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USING THE PERVASIVE METHOD OF TEACHING LEGAL ETHICS IN A PROPERTY COURSE

THOMAS L. SHAFFER*

The first-year introductory course in property law is about all that is left of the traditional black-box curriculum. It is where beginning law students cope with and despair of the arcana of English common law; where, with more detachment than, say, in the torts course, analysis of appellate opinions is what “thinking like a lawyer” means, with no more than peripheral and begrudging attention to modern legislation and administrative law; where legal reasoning is a stretching exercise and initiatory discipline. And, incidentally, surviving bravely the rude invasion of teachers of public law, it is where a teaching lawyer can point out that most lawyers spend most of their time in their law offices. Property is probably the only legal setting left where Washington, D.C., can be regarded as a foreign capital.

My impression is that those of us who teach Property in the first year have attended more to Watergate and the consequent invention of “professional responsibility” than we have attended to the codification of our legal material: We have become self-conscious about noticing the “ethical” issues that appear in or are obscured by appellate judges’ selective rendition of facts. The elders among us remember but have come to disapprove of Professor Kingsfield’s disdain for moral concern: “Ethics, schmethics: Ethics is for Episcopalians,”¹ has become of late a less characteristic rejoinder to a bold student’s moral disapproval of a judicial outcome or a legal argument.

As part of this modern trend due, no doubt, to the fact that accreditors now require schools to teach ethics,² compilers of casebooks are beginning to raise moral issues in their discussion notes. We are attempting to mix ethical analysis with traditional property-law distinctions and with bits of invitations to jurisprudence and legal anthropology. There is even a movement now to encourage Property teachers to attend to “professional responsibility” in

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1. A remark, rather like the fabled, “If you wanted to study ethics you should have gone to divinity school.” This version comes from Professor William Geimer, quoting one of his teachers.

2. DEBORAH L. RHODE, IN *THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 200 (2000) (describing the development of legal ethics courses in law schools).

traditional law courses with what is coming to be called the “pervasive method.”³

Pervasive-method, property course teaching of ethics is the subject of these observations, by an aging law teacher who thinks he responds to all modern trends, and who was commissioned by four colleagues to devise material for discussion in two editions of a property casebook published in the West Casebook Series.⁴ Notice three guidelines that seem to me to apply to the enterprise of devising materials and then using them in the enterprise of engaging property students in moral discourse:

First, the objective is moral engagement with students, and this by a teacher who may not otherwise think of herself as teaching ethics (which, after all, is an ancient and complex art: Ask Plato and John Calvin). “Pervasive” would seem to imply not only planting or noticing moral issues but also being prepared to discuss them with something like depth. Pervasive teaching of ethics implies at least disapproval of the practice of bringing in or temporarily adopting the vestments of a guest ethics guru, like the preacher coming to say a few words over the grave in Boot Hill, or the military chaplain giving the monthly character-guidance lecture to low-ranking military people in the post theater.

None of us claims the skill of Socrates at this work. We all have to learn to listen, more than we do to see if students understand analytical legal distinctions. I remember a first-year student who answered a case-note analytical (legal) provocation in one of my classes with a cosmic judgment such as, “That is just immoral.” I was by then (a couple of decades into teaching, survivor of many movements) too sensitive to say, “If you wanted to study morals, you should have gone to divinity school.” I tried a lame, “Oh? Why do you think that?” She said, “I don’t know. I guess it is because I was raised in the Southern Baptist Church.”⁵ That, although I did not see it clearly at the time, is a teaching moment. It is a “tell us more” moment. It is where pervasive teaching begins. It is a chance to notice, aloud, that it is legitimate, in the Property classroom, to ask and discover what the moral life is like for a lawyer doing this stuff.⁶

3. *Id.* at 201-02.

4. SANDRA H. JOHNSON, PETER W. SALSICH, JR., THOMAS L. SHAFFER & MICHAEL BRAUNSTEIN, *PROPERTY LAW: CASES, MATERIALS AND PROBLEMS* (2d ed. 1998) (Professor Braunstein did not join in the first edition; Professor Timothy S. Jost was a co-editor).

5. For more on this story, see Thomas L. Shaffer, *Moral Moments in Law School*, in 4 *SOC. RESP.: JOURNALISM, L., MED.* 32, 38 (Louis W. Hodges ed., 1978).

6. I compliment myself for somehow having created an atmosphere in which a first-year student was willing to tell her classmates where she goes to church and why that might make a difference in her legal education and theirs. See generally THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LAWYERS, LAW STUDENTS, AND PEOPLE* (1977), and RHODE, *supra* note 2, at 45-47 (discussing ways for a lawyer to gain professional fulfillment).

Second, it follows that the moral life for a lawyer doing this stuff is a moral life carried out in a certain kind of lawyer's place. Property practice is green-eyeshade, Wednesday-afternoon law practice. It is carried out in an office, with one or two clients and no one else present. One way or another, most of us now carry influence from the late Professor Louis M. Brown and his preventive-law emphasis⁷—I even have a preventive-law tie Louis gave me. We are inclined to point out that, in preventive (office) law, law comes before fact. However in what Louis called "curative" law, as in appellate opinions, fact came before law. That means the difference between a land contract and a lease, between a life estate and a fee simple, is a chosen difference, not the consequence of noticing a fact but the creation of a fact so that law will follow. It is a more flexible kind of law practice than litigation is, more open to creativity and moral direction.⁸

Third, "pervasive" implies educational planning, some attention to learning theory, or at least attention to sequence in the way issues come up in law classes. Conflict of interest is a familiar example:⁹ *Pigg v. Haley*,¹⁰ in the teaching book I have worked on, comes up in the introductory common-law-estates part of the course. It is there to introduce the difference between life estates and fees simple. It involved an aging farming couple in rural Virginia who were fond of the husband's young cousin and who evidently wanted the cousin to have the farm when they were both gone. The common-law-estates issue arose after the husband died; it involved an ambiguous holographic will, followed by an ambiguous, lawyer-drafted family settlement agreement.

The casebook notes that followed the Virginia Supreme Court's opinion¹¹ drew attention to the human relationships around the wife and the beloved cousin in two "ethical" contexts: (1) the day the wife and cousin agreed, in the law office, to resolve the ambiguities in the holograph with an agreement that gave her the husband's personal property and a life estate in the farm, remainder to the cousin; and (2) the fact that only one lawyer was working this deal out, for both parties, and committing it to a written agreement.¹²

7. See generally LOUIS M. BROWN, *LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW* chs. 22-24, 26 and pp. 265-94 (1986).

8. See generally LOUIS M. BROWN & THOMAS L. SHAFFER, *TOWARD A JURISPRUDENCE FOR THE LAW OFFICE*, 17 *AM. J. OF JURISPRUDENCE* 125 (1972) (discussing the decisional process occurring in the law office); see also SANDRA H. JOHNSON, PETER W. SALSICH, JR. & THOMAS L. SHAFFER, *PROPERTY LAW: CASES, MATERIALS AND PROBLEMS* 95-101 (1992).

9. See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, chs. 7-8 (1986).

10. 294 S.E.2d 851 (Va. 1982), discussed in JOHNSON ET AL., *supra* note 4, at 115.

11. JOHNSON ET AL., *supra* note 4, at 121-25.

12. Other lawyers later devised the argument that the cousin did not give consideration for the agreement, got the trial judge to buy their argument, and defended it in the Virginia Supreme Court, where they lost.

There is material in that law-office scene for looking at the regulatory rules on conflicts of interest, which is a useful thing to do, and one the book returns to at several other points in the course: in conveyancing situations,¹³ in escrow practice,¹⁴ in one lawyer handling title problems for both purchaser and lender¹⁵ and in law-office arrangements for what our book called “the law of neighbors,” meaning easements, servitudes, et cetera.¹⁶

As useful as a regulatory (let’s look at the rules) use of the casenote would be for students, and as useful as it would be to return to the regulatory issues in later contexts in the course, the rules are, in my view, a superficial way to respond to the teaching moment, which, like the remark of my Southern Baptist student, was a chance to imagine the moral life of a lawyer doing this work.¹⁷

It is unclear what the human relationship between the couple and the cousin had been—except that both said on the record that it was “close.” If there was more in the record regarding their relationship, the judges of the Supreme Court of Virginia were not interested in it. It is not known what the relationship between the cousin and the widow had become. They had, after the husband’s death, contracted to sell some of the farm to third parties—the judges do not say why. It seems a fair guess that these sets of relationships had everything to do with the work of the lawyer who drew up the family-settlement agreement, talked to the cousin and the widow about it, and set them up for litigation all the way to the state’s highest court. This sort of discussion material has to be *imagined* in the Property classroom. It lies in the imaginations of those who are present for discussion, all of whom have mothers, many of whom have cousins and some of whom know something about farming.¹⁸

Another way to put the moral inquiry would be to say that it has to do with trust—with trust probably too quickly given by these clients to their lawyer, and with trust unexplored between this farm widow and a young man who appears to have been a surrogate son for her (or perhaps her late husband’s surrogate son who never became a surrogate son for her). However this human stuff is imagined for purposes of discussion, it puts human faces on common-

13. JOHNSON ET AL., *supra* note 4, at 516-17.

14. *Id.* at 541.

15. *Id.* at 537.

16. *Id.* at 643-44, 763-66.

17. See generally Thomas L. Shaffer, *Beyond the Rules: The Responsibility and Role of Continuing Legal Education to Teach Alternative Ethical Considerations*, in AMERICAN LAW INSTITUTE AND AMERICAN BAR ASSOCIATION, C.L.E. AND THE LAWYER’S RESPONSIBILITIES IN AN EVOLVING PROFESSION 493-516 (Report on the Arden House III Conference 1987).

18. See generally Thomas L. Shaffer, *On Teaching Ethics With Stories About Clients*, 39 WM. & MARY L. REV. 421 (1998) (discussing teaching legal ethics in a clinic).

law estates and illustrates, in a variety of ways, the way trust works between lawyers and their clients.¹⁹

There is a spectrum of teaching skills involved here, enough so that “pervasive” teaching of this conflict-of-interest issue is possible across the variety of personalities that attract a lawyer to property teaching. The regulators have an array of rules, some of them relatively useful, for testing the issue. Some of these—notably the ones that turn on “independent professional judgment”²⁰—are at least mildly interesting for ethics, if only because they focus more on the protection of lawyers than on the well-being of clients. Noticing the regulatory apparatus in this early context in the property course sets up opportunities to notice how it works in other contexts such as conveyancing, title assurance and land use. The “professional responsibility” material is more like the provisions of a driver’s license manual than like the ethics that would have interested Aristotle or Martin Luther, but there is something to be said for learning the rules of the road on which our students will be driving. I prefer to work with Luther and Aristotle “and all them other high-falutin’ Greeks”²¹ first, then check the regulatory apparatus to see if a lawyer can manage to be a good person without losing her ticket.

The law-office challenge in property law is not to make sure clients will win if there is a dispute, but to make sure there will not be a dispute—and if there is a dispute, that the lawyer’s clients’ will have a way to work out the dispute without destroying their fortunes and their regard for one another—after all, they came to the office together. A good property-teaching book, in my opinion, provides learning along the way on the uses of alternative dispute resolution and the skills involved in a lawyer planning for it.²²

Both of these preventive-law considerations, and a deeper agenda for talking about the skills of helping clients with differing interests who remain represented by just one lawyer, call for imagination and creativity from students. My experience is that, in a first-year class, after they have been battered with the feudal land system, livery of seisin and the Statute of Uses, students are anxious to talk about the moral life.

19. For another similar family situation, see generally *Johnson v. Hendrickson*, 24 N.W.2d 914 (S.D. 1946). *JOHNSON ET AL.*, *supra* note 4, at 210-16.

20. As in “independence of professional judgment” in Rule 1.8(f)(2) of the Rules of Professional Conduct, or “exercise of his professional judgment” in D.R. 5-101(A) of the Model Code of Professional Responsibility. For the rules and annotation material on them, see STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 103-17, 485-96 (1999).

21. Meredith Wilson, *Piano Lesson*, from *THE MUSIC MAN* (Kermit Bloomgarden et al., producers, 1957), available at <http://www.themusicmanonline.com/Songs/4Piano.htm>.

22. For two examples, among a dozen or so opportunities for discussion and role-playing, on mediation in that casebook, see generally *JOHNSON ET AL.*, *supra* note 4, 632, 759-63.

Finally, then, there are devices for teaching that expand discussion. The meeting of the widow, the cousin and the lawyer is a dramatic scene; teachers from the somewhat discredited “human potential” school might think here about role-playing the relationship, or part of it.²³ Notice, for just one aspect of this, that most property lawyers, including this one, would not want that Virginia lawyer to have talked to either the wife or the cousin *alone*. That means keeping them together, talking to them together, and, thereby, probably, assuring that the conversation will never get as deep as it might if the lawyer talked to them one at a time—a tragic aspect of mediative law practice. Such a practice follows from Louis D. Brandeis’ “lawyer for the situation” ethics, from Professor Geoffrey Hazard’s modern rendition of it, and, in my experience, from Rule 2.2 of the American Bar Association’s Rules of Professional Conduct.²⁴ It does not preclude advertent resort to more formal mediation, but that resort seems unlikely on the law-office facts as they appear in *Pigg v. Haley*.²⁵ Keeping the conversation in the one-lawyer, two-clients setting, short of formal mediation, carries the risk of superficial concern. Perhaps it is just as well that undertaking ethical discussion with property students recognizes that the moral life involves pain as often as it promises triumph.

The law-office focus also demonstrates that moral direction is typically set by conscience at work away from the judiciary and away from public accountability. Certainly, morally questionable decisions on, say, land use, condominium administration, development of residential neighborhoods, and lease provisions are open to journalists and discussion in public forums, but those cases of public scrutiny of property law are a minor part of a property lawyer’s work. A preventive-law teacher can (as I, alas, have) swell up pontifically and say that property law in a courtroom is evidence of failure. No doubt, a focus on the law office in first-year property teaching leaves something out, but it is so much the dominant reality, and so important, that focusing on such things as takings law can be sacrificed for the moment and brought to the attention of the constitutional law teacher (who has probably picked up for her courses all the credit hours that were taken out of the property curriculum).

If that is so, it means that the ethical focus Robert F. Cochran, Jr. and I have suggested for teaching legal ethics is prominent. That focus, in a phrase, has a lawyer asking a client, or, even better, a client asking a lawyer, “What

23. See generally THOMAS L. SHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING: IN A NUTSHELL, 321-71 (3d ed. 1997) (suggesting exercises for role-playing legal interviews).

24. See generally THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 289-308 (1985) (discussing the codification of Brandeis’ ethic through Professor Hazard’s draft rules).

25. 294 S.E.2d 851 (Va. 1982).

would be fair?"²⁶ What would be fair in carving up spaces and providing for surface-water drainage in a land development? What would be fair in planning for land use with proposals to local government, or in drafting and imposing use covenants? What is fair in drafting provisions for commercial and residential leases?

Some of this issue of law-office fairness has to do with disputes. In the early days of a dispute, when another lawyer's client, or potential client, is not in the room but is already an adversary, it is important for office lawyers to think about, teach about and invite alternative dispute resolution, so that the possibilities are not lost that people can be good neighbors in the face of such things as adverse possession and easements, implied warranties of habitability in the rental and sale of residential real property, and even such eventually implacable judicial possibilities as loan default and foreclosure. Teaching materials for Property need therefore to include significant material on planning for and urging formal mediation and arbitration, for all of the customary reasons, fiscal and humane.²⁷

My thoughts turn, though, to being fair as a first move—which, I think, is what Bob Cochran had in mind in our ethics book.²⁸ Here is an example from my relatively recent practice as a supervising attorney in an Indiana legal aid clinic:

Indiana's legislative and judicial landlord-tenant law comes, mostly unchanged, from territorial days.²⁹ We had self-help evictions until a year or two ago. It is not clear that we have useful law on retaliatory evictions. Our warranty-of-habitability (case) law is relatively primitive (such as, there is no such thing as rent withholding). There is not much chance for successful attack on drastic, tenant-hostile lease provisions. If I were an advisor to landlords, I would have frequent opportunities to ask my clients, "What would be fair?" The moral issue I want to present, however, comes from my experience as an advisor to tenants.

About the only piece of progressive landlord-tenant law in Indiana is its statute on security deposits and its judicial aftermath.³⁰ The statute provides that the landlord account for use of the tenant's security deposit within forty-five days of the time the tenant vacates the premises and gives the landlord a

26. See generally THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 113-34 (1994) (suggesting a framework for moral discourse).

27. See, e.g., *supra* note 22.

28. SHAFFER & COCHRAN, *supra* note 26.

29. See generally IND. CODE ANN. § 32-7 (Michie 1995 repl. vol.), much of which dates from the nineteenth century.

30. See, e.g., IND. CODE ANN. § 32-7-5 (Michie 2001); *Greasel v. Troy*, 690 N.E.2d 298 (Ind. Ct. App. 1998); *Pinnacle Properties v. Saulka*, 693 N.E.2d 101 (Ind. Ct. App. 1998); *Turley v. Hyton*, 751 N.E.2d 249 (Ind. Ct. App. 2001); Michael A. Dorelli & Joseph C. Bowman, *Property Law: Recent Developments in Property Law*, 32 IND. L. REV. 973, 988-91 (1999).

new address.³¹ If the landlord fails to account, the tenant has a cause of action for return of the security deposit *and* attorneys fees.³² The judicial gloss from the Indiana Court of Appeals is that the landlord who fails to account in a timely manner not only loses recovery from the security deposit but also loses all claims to recovery for damages to the property and unpaid rent.³³ The risk to landlords who tend to rejoice at the departure of bad tenants and look to the future as they clean up the mess is significant, and in my experience, not all of them—not even all of the corporate ones, nor even their lawyers—are familiar with the prompt accounting requirement in the security-deposit statute.³⁴

And so into my legal-aid office comes a single mom who has a minimum-wage job and three small children. She has been told that her leasehold is ended for failure to pay rent and for extensive damage to the apartment she has been renting. I have to tell her that she is vulnerable to judicial eviction, which will take about a week, since Indiana eviction law has tight notice requirements;³⁵ that her complaints that the windows are broken and the upstairs toilet leaks through the floor are not defenses to eviction or to liability for at least some of the rent; that she can call the code enforcement office if she wants, but that any actions it takes cannot keep her in the apartment; and that her best course of action is to locate another place to live and let me bargain a little time from the landlord for her to move her children and her furniture.

That's the bad news. The good news (believe it or not) is maybe that the damages issue is not as bad as it looks. The landlord can probably demonstrate liability for damages of a couple of thousand dollars, and liability for unpaid rent of an equal amount—say four thousand dollars altogether. If the landlord gets a judgment for these amounts (at a hearing set at the time the possessory action is filed, but for a later court date), she is vulnerable to the loss of her five-hundred dollar security deposit, and to garnishment on her wages and savings (probably nothing, but sometimes somebody wins the lottery), for, say, four thousand dollars plus attorneys fees, interest, and costs.

The perhaps good news is the possibility that she can avoid these liabilities by giving the landlord her new address when she moves, and then keeping her head down for forty-five days.³⁶ The landlord may fail, for forty-five days, to account on the security deposit. If he could keep it, it would only cover a fourth or a fifth of his claim. He needs a judgment for the whole amount and

31. IND. CODE ANN. § 32-7-5.

32. *Id.*

33. *Id.*

34. My left-leaning jurisprudence tempts me to add that this is because landlords and their lawyers assume that Indiana landlord-tenant law always favors landlords, which, in most contexts, is a safe assumption.

35. IND. CODE ANN. §§ 32-7-9, 32-6-5 (Michie 2001).

36. *See* IND. CODE ANN. § 32-7-5.

can then, he might think, just deduct the security deposit, which he already has, from the amount of the judgment.

If the landlord does not provide a thorough accounting,³⁷ we can, in the damages hearing, defeat his four thousand dollar claim, recover the security deposit, and get an order for fees to help the legal-aid clinic with its expenses. The result we would shoot for is, for example, a six thousand dollar judgment for the tenant, against the landlord, and a judgment of zero for the landlord against the tenant. We may need to file a counterclaim. If, as is unlikely, the landlord has not filed for damages, my client can file her own action, waiting until after the forty-five days passes. If the landlord has filed for damages, and the hearing date is within forty-five days, my client can file for a continuance, without disclosing why she wants more time.

This strategy works, in my experience, more often than one might think. The key to it is to keep our heads down for forty-five days and not in any way let the landlord know what we have in mind. We say nothing about damages or the security deposit when we bargain for the time for her to move out of the apartment, nothing when we seek a continuance on the damages hearing, if we have to do that, and nothing when landlord and tenant run into one another at the supermarket.

Moral issue: Would this be fair? Should a lawyer, hardened toward landlords by years of helping low-income tenants and the victims of a hundred kinds of creditor oppression, even ask that question?³⁸ What should the lawyer say if his client asks that question? How about the fact that mom-and-pop landlords are often as low on the wealth scale as tenants are, and are not represented by lawyers who do not charge fees? If these questions, or some of them, are asked, and the client, a thoughtful and honorable person says, "Go ahead," does the lawyer still have a moral problem? I confess that I have not asked the question and, if my client asked the question and then said, "Go ahead," I probably would go ahead.

Lurking in that discussion is an important agenda for property-law teachers, and that, put with an academic cast, is the agenda of social justice—how much (as a left-leaning teacher might think of it) of property law, and especially landlord-tenant law, especially in Indiana, serves the ruling class and how little of it has to do with decent housing for low-income people?³⁹ That question can be put in legal-ethics terms, and may be different when taken up that way: Is a lawyer for poor people entitled to a special ethic?

37. See *Pinnacle Properties v. Saulka*, 693 N.E.2d 101 (Ind. Ct. App. 1998).

38. See generally *MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY* (Michael Hudson ed., 1996), to help get in the right mood, although little of it is about landlords.

39. See generally Thomas L. Shaffer, *Jews, Christians, Lawyers, and Money*, 25 VT. L. REV. 451 (2001).

Suppose, if I were representing landlords, I would never do anything this sneaky, and never advise my landlord-client to do anything this sneaky: Does that supposition preclude a different answer when my client is a tenant?

Our casebook, largely thanks to the learning and leadership of Professor Peter W. Salsich, Jr.,⁴⁰ provides discussion material on fair housing, housing for the homeless, the encounter between land developers and family farmers, and on the habitability and its consequences in the inner city.⁴¹ It does not yet provide this little, as the ethics teachers put it, “dilemma.” Maybe it should.

40. Professor Salsich has contributed an essay to this Teaching Property Issue: Peter W. Salsich, Jr., *Property Law Serves Human Society: A First Year Course Agenda*, 46 ST. LOUIS U. L.J. 617 (2002).

41. See generally JOHNSON ET AL., *supra* note 4.