The Role of Casuistry in Legal Ethics: A Tentative Inquiry

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The following essay is a work-in-progress. Professor Tremblay offers his unfinished ideas in this essay in an effort to invite reactions, criticisms, or research suggestions, all of which would aid him in refining his analysis of the subject. By presenting such works-in-progress, the Clinical Law Review seeks to provide a forum for sharing ideas and sparking debate.

**THE ROLE OF CASUISTRY IN LEGAL ETHICS: A TENTATIVE INQUIRY**

**PAUL R. TREMBLAY***

This Essay explores ethical decisionmaking within law practice "at the margins"—that is, when substantive, positive lawyering standards do not require a particular resolution to moral conflict. While lawyering is unique among professions in its elaborate designation of particular rules and mandates to be applied to questions normally considered "ethical," it at the same time leaves a substantial chunk of ethical decisionmaking up to the discretion of individual practitioners. The language, the methods, and the guidance to lawyers about how to make such calls, however, are impoverished and relatively unexplored.

Consider, for instance, how doctors approach ethical conflict. Compared to lawyers, physicians confront fewer circumstances in which ethical conflict is resolved *ex ante* through mandatory rules. The physician's code of ethics is shorter, simpler, and far less positive than are the equivalent codes applicable to lawyers.1 Doctors, though, face enormously complex and difficult questions of ethics and morals in their everyday practice. If medicine treated this discretionary zone as law does, doctors looking for guidance on discretionary questions would be told, essentially, "That's a tough one—but you can go either way. It's up to you." A brief review of the literature and clinical

* Associate Clinical Professor of Law, Boston College Law School. I owe a special debt of gratitude to my "philosopher" research assistant, John Ridge (Ph.D./J.D. Candidate, Boston College, 1995), who so patiently tried to help me to understand many of the concepts encountered in my casuistry research. Because this essay is a work-in-progress, the footnotes should not be taken as a comprehensive inventory or analysis of the relevant works in the field; rather, the footnotes are designed merely to identify the primary references.

materials on bioethics shows that medicine does not respond in this way. A glimpse into bioethics uncovers an enormously rich, developed, sophisticated, and thoughtful—though not universally accepted—pedagogical and theoretical tradition. Law’s ethics literature and pedagogy, by contrast, tend to focus on very different matters.

This Essay is a beginning and very tentative effort to cull from this rich bioethics discourse some insights which might aid lawyers to make more sophisticated ethical decisions at the margins. The Essay is incomplete and rather blunt, and will only highlight considerations which warrant much greater reflection. A later article, building on these ideas, will, I hope, investigate and develop more deeply the controversies and nuances that are present in this subject.

Before addressing the methods from bioethics which might be of some relevance, and in particular the importance of a “casuist’s” perspective on such matters, I must first briefly contrast the traditions and discourse that legal ethics represents. It is not an unsophisticated or primitive field by any means; its richness, though, is directed toward other endeavors.

While bioethics tends to focus most of its energies on theories and principles governing discretionary activity, legal ethics exhibits different priorities. The literature of legal ethics tends toward two types of moral/ethical questions. First, most legal ethics writing argues for or against some version of substantive law of professional responsibility. The recent Fordham Law School Conference on Ethical Issues in Representing Older Clients, as a ready and apt example, primarily focused on a series of recommendations about Model Rules changes and improvements. The American Law Institute’s Restatement of the Law Governing Lawyers is a similar endeavor which seeks principally to capture, rather than critique, formal mandatory standards of substantive law. Included within this effort to clarify and debate substantive law is an accompanying conversation about whether certain areas—or, by some arguments, legal ethics in general—ought to be governed at all, or left instead to individual discretion, but this conversation is infrequently connected to a developed method for ascertaining how to exercise such discretion.

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3 For this argument, see, e.g., Reed Elizabeth Loder, Tighter Rules for Professional Conduct: Saltwater for Thirst?, 1 GEO. J. LEGAL ETHICS 311 (1987); compare Reed Elizabeth Loder, Out From Uncertainty: A Model of the Lawyer-Client Relationship, 2 S. CAL. INTERDISC. L. REv. 89 (1993).

4 The most striking example of a rule-focused legal ethics inquiry of the sort I describe in the text would be the continuing debate within the profession concerning attorney-client confidentiality, a debate largely centered on the question of when Model Rule 1.6 should
The second broad area of professional responsibility scholarship and debate concerns the moral value of lawyering, and the validity of traditional ideas of role morality that have sometimes been used to defend lawyers' conduct. One might view this genre as providing the non-positive law perspective that I argue is missing within legal ethics, but it does not, by and large. The moral lawyering debate at its core confronts a question of civil disobedience. It responds with great insight to this issue: what ought a lawyer do when her professional obligation is “x” and her personal extra-professional moral obligation is “non-x”? Admittedly, this debate at times does slip into the positive law area, in the following way. Its focus on the moral value of lawyering at times generates arguments that some professional obligations ought not be imposed at all, i.e., should be left discretionary rather than mandatory, in order to avoid moral conflict. But again, this line of argument leaves either as a given or as a separate matter the ways in which the moral discretion questions might be answered.

There is, I know, a contingent among the “moral lawyering” writers that would seem especially committed to questions of discretionary ethics—I think in particular of Tom Shaffer and his unique perspective on values, community, and narrative, along with such scholars as Carrie Menkel-Meadow, Howard Lesnick, and other feminist and narrative critics of conventional ethical practice. I acknowledge this perspective but continue to feel that, their efforts notwithstanding, even these legal ethicists have not concentrated on, or succeeded in, crafting a workable and coherent process on which lawyers might rely when the usual standards leave the decisionmaking responsibility with the lawyer.

My basic argument here, then, is that neither of these two intellectual struggles in the existing literature on legal ethics offers a whole lot of substance to practicing lawyers searching for assistance in making their everyday ethical decisions when the prevailing standards al-

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5 The best example of this perspective is, of course, David Luban. See, for example, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1984), and especially Luban’s essay therein, The Adversary System Excuse, id. at 83; DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988). Many others have joined Luban (or preceded him) in this debate, including, but not limited to, William H. Simon, Deborah L. Rhode, Robert Gordon, Richard Wasserstrom, Stephen Ellmann, Gerald J. Postema, and Virginia Held.

low them freedom to choose among several possible actions. There is, however, a third focus of legal ethics which does seem to be an effort to be helpful in this way, but that focus is rather deficient in achieving that goal. The focus I refer to is this: each textbook or hornbook on Professional Responsibility or Legal Ethics, almost without exception, contains a chapter, or part thereof (usually at the very beginning), that addresses broad concepts of moral philosophy or ethical theory.\(^7\) A typical chapter will devote a few pages to the two central philosophical orientations, utilitarian and deontological, and perhaps include a discussion of other perspectives, such as contractarianism, rights-based approaches, hedonism, communitarianism, and feminism. One implication, and at times the explicit message, is that when the issues confronting lawyers become truly "ethical" (i.e., are not governed by the positive standards), this dose of theory can be helpful in guiding lawyers.

My contention is that this effort is certainly in the right direction, but almost wholly unhelpful, when one thinks about it, to practitioners in the field. We do need more explicit attention to how moral philosophy and applied ethics can guide conduct, but in ways which are more accessible and useful, if indeed such ways exist. Here is where the bioethicists' years of debate enter the picture.

A review of the field of "applied ethics," which is a subject both of philosophy literature and, more relevantly, of bioethics, offers a helpful historical progression.\(^8\) Applied ethics began as an early abstract and theoretical orientation of philosophers' efforts to apply their developed moral theories to "real world" problems. These first efforts to "apply" philosophy sought a somewhat scientific orientation, which expected to resolve ethical problems by a deductive application (presumably by "experts") of ethical theory to "the facts," which were to be provided by practitioners from the field. This application of theory to practice remained problematic, in large part because of the inability of the theorists to agree on anything resembling a universal theory of moral conduct. A deontologist might arrive at a different result from a utilitarian, and most practitioners would have no way to choose which "side" they ought to latch on to.


Bioethics has responded to this uncertainty and dissatisfaction by developing "mid-level principles" which attempt to avoid the metatheorizing of the philosophers, but which could nevertheless guide doctor decisionmaking. Most prominent, although certainly not the only example, has been the exposition of principles developed by Tom Beauchamp and James Childress in their *Principles of Biomedical Ethics*. Beauchamp and Childress conceive of four basic (and, within medicine, universal) principles: autonomy, nonmaleficence, beneficence, and justice. From these principles they develop "rules," which are somewhat more concrete. The resulting process remains very deductive and still quasi-scientific: principles (which were justified and not inconsistent with higher level theory) beget rules which when applied to facts offer answers.

Note the level of care and attention paid to the problems of moral choice by medicine's ethicists, compared to that within law. One might think that from this precedent legal ethics could draw comparable principles and begin to develop a similar discourse about ethics at the margins. But this history of the progression within bioethics is not yet complete—there is a later chapter which is important for our purposes. In very recent times a critical reaction to what has been termed "principlism" has arisen. The critics first disagree that principlism has offered guidance that is any more helpful to a practicing doctor than the metatheories of the past. What is missing from the principlism structure, the argument goes, is a way to reconcile competing principles (and in all ethical conflict some principles will compete). If reconciliation is sought from higher level theory, all of the earlier metaethics criticisms return. If reconciliation is sought from intuitive ad hoc balancing, then the entire undertaking is weakened, and its scientific pretenses exposed.

The recent critics offer a differing perspective, one which has ample applicability to law office practice, and one which attempts to accept and accommodate the difficulties which the two deductive

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10 It is true that this deductive method described in the text fits more aptly the methodology of the first three editions of the Beauchamp and Childress text. The newest fourth edition modifies its previous structurally deductive approach with explicit reference to the criticisms of the casuists and similar "inductive" ethicists. *Id.* at 17-20, 92-100. This is one example of the complexities of this field, which I hope to explore more fully in future work.

models demonstrate. I will refer to this new perspective as "casuistry," although it has other names within the literature (notably including "clinical ethics") and although casuistry has several forms.\textsuperscript{12}

The casuistry perspective contends that moral truth comes not from theory, applied in a deductive fashion to preordained facts, but in the reverse order—moral truth springs from facts, from the complex circumstances of concrete cases. As developed most deeply by Albert Jonsen and Stephen Toulmin, in \textit{The Abuse of Casuistry: A History of Moral Reasoning},\textsuperscript{13} as well as in several shorter journal pieces, casuistry suggests an alternative method of moral decisionmaking. Drawing upon a historical tradition which blossomed among the 15th and 16th century Jesuits, but which then was profoundly discredited as the commitment to scientific method gained favor, the casuists employ a distinctive method of case analysis, one which oddly enough is not very different from the American common law tradition. The Jonsen & Toulmin casuistic method begins with paradigm cases, the "easy" cases, which give rise to initial presumptions which carry weight in the absence of exceptional circumstances. (These paradigm cases are the equivalent of "precedent" in our common law.) From the paradigm cases one elicits "maxims," which are generally accepted but not universally applied statements of moral principle. In hard cases maxims will conflict, of course, and so the casuist's project is to use analogical reasoning, combined with a careful consideration of the \textit{particular circumstances} of the case at hand, to arrive at what is at best \textit{probable certitude} about the most appropriate course of conduct. This approach is avowedly Aristotelian. It embraces Aristotle's vision of \textit{phronesis}, that is, a commitment to practical wisdom and judgment as the only way in which virtue and ethics can be understood, and consistent with Aristotle, it rejects as descriptive of ethical thought the forms of thinking he calls \textit{episteme} (universalized, theoretical, or scientific knowledge) and \textit{techne} ("technique," or the technical reasoning associated with the applied arts). Principism and similar deductive methods of applied ethics, by contrast, assume a way of


\textsuperscript{13} Jonsen & Toulmin, Abuse of Casuistry, \textit{supra} note 11.
thinking about ethics which resembles more the ideas of *episteme* and *techne*.

One insight that arrives from this immersion into the bioethicists' casuistry is that, in several respects, this phenomenon *describes the present practice* of performing ethics at the margins in law circles. Or, perhaps put more modestly, the casuist's approach to ethical conflict resolution has far more in common with how lawyers exercise discretion than does a theory- or principle-based deductive method. My strong sense is that lawyers seldom employ in an explicit or developed way the deontological or utilitarian concepts they may have learned about in a Professional Responsibility (or undergraduate philosophy) course when they must decide, say, whether to reveal the intention of a client to commit an injurious crime, or whether to act aggressively in a negotiation. Lawyers are much more likely to rely on intuitive processes which balance harms and interests, in a decidedly un-rigorous manner. Their thought processes no doubt will include considerations which can be seen as "utilitarian" and "deontological," but practicing lawyers have neither the time nor the training to engage in a rigorous, philosophical analysis that an ethicist might perform. The casuist writers accept this implication for applied ethics, and understand "clinical ethics" as recognizing the considered judgments of philosophical tradition as descriptive of reflective case decisions of the past, rather than as "rules" to bind decisionmakers in the present.

If I am correct that the process described by Jonsen and Toulmin resembles that which occurs already in legal practice, then one benefit of a study of bioethical casuistry is to examine, critique, and make more explicit our own current practice. It is neither simple nor sufficient, however, to adopt the medical ethics use of this method for use by lawyers. The nature of ethical inquiry within bioethics is, in several respects, different from that within law. The casuistry literature is nothing if not context-sensitive, as might be expected, and the relevance of "fields" to the implementation of the method has been stressed by the clinical ethicists.

The casuists have crafted a concept of "special topics" (from Aristotle's *topoi*, or rhetorical topics) that are basic to, and indelibly present in, any ethical problem that presents itself in a particular field of conduct or profession. "Special topics" are elements which are invariant in their relevance to most decisions within a field but variable in their content. Put another way, a special topic will always be necessary to consider in making a judgment, but the context of the case at hand will affect how that topic matters in that case. For instance, bioethicists Jonsen, Seigler and Winslade, in their treatise *Clinical*
Ethics,14 a handbook for medical practitioners, conclude that the following special topics capture the central paradigms of medical ethics: patient preferences, medical condition, quality of life, and contextual features. A comparison of legal ethics to bioethics shows that in law the ethical difficulties are sometimes quite similar to those of medicine—the topic of patient preferences, for instance, considers questions of paternalism and autonomy which are all too familiar to lawyers—but in other ways the professions' ethical conflicts are notably different. Law presents far more frequently, for example, the tension of harm to third parties and systemic difficulties of just adjudication. There are few analogues within medicine. Also, some medical issues, such as the allocation of scarce resources and some choices to aid identified persons at the expense of unnamed others, are infrequent personal (as contrasted with institutional) issues for lawyers, except within the field of subsidized practice such as legal aid or legal services.

Those differences having been identified, one might still fruitfully seek to capture the "special topics" that arise in law, and begin to test their usefulness in assisting lawyers to come to more acceptable ethics resolutions. A possible list of "special topics" for law practice might include the following: client preferences; the ostensible purposes of the applicable law ("purposivism"); the likelihood and extent of harm to third parties; the adequacy of representation of one's adversary; the relative merit of the client's case; and (borrowing from Jonsen, Siegler, and Winslade) "contextual features," such as the economic position of the parties, the needs of the lawyers, the setting of the law firm or organization, and so forth.

Consider, then, the application of a casuistic method to one example from law practice: that of welfare fraud. A lawyer may discover that her client has engaged in deception of and misrepresentation to a welfare agency, and that the deception is ongoing, in that the person continues to receive an improper amount of benefits. For present purposes assume that eligibility is not improper, but the amount of benefits is. Because the effects of the fraud are not fully completed and in the past, and because the fraud is arguably continuing, the lawyer cannot consider the matter to be a past event which is entitled to full secrecy and irrelevant to the lawyer's current representation. The positive law perspective tells us that the lawyer cannot engage in, nor assist the client in, fraud.15 There are always

14 Jonsen, Siegler & Winslade, supra note 12.
questions in this kind of case, though, about whether a lawyer’s advocacy on one part of a welfare claim “assists” the earlier fraud. The process of predicting whether some future arbiter will interpret the standard as covering the lawyer’s actions (or, more likely, whether that action would ever be noticed) is a substantive law question which is not central to the ethics matter taken up here. Accompanying that process, though, is a parallel consideration (assuming one is willing to take the risks of proceeding amidst the substantive law ambiguity) of whether assisting someone who is engaged in fraud is “right.” This is the ethics question that matters here.

I suspect that most traditional approaches to this kind of ethical conflict would either be of little real use to the practitioner or would be too categorical. To decide the matter by reference to utilitarian theories can become mind-numbing in its complexity, for even if act-utilitarianism, despite its theoretical weaknesses, led one in a particular direction, rule-utilitarianism (another form of utilitarian calculation) might become bogged down in questions of which rules, and which utility, ought to matter. A deontological approach might end up being even more difficult for a busy lawyer to apply in a case like this, for example because the rights of public welfare recipients, of the indigent to be aided, and of taxpayers clash in very complicated ways. And if the lawyer sought to rely instead on principles and rules, the lawyer’s answers might be quite categorical: say, “lying is wrong.” That proposition may be perfectly correct, but the very reason this is a dilemma is that there are competing principles: “love thy neighbor”; “feed one’s children.”

A casuistry perspective offers fewer (or equally few) clear answers, but recognizes and embraces the reality that there are competing values. Rather than seeking a “principled” answer which might apply to all cases, the clinical ethics approach would explore the particular circumstances of this case, both those surrounding the original fraud, and those bearing on the actions the lawyer is intending to take now within the welfare case. Consideration of the circumstances and needs of this client, the fairness of the particular welfare regulations or scheme involved, the degree and amount of her “theft,” and the welfare decision or policy concerning which the lawyer’s services are now being used, ought to “count” in the decisionmaking process. This process may lead to less easy answers than a purported scientific/deductive method, but the answers ought to have more integrity and ought to fit better with our intuitive sense of justice, fairness, and morality.

The attraction to casuistry seems, for these reasons, to be compelling, but we must be satisfied that we are not embracing this method simply because it is accessible and fits well with other ideals of ethical
lawyering. There are complicated questions of moral truth-seeking here, questions which an Essay such as this can only begin to highlight. I am encouraged as I read the emerging bioethics trends towards casuistry, while at the same time I am intrigued by the remaining principlist critics of this method. Gnawing questions of relativism, self-interested decisionmaking, and parochialism remain to be debated. After all, there are powerful reasons why the term "casuistry" had, over the years, come to be known as a synonym for "sophistry." Jonsen and Toulmin have persuasively debunked that connotation, but the roots of the criticism remain as important caveats.

The most common and difficult of the conceptual problems that I foresee is discerning the role of theory, and of the usefulness of our rich history of moral theory development, to this endeavor. While this question is not without some controversy, it appears safe to assert that casuistry does not disregard the lessons of the last two thousand years of thinking about how one leads a moral life. There remains an important role here for theory, if a different one from that conventionally assumed. Theory helps capture the lessons that paradigm cases teach us—the theory, in that respect, comes from the cases, and summarizes their meaning, rather than the reverse. The fact that modern American culture values autonomy in a strong way, say, as compared to its commitment to the principle of beneficence, is important for a casuistic analysis of whether to intervene with a client whose decisions seem not to be maximizing ones. This point also suggests a further insight of casuistry, which is that it accepts moral value as rooted in a large way in the cultural and social context of the case. Unlike some theoretical efforts, case-based methods do not purport to reflect universal truths or immutable principles or balances.

Casuistry has enormous potential within progressive legal ethics. Like feminist ideas of thinking and interaction (but at the same time differing therefrom), casuistry accepts the inevitable importance of context. It supports an ethical stance which takes into account in a very important way such factors as race, poverty, powerlessness, and subordination. It encourages the teaching of ethics within clinical contexts in law schools, since it disagrees that ethics can be taught well with "A v. B" hypotheticals, stripped of all nuances, details, and feel-

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16 One brief example: In 1945, the then-prominent philosopher Edgar Sheffield Brightman wrote the following entry for "casuistry" in *An Encyclopedia of Religion*:

1) The application of ethical principles to specific cases. 2) Quibbling, rationalization, sophistry or an attempt to justify what does not merit justification; this meaning is often associated with methods used by Jesuits. See equivocation.

*(Quoted in Beauchamp & Childress, supra note 9, at 93.)*
ings. If the lessons of the casuists are correct, then the only true teaching of ethics at the margins will come within real cases.