

---

## ARTICLES

---

# SYMPOSIUM ON LEGAL EDUCATION AND THE PEDAGOGY OF ETHICS

## A Conversation Called Ethics

James R. Elkins,  
*West Virginia Law School*

What would it mean to have a primer on legal ethics? The idea of a "primer" brings me to a difficult set of questions, questions that I must live with if I am to teach, to learn, to read, to think about what it means to be an ethical lawyer. The idea of a primer raises issues implicit in my thinking and teaching. Trying to "make" such a primer helps me confront and make explicit these issues, yet the idea of a primer is problematic, if not alien, to my sense of ethics. For example, if we think of a primer as simple, straight-forward, uncomplicated, linear and well-organized, then it is difficult to say how such a text, on or about ethics, embodying these characteristics would be possible. The danger is that in simplifying, a primer becomes simplistic; in attempts to be objective, it becomes arid and academic. On a more optimistic note, a primer could serve as an introduction to ethical difficulties and confusions in addition to its description of contemporary moral stances. We might think of a primer as a map to a maze.

Legal ethics needs a primer. In recent years there has been renewed interest in legal ethics, as in professional ethics in general. There is a growing body of literature which explores the moral, ethical, value dimensions of our professions, our disciplines, and the educational programs within which professionals are trained. A

primer would be yet another phase in the movement to educate more "responsible" professionals and making more explicit the moral dimension of educational pedagogies and curricula.

Law schools are now mandated to offer instruction in "professional responsibility." Legal ethics has become another subject in the legal curriculum. The premise, now widely accepted, is that legal ethics is indeed a subject to be taught and learned. While it may be too early to consider a treatise on legal ethics, as one has treatises on contracts, torts, and labor law, it is time to consider new and better maps of the terrain.

An ethics primer should be directed toward the student of legal ethics rather than the lawyer. At the present state of development, we are uncertain how to teach the skills and sensibilities for an ethical professional life. To learn something about ethics, to find ways in which that learning can take place, and the obstacles it (and we) might encounter, suggest the areas of inquiry for a primer.

Our questions about "learning" ethics are also questions that confront lawyers. The lawyer is always and forever a student. Ethics is not a subject that can be transmitted as a form of "contained knowledge." There are real disagreements about what ethics is and how a concern for ethics should affect professional work. If ethics is not a subject to be taught, then we must first focus on the question how is it to be learned? What is an education in ethics?

A primer on legal ethics would respond to (but not answer) two questions: What is ethics all about? How do we talk about ethics? One argument is that a primer on legal ethics should offer the reader a definition of ethics. If an ethics text is to call itself a primer, then surely the reader will be afforded the convenience of starting at the beginning; and one way of beginning is to say what ethics is, to define it. What do we mean by ethics? What is it?

To ask what one means by moral, by ethical, even by values, is at once understandable and problematic. There is something to be said for definitions. They allow us to proceed, to realize early on the substantial problems and significant conflicts that we (reader and writer, student and teacher, you and I) will confront in our efforts to make ethics our conversation.

The difficulties with doing a primer mirror the difficulties in talking ethics. I want to resist giving a definition of ethics. Not because a definition is not possible, but because a definition—getting a sense of what ethics is—is exactly what we want to learn, what we expect to do in the teaching and learning, in the conversation called ethics. The insistence on definitions may impede the conversation. To provide a definition of ethics, to say what it is, makes a primer on legal ethics possible but undermines moral discourse. And so, early on, a primer for ethics (and moral discourse) must be given new meaning, meaning that comes out of our willingness to proceed without definitions, without a clear sense of what ethics is and how

one is to become ethical. An understanding of ethics is gained rather than given—and in the process we learn something about ethics and about learning.

Consider the following scenario. An argument erupts over a definition. "Do you really mean that to be ethical one must \_\_\_\_\_?" It is hard to imagine a definition of ethics that would satisfy a discerning listener. A definition of ethics will either leave something out—character, virtue, responsibility, fate—or devalue or discount some value, quality, or sensibility that "must" be a part of ethical life.

Let me give another example. My students have taken delight (and been confused) by efforts to define and distinguish morals and ethics. They argue that the failure to do so results in a muddle of unimaginable depth, making us easy prey to confusion. Listen as my students talk about these words:

i.

Our morals are for the most part learned. What we need is an education in ethics.

ii.

Ethics to me are moral standards of a profession. When I speak of morals, I think of personal morals or those standards continuously developed by a person during his lifetime.

iii.

I believe that morals are very personal, whereas ethics are the "morals" of a profession or group. Ethics are not necessarily the representation of the morals of the individual group members. They are decided upon either expressly or by implication.

iv.

I have difficulty in viewing ethics and morals as one and the same.... Morals are associated with religious beliefs and ethics are somehow more objective.

v.

To be ethical is to conform to a set of reasonably defined standards. These standards are determined by an analysis of the "system" under which one operates, particularly with respect to the history and evolution of the system. To "possess" legal ethics, if that is indeed possible, one must conform to the standards of the legal system. Morality seems to go beyond the scope of the reasonably defined standards. Morals, as opposed to ethics, are based more on personal opinion.

vi.

"Ethics" is the term which defines a set of principles which provide guidance for what men "ought" to do. Some ethical considerations have evolved from religious notions, while others have developed out of philosophical notions. "Morals," on the other hand, represent a set of personal values, attitudes, and beliefs through which the individual views the world in which he lives. Morals are thus more particular to the individual. One's set of moral standards determines how one views his ethical responsibilities. Each person's make-up affects the way in which he interprets certain principles.

Conversations which give way to the call for definitions (the definitional imperative) can produce clarity and understanding. Definitions have their place. They help us catch biases, prejudices, and distortions that swim around in our conversations. A definition may help us figure out where a speaker stands. In some conversations, it might permit a stalled or ineffectual dialogue to proceed.

And yet in a conversation about values, about the moral and ethical dimensions of our professional lives, I wonder whether definitions do not impede and imperil the dialogue. Definitions distort conversations in diverse ways. Definitional talk can be tangential, diversionary, and undermine as well as promote conversation. Definitional talk can take us away from what we really want to talk about. The cost of definitions may be high if complex, subtle, ephemeral connections that draw one's values into a coherent whole are sidetracked. A thoroughly rational conversation in which the terms of the discourse are neatly defined is a net that catches many fish while the quarry swims free.

Imagine a conversation about legal ethics that does not fall into the definitions trap. In this conversation (or classroom dialogue) we focus on how our talk reflects our ethics. What are we to say about our own expectations, concerns, and fears regarding the possibilities of and obstacles to ethical life as professionals? What kinds of strategies do we have for dealing with the moral and ethical dimension of lawyering? What affect does moral discourse have on our lives?

A lived sense of values can be and is often radically different from a defined system of values. In legal education a lived sense of values leads to talk about the inequities and hierarchies in law schools; about standards and the ideal of competence; about visions and failures; about the purpose and values implicit in the study of law; about the relationships of student to teacher, of student to student, and how these relationships give rise to assumptions about professional life. When we talk about professional work and professional life, when we say where we stand, what we believe, and what we "should" do, how we experience the world, and how our experience is dealt with in the world, we find ourselves in moral conversations. I call these conversations moral discourse, a discourse

that defines as it moves back and forth, as it calls into question the way we think and live, a discourse which provides new metaphors for professional work and new images of ourselves as professionals.

A discourse is an argument or conversation. The word discourse is derived from a Latin root which means to run about. Course comes from the same root as converse, which in its archaic meaning is to utter, or to give forth. When we talk about ethics we discourse: we find ourselves in conversation and argument; the giving forth of some part of ourselves; and a good deal of running around, with ample uncertainty and anxiety to make the outcome uncertain.

From this perspective an ethics primer is an offering of suggestions, possibilities, strategies for how one might move around, take a stance, evoke a tone and elicit new sensibilities; a guide to speaking and thinking about that which matters, about how one is to conceive and live a life.

It is ethics that brings us to conversations about professional life, to dialogues about how to live a moral life as a professional. In talking about lawyering and professional life, we say something about where we stand, how we experience the world and see the world, and how the world of our experience takes on moral consequences. Moral discourse is elusive but cannot be avoided. It presents each of us with the questions that surround our choices and permeate our lives. Ethics focuses on the choices that we make (and avoid making) and how those choices give our lives character; and ultimately, how our character becomes our choice.

Ethics is one way that we locate ourselves in a complex world. It is a way of seeing the world. In locating ourselves we need to know about and honor that experience of the world that gives reality to our own making and doing, to our own being.

Ethics is grounded in the lives that we live. An ethical sensibility is derived from ordinary life, from our doing and being in the world. The "felt sense" of everyday life—the routines and patterns, the given quality of a place, a time, and a community. Ethics is the relational ground of our everyday world, the interconnectedness, the web of meaning that is created by the nexus of person and action, consequence and person. Ethics is an ecology of human spirit and action, a way of seeing the world that links persons and actions to consequences, to an evaluation of harm and suffering. A utilitarian measures and weighs. But there are no scientific measures of ethics, for ethics is the process by which things and relations of value are brought into being. Ethics is the ecology of human meaning. Ethics lies beyond quantification and remains the most basic measure of all.

Ethics involves a kind of understanding, what Polanyi called tacit knowledge. Ethical understanding calls for locating the simple in relation to the complex. Ethics does not help make the complex simple. The movement in ethics is from the simple (surface) to the complex (depth). Ethics is a form of complexity; it makes life more meaningfully difficult.

There are many ways to learn ethics, as there are many philosophies, and more than one path to wisdom. The way that I have chosen depends upon conversation, dialogue, saying as much as we can about the practical and existential problems that we face when we try to say and do the right thing. In watching my students (and myself) struggle with the implications of trying to teach and learn ethics and realizing the difficulty created when we attempt to articulate what we will do as moral actors in the world, I see the promise of ethics. The student and teacher cannot talk about what lawyers do, and should do, without bringing into the classroom their own character and moral sensibilities. And when we talk, taking a stance on what can and should be done in response to moral problems (and the problem of character), we engage in moral discourse.

This view of ethics can be traced to Socrates. It is Socratic in that it assumes no subject of ethics to be learned, no knowledge called ethics to be passed from teacher to student. The moral and ethical dimension of lawyering is not located in the schools of ethical theory and moral philosophy, in the body of ethical rules that the profession prescribes for itself, or in judicial opinions that prescribe lawyering conduct. In Socratic teaching there is an assumption that we (student and teacher) each have access to the knowledge needed to live a good life. We already have what we need, the problem is in getting access to it, uncovering it, reclaiming it. We must figure out what we already have, what we have given up, what was lost along the way, and the extent to which we might reclaim and reown that which has been lost, hidden, or stolen. Learning ethics begins in the awareness of a sense of loss, an admission that we have given up something of value, that there is a cost to living in the world and doing what we do as professionals.

Ethics is Socratic teaching. The problem for ethics and legal education is that Socratic teaching has become the province of those who hold ethics in disdain. Socratic teaching is little more than a game: "Can you guess the answer that I'm looking for?" "I've got the answer and won't tell you because it's good for you to get it yourself."

It is what the student and teacher bring to ethics that is the subject of moral discourse. No one comes to ethics with a clean slate. Learning ethics, and being ethical, depends on a sense of self and how a self comprised of images, expectations, and fear (in addition to knowledge and skills) is to make a place for itself in the world of others. The moral and ethical views expressed in the justification of self and its choices is one way we engage in moral practice, in the working through of values that make character, and a sense of self possible.

Ethics, in its conversational mode, is a series of questions: What does it mean to have character, the kind of virtues that make one a responsible social and political actor, and a good lawyer? How does this work of lawyering, the imaginal universe of lawyers, this world

of legal discourse, this cognitive notion of "thinking like a lawyer," affect our way of being in the world, the self that we present to ourselves and others, and ultimately our soul?

Professional responsibility must be viewed in the light of the lawyer as person, a person with character, a character reflected in a narrative history. Professional responsibility is not learned as knowledge of a set of discrete rules and principles. The idea of professional responsibility lies closer to the notion of attending, bringing into awareness, and playing with the nuances and subtleties of moral values than in the routine learning of ethical rules and principles. The professional virtues—competence, knowledge, ability, zealotness, skillfulness form a kind of self, a form of character with its own ethical geography. We will understand professional responsibility only when we find the connection between person (self) and the character suggested in our professional role.

\* \* \*

I have tried over the years to be explicit about what I do when I teach ethics as conversation. I focus on the process and interaction, the way our being together and engaged in conversation over time affects our sense of moral values. The focus is on what we are doing, how we are talking, how we are making a place for ourselves, for our feelings, our expectations, our concerns, fears, and hopes about being good lawyers.

I must confess that it is not possible to say everything up front. There is much to say, much that we (and I) do not know how to say. I do not hide my own beliefs and values in these conversations. At the same time, I make clear that what we do, we must do together. We learn and we teach each other because that is what happens when we speak together about things that matter.

My students and I have a rather long journey to make together as we follow our way, by conversation, into the meaning of an ethical life in law. Some choose not to take the journey. The conversation is not an easy one. We must use words with unclear meanings, words that intellectuals, utilitarians, rationalists, behaviorists, postivists, practicalists, and legalists hold in low regard, words that generate confusion, uneasiness, anxiety. Ironically, it is morals and ethics, the words moral and ethical, that bring argument, disagreement, confusion, and conflict. It is these words, and words like justice, fairness, truth, honor, respect, hope, skill, and feeling that become part of our sense of self, works that describe an ethic and make an ethics of conversation.

We learn ethics from talking, conversing, and listening; by way of struggle with the words, sayings, tellings, teachings, and stories that we speak. We attempt to master the language by which we

construct a meaningful world: Struggling with words that express profound hopes, fears, and needs, making words work for oneself and others, and speaking of a world fit to live in is an ethic and a worthwhile ethical project.

James White introduces his book, *When Words Lose Their Meaning* (1984), with the assertion that "(o)ur life is a life of language." I see in the fantasy of an ethics primer a text which promotes speaking, conversation, stories—an ethics derived from conversation and narrative in contrast to a knowledge called ethics. The way we speak (the kind of professing I do) and the stories we tell are our ethics.

Ethics, and a good story, can start anywhere. There is no beginning. I have rejected starting with definitions. And yet ethics, like any story, must begin somewhere. In some stories we know in the beginning what is going to happen, and it is the particular craft of the writer to fulfill our expectations, to create a narrative text (a context, a world) in which knowing what is going to happen makes it possible to go along, to take pleasure in the realization that what has been promised will happen. Ethics is not that kind of story. Rather, ethics is more like the story in which a reader sets out with a belief or understanding about a character or situation and finds, as the story proceeds, that she must change her mind, that she misunderstood, or did not really know what she thought she knew. In this kind of story, and in ethics, we encounter surprise more often than reassurance, more twists and turns than well-worn paths. If one thinks about ethics as getting from one place to another, it is more like a dangerous mountain path than an expressway.

When James White says that "life is a life of language," a cultural activity like law can be seen as "a way of reading." It is an attitude that can be put to work in one's own life. The conversation ethics is a way of reading. Ethics, from this perspective, is not a body of knowledge, or a set of principles and rules, a methodology or manner of approaching problems, so much as a way of putting our lives to work in the moral practice we bring to our "reading" of situations, others, ourselves, and even our own culture. In this way of reading ethics definitions are "worked out" in the reading, for it is, as White argues, the reading of cultural text like law that can change our mind even as it locates us in the world.

Of course we do not make an ethical world and develop ethical sensibilities out of whole cloth. A world (embodied text/texts) of ethics already exist. The logic of the given text is to make ethics the reading of a book already written. But even with given texts, texts already in existence, we do not simply read the text but bring a world to the text by which the text is given meaning or is rejected as meaningless. An ideal reader "reconstructs" the text and participates in a world that the meaningful text makes possible. The relationship of writer and reader is less one of domination and submission, giving and receiving, presenting and accepting, than one of negotiation.



\* \* \*

The ethics that I envision is not a fox to be caught in the net of an ethics course; the fox called ethics is a mythical beast, ordinary and elusive. Ethics, like the fox, is crafty. Legal education and the ideal of professionalism (rhetoric and ideology) that accompanies it makes the quarry ethics ever more elusive. It is hard to admit that we have so much trouble caging this fox called ethics. Unable to capture it we cannot forget it. Our memory of what has been lost, but not forgotten, make us pry to depression, disenchantment, apathy, alienation, and burn-out. If we do not understand this "shadow" side of professional life, then ethics will remain a taunting illusion.

