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Moral Implications and Effects of Legal Education

OR: BROTHER JUSTINIAN GOES TO LAW SCHOOL

Thomas L. Shaffer

No thought attains to its fullest existence unless it is incarnated in a human environment, and by environment I mean something open to the world around, something which is steeped in the surrounding society and is in contact with the whole of it, and not simply a closed circle of disciples around a master. For the lack of such an environment in which to breathe, a superior mind makes a philosophy for itself; but that is a second best and it produces thought of a lesser degree of reality.

Simone Weill

The atmosphere in a community affects the morals of those who live and work in the community. Communities that diminish people have to put up with diminished people; they become diminished communities. Communities can nourish oppression, and when they do, they attract oppressive people. Optimistic people tend to be generous and generous people tend to be optimistic, and those things are true of communities, too.

I don’t propose here to prove such propositions, but if I were going to try, I would probably center the positive and heuristic end of my proof in Aristotle’s political philosophy, and the negative and empirical end of it in Colin Turnbull’s study of the Ik, the mountain people—one source about a community in which the state rests on friendship, the other about a people who live in savagery as a result of circumstances that drove love from their community. All of this is as true of law schools as it is of civil societies, fraternal lodges, churches, or scout troops.

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Moral Implications and Effects

It should therefore be possible to look at the law school—at each law school—from a moral point of view, or, to be as inclusive as I find possible, from any one of at least three moral points of view:

(1) that asks the law school what it aims to do, and then whether what it aims to do is worthwhile, and then whether what it is doing tends to achieve what it aims to do. That would be to analyze morals in a law school community from the point of view of the end of the enterprise—teleologically, as the philosophers say.5

(2) that finds the center of the moral life in human relationships—that argues, as Martin Buber did, that a person does not even come to be until he finds himself in a human relationship.6 This would be to analyze law school morals interpersonally.

(3) that asks about the relationship in a law school between its people and the community. This would be to use the ethics of responsibility as expounded by H. Richard Niebuhr7 and other modern theologians. Niebuhr would have each of those in the law school ask: (a) To whom am I responsible? (b) and in what community?

I.

As an example of how these moral points of view might work, imagine Brother Justinian, a monk from an island off the Irish coast, asked to come and advise an American law school on the effect of the law school community on the morals of its members. Brother Justinian was employed for this purpose because his fees are low and because the dean of the law school admires the ethos of monasteries, particularly Justinian’s, where there has not been a faculty meeting since the Protestant Reformation.

* * *

Brother Justinian begins teleologically. He notices that the school’s educational program aims at people becoming lawyers. He then looks at the way American lawyers work, and notices that they work together. Most American lawyers work on team projects in law firms; many work with corporate businesses in which teamwork is a central and often celebrated value, in which teamwork is at the end of a search for excellence.8 Trial lawyers in America settle almost all of their lawsuits, a process that involves lawyers working together. Most positions of leadership in America are held by lawyers who, in governing the nation, sit down and talk earnestly with one another. Brother Justinian concludes that working together is important in the legal profession8 and supposes that the school that trains lawyers will

6. Martin Buber, I and Thou (Walter Kaufmann, trans.; New York, 1972); The Knowledge of Man (Roland C. Smith, trans.; London, 1969); Between Man and Man 35 (Roland C. Smith, trans.; London, 1947): “Dialogue is not an affair of spiritual luxury and spiritual luxuriousness, it is a matter of creation, of the creation, and he is that, of the man of whom I speak, he is a creature, trivial and irreplaceable.”
9. My contract of employment, when I began practice in a large business-oriented law firm, said: “You will be given much more credit for furthering the cause of people with whom you are working than for feathering your own nest.” Thomas L. Shaffer, Four Issues in the Accreditation of Law Schools, 52 J. Legal Educ. 224, 234n (1982); Thomas L. Shaffer, Collaboration in Studying Law, 25 J. Legal Educ. 239 (1975), also in Shaffer & Redmount, supra note 5, ch. 3, 8; note 16 infra.
emphasize the skills of collaboration, understanding, and accommodation with which such discursive enterprises do their work.

Brother Justinian also says that one who comes from a monastery just naturally supposes that lawyers will want to be as collaborative as they can, partly because they want to be pleasant, and partly because they want to be smart—that is, partly because they want to enjoy life and partly because they want to learn. Thus, in the monastery, young novices have to learn to work together when they wash the dishes. And everyone knows that a group of people working together can do more things and think of more things than any one of them alone can do or think of.

The consequent teleological question, according to Brother Justinian, is whether what is done in the law school advances people toward this end of collaborating in their professional work. "In considering such an educational agenda," he says, "I would think you would encourage your students to work together. But I find that you do not.

"Grades are an example. You American law teachers grade students according to what is called a curve. A student's grade is based not on what he does, but on what other students do. That system works to discourage collaboration, a fact that at first confused me. Grading by a curve discourages collaboration because of the risk that my helping my fellow student will result in his answering your questions as well as or better than I can answer them. If I am bright at all, I will appreciate that risk and realize that my helping him may result in my getting a lower grade than if I had not helped him—even though my performance will be the same whether I help my fellow student or refuse to help him. (And if I benefit from the collaboration, my classmate probably will not.) This system appeared to me at first designed to encourage students either to work alone or to distract one another from study. This is a system in which I will probably do better if I keep my wit to myself, and best if my classmates do worse than I do.

"But, after prayer and reflection, I see what you are up to, and I am edified by it. You are teaching your students, as the Gospel commands, that the last shall be first and the first last. You are showing them that the way is straight and narrow, that in the moral life there is no free lunch. You are teaching them that the price of collaboration is suffering and sacrifice. Every student who loans another student his notes, or leaves a library book where it is supposed to be, is a saint! At first, I was anxious to take this lesson back to the monks in my abbey, but I am afraid that monks lack the character for it."

* * *

Brother Justinian looked at the law building from the second moral point of view—that of relationships, of Martin Buber's "I and Thou."

"Your law building," he says, "appears to be part of a physical place, and the place appears to be a university. A law school in America is, I think, a


11. Note 6 supra.
place where those who want to learn come together with those who think they are able to teach, and there they work together for a while, often in buildings, so that the student can prepare to practice the profession of law.

"There doesn't seem to be much need in such a place for separation by rank. In the monastery, for example, where we come together to work and to pray, we do not separate ourselves by rank. We organize ourselves for prayer in rows facing one another and then pray back and forth. And when we work, we all work together, if only because many tasks require two or three monks rather than one. Ora'et labora. Both the architecture and the logic of our monastery put us together. In time our attitude toward work and prayer becomes communal, so that, as Robert Frost said it, 'We work together when we work apart.' It seems to me that your functions are at least logistically similar, although you seem to mean something different when you use the work 'prayer,' and you are, if I may say so, remarkably undisciplined in your work.

"I notice that your building has four stories. The faculty are on the top, which must be a symbol of rank, since it is obviously not based on stamina or physical endurance. The books are on the third level, which at first seems irrational, since they weigh so much, and should not be high in the air unless you propose to amend the law of gravity. The rooms for teaching are on the second level, perhaps on the theory that what is in the books will seep down. This arrangement reminded me of Dante. And it seemed not only to symbolize hierarchy but to be hierarchy.

"I notice that the building also has limited spaces for students to talk together, eat together, meet on the matters they are allowed to discuss among themselves, and hang their overcoats. These areas are all on the bottom level, down with the furnace and the water pipes and far away from the teachers and almost as far away from the books. The parking lot for the students' cars is a long way from the building, and the places for librarians and professors is closer. There is one set of rest rooms for those who pay the school and a separate set for those who are paid by the school. The two groups do not come and go together. The building seemed to be telling me something, but it was harder to understand than the Book of Revelation.

"To me, this arrangement appeared at first to discourage relationships. The I's and the Thou's are separated by a vertical space of forty feet. Their cars are separate. They eat separately, and, I suppose, pray separately. Perhaps one professor was meant to be Thou to another, but, if so, I was not able to understand wherein such a system of relationships was educational. If what Buber called 'the heavenly bread of self-being' was passed up and down the fourth-floor hall, and there only, I didn't understand wherein your institution is a school or why the people in the basement come to you and pay money for what you have to say to them. (It is perhaps the case that they don't come to your school to receive the heavenly bread of self-being, but that would be an untested, undemonstrated, and cynical proposition; I won't pursue it, and I hope that if you pursue it you pursue it thoughtfully.)

This, as I say, was my difficulty at first, but then I came to see, as I had in the case of the grading system, that you are not being guided by logic and physics, but by the Gospel. I came to this, I'm afraid, indirectly, not as a result of contemplation, but as a result of the accident of meeting a jogger in the student parking lot, where I keep my donkey. I learned from her that physical exercise is important to American lawyers, who trot in special shoes along the edges of roads and on the roofs of hotels, join athletic clubs, put showers in their law offices, and organize tournaments with such clever titles as 'res gestae' and 'race judicata.' I understood that you American lawyers do not use your muscles for work, but, rather, you use your muscles for their own sake, in order to build muscles with which at some future time to build more muscles. It is a case of labora et labora.

"Through joining you in the contemplation of muscles, I came to understand both your morals and your architecture. You want your students to climb the stairs! In this way they will learn two things—to spend much of their time building their muscles, as a good lawyer should, and also to listen for and heed the Gospel admonition: 'Friend, come higher.'"

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The third subject on which Brother Justinian reported to the law school concerned its morals from the point of view of the ethics of responsibility. That school of moral thinking emphasizes truthfulness; it regards self-deception as the most dangerous evil, and it asks: To whom am I responsible, and in what community?

The empirical focus in this part of his report was academic attrition. Academic attrition, he thought, would show the relationship between grades and building: If you don't get the grades, you can't stay in the building. He reasoned, at first, to the assumption that the law school thus functioned as a gateway to the profession. He reasoned that professors were those who let some people become lawyers and refuse to let others.

Justinian found, of course, that his assumption was not true. He found that it was once the case that many of those who came to law school failed out before they could finish, but this is true no longer. The academic attrition rate at the school he visited was under 5 percent, and had been that low for years; clearly, a student who failed out there had to work at it. If he did not work, he stayed in. Brother Justinian heard and read statements from professors and deans and bar examiners about the duty of the teaching profession to save America from incompetent lawyers, but he decided that these statements were a gentlemanly and modest way to say to the country that none of its lawyers was incompetent.

It was fortunate for him that he corrected this early and erroneous impression. Otherwise, he might have supposed that the law school community feels responsible to people who go to lawyers, and responsible in

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13. Memorandum QS8383-18, January 24, 1983, from Dean James P. White, Consultant on Legal Education to the American Bar Association, to the Deans of ABA-Approved Law Schools, reported that attrition in American law schools totaled 6.1 percent, about a third (i.e., about 2 percent) of which was academic.
all of the communities where its graduates practice law. When he learned that law professors no longer keep the gates to the profession, he understood that those who teach in the law school are responsible only to one another and in the community immediately around them—that is, on the fourth floor.  

This realization brought Brother Justinian to another of those difficulties that had driven him to prayer and to the parking lot; here I return to his report:

"I wondered, then, why it was that activities in your school were so pervasively and universally subjected to the sorting out of students—why everything was ranked into first, second, and third; top half and lower half; best, runner-up, and also-ran. Life in your law school seemed to be a thing of contests—in the trial-practice rounds, in the moot court, even in the client-counseling competition; in each course; in overall performance in school; in honorary fraternities and social fraternities—in literally every activity on which the blue ribbon or the pocket calculator could be brought to bear.

"It was not, I had found, the case that all of this sorting out was in order to respond to a concern that young lawyers be competent. What, then, was it for?

"At first, I again thought you were being irrational. Let me show you what I mean: Here is a student, Sam Jones, who has a cumulative C-minus average in law school. He is not on the law review; he didn't place in moot court; he came in fourth (of four) in his practice trial; he was eliminated from the client-counseling competition after the first round; and he was not elected secretary of Phi Alpha Delta.

"It appears that, in the eyes of the law school world, Sam is not doing well. Certainly no one tells him he is doing well. But you will not fail him out. He is going to be a lawyer; he is going to take on the lives and fortunes of his fellow citizens; he will assume leadership in his community. It seemed to me, with such a life of duty and burden before him, that it would be best for everyone if Sam went forth from your school with a spring in his step.

"He is not, after all, a failure. He is passing your courses. He did well in college. He can read and write and think; he looks good in his new suit. Even if he had no successes in his life, still, given the way you Americans run your country, he is going to be a person of power, and it will only increase the peril of his clients and his community to send him forth with a poor opinion of himself.

"It seemed logical to me that a sound view of your broad responsibilities would cause you to insure Sam's self-confidence, even if it is to him, not his clients, that you are responsible, and in your law school community, not the..."
community Sam will some day lead, that you practice your responsibility.  

"Again, and I blush to confess it, you seemed irrational. Everything you did seemed designed to send Sam forth feeling worthless and incapable. Everything you did seemed designed to destroy his confidence in himself. If you are going to graduate him anyway, I said to myself, why not graduate him with grace, or even with hope?

"It's not as if there is nothing about Sam's work that would justify a boost; it's not as if Sam never does anything well. It's not as if Sam's teachers have to be dishonest with him, and not as if praise is so much in the air of the law school that it will lose its force from dissipation. In fact, I have hardly heard anyone praised or complimented since I arrived, and I have seen wit and hard work everywhere. Your students are apparently supposed to take their encouragement from their rank in their classes and from the contests they win, not from their teachers.

"Those who dispense the things in life which make us feel better should realize, I said to myself, that some good things can be shared and some cannot. Rank in class and the first prize for performance, I suppose, in the nature of things, cannot be shared. But boosts and compliments can be shared; they can be given to Sam without being taken away from someone who gets higher grades. I even had the passing fancy that it wouldn't hurt to give Sam's mediocre performance a 'B' instead of a 'C,' since you're going to graduate him anyway, but a cold shower drove that thought from my mind."

15. And in this way, since he will do better in the profession if he has self-confidence, one might take some account of the moral claims of Sam's clients and their community. I mean here to make the argument that an advertent ethics of responsibility would lead to more careful and more skillful appreciation of those claims. Norman Redlich's argument, infra 215–221, for ordinary courtesy to students is an argument for the virtue of tolerance for civility. Glenn E. Tinder, Tolerance (Amherst, Mass., 1975) rests political philosophy on this virtue; G. Meilander, Friendship (1981), rests much of Christian theology on it; David Hoffman, A Course of Legal Study, 2d ed. (Baltimore, 1836), depended on it for much of American legal ethics. Walter Gellhorn argued in discussion, on January 6, 1984, that Redlich was merely describing a job. In one sense that is so, since institutional teachers of virtue train pupils with sanctions as well as with encouragement (note 16 infra), and job sanctions can be in that sense a minor source of virtue. But, in broader effect, Gellhorn's argument seems to deny that momentous moral actions are the product of routine moral actions. Virtues as skills—habits, if you like—are something we learn in routine. And when we have learned them we are able to live good lives in the face of suffering and of powerful pressures to be unvirtuous. Redlich's moral position is not trivial.

16. Fernand N. Dutile (Notre Dame) and Roger W. Groot (Washington and Lee) took exception to Brother Justinian's aside on grades. Groot said, "I believe my responsibility to 'B' students is equal to my responsibility to 'C' students. It makes no difference what the symbol is. I believe hard work and talent should be rewarded. If nobody gets lower than a 'B' the better performers in the 'B' group are being told that there is no point in working so hard and that talent doesn't count. The first message is pernicious; the second is palpably untrue." Dutile said, "There are some good reasons . . . for giving a student a 'C,' even if he will graduate. First of all, to give him a 'B' inevitably devalues the grades of other students, thereby implicating justice for them. Second, one might argue that the possibility of receiving a 'C' or worse contributes to the performance of those students at the top of the class. . . . I have enough human foibles and a long enough memory to know that the possibility of a low grade provides some incentive for study tonight. The long-range goals are not as effective since they present less imminent sanctions." (I think H. R. Niebuhr's argument is that the presence of clients and community's immediate, not long-range, or that it should be.) To argue that competitive teaching devices are a way to recognize or reward quality doesn't reach the issue I am trying to raise, about the law teacher's
Brother Justinian’s struggle over this third difficulty was like forty days in the desert for him. It brought him such distress that he decided for a while that the reason the law school sorted people out was a mystery, like the doctrine of the Trinity. In this mood he was ready to return to the monastery and recommend that the abbot institute ranking in the choir stalls.

He was saved by talking to a judge of the United States District Court. The judge was an alumnus of the law school Justinian was advising. After two glasses of wine, the judge told the monk that he (the judge) had, like Sam, been a C-minus student at the law school. The judge said professors are impressed with rank because rank was their ladder into teaching; and large law firms are impressed with rank because they want the faculty to do their work for them.

The judge had another glass and said he knew twenty federal judges who had come from the bottom half of their law school classes and only two who hadn’t. The bar association in his state had never had a president who was on the law review, he said, and half the generals counsel of the public corporations in the state had not placed in the moot court competition. He had a fourth glass of wine and said these lawyers and judges were like Prime Minister Winston Churchill and General George Marshall, who did not do well in their professional training: One of them was barely accepted for the lowest tier of military training; the other was sent away without a diploma. The judge had a fifth and penultimate glass of wine, rose to his feet, and said to all within half a mile, “Hell, for every leader who has impressed his teachers, there are ten who have not!”

Brother Justinian covered his ears at this last, but he took the judge’s point. And he began to see his way out of his third and greatest difficulty. “I came to understand,” he said, “that the sorting out process in law school is not irrational. It is designed to remove from the lawyer population the best students. To put them out of harm’s way, in law faculties and firms in New York City. In responsibility to clients and community. Doing good work is neither virtuous nor vicious; see my On Being a Christian and a Lawyer ch. 15 (Provo, Utah, 1980), discussing C. S. Lewis’s view on esthetic goodness. Good work is worth encouraging, I argue, if it tends to the service of clients and community. It is not clear to me that competitive devices encourage that sort of good work. Often, I think, they encourage its opposite. See my essay on collaboration, note 9 supra. One might argue that competitive devices help the university or the profession to stand for excellence, but that value, too, should be related to the immediate presence of clients and community. Otherwise Sam and his clients are being used to serve institutional ends; see Sandalow’s discussion at 165–175 infra. I think Sam and his clients are being harmed in this process of being used. Arguments that teaching devices should reward analytical or intellectual or esthetic excellence can probably be worked out—although C. S. Lewis, no mean thinker, could not work them out. I am suspicious of the self-deception in such arguments, though—self-deception that sometimes shows up in diminishing the value of service to clients and sometimes makes an idol of professional work. See my Henry Knox and the Moral Theology of Law Firms, 38 Wash. & Lee L. Rev. 347 (1981).

Mary I. Bland & Sharon R. Ritenour, eds., 1 The Papers of George Catlett Marshall: The Soldierly Spirit, December 1880–June 1939 (Baltimore, 1981); Randolph Spenser Churchill, 1 Winston Churchill (1966); Randolph says that Winston was sent to the army class at Harrow because Winston’s father thought him “not clever enough to go to the Bar;” (id. at 20).
that way, the Generals Marshall, the Winston Churchills, the federal judges and corporate lawyers and bar association presidents, are free to take on the leadership of the American public.

"I had been right to suppose that your law school is elitist, but I had mistaken the top for the bottom. Sam Jones, for example, had appeared to be a person who was passed over, when in fact he was being chosen. Good heavens, I murmured to myself, sitting by the judge, who had dozed off over his sixth glass of wine: Sam is probably headed for the Supreme Court!

"I reflected more carefully later: Your practice of sorting people out is an assurance of leadership, but, as important as leadership is, it is not the main virtue of this ingenious system of yours. The main virtue is in the way you guarantee that things in America will not get worse: Your grading system and your architecture are calls to virtue. But systems of virtue tend to leak; there is a chance that some of your students will turn ugly and become competitors instead of saints. Your sorting-out process protects your community from the worst results of such aberrations. Money, glory, rank, prestige, and honor are building blocks. You use them to make a wall around those you dare not inflict on the republic, because they are the very people who would make things worse if you didn't do something to restrain them.

"In this way, through a miracle, revealed in the reckless vehemence of a tipsy judge, I learned how it is, in America, that the meek inherit the earth."

II.

Brother Justinian makes three charges of law school immorality—that law schools are unvirtuous; that they are unprincipled; and that they are irresponsible. Concerned as he is with the requirements of fraternal correction, he is perhaps less direct about these than an insider might have been. It may pay to examine the charges more closely.

Unvirtuous. The teleological moral analysis, what H. Richard Niebuhr called "man-the-maker ethics," is a way to talk about the moral life as if it were a building of something—a building, finally, of character.\(^{18}\) The notion comes from Aristotle; it became part of our religious tradition in the Middle Ages, when Jewish and Christian thinkers appropriated Aristotle's ethics. (Brother Justinian thinks that Aristotle was a Greek monk.) When you talk about moral issues in that school of thought you don't talk about right and wrong; you talk about good and bad.\(^{19}\) You don't talk about acts; you talk about human qualities—virtues and vices, bad habits and good habits. Not about quandaries, problems, and decisions, but about character.\(^{20}\) This is the ethic of the Scout Law: A scout is loyal, helpful, cheerful, trustworthy, and so forth. Those qualities are virtues. They are what cause us to perform right actions. Our oldest American-lawyer ethical tradition is full

\(^{18}\) Note 5 supra; Stanley Hauerwas, Character and the Christian Life (San Antonio, 1975).

\(^{19}\) Note 2 supra, Bk. 2.

\(^{20}\) Edmund L. Pincoffs, Quandary Ethics, 552 Mind, October 1971; James W. McClendon, Biography as Theology ch. 1, 4 (Nashville, 1974).
of the ethics of virtue; it persists even in the rules proposed by the ABA's Kutak Commission.21

How do you tell which qualities are which? You can determine that in two ways: The one Niebuhr talks about most22 is the way that asks where you are going, what I called, in the introduction to this piece, teleology. Life is a journey; you figure out, or you just know, where you started and where you want to end up. Then you ask whether a certain disposition or characteristic will help you along the way. If it will help, it's a virtue; if it will not help, it's a vice.

The other way to determine which quality is which is to look around you and see whom you admire. The qualities you find in an admirable life are virtues; the qualities you find in a disgusting life are vices. Aristotle referred to "the man of practical wisdom" in ancient Athens—the gentleman, in other words; the ethics we lawyers have followed when we have been at our best in America are the ethics of gentlemen.23 We ask, for example, what General Lee would have done... Niebuhr claimed that such an inquiry is a way to open oneself to culture, since any culture's gentlemen show you in their lives what that culture's values are.24

One difficulty with man-the-maker ethics, a difficulty that persists in Alasdair MacIntyre's recent brief for Aristotle,25 is that they contain no way

21. The preamble, for example, appeals mostly to what one might call functional skills (competence, promptness, diligence), which, in the aggregate, might amount to the virtue of tolerance or civility (note 15 supra); but the Rules also appeal to such traditional virtues as honesty and patriotism and treat of responsibility in a broad Niebuhrian way.

22. Note 5 supra; see also Alasdair MacIntyre, After Virtue 135 (Notre Dame, Ind., 1981).


25. Note 22 supra; see J. White, The Ethics of Argument: Plato's Gorgias and the Modern Lawyer, 50 U. Chi. L. Rev. 849 (1983). Such projects as White's, in such able hands, are persuasive, but I am left, as some of my friends are, wondering if MacIntyre and White face as squarely as Niebuhr did the problem of culture. White suggests the difficulty, even if he doesn't answer it, when he says of Socrates, "The object of it all is truth, and its method is friendship, the full recognition of the value of self and the other in a universe of two" (at 870). He has Socrates identify the risks of an adversary ethic when he also says that the rhetorician "can never be refuted, but only beaten. He has no self in a world of others" (at 878). And then he has Euphemes answer Socrates with words that Neibuhr might have endorsed: "The answers must be good not only for the two of us, but for our whole community, for the others who act in our universe and speak our language. To say, as you do, that it is never good to have any relationship with any person that has any object other than discovering what is ultimately good for each of those two would in fact mean the end of the culture; the lawyer is one whose aim it is to maintain and improve the culture that makes possible a larger life, in a larger world" (at 886). White gets the client and the community into the teacher-student relationship in law school; in this he is a faithful Aristotelian. But White does not provide, yet, a way to go beyond the culture in which all four participants share—unless you read those last few words universally, which may be to say theoretically. Another possibility here is MacIntyre's description of the practice (as an art or skill or profession). When he comes to talk of the community of practitioners (as distinguished from the institutions in which the practice is pursued), he claims there is a moral consensus, out of which consensus the practitioner grows in virtue. De gustibus est disputandum, he says. The question, then, is where the third person fits into the fraternal relationship; MacIntyre is open to many possibilities, maybe even to Niebuhr's theory of the triad. MacIntyre, supra note 22, at 175–83.
to get outside the culture, no way to find out if the culture's values are sound. This has been a persistent difficulty in the American legal ethics of the gentleman: The gentleman is a creation of his culture; the best he can do—and it is often an admirable best—is to claim that the culture should follow its own values. He is always more or less lost without a compass when the culture's values are corrupted, as any culture's values inevitably are. That is a difficulty with the branch of ethical thinking that bases its arguments on such figures as the man of practical wisdom.

Another difficulty with man-the-maker ethics is that it is teleological; it bases its reasoning on the telos, the end (of an activity and, finally, of a human life). The difficulty is that it is hard to guess at one's destiny in a morally practical way, and it is impossible to do that without reference to the culture in which that destiny is played out (and then you are back to a moral system that has no way to test its culture). Teleological analysis works well for such short-term tasks as changing a tire or deciding, in the professional-responsibility course, whether to get into lawyer advertising. It does not work so well on larger, vaguer questions, questions that call for a broad assessment of where we come from, and on a clearer notion than most of us have of where we are going. (A program of legal education probably falls more toward the big-vague end of this spectrum than toward the short-term end.) And if assessment of such grand questions is possible, it is hardly possible outside a cultural context (and then you are back, again, to a moral system that has no way to test its culture). All of which means that we law teachers need not fret over Brother Justinian's charge that we fail the teleological test; in a move familiar in our calling, we don't argue that we have passed the test; we attack the test instead.

*Unprincipled.* Brother Justinian accuses us of not doing the right thing. That means he accuses us of not following the rules. For example, the rule that says a person is to be treated as an end in himself and not merely as a means.\(^{26}\) What rules? I suppose he would say the *applicable* rules. And then we might say, "How do we know which rules are applicable?" And at this point, if he is true to the tradition he is using, he would have to try to talk us into a principle from which a logical person would have to reason that we should, for instance, not grade on the curve, not separate ourselves from our students, and not separate our students from one another. That argument might finally come to the point—as it usually does—where one side would insist on its principle and the other side would insist that the principle is not adequate to the case. Finally, that is, such an argument comes to saying that each of us is free, or self-governing, and each of us has to choose the rules he will be governed by. At that point the claim from principle falls apart.

It falls apart, first, because it provides no way to deal with the reality of the moral life, which is that we do not live by following right principles; we live by violating them.\(^{27}\) Sophocles described our situation; we are all Antigones.

Two rules, not one, are to be obeyed. Both are reasonable; both follow from


\(^{27}\) Stanley Hauerwas, *The Peaceable Kingdom* (Notre Dame, Ind., 1983).
ethical universals. But we cannot obey one without disobeying the other. What we have to learn is not so much how to obey the right rule as to live with and honor the rule we refuse to obey. And principles do not show us how to do that, because the question is not so much what to do as it is how to do what we do. Or how to be the persons we want to be.28

The last scene in Socrates’ life is a scene in which he demonstrates not right choice but virtuous behavior: He will not flee from the city, because, he says, he loves the city as a child loves his parents. He must stay in the city even though the city is unjust. He must stay and be killed, unjustly, by the city. And, I suppose, we admire him—not because he is right, but because he is good, which means, one way or another, that we are thrown back on the need to examine (his)(our) culture. (I could sketch out a similar analysis of each of the law school situations Brother Justinian noticed, but my readers can do it better.) We are saved from the ethics of principle by the ethics of virtue, but we are still not saved from the inability of the ethics of virtue to make moral examinations of culture.

Irresponsible. H. Richard Niebuhr is, I think, an adequate source for consideration of the ethics of responsibility. (Brother Justinian thinks of the Niebuhr brothers, Reinhold and Richard, as Presbyterian monks.) Niebuhr’s The Responsible Self is particularly interesting for us teachers because its substance comes from his classroom teaching, of ethics, to students who proposed to become professionals. Niebuhr began his enterprise with Martin Buber. Buber is everywhere in Niebuhr’s thought.29 The essence of Buber’s insight is that our moral life centers in relationships with other people: I act in reference to my life with another person. When Buber even went so far as to place ontological significance on the relationship, he meant it: Descartes raised this problem of how we know we exist; Descartes said, “I think, therefore I am.” Buber said, “I love, therefore I am.”

But Niebuhr makes something of his own out of Buber’s point by teaching that the two people in a relationship act in reference to a third person or group of persons; in this way our moral life, which is fundamentally a life in relationships, exists in a community and in a culture; and, in this way, our moral life opens onto a stairway—a Jacob’s ladder—that begins by transcending the relationship and ends by transcending the culture. You can see more as you go up the ladder: from the people in the classroom, to the people in the school, to the people in the university, to the people in the country, to the people in the world, to creation itself.

Niebuhr was not alone in finding that the ethics of principle is inadequate, even bankrupt, but his special angle on the point was also a replacement for the ethics of autonomy: It is more useful to ask, “To whom am I responsible, and in what community?” than it is to ask, “What rules should I choose?” The ethics of responsibility provide a better procedure for coping with rules than talk about freedom does. If you think about this as Niebuhr did, though, you answer with your life—with what your life has

28. This is in general, I think, the argument in MacIntyre, supra note 22.
29. But he claims that Samuel Taylor Coleridge and Ludwig Feuerbach anticipated Buber; note 5 supra 72n.
been, and with what is going on in your life at the moment, and with what
will go on in it in the next moment. If we lived in law faculties with such
questions constantly before us, we might avoid self-deception, but we would
not avoid pain—to ourselves and to others. Here's an example, or maybe a
parable:

Cleveland Amory wrote an article in one of the Sunday supplements last
year called "Good Guys, Bad

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Guys,"30 about sports heroes. He provided four
heroes and four nerds. One of his heroes was the German Olympic jumper
Luz Long. Amory gave two reasons for finding Luz Long to be a hero,
reasons also involving Jesse Owens, black Olympic star from the United
States. This was the 1936 Olympics, held in Germany; the Nazis, who ran
Germany then, did all they could to make the games a triumph for the
master race. There were enormous pressures on Long to aid in that effort—
and therefore there was a mighty push on him to beat Jesse Owens. His
country was depending on him. Amory says:

In the qualifying heat, seeing that Owens had jumped short on his first try and had
fouled on his second, Long, who already had qualified, walked over and persuaded
Owens, for his third and final try, to make a mark well behind the takeoff point. Owens
did so, qualified and, in the finals, broke the Olympic record . . . defeating Long, who
came in second. . . .

Hitler had refused to greet any black winners, but, after Owens' triumph, Long walked
back down the jump runway with him and, directly in front of [Hitler's] box, put his arms
around him.

In 1943, a German soldier, Luz Long was killed in action.

That story shows to whom Long was responsible, and in what community.
It also shows how the answers to both questions changed, because the
community changed. If on one occasion he was responsible in a brotherhood
of sport, or maybe in the brotherhood of man, on another he responded by
giving his life for the Third Reich. If on one occasion he transcended one
culture by being faithful to another, he finally honored both. Because the
community changed, the answer to the question, "To whom am I
responsible?" changed. This story also shows how moral life is tragic, as
"Antigone" did, and as the story of Socrates does. Maybe Luz Long's story is
a parable that shows us how to respond more truthfully to Brother
Justinian's observation on the irrationality and harm that comes from
ranking students.

This consideration brings me to asking about the ethics involved in our
lives as law teachers in law schools and to the fact that each of us, when he
deals with his own conscience, deals also with the consciences of others. The
faculty, collectively, is dealing not only with the school's responsibility but
also with the responsibility of the profession and of the community.

It is not likely—probably not even possible—that any of us can act
without reference to other consciences. Cardinal Wolsey told Thomas Moore
that conscience must sometimes give way to the necessities of statecraft. And
Moore said that when statesmen forsake their private consciences for the sake
of their public duties they lead their countries by a short route to chaos. A
similar response is possible to those who argue that law-faculty policies have

to bend to what is called the "real" world. The law school world is "real" and the world outside is part of the law school world: "The responsible self," Niebuhr said, "is driven . . . to nothing less than a universal community." The same is true of law faculties. There is no honest way to avoid what Brother Justinian says about what each of our students, even the weakest among them, will do in the profession and the community. We cannot deal with that point except by looking the other way—which we do, all the time. Any relationship is a relationship of three. The clients our students will have sit with us and our students as we learn to deal with one another. Such a fact bears on how we ask and answer, "To whom am I responsible, and in what community?"

Niebuhr wanted to talk about these moral issues in terms of responsibility, and there are at least three ways to do that: We can talk about being responsible to somebody, or about being responsible for somebody, or about being responsible with somebody. We law teachers have fairly well rejected the claim that we should be responsible to anybody. We are the last of the prima donnas. If you don't believe that, imagine for a moment what would happen in your faculty if the dean tomorrow ordered the tax teachers to cover the Clifford-Trust rules, or the torts teachers not to leave out libel and invasion of privacy. Or remember what has happened when the organized bar or the courts have proposed, even in the mildest ways, to require law school courses or subjects in courses.

It is more plausible for us to talk about being responsible for somebody, even if we also resolutely evade having to answer for ourselves in that way. When we feel responsible for, say, one of our students, we go through an ethical checklist—not for ourselves now, but for the other—a student, say. I will ask myself: What do I want for her? And maybe I will answer that I want her to be free; or that I want her to be right; or that I want her to be good, to be the sort of person who makes good decisions. ("Good lives are made so by discipline," King Creon says. "Then we keep the laws.") There are differences among these ways of looking at responsibility for our students, but what is wrong with all of them is that they appropriate a suffocating burden. 31

Responsibility-for is represented in Trollope's novel, The Eustace Diamonds, in the character of the Eustace family lawyer, Mr. Camperdown. Mr. Camperdown told the Eustaces what to put in their wills, when to sell their land, when to be harsh with tenants and when to be benevolent. Of such lawyers, Trollope said, "The outside world to them was a world of pretty, laughing, ignorant children; and lawyers were the parents, guardians, pastors, and masters by whom the children should be protected from the evils incident to their childishness." And if you think it inappropriate to use a literary lawyer when I am talking about law teachers, I invite your reflection on the fact that our students are our clients; it is from us that our students learn how to treat their clients.

Niebuhr’s prescription for the vicarious moral life was neither being responsible to nor being responsible for. I take him to have described a moral world in which each of us is responsible with the other; we are three (teacher, student, and invisible client); we are responsible with one another in the community of people who come together in the legal enterprise. Niebuhr called that “triadic responsibility”; he said that our actions are fitting as they fit into the web of responsibility which is our shared moral life. And as responsibility is shared in this way, in each relationship, the law office looks to the community, the community to the nation, the nation to all of mankind, and . . . (Niebuhr, after all, was a theology teacher.)

My moral action, Niebuhr says, fits, “as a sentence fits into a paragraph . . . a note into a chord . . . as the act of eating a common meal fits into the lifelong companionship of a family.” Isn’t that the moral judgment Socrates pronounced when he spoke to the jury about his accusers? “I shall go away, sentenced by you to death; they will go away, sentenced by truth to wickedness and injustice.” Isn’t that Isaiah’s judgment on Judah—that it burns animals in the Temple and in the smoke hides from itself its injustices to the poor? Niebuhr would have asked Judah, “If this is your religion, where do the widows and orphans fit in?”

32. Note 5 supra ch. 4.