

1998

# On Teaching Legal Ethics with Stories About Clients

Thomas L. Shaffer

*Notre Dame Law School*, [thomas.l.shaffer.1@nd.edu](mailto:thomas.l.shaffer.1@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Legal Education Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

---

## Recommended Citation

Thomas L. Shaffer, *On Teaching Legal Ethics with Stories About Clients*, 39 *Wm. & Mary L. Rev.* 421 (1997-1998).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/192](https://scholarship.law.nd.edu/law_faculty_scholarship/192)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# ON TEACHING LEGAL ETHICS WITH STORIES ABOUT CLIENTS

THOMAS L. SHAFFER\*

The moral point of view I will try to describe is from an off-campus legal-aid clinic where law students represent clients. In the University of Notre Dame's clinic, law students serve as clients' principal lawyers. We reverse the ordinary priority between older lawyer and younger lawyer. In the firm in which I did my apprenticeship, the young lawyer helped the older lawyer with the older lawyer's cases. In our office, the older lawyers, the clinical faculty, help the student-lawyers with *their* cases.<sup>1</sup>

The formal meeting for teaching ethics is a seminar: a weekly, two-hour law firm meeting, including both student and faculty lawyers, in which the moral dimensions of our law practice are noticed and resolved, as Bolt's Sir Thomas More put it, "in the tangle of [the] mind!"<sup>2</sup> The addition of a formal meeting helps insure that our student-lawyers know about one another's cases.<sup>3</sup>

The pedagogical and moral arguments for and against such an approach to instruction in legal ethics have been published.<sup>4</sup> I will quickly summarize these arguments, and then compare our

---

\* B.A., J.D., LL.D.; Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic. I am grateful for the assistance and advice of Thomas D. Eisele, Linda Harrington, Teresa Phelps, Nancy J. Shaffer, James Boyd White, Robert E. Rodes, Jr., and James E. Moliterno.

1. This switching of priorities works often enough to encourage students to act like lawyers when the student-lawyer takes on a new case. It works less well when the case, due to the tyranny of the academic calendar, moves from one student-lawyer to another.

2. ROBERT BOLT, *A MAN FOR ALL SEASONS* 126 (Vintage Books 1990) (1962).

3. A grant from the Keck Foundation substantially supported the first three years of our seminar.

4. Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996) (advocating the clinical law office as a forum for moral considerations); Christine Mary Venter, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 282, 290-93 (encouraging teaching ethics in a "law office" setting).

version of clinical legal ethics with a successful law school enterprise that has somewhat the same ethical purpose, but that uses literary narrative instead of what our lawyers say about their clients.

Our clinical ethics seminar is restricted to students and supervising attorneys who are members of the firm. We discuss cases in which tactical and moral decisions are being made, including moral directions that are not apparent until we get to them in the seminar. The latter are instances in which, as Kierkegaard would have it, the student-lawyer chose not to choose.<sup>5</sup> The principal differences between "ethical dilemmas" taught in the clinic and those taught in other law school settings are that:

(1) our dilemmas are occasioned by people rather than judicial cases, written problems, or stories told by outsiders; and

(2) in our seminar, resolution *by the firm* is what we are after.

If the seminar is working, a succession of differing views is inevitable, but the business of the seminar cannot stop when all raised hands have been recognized. We do not succeed ethically if we cannot locate a course of action for our lawyer and our law firm.<sup>6</sup> Ethics is defined usefully as thinking and talking about morals. It involves imagination and creativity: Ethics in a busy law office, when taken seriously, should provoke thought and discussion that uncover alternative courses of action.

Last fall, I was asked to tell a session of the Seventh Circuit Judicial Conference about how the clinical seminar differs from other ways of teaching ethics to law students. I mentioned those two differences and three others:

(3) Using the law firm setting to discuss morals tends to overcome familiar obstacles to moral discourse in law school. If, for example, conscience points one way and the rules imposed on us by the Indiana Supreme Court point another, and if our ethic is that conscience trumps the rules, which it is, we have to figure out how to do the right thing and not get into trouble. We have to

---

5. See 2 SOREN KIERKEGAARD, EITHER/OR 265 (Walter Lowrie trans., 1959).

6. The need to determine a course of action is more than a pragmatic or institutional necessity. It is also an attempt to arrive at what John Howard Yoder calls "the communal quality of belief." JOHN HOWARD YODER, THE PRIESTLY KINGDOM 24 (1984). Resolution in our seminar almost always comes by consensus; we almost never have to take votes.

figure out what the right thing is, and then occasionally we have to *confront* a professional rule rather than *follow* it. We may have to invoke Miss Manners, who wrote to a troubled lawyer: “[L]ike most professions the law is . . . tough. Miss Manners would think that anyone practicing it successfully would have the strength to set her own standards and not give in to bullies.”<sup>7</sup>

(4) The cases and discussions we examine in the seminar are compelling. The students talk about them outside the classroom setting.

(5) The enterprise edges students into deeper moral reflection. For example, it sometimes brings them to the connection between being a lawyer and being a religious believer, or to the morals we bring to the law: the way we thought before we learned to think like lawyers.

The comparison I have in mind is between what goes on at Notre Dame and what goes on in one of Professor James Boyd White’s law and literature classes at the University of Michigan.<sup>8</sup> Both classes use provocation. White provokes his students

7. JUDITH MARTIN, *MISS MANNERS RESCUES CIVILIZATION* 242 (1996).

8. I work here from a paper he wrote in the Canadian journal *Mosaic* and has reworked in the manuscript for his new book, *In Particular: Occasional Essays on Law and Legal Education*. See James Boyd White, *Teaching Law and Literature*, 27 *MOSAIC* 1 (1994). He accepts the label “law and literature” for curricular purposes, but says his is “a course grounded in the specific experience of the eager and genuine mind of a student giving himself/herself a legal education.” *Id.* at 4.

Professor White wants each student “to engage in a legal education and to function as a legal mind,” *id.* at 1, and I suppose we want that as well. In both of our seminars, students work together from moral directions taken in short papers written weekly by each student. In both cases, the papers are offered for group discussion. The agenda for each hour of our seminar is taken from the weekly papers and from two to four student-lawyers’ descriptions of their experiences with their clients, with other lawyers, and with the courts. Still, as applied in the Notre Dame seminar, I would say “students give one another” for “give himself,” and “consciousness” or “mind and heart” for “mind.” Those distinctions between White’s aspirations and mine may trace to the interesting fact that most of the other supervising attorneys in the Notre Dame clinic have been women, and that most of the student-lawyers are women. I have, despite the disadvantages suffered by being an aging white male academic, learned a lot from the women I work with. See Thomas L. Shaffer, *Surprised by Joy on Howard Street*, in *LABORS FROM THE HEART: MISSION AND MINISTRY IN A CATHOLIC UNIVERSITY* 221, 221-30 (Mark L. Poorman ed., 1996). White’s students write papers on what they read. See White, *supra*, at 4-6. Our student-lawyers write on their experience in the practice of law. Our students, like White’s, also read books and are invited to compare what they read with their experience in practice.

with an array of assigned readings, all of them about people, not all of them about law, ranging from Homer and Plato to Fowler on the split infinitive and the autobiography of Dick Gregory.<sup>9</sup> We provoke our students with a parade of accounts from our members, accounts of people they think they can help.

White's enterprise is, I think, a beautiful example of the late Dean Edward Levi's description of good legal education as graduate education in liberal arts.<sup>10</sup> I am suggesting that good legal education might also include consideration of real clients. I propose comparisons under these headings: Relationships, Language, Disruption, Translation, and Anthropology.

### I. RELATIONSHIPS

Professor White asks his student to think and write about an *experience* "first as he/she might do as a lawyer . . . then in some other way, available from the rest of life."<sup>11</sup> Our procedure is similar, with the difference that the account of the "experience," as lawyer and "in some other way," is relational in a way that telling about an experience may not be.<sup>12</sup> Comparing the consideration of relationships that occurs in White's class with the consideration of relationships that occurs in our seminar, I notice that ours is probably more open-ended because the student experience involved is with people who are relatively unpredictable.

---

It is interesting to recall how popular Bolt's play about Sir Thomas More, *see supra* note 2, has been among American lawyers. It is the story of a lawyer who did not obey; who was the King's good servant, but God's first. It is also a story about—of—ethics. The scenes are either about the imposition of power or about deliberating how to serve God in the tangle of the mind. The quotation mentioned earlier in the text accompanying note 2 comes in the middle of a discussion among More, his daughter Margaret, and his son-in-law William Roper, on the morals of martyrdom. *See supra* note 2 and accompanying text.

9. *See* White, *supra* note 8, at 4.

10. *See* EDWARD H. LEVI, POINT OF VIEW 114 (1969).

11. White, *supra* note 8, at 2.

12. I would not want to say that reading what others write is not relational. Part of White's genius as a teacher is that he develops and exploits the relationships readers have with writers.

Another difference is that we have one another as poor substitutes for the insights and focuses of the great tellers of stories. My colleague and friend, Professor Teresa Phelps, asked me why I said our storytellers are poor substitutes for the likes of Homer, Fowler, and Dick Gregory, whom White assigns. I thought about crossing out "poor" and decided not to because when we are at our best, the language of our stories is language we heard from our clients.<sup>13</sup> We are poor substitutes for our clients because we are not poor; we are not oppressed; and we do not listen carefully enough to those who are poor and oppressed to tell their stories as they would.<sup>14</sup> The stories we tell one another are poorer, then, if only for want of development. We could not use literary accounts as White's students do, because the "system," that in one way or another gathers, preserves, and elaborates White's material, does not pay attention to our clients' alternative accounts of reality.<sup>15</sup>

---

13. I avoid saying in the text that we are poor substitutes because our clients are poor people. I mention it in a footnote because, maybe, there is something deeper in that play on words than at first appears.

14. White says, as to his concern with the development of a "legal mind":

[T]he main point of the course is that the typical law student thinks of law as calling upon only a small percentage of her powers, for this is what the usual class and exam teach her. I am trying to help them imagine the law and themselves differently, in such a way as to permit them to bring far more of their intellectual and other capacities to bear on what they do. The idea is that they will be better lawyers if they can do that, and also that they will have better lives as people.

Letter from James Boyd White, Hart Wright Professor of Law at the University of Michigan, to Thomas L. Shaffer, Robert and Marion Short Professor of Law at the University of Notre Dame (Feb. 19, 1997) [hereinafter White Letter] (on file with the author).

15. The literary alternative has an advantage in this regard because the alternative account of reality presented there is more accomplished, vastly more articulate, than the stories our clients tell us. I am grateful to Professor Thomas D. Eisele for pointing out this comparison to me. An example of the comparison is the subversive voice of scripture, explicated in the impressive scholarship of Professor Walter Brueggemann. See, e.g., WALTER BRUEGGEMANN, *A SOCIAL READING OF THE OLD TESTAMENT* (Patrick D. Miller ed., 1994). White's hope is that his student, in learning to speak as a lawyer, "remakes the possibilities for self and community." White, *supra* note 8, at 8. That can happen in reading. Certainly I am confronted, emotionally, by things Hebrew prophets wrote millennia ago, by what Anne Frank wrote half a century ago, and by things in the daily newspaper written by somebody I will never meet and may not even want to meet.

There is a discipline in our work that comes, or should come, from the fact that we should not suppose that our client's small powers depend on official—lawyers'—accounts of reality as much as we believe they do. We should further train ourselves not to suppose that our clients, because they do not depend on a lawyer's reality, lack the ability, as White puts it, to "remake[] the possibilities."<sup>16</sup>

We are, thus, poor storytellers who tell our clients' stories anyway. Our telling them at all is more aspiration than achievement. I would not want to dwell for long on the proposition that the reality I gain from hearing one of my students describe meeting a stranger for an hour or two, in a formal setting, not of the stranger's choice, is more reliable than the reality I have from a great storyteller. Or vice versa. President Kennedy was right to say, "If more politicians knew poetry, and more poets knew politics . . . the world would be a little better place."<sup>17</sup> On this comparison of using relationships in teaching, it is perhaps enough to propose a comparison of sources.

## II. LANGUAGE

I might with more profit push the distinction between relationships in reading and relationships in the law office in another direction. White and I seem to have developed different understandings about *what lawyers do*. He believes he can teach what lawyers do, and affect it, by moving each of his students to a private encounter with the way *she* uses words.<sup>18</sup> One goal of his enterprise is to explore the voice each student uses when she uses language.<sup>19</sup> He wants her to discover that when she comes to him she has "no satisfactory voice"<sup>20</sup> in which to speak as a lawyer. The language his students used to get good grades in college, in which they have "an enormous investment,"<sup>21</sup> will

16. White, *supra* note 8, at 8.

17. John F. Kennedy, *epigraph* in JOHN HALPERIN, C.P. SNOW: AN ORAL BIOGRAPHY iv (1983).

18. See White, *supra* note 8, at 3-6.

19. See *id.* at 3.

20. *Id.*

21. *Id.*

not help them be good lawyers, but neither will the language of the law. He wants to push his student into a hole, in this matter of language, and then help her get back out.<sup>22</sup>

I was at first moved to irony when I considered how students in our clinic use language.<sup>23</sup> In my experience, the clinic's student-lawyers use language in a relentlessly conventional way. They depend on printed forms; they lapse into the redundancies and legalisms I railed against in a former life.<sup>24</sup> I thought at first that the precise and insightful language for which White aims would make little difference in their work. It might, in fact, be self-indulgent.<sup>25</sup> Our student-lawyers would say that what they are *doing* is so much more important than what they are *writing*. This reminds me of the law firm colleagues of Auchincloss's stuffy young lawyer, Timothy Colt, who despaired of teaching poor Tim that corporate documents are not works of art.<sup>26</sup> And I also recall what I thought when I first read Dean Anthony Kronman's book on the lost lawyer:<sup>27</sup> Clinics do not exist to educate appellate judges.

But then Terry Phelps (and my wife Nancy) told me I should think again: The relevant comparison is not the language of forms and the language our students copy into our firm's briefs

22. *See id.*

23. I mean "irony" in the careful way the notion was described by Reinhold Niebuhr—the reflection represented in a sympathetic but knowing smile. *See* REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 155-56 (1962).

24. *See, e.g.*, THOMAS L. SHAFFER & CAROL ANN MOONEY, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 181-201 (3d ed. 1991).

25. Or maybe what I should say is that we neglect an opportunity. As White stated:

I think what lawyers *do* with words matters at least as much as what they *say*, but this does not make the problem of learning to speak and write well any less salient. Except for wholly routine gestures I think the lawyer will be better for learning how to think about what he is doing, and why, and whether he is succeeding.

White Letter, *supra* note 14. If we miss the opportunity to explore the *performative language* we use for our clients, I hope we learn to do better in the *narrative language* we use to tell one another about them.

26. *See* LOUIS AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* 35-36, 46-49 (1956).

27. *See* Thomas L. Shaffer, Book Review, 41 *LOY. L. REV.* 387 (1995) (reviewing ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).



and memoranda.<sup>28</sup> Ironic or not, it is not useful to compare that quasi-performative language with the language of the great storytellers.

White's great storytellers serve a pedagogical function by prompting students to stop and think—to find the language of the law morally inadequate. We meet the challenge of this comparison when we attend to the language of *our* storytellers, rather than our forms, and test its faithfulness to the words of our clients. The honest consequence is that we do best when we admit how often we fail to listen to clients and to tell their stories well *in* the language we use for them. When we do manage to use our clients' language adequately, we get a fix on what White may provoke by having his students read *Billy Budd*:<sup>29</sup> Our students, when we do our version of this well, notice that legal aid lawyers put themselves between vulnerable people and the lethal power of the state. I do mean lethal. Anytime we have a student who leaves not understanding how oppressive the law is—we fail.

White uses judicial and statutory language as well as stories told by great storytellers. I think he would agree with me that the language being imposed—the language imposed on our clients—is the language of power masked in abstract masculine rationality.<sup>30</sup> He may not be happy that the words our student-lawyers send back are in the same language, but we have a couple of responses. First, we may be using the boilerplate of the law in the way Dean Houston used the language of individualistic civil liberties to gain community participation for his clients,<sup>31</sup> or in the way the besieged occupants of the biblical city spoke two languages in order to come to terms with an invading

---

28. See generally Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986) (discussing teaching legal writing as conversation).

29. HERMAN MELVILLE, *BILLY BUDD AND OTHER TALES* (Signet Classics 1979) (1920); see White, *supra* note 8, at 9.

30. A characterization described eloquently in MARTHA MINNOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 151-56 (1990).

31. See THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* 101-02 (1991). See generally, Genna Rae McNeil, *Charles Hamilton Houston: Social Engineer for Civil Rights*, in *BLACK LEADERS OF THE TWENTIETH CENTURY* 221, 221-40 (J.H. Franklin & August Meier eds., 1982) (describing the legal battle for civil rights waged under the tactical leadership of Charles H. Houston).

army.<sup>32</sup> We use that language not in order to train ourselves to think *that way*, but to fence in our ability to think in another way. We use such "imperial" language in attempts to get the empire off the backs of our clients.<sup>33</sup>

Second, law office language is instrumental most of the time. Thought occurs somewhere, and thoughtful language too, but probably not in the pleading, the power of attorney, or the stock prospectus. We learn to seek not eloquent, but utilitarian language. Used in an instrumental way, law is seldom literature. In our experience and that of our student-lawyers, law is a tool box. I cannot imagine why we would want it to be anything else.

### III. DISRUPTION

Both enterprises are ethical. White's claim is that literature can be used to develop in students "a literary mode of thinking, on which one might build one's life as a lawyer."<sup>34</sup> He says along the way that the "law is by nature literary."<sup>35</sup>

White goes beyond the claims that law is literary and literary law is ethics. He goes all the way to the claim that his enterprise is, and is intended to be, *disruptive*.<sup>36</sup> There is a voice behind the voice. To read and understand and use literature as White does is like reading, understanding, and using the Hebrew prophets: It *destabilizes* convention and subverts power.<sup>37</sup> White can thus say that: Homer's poetry both celebrates and criticizes heroic culture;<sup>38</sup> Plato is "at odds with the implications of the central value terms of his culture";<sup>39</sup> Samuel Johnson tried to "give life" to the moral platitudes he found all around him and arguably demonstrated that the morality of the platitudes undermines the purpose of those who use them.<sup>40</sup>

32. See 2 Kings 18-19.

33. The allusion here is to Walter Brueggemann, *II Kings 18-19: The Legitimacy of a Sectarian Hermeneutic*, 7 HORIZONS IN BIBLICAL THEOLOGY 1, 4 (1985).

34. White, *supra* note 8, at 5.

35. *Id.* at 6.

36. See *id.* at 5-6.

37. See WALTER BRUEGGEMANN, OLD TESTAMENT THEOLOGY 144-49 (Patrick D. Miller ed., 1992).

38. See White, *supra* note 8, at 7.

39. *Id.*

40. See *id.* at 4. White's students, trained by these secular prophets, are in some

The clients my student-lawyers serve, given their passing grasp on the handles of legal power, might now and then disrupt our helping-persons legal mentality as literature would. A little story told by a woman who writes for a newspaper in New York makes the point.

I saw a blind man who seemed confused about where to go. I approached him and asked if he needed help. He said he wanted to go to the Port Authority Bus Terminal. When he took my arm so that I could help him, he felt my coat sleeve and asked what kind of coat I was wearing. "Fur," I said. "Shame on you," he replied.<sup>41</sup>

A literary mode of both thinking and practicing law for poor people should be disruptive: It should disrupt most of all what we who live privileged lives, in and around the legal profession and especially on university law faculties, think the law by nature is. Finally, the claim I might but do not need to make is that the stories my students and I tell one another about our clients—poor storytellers that we are—bring disruption to consciousness as well as reading and writing about stories told outside would.

---

ways better equipped than my students to deal with the economic realities of modern American lawyering: Law graduates leave Notre Dame with as much as \$100,000 in educational debt. Cf. UNIVERSITY OF NOTRE DAME, 92 BULLETIN OF INFORMATION 12 (July 1996) [hereinafter BULLETIN] (stating that law school tuition for the 1996-97 school year is \$19,400 excluding living expenses). Many of them have been student-lawyers in our clinic. It is fair to ask where we think they will practice law. The answer is that most of them will be representing interests that oppress our clients. What keeps me from concluding that the consciousness raising they get in our law practice will in the end make things worse for people like our clients? That is a question to be kept open and alive. My operating answer depends on the continuing possibility that lawyers representing business and government exercise moral influence over their clients. I would not want to push that very far, however. My friend and teacher, Professor Robert E. Rodes, Jr., is more hopeful in this regard than I am. See ROBERT E. RODES, JR., PILGRIM LAW 105 (1998).

41. Richard John Neuhaus, *The Public Square*, FIRST THINGS, May 1996, at 72, 84 (quoting a letter from Beverly Polinsky).

## IV. TRANSLATION

White creatively compares his students' struggles with language, thinking, and law to the difficulties translators have with what Ortega y Gasset called the deficiencies in what is being translated and the exuberances of the translator.<sup>42</sup> Any lawyer, with any client, would see the usefulness of extending the comparison to the practice of law. A student-lawyer who works with a client who comes to a legal aid clinic knows about translation from his client's story into his own in ways that go to language and beyond, to complexities in relationship for which translation is at best a metaphor.

Our seminar sessions regularly deal with the fact that somebody who is being oppressed is like the blind man who wanted to go to the bus station.<sup>43</sup> He is not as docile in being led to his destination as his lawyer supposes he should be.

Translation is a metaphor for inexplicable silence and apparent indifference. Something is not getting translated when our students' clients fail to show up for interviews, fail to call on the phone when they were told they should, and in a thousand ways silently tell their lawyers that they must be taken into account, even when taking them into account does not fit their lawyers' busy class schedules. These clients' lapses in ordinary courtesy are often, I think, not so much thoughtless as instances of what Freud called the psychopathology of everyday life.<sup>44</sup> Our clients are telling us something; they are telling us stories about themselves. We are not listening, and when we do not listen, we cannot translate.

We sometimes discuss the crude possibility of charging our clients small retainers, so they will have a monetary investment in our work for them and will do what we want them to do. It would probably save us trouble and frustration, but we have not done it, and I do not think we will—a prediction that tells you

---

42. See White, *supra* note 8, at 9-10.

43. See *supra* note 41 and accompanying text.

44. See generally SIGMUND FREUD, *THE PSYCHOPATHOLOGY OF EVERYDAY LIFE* (James Strachey ed. & Alan Tyson trans., W.W. Norton & Co., Inc. 1960) (1901) (discussing why people forget information, intentions, and promises, often because of an overt or hidden counter-will).

more about our ambivalence than it tells you about our clients. Talking about the idea of charging the people we represent somehow causes us to face the fact that it is *we* who are helped by those we help.<sup>45</sup> Maybe we choose here, by not choosing, because we think it is better not to get any deeper than we already have into lawyer power.<sup>46</sup>

There is a kind of vicarious suffering in this which, if we were very clever, we could mine for moral instruction. For example, one of our student-lawyers, about to leave for fall break, arranged for a continued hearing on an eviction. She did everything she should have done with the landlord's lawyer and the clerk. She told our client about the continuance, and then went away for the break. Our client ignored instructions, went to court on the day originally scheduled, and somehow persuaded the judge to dismiss the landlord's motion for immediate possession.

The landlord's lawyer was furious at us; our student-lawyer rebuked our client and tried without much success to explain the situation to the landlord's lawyer. As a result, we are now unforgiven by him *and* by our client. Something important did not get translated. That, by the way, is an example of the situations we talk about in the seminar: We have to figure out what to do about this client.

Maybe this is less about translation than it is about tolerance. Glenn Tinder defines the virtue of tolerance as the habit of *waiting for the other*.<sup>47</sup> Our students have experience at trial and error methods for practicing that virtue. I am afraid it is not helped but further complicated by the student-lawyer's thinking she can express her client's story in the language of the law. Most of my concern for my student here is not most deeply about

---

45. Student-lawyers are not paid for their legal services. They pay for giving them. A Notre Dame law student who takes all possible advantage of what our clinic offers can earn a total of fifteen semester hours of credit, at a cost to him of about \$9,700. Cf. BULLETIN, *supra* note 40, at 12, 20 (reporting that Notre Dame Law students pay \$19,400 for two semesters).

46. That is into "self-interest that does careless damage to the powerless," which is to a lawyer "power [that] operates largely to close things down and keep all the assets frozen." WALTER BRUEGGEMANN, *THE THREAT OF LIFE* 50, 152 (1996).

47. See GLENN TINDER, *TOLERANCE: TOWARD A NEW CIVILITY* 83 (1976).

language at all. The necessary skill is to wait uncritically for what her clients want to tell her.

## V. ANTHROPOLOGY

None of this, so far, amounts to an attempt at criticism of White's admirable project. I am only trying to match colors. The one clear criticism I have of White's project is that it is bad anthropology. I suspect that White's way of teaching ethics runs a greater risk than ours of what Walter Brueggemann calls the "self-interest that does careless damage to the powerless."<sup>48</sup> Each of White's students initially works alone, in a lonely place.<sup>49</sup> Each of them tells himself that it is up to him, and him alone, both to develop the voice he will use as a lawyer and to approve, morally and alone, of using that voice, whatever it is. White says he intends to "affirm the student's already existing capacity for thought and life and establish a hope for the way in which he/she might work as a lawyer."<sup>50</sup> If White's system is working, the student gets deeply into deep questions.<sup>51</sup> But each of them does it primarily, at the beginning, and, I think, at the end, in a lonely place, learning to express himself in a lonely way. When he meets with colleagues and teachers, it is to hear them tell him that loneliness in ethics is the way it is.

Our approach is by contrast *communal*. It turns on what John Howard Yoder calls the "*communal quality of belief*."<sup>52</sup> That is, I do not really know what *I* think until *we* figure out what *we* think—about, for example, how well our client's story is being told when our client is not present. (I, like Martin Buber,<sup>53</sup> call that *anthropology* because it concerns the way people are.) A student in our seminar turns over to his colleagues his client's

---

48. BRUEGGEMANN, *supra* note 46, at 152.

49. See White Letter, *supra* note 14.

50. White, *supra* note 8, at 4.

51. See, e.g., *id.* at 3-5.

52. YODER, *supra* note 6, at 22-26 (emphasis added).

53. See generally THE LETTERS OF MARTIN BUBER 30 (Nahum N. Glazer & Paul Mendes-Flohr eds., Richard Winston et al. trans., Schocken Books 1991) (describing Buber's concept of "the science of man viewed philosophically"). For a discussion of this concept, see Eugene B. Borowitz, *Humanism and Religious Belief in Martin Buber*, 53 THOUGHT 320 (1978).

story, his inability to tell it well, and his puzzlement at what this other person—so unlike himself—is doing. He and his colleagues then determine what to do. What our student has figured out is not written primarily in a paper and graded by a teacher; it is presented and discussed in a meeting of the law firm. *We* think together, *we* discern the adequacy of the story as told, and *we* do what *we* figure out to do.<sup>54</sup>

## VI. OTHERS

This “we” is arbitrary. There are no clients in our seminar. Clients are to our seminar what authors are to White’s: Both his authors and our clients are represented and spoken for by students.<sup>55</sup> In our case there is also an array of people other than clients whom students describe but who are unrepresented: the lawyers they meet when they go to town, the judges before whom they appear, and other members of the law faculty. Each of these three groups affects the character of the seminar:

---

54. See WAYNE C. BOOTH, *THE COMPANY WE KEEP* 70-77 (1988). Booth refers to a similar communal process, in discussing literature, as “coduction,” *i.e.*, the project that seeks to bring meaning out together. See *id.* at 72. He stated:

Coduction will be what we do whenever we say to the world (or prepare ourselves to say): “Of the works of this general kind that I have experienced, *comparing my experience with other more or less qualified observers*, this one seems to me among the better (or weaker) ones . . . Here are my reasons.” Every such statement implicitly calls for continuing conversation: “How does my coduction compare with yours?” . . . [I]t can never be performed with confidence by one person alone.”

*Id.* at 72-73. I am grateful to my friend and colleague, Professor Teresa Phelps, for pointing out that useful parallel. “The point . . . isn’t so much about belief as about whether you’re willing to take the risk of study. Study leads to conversation, and conversation leads to community, and that’s what we’re desperate for.” David Van Biema, *Genesis Reconsidered*, *TIME*, Oct. 28, 1996, at 66, 75 (quoting Rabbi Burton Visotzky).

I am not sure what it proves, but grades are virtually irrelevant in our clinical seminars. The students get grades, of course; the seminar carries degree credit and satisfies our upper-division ethics requirement. We grade it pass/fail, based on attendance and participation. I have yet to have a student say anything to me about what his or her grade is, was, or will be. The group last year (Spring 1997) was asked if they wanted competitive grades; 85% voted no. The others agreed, so that we ended with a consensus on the matter.

55. See White, *supra* note 8, at 2-13 (describing the intensive and active involvement of White’s students in teaching their peers through an open examination and discussion of their own writings on the literary works selected by White).

(1) *Lawyers*. We are blessed with a companionable, civil local bar, with, of course, a few deviants. This makes it possible to suggest that our student-lawyers approach lawyers on the other side expecting courtesy and cooperation, and even to hope for training, critique, suggestion, and faint praise. The occasional bad experience one of us has with another lawyer gives the seminar an opportunity to talk about how to respond to lawyers who are jerks and occasionally about what to do about the other lawyer who breaks the professional rules in a serious or harmful way.<sup>56</sup> I think of this as an alternative to bringing lawyers to law school ethics classes as guest speakers, actors, or commentators in simulated exercises.

(2) *Judges*. Our student-lawyers get most of their education about judges the way they learned not to touch hot stoves. Beyond that, and particularly as to direct ethical discussion outside the seminar, professors and students find judges understandably less willing than lawyers to reflect on the encounter. This means that our discussions of the ethics of lawyer-court relations is mediated through the journals of members of the seminar: Once in a while one of us gets to tell a judge's story.

We are, withal, a law office. Keeping judges friendly is worth some effort, and this may argue for inviting them to talk to seminar sessions, for public relations reasons, even if their appearance is an inefficient use of class time. If we use the seminar for that sort of agenda at all, then we have to use it frequently because in our middle-sized Midwestern county there are seventeen judges to take into account.<sup>57</sup> This presents an issue for discussion.

(3) *Other law faculty*. Law professors do not like clinics. I am not telling stories out of school. I have taught in six university law schools, spent significant time in a dozen others, and talked to people from still others. I generalize from a broad universe:

---

56. We have a policy against representing plaintiffs in legal malpractice actions, including unpromising cases the plaintiffs' bar would not take. We follow local practice and Rule 8.3(a) of the Indiana Rules of Professional Conduct in not reporting violations of professional rules that are not serious or harmful. See IND. R.P.C. 8.3(a) (Michie 1997).

57. See generally THE AMERICAN BENCH 902-67 (Ruth A. Kennedy ed., 9th ed. 1997/98) (listing judges sitting in St. Joseph County, Indiana).



Law professors do not like clinics. With notable exceptions, they are not supportive,<sup>58</sup> and when they endure our presence it is without enthusiasm. There is a lot to the old cliché about law teachers who believe that Wednesday afternoon law practice is not interesting: not for thinking like a lawyer; not for ethics, either.

Their assumption is mistaken, but I despair of persuading my colleagues of their mistake, partly because I did not persuade very many to follow my suggestions in favor of a Wednesday afternoon, law office focus on wills and trusts<sup>59</sup> or property.<sup>60</sup> What I have to offer on this situation is minimal. First, we need to offer the faculty evidence that our *coverage* is adequate. We must prove that the clinical ethics project addresses most of the canon, such as it is: confidentiality, conflicts of interest, truthfulness, and disciplinary process.<sup>61</sup> Second, we need to show the faculty that our student-lawyers are adequately supervised. We achieve this by cooperating with the appointments system to locate and appoint good lawyers who are also good hands-on teachers, and by keeping the clinic's student-faculty ratio within bounds.<sup>62</sup>

---

58. One notable exception for me has been my friend and teacher, Professor Robert E. Rodes, Jr., who has been generous with his time and his agile mind to our student-lawyers, to their clients, and to me.

59. See THOMAS L. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* vii-x (2d ed. 1979) (arguing for a clinical approach to teaching the law of wills and trusts).

60. See SANDRA H. JOHNSON ET AL., *PROPERTY LAW: CASES, MATERIALS AND PROBLEMS* 95-101 (1992).

61. See, e.g., IND. CODE ANN. R.P.C. (Michie 1997).

62. The ratio is unusually intense in clinics; we find that a full-time faculty ratio of one teacher to eight students keeps us as busy as we can bear to be; by contrast, an overall ratio of one to seventeen in the law school, which is approximately the ratio at Notre Dame, would be unusually favorable. See IAN VAN TUYL, *THE PRINCETON REVIEW STUDENT ADVANTAGE: GUIDE TO LAW SCHOOLS 1997 EDITION* 325 (1996).

On the matter of faculty surveillance of what we do in the clinic: Either as a consequence of low faculty interest in the clinic, or as an application of the tradition of academic freedom in the matter of course coverage, my observation is that response to faculty oversight is more a matter of public relations than of accountability.

## VII. CONCLUSION

Both White and I have learned that the principal teaching talent in our different projects is the ability to get out of our students' way. The difference may be that he prefers a singular possessive on "student," where I prefer a plural possessive. We both aspire to the time and place where each student will gain what White calls "an ethic of tentativeness and respect for the other,"<sup>63</sup> assemble and use her own experience, and "proceed nonetheless."<sup>64</sup>

White aims to help his student proceed in a thoughtful, self-conscious way, and not in a fatuous, illiterate, self-deceptive way. I have no doubt that, taught by him, writing, learned from literature,<sup>65</sup> provides the help. I would love to be one of his students.

In a way this objective—this aversion to the fatuous, the illiterate, and the self-deceptive—is less difficult in clinical legal ethics. We do not need much skill for keeping our students from getting haughty. If their clients do not do it, and their colleagues in the seminar let them off too easily, we work in a practicing bar of some 500 lawyers,<sup>66</sup> and we have seventeen judges<sup>67</sup> who think that anybody who comes to court with a professor in tow silently announces at the door that she is in need of fraternal correction.

---

63. White, *supra* note 8, at 10.

64. *Id.*

65. Professor White wrote:

I mean, "literary" in a rather special way—not as a matter of mere aesthetics or elegance, but as a kind of self-consciousness about language, especially about one's actual or possible transformations of the language one uses. For me the lines between the intellectual and the aesthetic and the moral and the political are false, since all of our speech acts have meaning in each of those dimensions.

White Letter, *supra* note 14.

66. See Letter from Lynda Daley, Director of the St. Joseph County Bar Association, to the *William and Mary Law Review* (Aug. 25, 1997) (on file with the *William and Mary Law Review*).

67. See THE AMERICAN BENCH, *supra* note 57, at 902-67.

