

LEGAL ETHICS: ART OR THEORY?

STEPHEN GILLERS*

Just a word on the relevance of this brief essay to Norman's professional life. Those who know him will intuit the connection. For others, let me say only that the work of the world requires two kinds of people: those who try to imagine what may be possible and those who make the possible possible. We need both or nothing will happen.

It is spring and I am having lunch with a friend who has been a law professor for more than 30 years. His law school was in need of someone to teach legal ethics (or, as some schools call it, professional responsibility of the legal profession) the following year, and although he was not particularly interested in teaching the course, he is a good citizen who has taught many courses outside his field when his school needed him. And so without being asked, he volunteered. Our lunch was meant to answer his questions about the subject matter of the course and about teaching it, which I had been doing for more than twenty years. We talked about confidentiality, conflicts of interest, fiduciary duty, corporate lawyers, trial lawyer ethics, and other topics one could choose to cover, and we talked about different ways to teach the material.

Then, as we were leaving the restaurant, I said that I thought it was among the hardest of law school courses to teach and ran through my explanations: students did not yet have the practical experience to see the import of the rules both for their own work lives and for their clients (in a few years they would); unlike anti-trust law or environmental law, the course did not offer students a body of knowledge directly relevant to solving the problems of clients (in other words, knowledge they could sell); because employers were not particularly interested in whether students did well in legal ethics, as long as they did not do poorly, the market did not reward top performers; and as his and my students perceived, optimistically in my view, the probability was near to nil that they would trip over a disciplinary rule without warning.

These reasons did not seem to impress my friend so far as I could tell. Instead, he offered another. "Of course, it's hard to teach," he mused, no less certain of his explanation for never having taught the course. "It's hard because legal ethics does not have a theory. It's just a bunch of rules."

* Vice Dean, Professor of Law, New York University School of Law.

I let the remark pass because at the moment it hardly registered. But I thought about it later and I have been thinking about it ever since. Was it true that legal ethics had no theory? Was it “just” a bunch of rules? If so, was that *a*—or even *the*—reason that made teaching it hard? Was his comment intended merely as an observation, which may or may not be true, or was it meant to marginalize the body of knowledge to which I had pretty much devoted my academic life, including a casebook about to enter its sixth edition? Should I have said “how dare you” or the academic equivalent (“I suggest your reply is misguided”) in response to his comment? Did pedagogical chivalry require me to come to the aid of my subject? If so, I failed, at least until now and maybe even now.

Does legal ethics have a theory? I suppose it depends on what we mean by “theory.” Let’s take a definition that should not be especially controversial. Let’s say a theory, at least for law professors, means a statement of principle at a level of generality high enough to identify the applicable rule and outcome in a broad category of cases. The more ambitious the theory, the broader the category of cases it is able to explain or predict. A theory can be retrospective (“here’s how to understand the seemingly discordant decisions”) or normative (“here’s what the principle should be and why, even if courts or other lawmakers have not always honored it”). We can argue whether a theory is right or wrong, but if it satisfies these criteria, among others, it is a theory.

While others can debate and refine my definition, it should suffice for current purposes and permits some interesting observations. First, status for law teachers is often directly proportional to the breadth of their theories or the complexity of the law those theories address. It is in the nature of law that we will never have a “theory of everything” or anything close. Science gets those opportunities. Because the law of any jurisdiction is of necessity culturally and temporally bound, theories of law cannot go very far beyond their time and place. Of course, *philosophers* of law get a wider berth, a greater opportunity to pronounce for other times and places, but teachers of substantive law subjects rarely do. In 1950, few if any theories of the Fourteenth Amendment would have been broad enough to encompass a right to reproductive freedom (and any that did would have been ignored). A half century later, none can ignore some such right. It should be humbling, though it likely is not, that today we are surely in the same position with regard to rights that we cannot begin to imagine, but which will be self-evident, or at least unremarkable, to our academic successors a half-century from now.

These limitations on legal theory do not mean we cannot or should not do theory. We can and should. It would be inconsistent with the academic mission, as popularly understood, to fail to do so. Of course, some legal areas are more amenable to theory than others. Usually, these areas are proximate to traditional academic disciplines. They include, for example, constitutional law, criminal law, tort law, and antitrust law. By contrast, corporate and commercial subjects have a narrower compass, one more limited by time and place, unless they are really economics in disguise.

The centrifugal force pulling us toward theory is inevitable. The idea of law presumes principles of general applicability, or at least ours does. American courts, for example, cannot decide cases without regard to decisions in other cases. Their decisions must derive from principles, not the identities of the litigants or the immediate facts of a dispute, and those principles will necessarily help decide other cases, too. The academic legal enterprise has as its social and intellectual responsibility the task of assisting lawmakers in identifying those principles.

This view of theory can be contrasted with practice. Practicing lawyers will seek to take advantage of theories but, with rare exception, they do not create them. They find their theories in appellate decisions and the literature of the legal academy. If theory works from the top down, practice works from the bottom up. Practice engages theory by applying it; when it is conscious of engaging it at all. Academic lawyers are not particularly concerned with the implementation of theory unless their subject of study is the legal institutions charged with doing so— courts, legislatures, agencies. Even then, they operate at a level of generality much higher than the practicing lawyer because their focus is how lawgiving institutions should work (if normative) or have worked (if empirical or historical), not the practicalities of making them work, and certainly not the daily need to win their approval.

Of course, I am myself speaking in generalities. There are exceptions to each of these statements, but my premise is that generally, the academy rewards theoretical and critical analysis of rules, not their mere description, the management of their administration through legal institutions, or even their facile application to complex cases (except when done to prove or disprove the validity of a theory). The great academic treatise writers of bygone times have been mostly replaced by the editorial departments of law book publishers, sometimes supplemented by the piecework of younger law professors getting paid by the page. No glory attaches to so practical an enterprise.

All well and good; let the legal scholars aspire to the same firmaments as their counterparts in traditional academic areas. Maybe they will never be able to reach the heights (or levels of abstractions) of the physicists, the economists or even the historians, but why not go as far as your mind can take you? That is how many people, especially scholars, try to make sense of the world, and the world is better for it.

Some, however, choose another route, one that, circuitously, chugs toward the same destination; artists, for example. A novel, a poem, a painting, a photograph, a dance, and a play have in common the here and now, the immediate, the hard reality of themselves. The artist, like the practicing lawyer (though in a different medium), works at ground level, with things themselves, things that may eventually be seen to embody ideas, even whole theories, but if so, that is a happy by-product, not the main purpose, of the art. For the legal theorist, it is just the opposite. She is prospecting for the perfect idea. The thing it explains is a byproduct of the theory. For the artist, the creation works or not and no theory is required to decide that question.

Great art eschews didacticism. It is about its subject, as far as the artist is concerned. Others may appropriate the creation as a subject for their own work—literary critics, art historians, students of aesthetics—as they search for their own brand of universal meaning, their own theory of their discipline. Finding meaning that transcends the immediacy of the work of art is their business and it is a fine one. But the artist creates only the work of art, which is what it is, its physical self. The artist may aspire to the universal, but the creation must not offer itself as universal, or it will be bad art or not art at all, but propaganda or a polemic. If it contains the seeds of something bigger than itself, that will be for others to find through interpretation. “No ideas but in things,” William Carlos Williams wrote in his poem *Paterson*.¹ Even the literary theorist must anchor and defend his or her theory or transcendental meaning with support from the art, the thing.

Here we see a wonderful paradox, one that should encourage modesty but probably does not. The man or woman who spends a life creating works of art has a better chance to have influence across the centuries than almost any academic, but certainly better than the legal academic who spends a life constructing theory. Shakespeare remains influential 437 years after his birth, read and seen by millions yearly, the subject of endless study. No lawyer or

1. WILLIAM CARLOS WILLIAMS, *PATERSON* 14 (1948).

judge has ever had or ever will have that influence. The medium will not allow it. Perhaps, I am being unfair. Shakespeare is unique. Let's stay within the last 150 years. What legal scholar has influence that can compare with Twain, Cezanne, Bach, or Chekhov? Am I still unfair? I am picking giants. But take the next level down—Woolf, Ibsen, Manet, and Brahms—and the point is made. Art, with no pretense toward theory, indeed with an aversion to theory, has a capacity for longevity that will always be denied most theories outside the physical sciences and mathematics, and certainly legal ones.

What answer, then, will this brief excursion into legal theory offer my friend, the Good Samaritan? First, let us admit that he is right in his claim that legal ethics has no theory, as I have defined the term. Any theory we might propose will have little predictive value. Here is one possibility: *the rules governing the behavior of lawyers must strive to maximize the efficiency and goals of the justice system, recognize the probable expectations of those who use and administer the justice system (i.e. be predictable), and respect the autonomy of clients, for whom lawyers are a means to the end of securing their legal rights in a constitutional democracy.* That is as good a statement of the goals of the law governing lawyers as any, but is it a theory? I don't think so. It does not tell us enough about how to resolve particular dilemmas. It does not do much, in other words, to advance solutions. It gets us started, but only that. Or to put the matter another way: my proposition can be cited to advance inconsistent solutions. We could probably do better—get further along—if we tried to articulate theories for particular topics within the field of legal ethics—conflicts, say, or client autonomy—but even then I don't think we will have produced a theory, just a more specific articulation of values.

That does not make my friend entirely right, however. Recall that he said that teaching legal ethics was hard because the subject lacked a theory. The subject may lack a theory but is that what makes it hard to teach? Do students miss a theory? I doubt it. What they miss, what they will not have for a while, is the opposite: a practical context. We can offer substitutes for experience, but none will equal it. My friend also lacks experience. His professional life has been only theory. He went from law school to two judicial clerkships and then to teaching law. So when he says the course is hard to teach because it lacks a theory, he means, I think, that he expects it will be hard for him because theory is what he lives for and by. This is not to say that only faculty with practice experience should teach legal ethics. While practice certainly

helps, its absence can be surmounted with imagination and common sense.

Without a theory as described above, the proper elaboration and application of rules of legal ethics rests on pragmatism. The lifeblood of the law governing lawyers is what works best to respond to the empirical expectations of lawyers and clients while also protecting the values of the justice system, including values of professional loyalty, confidentiality, honesty, client autonomy, competence, efficiency, professionalism, access to counsel, and accurate verdicts. Dealing with clients, judges, adversaries, and co-workers in a practice environment is a sobering experience, one that emphasizes the importance of rules that work in the world practicing lawyers actually inhabit. Legal ethics cannot have a theory any more than a painting or a musical composition can have a theory. It is about experience. For that reason, it may be the law school subject that best captures the gap between academic law and the practice of law, a gap that some believe widens yearly to the detriment of both pursuits.

Consider this example. Much discussion addresses whether a law firm that hires a lawyer from another firm should be able to avoid imputation of the transient lawyer's conflicts by use of a screen. A screen attempts to prevent access to or exchange of information about a matter between a conflicted lawyer and other lawyers who want to avoid imputation of a conflict. Some states allow screens, but a majority do not. A third group of states allow them under limited circumstances. In New York, the courts ask whether the information the transient lawyer has about the new firm's adversary is "unlikely to be significant or material."² If so, a screen will be allowed. Tennessee allows screening to avoid imputation of conflicts but not if the situation creates an "appearance of impropriety," which it does if an "ordinary knowledgeable citizen acquainted with the facts would conclude that the . . . representation poses substantial risk of disservice to either the public interest or the interest of one of the clients."³

Looked at theoretically, it is possible to defend these compromises. Lawyer mobility is important. Choice of counsel is important. But client trust and protection of client confidences are also important. So, creating a standard that proposes to weigh competing interests and permit or reject screening depending on which

2. *Kassis v. Teacher's Ins. and Annuity Ass'n*, 717 N.E.2d 674, 678 (N.Y. Ct. App. 1999).

3. *Clinard v. Blackwood*, 46 S.W.3d 177, 187 (Tenn. 2001).

interests are dominant in a particular situation would also seem to make sense—at least, in theory. Pragmatically, it presents certain serious problems. Imagine a law firm that is considering an offer to a mid-level associate at another firm in town. One concern the firm might have is whether the associate's arrival will imputedly conflict it out of matters where the associate's present firm is currently the adversary. The firm has a broader interest, too. The associate's work at his or her current firm may, in addition, create conflicts with unpredictable future work that the new firm may someday be asked to accept. How can the new firm evaluate the risk to itself and its clients?

Imagine this conversation with a prospective associate. The new firm gives him or her a list of cases in which it then represents clients adverse to the associate's current firm and asks whether the associate has been exposed (through work or otherwise) to confidential information in these matters. If not, the firm does not have to worry about a motion to disqualify when it hires the associate. But what if the associate says yes, he or she did "a little" work on a few of the cases. What is "a little?" In New York, the new firm might ask if the information the associate acquired is "unlikely to be significant or material." But how is the associate to know? And how can anyone know what a court may later say? Even if the firm is willing to accept that any information the associate acquired is not significant or material at the moment, that could change. In Tennessee, the new firm will have to guess whether a later court will determine that screening will not protect the new firm from disqualification because of an "appearance of impropriety."

From the new firm's point of view, even a modest risk is not worth running, certainly not for a mid-level associate. If it guesses wrong and is ordered removed from the case, it will have a very angry client and may have to return some fees or pay to have a successor firm learn the case. Even if it wins a disqualification motion, the cost of winning can be expensive, an expense the client may not believe it should bear. After all, the decision to hire the associate and run the risk was to benefit the firm, not the client (who could not care less).

The ambiguities do not end there. Even if our imaginary firm hires the associate, having determined that he or she did no work on adverse matters or that the work did not expose the associate to "significant or material" information or create an "appearance of impropriety," the firm must still worry about future conflicts. Imagine that three months after the associate arrives at the new firm, the firm is asked to represent XYZ Co., which has just been sued by DEF

Co. DEF Co. is represented by the new associate's prior firm. The associate's new firm does a conflicts check and finds that it has never done any work for DEF. But because the firm is conflicts savvy, it does not rely solely on its computers. Instead, it sends all lawyers an e-mail identifying both the prospective client and adversary and asking whether either might create a conflict. Our associate pipes up. When the associate was at the firm that represents DEF, he or she did research on DEF's then potential claim against XYZ. This is not good. The ensuing conversation might go this way:

"How much research?"

"Some. About six hours."

"On what issues?"

"I'm not allowed to say, am I?"

"Well, did you get significant or material information about the matter?"

"I don't know. I don't want to say no and then get everyone into trouble."

"Do you suppose if we screened you it would nevertheless create an appearance of impropriety?"

"That question is beyond my pay grade, don't you think?"

The law firm must then decide whether to gamble. After conferring with XYZ, the firm might screen the associate and risk a disqualification battle which, win or lose, will be costly. Or the firm can decline the work, which is costly in another way. The firm loses a client; a client loses the firm it wants. The upshot: a rule that makes a lot of sense theoretically—let's balance the interests—is of small utility in practice.

Oddly, what my friend finds unappetizing about teaching legal ethics, its lack of theory, is precisely what many of us who teach the subject enjoy. In a word, it is messy just as life is messy. It lacks neat edges. It requires us to tell stories about human events. Each event is unique in some way and for that reason each event has the capacity to subvert any theory that purports to explain it. The subject of legal ethics has a tendency to resist theory, and always to surprise it. While that does not exclude theory as part of the enterprise, it insures that theory will always have to fight for its place and that that place will always be at risk.