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Coherence and Incoherence in Values-Talk

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Clinical Essay

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I. VALUES-TALK AND THE 1998 CLINICAL CONFERENCE

The theme of the 1998 Conference of the Clinical Section of the Association of American Law Schools, held in Portland, Oregon, was "values"—what values law professors hold, how they might differ from those of their students, whether it is appropriate to "teach" about values, whether it is even possible not to teach about them, how to discuss values in a non-threatening fashion, whether some values might simply be wrong, and so forth. Important questions, generating productive conversation and debate, to the deep satisfaction, from all signs, of the participants, who are not known to be uncritical of such conferences and their agendas.

The agenda for the conference asked the assembled clinical law professors to wrestle with questions about incorporating values in teaching, including the questions I have just described, and to develop teaching ideas that might serve to engage and educate students on these matters. Each working group at the conference was asked to develop comments, aphorisms, questions, and themes, reflecting the collective effort of the group to make sense of values in the work of clinical law faculty. At the close of the conference the results of those efforts were compiled and distributed to the participants. I reproduce a sampling of the generated ideas in the margin.[1] Their contents serve

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[1] The following is a representative sampling from the several pages of ideas collected by the conference organizers from the work in the small group settings. The compendium captured the sentiments of the participants in the way seen here—as somewhat random, but heartfelt, expressions of the way that value questions affect the work of these teachers.

What Are Our Values?

Preparation, thoroughness, respect for clients and dignity, genuineness, importance of self-knowledge and awareness, self-reflection, balance, setting boundaries, economic stability, ability to recognize differences, justice, equality, liberty, process, understanding how individual case fits into larger picture, caring, being an ethical attorney, collaboration, fun, judging where you as lawyer add value, creativity, problem-solving, recognition of non-legal aspects of problem, civility, recognition, dead ends, honesty/integrity, truth-telling, admitting mistakes, power, risk-taking. . . .
Clients should be truthful, what constitutes a "deserving" client, how much to probe client's goals vs. deferring to stated goals, value of discussing values, class presump-

as an important focus of my ideas.

A vivid theme expressed by many at the conference's close and apparent in the compendium was that the discussions, despite their intensity and liveliness, "had not resolved" many of the questions about values and their role in legal education. A common reaction was that the debate and dialogue was enormously valuable, notwithstanding the lack of closure, and the very act of considering the role of values in lawyering and law teaching was itself a significant normative statement.

I find all of the above to be both important and true. As a participant I experienced the discussions as fruitful and provocative. At the same time, I came to conclude that the use of the concept of values was, at bottom, somewhat incoherent. It need not be incoherent, however. A more careful understanding of the concepts that underlie the term "values" can frame a discussion that possesses more common

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tions, client competence, client self-determination, "a job well done," obligation to give back to the community, reflection as a value, underlying value of class, in addition to having students explore their values—including students in choice of which cases to take.

Defining the breadth and limits of lawyer roles, benefits to client (case result, empowerment, sense of self-worth, satisfying client desires, being listened to), the profession as service—*pro bono*, skills development, personal satisfaction and expectations, perspective and/or vision, competence.

Need to/importance of listening to the client's voice, need to/importance of respecting client autonomy, understanding the need to explore values and to test values, need to think about/respect dignity of all people involved, importance of acting on our values/putting our values into practice, recognizing our internal conflicts of values, recognizing conflicts between our values/students' values and our values/client's values.

Importance of increasing our and the students' awareness of our values—-that our values are being played out and are affecting the lawyering, importance of talking about our values/teaching values as we talk about skills, need to develop our skills at talking about values.

Collaboration, respect, understanding and appreciating differences, hard work (paid or not), responsibility, excellence, self-reflection, trust, honesty.

Respect for indigenous and/or non-dominant cultures.

Important Questions

Tensions between needs and goals of community and pedagogical needs of students. Who do we include in our case selection process? Do we want to be teaching students to be "good" lawyers or good public interest lawyers and by whose definition of "good"?

Is it possible to lead a balanced life as an attorney? Where do we learn legal values we have, from words or deeds? What to do when I can't figure out my own values? Is it our place to "teach values?" Are there any values we can teach? Is clinical teaching better or worse suited for teaching values? Is there a nice separation between personal and professional values? If so, can we/should we challenge or change personal values of students? Should we reveal our own personal and professional values? If so, when in the course of the relationship?

When do we have to do what client says? When is it okay to let our own principles dictate (i.e., decline case, withdraw)?

meaning than that captured in the compendium. In this short essay I
hope to develop, in simple and careful fashion, the ways I think the
discussion might be reframed. My assessment arises from my study of
casuistry, although I shall not in these pages develop deeply the con-
nection between the thoughts here and that art.

II.   WHAT THE CONFERENCE PARTICIPANTS SEE AS VALUES

I wish to start with what seems to be the understanding of values.
Look again at the list generated by the conference in the above foot-
note. From that list we might make .the following observations about
values:

> 1. Values are core beliefs, which may or may not be negotiable. We
> know they are core beliefs. They represent what we hold dearly.
> They are *moral* in the sense that they stand for perceptions of "the
> good." We are less sure about whether they are negotiable or not,
> but the answer to that question is of considerable importance.
> More on that below.
> 2. Different people have different values. We do not know exactly
> why, or where they come from (our parents? culture? theology?),
> but we know that we do not all share the same ones.
> 3. The juxtaposition of these first two points leads to the question of
> whether we can, should, or have to "teach" about values. A fre-
> quent question throughout the conference, and a frequent question
> everywhere these issues surface, is whether we should "impose" our
> values on others. That is a hard question, and may turn on the ear-
> lier question about whether values are negotiable or not.
> 4. There are some values about which we feel most strongly, for
> instance, the value of racial tolerance. We seem to agree that we
> should teach or even "impose" those values, but we then proceed to
> perplexing questions about how to do so. We worry about escala-
> tion of emotion and pain, the absence of shared language, and the
> fear that we simply won't be able to reach those with such different
> values.

One can easily see that these questions are hard to discuss, harder to
resolve, but exquisitely important. Hence the fabulous conference,
with uniform high praise joined with uniform acknowledgment that
closure is not easily to be found. Somehow, we suspect, from the de-
veloping and continuing dialogue will emerge a semblance of closure,
some insight about ways to reconcile the competing sentiments by
which we hold values dearly but cannot discern how we alter or im-
prove those of others.

III.   A SYMPATHETIC CRITIQUE OF VALUES-TALK

I think that the above view of values incorporates common mis-

conceptions about the role of values in lawyering and in behavior gen-
erally. It suffers from misunderstandings which are so engrained that
we have difficulty acknowledging them. I want first to describe the
flaws in a very general way, and then try to make my critique a bit
more substantive by borrowing two concepts from philosophers, con-
cepts which I have had trouble understanding at times but which
seem, now, to offer some helpful insights here.

Here's the critique in its most blunt sense: Values-talk cannot
shake the central assumption that moral sensibility is personal and
subjective. If values are core beliefs about morality and about "the
good," *and* if different people have different values, that is, differing
visions of "the good," *and* if people do not share a common evaluative
language through which to determine which values are "correct," then
all of the above concerns and questions become, ultimately, incoher-
ent. There is no hope for any closure if we accept those prevailing
assumptions. But there is a different way, and better way, to envision
this topic. If instead of the above description we conceive of values as
reflections of differing perceptions of *fact*, perceptions affected by bias
and by qualities of character, then we shift the discussion from matters
that are personal and subjective to matters that have some basis for
interpersonal agreement.

Two concepts familiar to philosophers might help make sense of
the critique here. They both lead to this different conception of what
we mean by "values," which permits more constructive discussion and
even the possibility of closure. Each concept is captured by a phrase
which can sound abstract but which we can use to aid our understand-
ing of values-talk.

The first philosopher phrase is "the thick theory of the good."[2]
Values-talk rests on an assumption that we do not have a shared, sub-
stantive, theoretical framework telling us what is good, and, recipro-
cally, what is bad. If I think something is evil—take racism, for

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[2] "A thick theory . . . requires substantive standards for what it is to live well."
Thomas Morawetz, *Persons Without History: Liberal Theory and Human Experience*, 66
B.U. L. REV. 1013, 1019 (1986). The idea of "thick" or "thin" theories began with the
work of John Rawls, who defended his theory of justice on "thin" notions of process but
whose critics saw "thick" sentiments underlying his arguments. *See* JOHN RAWLS, A THE-
ORY OF JUSTICE 395-99 (1972); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUS-
TICE 24-28 (1982)(Rawls's arguments reflect hidden substantive content). Bernard
Williams has described "thick ethical concepts," such as treachery, promise, brutality, or
courage, to demonstrate that our use of language often assumes a normative character
within the world. *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 128-
31, 140 (1985).

For a skeptical view of the possibility of a "thick theory of the good," see William H.
Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 225
(1991).

instance—and you think it is not so bad, we tend to believe that I cannot demonstrate that you are wrong, absent a thick theory of the good. And we seem to lack such a thick theory, by all accounts, as long as we rule out theology as the basis for such a common understanding. This is the core difficulty of values-talk. All discussion ends at that place. Only if we can find some manner by which to discuss good and bad with a shared evaluative language can values-talk make sense. In some respects, it is that search which animates conferences like the one I have just experienced. It is that search that makes the discussion so enriching and valuable. What we need is a means to make the dialogue more fruitful.

A second philosopher insight might offer some hope in that direction. Here's the insight: Philosophers in recent years have criticized moral discourse for what they call the "fact/value distinction."[3] I have read this phrase frequently, and it always made some abstract sense, maybe in the way that some of the Platonic ideals made some conceptual sense in high school, but I confess to having had some difficulty understanding how the argument made any difference in my working life, in the way that, say, the fact/law distinction might affect how I craft a summary judgment motion. But think of values-talk, and you can see how the fact/value distinction begins to make important sense.

The philosophers say that we err when we think that values are separate from facts. We tend to think that we "have" values, that we *possess* them, and we then use, or apply, or reflect those values when we encounter situations in the world. It is as if each person owns his or her values, the way that I might *have* a Mercury Sable, or a mustache, or a limp. By this conventional view the external world's facts are objective and "out there," while the values are inside each of us, or at least possessed by each of us, and therefore *subjective*. We find it easy to talk about facts, but hard to talk about values, in this separated world.

The philosophers tell us that the fact/value distinction is false. Moral sensibility arises from the experience of and action upon concrete circumstances. I do not "have" values as much as I "experience"

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[3] The fact/value distinction, which argues that "is" cannot imply "ought," appears central to Enlightenment moral philosophy, and subject to much criticism in modern and postmodern ethical work. The unity of fact and value is an important part of MacIntyre's virtue ethics. *See* ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984). It also has been described as "an essential part of Aristotle's philosophy," *see* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics* 133 U. PENN. L. REV. 291, 317 (1985), and similarly critical to the new casuistry, *see* MARK G. KUCZEWSKI, FRAGMENTATION AND CONSENSUS: COMMUNITARIAN AND CASUIST BIOETHICS 10 (1997); Karen Hanson, *Are Principles Ever Properly Ignored? A Reply to Beauchamp on Bioethical Paradigms*, 69 IND. L.J. 975, 977 (1994).

values when I encounter others. It is therefore not helpful to talk about teaching or imposing or indoctrinating values, because values are not something that you have or do not have, outside of specific contextual interactions.

But you demur. Even if the philosophers are right about this, you say, we have just moved the debate a step away, with precisely the same difficulties. I see a complex fact pattern and I see "racism," while your look at the same pattern and you see "justified treatment" We still have no common evaluative language, so what have we gained? We still look like we have different values, and without the thick theory of the good I have no ability to persuade you that I am right and you are not.

Well, that is indeed the rub, but recognizing the fact/value myth helps us to move beyond that impasse. Here's where the most valuable insight of the philosophers comes in. We actually do share our evaluative moral experiences much more commonly than our values-talk implies. Ultimately, our values are quite the same, even without any elusive thick theory. Their recognition pattern among concrete, messy world circumstances will differ, but where we differ is in our understanding of *facts*, and in the *character* we possess to act consistent with the ideals that we all share, by and large. And, as to both of these concepts, we have a developed common language available to us to permit development of better answers and more honorable behavior.

This may seem quite counterintuitive, and it is no doubt far more complicated than I am permitting it for now, but it is fundamentally right. Look again at the earlier footnote, with the list of values generated by the clinical teachers. Read it carefully. Consider how many people you know, including your political opponents, your students, your colleagues, or your clients, who in fact *disagree* with any one of those values as a statement of the good, in its purest form. There are no doubt many people who you think, or know, will resolve questions involving these issues differently from the way you would, but *not* because they have different "values." Will they really argue against justice, against client autonomy, against respect, against bias, at least as ideals? Unlikely. It is rare that those who disagree about policy or behavior disagree about the underlying values.

The art of casuistry says that we fundamentally agree about paradigm cases. Our moral sense stems from deep agreement about fundamental, easy examples. Who will question that two perfectly equally situated individuals deserve equal treatment? Or that the law should be applied fairly and without corrupted influences? As principles, as kernels of truth, we will not find, at least in our general cul-

ture, disagreement about these moral sentiments.

But we disagree a lot, you say. You value *pro bono*, and I do not. You are racist, and I am tolerant. These are value clashes, you say. Here is where how we define the term "value" takes on special signifi-cance. I "disvalue" *pro bono* because I have certain understandings about how the world operates, how much or how little money lawyers earn, and how my money should be spent. Most of our disagreement will arise out of *biases* and (a truly related consideration) the way in which I understand the world to function. Each of these is largely a factual, empirical, or at least *explorable* idea. If we debate *pro bono*, we need not get stuck at the level of emotivism, the subjective view of what is "good" in a fundamental moral sense. If that is the basis of our conversation, we will walk away thinking, correctly, that there is no resolution to our dispute. If instead we work to identify those ex-amples where we agree (and we always will agree at some level), then our conversation will have a coherence, a common language, and a possibility of closure.

Look back one last time at the list of values generated by the clinical professors. Many of them are values which, as I pointed out before, we will all share, even if we may disagree strongly about how each value ought to be implemented. Many of the others are not "val-ues" at all, but instead are stances grounded in commitments to views of the world, reflecting not so much versions of the good as under-standings about empirical reality. And that, despite the postmodernists' pleas, we can talk about with much greater certainty.

Here's the last insight from the philosophers. It is largely inco-herent, or at least premature, to conclude that you value, say, "client autonomy" over "client best interests," unless you have a real client and a real choice in front of you. To describe yourself as a supporter of client autonomy is to treat autonomy as a value separate from the facts in which the value will have meaning. It is nonsensical to iden-tify that value apart from how you respond to a given constellation of circumstances, where real individuals are struggling with complex and uncertain choices. If you and a student with whom you work find yourselves opting for different behaviors when facing that same con-stellation, we might call that a difference in values, but it is likely far more accurate, and far more productive, to understand your disagree-ment as stemming from differences in predictions about future harm, or about psychological or medical concepts of "informed consent," or the like.

IV. Conclusion: Coherence in Values-Talk

If these preliminary thoughts are correct, then our ongoing dis-

cussions about values can have more common meaning than the compendium implies. In some cases, for sure, disagreement about "values" will be just that, in the conventionally understood way. The one will advocate as a moral proposition that permitting poor persons who cannot work to suffer the pains of homelessness and hunger is justified, while the other will find that prospect unfathomable. In those cases we are left with the Babel that we have now, with no common criteria by which to persuade one or the other that she is wrong. But those examples, if I am right, will be rare. Instead we will have debates about lazy welfare cheats that are grounded in questions of empirical reality, about biases in perception, and about the courage that it takes to accept morally honorable action when it is personally painful.

We cannot pretend that these newer, reconfigured debates are much easier to endure or accomplish. Redefining a racist from one who values inequality to one who suffers biases about how groups of people act may permit a more comprehensible discussion of the topic, but it cannot promise any easier ways to persuade the racist that his view of certain groups is distorted. But, until we shift our vision of what separates those who seemingly share differing values, the hope of closure will remain forever elusive.

So let the discussion about values continue, and let the fruits of the marvelous Portland conference enrich us further. But as we persevere in our effort to make sense of ethics in our practice, let us not misunderstand where we disagree, and let us not mistake disagreement about the state of the world for conflict about what it means to be good. It is better, in the end, to argue instead about facts, and to unpack our dissension until we find the places where we can agree on the easier cases.