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The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management

WILLIAM H. SIMON*

Insurance companies have come to play a role in professional responsibility compliance that rivals that of courts and disciplinary agencies. The insurers, however, depart from the judicial perspective of the traditional enforcement agencies. Instead, they take the risk management perspective that Anthony Alfieri describes.¹

I agree with Alfieri that risk management poses real dangers of cynicism and Babbitry. Nevertheless, I also see more upside than he does. The new perspective is valuable, not just as a strategy for attracting student attention, but as an antidote to real and basic deficiencies in mainstream ethics teaching and traditional professional practice. In this Comment, I first suggest why the risk management perspective arouses deep ambivalence on the part of ethics teachers. I then point to three respects in which risk management has the potential to make contributions to ethical reflection. In two of these respects, it might remedy deficiencies in current ethics teaching; in the other, it seems complementary to current ethics teaching.

I. THE ANXIETY OF ETHICS TEACHING

Alfieri's critique of the risk management perspective on professional responsibility acutely captures a central torment in the life of the legal ethics teacher. Ethics teachers in professional schools worry about their credibility with their students. Their students aspire to be practitioners. The teachers do not. They have given up practice, if they ever pursued it. This means that their knowledge of the circumstances of practice is limited, and even more importantly, that they are not subject to pressures to attract and please clients or to satisfy the demands of law firm superiors. They have renounced the biggest material rewards. Yet, they have achieved a combination of upper-middle class material comfort and on-the-job freedom unknown in most quarters of the economy. They get paid, in part, for taking positions that more often than not have no consequences in the outside world. Tenure immunizes them from adverse consequences within the academy.

In this situation, the teacher's defense of more than minimal professional responsibility standards is likely to sound naïve or self-righteous. Most students know that law schools do not equip them with a broad range of the skills they will need for practice. At many schools, the students are counting on the large firm employers for which they expect to work to teach them about practice. By

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1. See generally Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006).

and large, however, practitioners have been uninterested in professional responsibility. They have routines to check for conflicts, and they are aware of a range of duties to clients and third parties, but they have not been particularly self-conscious or reflective about such matters; to a surprising extent they have been indifferent, if not averse, to open discussion of difficult issues. If practitioners are uninterested in most ethical issues, or unreflective and insensitive to them, then that strongly suggests to students that the issues are unimportant. In the world of practice, ambitious thinking about difficult issues seems at worst an indication of softness and insecurity, at best a kind of intellectual ornamentation.

Yet every now and then, the ethics teacher gets a taste of vindication. This vindication is most likely to happen in the aftermath of high-profile scandals in which prominent, sophisticated practitioners have been complicit in outrageous behavior by their clients. The lawyers are roundly condemned for violating standards of the sort that the ethics teacher has long espoused. Even better, people express disgust at the failure of the lawyers even to identify and reflect on the issues in the manner in which the teacher has been trying to train her students. And the straying lawyers are often exposed to substantial, tangible sanctions.

These moments suggest a natural strategy for shoring up the teacher's pedagogical authority. They provide cautionary tales suggesting that students have worldly motives to heed the teacher, and they imply that practitioners are not consistently reliable in their judgments on these matters.

These moments, however, do not endure. They do not seem to work any major, enduring shift in the relative authority of teachers and practitioners. On reflection, we can see why. Only a small minority of practitioners comes to grief in the scandals (and even they succeed sometimes in portraying themselves as victims of inescapable arbitrariness on the part of enforcers). Moreover, the students know that the ethics teacher's interest in these matters is not exactly scientific. Her scandal-derived sample is biased toward situations in which lawyers get caught. She has little interest in and less information about episodes in which lawyers who violate her precepts escape sanctions and achieve unmitigated success.

Even to the extent she can appeal to prudence and self-interest effectively, the ethics teacher is bound to feel ambivalent about this appeal. The ethics teacher is usually an idealist. She came to the subject to explore and defend an image of lawyering that she finds intrinsically good. Part of the attraction of ethics for her is precisely its appeal to a perspective above the grubby struggle for place and reward. The strategy of prudence seems to compromise these motives. If "loss prevention" means just losing money and not your ideals, it seems a crass and unworthy substitute for ethics. So the teacher's revenge proves bittersweet. The practitioners suffer for their indifference to her efforts. But they interpret their suffering in ways that ignore key values that motivate these efforts.

II. ADVANTAGES OF RISK MANAGEMENT

Risk management has the potential to make three major contributions to professional responsibility discourse.

First, risk management is *worldly*.

Ethics teaching tends toward idealism. Idealism is good to the extent that it encourages us to consider values and possible ways of living them beyond the ones represented in the most salient patterns of behavior we observe. But when idealism leads to withdrawal or aloofness from practical affairs, it marginalizes ethics teaching. Some religious vocations encourage withdrawal as a road to the ideal, but this is not an option for professionals. They have to live in the world. Academics have a partial dispensation from worldly pressures, but to the extent that they indulge their position to ignore or disdain worldly ambitions and pressures, students are right to question their teachers' understanding of their needs.

Risk management forces attention to practical consequences of professional responsibility decisions, at least insofar as consequences are measured by liability (a limitation I will comment on in a moment). In treating liability as probabilistic rather than binary and absolute, risk management demands that we take a more realistic attitude toward the legal system. In demanding that we measure and balance harms and benefits, this approach improves on a categorical morality that treats all norm violations as comparable.

With its emphasis on self-interest, risk management is an improvement over an ethical perspective insisting that each discussant treat herself as just one person among a universe of people with equally valid claims for her consideration. It is an improvement not only because marketing professional responsibility to students with worldly aspirations becomes easier, but also because an ethic that sees responsibility as an aspect of self-fulfillment is more plausible and more powerful than one that sees responsibility as a form of self-denial. The attempt to transcend self-interest often leads to hypocrisy or preachy irrelevance.

Prior to the 1970s, elite law schools tended not to teach professional responsibility. Many other law schools more often did, often under the rubric of "Law Office Management."² The courses assumed that professional responsibility issues were embedded in the vocational tasks of constructing and operating a law practice. Additionally, the courses were oriented mostly to sole and very small firm practitioners and included technical material on such matters as client trust accounts at a level of detail that doubtless bored many. They also often ignored controversial normative questions (for example, cross-examining the truthful witness) in favor of trite exhortations (such as "do not steal from your clients"). When ethics became fashionable in the 1970s, the elite schools developed an approach that was exclusively normative. Courses varied from the

2. See, e.g., KLINE D. STRONG & ARBEN O. CLARKE, *LAW OFFICE MANAGEMENT* (1974).

mundanely doctrinal to the ambitiously speculative, but issues of management were excluded, apparently as beneath notice. Of course, the small-firm focus of the "Law Office Management" courses would have been inappropriate for students headed for big firms, but it would have been possible to develop a perspective on the organization of practice in big firms. The elite schools did not do that, however, and the other schools followed their lead, sometimes giving up their "Law Office Management" courses to adopt the more purely normative model.

Only recently have we seen the development of a literature on the organization of practice on which a thicker, more organizationally grounded approach might rest.³ If the risk management perspective could encourage the integration of this understanding into ethics teaching, it would perform a valuable service.

Second, risk management is *collaborative*.

Substantively, ethics teachers are altruists who argue for greater concern for others. But methodologically, they are individualists. They portray ethical decisionmaking as a fundamentally individual affair. Some matters are determined through legal analysis of rules and authority. Here the assumption is that each lawyer can apply her technical skills to arrive at the answer. Where authority is indeterminate, ethicists most commonly call for a choice in terms of personal value.⁴ The individual lawyer has to decide in terms of her conscience and her image of the kind of person she wants to be. The most dramatic variations call to mind Martin Luther at the Diet of Worms proclaiming, "Here I stand." The more routine decisions are more private, but no less individual. There is also another perspective, exemplified by Anthony Kronman's defense of "prudentialism," that sees the lawyer resolving hard issues in terms of open-textured but public values.⁵ But again, this is an individual perspective. Kronman's image is the "lawyer-statesman"—a paragon of sagacity who stands above institutions.⁶

In contrast, the risk management view is resolutely collaborative. Among the warning signs or red flags to which risk management draws anxious attention are these:

There are no shared goals for the firm; no leader has emerged; or worse, you are a group of partners that refuses to be managed. Your practice management systems are stand-alone systems (i.e., you don't share calendars, case manage-

3. Milton Regan's case history of John Gellene's criminal prosecution is an outstanding example. See generally MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

4. For example, David Luban's classic defense of "moral activism" speaks of ethical decisionmaking in consistently individual terms. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xxii, 160-61, 170-74, 210, 237-38 (1988).

5. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 219-25 (1993).

6. See *id.* at 15.

ment, conflicts systems or trust accounts). Every lawyer does what she wants to do; there is no accountability to others in the firm.⁷

Risk managers hate “eat-what-you-kill” compensation systems because they give individual lawyers much stronger incentives to please their own clients than to protect the firm’s collective material and reputational interests.⁸ To address this concern, one anonymous liability insurance executive recommends that its firms institute a “lone wolf” detection system that targets for quarterly review each case in the firm on which only a single lawyer has billed time.

The risk management perspective points to an ambiguity in Milton Regan’s extraordinary account of the John Gellene case, in which a Milbank Tweed bankruptcy partner was convicted of perjury for failing to disclose the firm’s relationship with a creditor that might have prompted conflict objections to its representation of the debtor. On the one hand, Regan portrays the problem as an organizational failure. Gellene was the classic “lone wolf.”⁹ He was a solitary operator, given to ignoring firm rules (and even Bar rules) in accordance with his own judgment of their importance and legitimacy. He tended to work on his own schedule, often without assistance.¹⁰ He made critical professional responsibility decisions, including the ones that led to his perjury conviction, in private without discussing the issues with his partners.¹¹ In Regan’s view, firms tend to attract and engender lone wolves by embracing the “tournament culture” associated with up-or-out, promotion-to-partner practices.¹² High-risk, high-reward structures and fierce competition encourage aggressive, risky attitudes toward compliance. And the loose, virtually anarchic organization of the traditional firm leaves the organization vulnerable to such behavior. Much of the book reads like a cautionary tale about the importance of risk management.¹³

But the book has another theme—the market, and more specifically, the commercialization of practice in increasingly competitive service and labor

7. Suzanne Rose, *Risk Management: Is the Culture of Your Firm Inviting Malpractice or Ethics Violations?*, 41 TENN. B.J. 22, 22–23 (2005); see also Anthony Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Risk Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677, 680–81 (1994) (discussing large firm lawyers’ independence and the liability issues arising from this arrangement).

8. See Rose, *supra* note 7, at 23–24 (noting how this type of compensation system endangers a firm’s overall work product and exposes it to liability by rewarding personal performance over business development).

9. REGAN, *supra* note 3, at 193.

10. *Id.* at 199, 345.

11. See *id.* at 214–15, 260–61, 297.

12. *Id.* at 304–05.

13. Regan speculates that, had the relevant decisions been made collectively within the firm’s bankruptcy practice group, they might not have come out differently because the other lawyers in the group shared Gellene’s incentives and biases. *Id.* at 348. This could be true, but it is not obviously so. Sometimes forcing articulation and deliberation can make a difference, even among like-minded peers. But even conceding the point, it goes to the optimal shape of risk management, not its basic desirability. Monitoring procedures should ensure that lawyers are reviewed by people from outside their practice field.

markets.¹⁴ Firms have to hustle for clients; and they have to struggle to recruit and retain lawyers. *The American Lawyer* mercilessly measures and discloses the relative performance of firms in terms of “profits per partner.”¹⁵ Regan suggests that competitive pressures induce lawyers to cut corners and push the limits of ethical and legal constraints.¹⁶ (This, of course, was once a central rationale of the bar for constraining competition in the market for legal services.)

Yet, it seems unlikely that the quest to maximize income—Regan’s second theme—is compatible with the risks and the centrifugal tendencies of anarchic organization—his first theme. Successful firms by definition have collective assets, and anarchic organization exposes these assets to severe and unnecessary risk. The liability and reputational risks in the lawyer conduct in many recent scandals seem far out of proportion to any plausibly expected gain to the firm. It often appears that part of the problem is a misalignment of firm incentives and individual incentives. A competitive market ought to generate pressure for more collaborative organization. This intuition seems confirmed by the fact that insurers are successfully pressing firms to change in this direction. If the market was once part of the problem, it now seems to be part of the cure.¹⁷

Third, like ethics teaching, risk management encourages *clear articulation* of ethical decisions.

There has been a powerful tendency in the profession to defer explicit confrontation with difficult issues. At the institutional level, we see this proclivity in the profession’s failure to address key issues regarding the responsibility of lawyers in salient financial scandals. We also see it in the failure of doctrine to address the distinctive features of organizational, as opposed to individual, representation until more than a century after the advent of modern corporate practice, and in the deliberate ambiguity of doctrine after the promulgation of Model Rule of Professional Conduct 1.13.¹⁸ At the individual level, we see it in stories like Regan’s *Eat What You Kill*, which show prominent lawyers making critical decisions on high stakes issues with little or no reflection or discussion.¹⁹

14. See *id.* at 32–36. For a single-minded development of this theme, see Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888–89, 903, 912–16 (1999).

15. See, e.g., 2005 *Profits Per Partner*, AM. LAW., May 2006, at 165.

16. REGAN, *supra* note 3, at 358.

17. Collaboration can take oppressive forms as well as empowering ones. The collaborative situation most likely to be considered in traditional ethics courses is the one in which a junior lawyer is asked by a superior to do something she believes to be wrong. There is no guarantee that the move from individualism to collaboration will be progressive, but other features of the risk management approach are responsive to the danger. For example, peer review processes, confidential internal grievance procedures, and demand for transparency on the part of all decisionmakers impose accountability on superiors as well as subordinates.

18. MODEL RULES OF PROF’L CONDUCT R. 1.13 (1980) (on the “Organization as Client”).

19. See REGAN, *supra* note 3, at 323 (discussing Gellene’s failure to reflect on or discuss critical decision); see also William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the*

Part of the explanation for this tendency seems psychological. Hard ethical issues are stressful because they typically involve conflicts within the firm or between the firm and its clients. Closing one's eyes to them alleviates tension. Moreover, there seems to be a fear that explicit consideration and decisionmaking on such issues will commit the actors to positions that may turn out to be wrong. Deferring consideration seems to preserve flexibility for post hoc rationalization. Still another factor in some quarters is a culture of macho toughness that identifies ethical concerns with weakness.²⁰

Ethics teachers, of course, deplore this tendency. They encourage their students to articulate their reasoning on hard issues as clearly as they can. In this, they have an ally in risk management. A central tendency of the managerial philosophy that underlies risk management is the value of articulation. "Say what you do and do what you say" is a fundamental maxim of this philosophy.²¹ Articulation is valued in part because it induces reflection by the person who articulates, in part because it induces transparency so that co-workers can assess and deliberate about each other's performances, and in part because it helps people learn from each other. If a central tenet of the most ambitious forms of ethical idealism is that only the examined life is worth living, then the ethical idealist will find something to approve of in risk management.

To be sure, as Alfieri emphasizes, the examination contemplated by risk management sounds much less ambitious than the one contemplated by moral philosophy.²² Avoiding liability is a very small part of the ambitions the moral philosopher associates with the good life. But even if the adoption of these systems is prompted by pecuniary concerns, there is no reason why they cannot range more broadly. Law firms these days typically perceive other basic problems beside loss prevention. Many firms are struggling over issues of management structure and compensation. Many are having trouble recruiting and retaining associates. And while they may not be seen as comparably urgent, issues of race and gender diversity, pro bono commitment, and work-family balance are also on the agenda. Managerial efforts to address liability concerns will very likely overlap efforts to address these other issues. If the prescription

Bar's Temptations of Evasion and Apology, 23 *LAW & SOC. INQUIRY* 243, 259–67 (1998) (documenting the Bar's evasion of key issues raised by the banking regulators' charges against Kaye Scholer in the Lincoln Savings & Loan case); William H. Simon, *Wrongs of Ignorance and Accountability: Lawyer Responsibility for Collective Misconduct*, 22 *YALE J. ON REG.* 1, 17–20, 29–34 (2005) (arguing that the Bar's norms on corporate representation have been deliberately ambiguous).

20. See ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 101–61 (1998) (arguing that fear of commitment and a culture of toughness inhibit explicit consideration of ethical issues); Donald C. Langevoort, *The Epistemology of Corporate Securities Lawyering: Biases, Organization, and Behavior*, 63 *BROOK. L. REV.* 629, 647–55 (1997) (arguing that stress-driven psychological processes lead lawyers to ignore or misperceive ethical issues).

21. THE ISO 14000 HANDBOOK 196 (Joseph Cascio ed., 1996). For a discussion of this and related themes, see generally William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 37–64 (Grainne de Burca & Joanne Scott eds., 2006).

22. See generally Alfieri, *supra* note 1.

to self-consciously articulate and periodically reevaluate goals and policies to achieve them takes hold across any of these domains, it would not be surprising if it spread to the others. The ethics teacher ought to greet that prospect with at least qualified optimism.