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The Pervasive Method of Teaching Ethics

David T. Link

The law school curriculum at Notre Dame is based on a two-faceted mission statement that the faculty developed in 1974. Moral values are central to both facets: (1) to be an outstanding teaching school that prepares competent and compassionate attorneys whose decisions are guided by the values and morality that Notre Dame represents; (2) to promote leading contributions to the development of the law, the system of justice, the legal profession, and legal education, through faculty scholarship and institutional projects that embody important qualities of the Notre Dame value system. We intend to dedicate as much intensity to sensitizing our students and other scholars to the many ethical dilemmas that lawyers and clients face as we do to teaching and scholarship on substantive or procedural issues.

Every good law school eventually develops a main and perhaps unique theme through which it examines the philosophy and effectiveness of the law. Some schools would describe their main theme in terms of "law and economics," "law and business," "law and practice," or some similar shorthand expression. There are other main themes and myriad variations and combinations, along with a variety of approaches to exploring them (e.g., critical legal studies, case method, problem method). Notre Dame decided, with the confirming advice of Guido Calabresi, dean of the Yale law school, to concentrate on law and ethics.

Inspiring a concentration of law and ethics in student and faculty research and scholarship is fairly easy, especially when the faculty has Thomas Shaffer, one of the leading legal ethics scholars in the country, as a role model. Actually creating a course of study that is permeated by law and ethics is a more difficult task, however, because the curriculum must still give substance and procedure thorough treatment, and it must also explore other philosophies of law along with the main institutional theme.

When Notre Dame redefined its mission, its new curriculum included the usual goals and purposes: to teach students to "think like lawyers," to impart principles of law, to prepare students for practice, and to explore jurisprudence. Within this traditional framework, we wanted to devise a "pervasive method" for teaching ethics. That is, we wanted every professor in every course to discuss ethics along with substantive, theoretical, and procedural law.

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If a school is to accomplish all of its curricular goals, most courses must serve more than a single purpose. Our plan turns this necessity into a distinctive choice: we expect the entire faculty to find the time to explore the ethical dimensions of their courses. Because the pervasive method alone might fail to cover all aspects of ethics and law, we created three new required courses: a first-year legal ethics course (which this article will describe in detail); a jurisprudence course (a requirement that several options fulfill); and a third-year applied-ethics course. The jurisprudence courses explore a number of the philosophies of law.¹ The third-year ethics course focuses on practical ethical questions: How does the practitioner recognize an ethical dilemma? What can be done about it? What rules and theories apply? Assignments requiring such techniques as time keeping and journal preparation introduce third-year students to how a responsible practitioner might organize a law practice.

Thus, the first-year ethics course has its significance within the framework of the pervasive method and the required jurisprudence and applied-ethics courses. The pervasive method ensures the teaching of ethics in relation to each of the traditional first-year subjects. The first-year ethics course is designed to do something else. It is a theoretical course that emphasizes that ethics has an existence and nature independent of its application. Studying ethics is in itself every bit as important to the law graduate as learning contracts, torts, procedure, criminal law, or property.

The course is much more than an introduction to professional responsibility. In fact, although the students read and are examined on the Model Rules of Professional Conduct, learning the rules is only a small part of the course. Ethics I presents a perspective on lawyering that should sustain the students no matter how they eventually utilize their legal training. The course emphasizes the lawyer's role as a principal protector of justice. The importance of a properly functioning legal profession to maintaining freedom and order is assessed through a discussion of the historical significance of the actions of totalitarian regimes, many of which close law schools and suppress the legal profession when they take power.

The first-year ethics course presents an opportunity to put a special emphasis on the law school's mission. Discussions of professionalism develop the idea of the moral lawyer and draw distinctions between the terms "lawyer" and "attorney" and between being a legal mechanic and standing in a client's shoes. Illustrations of creative lawyering show students that creativity is not a matter of "bending the law"; rather, it is part of a positive duty to find lawful ways to serve a client whose problems may demand a unique solution. To the notion of the lawyer as advocate, students add other roles, such as the lawyer as counselor, arbitrator, and mediator. Rather than accepting adversarial ethics unquestioningly, they discover the lawyer's potential as a peacemaker and as a leader in all levels of society.

1. Various philosophies of law and other methods of analyzing and evaluating the law are also part of other courses. For example, torts and antitrust courses incorporate law and economics.

The course also develops a working definition of justice. Although it will take at least the full three years of law school for students to achieve a satisfactory understanding of the concept of justice, they cannot become sensitive to ethical questions if they are ignorant of justice and the role of the legal system. Before the students consider classic definitions, however, they discuss justice without reference to the law or the legal system. The students are then challenged to use their own intuition about justice, equity, and fair play to justify the logic of a rigid stare-decisis system. They also discover that judges may not honor precedent as rigidly as other first-year courses may have led them to believe. They learn that the good lawyer can think intuitively but prove and communicate logically.

The treatment of ethics goes well beyond discussions of professional responsibility. The students are taught that the various standards of professional responsibility do not suffice as norms for ethical decision making. First of all, many professional standards are not concerned with ethics. Some serve to maintain the lawyer monopoly, others are rules of order, and still others are rules designed to make lawyering easier or more profitable. Although the lawyer monopoly and legal economics may have some relationship to ethics (they may, for instance, assure expertise or lawyer services at an affordable price), the rules do not present adequate norms. Only about half of the Notre Dame law students have taken an undergraduate course in ethics (usually applied ethics, not ethical theory). The first-year course, therefore, provides a brief introduction to various ethical theories. This grounding makes it possible to put the Rules of Professional Conduct in context. Some professional standards are mandatory and, if adopted by the governing jurisdiction, offer a basis for disciplinary action, while other "rules" are simply advisory or permissive. Because such rules are inadequate as a comprehensive system of ethical norms, the course devotes considerable time to encouraging the students to set up their own personal standards. Students consider how they want to be regarded as a lawyer and confront how difficult the actual choices can be: violate a canon of professional responsibility and you might lose your license to practice; violate your personal standards and you will lose all of your reasons for going to law school and becoming a lawyer.

Students also explore the attorney-client relationship and the lawyer's role as a monitor of the client's ethical responsibility. They consider how good lawyering affects client responsibility and how one can act ethically and still do effective work. Thus, the course provides an introduction to the practical aspects of ethical decision making, which is explored in depth in the third year.

How do we integrate the concerns of the first-year ethics course? We use storytelling much more than case method or problem method. We try to create lawyerly role models. We explore what makes certain good lawyers and bad lawyers tick. The advantage of the required text, Thomas Shaffer's *American Legal Ethics: Text, Readings, and Discussion Topics*, is that it is mainly a storybook. It tells stories about lawyers as practitioners, judges, and teachers, and it explores a variety of philosophies as they affect the

decision-making process in the legal profession. Especially important is the deep exploration of the “one kingdom” and “two kingdom” theories.² Can a lawyer live one way at home and another way in town?

The course begins with a screening and discussion of the film, *To Kill a Mockingbird*.³ Although most of the students have either read Harper Lee’s novel or seen the film version before they come to law school, few have ever focused close attention on Atticus Finch as an attorney. Discussion of Finch’s lawyering skills and their effectiveness includes an exploration of the term “attorney.” Is Finch the competent and creative attorney going to town for—“standing in the shoes of”—his client? The actions of Atticus Finch are placed in the context of John Rawls’s concepts of pure procedural justice and of perfect and imperfect justice.⁴ Why does a lawyer take an unpopular case that he knows he will lose? Why is a man willing to turn his son over to a criminal justice system that he knows does not work very well? It did not work at all for Tom Robinson, Finch’s client. But Finch is not willing to turn over to that same system a person with a chronic mental illness. Finch is a man who defines his own basic ethical standard as truth telling, but who is willing to lie to protect Boo Radley. How does Finch translate his intuition of justice into a system of logic that he truly respects? What are the real ethical standards that drive a man like Atticus Finch? Is he a “one kingdom” or “two kingdom” lawyer? How does Finch compare to Justice Brandeis and to other lawyers depicted in the Shaffer book.⁵

The students also view the ABA series of ethical-dilemma videotapes, not so much to identify examples of wrongdoing as to explore *how* the attorneys go wrong. How might they have carried out better the lawyer’s responsibility for the client’s decisions? One videotape portrays a lawyer who is in a position of tremendous power because he realizes that the opposing lawyer does not know the applicable law. Can the lawyer with the power ethically take advantage of the opposing lawyer—no matter how inept—and client? Can the “power lawyer” negotiate without taking into account justice to the opposing client?

The object of the introductory course is to propose the model of the lawyer as hero. We try to show that the attorney can perform as a lawyer-champion in all his or her work. Immanuel Kant instructs us that morality is taught through the example of “heroes who sacrifice all to duty,

2. Thomas Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics*, pt. 2 (New York, 1985).
3. Although students may borrow the classic film from the library to watch on their own, caution is advised. In one class an embarrassed student who had been silent during the discussion admitted that he had watched *One Flew Over the Cuckoo’s Nest*. He said that he remembered the assignment had to do with a bird. When his wife asked what the film had to do with law school, he speculated that the assignment might be about false imprisonment. He was given the opportunity to review the correct film.
4. John Rawls, *A Theory of Justice* 84–86 (Cambridge, Mass., 1971).
5. The Skokie American Nazi Party case offers a different perspective on some of the same problems. The case also provokes a discussion of how a lawyer should handle threats. When a client tries to misuse a lawyer’s talents, what should the lawyer do? Must a lawyer take every client that seeks the lawyer’s services? How does the lawyer sort out the claims of “client” versus “cause”?

not the people who happen to prosper by doing what it commands.”⁶ In this way, we can “teach people to ‘feel their own dignity.’”⁷

The ethics course is taught at the beginning of the first semester because the faculty wants to catch the students while they are still unspoiled, while they still have a high level of idealism. More important, we believe that the ethical focus creates an ambience that will strongly affect their law school career as well as their eventual professional decision making. Because it is an integral part of the pervasive method, in which the lessons learned in Ethics I are completed in other substantive courses, in jurisprudence, and in the third-year ethics course, the first-year ethics course is not properly categorized as an introduction to law, an introduction to ethics, or a lawyering-process course. Although it is in part all of these, the course also provides the impetus for drawing morality into all our courses. The course explains to the students, many of whom come to Notre Dame because of the law school’s mission statement, why we teach ethics by the pervasive method and why ethics will be covered in many other courses. We want our students to envision at the outset the lawyer’s “superior opportunity of being a good man”⁸ or woman.

6. John Kultgen, *Ethics and Professionalism* 363–64 (Philadelphia, 1988) (on Kant).

7. *Id.* at 364 (quoting Kant).

8. Abraham Lincoln, Notes for Law Lecture, July 1850 (?), in *2 Complete Works of Abraham Lincoln* 140, 142 (New York, 1894).

