

Can Law Schools Teach Values?

By CHRISTOPHER L. EISGRUBER*

WHEN THE WATERGATE scandal broke, many Americans were outraged that Richard Nixon's lawyers assisted his cover up. Attorneys, they thought, should be especially vigilant about upholding the law. Yet, instead of sounding the alarm, several of the nation's most prominent lawyers—including the Attorney General—participated in the plot. Some people called for new regulatory measures that could detect and punish unethical behavior by attorneys. The organized bar, however, responded by demanding that the nation's law schools obligate every student to receive instruction in legal ethics. The bar apparently believed (or wanted the public to believe) that John Mitchell and John Dean would have behaved more honorably if only they had been better instructed while in law school.¹

When I taught the mandatory Professional Responsibility course at the New York University School of Law, I would summarize these facts in my opening lecture. I would then pause, draw a deep breath, and say to the students, "O.K., then, let me be clear about this. If a client—*any* client, even the President of the United States—asks you to cover up a hotel break in, or participate in any other criminal activity, don't do it! That would be unethical!"

Most of the students laughed. That was partly because they resented being forced to take "Professional Responsibility" and so appreciated my willingness to poke fun at the requirement's pedigree. But the joke also had a more philosophical point, one germane to our topic here. If we want to deter people (including lawyers) from committing theft, fraud, or other crimes, a law school course is an ineffective tool for the task. Perhaps a more aggressive regulatory structure could deter wrongdoing by lawyers. Perhaps stronger families and communities could produce people (including, perhaps, law students

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1. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 928–29 (1995).

and lawyers) with sturdier moral commitments. Perhaps one on one mentorship or counseling could rescue some students who have strayed from the true path. It seems naive, though, to suppose that a mandatory law school class on the lawyer/client relationship could rehabilitate students whose moral compasses are broken, wavering, or fragile.

Yet, the theme for this symposium—"Teaching Values in Law School"—presupposes that somehow (if not through the "legal ethics" curriculum, then in some other way) law schools can indeed improve the moral character of their students. Perhaps good teaching can save students from becoming scoundrels after all. Or, if not, then perhaps teachers can take well-intentioned students and make them more egalitarian, more courageous, or better in some other way. Is that plausible? In the pages that follow, I begin by reflecting on the difficulties of teaching virtue. I then turn to some ways in which law schools might nevertheless improve the behavior and moral understanding of their students.

I. Is Virtue Teachable?

How are values taught and learned? The process is mysterious. In Plato's *Meno*, Socrates leads Meno through an extended discussion about whether and how virtue can be taught. He theorizes that all teaching involves teasing out knowledge already in some sense possessed by the student. Socrates elaborates this view by telling a fanciful story about how immortal souls are reincarnated after collecting knowledge during past lifetimes and between lifetimes. Socrates maintains that people have this knowledge in their souls at birth but need to be made aware of it; hence, learning is a kind of remembering.² Socrates illustrates this point in one of the most famous episodes from the Platonic corpus: using carefully constructed questions, Socrates leads an uneducated slave boy to articulate the Pythagorean Theorem. Socrates gets Meno to conclude that the boy knew the theorem all along—he had merely forgotten it, and the teacher's task was to remind him of what he knew.³

Taken literally, this view is wildly unconvincing, even if we put to one side its supernatural elements. Some ideas may be embedded in human nature (or, to use a more fashionable metaphor, hard-wired into our brains) but it is preposterous to suppose that *all* knowledge—

2. See PLATO, *MENO* 81b–81e.

3. See *id.* at 82b–86b.

the recipe for crême brulee, the details of the parole evidence rule, or directions to your uncle's house in Winnipeg—is lodged within us, needing only to be remembered rather than acquired. Can Socrates really have meant to suggest otherwise? Perhaps recipes, legal technicalities, and road maps are too trivial to count as knowledge for Socrates.⁴ Still, the Pythagorean Theorem itself seems to be knowledge that we must acquire rather than recover. Socrates' clever questioning of the slave boy proves only that Socrates knew the theorem well enough to lead somebody else through it—not that the boy knew the theorem before his conversation with Socrates, or even that he understood it afterward.

In Plato's dialogues, however, superficial impressions are rarely reliable. When Socrates propounds an unbelievable theory, there is usually a deeper point. Even if learning is not remembering, it does seem we must first know something to learn something. So, for example, even if the slave boy did not know the Pythagorean Theorem, and even if he could not articulate it without the benefit of Socrates' clever questions, the boy did have to know how to answer those questions. More generally, young geometers must be able to recognize what counts as a step in a mathematical argument in order to learn the proof for a theorem, and they must be able to recognize “triangles” in order to start making claims about triangles.

Likewise, to learn a value, somebody must already know something—something a teacher can invoke in order to communicate the value. What sort of knowledge would that be? Imagine a law student named Antoinette who says, “I don't care that the poor have no bread; that's their tough luck. Personally, I hope to get rich helping clients create off-shore tax shelters.” What could we say to Antoinette? Suppose we tell her that gross poverty is inconsistent with the equality of persons. “I don't believe in equality,” says Antoinette. Now what do we say? Is there any way to teach Antoinette the value of equality?

Perhaps Antoinette herself invoked the ideal of equality on a previous occasion. Perhaps, for example, she did so yesterday, in order to complain about a grade she received—“you gave Albert credit for this point, and it's unfair to treat me differently.” If so, we could remind Antoinette that she had previously endorsed the value of equality. If we do not have any such examples handy, we might say to Antoinette, “Wouldn't you feel that you were unjustly disadvantaged if you had

4. Alternatively, directions and recipes might (under ordinary circumstances) count only as “right opinion,” which, Socrates later suggests (in a passage dealing with road maps), can indeed be acquired. *See id.* at 97a–97b.

nothing to eat?" "Of course I would," Antoinette might reply, "but that doesn't mean that my feelings would be justified. In any event, I'm not like the poor—they're lower class!"

Do we have any response? Suppose we introduce Antoinette to Tiny Tim, a destitute young man who is intelligent and kind. We run the risk that Antoinette's prejudice leads her to find Tim revolting. Suppose, though, that she sympathizes with him. We say to her, "Now don't you think it unjust that Tim, and others like him, are starving?" Antoinette might reply, "You're right; I was mistaken. I see now that the poor are no different from me. It is indeed unjust that they are starving." Or she might say, "No, actually, Tim is like me and it's unjust that *he* is starving—but he's different from the ordinary rabble, who are disgusting and beneath my contempt." Or she might even say, "Well, I like Tim, and I've invited him to eat cake and maybe I'll offer him a job as my valet, but I still don't understand this equality business. I'll be nice to him as long as it pleases me, but that's as far as it goes."

Now, here is something remarkable: all of the dialectical strategies canvassed above presuppose that Antoinette was mistaken when she said that she did not believe in equality. They assume, in other words, that our task is not so much to endow Antoinette with a value that she previously lacked, but to remind her of a value that she had ignored or forgotten. That is obviously what we are doing when we point out to Antoinette that she invoked equality on a previous occasion. It is also what we are doing if we encourage Antoinette to concede that she *would* invoke equality if her circumstances were different. And likewise, when we encourage Antoinette to sympathize with Tim, we are assuming that she in fact endorses the value of equality but has made a mistake about its application: namely, she has wrongly assumed that poor people are different from her in some morally relevant way. And, as illustrated by the last of the responses imagined above, if Antoinette really does not believe in equality at all, it is unlikely that her sympathy for Tim will enable us to make any headway.

There are more radical (one might say tyrannical) ways to re-educate Antoinette. Suppose, frustrated by her lack of sympathy for Tim or her disdain for equality, we decide to make Antoinette stand in Tim's shoes. We deprive her of her wealth and connections (How? Who knows!) and leave her to fend for herself in some miserable neighborhood she does not know. We watch from a distance, waiting until Antoinette cries out to somebody, demanding that she be

treated as an equal. After an interval, we rescue her. Perhaps cruel necessity will have brought Antoinette to a kind of moral epiphany—perhaps she will be sensitive to equality arguments in a way that she never was before. Or perhaps not. She might regard her appeals to equality as mere rhetoric, defensible on strategic but not moral grounds. Indeed, the whole experience might make her hate egalitarians and equality all the more, since egalitarians made her miserable. Or she might simply continue to insist that she was different from other poor people—she could appeal to equality, but those who are truly lower class have no right to do so. What determines how Antoinette will respond to her ordeal? What determines, in particular, whether her suffering will make her more or less well disposed to equality? The answer is not obvious, but it is at least possible that Antoinette will become more attached to equality only if that ideal already has some grip on her before she is made to stand in Tim's place.

I do not mean to suggest that we are all born with our moral outlooks embedded within us, complete and fully formed. That view would be no less fantastic than Plato's myth about the multiple lives of immortal souls. People growing up in different cultures have different values. Most people growing up in the United States, for example, will be more favorably disposed toward religious toleration than people growing up in a fundamentalist theocratic society. Likewise, people in different families tend to have different values and characters. It seems undeniable that good parenting matters to a child's character—although it is by no means obvious what good parenting is or how much it can accomplish.

Still, our brief reflection upon the *Meno* shows that Socrates' surprising theory—that "learning is a kind of remembering"—has more to recommend it than first meets the eye. In particular, teaching values may have more to do with reminding people (making them more aware) of values they already hold than with imparting new values. If so, a good teacher does not so much change students as make them into better versions of what they already are. Or, to reformulate the point, moral education (and perhaps education more generally) is almost always *ad hominem*—not in the colloquial sense of being a personal insult, but in the literal sense of being addressed *to the particular person* rather than only to abstract, impersonal standards of truth.⁵ In

5. For further discussion of this point in connection with the Supreme Court's "educative" function, see Christopher L. Eisgruber, *Is the Supreme Court an Educational Institution?*, 67 N.Y.U. L. Rev. 961, 972–73 (1992). In that article, I eventually concluded that the Supreme Court opinions could have a modest educative effect upon law students and others

our imagined conversation with Antoinette, for example, we tried to reinforce her commitment to equality by appealing to various of her own opinions, experiences, or desires—her own past claims, her sense of entitlement, her sympathies. To teach Antoinette effectively about equality, we must know something not only about equality but about Antoinette.

Ad hominem teaching is difficult in large classrooms. An argument that appeals directly to Antoinette's personal experience or interests may have no purchase at all on Beauregard, Carlos, Dottie, or any of 100 other students in the room. Moreover, *ad hominem* arguments that would work in a more private setting might be simultaneously ineffective and inappropriate in such a public forum. Antoinette might be embarrassed rather than edified if a teacher points out the inconsistencies in her personal statements and opinions. She might experience the intervention as an insulting attack, and she might dedicate herself to parrying such attacks rather than to reforming her opinions (in one common view, it is the desire to teach this rhetorical skill that justifies the use of the "Socratic method" in law school classrooms).

Indeed, there is no particular reason to suppose that Antoinette (or any other law student) would welcome such *ad hominem* discussions even in friendlier, private settings. Law students are pretty well formed people—by which I do not mean that they are rightly formed, but that they are, for better or worse, set in their ways. The youngest law students tend to be around twenty-one years old and some are much older. In his brilliant *Emile*, Jean-Jacques Rousseau contended that the most critical period for moral education occurred with the onset of sexual desire.⁶ We need not endorse that judgment to recognize that law students are adults rather than children, and (like most adults) they think they know themselves—their values, their wants, and so on. Law students want their teachers to help them get what they want, not to tell them (or remind them!) what they "really" want or should want.

Among other things, law students know (or think they know) what career they want for themselves. They want to be lawyers. This simple fact narrows significantly the kind of impact a law professor

who paid close attention to judicial opinions early in their adult lives. *See id.* at 1008–10. As one might infer from the general themes of this essay, I am now more doubtful about whether such effects exist—although it remains possible that Supreme Court opinions will influence how lawyers view their professional identity. *See infra* Part II.D.

6. *See* JEAN-JACQUES ROUSSEAU, *EMILE, OR ON EDUCATION* 232–33 (A. Bloom trans., 1979).

can have. The decision to go to law school might be life changing, but that decision has been made. Law professors can, of course, persuade a shaken student to stay in law school. They can also (in various ways, including by teaching so badly that the experience is unbearable) convince students to *leave* law school. But it is much more likely that undergraduate faculty can change lives in this way—for example, by convincing a student who had always planned to go to law school that finance is her true calling. And teachers who mentor even younger students can expand their horizons in more profound ways—such as by getting a student who had never considered attending college, or leaving her hometown, to do so.

The fact that law students are training to be lawyers has other implications. Becoming a lawyer might involve, among other things, acquiring certain “habits of mind” that are useful to the practice of law.⁷ Such habits may embody or reinforce certain values. For example, becoming a lawyer may involve developing a heightened sensitivity to linguistic imprecision, and this sensitivity may correlate with a respect for rationalism, articulate justification, or what political theorists call “public reason.” A law school that inculcates such value laden habits of mind would in a real sense be “teaching values.” But it would be teaching values in a way that was largely independent of pedagogical decisions by individual teachers or even curricular decisions by individual law schools. If acquiring the habit is genuinely necessary to becoming a good lawyer, then no successful law school could refuse to communicate the habit to its students. To be sure, the law school might try to make students more self-conscious about the habit, or limit its extreme manifestations. My point is only that, here again, students’ aspirations to be lawyers will constrain the kind of teaching that law schools can do.

It is also worth noting that by comparison to other “teachers”—especially parents—law professors have only limited means by which to teach values. Professors can lecture, question, mentor, befriend, cajole, criticize, and grade. In most cases, they will see their students for only a few hours a week, often in large groups. Parents, by contrast, can feed, dress, nurture, kiss, berate, awaken, and punish their children. They control almost the totality of their children’s environment, especially during the crucial pre-school years. They can decide what their children will wear; where and when their children will eat; when they can go out; and where (and, in the pre-school years, whether)

7. James Boyd White has argued this point with special subtlety. See, e.g., JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* (1990).

they will go to school. Parents can announce that their toddlers will go to the grocery store, and if the toddlers resist, parents can scoop them up and put them in the car. This comes close to (perhaps it goes beyond) the quasi-tyrannical power we imagined exercising in order to make Antoinette experience the pains of poverty. Such extraordinary dominion empowers parents to shape the habits and values of their children. Law professors have (thank goodness!) no comparable control over their students.

These considerations suggest we should be skeptical about grand exhortations that call upon law professors to improve the values of their students. The capacity of law professors to teach values will be modest at best. Yet, even if law professors cannot teach values at all, their teaching may be able to increase the likelihood that American lawyers will practice ethically. I explore this paradoxical suggestion in the next Part, but I can state the basic idea quickly: most law students come to law school with decent values. If teachers can strengthen students, by giving them skills, opportunities, and resolve needed to act on the values they already have, then teachers can improve the behavior of their students without changing their values. My emphasis in the next Part, then, will be on how teachers can improve the legal profession by making students stronger, rather than by making them more virtuous.

II. Making Good Students Stronger

A. Reinforcing the Connection Between Law and Justice

Oddly enough, some American lawyers take pride in their ability to disregard justice. They suppose that lawyers must be faithful to the law rather than to justice, and that tough minded lawyers will therefore not care much about justice. In the mythology of American law, this attitude is exemplified by the great Oliver Wendell Holmes. Holmes wrote to a friend, "I have said to my brethren that I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms."⁸ Holmes is also the star of a famous story told by Judge Learned Hand. In the story, Hand rides with his mentor Holmes to the Supreme Court. As they part, Hand cries out, "Do justice!" Holmes beckons Hand near, and admonishes him: "That is not my job. My job is to play

8. THE MIND AND FAITH OF JUSTICE HOLMES 435 (Max Lerner ed., 1943).

the game according to the rules.”⁹ Hand relished this story and the lesson it conveyed. Other prominent judges and lawyers have embraced it with kindred enthusiasm. Some law professors relate the story to their students, as a way of telling them what it means to become a lawyer.

It is remarkable that American lawyers would lionize judges for professing their indifference to justice. Of course, these lawyers do not really hate justice, any more than Holmes himself did. The story about Hand and Holmes is a dramatic way to make a more plausible point—namely, that doing justice will often require judges and lawyers to defer to whatever opinions have been embodied in the law, rather than to act on their own, independent judgments about the substantive matter at hand. Still, one can make this point without sneering at justice.

Indeed, although lawyers must not disregard the law in favor of their own, personal judgments about justice, one might suppose that they ought also to struggle mightily to keep law and justice in accord with one another so far as is possible. There are great judges in American history—John Marshall, Louis Brandeis, and Benjamin Cardozo, for example—who spoke no insults to justice. Holmes and his colleagues on the Supreme Court are honored with the title of “Justice,” rather than “Umpire” or “Referee.” The Court’s building bears the inscription “Equal Justice Under Law,” not “The Rules of the Game” or “We Hate Justice.” Imagine the reaction of visitors if it were otherwise!

In my book *Constitutional Self-Government*¹⁰ and elsewhere, I have argued that Holmes was wrong to think that somebody who speaks about justice has thereby ceased to speak in legal terms. I have argued that, on the contrary, it is impossible to speak competently about the law without speaking about justice. I have propounded the same view in my classroom teaching. I offer the view as a way of understanding the law and adjudicative institutions, not as an ethics lesson for my students, but it has both ethical content and ethical consequences. The view has ethical content because the case in favor of connecting law and justice depends upon how one interprets the value of democracy. It has ethical consequences because it recommends that judges consult their convictions about justice when they construe the law—

9. The many tellings of this story are described in Michael Herz, “Do Justice!": *Variations on a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996).

10. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 71, 211, & *passim* (2001).

and hence that lawyers, including law students, think about justice when they interpret the law.

Some people might, I suppose, regard this sort of argument as a way of “teaching values”—certainly it propounds a value laden account of the legal process. But to say that I am “teaching values” strikes me as imprecise. I am not, for example, teaching students to value justice or democracy; on the contrary, my arguments about the connection between law and justice presuppose that the students are already committed to justice and democracy (my arguments analyze the implications of those commitments). Nor do I try to tell students how they should understand justice—on the contrary, my principal point is to emphasize that they should not ignore or put aside their conceptions of justice (whatever those may be) when they think about the law.

I am not, in other words, trying to change or improve students’ values; instead, I seek to equip students with a theory of the legal process that frees them to act upon their pre-existing commitments to democracy and justice. If successful, such teaching may fortify students who are already disposed to do good, but it presupposes rather than creates that disposition. It thus represents one way in which law school teachers can strengthen students who already have good values.

B. Individual Mentorship

In Part I, I suggested that values might best be taught (if they can be taught at all) through *ad hominem* argument in one on one settings. Mentorship relationships—the kind that form, for example, around a successful independent research project—provide a context in which discussions of that kind might occur. Sheer numbers ensure that these kinds of relationships will be the exception rather than the rule: students far outnumber faculty, and if these relationships are to be sites of real teaching—rather than mere sources for recommendation letters—they demand time and energy. But when such relationships form, they can generate rich discussions of the ethical issues that attend a life in the law.

In my own experience, healthy mentoring relationships develop best with a certain set of students: those who are not only intelligent and willing to work hard, but who are also genuinely eager to subject their own ideas and commitments to criticism in the hope of getting closer to the truth about law, morality, and justice. Students who have these traits bring a good set of values to the relationship before it

begins; they have what are, in my view, the most crucial and rarest ingredients of good character. With such students, it is possible to engage in deep and productive argument that might change their mind—or *my* mind—about things that matter. Yet, it is far from clear that these exchanges amount to “teaching values” rather than to building upon values that were already embraced.

Yet, even if professors cannot teach values to their students, they may be able to improve the prospects of students who already have the kind of good character needed for meaningful mentoring relationships. When I look back at the students whom I have mentored, I cannot say with any confidence that I have taught values to them (nor is that what I conceived of myself as doing). On the other hand, in at least some cases, I have enabled these students to complete projects they would not otherwise have done, or to improve the quality of those projects, or to get jobs they wanted, or to weather difficulties of one kind or another. I like to think that, in these ways, I have made a difference in their lives.

Helping good students do well would be a good thing even if the only beneficiaries were the particular students aided. Yet, if many teachers help many students of good character, the teachers’ efforts may also change the profession as a whole. Morally arbitrary characteristics (including race, sex, trivial differences in intellectual talent, personality, connections, and appearance) often play a crucial role in determining who gets a job. By giving good students a boost, teachers may increase the likelihood that those students will eventually win leadership positions—and this redistribution of professional power may change the profession and make it more ethical, even if the teachers never make any individual student more ethical.

C. Prudential Lessons for the Well-Intentioned

I began this essay by expressing doubts about whether professional responsibility classes can deter rascals from misbehaving. Fortunately, however, most law students are well-intentioned rather than corrupt—but we all know what kind of roads are paved with good intentions. And, indeed, casebooks on professional responsibility are filled with tales of unfortunate slobs who—through carelessness and a touch of laziness or greed, rather than gross moral turpitude—ensnarled themselves in conflicts of interest, assumed responsibilities they did not want or could not handle, disclosed privileged communications, and so on. Students who pay attention can learn something

about how to steer clear of trouble. Both they and their clients will benefit.

For example, students usually assume that giving free legal advice to friends, neighbors, and casual acquaintances is a kind of favor—giving away a service for which others would charge. It is, in other words, the sort of thing that a good, generous person would do. The students are accordingly shocked to learn that casual advice may subject them to malpractice liability.¹¹ This rule provides lawyers with an incentive never to dispense free advice. Some students are tempted to conclude that the law induces lawyers to act *less* ethically: in particular, the threat of liability encourages them to hoard their expertise, as Antoinette might do, rather than share it, as their generous instincts would have them do. But, pushed to probe deeper, the students discover that there are real risks to giving casual advice. Non-lawyers often assume that the law speaks unambiguously to whatever problems concern them. They may also assume that competent lawyers know the law (all of it!) off the top of their heads. These assumptions create a hazard. A lawyer may offer a plausible, unresearched guess about what the law says; her neighbor may receive it as a definitive pronouncement of legal fact. And the neighbor may, quite literally, bet the ranch on the assumption that the pronouncement is true. The magnitude of this risk is an open question, but well-intentioned students will be more ethical lawyers if they appreciate its existence.

Conflicts of interest provide another example. Under some circumstances, it may seem harmless, and even ungracious, for a lawyer to refuse matters from two clients with potentially adverse interests. The two clients might be longstanding friends of the lawyer, for example; they might have an amicable relation with one another, and the lawyer might be confident that he or she could sort out any conflicts that arose.¹² Under such circumstances, what purpose is served by fastidious insistence on the rules governing conflicts of interest? Why not let both clients have the lawyer they want? Of course, the lawyer almost always has a self-interested reason for wanting to suppose that the conflict is illusory. If the lawyer turns away one client, the lawyer will certainly lose fees in the short run and may lose the client's future business too. Attentive students can learn to guard against the possibil-

11. The crucial question is whether an attorney/client relationship was formed; for discussion of trends in the law, see STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS IN LAW AND ETHICS* 18–21 (5th ed. 1998).

12. For a fact pattern of this kind, see, e.g., *Simpson v. James*, 903 F.2d 372 (5th Cir. 1990).

ity that financial self-interest will lead them to minimize real conflicts. They can also learn why conflicts matter—that is, they can see how representations that at first seemed innocuous unravel when small facts change.

Professional responsibility courses are in large part about what it means to have a client—more specifically, about what it means to serve a client and about the pressures that result when one's livelihood depends upon retaining clients. Few students have thought hard about such problems. Even fewer have any experience with them. No matter how good their values or character, students may have trouble anticipating the stresses and complexities of the attorney/client relationship. Forewarned is forearmed; by making students aware of hidden traps and dangers, legal ethics classes may enable new lawyers to practice more ethically even if such classes do not teach them any values they did not already embrace.

D. Instilling a Vocational Interest in the Law

Strong temptations may lure even lawyers with good values to behave unethically. For example, small, apparently trivial ethical compromises (such as ignoring an apparently harmless conflict of interest) might seem crucial to achieving large rewards—retaining a client, securing a partnership, or winning a case. To help lawyers resist temptation, what matters is not that they be given better values but rather that they be motivated to act on their values.

The question of what motivates ethical behavior, like the question of how (if at all) virtue can be taught, is philosophically vexed. There is one obvious way to solve the problem, though, and that is by removing the conflict: if what is ethical is also in a lawyer's interest, then we need not worry about whether she will have nerve enough to stand by her convictions. That is one point of legal sanctions. By imposing civil or criminal liability for wrongful acts, we give people a self-interested reason to do the right thing—namely, if they do the wrong thing, and they are caught, they will pay for their actions. James Madison's defense of the constitutional separation of powers on the ground that it connects "the interests of the man . . . with the constitutional rights of the place" is a more subtle version of the same idea.¹³

One way to give lawyers a self-interested reason to behave ethically is through disciplinary rules. As with ordinary tort or criminal law, lawyers who violate the disciplinary rules and get caught will pay a

13. THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961).

price for their actions. That “price” is an incentive for even selfish lawyers to avoid ethical infractions. Yet, obviously, disciplinary rules are an awkward, imperfect mechanism for producing ethical behavior. Detecting unethical behavior is often difficult; enforcing the rules may be costly; and “doing nothing wrong” is not the same thing as “doing good.” Ideally, we should like to have self-interested reasons for lawyers to behave ethically even when they are not worried about being caught and disciplined.

A well-shaped sense of professional identity might give lawyers an incentive to behave ethically, and leaders (including teachers) may have some capacity to shape how law students and lawyers see themselves. The possibility is nicely illustrated by a news story from 1997. Lawyers at Whiteman Air Force Base in Missouri were publishing a weekly newsletter entitled, “Nooseletter.” The head of the Air Combat Command’s legal office, Brigadier General William Moorman, saw the newsletter and ordered that it be renamed. In his memorandum to the lawyers, Moorman wrote, “Do you proudly proclaim yourself as a ‘hang-’em-high-judge’ or do you take pride in the fact that you are interested in truth, fairness, justice, equitable treatment and good order and discipline?”¹⁴ If lawyers want to see themselves as dedicated to truth, justice, and equitable treatment, that aspiration will motivate them to behave ethically. They will feel better about themselves if they live up to a high standard.

More generally, lawyers may be inspired to behave ethically insofar as they internalize a conception of professional success distinct from making money, exercising power, or winning cases. Law schools sometimes give students remarkably little to work with in this regard. To be sure, almost every law school urges its students to do something besides make money—but the usual alternative is “public service,” in the form either of “pro bono” work or a career as a public interest attorney. I cringed through several graduation ceremonies while some speaker hammered home the moral imperative for every student to go into civil rights practice, thereby impugning the integrity of most of the law school’s graduates, who were bound for practice at large firms. Scolding the graduates for their career path makes little sense. Even putting aside financial considerations, the competition for some public interest jobs is keen, and students who want them cannot always get

14. Elaine Sciolino, *Air Force Orders Lawyers to Review Procedures for Fairness*, N.Y. TIMES, July 8, 1997, at A10.

them.¹⁵ Pro bono work is a more realistic, though often onerous, option for many law students. On the one hand, young lawyers can do pro bono work while they pursue careers in private practice; on the other hand, most firms regard pro bono work as a supplement to (rather than a substitute for) income producing billable hours. As a result, pro bono commitments tend to lengthen work schedules that are already so demanding as to be almost inhuman, especially for lawyers with families.

Insofar as students have chosen to go into the private practice of law, the incessant equation of “ethical lawyering” with “public interest law” can actually have a negative effect: It can convince young lawyers that they have “sold out,” and so dissuade them from asking what it would mean to live ethically within the career they have chosen for themselves. For lawyers to have a satisfying sense of professional identity, they must have a model of ethical practice that is at least potentially consistent with the careers they actually have, rather than with others that they have rejected or that are unavailable to them. Lawyers must be able to treat law as their calling, rather than just as a way to make money (perhaps a lot of money); they must find value in the ordinary practice of law. They must be able to take pride in their work even when their clients are not angels, their cause is not glorious, and their salary is not ballooning (or even rising). There are at least four possible sources of such pride: pride in helping clients; pride in the craft of law; pride in how one treats one’s co-workers, employees, and adversaries; and pride in one’s role as contributor to a larger system of legal justice.

Perhaps law schools can help students to develop a sense of professional identity consistent with the kinds of practice they are likely to have. In theory, at least, law schools might do so by supplying positive (ordinary and achievable, rather than heroic) role models; by discussing explicitly what it means to live ethically in the law; by illuminating the law’s connection to justice and other values; or by introducing students to the intellectual pleasures that can accompany the analysis of legal problems, both in the classroom and in practice. I’m not sure how much impact any of these techniques can have. Once again, it may matter more what students bring to law school than what law

15. A careful and useful analysis of law school graduates’ career choices is Lewis Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829 (1995). On jobs in the public interest sector, see *id.* at 842–46; on the competition for “elite” public interest jobs, see *id.* at 915.

school gives to them. Or, alternatively, it may be that conceptions of professional identity are shaped by the incentives young lawyers encounter in the workplace, rather than by law school lessons. But perhaps not; perhaps creative teaching can help to endow young lawyers with a constructive sense of professional pride. Certainly there is little to lose from trying.

Conclusion

We hear much nowadays about the importance of teaching values, in law schools and elsewhere. Sometimes it seems as though lawyers and law professors want to see themselves as makers and interpreters of people, rather than as makers and interpreters of laws. That is ironic but understandable. Insofar as people are self-interested, we must rely on regulations and institutions to give them incentives to respect the interests of others. Such strategies are often ineffective and sometimes oppressive. How much better it would be if people freely chose to care about their neighbors, countrymen, and fellow human beings! Moral education therefore holds great promise: if successful, it simultaneously respects people's freedom and makes them behave better.

Unfortunately, moral education is difficult. For purposes of policymaking in liberal democracies, we may have to take adult human beings—including law students and lawyers—more or less as we find them. Campaigns for moral education seem, at least if targeted at free adults, likely to do more harm than good. At best, they are ineffective and divert energy from more practical reform strategies; at worst, they degenerate into tiresome and destructive “culture wars” about which lifestyles are praiseworthy and which are to blame for the nation's ills.¹⁶

I do not mean to be pessimistic. Though people are not angels and few are saints, neither are they demons. Nearly all care in some measure about the interests of others, and some care greatly. We may be able to nurture the better instincts of human nature in various

16. I make a related argument in Christopher L. Eisgruber, *Civic Virtue and the Limits of Constitutionalism*, 69 *FORD. L. REV.* 2131, 2150 (2001) (“If . . . we neglect the limits of constitutionalism, there is a risk that we will damage or destroy valuable constitutional rights in a well-intentioned quest to create societal virtues that, no matter how noble or commendable, are simply not achievable through constitutional law.”). For purposes of this essay, there is no need to consider what forms of moral education (if any) are likely to be effective in elementary and secondary schools, but I have pursued the issue elsewhere: Christopher L. Eisgruber, *How Do Liberal Democracies Teach Values?*, *NOMOS XLIII: MORAL AND POLITICAL EDUCATION* (Stephen Macedo & Yael Tamir eds., 2002).

ways—for example, by alleviating the burdens of poverty, crime, and violence; by enabling parents to spend more time with their children; and by facilitating access to higher education. I am also inclined to believe that sustained public deliberation about moral issues can, over generations, improve the moral character of a people.

Nor am I skeptical about the value of ambitious, dedicated, and energetic teaching, in law schools and elsewhere. Good teaching can deepen students' understandings of the roles and institutions they will inhabit; it can equip them with insights, theories, and skills to address new problems; and it can inspire students to achieve more than they had thought possible. If teaching cannot make students good, it can nevertheless fortify and nurture the good that is already in them.

I am very skeptical, however, about whether we can improve student character or reform American society by tweaking the moral content of school curricula, in law schools or elsewhere. Humanity's crooked timber is not so easily made straight.¹⁷ Regulations and institutions—in other words, the laws, broadly defined—may be the best mechanisms for improving the behavior of human beings who are, by their natures, durably imperfect. That message is, among other things, an important one to convey to students who have chosen to become not teachers but lawyers and who need to appreciate the dignity of their calling.

17. The metaphor is from Isaiah Berlin, *Two Concepts of Liberty*, *FOUR ESSAYS ON LIBERTY* 170 (1969).

