Symposium

Teaching Values—The Center for Applied Legal Ethics

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THE UNIVERSITY OF SAN FRANCISCO School of Law ("U.S.F.") created a Center for Applied Legal Ethics ("CALE" or "Center") in the spring of 2000. The event provided an opportunity to reflect on how to educate law students about ethics. To take advantage of this opportunity, and to begin a dialogue that we hope will continue for many years to come, the Center asked four scholars to write about teaching values in law school. The scholars are: Christopher Eisgruber, Director, Program in Law and Public Affairs, and Laurance A. Rockefeller Professor of Public Affairs, Woodrow Wilson School and the University Center for Human Values, Princeton University; Joshua Rosenberg, Professor of Law, University of San Francisco School of Law; Paul Tremblay, Clinical Professor of Law, Boston College Law School; and W. Bradley Wendel, Assistant Professor of Law, Washington and Lee University. The full statement to which the scholars were asked to respond is reproduced at the end of this introduction.

I. The Articles

The contribution by Professor Christopher Eisgruber offers an intriguing account of why teaching values in law school is perhaps best understood as getting students to remember the beliefs they already hold. He adapts to law teaching an idea he explored in his article in

* Associate Professor of Law and Chair, Faculty Legal Ethics Committee, Center for Applied Legal Ethics, University of San Francisco School of Law. I received valuable comments on this introduction from John Adler, Jeff Brand, and Alice Kaswan. It also was improved by the thoughtful comments of Dulci Grantham, whose hard work and good sense have been a great benefit to this Symposium, the University of San Francisco Law Review, and the law school. The Center would not exist, and this Symposium issue of the Law Review would not have occurred, without the enthusiasm and support of the Center's Director, Richard Zitrin; the former Dean of the University of San Francisco School of Law, Jay Folberg; and the current Dean of the law school, Jeff Brand.

the New York University Law Review on whether the Supreme Court can function as an educative institution.[1]

Harkening back to Plato's *Meno*, Professor Eisgruber's idea is that the effective teaching of values in fact often entails appealing to values a person already possesses, and showing them that their views on a particular subject do not reflect the best understanding of those values. As I hoped he might, Professor Eisgruber develops similar notions in the context of legal education. He discusses teaching values as a form of helping students to remember the values they already have, and as helping them to refine proper application of those values.[2]

Professor Eisgruber is not optimistic, however, that this can be done in law school, particularly in large classrooms where students are unlikely to be open to discussion about their values, or to any effort to get them to reconsider how they best apply. More promising, according to Professor Eisgruber, is the effort to affirm well-intentioned students in their commitment to remain ethical and moral when they practice law, including by disabusing them of the notion that they must abandon justice if they are to understand the law properly, by providing mentorship to students, by alerting well-intentioned students to various potential ethical hazards in the practice of law, and by instilling in students a view of legal practice that aspires to more than just securing wealth. None of these efforts requires changing students' values or their understanding of their values.

Professor Eisgruber's article, I believe, not only provides valuable guidance, but also suggests various ways in which trying to accomplish too much in the effort to teach values in law school may do more harm than good. To borrow from one of the points in his article, Professor Eisgruber identifies the potential harm that can be done by the well-intentioned law professor seeking to teach values, and "we all know what kind of roads are paved with good intentions."[3]

Professor Joshua Rosenberg, my colleague at the University of San Francisco School of Law, largely agrees with Professor Eisgruber's pessimism about teaching values in the ordinary law school class. However, where Professor Eisgruber explores the limited but important role law professors can play in strengthening students' commitment to

1. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992).

2. *See generally* Christopher L. Eisgruber, *Can Law Schools Teach Values?*, 36 U.S.F. L. REV. 603 (2002), *infra*.

3. *Id.* at 613, *infra*.

their values, Professor Rosenberg offers a creative alternative to traditional law teaching.

For years Professor Rosenberg has taught a class at the Stanford Business School on interpersonal dynamics, and he has brought a version of the class to the University of San Francisco School of Law. The class is called "Interpersonal Dynamics for Lawyers." It addresses not substantive law, but rather the interpersonal dynamics between law students. How a lawyer interacts with others is perhaps as important as any other skill or attribute in a successful legal practice. Yet it is a topic that receives little attention at most law schools.[4] Among the many lessons Professor Rosenberg hopes the students in his class learn is how to empathize more effectively. This can have all sorts of salutary effects that Professor Rosenberg explores, including *reforming* students' value systems, *enabling* them to act on the values they already possess, and *motivating* them to act consistently with their values. Professor Rosenberg is nothing if not creative, and reading about how his class works and some of the discussions it has produced is intriguing, provocative, and instructive.

Professor W. Bradley Wendel tackles the problem of teaching values to students in a more familiar environment. His concern is with the student who engages in an easy cynicism about the nature of ethical truth, a cynicism founded on skepticism, subjectivism, or relativism. He first describes what he believes are the reasons that law students tend to be cynical in this way, and then provides an argument for why the everyday experiences of law students in passing value judgments on behavior, and acting on those judgments, provide enough objectivity to warrant a serious rational engagement about legal ethics. What he leaves us with is a valuable defense of reason-giving in legal ethics, one that recognizes and touches on the deep issues that arise in developing some notion of objectivity but that does a remarkable job of not getting bogged down in those issues. For me, his analysis provides a valuable defense of rational discourse about values that I expect to explore in class.

The upshot of Professor Wendel's analysis is that we can properly engage in substantive ethical arguments, rather than having to focus on the meta-ethical foundations of those arguments. In particular,

4. A rare exception is the Center for Applied Legal Studies, a clinic at the Georgetown University Law Center, where I had the pleasure of teaching as a fellow for two years. A brief discussion of how the Center for Applied Legal Studies addresses interpersonal dynamics is found in Jane Aiken, David Koplow, Lisa Lerman, J.P. Ogilvy, and Philip Schrag, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1051, 1060 (1985).

Professor Wendel would have us lead students in thinking through ethical problems "from the bottom up."[5] In other words, rather than start from very abstract principles, his analysis supports beginning with agreement about what is wrong and what is right in particular situations, and reasoning by analogy and generalizing to more abstract ethical principles. This he offers as a practical and promising way to build on the everyday practice of students in rendering moral judgments, and to have them extend that practice to problems in legal ethics.

In many ways, one can understand Professor Paul Tremblay's article as complementing Professor Wendel's analysis, and taking up where Professor Wendel leaves off. Professor Tremblay shares Professor Wendel's view that we can engage in meaningful debate and discussion of values—both scholars are, if you will, skeptical of skepticism. Professor Tremblay also offers a response to relativism, as well as to concerns that the role of faith or the incommensurability of values could be an obstacle to teaching values or relying on them in legal ethics. Professor Tremblay then offers a rich account of a method of reasoning through ethical and moral dilemmas—one that Professor Wendel might well accept as a valid approach to proceeding from the bottom up.[6] Professor Tremblay recognizes that his preferred method of ethical and moral reasoning is likely to be of particular benefit to lawyers (and law students) who try to do the right thing but who are not sure what that is. He holds much less hope for teaching and talking about values with legal practitioners who are not inclined to try to act properly, noting that many of those lawyers may be overwhelmed and out of control, and would need the benefit of institutional reform if they are to mend their ways. Much like Professor Eisgruber, Professor Tremblay focuses on law students who are well-intentioned in the first place.

Professor Tremblay's preferred method of ethical reasoning relies on the notion of casuistry. Casuistry does not purport to be an ethical or moral *theory*. Indeed, Professor Tremblay would not recommend attempting to teach law students a general ethical or moral theory at all (although he does not deny the potential value of exploring those theories). Rather casuistry is an ethical *practice*, one that works

5. *See* W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 713 (2002), *infra*.

6. Indeed, Professor Tremblay describes casuistry as proceeding "from the ground up," a metaphor that has more than a superficial resemblance, I believe, to how Professor Tremblay would have students engage moral and ethical problems. *See* Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 692 (2002), *infra*.

from paradigmatic situations to cast light on how to act in situations that are more problematic. It is an inductive process, resembling in many ways the reasoning law students undertake in learning how to interpret and apply precedent. Professor Tremblay is optimistic about the prospects for argument about values through casuistry. This optimism is based in part on sociological evidence that Americans do in fact share the same values on many important questions, and that they are much more likely to disagree about the facts relevant to ethical or moral decisions than about the ethical or moral aims to be pursued.

II. Applying the Articles

One virtue of the articles in this Symposium is that they are of use in the practice of teaching. For me, in particular, they help to clarify some of the choices I have made in teaching Legal Ethics, as well as to suggest ways in which I might reform what I do. In elaborating on these points, it is worthwhile to say a few words about my understanding of what I try to achieve in teaching Legal Ethics. My aim is to suggest some of the ways in which the contributions to this Symposium offer guidance that is useful to the average professor of law.

One point seems worth making at the outset. I believe that I do not generally argue with students over particular moral or ethical issues, nor do I tend to preach to them about the values they should hold. I do not want to overstate this point. I do believe that some positions on ethics and morals are hard to take seriously. I do not think that I would be reluctant to press a student, for example, who claims that killing innocent children is not wrong. But in my experience students rarely assert truly indefensible moral or ethical positions, positions that are so contrary to my intuitions about right or wrong that I almost cannot resist debating with them. On most occasions, students seem sincere and reasonable (or not outrageous) in their positions, and, when they do, I am not inclined to argue with them, although I am eager to explore their views, challenge their thinking, and facilitate a meaningful engagement among members of the class.

At times, I have wondered whether I should express my views in a more heavy handed way. My reluctance to do so, however, finds support in particular in Professor Chris Eisgruber's analysis. After all, as he notes, students are unlikely to be persuaded to change their values, or to revise their understanding of the best interpretation of their values, or to reconsider how they should apply their values, unless they are sufficiently comfortable to discuss their values openly. Moral edu-

cation, as Professor Eisgruber explains, is likely to succeed, if at all, only if it is addressed specifically to the individual student. To do this, the teacher must learn what a student believes, and where her doubts lie. In other words, the student must be forthcoming about her views. Whether it is possible to get students to be this open in a classroom is questionable. If it is possible, however, it will result from a level of comfort unlikely in the presence of a judgmental professor. This suggests that while didacticism by the professor is intended to persuade, it is apt to have the opposite effect. It is likely to create an educational environment inhospitable to the sort of vulnerability that is necessary for a student to reconsider her values and their application.

Professor Rosenberg adds yet another reason to question arguing with or preaching to students. As he notes, empathy may play various roles in morality. Debating and proselytizing do not generally involve empathy. They do not model for the students an attentiveness to the thoughts of others, or to their feelings. If professors will not listen in earnest to their students in a legal ethics class, and will not thereby encourage students to listen to one another, students are unlikely to see understanding different perspectives as integral to the practice of law. This may, in effect, undermine any effort to develop their values, and to inspire students to act on those values. After reading Professor Rosenberg's piece, I will be more focused on the issue of interpersonal dynamics in class. I will try to be attentive to why the structure and tone of a given class, on a given day, encouraged students to speak candidly and comfortably.

Beyond these general comments, there is a particular method of teaching in legal ethics that the contributions to this Symposium have caused me to view in a new light or, I should say, in several new lights. That method is the use of exercises that simulate legal practice, and, I believe, it creates real opportunities for teaching about values. The Legal Ethics classes at the University of San Francisco School of Law are generally limited to twenty-four students, which has allowed me to undertake a large number of exercises. Generally, these involve some aspect of the practice of law, including, for example, taking or defending a deposition, revealing to a client a potential conflict of interest, engaging in an oral argument before a court, and negotiating with opposing counsel or an unrepresented party.[7] I believe these exercises

7. In fact, I work with students, two at a time, who develop the exercises that will be used in the class. We meet from once to half a dozen times or more, and write and rewrite instructions, roles, and other handouts that will be used in class.

lie at the heart of any lessons about ethics and morality the students may learn in my class.

The exercises perform several functions. First, they teach students a bit about the practice of law. Almost all of them involve skills and situations that few of the students have encountered in the past.

A second function of the exercises is to allow students to identify ethical issues in context. I try to embed in each exercise ethical dilemmas, some obvious and others subtle. None of the dilemmas comes with a label attached. Many of the students miss the dilemmas, even the obvious ones. This is to be expected. New situations are disorienting. My hope is to orient the students, to help them to recognize ethical issues when they arise in practice. Again, on this point, Professor Eisgruber's article is relevant. He explains that one of the roles a law professor can and should play in encouraging ethical behavior is to alert students to some of the hazards they will face in legal practice.

A third function of the exercises is to encourage students to make commitments while they are still in law school about how they think they should behave when they are in legal practice. My aim is not so much to *reform* the values of the students, as to get them to *commit* to their current values. I do not want to leave them to assess what is and is not ethical on various issues until they are operating under the pressures of the practice of the law, in the presence of too many lawyers who have rationalized whatever behavior is expedient in a given circumstance. My hope is that a student who is contemplating some ethically dubious conduct, and who sees others in legal practice engage in that conduct, may realize how critical she was of that kind of behavior when she had the time and the distance to examine it objectively in law school. Perhaps she will pause, think about what she risks becoming, and decide not to engage in behavior that, as a law student, she would have considered unethical or immoral. This approach resonates with Professor Eisgruber's view that teaching values may, in a sense, really involve getting students to remember their values, and with his notion that the best a law professor may be able to do is to keep students committed to the values they already possess.

A fourth, and perhaps final, function of the exercises is to serve as a point of departure for discussion and analysis. In particular, I want to challenge students who assume a prematurely jaded view, who are cynical about ethics and morality in the law. The most common form of this cynicism is to take an extreme view of the adversarial nature of legal practice, and to assume that all practicing lawyers have as their one, overriding ethical commitment the goal of achieving everything

they possibly can for their clients, regardless of the means. Other common forms of cynicism are more sweeping, and often entail doubts that one can meaningfully say any conduct is right or wrong. Exercises provide a way to challenge this easy cynicism, to show students that in practice, in context, they often have clear views on what conduct is ethical, and that those views can be ordered according to some general principles that provide guidance in problematic situations.

On this point, the articles of Professors Wendel and Tremblay are of particular use. Professors Wendel and Tremblay offer important arguments as to the viability of rational engagement about values. Moreover, their contributions suggest valuable points of departure for persuading students that it is worthwhile to discuss the values they hold, and their applicability to particular situations. I may well derive from Professor Wendel's article an exercise that will analyze the various ways in which students act on their values, and believe that they can articulate rational justifications of those values. The goal will be to encourage students to embrace discussing values in class. Similarly, Professor Tremblay has inspired me to identify various points of consensus about values among students in class, and to explore the extent to which students' views diverge, not because they disagree on underlying values or because they are unwilling to debate and discuss values, but because of their differences of opinion on facts about the world.

In these ways, I find the articles in this Symposium issue valuable. No doubt other readers will take other lessons from them. I encourage you to read and respond to them. We see this Symposium issue not as making authoritative pronouncements, but as opening a discussion through the Center for Applied Legal Ethics.

III. A Brief Background on the Center for Applied Legal Ethics

A few more words are in order about the Center. It seeks to promote the ethical practice of law. It aspires to be both practical and theoretical, to ensure that abstract positions on legal ethics are brought to bear on and disciplined by the realities of practice. The goals of the Center include developing, discussing, and experimenting with different methods for teaching legal ethics, and writing and supporting scholarship on legal ethics. This Symposium issue promotes these goals, falling, as it does, at the intersection of teaching and scholarship.

The success of the Center will depend first and foremost on the efforts of its Director, Richard Zitrin, as well as on the contributions of

the members of the Center's Faculty Legal Ethics Committee (Dean Brand, Professors Adler, Folberg, Mounts, Putz, and me), and on the fine work of leaders in the field of legal ethics in California, who contribute to the Center and the law school in many ways, including by teaching Legal Ethics at the University of San Francisco School of Law. This last group includes Judith Epstein, Richard Heafey, Carol Langford, Todd Peterson, and Mark Tuft, to whom the law school is profoundly grateful.

Participants in the Center have been "doing" legal ethics for a while, well before the Center was formed. They will continue their activities as part of CALE. This is appropriate, after all, in a Center that focuses on *applied* legal ethics. I take that word to mean, among other things, that we should act. And participants at the Center have been acting.

At the heart of the Center is its Director, Richard Zitrin. He travels around the country speaking about legal ethics, including at orientation programs on ethics at law schools. He also writes books on the subject and contributes to bar associations and the like in an effort to promote the ethical practice of law. Additionally, he serves as an expert, an advisor, and an advocate on ethical issues. Similarly, as Chair of the Faculty Legal Ethics Committee at the Center, I have provided counsel on ethical issues in the law. I have served as Reporter for the California Supreme Court Advisory Task Force on Multijurisdictional Practice, and I will serve as the Reporter on the committee that will advise the California Supreme Court on how to implement the Report of the Advisory Task Force. In undertaking these and other tasks, our hope is to improve in some small way the ethics of legal practitioners and the legal profession.

The greatest part of our energy, however, is spent right here at the University of San Francisco School of Law, where we teach legal ethics and try to foster in our students a commitment to the ethical practice of law. Our aspirations, of course, go well beyond explaining to students the technical requirements of various ethical codes and pertinent doctrines. We hope that students will consider and discuss their beliefs about what it means to be both an ethical and moral lawyer—and, indeed, an ethical and moral person—and that they will be inspired to act ethically and morally. These are obvious aims for teaching legal ethics and the law—obvious in the sense that they are not novel, even if not every law professor would agree that law school should pursue them. It is not at all obvious, however, whether law school *can* affect law students' views on ethics and morality, whether it

should do so, and, if it can, *how* it should do so. That is why those are the issues that we asked the participants in this Symposium issue of the U.S.F. Law Review to use as a basis for writing articles. To be precise, the following is the topic to which contributors responded:

> Every law school attempts to teach its students legal ethics, most obviously through a mandatory class on professional responsibility. Some would characterize this effort as reflecting a fundamental goal of a law school: To shape the values of the legal practitioners it will graduate. This goal raises questions of both practical and theoretical importance.
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> The practical questions include which values law professors should teach and how they should teach them. The legal academy today is squeamish about moral education, in a way that many teachers (and philosophers) of antiquity were not. As a result, law professors may be hesitant to reveal the values they promote in the classroom and the methods they use to engage in the moral education of their students. Surely, however, law professors—particularly but not only those assigned to teach legal ethics—do attempt to impart some values, and make some conscious decisions about how they may effectively and legitimately go about imparting them. This Symposium issue of the University of San Francisco Law Review asks law professors to invite others into their classrooms to understand their goals in teaching values to law students, the methods they employ, and the successes and failures they have met.
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> These practical questions about teaching values in law school lead naturally into theoretical questions about the nature of legal education. Many would characterize western education as dedicated to the free and critical analysis of our political, economic, social and religious institutions, including the practice of law. Arguably essential to this analysis is a measure of neutrality among competing theories of the good. Some may dismiss such neutrality as merely masking value choices. Others may accept it as a possibility, but reject it, at least in part, as inconsistent with the obligation of law schools to socialize ethical participants in the practice of law. How would you situate the values you teach law students and your methods for teaching them in your view of the role of legal education as part of the political structure of our society?
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> We ask you, in sum, to address the following questions: Should law professors attempt to influence the values of law students? How, if at all, can they do so, both effectively and legitimately? Which values should law professors promote?