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The Practice of Teaching, the Practice of Law: What Does It Mean To Practice Responsibly?

Howard Lesnick*

I.

Whenever I begin to think about the word *practice*, in connection with teaching or lawyering, I recall one of my favorite cartoons. It shows a priest seated at a piano and a bearded man wearing a skull cap standing behind him, looking at the sheet music. The caption reads, "A practicing Catholic and an observant Jew."

As a law teacher, I have to be sure you understand the "holding" of the cartoon. The priest, who at the time in question was "practicing" the piano, presumably also "practices" his religion; the "observer" of the piano-playing also presumably "observes" the tenets (indeed, the "practices") of his religion.

We often think of *practice* in the first sense, as regular rehearsals, whether for a particular performance or for undertaking the work of an occupation, as in the case of a high school "practice teacher." The maxim is "practice makes perfect," and sometimes that may be so. Maybe. A childhood friend, having "observed" my piano playing over some years, once commented that I was getting better. When I happily responded, "Do you think so?" he replied, "For sure. You used to play easy pieces badly; now you play harder pieces badly." A less astringent understanding of the limited truth of the maxim is manifested in

* Jefferson B. Fordham Professor of Law, University of Pennsylvania. This essay originated as the Charles Dyson Lecture, delivered at Pace University School of Law on April 23, 2008. I am grateful to the School for the invitation, and to Vanessa Merton, Professor of Law and Supervisor of the Immigration Justice Clinic at Pace, for her role in that and for much more. She was a dear colleague for six years at the founding of CUNY Law School, during which I learned more about the meaning of the responsible practices of teaching and lawyering from the remarkable group of students, teachers, and staff members we assembled than I can recount or acknowledge, but from no one person more than from her. I am ever in your debt, Vanessa; may your song always be sung.

the experience of many of us that, with years of "practice," as we move closer to being "perfect" at our craft, we "observe" perfection receding ever further along our path. With that latter wisdom, we approach an understanding of our work, not simply as a skill that we practice to acquire, but as a practice in itself.

We need to inquire, then, what it is about lawyering and teaching that makes it appropriate to term them "practices." Our understanding of that question has been widely influenced by the work of Alasdair MacIntyre. His carefully crafted definition is about seven lines long, but resonates with what I never realized I thought.[1] Let me describe its three core ingredients.

First, a practice involves what he terms a "coherent and complex form of socially established co-operative human activity . . . ."[2] This requirement, Macintyre observes, distinguishes planting turnips from farming, arranging some bricks from architecture, throwing a football around from playing the game of football.[3]

Second, through such activity, "goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence"[4] appropriate to it. Motivating a highly intelligent seven-year-old child to learn the game of chess by offering him fifty cents worth of candy for each game won may induce the child to play, but not to improve his or her skill at the game if he can learn to cheat without detection, since either skill achieves equally the *external* good, the candy. However, as MacIntyre suggests, only by trying to excel at the game can the child achieve the goods internal to a developed proficiency at chess.[5] (For those who might wonder what those goods might possibly be, I will digress briefly to mention MacIntyre's description of them: "the achievement of a certain highly partic-

1. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187 (3d ed. 2007) ("By a practice I am going to mean any coherent and complex form of socially established co-operative human activity through which goods internal to that form of activity are realised in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.").

2. *Id.*

3. *Id.*

4. *Id.* at 187-88.

5. *Id.* at 188.

ular kind of analytical skill, strategic imagination and competitive intensity . . . ."[6]) He goes on to suggest—and this is not a digression—that for any practice the good acquired will be "of a certain highly particular" sort.[7]

Finally, through the realization of those internal goods our capacity to understand and master them more deeply is "systematically extended."[8] It is through participation in the attempts to sustain progress toward excellence that a practitioner of a specific practice discovers the good of what MacIntyre terms "a certain kind of life," the life of an artist, a carpenter, a teacher, or a lawyer.[9]

II.

What *are* the human goods that we may realize through seeking to meet appropriate standards of excellence in the practices of lawyering and teaching, and in the process systematically extend our capacity more deeply to understand and master those goods? Looking first at law, I will identify five that seem salient to me; of course, I cannot claim that my catalogue will be definitive.

The first is that a lawyer stands with those in trouble. I am not talking about "zeal" or "loyalty" in the reified sense that we often use those terms in professional responsibility law. There is some significant room in an ethical universe for withholding one's judgment of a client who is in more trouble than he or she deserves or, desert apart, may have no one else standing between him or her and justice. Making an argument, or otherwise advancing an interest that, but for your engagement on a client's behalf, you would not want to prevail, is at times a fine thing to do. So long as these principles are not mindlessly invoked in cases where they are grievously inapt, or turned into abstractions to which you must be committed because of your role, they have, I believe, significant moral strength and a modicum of nobility.

6. *Id.*
7. *Id.*
8. *Id.* at 187.
9. *Id.* at 190. Professor (and former Dean of Yale Law School) Anthony Kronman has written of such goods provocatively, in my judgment, in the life of a lawyer, in THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

Second is the potential that law practice has to aid people in navigating their way through obstacles in a wide range of human contexts: forming businesses, enabling businesses or family members to separate, obtaining governmental approvals of various sorts, drafting agreements, wills, and letters—in short, facilitating the passage of people through the rapids they must traverse in this law-drenched world. The interests of the people involved are sometimes mostly divergent, at other times primarily congruent; a lawyer's help may be necessary in both cases, and providing that help will often be a blessing, not only to the client, but to the world.

Here, I am not focusing specifically on being a "lawyer for the situation" or a mediator, nor on the developing "collaborative law" movement, but have more generally in mind the opportunity that a lawyer can often have, although acting as counsel for one of the parties, to enable his or her client, and the other parties as well, to reach a goal they regard as a good outcome. That is something that can warrant real satisfaction. Of course, there is a difference between what I have described and throwing tacks in front of another person's car so that a client's car can move around more freely—what in legal terms is drafting documents to assure that in foreseen and unforeseen circumstances your client retains all favorable options, while the other guy is left to twist slowly in the wind. That may be part of the joy of law practice, but it is not what I am talking about.

The third theme is that the first two give a lawyer an opportunity—and here I will use a word that makes some squirm—to empower the client. What do I mean by that? You probably know the line that all of Western thought is a series of footnotes to Plato. My favorite Platonic footnote call is in the *Gorgias*, where Socrates says to Callicles, "Has any citizen hitherto become a better man through the influence of Callicles?"[10] Although Socrates' challenge was not addressed to a lawyer, it is an especially striking one for lawyers. For the question calls on us to ask, what does it mean to represent someone?

Of course, in our world, to say that part of a lawyer's job is to help a client to become a better person immediately conjures

10. PLATO, GORGIAS *515 (Walter Hamilton trans., New York, Penguin Books 1960) [hereinafter PLATO, GORGIAS].

up the specter of "paternalism," telling a client that he or she will be better off going to jail for ten or twenty years or paying or giving up the chance to obtain thousands (or millions) of dollars. But it need not be thought of in such highly polarized terms. It does not mean that clients should lose their homes, their liberty, or their lives, even if they deserve it. It does mean that there is more to representing a person than staving off disaster or getting some property away from the other fellow. What would it do to our idea of representing people if, although it included protecting them from immediately threatened harm, it did that in a way that enabled the client to remain or become able to act as an enfranchised person in the world? The fundamental good of fostering that goal is eloquently brought to mind by these classic words of Isaiah Berlin:

> I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, act of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own . . . . I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes.[11]

There is much in having "legal troubles" that tends to disable one from realizing this aspiration, and legal representation can ameliorate, rather than intensify, that disability. Where it can, in the process, also help the client to understand his or her self-interest as not always in polar opposition with the interest of others and to recognize and accept limits on his or her antisocial tendencies or desire for revenge, it serves an additional human good.

The fourth theme is that advocacy in law is a relatively peaceful way of seeking justice. Justice and peace are often posed as competing goods, and law offers a way of "fighting" without real violence. Of course law attracts people who have a certain degree of aggressiveness in them, but it usually takes verbal rather than physical forms—a Rule 11 motion rather than fists, clubs, or knives. In a world that continues to see so

11. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 8 (1958).

much violence far worse than fists, clubs, and knives, verbal aggression (even a Rule 11 motion) does not look quite so bad. Although, as Robert Cover so arrestingly reminded us many years ago, the ultimate power of law is its willingness to turn to violence;[12] in many, many instances, it uses that willingness as an unspoken means of calling disputants to account according to non-violent procedures and to norms that to some significant degree can claim to respond to the call of justice. From that perspective, filing or moving to dismiss a complaint is a nonviolent, albeit coercive, overture in support of a claim of justice.

Finally, practicing law is the pursuit of a craft that can be endlessly challenging. Becoming better and better at tic-tac-toe must lose its appeal at some point, while becoming better and better at chess may remain, at least for some, perpetually rewarding. Of course, there is a lot of law practice that is "the same damned thing over and over," but I think you will readily know what I mean about its endlessly challenging possibilities, however seldom they may be realized. Law practice, moreover, has the great added value, which chess does not, of having a social purpose for one's skill. Although lawyers may be prone to exaggerate their importance, law and law practice significantly affect people's lives, for better and worse, and that can be a major validation of the satisfaction that comes from mastery of the craft.

What, now, are the salient internal goods of teaching? I can approach that difficult question only by beginning with what, in my judgment, they are *not*. The prevalent notion of teaching, I believe—and this is especially so with respect to professional schools—is that we transmit to students some of our acquired knowledge and skills, which will be useful to them later in their careers. We have the knowledge (provided that we keep up our scholarship), our students need it, and, in teaching, we "impart" what we have to them and so render them more proficient. In criticizing this instrumental use of knowledge, Robert Bellah has turned to a metaphor that I find distressingly familiar: it tends, he asserts, "to make of the university a kind

12. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

of universal filling station where students tank up on knowledge they will 'need' later."[13]

Although I acknowledge that in this paradigm the goods identified are internal to the practice of teaching—they are not simply the rewards of job security, a certain status, and favorable working conditions—I find the conception of teaching it embodies woefully deficient. Specifically:

> - It trivializes both knowledge and the utility of knowledge, first by overvaluing its utilitarian nature over its intrinsic worth, then by focusing on narrow measures of the benefits of an education. In the process, it loses sight of the deeper value of knowledge—whether of legal doctrine, skills, history, or theory—as a means to greater understanding of the world and of oneself.
>
> - By seeking so heavily to justify present choices in terms of the future, it excessively dichotomizes the present and the future, thereby gravely disserving students' capacity to learn to live integrated lives.
>
> - It both inflates and cabins, in troubling ways, the work of the teacher: by exaggerating the value of expertise and authority, it denigrates and inhibits the self-teaching capacities of students, at the same time as it tends to render "off limits" a teacher's motivation to engage more than the cognitive or argumentative powers of his or her students.
>
> - It distorts the authentic experience and motivation of many teachers by fostering a view of research and scholarship as augmenting a teacher's "human capital" and of teaching and other student-oriented work as depleting it, thereby helping to erect a destructive conflict of interest between teacher and student.
>
> - It gives students an implicit model of the professional relation that encourages them to adopt a comparably crippling view of the attorney-client relation and an implicit model of public life that is profoundly antidemocratic and justificatory of inequality.
>
> - Most fundamentally, it reifies both teacher and student, in that it abstracts their roles as teachers and

13. Robert N. Bellah, *The New Religious Consciousness and the Secular University*, DAEDALUS, Fall 1974, at 110.

> students from their individual identities; it uses people to teach things, not recognizing, as a wise friend long ago said to me, that true teaching is using things to teach people.

Curiously enough, the good of teaching that I want to articulate is embedded in one aspect of the etymology of the word, *educate*: it is derived (I am told, for I know no Latin) from the word, *educere*, to draw out something latent. To me, it revolutionizes the idea of teaching to think of it as bringing out something that is in a student, rather than putting something in that he or she lacks. When Socrates demonstrated, in the *Meno*, that the slave-boy unknowingly knew that the square on the diagonal of a square is double its area,[14] to me he was accrediting, not the latency of some forgotten prenatal knowledge or his own ability to ask leading questions, but the ability to transform oneself that is constitutive of being human. There is somewhere a magnificent line of Albert Schweitzer's, which, as best I can remember it, says, "there is a physician within each of us, and much of the practice of medicine is the art of bringing out the physician in the sick person."

To draw out of students what is latent inside them, teachers must, I believe, put more of themselves into their engagement with the subject matter. In my better moments, I share more fully with my students some of the aspirations for the attorney-client relation that have made it, at times, seem a fit context in which to live a life. My goal is to invite my students to ask themselves what being a lawyer means, or can come to mean, to them. My aim is not to avow for its own sake a particular set of answers as the truth, nor to lead them to reach answers like mine. It is rather to avow the appropriateness and importance of asking the questions and engaging with whatever answers that calls forth. *Teaching, to me, is evoking that engagement.* The process of engagement is a relational, and not merely an instrumental, interaction. It is not dominated by, although it may contain, a desire to affect another's world view. What it seeks to "impart" to students is an enhanced capacity to

14. PLATO, MENO *84d-85c (G.M.A. Grube trans., Indianapolis, Hackett Publishing 1976).

understand and develop their own selfhood. The delivery of *that* "tank of gas" is, to me, the internal good of teaching.

In short—if it's not too late to be brief—to make of my teaching a practice, to realize its internal goods, I need to facilitate my students' capacities to think of *lawyering* as a practice, to consider what they might come to perceive as its internal goods and how they might more fully enable themselves to realize them.

In those efforts, mine and theirs, two sorts of barriers arise. One is the product of the increasingly pervasive proclamation of our culture that the important goods of any activity are self-evidently those *external* to it. The other is the way in which the concept of professional responsibility itself has (perversely, in my judgment) come to lend apparent normative force to that proclamation. To those barriers I now turn.

III.

In part, the credibility of the concept of internal goods is undermined by the changing world of law practice. (I believe that an analogous process has been increasingly at work in teaching—making universities factories for the production and marketing of knowledge—but I will not develop that thought here.) Such fundamental factors as the endlessly increasing division of labor, bureaucratization, and hierarchy in the practice setting make the individual lawyer a less and less significant and informed cog in an increasingly large and complex set of wheels. This phenomenon is hardly a recent development, but the accelerating growth in size and complexity of law firms and the runaway consolidation and rationalization of the business-client world have made matters much worse. Legal representation is coming to be seen, within the bar as well as the corporate world, as simply the production of a "product" delivered to the client firm as a means of reducing its transaction costs in a series of complex bends in the corporate road and to be valued, therefore, largely for its utility in quantitative monetary terms. The clients' desire for "one-stop shopping" not only fuels the growth of multidisciplinary practice, it is gradually—and less and less gradually—affecting the thinking of lawyers and universities, pressing to affiliate the corporate practice of law more with the range of professional consultant services available to

mega-corporations than with brother and sister attorneys in other practice fields and, more fundamentally, with the inherited norms of the legal profession. These factors foster an increasing detachment from the lawyer's own sense of craft or the larger significance of the project of which the lawyer's work becomes an increasingly segmented part.

The influence of these inputs is broadly reinforced by the corrosive effect of the wider culture. Law teacher and classicist James Boyd White, in a fine essay initially addressed to law students, has given us a salient description of the deeper meaning of the commercialization of law practice—not such symptoms as advertising and firm marketing directors, but a conception of professional life "in which attention is focused not on the meaning of what the lawyer is actually doing as a lawyer, so much as upon the market for his services."[15] White goes on: "This in turn reflects a larger reconception of the nature of human life, especially our shared life, as an essentially economic activity, a process often described as one in which self-interested actors rationally pursue their goals . . . ."[16]

We can, I suggest, recognize this as a description not merely of law practice but of the world we live in and, increasingly so, in the world we will be living in. In that world, there is little to animate a focus on internal goods of any sort. Personal relations, a care for craft and craft autonomy, a grounding of reputation in the quality of one's work rather than the effective demand for it—these and other like virtues cannot hold their own in the blowing winds of market forces. Work life is seen not only as a race, but as an endless series of races, large and small, with success in one round soon recognized as achieving only a qualification for entry into the next and with success identified largely by comparing the money, prestige, or power obtained with that of neighboring others. Like the candy hoard of the seven-year-old chess cheat, that the rewards in fact be earned is not required. In the incessant weighing of gains and losses, internal goods tend to appear as little more than consolation prizes for losers, and Vince Lombardi's famous maxim (as best

15. James Boyd White, *Meaning in the Life of the Lawyer*, 26 CUMB. L. REV. 763, 765 (1995-1996).

16. *Id.*

as I can recall it), "Coming in second is being first among the losers," is more and more the world's mantra.

In that environment, the concept of "responsibility" in the practice of law, and indeed in that of teaching as well, is sufficiently protean that it can serve to undermine further, as easily as to bolster, a commitment to the pursuit of goods internal to the practice.

The problem is, again, as old as Plato. His practitioner and teacher of rhetoric, Gorgias, foreshadows contemporary lawyers and educators. Claiming that the orator (today, let us say, lawyer) has a skill that enables him to speak "against any opposition in such a way as to prevail on any topic he chooses," he acknowledged that he was "bound to make a proper use of his oratory . . . ."[17] In his practice, the orator is a responsible agent. His teacher, however, by whose efforts he "has acquired oratorical skill," does not share in that responsibility. "[H]is instruction was given to be employed for good ends," and he in no way "deserves detestation."[18]

So, for the most part, it is today. While Gorgias was trapped by Socrates' rhetorical skill into momentarily asserting that he would sometimes have to teach his pupils to use their skills justly,[19] both the norms of university life and the formal rules of the legal profession leave practitioners free of responsibility for the harms caused by the wrongful use, by their alumni and clients, of their teaching and representation. In both arenas, as you well know, the principal norm is one of non-responsibility.[20]

To me, the core meaning of the idea of responsibility is the recognition of the fact that the choices one makes as a lawyer, like those one makes elsewhere in life, affect people's lives. From this recognition flows the realization that our work, as lawyers or as teachers of nascent lawyers, can be an affirmation, or a negation, of the norms and goals that we want our

17. PLATO, GORGIAS, *supra* note 10, at *457.

18. *Id.*

19. *Id.* at *460.

20. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(b), (d) cmt. 5, R. 4.1 cmt. 1, R. 4.4 cmt. 1 (2002). The earlier Model Code of Professional Responsibility, still in force here and there, is even more emphatic. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1), EC 7-7, 7-8 (1980). It takes no citations to recognize that the same is true of the practice of teaching.

lives to embody. The Vietnamese monk Thich Nhat Hanh, a vegetarian committed to the Buddhist principle of "right livelihood," saw some comfort to be justly claimed by one who was a teacher and not a butcher, yet went on soberly to acknowledge that, through his children, the butcher would benefit from the teacher's work.[21] He presumably would not have had the children excluded from the classroom, and we do not know how he would have responded to the awareness that they might well, in their turn, become butchers.

In my view, the primary task of a law school should be to help students explore the fuller meaning and implications of responsibility in law practice. Prevailing professional norms, however, tend to cripple that endeavor at the outset. First, those norms reflect and reinforce societal commodification of the lawyer-client relation and a shriveled concept of responsibility. Second, the obsessive focus in both law schools and law practice on rights, obligations, and the hierarchy of decisional authority supports what Professor Joseph Allegretti has described critically as the widespread inability to "envision a relationship between lawyers and clients in which one or the other is not in charge of and dominant over the other."[22] As he perceives the prevalent norm, "[e]ither the lawyer is in charge of the relationship, or the lawyer . . . regards himself as the unthinking instrument of the client."[23]

The challenge is to integrate one's own convictions with a lively awareness that even the strongest convictions are personal, and that the manner of bringing them into one's interaction with clients and students must reflect the realities of their vulnerabilities. Enabling students or clients to become more fully capable of taking responsibility for the effects of their work is critically different from telling them that they should be responsible. It is essential to respect the personhood of our clients and our students, who each bear primary responsibility for their own life decisions. Yet recognition of these truths should not end the matter. Leaving students or clients free to live their

21. THICH NHAT HANH, INTERBEING: FOURTEEN GUIDELINES FOR ENGAGED BUDDHISM 45 (Fred Eppsteiner ed., 3d ed. 1998).

22. JOSEPH G. ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE 41 (1996).

23. *Id.* at 45.

lives as they think best does not warrant assuring them, tacitly or explicitly, that they are free of the necessity to choose or to accept facile reassurances that their choices are not morally freighted. The task is to engage the moral agency of the other, to invite him or her to reflection and, perhaps, to dialogue.

I cannot here develop more fully the contours of a responsible approach to counseling in law practice or to the interaction between responsibility and values in law teaching.[24] I will close with a passage from the classic study of contemporary America, *Habits of the Heart*, by Robert Bellah and his associates:

> "Perhaps life is not a race whose only goal is being foremost. . . . There are practices of life, good in themselves, that are inherently fulfilling. Perhaps work that is intrinsically rewarding is better for human beings than work that is only extrinsically rewarded. Perhaps enduring commitment to those we love and civic friendship toward our fellow citizens are preferable to restless competition and anxious self-defense. Perhaps common worship, in which we express our gratitude and wonder in the face of the mystery of being itself, is the most important thing of all. If so, we will have to change our lives and begin to remember what we have been happier to forget."[25]

To which I can only add, Amen. May it be so.

24. A very brief engagement with this question appears in Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633, 641-44 (1986).

25. I owe appreciation of the salience of this passage to Professor and Dean Emeritus Kenneth Penegar, who quoted it in his excellent critique. Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 391 n.263 (1988) (quoting ROBERT N. BELLAH ET. AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 295 (1985)).