation. This is my fourth book as a member of the ethical remnant: My concern is both with legal ethics as it rose to the top of the Watergate swamp, and also with what is left over from the continuation of the tradition and practice (which Watergate made more prominent) of excluding bad people from the profession and throwing scoundrels out.

Interest in consensus statements from lawyers about how lawyers should behave begins, in America, so far as I can tell, in 1817, when the truculent Baltimore law teacher David Hoffman put an appendix on lawyer "deportment," at the end of his celebrated "course of law study." In 1836, Hoffman revised his "Course" and expanded his appendix into a set of "Fifty Resolutions on Professional Deportment." Half a century later, as lawyers were being identified with the Robber Barons of the Industrial Revolution (1870-1880), and began as a consequence to form bar associations, it became routine for lawyers in association to express formal agreement with statements such as Hoffman's. The statements were academic pieces of work. They originated as instruction to law students, who were not asked whether they agreed with what they read or heard. Hoffman's "resolutions" were useful, but the more popular source for proposed consensus was a set of lectures given in 1854 by the founding dean of the University of Pennsylvania Law School, Judge George Sharswood.

Between 1880 and 1908 these academic statements, garnished with adoption by local bar associations, were formulated into (or at any rate called) codes. The most famous instance of codal translation was the Alabama Code that Judge Thomas Goode Jones worked out in the 1880s. In the twenty years after Judge Jones finished the Alabama Code, his draft for the Alabama Bar was adopted either as court rules by the supreme courts of several states, or as statutes by state legislatures. The translation from statement to code and from bar-association code to court rule or statute meant that these statements had become sources of law.

The mainline twentieth century tradition with which the late Mr Drinker is identified begins with the adoption by the American Bar Association, in 1908, of the "Canons of Ethics," a model legal code for courts and legislatures to follow. The aspiration was that the A.B.A. model would become general and the system would therefore


3. Jones was not an academic; he was then a circuit judge, a Confederate war hero who would become governor of Alabama and, later, United States district judge.

4. In some cases they were adopted both as court rules and as statutes. The British notion of the source of legal power to regulate lawyers is that such authority is in the courts, whose officers lawyers are; but that notion has been resisted by egalitarian American politics that would put the authority in elected representatives of the people.
become uniform. The tradition continued through half a century of interpretation and amendment, much of it presided over by the durable Mr. Drinker. It entered a period of revision in the post-war (World War II) profession, producing the A.B.A.'s "Model Code of Professional Responsibility" of 1970 (also a model for courts and legislatures to adopt) and it reached its current definitive expression when the A.B.A. adopted its new proposed "Rules of Professional Conduct" in 1983. About half the states now follow the 1970 Code and half the 1983 Rules.

This is the "law-on-lawyers" tradition in America. It continues now in a project of the American Law Institute to "re-state" the law governing lawyers. When that project is approved by the majority of those attending a meeting of the Institute, a by-invitation-only organization of prominent judges, law teachers, and practitioners, it will be to the law of lawyers what the Restatements of Torts, Contracts, Property, and Trusts are to those parts of the law-school curriculum—an influential generalization of the common law on the coercive regulation of lawyer behavior.

The modern development that is relevant to my project, which I trace to the Watergate Hotel in 1972, is the elimination of moral aspiration from American lawyers' professional consensus. The Canons of 1908, and their nineteenth-century antecedents, had mixed morals and law because they were mixed in the minds of the legal gentlemen who produced the Canons and their antecedents. The 1970 Code retained both, but distinguished them. The coercive part of the Code, called "disciplinary rules," was graphically separate and printed in bold type. However, before the reader reached the bold type, the Code presented, on each of nine broad statements on lawyer behavior, a consensus statement of moral aspirations called "ethical considerations."5

The 1983 proposed Rules eliminated the ethical considerations, as it eliminated traditional words of moral assertion, e.g., right, wrong, good, bad, conscience, and character. In its place are words of etiquette and regulation, e.g., proper, permitted, indicative verbs of description rather than conditional or imperative verbs of moral duty. In the basic text of the rules, "shall" was substituted for "should," as if the rules were the words of a statute. The 1983 project replaced, in its proposed title, "Rules" for "Code" and "Conduct" for "Responsibility." It declared independence from legal ethics. It left, for those who want to bother with it, space to develop legal ethics.

Removed from its tradition, what the law on lawyers is is now the work of a small sub-fraternity of law teachers of which I am a member. In the early seventies, my law school (The University of Notre Dame) instituted a new course for beginning students in legal ethics. My colleague Fernand Dutile and I were assigned to

5. Except in Virginia, where the bold type came first and in Maine, where the ethical considerations were not adopted at all.
teach the new course. I brought to the task ten years of teaching wills and trusts and some recent adventures in legal interviewing and counseling. Dutile was, and is, a criminal-law teacher who also works, writes, edits, and teaches on the law of education. We found a couple of casebooks regarding the law on lawyers and appellate opinions in admission and exclusion cases for teaching material, which is the path of least resistance when one is assigned to teach a course on this body of law.

I also found some fragmentary information, and nurtured a vague hope, that there were law teachers who were interested in ethics in the way Socrates (or even Moses) was. Dutile and I taught for a couple of years out of the casebooks and a problem book by Dean Norman Redlich. In a festschrift for Louis M. Brown, I wrote an article called "Christian Theories of Professional Responsibility." It was a clumsy essay, but it was the first of its kind. Most of my friends in the law-teaching fraternity accepted it politely, as if I had compared the Internal Revenue Code to the Book of Revelation. A few kindred spirits read my essay, and some of those thought it was interesting. I began to get concrete information from them about law teachers becoming teachers of ethics.

Thus, in the last half generation, university law schools have seen the growth and even early signs of the maturity of an academic sub-discipline and a fraternity whose principal interest in teaching, scholarship, and practice (one, two, or all three) is legal ethics, meaning ethics. It is a curious fraternity. It includes Rhode, Martyn, and Maute. Members of it are people (i) with one leg shorter than the other; (ii) climbing the Tower of Babel; (iii) who suspect that they belong somewhere else.

Legs. Legal ethicists are not like their counterparts in medical schools or divinity schools. Few teachers and scholars of medical ethics are physicians but almost all legal ethicists are lawyers. Those who "do" medical ethics are philosophers and theologians, scholars who have given extensive, disciplined attention to the deepest and oldest sources of moral thought, such as Hauerwas, McCormick, Beauchamp, Childress, May, Gerald Dworkin, et al. Few legal ethicists are formally trained in philosophy or theology. Most are, as I am, academic lawyers who seem to have given up reading law. We read philosophy and theology, novels, anthropology, and humanistic social science. When we talk and write, we depend on and exploit those who write what we read.

6. These, I hasten to interject, are not the same thing: Socrates inquired. Moses, who was hit over the head by God, got the answer to a question he had not asked.

7. My clumsy essay for Lou Brown was published in the same year as Monroe Freedman's book, LEGAL ETHICS IN AN ADVERSARY SYSTEM, a provocative and influential set of arguments that, more than anything so far, has set the terms of debate in American legal ethics.
We are lawyers, though. We have gone through the black-box process, in law school, and, usually, in law practice, that elders in our profession refer to as "paying your dues." We have been to boot camp. Many of us have actually had to think about supporting our families with fees from clients. We are in a better position with respect to the morals of law practice than most scholars and teachers in medical ethics are with respect to the morals of practicing medicine. As professional colleagues, we can demand attention from former students and practitioners. Medical ethicists can rarely do that. They figuratively, and often enough literally, walk last in the procession of white-coated people that make rounds in the teaching hospital.

Medical ethicists, however, have more confidence than we do when they write and talk about traditions of thought that support ethics as an academic discipline. They have paid their dues in the fraternities of the humanities, as graduate students, teaching assistants, and learners of language and of argot. Many of them have been in the clergy and have therefore endured the labyrinthine hierarchy and cruel bureaucracy maintained, since the days of King Solomon, by the Children of God. Most of them have also been tortured by an academic tenure process that is uglier and cruder than the ones we have in professional schools. In a way, this is analogous to our black-box conversion to "thinking like a lawyer." Scholars in medical ethics have gained a confidence in the use of ethical literature that is, I suppose, akin to the confidence we American lawyers have with our arcane common law case method. Students of legal ethics lack confidence in ethics. We have to gain confidence in the traditions of academic ethics, if we ever do, uncertainly and dependently. We bluff alot, but in fact, with each of us, one leg is shorter than the other.

Babel. I manipulated the title for this chapter from Jeffrey Stout's book Ethics After Babel. Stout's book was a response to Alasdair MacIntyre's "After Virtue." Both are parts of a conversation among students of ethics that includes the five authors of "Habits of the Heart." These three recent, impressive, and apparently influential books on ethics enjoy a wide readership among academics, including law teachers who teach jurisprudence and public law. They, and the conversations they provoked, describe what we lawyers found when we first proposed to be serious about ethics and to exploit our colleagues in the humanities.

We found chaos, disarray and a stately argument over whether the chaos and disarray could again become useful. I say "again," because one thing those in academic ethics seem to agree about is that there was a past in which academic ethics was useful. They do not agree about when or on what sources in the past were useful. I said "stately argument" because the chaos and disarray don't alarm the debaters. They are less passionate about the mess their discipline is in than we lawyers are likely to be about our messes. They seem to have less at stake than we do. I think that is because
their discipline is practiced on a Tower of Babel and we don't want ours to be.

In a sequel to After Virtue, MacIntyre states, "[m]odern academic philosophy turns out by and large to provide means for a more accurate and informed definition of disagreement rather than for progress toward its resolution . . . [Philosophers] succeed in articulating the rival standpoints with greater clarity, greater fluency, and a wider range of arguments than do most others, but . . . little more than this." Stout is less grim, but that is because he expects less from his colleagues. He argues that progress toward resolution is possible without the conceptual agreement MacIntyre cannot find. Stout does not argue that there is progress toward resolution. The authors of Habits of the Heart report significant moral consensus in America. They also found significant survival of the moral traditions of community and of biblical faith that Alexis deToqueville noticed in David Hoffman's America, but they report that the students of ethics have failed to create a common language. Consequently, academic lawyers don't know how to talk to one another about moral questions or how to introduce our students to their ethical heritage.

Acedemic ethics did not give the guidance we, of the remnant from Watergate, has hoped to find. What we found is that legal ethics has to formulate for itself what the pioneers might have hoped to find in academic ethics. We have to define our ethical questions as much as other legal scholars have to formulate contemporary questions about the law of property or the function of the fault doctrine in torts. We can exploit the students of ethics in philosophy, theology and the humanistic social sciences, but we have to do it in the way we exploit judges: We couldn't get along without them; if we didn't have them, we would have to invent them; but they will not hand us anything that is ready to wear. If we do wear what they hand us, what we wear will not fit.

We Belong Somewhere Else. The promise of moral philosophy is that it will give us a language that we can use to talk to one another about morals. Moral philosophy fails us entirely if we find that its language does not communicate. It fails us significantly when, although we find that we can communicate with its language, we cannot talk about what is deeply important in our moral lives because it only gives us a set of lowest common denominators instead of what Socrates gave the youth of Athens. MacIntyre argues that moral philosophy has failed in the first way. Words such as "justice" and "reason" do not mean the same thing to a lecturer in philosophy as they do to her students. The language of liberal democracy, which is the language of American legal education, fails in the second way. We, as lawyers, are able to sit down with our students and talk about "rights" in the law, but such rights language in the law is purposely shallow so that it can serve a legal order that claims to be value free.
When the lawyer who teaches legal ethics (he of the uneven legs) moves discourse from law to morals, and retains the language of rights, what he has to say, if it communicates anything at all, is trivial; a value-free moral system is not interesting. Rights language in legal ethics may also be wrong, but before that issue is even considered it is trivial. When I attempt to contribute to such conversations I feel trivial, when I listen to them I feel that I belong somewhere else. My purpose is to suggest what "where we belong" looks like.

Socrates went around Athens telling law teachers and law students that their highest concern should be to be good people. He said their next and consequent concern should be to show the citizens of Athens how to be good people. For Socrates, as for virtually all of the giants of classical moral philosophy and much of Hebraic\(^8\) moral theology, ethical discussion is discussion about being good persons and helping others to be good persons. When we speak of Aristotle's "man of practical wisdom," literature's heroes, religion's saints, paragons, role models, professional exemplars, Francis of Assisi, Atticus Finch, or Leland McKenzie, \textit{it is the good person we are talking about}. The ethical speculation that supports such moral talk is founded in disciplined curiosity about the good person. This is the way classical moral philosophy informed those who proposed to teach the young. It was the context for Socrates's admonition to law teachers. Moral philosophy showed teachers how to hold up the good person as a coherent object of admiration, a coherent source of moral standards, a scheme for the moral formation of young people and especially, in the citation to Socrates I mention now, apprentice lawyers. Goodness among apprentices who would soon be lawyers was, in Socrates's argument, a goal in itself. Virtue and good character are goals in themselves. Moreover, as Socrates applied the idea to the lawyers of Athens it also became a means to a civic goal, the goodness of the clients of lawyers.

If I trace that argument into the modern division of what was once called legal ethics in America, into the law on lawyers and legal ethics as ethics, I won't find evidence of Socratic influence anywhere. It is not in the law on lawyers, nor in revived, post-Watergate legal ethics. It is a novel proposition, believe it or not, to say that if we want communities of good people we need lawyers who are good people. In moral discourse, as in political and legal discourse, we don't talk about good people, we talk about rights. The assumption in discussions of rights, in politics, law, or ethics, is

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\(^8\) I use "Hebraic" instead of "Judeo-Christian" to make and retain the argument that Jews and Christians have a single tradition in ethics.
that what citizens want for one another, or lawyers for their clients, is not goodness but isolation and independence. The assumption in the law on lawyers is that behavioral influence runs, not as Socrates thought, from lawyers to clients, but in the other direction, and that influence is bad. It corrupts lawyers. Clients want lawyers to do wrong actions and many lawyers today obey their clients and do wrong for them. That's why, in 1983, we got a new beginning for the law on lawyers. The law of lawyers is concerned with whether lawyers are to refuse to do the wrong actions clients want them to do. In this way, the law on lawyers evades concern for the goodness of clients. It treats clients as threats to the moral isolation and independence of lawyers. The result is that the substance of the law on lawyers says it is enough that lawyers require clients to obey the law.

Those who labor in legal ethics as ethics use the language of rights in ethics and accept the liberal premise that what makes a moral rule binding is that the moral actor chose it. Most of post-Watergate legal ethics focuses as much on rights as the law on lawyers does, and that means that legal ethics is act centered, rather than person centered.

Rights language became the principal language of legal ethics out of habit. When the remnant of Watergate established legal ethics in the minds and mouths of law teachers, our habitual liberal discourse was in place in our law courses and our legal scholarship. We naturally began to use it as a way to talk about moral questions. Most of us went right on talking about rights, which means we talk about facts instead of about people. I think this has been a mistake. It has been a mistake for us to write, study, and teach about the acts of abstract, depersonalized, inevitably male lawyers. It has been a mistake for us to ask whether certain hypothetical actions are right or wrong and to neglect to ask about the people who perform the acts. It has been a mistake for us to think of people as if they had no personalities and then to discuss them as we learned to discuss landowners in the law of property; "A conveys Blackacre to B who leases to C."

This mistake, fostered by the use of the language of rights in the law, has led to other mistakes. If the act, rather than the person, is raw material for ethical discussion, we are required by logic to concentrate on the choices the actor makes. An act is the product of a choice. It will be useless to talk about morals unless we talk about the psychic process that produces acts. Ethics assumes we have control of our moral lives. Control of a moral life that is made up of acts is expressed in terms of choices.

If thinking about acts leads to thinking about choices then we have to think about the issues that lead us to choices. We think about issues, rather than about lives and persons and cultures. An issue, in law or in ethics, is a set of facts presented to a choosing psyche in the way a casebook legal issue is a set of facts presented to an appellate judge. In ethics, choices are what emerge from these
issues, problems, puzzles, quandaries, or, as it most usually put among lawyers and judges, "ethical dilemmas." So common is the presentation of the dilemma as a device for discussion in our subject that the phrase "ethical dilemma" is spoken as if it were one word. Consideration of persons lives and cultures proceeds differently, as I hope I can show. The fundamental difference is anthropological in that, deep down, a person is not just a chooser. There are things about persons, termed moral agents by moral philosophy, that are more interesting than the choices they make, or the sum of all the choices they have made.9

Act-based ethics turns on the significance of quandaries, but it has shown less interest than you might expect in how quandaries come about. That is why discussions of rights in ethics seem shallow and are usually trivial. It is probably why the contents of journals such as "Ethics" are arcane to the eyes and ears of lawyers. Moral philosophers know, as much as teachers of future interests do, that the way to keep hold of a trivial subject is to make it complicated. What would be interesting in these discussions of acts is to locate what it is that makes one person see a moral quandary where another person would see something else, but teachers of "act" ethics leave that question to the poets.

"Crimes and Misdemeanors," Woody Allen's latest and most curious film about guilt, large and small, shows what I mean. It is a story about film makers. An old philosopher fascinates the less confident of two film makers, played, of course, by Mr. Allen. The film maker takes the unpromising course of shooting thousands of feet of film of the old philosopher talking into a camera. The old philosopher is based, I suppose, on the late Primmo Levi. Like Levi, he finally commits suicide. The maker of the film within the film then goes back to look at the thousands of feet of film he has of the old philosopher speaking his wisdom into the camera. The film maker wants, perhaps, to see if he can savage anything for commerce, but probably he just wants to see if he can understand why what struck him as marketable moral wisdom ended up in self destruction.

In the filmmaker's attempt to explain the suicide, or perhaps just to show the senselessness of it, he discovers the clip where the old philosopher states that human beings are defined by their choices. We are choosers. What we has turn out to be is the sum total of our own choices. I found these remarks amazing in context, so I took the first opportunity to talk to one of my friends about it. My friend said he thought the old philosopher's observation fit the rest of the

story in Allen's film, the physician's choosing to murder his mistress, other choices of infidelity to spouses, as it seemed to fit the philosopher's choosing to murder himself.

My friend may be right. I don't think so. If he is right, the fitting drips with irony. The physician, an ophthalmologist, has murdered his mistress and he is tortured by guilt. He is tortured, rather than merely fearful of being found out, because he is a Jew. I don't mean that you have to be a Jew to feel guilty for murder, but that this person feels guilty as a Jew would feel guilty. He feels guilty because he is a Jew. We know from Philip Roth and Bruce Jay Friedman and "Bye Bye Birdie" that there is something unique about Jewish guilt. Jewish guilt is a recurrent theme in Woody Allen's films, although this is the first time he tells a story about it that doesn't make you laugh.

The tortured physician suffers when he cannot sleep at night or pay attention to his patients during the day. Even his ultimate formulation that the murder was a fateful choice as if he were Adam in the Garden, are products of his growing up in an observant and pious home, of hours and hours spent in the synagogue and reading the Torah. The old philosopher says of us human beings that each of us is the sum of his choices, but the doctor did not choose to be a Jew. What is special, and therefore interesting, is that his guilt is not something he chose.

The last scene in the movie shows the doctor in improving emotional shape. He is still bothered by guilt, a little bit all the time and occasionally a lot, but he is getting by. He reveals this in a one-on-one conversation with the hapless film maker, in a corner, during a Jewish wedding in the Waldorf Astoria Hotel. If the doctor has figured out a way to live with his guilt, his way is the way of Jews in America who can finance weddings and bar mitzvahs at the Waldorf, who want more to be prosperous Americans with Father-Knows-Best families in the suburbs than they want to be Jews. The old philosopher would say that who the doctor is, there in the quiet corner in the Waldorf, is the sum of his choices, but the doctor did not choose to be a Jew in America.

The wedding also gives us the film's most touching scene. The father of the bride is a rabbi who has gone blind. He dances with his beautiful daughter, the two of them alone in the middle of the dance floor. The rabbi is an exemplar of courage. He is a modern man trying to understand and interpret both fate and the Torah to himself and others. He is also a blind man who loves his daughter. He did not choose to be a Jew, any more than the physician did. I suppose one could say that, in a sense, the rabbi has chosen to be a Jew and the physician, in murdering his mistress, has chosen not to be a Jew, but that argument would be false. If the doctor has chosen not to be a Jew, his choice is no comfort to him when he wakes up in the middle of the night, tortured by guilt, Jewish guilt, for what he has done. If he has chosen not to be a Jew, what is he doing at the
wedding of the rabbi's daughter? What is he doing in a Jewish family?

The rabbi did not choose to be blind. His daughter did not choose to be a Jew or to have a father who would be such a good man, and who would go blind. The irony in Woody Allen's film is the irony of the old philosopher saying we are choosers when the language of choice explains so poorly the important things about the people in the film.

I think Woody Allen saw the irony and set out to show it in his film. If he didn't, the irony was an inevitable consequence of his act. A storyteller cannot do anything with choosers. A poet cannot write poems about people described in theories of rights, or by the old professor in "Crimes and Misdemeanors." A movie about choosers would be unmarketable, which is why the film-maker in this story is so hapless. The old professor professed act ethics, and act ethics needs hypothetical people who are described without personalities or relationships. They must be fungible, interchangeable people. Act ethics could not explain to the blind rabbi why he should give his daughter a wedding in the Waldorf. The old professor's ethic cannot explain why he killed himself. It would be necessary to get into his life and the lives of people he loved and lost and those who loved and lost him, if you want an answer to that question.

Act ethics needs people who can be described without relationships or, at least, without the earthy things about relationships that would interest a poet. The dogma in act ethics is that the individual should choose his own morals. He shouldn't get them from someone else, as the doctor and the rabbi did; as we all do. What gives authority to morals in our lives, according to act ethics, is that we have chosen them. If each of us should choose his own morals, ethics would have to be careful not to describe each of us as significantly related to other people. If my relationships are potent, then my choices might not be my own. Act ethics thus describes excellence in terms of separation. Each of us is a self-ruling, free chooser. In those attributes lie our excellence, and so act ethics treats each person as being alone, a choosing machine that runs itself. What I am suggesting, of course, is that it is useful in legal ethics to focus on the good person, on people rather than acts and on good and bad rather than right and wrong. Focus on the good person will imply a prominence for relationships in ethics. Putting people back together again, or, rather, putting people back into ethical theory, will make us notice that we people are connected to one another, connected radically (i.e. at the roots). We belong. It is not that we belong because of our choices, but that we make the choices we do because we are connected to other people. We belong before we make choices. We make the choices we make because we belong.

I mean to argue here, as Saul Bellow's Augie March did, that first you are, and then you can, if you want to, choose to be what you are, that this is the human condition. We are primarily members,
not choosers. We are primarily connected, not alone. "All the influences were lined up waiting for me," Augie said. "I was born, and there they were to form me, which is why I tell you more of them than of myself." Augie was a poor Jewish boy of my generation and he spoke of growing up in Chicago. He said: "I know I longed very much, but I didn't understand for what... [f]riends, human pals, men and brethren, there is no brief, digest, or shorthand way to say where it leads. Crusoe, alone with nature, under heaven, had a busy, complicated time of it with the inhuman itself, and I am in a crowd that yields results with more difficulty and reluctance and am part of it myself."

Legal education, more than any other kind of professional or graduate education, places high value on discussion in large classes. The term discussion is used because of its claim to be "Socratic," and large classes because they are essential to the economics of the enterprise. When I taught legal ethics with dilemmas, twenty years ago, I found that discussion needs different premises in ethics than it has always had in law. In legal discussion there is an analytical discipline involved that we call "thinking like a lawyer," but that involves intuition on the imposition of coercive power. Closure in an ethical discussion depends on persuasion and insight, where closure in a discussion about law depends on force. This is true because someone has to be persuaded in the law, but unless the person persuaded is the person who can invoke coercion, the legal discussion is not closed.

Those who teach in the remnant of Watergate are not satisfied to close off discussion of legal ethics by invoking the law on lawyers. Consequently, discussion in legal ethics classes will be discussion governed by insight and persuasion. My first method for this, using "ethical dilemma quandaries," was to seek expressions of opinion. I used, for example, a situation that was part of my own limited law practice in those days, the draft-eligible young man who wondered if he should emigrate to Canada. In one such case, my client had sought and been denied conscientious-objector status from his local draft board and there was no promising avenue of appeal. The basis for his objection was that he believed his country's military adventure in Southeast Asia was an unjust war, and according to his traditional Roman Catholic beliefs, he could not fight in that war. He did not object to all war. His belief in "selective objection," about which he had, unfortunately, been

10. I suspect it is no accident that the examples that came to my mind, from Woody Allen's film and Bellow's novel, have come from Jewish storytellers telling about Jews in America, even though I am not Jewish and have no connection with Jewish culture except through friends I made in adulthood and the fact that I am a Christian. It is important to Jews in America to hold on to a sense of themselves as a people. Jews are better at it than any other group I can think of.
candid when he talked to his draft board, is not provided for in American law. His choices were to be inducted for combat duty or to become a fugitive from the Selective Service system. He wondered what he should do, so he asked his lawyer. His lawyer's quandary was between advice to disobey the law and advice that would save the client's conscience with the least likely pain to the client.

In the classroom, Student A raises her hand and says she would never advise a client to disobey the law, that such professional behavior would be like a physician advising suicide. My client, she says, has no right to disobey the law and so I have no right to tell him to disobey the law. Student B raises his hand and says, "Why not? He got a raw deal. How is it that a Quaker, who objects to all war, has a right to conscientious objection, but a Catholic, who opposes unjust war, does not?"

Student C raises his hand and says my client is confronted with a summons to limited martyrdom. The basis for this assertion was that judges in the United States sent evaders such as my client to federal prison for five years. The martyrdom, if that's what it was, was limited. Our law did not provide for capital punishment as did the law of Nazi Germany. With answers from D, E, and F to add to these three, I would have, in about fifteen minutes, produced an array of reactions to the dilemma. With a bit of pressing to clarify positions, I satisfied what I at first thought to be a sufficient "Socratic" agenda for a large class of law students talking about legal ethics as ethics.

The implications of my procedures were that legal ethics is a matter of choice. Once our hypothetical lawyer manages to keep herself out of trouble using the law on lawyers, what she does to herself and her client with her professional power and skill depends on what she chooses to do. What makes her choice moral is that she chooses it. My legal-ethics classroom, with a lot of help from voluble students, produced a moral smorgasbord from which students could select what struck them as the moral thing to do. What was selected would take its moral authority from the fact that it was selected. Persuasion and insight were not ruled out, but I hardly ever saw anyone who looked like he was being persuaded, and what students said seemed less like insight and more like what people say when they explain why they order a particular brand of beer.

I grew out of that way of teaching legal ethics by depending, as I always do, on scholars in academic ethics. I drew mainly from Stanley Hauerwas, who declared war on democratic-liberal ethics and politics, at about the time I started thinking that I was not doing a very good job with my legal-ethics classes. The vestige of insight I remember most prominently from those days, though, came not from Hauerwas but from Christina Hoff Sommers, who teaches philosophy to undergraduates and who inveighed, in The American Scholar, against "ethics without virtue." Her argument is that the sort of ethics teaching I was doing undermines common sense: "In
a term paper . . . one of my students wrote that Jonathan Swift's 'modest proposal' . . . was 'good for Swift's society, but not for ours.'\textsuperscript{11}

"[O]ne comes up against a grotesquely distorted perspective that common sense has little power to set right," Sommers said. "When a sophomore was asked whether she saw Nagasaki as the moral equivalent of a traffic accident, she replied, 'From a moral point of view, yes.'" Sommers thought that the ethics she saw reflected in these student responses demonstrated that the students lacked the mental equipment to make a negative moral judgment on their own, or anyone's, behavior.\textsuperscript{12}

Sommers' principle concern as a teacher of ethics was that her students' responses to moral questions indicated no sense of culture, no sense of where they had come from or of the community for which they were being prepared. That concern seemed right and it seemed to suggest an approach for large class discussion. I needed to dig deeper. When Student A said a lawyer cannot advise clients to disobey the law, I needed to find out where in her personality and her life that answer came from. When student C talked of my client's martyrdom to a Protestant jurisprudence of conscientious objection, I needed to find out if the source of his point really was his reading Jacques Maritain in college, or maybe he liked Maritain because of something that was older and deeper than college.

Anthropologist Carol Greenhouse, in her recent study of how Baptists in Georgia do justice, and I, in later attempts to get ethical discussion going in large classes of law students, both discovered something about the way people work when they think about morals. As nearly as I can tell, we discovered the same thing, although my discovery was the result of halting classroom experiments, and hers was scientific and supported by a foundation grant. The discovery is that people show what their morals are by claiming where they come from. Ethics is accounting for where you belong.

Greenhouse studied how members of a Baptist congregation in a suburb of Atlanta deal with their disputes. Hers was a study of justice and of the home life of those who do justice. Her premise or, to describe it as it seems to have happened, her conclusion, or discovery, is that people tend to explain their morals by claiming

\textsuperscript{11} Swift proposed that the way to solve the problem of hunger in Ireland was for the Irish to eat their children.

\textsuperscript{12} Years later I thought of Sommers when I read a "singles" column in our newspaper. The columnist had conducted a survey in which she found that women who have affairs with married men prefer that wives not know about the affairs. They preferred that the wives be deceived. The columnist (Susan Deitz) said, "Obviously the sense of keen competition between rival females was a strong element in the allure of a married lover." Maybe she believes that sexual love is a jungle; maybe she cannot notice a moral judgment when she sees one.
membership in a moral community such as a family, an ethnic group, a region of the country, or, in the case of her Baptists, a local religious denomination. We account for ourselves morally by naming what we belong to. I found the same sort of thing when I started pressing law students a bit about what seemed to be their moral choices. When I pressed Student A about this, and would not let her get away with shrugging her shoulders and saying, "That's how I feel," she would add, "I feel that way because I am a Presbyterian."

Student B, when I pressed him to see if I could understand how he explained his reaction the other way, when I was lucky said, "I was brought up to believe that an unjust law is no law at all." Really? Is that "principle" something he learned at his mother's knee? Well, no, it isn't. He learned the principle in college, from a political science teacher he liked. The principle he remembers is one he learned relatively late in his young life. It expresses something he thinks, but it really, now that he thinks about it, does not explain why he thinks as he does. When he thinks about explanation, the reaction of Student B resembles what his immigrant Calabrian grandfather felt about killing people for the Italian state. When I am lucky, Student B will mention to me after class, or a month later, or ten years later, that the discussion led to his deciding that he felt as he did about the draft board because he is an Italian American. He had figured out where he came from.

Greenhouse argues, as an anthropologist, that the critical feature in an explanation of behavior is that the explainer claims to be in a community. His accounting for himself as a moral person is a claim of membership. He explains himself by telling you where he belongs. He comes up with one explanation rather than another, "and thereby identifies with one group over another." Ours, as deToqueville said, is "a society built not on obedience," not, that is, on principles such as the one Student B came up with at first, not on choice, "but on participation."

Greenhouse did not claim that this process of explanation was as evident and handy as how one of her Southern Baptists might have explained his aversion to tobacco or dancing. Often the realization that I react as I do to a moral question because of where I belong, marks the end of, or at least a stopping place in, a search. Greenhouse asked one of her Georgia Baptists why he did not stand up for himself in a family quarrel. He does not say at first that it is because he is a Baptist. He quoted a principle or a bit of scripture, or identified a habit he noticed in himself. It is only after he talks a bit, and Greenhouse helps him along, that he realizes and says that his explanation is membership. He feels as he does about being assertive in quarrels because he is a Baptist. Both the inquiry, which in an ethics class would have been stated as a quandary, and the moral explanation relate to a "we" feeling, a feeling this person gets when he looks to the left and to the right and says to himself, "I am one of those. When I speak of 'those', I can say 'we.'" It is not
that he belongs because he made the right choice, but that he is right because he belongs.

Ethnic membership as a way to understand morals often lies at the end of a search. The first-person accounts I use later often read like exercises in personal discovery. The moment of discovery, however, is not at all like the moment of choice Sommers noticed and decried as "half-baked relativism." Michael Novak, focusing on the ethics of the late immigrants to America, explained that their saying 'we" in this way is not a choice so much as it is a return, not joining so much as noticing where I am, and what I am, and thereby gaining an understanding of my moral self.

I may even say, "I have come home." The event I might have called a quandary or, in law school, an ethical dilemma, has ended up giving me a sense of being at home. There is, of course, some exercise of will involved in membership, even if it is psychologically a homecoming. First we remember that we are members. Then, perhaps, in some way or other, we choose to be members. Choice is, however, secondary, sequential and consequential. Influences, as Augie March said, are at work here. They are prior, in time and in potency, to quandaries, choices, rules, principles, prior to deductive reasoning, or logic, or scripture, or threat. Belonging explains reality.

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There comes a point in time where Jem Finch, age 12, in rural Alabama, in 1935, understands that his lawyer father is not, after all, an effete and book-bound man who can no longer play softball for the Methodists, but is the sort of person Jem is going to become. Jem said, "Atticus is a gentleman. And so am I." Harper Lee said her novel about Atticus was the story of a conscience. In the first part of what follows, I propose that the community we American lawyers will find, when we explain ourselves as belonging, is the community Jem noticed, a community of gentlemen.13

Robert Viscusi, the social historian, turned to his fellow Italian Americans, at a conference of the American Italian Historical Association, and said, with obvious emphasis: "We Italian Americans of professional rank are in danger . . . of respectability."

"Perhaps it is no great harm that we have taken to bringing useless chafing-dishes instead of flexible cash as wedding presents. But it will have been very great harm indeed if we turn and look back at ourselves after long, active, chatty careers and can only see . . . well-established, upwardly mobile, endlessly aspirant dullards

[who put] . . . our dignity before our conscience or our desire to be accepted before our desire to tell the truth."

Jem Finch's gentleman's ethic would, I think, be part of what Viscusi warned his fellow "Italian Americans of professional rank" against, and he warned them against gentlemen for good reason. But mostly, in warning them as he did, Viscusi pointed to the moral aspiration in the Italian heritage, rather than to the cultural traps laid by Protestant Americans. I propose, in the second part of what follows, the possibility of an American lawyer's explaining herself as belonging to one of those "communities of memory" the late immigrants brought to America.14

Walter Brueggemann, theologian and scripture scholar, once wrote of teaching children in the Sunday schools of the Hebraic communities that religious formation was a matter of learning that people of faith are separate. He said that education in the religious tradition is "education in passion . . . nurture[d] into a distinct community that knows itself to be at odds with dominant assumptions . . . an insistence on being . . . chosen, summoned, commanded, and promised." Such an education, such a belonging and sense of belonging is "concrete and specific . . . nurture in particularity . . . that produces adults who know so well who they are and what is commanded that they value and celebrate their oddity in the face of every seductive and powerful imperial alternative." In the last part of what follows, I propose to consider oddity and particularity, a legal ethic that rests in the paradox and contradiction that is the story of Israel and of the Cross.15
