This talk, originally written in late December, 2019, was submitted to the Oregon Bar Bulletin for distribution to Oregon's lawyers. I had long wanted to do a comparison of legal and philosophical ethics, and when I discussed the project with the Bulletin’s editor, it was greeted with enthusiasm. Several weeks later, it was rejected, “…for the very reasons that it needs to be printed.” “…The passion with which it is written will be seen as political, and that will offend many readers.” So here it is, and leaving aside that offending lawyers would seem to some to be a very good idea, see what you think.

There is a vast gulf between legal ethics and philosophical ethics. By the former we make a living; by the latter, a life. Legal ethics requires us to be competent, diligent, honest, dedicated, trustworthy—almost the same as the boy scout oath, leaving out the thrifty, courteous and kind parts. They regulate a profession wherein we act as fiduciaries, advocates and protectors of our clients. Thus we shouldn’t steal from them, lie to them, ignore them or sell them out.

From a philosophical standpoint, that is thin gruel. What duty do we have to the society as a whole; to future generations? What about our dedication to the metaphysical big three of justice, truth and beauty? A fundamental of nearly every ethical system is some form of the golden rule: do unto others as you would have them do unto you. As a life-long trial lawyer I know that the side with the most power routinely tries to bury the other with document dumps, outrageous, burdensome and expensive discovery requests, endless depositions, delays and misdirection. We pride ourselves on our art and the last thing we seek is the level playing field. The rule here is not the least bit golden; winning is what counts. What’s more, the justice system we serve is not really about justice-- it is about finality. It is the practical plumber patching the pipes so they don’t leak any more.

Law and ethics have traditionally played discrete and separate roles in our society. The law says you can or can’t and if you do or don’t you will be punished, fined or jailed. Ethics says you should or shouldn’t and if you do or don’t, your reward will be self-imposed (guilt, regret) or by society’s shit-list (shame, exclusion). That is all changing. Here’s why.

Truth

Truth telling is at the heart of moral instruction for most children. It is a patriotic good as well as a social one: George Washington is revered for confessing that he chopped down the cherry tree. Abe Lincoln is “Honest Abe”. We know that commerce is based on truth—that a dollar is worth a dollar, that a person’s word is her bond, that the contents of a prospectus are accurate. The law is equipped to deal with falsehood: one of the three exceptions to the absolute protection of the First Amendment (“Congress shall make no law…[regarding] speech, press, petition and assembly”) is fraud, forgery bribery and other similar untruths.

Those of us receiving religious education as children learned of another kind of truth, namely that of a revealed religion. Here the Torah, the Quran and the New Testament are similar in that God is declared to be the source of all truth. Moses sees God in a cloud and God proclaims himself to be “abundant in goodness and truth” (Exodus 34:6). “God is the Truth (Quran 22:6). “You shall know the truth and the truth shall set you free” (John 8:32). The pivotal exchange in Christianity is at Jesus’s trial when Pilate asks: “What is truth?” and Jesus responds that those who believe know the truth (John18:38).
The two kinds of truth coexisted for generations, the secular one being based on facts that were provable in court and the religious ones being a matter of belief based on religious conviction as protected by the First Amendment. Then in the first part of the twenty-first century, facts took a Nietzschian turn (Nietzsche being the philosopher who wrote that there are no eternal facts as there are no absolute truths). Reality and belief merged. History became what one wanted it to be. Facts were no longer persuasive. Facts were not facts. Truth became what comedian Stephen Colbert labelled “truthiness”: a belief that something is true based on intuition or perception without regard to evidence, logic, intellectual examination, or facts.

Ethics in a Post-Truth World

There can be no democratic government when two branches, the judicial and legislative, are based on telling the truth, and the executive branch, charged with enforcing the laws, is totally unacquainted with it. Witnesses are sworn to tell the truth in judicial proceedings and the jury is instructed to truthfully find the facts. Congressional witnesses are often sworn and falsehood can be punished by contempt of congress. Here is where legal ethics becomes relevant beyond our just keeping our licenses. ORS 9.460 lists the duties of an attorney to support the Constitution of the United States and this State, to employ only such means as are consistent with the truth and never seek to mislead the court or the jury by any artifice or false statement of law or fact.

Thus, while the rest of our citizens, and particularly those who have been elected and have chosen to place loyalty to a political party above loyalty to the Constitution, may choose to argue from a fact-free foundation, we have an obligation to the facts and the truth. And while one of the least endearing of our skills, that is, making an argument with absolutely no merit seem as if it has some, need not be entirely lost (we do have some duty to continue to annoy), ORPC 4.1 prohibits us from making false statements of law or fact. In short, both legal and philosophical ethics require a dedication to truth based on facts.

Sounds simple. Isn’t. Here are just a couple of impediments to ethical action. Stare decisis means the law is difficult to change. It gives certainty, which is important, but it also begs the question that should be asked, namely: is this how the law should be? Many of our laws are so ingrained and so unfair that people despair of getting anything other than screwed. Take for example, the thousands of pages of the tax code, written to benefit the least deserving. According to a Washington Post survey in December, 2019, about 400 of America’s largest corporations paid an average federal tax rate of 11.3 percent on their 2018 profits—roughly half of what they were supposed to pay under their 2017 tax cut. Ninety-one Fortune 500 companies payed no federal tax at all. Amazon paid an effective tax rate of 1.2% on revenue of $13 Billion plus it has $1.7 Billion in credits against future taxes.

My law school tax professor would applaud: “it is a game” he would say over and over in class. It is a highly immoral, thoroughly rigged game of pay to play. That is not what the law should be, and yes, I know that there can be dozens of counter arguments, as only we can make, why this is ultimately good for society, but it is an unjust society where the rich pay less than the poor.

Just one more impediment and then on to thinking about maybe getting around to perhaps doing something. Someday. Abraham Maslow’s oft-quoted observation that if the only tool you have is a hammer, everything begins to look like a nail is fitting in that we deal with every issue as if it were a political problem. Democracy under the Constitution we are sworn to protect is much more than
politics—in fact, politics is, or should be, a minor part of a functioning democracy. Instead of having the moral debates about what we value and how we would like our society to function, we simply hurl political epithets at each other. Should everyone have decent shelter, food, education, health care and individual dignity? If not, why not? Who is excluded and why? If we are clear on those values then we can tackle the incremental, and political questions of how we get there. Without the moral debate first, progress remains in the dumpster.

Other democratic (and moral) values that are in the lost and found are a sense of community, of common goals, of inclusion, trust and generosity of spirit, of respect for differences and giving a sucker a break, of recognizing that we can not know where the other person’s shoe pinches. We have forgotten the most critical of democratic principles: that everyone of us has something to contribute and it is the sum total of those contributions that makes a society strong.

**Toward a New Social Contract**

We need a new social contract—one that we think about, debate and collectively adopt that reflects how we want to live together. On Nine-Eleven when the terrorists brought down the twin towers, crashed into the pentagon and hijacked flight 93 President George W. Bush urged us to go shopping. I know his intent was to restore a sense of normalcy, but is shopping what defines us? What do we care about? What are we willing to die for? What do we want to leave as our legacy for our children? Do we want to keep living in silos where everyone has his own set of facts? Is lying the new norm for public officials?

These are moral issues that have to coalesce into a new common societal belief before they can be put into law. Laws don’t work without voluntary compliance—look at prohibition and the fifty-five mile an hour speed limit. If most people don’t voluntarily comply, a law is unenforceable.

If we are to have a new social contract it will not be the politicians who write it. It will be the singers and poets and artists who can best articulate where we are headed. It will be based on a widespread consensus that what we are doing in politics and national affairs is no way to live. It will start from the ground up—from local communities and groups who relearn how to listen to each other.

[Author’s note: the italicized material was not in the original article]. The reasons that artists and humanists will write the new social contract is that power comes from ideas. According to poet William Butler Yeats, “rhetoric is the argument you have with others; poetry is the argument you have with yourself.” A poem draws on everything the poet has ever seen, known, or experienced. It is the dark glass to self-understanding. Poetry is a quest to make sense of the senseless, to plumb mystery, uncertainty, and doubt. Poet Jane Hirshfield uses the analogy of an ocean swimmer waving. Those on the shored wave back, but the swimmer is not waving, she is drowning. The arts and humanities can enlist emotion as well as reason in making their arguments. Art is always first voice. You won’t find a good humanist or artist leaving the thinking to others and that is critical to the health of our society. What’s more, art confronts. It has moral authority to call out falsehood and pretention and injustice. In these days of value-free religion, this role is particularly important. Humanities and art educate our children to take risks, know themselves, survive failure and to try and fail again and to learn and be stronger. Arts and humanities foster creativity and curiosity and courage. And art give us hope. Through music, dance, visual art, books, poems, plays and film art can lower the heart rate, relieve stress,
comfort, reduce anxiety and just make us feel better. The humanities comprise the best thinking humans have done over all of our history. Why would we not want to absorb that wisdom?

W.D. Ross wrote a book called The Right and the Good in 1930 in which he explained that we have prima facie duties to other members of society including promise keeping, kindness, respect for personal dignity and the like. Prima facie means self-evident. How, you might ask, can there be self-evident duties when we are all operating with our own set of “facts”? My guess is that we are not all that different from each other if we could sit around a table and actually talk (and by that I mean listen).

What appeals to me from Ross’s thought is that these duties should be known to all and protected for the good of society. In our age of twitter and selfies and fifteen minutes of fame and total self-absorption, egos have metastasized into a social disease. But beyond ourselves is the inherent knowledge that what I should do cannot be separated from what is good for all of society. This is one of existentialist philosopher Jean-Paul Sartre’s main points.

The Lawyer’s Skills

While we should listen to the poets and singers, the skills we possess as lawyers can help lead us toward a new social contract and a renewed appreciation of truth-telling. Foremost of these skills is the ability to see both sides of an argument and therefore to mediate the most outlandish of claims. We are problem solvers. I always felt that no matter how much I enjoyed the combat of a trial, the fact that we were unable to resolve the dispute was something of a personal failure.

We are required to exercise independent judgment and as such are well positioned, if we choose to be, as peace-makers. We serve and advise non-profit organizations, many of whom exist to make our society more inclusive, compassionate and just. We can distinguish between self-interest and selfish interest. We respect confidentiality, one of the main ingredients of individual dignity. We are required by ORPC 3.4 to be fair to others and by ORS 9.460(4) to uphold the cause of the oppressed and defenseless. We are professional listeners, questioners and advocates.

These are but a few of the skills of our profession that, when turned toward the cause of a more healthy society, can unify legal and philosophical ethics. How ought I to live? In harmony is a good start: with my neighbors, my fellow citizens, my natural world and all of its creatures. In harmony with the metaphysical values of justice, truth and beauty. If anything in the moral universe is hardwired it is a fundamental sense of fairness. Let’s start there.

If I Got to Call the Shots

I have some suggestions of how we might make our society better. Some are ethical, some political. All are a pipe dream unless…..

1. Democracy is not a spectator sport and the way you get to love your country is to do something for it. Therefore, I propose National Service, for a year, for every person who attains the age of 18.

2. Everyone, that is each individual, each corporation, each business of any kind shall pay some amount of tax to our government each year. We all benefit from our government and we should all pay for it. Nobody gets by for free.
3. Everyone should have to, be eager to, sing the national anthem. Since when did our national song become a performance piece where we stand dumbly and listen to the latest dipsy doodles of a performer? Doesn’t matter if you can sing; get those words out as if you mean it.

4. On a prescribed day every year, everyone should be required to take the citizenship exam. Here are some sample questions: name one US Territory; who, under the Constitution, can veto a bill; name one state that borders Mexico; what does freedom of religion mean; who is Commander in Chief of the military; how many senators are there; what is one thing Benjamin Franklin is famous for; what year was the Constitution written?

5. One day per year should be a national no driving day.

6. Ethics instruction should be mandatory in school curricula.

7. Every five years, all corporations should have to prove that they have paid taxes and otherwise been responsible citizens to continue to do business in the United States. Disqualifying activities would be polluting, unfair labor practices, harmful products and the like.

8. Campaigns for political office would be limited to 10 weeks before the election and while a candidate could spend unlimited amounts, those expenditures could only be during that 10 weeks.

While none of these, if instituted, would fix what ails us, business as usual is not an option if we want to keep our democracy and protect our Constitution. Just because we can’t make it perfect doesn’t mean we can’t make it better. Artist Eugene Delacroix put it this way: “Artists who seek perfection in everything are those who can attain it in nothing.”

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