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### Rules, Story and Commitment in the Teaching of Legal Ethics

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# RULE, STORY, AND COMMITMENT IN THE TEACHING OF LEGAL ETHICS

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## INTRODUCTION

Law students, law teachers and practitioners often assume that legal ethics is mushy pap that the organized profession requires law students to study for public-relations purposes. How would it look to the man on the street if we did not require law students to study legal ethics? Garry Trudeau pointedly expressed this view some years ago in *Doonesbury*.<sup>1</sup> A lengthy series of episodes in that comic strip involved Joanie Caucus's law school experiences.<sup>2</sup> One day in the school cafeteria she asked her friend, Woody, about the utility of a newly required course in legal ethics.<sup>3</sup> Woody replied: "Nah—all that ethics stuff is just more Watergate fallout! Trendy lip service to our better selves!"<sup>4</sup>

There is historical<sup>5</sup> and empirical<sup>6</sup> support for Woody's skep-

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1. Garry B. Trudeau, *Doonesbury* (1975), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 1 (6th ed. 1995).

2. See GARRY B. TRUDEAU, *THE DOONESBURY CHRONICLES* (1975); GARRY B. TRUDEAU, *DOONESBURY'S GREATEST HITS* (1978).

3. Trudeau, *supra* note 1.

4. *Id.*

5. For recent general discussions of the history of legal ethics teaching, see MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 1, 5-28 (1980) (stating that law schools are "inhospitable" places for study of the professional and personal problems of life as a lawyer); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 33-38 (1992) (asserting that "[t]he conventional view on most faculties has been that education in professional responsibility is someone else's responsibility").

For snapshots in time, see George P. Costigan Jr., *The Teaching of Legal Ethics*, 4 AM. L. SCH. REV. 290 (1917); JULIUS STONE, *LEGAL EDUCATION AND PUBLIC RESPONSIBILITY: REPORT AND ANALYSIS OF THE CONFERENCE ON THE EDUCATION OF LAWYERS FOR THEIR PUBLIC RESPONSIBILITIES*, 1956 (1959); LEROY L. LAMBORN, *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY: A SURVEY OF CURRENT METHODS OF*

ticism. The thorough empirical study conducted by Ronald Pipkin in 1975-1976 showed that students perceived courses in professional responsibility "as requiring less time, as substantially easier, as less well taught, and as a less valuable use of class time" than other courses.<sup>7</sup> Since 1976, when Pipkin collected his data, the volume and complexity of case law dealing with the responsibilities of lawyers has exploded; new and more challenging textbooks have been published on the subject;<sup>8</sup> and the subject we refer to as "the law and ethics of lawyering" has become a half-way respectable field of academic scholarship.<sup>9</sup>

Yet despite these changes, legal ethics remains an unloved orphan of legal education.<sup>10</sup> "Serious scholarship" in legal ethics is still considered somewhat of an oxymoron.<sup>11</sup> Many law school faculties remain convinced that the subject is unteachable or be-

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INSTRUCTION IN AMERICAN LAW SCHOOLS (1963); EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER (Donald T. Weckstein ed., 1970); TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE (Patrick A. Keenan ed., 1979).

6. See Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 275 (arguing that law school experiences "desensitize[] students to legal ethics"). Based on data gathered in 1975-1976, Pipkin's study concluded that the "latent hierarchy" of legal education led law students to believe that legal ethics courses, because they were not taught in the Socratic method, were less important and less intellectually demanding. *Id.* at 262-65; see also KELLY, *supra* note 5, at 23-28; Rhode, *supra* note 5, at 39-41.

7. Pipkin, *supra* note 6, at 257-58.

8. See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (4th ed. 1995); GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, THE LAW AND ETHICS OF LAWYERING (2d ed. 1994); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (2d ed. 1995).

9. Terminology is not unimportant. For years a common name for the subject of legal ethics has been "Professional Responsibility." This term has two problems: first, it suggests that the subject is limited to the ABA code bearing that name; second, it is too easily transformed by students into the nickname "P.R.," which has an unfortunate established cultural meaning as: "public relations." We prefer "law and ethics of lawyering" as reflecting the full dimensions of the subject. In this Article, for purposes of convenience, we use the shorthand terms "legal ethics" and "ethics" to refer to our topic.

10. See *supra* note 5.

11. Many first-tier law schools have no faculty member or at least no senior faculty member whose research centers on questions of legal ethics. See generally Rhode, *supra* note 5, at 40 (stating that ethics courses are usually taught by junior faculty and outside lecturers). In our conversations with members of those faculties, a persistent refrain is that faculty members see most of the scholarship in this subject as being below the school's standards.

lieve that it is not worth teaching.<sup>12</sup> The lowly status of legal ethics within the larger law school community is a challenge facing both those who teach basic or advanced courses in this subject and those who seek to "mainstream" matters of professional responsibility.

In most law schools today legal ethics occupies a minor academic role as a one- or two-credit required course in the upperclass years, often taught by adjuncts or by a rotating group of faculty conscripts.<sup>13</sup> A few law schools, including some of the more prestigious ones, require virtually no course work explicitly dealing with what lawyers do, or how the profession is structured and regulated; nor do their curricula require teaching the legal and ethical norms that govern lawyer conduct.<sup>14</sup> These schools maintain that instruction in these topics "pervades" the curriculum, but, when questioned, professors at these schools often concede that they feel uncomfortable dealing with the

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12. See *id.* at 39-41 (discussing student reactions to ethics courses and the views of some faculty that the subject is worth teaching but that only the rarest of individuals can make the course work).

13. See *supra* note 6 and accompanying text.

14. As of the academic year 1995-1996, based on statements in academic catalogues and conversations with law school registrars, a number of major law schools require little or no instruction in legal ethics: Boston University School of Law (no required course; in the first, second, and third years, three days will be devoted to lectures and discussion groups concerning professional ethics and responsibility) BOSTON UNIVERSITY SCHOOL OF LAW 1994/95 at 17; University of Chicago Law School (a 1.5 credit course is required prior to graduation); Columbia University School of Law (a five-day intensive course, receiving one credit and graded on a pass-fail basis, is required at the beginning of the third year) COLUMBIA UNIVERSITY SCHOOL OF LAW BULLETIN 1996-97 at 52; Duke University School of Law (a five-day intensive course, receiving one credit and graded on the same basis as other courses, is required during the January intersession of the first year) 67 BULLETIN OF DUKE UNIVERSITY 1995-96 THE SCHOOL OF LAW No. 6 at 57; University of Michigan Law School (students are required to have exposure to legal ethics in some manner, either by taking an elective two-credit or three-credit course in the subject, by taking one of a number of electives that have some legal ethics content, or, in the current year, by a five-day, one-credit "bridge week" involving all first-year classes and graded on a pass-fail basis) 23 THE UNIVERSITY OF MICHIGAN LAW SCHOOL BULLETIN No. 5 at 12, 38, 50 (1993-95); Stanford Law School (no required course; first-year faculty are encouraged to include a module on legal ethics in their courses); and Yale Law School (once-a-week lectures or presentations are required during the first term of law school on a non-credit, ungraded basis) 90 BULLETIN OF YALE UNIVERSITY No. 8 at 21 (1994-95). Note that none of the seven schools require that each J.D. student take at least two semester hours of instruction in legal ethics.

subject and, thus, do not devote substantial course-time to its study.<sup>15</sup> The "pervasive method," at most schools that profess to use it, actually is little more than tokenism designed to satisfy the American Bar Association (ABA) accreditation requirement, to which we now turn.

The ABA requires each "approved" law school to provide each student "instruction in the duties and responsibilities of the legal profession."<sup>16</sup> First adopted in August, 1973, in the midst of the Watergate disclosures, this requirement has never been interpreted and is infrequently referred to or enforced in the accreditation process.<sup>17</sup> The professional responsibility requirement is the only substantive teaching requirement imposed by the ABA.<sup>18</sup>

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15. See Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 139, 142-43.

16. The ABA Standards for the Approval of Law Schools provide:

The law school shall: . . . require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Model Rules of Professional Conduct, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction.

ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS Standard 302(a)(iv) (1995). Only 13 states permit a person who has not graduated from an ABA-approved law school to sit for the bar examination, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR & THE NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1995-1996, and in a number of those states, the opportunities for alternative entry are severely circumscribed. *Id.*

17. See ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS (1995) (containing no interpretations of Standard 302(a)(iv)). One of the authors, who was engaged for a number of years in reviewing ABA accreditation reports, can recall only a few references to the professional responsibility standard. The other provisions of Standard 302(a)(i)-(iii), requiring that instruction in professional skills be offered, are discussed at length in every accreditation report and are the subject of several interpretations. The difference in treatment is perhaps due to the ABA practice from 1985-1995 of including a clinical instructor on most site inspection teams, a group that takes a strong interest in professional skills offerings.

18. The other provisions of the ABA Standards for the Approval of Law Schools require merely that a school "offer . . . instruction" in certain areas—"subjects generally regarded as the core of the law school curriculum," "one rigorous writing experience," and "professional skills"—but do not require that students actually take such instruction. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS Standard 302(a)(i)-(iii) (1995). For a recent discussion of developments in law school accreditation, see

Should the ethics teaching requirement be scrapped? We consider that question in Part I. Although we ultimately conclude the rule should be maintained, we believe this fundamental question must be asked. Given the disdain many legal academicians have for legal ethics,<sup>19</sup> we find it more than a little curious that no one has suggested abandoning the requirement. In this Article we ask the question that the skeptics have failed to ask. In the process we will examine the paradox they have created by failing to suggest the elimination of a requirement that they are so willing to scorn.

After concluding that the ABA and law schools should require ethics instruction, we turn in Part II to the questions of what is appropriate subject matter for ethics courses and when they should be taught. We emphasize the nature and importance of rule, story, and commitment throughout this Part, as we do throughout Part I. With Geoffrey Hazard we co-authored a casebook on legal ethics and the law governing lawyers.<sup>20</sup> Thus our view on what should be taught will not surprise people familiar with that book.<sup>21</sup> In Part II we try to make explicit what is implicit in that other work—the reasons we designed our book as we did and the lessons we hoped to teach through the material we included. We also address the question of *when* students should learn *what* concerning legal ethics. We conclude that some first-year instruction is important, but that, after the first year, an additional ethics course is also necessary. The required courses should be supplemented with a well-designed and deliberate effort to teach ethics through the pervasive method in upper-level courses.<sup>22</sup>

Finally, in Part III, we turn to the question of who should teach legal ethics, a neglected topic within which commitment and character loom large. Although the silence on whether ethics should remain a required course is somewhat unexpected, the silence on what kind of person should teach legal ethics is all-too-predictable and, at the same time, enormously problematic. The

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*Symposium on Accreditation*, 45 J. LEGAL EDUC. 415 (1995).

19. See *supra* notes 11-15 and accompanying text.

20. HAZARD, ET AL., *supra* note 8.

21. See *id.*

22. See generally Rhode, *supra* note 5.

subject that dare not speak its name within the walls of the academy is the character of academics. We believe nonetheless that we must discuss the character of those who purport to teach ethics, indeed the character of those who purport to teach anything, and so we end by speaking of character and apologize in advance if we offend anyone by mentioning the unmentionable.

### I. SHOULD THE ETHICS REQUIREMENT BE SCRAPPED?

As we have suggested, there is some truth to the proposition that the ABA introduced the ethics requirement in response to the profession's embarrassment about the numbers of lawyers who acted illegally and otherwise reprehensibly during the Watergate affair.<sup>23</sup> This genesis has some important implications, discussed later, for what should be taught in legal ethics courses.<sup>24</sup> Putting historical considerations aside for the time being, we propose to take a functional approach to the ABA's ethics requirement. Given the trouble this course presents for law schools, the difficulty of finding teachers capable of holding students' respect while teaching the course, and the number of serious academics who doubt its significance, we wonder whether it might be time to scrap this requirement.

An introductory word about the scope of our inquiry is in order. One could approach this question by asking what business the ABA has requiring anything of any law school. That is a legitimate inquiry, worthy of discussion, but we do not address that question. We begin instead by taking for granted the present structure of law school accreditation with all its attendant problems. Given that structure and the importance many states and many people in the profession place on students having attended an ABA-approved school, we ask whether it makes sense for the ABA to impose instruction in legal ethics as its one

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23. Tom Shaffer attributes the ethics requirement to professional embarrassment flowing from the Watergate disclosures. See THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 1-5 (1991). "Legal ethics owes as much to Richard M. Nixon as it does to the American Bar Association. . . . The criminal politics that destroyed Mr. Nixon's presidency summoned American lawyers to a serious, systematic curiosity about the morals of their craft." *Id.* at 1. See also Trudeau, *supra* note 1.

24. See *infra* notes 100-01 and accompanying text.



substantive course requirement.

We start with a simple observation that the rule exists and that its mere existence carries important implications. As an initial consideration, repealing a rule is an act of significance. To provide an example from a different context, Sanford Levinson has argued that the Fifteenth Amendment to the Constitution is unnecessary given modern constitutional interpretation of the Fourteenth Amendment.<sup>25</sup> Nonetheless, Levinson recognizes that his assertion differs greatly from advocating that the Fifteenth Amendment should be repealed. The act of repeal would, logically, signify some doubt regarding the principle embedded in the Amendment, accompanying rhetoric notwithstanding. It seems apparent that any successful move to repeal the Fifteenth Amendment would inevitably change our interpretation of the Fourteenth Amendment, and thus our understanding of the Constitution. Such is the way law works. However superfluous the Fifteenth Amendment might seem to some constitutional scholars, one would be hard-pressed to find any of them who would seriously argue for its repeal.

To suggest repealing the rule requiring legal ethics instruction, based upon no more than the claim that the rule is superfluous, would be unconvincing. A more appropriate and persuasive argument for repeal should rely on a claim that requiring ethics instruction is intrusive, burdensome, and wrong. Surely, one might hope, we can amend error and repeal the rule without the sky falling down. Here, however, the message from *Doonesbury* becomes important.<sup>26</sup> Legal academics, and perhaps many lawyers, might secretly believe (indeed, profess to *know*) that legal ethics is just so much rubbish, but silence about the rule is maintained for the benefit of appearances. The public would misread what we intended to do if we abandoned the requirement. The average citizen might think that the profession did not care about the honesty and integrity of lawyers. Of course, within the academy we could tell ourselves that the

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25. Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 268 n.43 (1985) (asserting that the proposition that voting rights proceed from the Fourteenth Amendment makes the Fifteenth Amendment superfluous).

26. See *supra* note 1 and accompanying text.

abandonment of the rule demonstrated no such thing. It merely demonstrated (now, here comes the difficult part) that "... ." We invite the reader to complete that sentence.

For example, we could tell ourselves that the repeal merely demonstrated that ethics cannot be taught to students of such advanced years whose personal ethics are fully developed. There are, however, two problems with that answer. First, empirical and anecdotal evidence suggests otherwise.<sup>27</sup> Second, even if it were true that instruction, discussion, or analysis cannot improve personal ethics, the subject of legal ethics is not coextensive with the subject of personal ethics. The restrictions on a lawyer engaging in a business transaction with a client,<sup>28</sup> the rules on safekeeping client property,<sup>29</sup> and the nuances of conflicts of interest<sup>30</sup> are not matters that law students should be

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27. The empirical evidence and theoretical justification are ably summarized in Rhode, *supra* note 5, at 42-50. Rhode concludes that the subject is so central to effective law practice that it should be required of all students, that there is substantial evidence of "some modest relationship between moral judgment and moral behavior," and that "[c]onduct can also be affected by making individuals aware of ways that pressures for conformity, structures of authority, and diffusion of responsibility skew judgment." *Id.* at 47. She also notes that good teaching can avoid the extremes of moral relativism, on the one hand, and patronizing indoctrination, on the other. *Id.* at 48-50.

28. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (1992); see also *In re Neville*, 708 P.2d 1297 (Ariz. 1985) (censuring a lawyer for his failure to give full information to a client who was an experienced real estate trader and who had been represented by the lawyer in various real estate deals for over ten years); *Sexton v. Arkansas Supreme Court Comm.*, 774 S.W.2d 114 (Ark. 1989) (suspending the license of an attorney who borrowed money from his client without fully disclosing the speculative nature of the transaction and the risks of nonpayment); *In re Smyzer*, 527 A.2d 857 (N.J. 1987) (disbarring a lawyer for convincing a client to invest proceeds from the sale of her home in a holding company without disclosing his interest in the company).

29. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15; see also *In re Velasquez*, 507 A.2d 145 (D.C. App. 1986) (granting reciprocal disbarment of a lawyer who deposited personal and business funds into trust account to conceal funds from creditors); *Attorney Grievance Comm'n v. Dacy*, 542 A.2d 841 (Md. 1988) (suspending lawyer for making temporary transfers between bank, lawyer's personal account, and escrow account during representation of financial institution in real estate settlement matters).

30. Our coursebook devotes two lengthy chapters consisting of 235 pages of text, 14 principal cases, and numerous notes to this important and complex subject. HAZARD ET AL., *supra* note 8, at 619-854. A lawyer's duty to avoid conflicting interests can be introduced in a three-credit ethics course, but full treatment would require a separate course.

expected to intuit based on their otherwise fully developed moral character, however good that moral character might be. Further, it is not sensible to suggest that we should not teach the design and performance of institutions of justice, the role of lawyers in those institutions, and the availability or nonavailability of lawyers to large sectors of the populace, based on some claim that character cannot be molded. Note that the ABA Standard requires instruction on the "history, goals . . . and responsibilities of the legal profession" as well as its ethics codes.<sup>31</sup> Repealing the rule concerning ethics teaching simply cannot be justified by the claim that there is nothing there to teach.

Alternatively, perhaps repeal could be explained by the sorry track record law schools seem to have at addressing these issues. However much the subject may have developed since Pipkin's study,<sup>32</sup> our many conversations with faculty at law schools across the country convince us to report unhappily that student response to many legal ethics courses mirrors the results of Pipkin's 1976 study: Students perceive ethics courses as easier, less well taught, and a less valuable use of class time than most other instruction.<sup>33</sup> Is that not enough of a reason to repeal the requirement?

It may surprise our readers to learn that we are tempted occasionally to answer that last question in the affirmative. In general, we oppose external bodies mandating curricular requirements for schools of higher education. Overcoming that presumption requires a strong justification. The results of more than twenty years of required ethics instruction are mixed. Because so many law schools have not taken the requirement seriously, merely giving it lip service, and because the ABA has acquiesced in this neglect by not enforcing its rule, the ethics instruction has frequently been trivialized.<sup>34</sup> The related requirement that stu-

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31. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS Standard 302(a)(iv) (1995).

32. Pipkin, *supra* note 6.

33. See, e.g., Rhode, *supra* note 5, at 40-41.

34. Although the ABA has no formal non-enforcement policy, such an informal policy can be inferred. The ABA countenances schools with no separate ethics course, see *supra* notes 13-18 and accompanying text, and exclusive reliance on the pervasive approach is ineffective or insufficient. See Carrie J. Menkel-Meadow & Richard A. Sander, *The Infusion Method at UCLA: Teaching Ethics Pervasively*, LAW &

dents pass a multiple-choice examination that tests knowledge of the ABA ethics codes also leads many students to view the course solely as a bar preparation opportunity.<sup>35</sup>

Making students sit through courses they do not want to take troubles us in and of itself. Even more troubling to us is that the exercise may undermine rather than advance ethical sensitivity and behavior, i.e., promote a form of "anti-ethics." Exposing a captive audience of students to pedestrian and unchallenging instruction in ethics may produce negative results: numbness to ethical difficulties of practice, and, far worse, a cavalier attitude toward the responsibilities lawyers have to clients and the public. Given our belief that democracy depends to some degree upon lawyers fulfilling their designated roles with integrity and diligence, we believe it is shameful that law schools should tolerate the teaching of anti-ethics. What tempts us to suggest abandoning the rule on teaching legal ethics is that many law schools and the ABA tolerate indifferent teaching of the subject, maintaining the course requirements largely as a means of reassuring the public that the profession cares about ethics.<sup>36</sup>

Suggesting that a requirement be abandoned because some or many law schools teach this important subject abominably rests on an implicit premise: Either the subject is unteachable or the law schools and the profession just do not really care about this area of study we call legal ethics and, consequently, will never bother to teach it correctly. Because we know that the subject is as teachable as nearly everything else dealt with in the law school curriculum,<sup>37</sup> we believe that the public rightly would perceive that abandoning the ethics requirement was a statement that those who train lawyers—a significant portion of the profession—are uninterested in exposing law students to a serious consideration of the responsibilities of lawyers, either as those responsibilities currently exist or as they should or could be.

What we have demonstrated thus far is that a rule by itself

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CONTEMP. PROBS., Summer/Autumn 1995, at 129, 135 (stating that "we should not rely on the infusion method to teach legal ethics").

35. See Rhode, *supra* note 5, at 40-41.

36. See *supra* notes 10-15 and accompanying text.

37. See *supra* text accompanying notes 27-30.

tells us very little about the "law" or the normative understanding of the community that professes to have such a rule. The ethics requirement does not mean that law schools take the subject seriously; promulgation of a rule does not by itself bring about the consequences implicit in the rule's purpose.<sup>38</sup> One must understand the stories attached to this rule—the stories constituting the community's understanding of what the rule means—to grasp the meaning of this bit of "law." Unfortunately, many of these stories undermine the rule's import. They are stories about the rule being a cheap public relations move on the part of a profession suffering much public criticism.<sup>39</sup> They are stories about "gut" courses taught by adjunct-professors more interested in telling war stories than engaging in legal or ethical analysis.<sup>40</sup> They are stories that proclaim that the rule itself is a sham—a disgraceful state of affairs.<sup>41</sup>

Of course, there are counter-stories alive within the law school community. Stories told by a lively band of teacher/scholars who devote much of their academic careers to the subject of legal ethics.<sup>42</sup> These scholars, however, remain for the most part outside the mainstream. At many prestigious law schools, we have heard faculty members explain (unconvincingly, in our view) why their school has no such person on board: They cannot find or hire any scholar of quality in this subject. The stories told by committed ethics teachers, held in such low esteem by the "haves" in our profession, are unlikely to dominate anytime in the near future. Nonetheless, these counter-stories are impor-

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38. See *supra* notes 16-18 and accompanying text.

39. See, e.g., Grant Uvifusa, *Who Do We Trust?*, READERS DIG., Jan. 1993, at 109 (citing a Harris poll that indicated that only 25% of Americans gave lawyers' moral and ethical standards a positive rating).

40. See Rhode, *supra* note 5, at 40.

41. See, e.g., Pipkin, *supra* note 6; Trudeau, *supra* note 1.

42. See, e.g., SHAFFER, *supra* note 23, at 21-24 (describing a number of such teachers); see also Walter H. Bennett, Jr., *The UNC Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 173, 174 & nn.3-4; Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 193, 199 & n.27; David B. Wilkins, *Redefining the 'Professional' in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 241, 247-51.

tant, which is why we write on this subject.

The counter-stories, those that place ethics at the center of legal education and celebrate the richness and complexity of the subject, are important because they challenge accepted understanding. They help reveal the poverty and shame of prevailing conceptions and thereby undermine accepted understandings. Would we really be better off, more proud of our calling and the schools of which we are a part, if no one in the academy took seriously the idea that legal ethics was a subject of importance? Few would answer that question in the affirmative. Academic snobbery notwithstanding, most law professors want to believe that they belong to a system that cares about the integrity and behavior of the lawyers that it produces. We would like to think that we are part of a process that at least aims to produce lawyers of whom we can be proud—lawyers who will not disgrace us by disgracing themselves. The counter-stories told by the ethicists help keep that hope alive.

The import of a rule (such as the requirement that law schools teach ethics) or a story (such as one showing that ethics is a rich subject, central to the study of law) rests upon the commitment demonstrated to the rule or the story. Who risks what in the name of the rule? Who takes what action in the name of the story? The commitment of the legal academy to the rule requiring legal ethics is embarrassingly low.<sup>43</sup> At many schools any teacher will do, whether or not the teacher is a full-time academic, dedicated to the subject, or engaged in scholarship on it.<sup>44</sup> No law school would think of taking the same approach to the staffing of civil procedure, contracts, constitutional law, or any other subject that is viewed as part of the "core curriculum." Anecdotal reports also indicate a casualness with respect to the materials used or even whether reading is required at all. The existence of so many one- or two-credit ethics offerings (and even no-credit requirements), in a domain in which core subjects are given three to six credits, also demonstrates the low estate of the course. We might pass off the indifference to the materials used to teach the subject as honoring the principle of academic

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43. See *supra* notes 10-15 and accompanying text.

44. See *supra* notes 13-15 and accompanying text.

freedom, but we cannot similarly dismiss the casualness regarding teacher selection and the low credit hours.

The excuse that full-time teachers dedicated to teaching and scholarship in the field cannot be found will not do. The market somehow produces highly qualified people to fill tenure-track teaching positions for the courses that require them. We do not hold unlimited faith in the invisible hand of the market, but we recognize its operative power when law teaching positions are in large demand, as is the case today.<sup>45</sup> That same invisible hand, we believe, has created the dearth of credible people in this subject. Put simply, it is not a career-savvy move for a young person entering the law teaching market to advertise herself as dedicated primarily to ethics. It may be permissible to express some willingness to teach legal ethics, but too much enthusiasm is dangerous. One would not want to be mistaken for a simpleton by demonstrating deep interest in a subject held in such low regard.

Coercion can increase commitment. It is often easier to conform than to fight. The ABA, if it cared to enforce its requirement, could insist that full-time faculty teach the course. Alumni dissatisfied with their own shoddy ethics training could dedicate chairs to the subject or otherwise exert influence to change current practice. Deans, who now have to puff and dissemble to accreditation teams, might instead use their influence to set the hiring of ethics teachers and the teaching of the subject as a priority. Such efforts, however, would require care and commitment on the part of those actors.

Embarrassment can also provoke change, which in part explains why we write this and employ a provocative tone. The lying about legal ethics should stop—a simple proposition and one we take as unassailable. If the lying continues, a case for repealing the ethics teaching requirement can be made. Let the public and press read that move as an expression of our disinterest toward the integrity of the lawyers we produce. The truth

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45. Adam Smith referred to the market forces governed by the notions of supply and demand as "an invisible hand." See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 456 (R.H. Campbell et al. eds., 1976) (1776).

would then be out.

Why should law faculties, deans and the organized profession commit to teaching legal ethics and teaching it well? The affirmative case for enforcing and caring about the rule requiring the teaching of ethics warrants brief statement. First, the widespread assumption that law students will learn what they need to know about the law of lawyering, the regulation of the legal profession, and the moral aspects of being a lawyer by a process of exposure to law school is clearly wrong. What law students need to understand about the law and ethics of lawyering does not occur naturally and pervasively throughout the curriculum without much special planning, attention, and monitoring. As Deborah Rhode put it, this *laissez faire* position toward incorporating ethical instruction with the rest of the curriculum is difficult to reconcile with the available evidence about what actually happens.<sup>46</sup> In the 1950s, for example, students at nationally accredited law schools reported that only a minute fraction of curricular offerings introduced ethical issues into discussion.<sup>47</sup> Rhode's recent survey of 138 casebooks in fourteen subject matter areas published by the three leading casebook publishers "reveal[ed] only a small minority of texts that [gave] substantial attention to issues of professional responsibility."<sup>48</sup> Rhode found that the coverage varied somewhat by subject matter (e.g., civil procedure texts addressed more ethics issues than contracts texts), was often confined to a reprinting of some bar rules, and that the median coverage of ethics issues per volume was 1.4% of total pages.<sup>49</sup>

Second, the law of lawyering affects everything that a lawyer does from the first day of practice to the last. Viewed in practical terms, this body of law is more important to lawyers than any other subject matter in the law curriculum. Many law graduates never deal with much of the legal doctrine that they learned as part of the required curriculum, for example, future

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46. Rhode, *supra* note 5, at 35-36 (stating that there is reason to doubt how pervasive ethical instruction really is).

47. See KELLY, *supra* note 5, at 15 (stating that the extent of pervasive teaching of ethics was minimal).

48. Rhode, *supra* note 5, at 41.

49. *Id.* at 41 n.52.



interests, but every law graduate who practices law needs to know the basic elements of the law of lawyering.<sup>50</sup> An understanding of the system through which society grants access to law and legal institutions and of the lawyer's role in that system is as central to legal training as the society's concepts of contract or property law.

In every field of practice, lawyers encounter fundamental ethics issues—prohibited assistance, confidentiality and loyalty.<sup>51</sup> Understanding this body of law is a prerequisite to the moral reasoning and moral choice that flow from legal rules that confer discretion upon the lawyer. Where the ethics rules require or prohibit certain conduct, a lawyer's decision to disobey should come from conscientious deliberation and choice, not blithe ignorance. Critical reflection upon and reform of legal rules and institutions that regulate lawyer behavior rest upon knowledge of this law and of the regulatory structures that administer it.

Third, despite the doubts previously mentioned, solid evidence shows that exposure to professional ethics instruction can serve to heighten ethical sensitivity and may increase student capacity for reflective moral judgment.<sup>52</sup> Most law students lack formal exposure to moral philosophy; they also tend to be uninformed about the history and sociology of the legal profession and of other professions here and abroad.<sup>53</sup> Exposure to a wide range of illustrative problems in the context of moral traditions, the law of lawyering, and other relevant knowledge advances the ability to recognize ethical issues and the capacity to engage in critical reflection concerning them. Questions of central importance are addressed on both the personal level of "What kind of a lawyer do I want to be?" and the collective level of "What kind of profession do I want to serve?" The personal dimension addresses choices such as area of practice and lawyer role, for example, advocate or counselor, as well as choices of behavior within a particular subject matter area or professional role. The

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50. *Id.* at 43.

51. *Id.*

52. *See supra* note 27.

53. *See Rhode, supra* note 5, at 43.

collective dimension addresses choices that the profession and society must make concerning the content and extent of professional regulation, the structural arrangements controlling the availability of lawyers, and similar matters.

Professional ethics consists of the ideals and norms of a historically situated group, understood and mediated through institutions and practices.<sup>54</sup> Professional ethics differs from personal ethics, although personal ethics are important. Legal ethics is not moral philosophy, the sociology of professions, or economics, although they can contribute to understanding professional ethics.<sup>55</sup> Professional ethics transcends and informs such essential elements of good practice as skills or craftsmanship. Legal ethics is a field of independent moral complexity arising out of the tradition and practice of lawyering in the American republic.<sup>56</sup> Applied economic analysis illuminates some aspects of the subject, especially the regulatory structures affecting the availability, cost, and quality of service.<sup>57</sup> Supply and demand in competitive markets, barriers to entry, the concept of externalities, and the economist's theory of agency costs are essential to understanding the market for legal services and major dimensions of the lawyer-client relationship.<sup>58</sup> Similarly,

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54. See ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187-203, 220-25 (2d ed. 1984) (articulating an Aristotelian concept of virtue in which complex forms of human cooperative activity—"practices"—develop standards of excellence in the internal goods of the particular practice, such as that of practicing law; and in which institutions, such as the organized bar, can assist individuals in the acquisition of habits and virtues required for excellence in that practice); THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 296-97 (1987); see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (addressing professional ethics in the particular context of the legal profession).

55. See Wilkins, *supra* note 42, at 242-43, 247-57 (defining legal ethics and relating it to other disciplines).

56. See KRONMAN, *supra* note 54.

57. See, e.g., HAZARD ET AL., *supra* note 8, at 439-43 (presenting a game-theoretic analysis of abusive litigation tactics); *id.* at 532-34 (discussing the economic incentives of contingent fees); *id.* at 539-43 (addressing the effects of the American rule on who pays the costs of litigation); *id.* at 934-36 (analyzing the supply and demand for legal services); *id.* at 955-56 (explaining market imperfections in the delivery of legal services); *id.* at 978-79 (considering the effects of lawyer advertising).

58. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 469-70, 588-90 (4th ed. 1992) (describing how markets for legal services operate, and the social effects of various models of the legal marketplace).

feminist and critical theories offer useful perspectives on many aspects of the subject.<sup>59</sup> But the heart of legal ethics—the extent to which obligations to the courts, third persons, and the legal system should constrain lawyers' behavior on a client's behalf is a normative domain flowing from American political traditions and legal practice involving the pursuit of public good through institutional arrangements.<sup>60</sup>

Stephen Bundy has summarized some of the reasons why requiring exposure to legal ethics is essential to a sound law curriculum:

[A] lawyer cannot accurately grasp the contours, significance, or potential for reform of U.S. law without understanding the core material of legal ethics. That material includes, at a minimum, the role of lawyers in making, shaping compliance with, and enforcing the law, this country's increasingly controversial attachment to the adversary system, and the circumstances under which actors have access to legal counsel or advocacy. A legal ethics course is also the natural setting to discuss the policy preferences that underlie our nation's perennial (and presently heated) national debates about regulation, litigation, and the role of lawyers. Those include our continuing national preferences for weak, poorly funded, and highly politicized governmental and judicial authorities, for litigated, rather than consensual, solutions to problems of governance, and for political and legal processes dominated by private parties and their lawyers. Finally, the legal ethics course offers students a chance to consider potentially impor-

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59. Carol Gilligan's emphasis on maintaining and building relationships provides an important example. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 24-63 (1982); Stephen Ellmann, *The Ethic of Care As an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993) (applying Gilligan's ethics of care to the practice of law); see also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (discussing feminist scholarship and the legal profession); Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994) (discussing women's professional roles and relationships).

60. In a series of historical articles on American legal education, Paul D. Carrington has shown that pursuing the public good was a central aim of legal education from the earliest days and at least through the 1950s. See, e.g., Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691, 695-701 (1995) (noting that perhaps the most vital function of university legal education was to prepare graduates for public responsibilities).

tant modes of legal regulation—such as selection on the basis of personal character, professional socialization, reputation, and professional discipline—that they will not encounter elsewhere in the curriculum.<sup>61</sup>

One reason why deans and faculties should care about recruiting teachers committed to this field is that effective teaching of legal ethics requires continuing growth in the quality and quantity of legal scholarship bearing on the subject.<sup>62</sup> Conventional wisdom understands that academic respect for a subject depends on faculty recognition that good scholarship has been done in the field, that interesting questions exist, and that the subject offers opportunities for creative scholarship. Moreover, the capacity of course materials and instructors to engage students in critical reflection on lawyer roles and practice rests inevitably on empirical and theoretical scholarship that describes or predicts behavior accurately and suggests or advances alternative possibilities.

But something more can be said about the importance of encouraging scholarship concerning lawyers and law practice.<sup>63</sup> Quality scholarship in legal ethics has the potential to exert a positive influence on legal scholarship as a whole because, at its best, scholarship in legal ethics offers two attributes sorely lacking in contemporary legal scholarship: attention to context and a focus on obligation.

The subject of “practical ethics,” above all, is contextual.<sup>64</sup> This rings true whether the focus is on professional ethics or on the normative considerations in personal choice. By contextual, we mean that practical ethics addresses specific persons situated

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61. Stephen M. Bundy, *Ethics Education in the First Year: An Experiment*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 19, 32-33 (footnotes omitted).

62. See Rhode, *supra* note 5, at 53.

63. The material in this and the next two paragraphs is drawn from Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 117, 126-27 (footnotes added).

64. See generally Susan P. Koniak, *When Courts Refuse To Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993) (discussing conflicting commitments of the courts and of the organized bar concerning lawyer conduct in the context of the Kaye, Scholer case); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993) (discussing the importance of context in lawyer regulation).

in specific settings having to make decisions in real time, which is always in short supply, resulting in imperfect information, with real and often irreversible consequences. Law as a larger human institution is similarly contextual—that is, specific in historical time and in place of application—for essentially similar reasons.

Despite these characteristics of law, and therefore also of the practice of law, including the judicial function, the ethos of legal scholarship over the last two decades has celebrated the abstract, expressing contempt for the contextual characteristics that make law, Law. The quest has been for an escape from the specific into the general, the universal, and the eternal. The theory underlying law and economics, for example, is of this generalist character, as is the “equality” theorizing of scholars who differ in their political commitments from their law-and-economics counterparts.<sup>65</sup> Writing about law—a contextual enterprise—at the levels of abstraction so cherished by much of legal academia, in our opinion, sheds precious little light on the subject ostensibly under consideration. In contrast, the illuminating work in law and economics and other “law and —” disciplines is based upon factual foundations such as social science case studies, whether the work is empirical, historical or descriptive. Too often that work is marginalized. Legal ethics is similarly fact-based, and similarly marginalized. A broader recognition of the possibilities of scholarly endeavor in the legal ethics field would attract a new cadre of scholar-teachers to the

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65. Despite their different vantage points, two recent books similarly criticize contemporary legal scholarship. See KRONMAN, *supra* note 54, at 225-70 (noting that recent legal scholarship has been “dominated by two movements inspired by an ideal of legal science that is antagonistic to the common-law tradition and to the claims of practical wisdom which that tradition has always honored”); *id.* at 267; see also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 199-229 (1994) (observing that many contemporary legal scholars have had little law practice and tend to disdain it; much fashionable legal scholarship is either advocacy, highly abstract or addressed to nonlawyer audiences).

field,<sup>66</sup> stimulate faculty interest in teaching the subject,<sup>67</sup> and give rise to a law school culture that would be more hospitable and welcoming to the subject.<sup>68</sup> Informed by such scholarship, law practices and legal institutions might serve public purposes more adequately and foster accurate outcomes in fair and efficient proceedings.

## II. WHAT SHOULD BE TAUGHT AND WHEN

### A. *The Place of Legal Ethics in Legal Education*

What should be taught? When and how? What place would the subject of legal ethics have in an ideal law curriculum? The major possibilities, singly or in combination, are: (1) a required first-year course,<sup>69</sup> (2) a required upperclass course,<sup>70</sup> (3) pervasive teaching of the subject throughout the curriculum,<sup>71</sup> and (4) treatment of the subject in clinical settings,<sup>72</sup> as well as a variety of elective upperclass offerings.<sup>73</sup> Much has and can be

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66. Regarding the efficacy of incentives in producing a desired outcome, see generally SMITH, *supra* note 45, at 456 ("By pursuing his own interest [the individual] frequently promotes that of the society more effectually than when he really intends to promote it.").

67. *Id.*

68. *Id.*

69. Bundy, *supra* note 61, at 24-27 (discussing the failed Berkeley experiment with a required first-year course).

70. See, e.g., KELLY, *supra* note 5, at 49 (indicating that most law schools require an upper-class ethics course); *infra* note 84.

71. The best and most comprehensive treatment of the pervasive approach is Rhode, *supra* note 5. See also Koniak & Hazard, *supra* note 63 (discussing the pervasive approach generally); Menkel-Meadow & Sander, *supra* note 34 (discussing the UCLA experiment with a pervasive approach); Rhode, *supra* note 15 (describing Stanford's experience with pervasive instruction).

72. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 40, 58-87 (1995) (arguing that good, practical judgment is best taught in clinical teaching of lawyering and legal ethics). For additional sources arguing that legal ethics is best taught in clinical settings, see *id.* at 40 n.37; see also Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 37 (discussing Northwestern's program integrating legal ethics with trial advocacy).

73. See Bennett, *supra* note 42 (discussing a unique course involving law students working with the oral histories of practitioner mentors); Heidi L. Feldman, *Enriching the Legal Ethics Curriculum: From Requirement to Desire*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 51 (discussing Michigan's first-year "bridge week"

said about each of these alternatives. A symposium issue of *Law and Contemporary Problems*, arising out of a national conference held by and for recipients of ethics grants from the W.M. Keck Foundation, canvasses the advantages and disadvantages of each.<sup>74</sup> We will not repeat that discussion here. Instead, we proceed directly to our conclusions.

What would be the elements of an ideal law curriculum that took issues related to the law and ethics of lawyering, broadly viewed, as seriously as law schools now take core subjects such as civil procedure or contracts?

First, although requiring an ethics course in the first year seems like an inherently attractive proposition, the competition for hours in that formative year poses a severe obstacle to the introduction of any new course.<sup>75</sup> Moreover, first-year students' lack of knowledge about what lawyers do and the settings in which they work interferes with an understanding of the problems arising out of the professional role.<sup>76</sup> Further, a sophisticated discussion of some ethics issues requires substantive knowledge of legal concepts not ordinarily taught in the first

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and various advanced seminars dealing with legal ethics); Thomas B. Metzloff, *Seeing the Trees Within the Forest: Contextualized Ethics Courses As a Strategy for Teaching Legal Ethics*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 227 (discussing Duke's effort to teach legal ethics in a variety of advanced courses and seminars, some dealing with practice contexts, such as civil litigation, and others more humanistic in nature).

74. LAW & CONTEMP. PROBS., Summer/Autumn 1995.

75. Stephen Bundy's description of the Berkeley experience supports both points: The course received only two credit-hours and could not survive under these conditions. Bundy, *supra* note 61, at 27-28. Yet the case for first-year exposure is a strong one:

By focusing exclusively on learning the "law" and the tropes of argument and interpretation that lawyers use to serve their clients, the standard first-year curriculum falsely implies that the only important ethical issues are those of competent performance within a well-functioning attorney-client relationship and a well-functioning adversary system. This renders invisible virtually all the difficult and important issues of professional obligation and system design, and gives students a highly distorted—and potentially dangerous—picture of their future professional role.

*Id.* at 32. The three-year effort by a group of law professors at Berkeley to teach an adequate ethics course in two semester-hours led to "an unshakable conviction that the course could not be taught properly in less than three units [45 hours of instruction]." *Id.* at 19.

76. *See id.* at 28-29, 33.

year. For example, first-year students likely would not fully understand the conflict of interest problem posed by a lawyer for a corporation in representing both the manager charged with wrongdoing in a shareholder's derivative action and the corporation itself.<sup>77</sup> The contextual character of professional ethics means that students' lack of exposure to relevant advanced courses poses a real problem. Important and conceptually demanding issues such as aiding and abetting client fraud, the duties owed to constituents in representation of a corporation or other legal entity, and the responsibilities of lawyers who facilitate transactions by means of legal opinions are difficult to teach to beginning law students.<sup>78</sup> Nevertheless, we believe that introducing some ethics issues in the first year is highly desirable. Because the first year curriculum generally emphasizes litigation roles, an introduction to adversary limits and to other lawyer roles should come early.

Second, if the first-year curriculum does not include a required course surveying the subject, prior to graduation students should take an ethics course of at least three semester-hour units. Allocating only one or two credit-hours makes it difficult or impossible to do the subject matter justice.<sup>79</sup> In addition, because most major law school courses, and virtually all required courses, provide at least three semester-hours of credit, students perceive a two-credit course as less important and, therefore, such a course receives less attention than other courses that receive three or four hours of credit.<sup>80</sup>

Third, the ethics course should explore and replicate, in practice contexts, basic concepts of the subject. Those concepts include: confidentiality; avoiding conflicting interests; and distinguishing the lawyer's roles as a counselor, planning and documenting transactions in the privacy of the law office, and as an advocate, playing a partisan and combative role in contentious

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77. See *id.* at 33-34 (discussing the need to continue ethics instruction in the context of second- and third-year course topics).

78. See *id.*

79. See *supra* text accompanying notes 13-15.

80. See Pipkin, *supra* note 6, at 252 (arguing that courses with fewer units of credit are often perceived by students as not rating well on the "latent hierarchy" of law school courses).



public proceedings. Examining these matters by concentrating on the factual settings in which they arise gives students a chance to revisit and better imagine the implicit but specific backdrop of many widely elected courses, whether it be corporate practice, criminal prosecution or defense, matrimonial dissolution, or estate planning.<sup>81</sup> In short, the law and ethics of lawyering should integrate and revisit different parts of the curriculum the way upperclass courses such as administrative law, evidence, advanced civil procedure, federal courts, conflict of laws, trial practice, commercial law, collective bargaining, and insurance currently revisit first-year civil procedure or contracts courses in richer detail.

The case for continuing pervasive ethics instruction beyond the required course, is a powerful one. Ethics issues arise in a particular context, one that directly influences ethical decision-making.<sup>82</sup> Instructors, because they can and should know the context well, can highlight the interaction of legal rules, institutional arrangements and ethical obligations within a particular setting.<sup>83</sup>

Pervasive instruction also locates ethics in the heartland of legal education—the major first-year and other required or elective courses that form the curriculum's core.<sup>84</sup> The curriculum implicitly teaches legal ethics, how lawyers do and should behave in representing clients.

The pervasive method exists as an actuality at all schools. . . . Whenever a professor asks a student what the

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81. See Rhode, *supra* note 5, at 50.

82. See *id.* at 50-51.

83. See *id.*

84. See E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 881-92 (presenting survey results that identify a common core curriculum and casebook-oriented teaching at American law schools; innovations, such as clinical skills-teaching, are discouraged because they are more costly, more difficult to administer, conflict with institutional attitudes and habits, impose greater demands on teachers, and may be perceived by students as less directly related to job placement). For more recent data concerning required and elective courses at American law schools, see WILLIAM B. POWERS, *A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA* (1987). Table-3 of the Powers survey indicates that the percentage of law schools requiring a legal ethics course rose from 53.5% in 1974-1975 to 80.5% in 1984-1986. *Id.* at 12-13.

lawyer in a case should have done differently, what strategy might have worked better than the one employed, what advice a lawyer should give a client in light of certain legal principles, students are being asked what a lawyer might do and what a lawyer should do.<sup>85</sup>

Law students garner their basic understanding of what a lawyer does and should do from this constant and pervasive exposure.<sup>86</sup> But, too often, lack of awareness, inconsistency, sloppiness, and even ignorance, surround the teaching of the ethics component.<sup>87</sup> A conscious and systematic effort to encourage all teachers to deal directly and intelligently with ethics issues relating to their subjects is badly needed. The pervasive approach, however, will not succeed unless the faculty as a whole commits to it and institutional monitoring ensures that individual faculty members take their responsibility seriously.<sup>88</sup>

Relying exclusively on the pervasive method, however, almost certainly will not suffice. "[B]y giving the pieces of legal ethics a home everywhere, it effectively deprives its core concepts of a home anywhere."<sup>89</sup> It is always in danger of failing to "confront, in any probing or systematic way, the central ethical concepts, institutional and political understandings, and regulatory alternatives that underlie all areas of professional ethics and regulation."<sup>90</sup> Administrators, professors, and students are all too likely to view pervasive ethics, by itself, as an ungraded "add-on"—a temporary detour from the serious work of each course.

Fourth, an array of elective courses should offer more specific treatment of individual practice contexts to smaller groups of students, for example, the special ethics problems of corporate practice.<sup>91</sup> Interdisciplinary seminars should exist that relate

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85. Koniak & Hazard, *supra* note 63, at 118.

86. *Id.* at 118-19.

87. *Id.* at 119-20.

88. See Rhode, *supra* note 5, at 51-53; Rhode, *supra* note 15, at 145-48 (describing elements of mandate and choice in Stanford's program of pervasive instruction).

89. See Bundy, *supra* note 61, at 33.

90. *Id.*

91. See Daly et al., *supra* note 42, at 199-211 (describing Fordham Law School's effort to teach legal ethics in a practice context, focusing on topics such as corporate representation, criminal prosecution and defense, etc.).

lawyers and the legal profession to some related body of information or ideas (e.g., history or sociology of the legal profession, lawyering and moral philosophy, economic analysis of legal institutions).<sup>92</sup> Clinical and trial advocacy courses provide a special opportunity for examining ethics in real time with real pressures.<sup>93</sup> Every school should take advantage of these powerful learning opportunities.

Finally, tenured and tenure-track members of the faculty who have a serious scholarly interest in the law and ethics of lawyering should teach most of the ethics curriculum, especially the required elements.

The painful reality is that not a single law school in the United States combines the elements mentioned above in its current curriculum. Professional ethics may get prominent attention in law alumni publications but merits only a whisper and a promise when it comes to faculty selection, inclusion in the core curriculum, and the research interests of law faculty.<sup>94</sup> Remedying this neglect should be a central goal of law deans and faculties.

### *B. Rule, Story, and Commitment in Teaching "The Law and Ethics of Lawyering"*

We have previously expressed our ideas concerning the basic required course in "the law and ethics of lawyering" in the book of that title we published with Geoffrey Hazard.<sup>95</sup> The course embodied in that book represents our best effort to reform attitudes about the subject and to improve its teaching. We believe the basic course we designed is analytically sound, is pedagogically challenging, and engenders student attention and respect. Here we discuss our goals for the course, the themes we emphasize, and some continuing problems about which we have tentative thoughts. We have organized these reflections under three subheadings: Rule, Story, and Commitment. We believe that all

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92. See generally sources cited *supra* note 73.

93. See generally sources cited *supra* note 72 (arguing that students best assimilate ethical standards when they must confront ethical dilemmas during simulated law practice).

94. See *supra* notes 10-15 and accompanying text.

95. HAZARD ET AL., *supra* note 8.

three elements are essential to a good legal ethics course.

### *1. Rules and Their Limitations*

"Rule" refers to normative statements in the form of legal rules. Although any legal ethics course must discuss legal rules, exclusive reliance upon this method can concentrate too narrowly on the codes of lawyer ethics adopted by the ABA and tested by the Multistate Professional Responsibility Examination (MPRE). The law of lawyering, however, is the proper subject matter and that law includes important aspects of agency law, civil procedure, criminal law, evidence and other subjects.<sup>96</sup> The law of lawyering further encompasses some aspects of substantive law relating to important fields of legal practice, for example, SEC rules governing issuance of securities or IRS rules governing tax preparation.

Our insistence on emphasizing the "law of lawyering" serves several purposes. First, law students value courses that teach relevant legal doctrine in a rigorous yet rewarding fashion. Our emphasis on law increases the respect of students for the subject. Second, understanding the options for actors embedded in the underlying law and the options condemned by law is an important and practical first step for the exercise of moral judgment as a lawyer. Overall, we have found that issues of personal identity (What kind of a lawyer do I want to be?), moral decision-making (What are the sources of guidance and what norms should control behavior?), and professional role (How should a lawyer relate to clients, colleagues, courts and third parties?) emerge out of a robust consideration of the law of lawyering. In our experience, law students, especially in large classes, hesitate to begin with ethical discourse, but they are willing to reach ethical issues and reflect upon them when the issues grow out of an informed consideration of the options available in a story- or case-oriented

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96. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (discussing an organization's attorney-client privilege when the organization's lawyer obtains information from lower-level employees to give legal advice to corporate managers); *Cuyler v. Sullivan*, 446 U.S. 333 (1979) (discussing potential conflicts of interest when an attorney represents co-defendants); *Hickman v. Taylor*, 329 U.S. 495 (1947) (holding that attorney work product is generally protected from discovery).

analysis. Traditional legal materials promote discussion of critical issues: social structure—the sociology of the legal profession and of the lawyer-client relationship; regulatory authority—who should govern the profession and by what means; legal theory—whether the adversary system is morally justified; and regulation of the legal services market—who gets highly competent legal services and who does not. Well-chosen cases placed in a rich practice context, supplemented by the profession's ethics rules and ethics opinions, the "other law" of the state, and summaries and excerpts from relevant literature provide a rich base upon which to explore these important issues.

Although rules are an essential element of the law and ethics of lawyering, they are inadequate as a primary focus for several reasons. First, the term "rules," in the context of legal ethics tends to refer to the ethics codes promulgated by the ABA and adopted in one form or another by the high courts of the states. The MPRE, required for admission to the bar in forty-seven jurisdictions,<sup>97</sup> uses multiple-choice questions to test student knowledge of the disciplinary rules set forth in the two modern ABA ethics codes<sup>98</sup>—a law that excludes most of the law of lawyering and that is not in effect anywhere.<sup>99</sup> Because most law students must take this test, many of them approach their required ethics course with tunnel vision—viewing it as preparation for the MPRE. These students badly need a broader view of the subject.

The serious study of legal ethics requires consideration of what actually happens in the kinds of situations in which lawyers find themselves. Unless we consider the other law that

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97. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR & THE NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 24-25 (1996).

98. See MODEL RULES OF PROFESSIONAL CONDUCT (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982). By focusing on the Model Rules and Model Code, the MPRE neglects the case law that interprets the rules and that fills gaps in areas where the rules are silent.

99. The committee responsible for preparing the MPRE has recommended that the National Conference of Bar Examiners expand the scope of the MPRE to include parts of the law of lawyering not dealt with in the ABA's two ethics codes, but the Conference has not yet responded. Interview with John S. Dzienkowski, member of the MPRE Committee (Jan. 1996).

governs these situations, for example, the criminal prohibition of conduct constituting an obstruction of justice, this is impossible. Obstruction of justice, it will be noted, was the charge brought against the lawyers involved in Watergate, not some violation of the disciplinary rules.<sup>100</sup> Subsequent professional disciplinary actions taken against Watergate's lawyers under the ethics rules flowed from criminal convictions obtained under generally applicable statutes, not from special law directed only to lawyers. It is a fact of life that professional discipline is not the principal sanction that influences or controls lawyer behavior. Threats of judicial contempt sanctions, malpractice liability, civil liability to third persons, administrative and regulatory controls in agency proceedings, and possible criminal charges affect behavior much more potently.<sup>101</sup>

The "other" law that is relevant depends upon the substantive and procedural context of a given situation. For example, important issues of loyalty and confidentiality in a lawyer's representation of a corporation present themselves when the current managers are charged with wrongdoing in a shareholder's derivative suit; corporate law, procedural law and perhaps other law are as important as ethics rules when one considers what to do in these settings. Realistic detail must guide the discussion of what a lawyer should do. Without it, the ethics lessons are useless. Teaching legal ethics thus requires teaching a rich body of particulars about lawyers' work.

The common view that legal ethics begins and ends with the profession's ethics codes is a fundamental mistake. The ethics codes do not speak on many subjects, leaving other law to govern many important matters.<sup>102</sup> On many critical matters, such

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100. Most of the Watergate lawyers were charged with violating 18 U.S.C. § 1503, the federal obstruction of justice statute. See, e.g., *United States v. Haldeman*, 559 F.2d 31, 51 & nn.2-3 (D.C. Cir. 1976).

101. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (discussing the various disciplinary, liability, institutional, and legislative controls on lawyer behavior).

102. The ABA Model Rules of Professional Conduct, for example, are silent on the lawyer's authority to use threats of criminal charges in negotiations with a third person. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 cmt. *threatening to prosecute or to report* (1995) (noting omission from Model Rules). The ABA Model Code of Professional Responsibility also contained no explicit provisions governing

as providing illegal assistance or dealing with a tribunal, the codes merely refer the matter to other law.<sup>103</sup> Some rule provisions confer a discretion on lawyers that may or may not coincide with background law; a lawyer, with or without client consultation and concurrence, must nevertheless decide on a course of action.<sup>104</sup> In all of these situations, the other law applicable to lawyers is a critical source of guidance. The fact that the ethics codes provide little guidance on many matters requires that the "other law" of lawyering receive systematic attention. An important theme of a good legal ethics course is that lawyers must look to a broad range of legal and moral sources when they make professional decisions.

Lawyers will find themselves in serious trouble if, when faced with a difficult ethical problem, they assume that all they need to know is the text of the ethics rules.<sup>105</sup> The breadth of cover-

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conflicts of interest between a current and former client. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. *Model Code Comparison* (1995) (noting absence of counterpart provision under Model Code). The California Rules of Professional Conduct say nothing about one of the lawyer's most important duties, that of confidentiality, leaving the topic to an inadequate and sweeping statutory provision. See CAL. BUS. & PROF. CODE § 6068 (West Supp. 1995); Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467 (1995) (asserting the need for legislation to address lawyer-client confidentiality).

103. The limits on a lawyer's partisan and zealous representation of a client were historically expressed in terms of acting "within and not without the bounds of the law." CANONS OF PROFESSIONAL ETHICS Canon 15 (1969). These limits are now phrased in terms of not assisting "conduct that the lawyer knows is *criminal* or *fraudulent*." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995) (emphasis added) (referring the lawyer to the general law of crime and fraud). Important exceptions to the professional duty of confidentiality also turn on these terms. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1995) (allowing lawyers to reveal confidential information if necessary to prevent the client from committing specified criminal acts). The responsibilities of an advocate to opposing parties and counsel, embodied in Model Rule 3.4, are largely a restatement of or cross-reference to criminal and procedural law. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1995). Ex parte communications and attempts to influence judges or juries are governed explicitly by a cross-reference to means "permitted" or "prohibited by law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1995).

104. For discussions of the discretion conferred on lawyers by current ethics codes, see ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 765-84 (3d ed. 1989); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529; Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11 (1991).

105. The simplistic view that confines legal ethics to the ethics codes often leads

age of a good ethics course refreshes student knowledge about subjects left unstudied for some time, or not studied at all, and forces the student to integrate earlier learning with the new material governing the conduct of lawyers.

The interrelationship between the profession's codes and the state's other law has a deeper dimension. In a few highly important situations, such as client fraud and issues arising in entity representation, other law—especially agency, criminal, evidence, procedural, and tort law—governs the conduct of lawyers and sometimes dictates a response different from that suggested on the face of the ethics rules.<sup>106</sup> Because other law generally trumps the ethics rules, a lawyer who relies narrowly on ethics rules and professional ideology takes grave risks.<sup>107</sup> One of the major themes underlying a good legal ethics course is the tension between the profession's vision of lawyering, embodied largely in professional codes, ethics opinions and professional ideology, and other, usually more authoritative, sources of law.<sup>108</sup>

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lawyers to believe that they can resolve ethical issues without engaging in legal research. Practicing lawyers who would never dream of giving an opinion to a client without reading cases interpreting a statute make decisions regarding their professional duties without consulting a single case or an outside expert. Many of the major cases involving the civil liability of lawyers or their disbarment involve lawyers who have gotten themselves in serious problems because they failed to research the law governing lawyers or to obtain specialized legal advice from other knowledgeable lawyers. Here, as elsewhere, it is often true that "a lawyer who represents herself has a fool for a client." If the lawyer is to represent herself, she should at least canvass *all* the law that is applicable before deciding on a course of action.

106. The ABA Standing Committee of Ethics and Professional Responsibility, which issues advisory opinions concerning the meaning of the ABA Model Rules of Professional Conduct, has concluded that Model Rule 1.6(b) in its present form is unworkable, in the absence of a provision allowing disclosure of confidential information to the extent necessary "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." *ABA Rejects Ancillary Business, Inroads on Client Confidence*, 7 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 256, 258 (Aug. 28, 1991). The committee's report was rejected by the ABA House of Delegates in 1991. *Id.* The committee emphasized that a literal application of Model Rule 1.6 "dictate[s] results which we believe to be unjust and inconsistent and which threaten to unfairly subject lawyers to potential civil liability and criminal prosecution." *Proposals May Change Rules on Ancillaries, Confidentiality*, 7 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 172, 173 (June 19, 1991).

107. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1412-13 (1992).

108. See generally *id.* (noting that "even when the ethics rules purport to speak



The characteristics of the professional rules, which lawyers drafted to govern themselves, also tell us something about self-regulation.<sup>109</sup> When lawyers draft rules that apply to their own work, they naturally prefer rules that require neither interpretation nor any element of discretion in their enforcement. Although most lawyers recognize that this conception of law is childish and simplistic when held by their clients, they yearn for that simplicity when the law applies to themselves. Lawyers are simplistic about this set of legal rules precisely because this law affects them. This attitude explains why the rules produced by the profession either tend to tell lawyers exactly what to do, for example, "don't commingle funds," or impose little or no constraint on their behavior.<sup>110</sup> "[L]awyers by and large have a very negative impression of the administration of justice, gleaned from their experience representing clients, and want as little of it for themselves as can be."<sup>111</sup>

A second reason why a single-minded focus on legal rules is

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directly on a matter and are the only existing source of precept on the question, they may be ignored with relative ease so long as the case is not a disciplinary proceeding"); Koniak, *supra* note 64 (discussing the tension between the profession's notions of lawyering and the state's requirements in the context of the actions of lawyers representing savings and loan associations).

109. Geoffrey C. Hazard, Jr., *Professional Ethics, Rules, and Conduct*, in CLE AND THE LAWYER'S RESPONSIBILITIES IN AN EVOLVING PROFESSION: THE REPORT ON THE ARDEN HOUSE III CONFERENCE 477, 487-90 (ALI/ABA, 1988) [hereinafter ARDEN HOUSE III CONFERENCE].

110. The rules governing the safekeeping of client property are detailed and specific. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1995). The rule dealing with use of dilatory tactics, however, is a model of generality and vagueness: "A lawyer shall make *reasonable* efforts to expedite litigation *consistent with the interests of the client*." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1995) (emphases added). Bar discipline proceedings evidence the difference between these two types of rules: The rules governing commingling of funds are strictly and frequently enforced, while a lawyer's use of dilatory tactics is virtually never the subject of discipline. To illustrate, an August 21, 1996 Westlaw search of all state cases after 1985 with "discipline" in the synopsis, using the search terms (comming! /5 funds) yielded 665 cases. Substituting the phrase "dilatory tactics" for the earlier search term yielded just 19 cases; of these 19 cases, most references to dilatory tactics concerned the lawyer's conduct before the disciplinary tribunal. See, e.g., *In re Bell*, 588 N.E.2d 1093, 1095 (1992); *In re Stein*, 575 N.Y.S.2d 18, 19 (1991).

111. Hazard, *supra* note 109, at 489. See also Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 50-52 (1991) (describing an empirical study showing the negative view of the legal system conveyed to clients by matrimonial lawyers).

ineffective, even if interpreted in the broader sense of the total law of lawyering, is its neglect of broader ethical concerns. A rule-oriented approach implies that ethics need not be viewed broadly, that is, as an aspect of morality. "Real" ethics is trivialized or ignored. A legal ethics course should include discussion of how to be a good person while being a good lawyer. One aspect of this dimension of lawyering is the proper extent to which a lawyer can bring to bear her own moral values while effectively representing clients.

The final reason why rules are inadequate as a primary focus is practical as well as jurisprudential: Rules themselves omit the stories that give them meaning and neglect the commitment of individuals and groups that gives them life and power. Any sophisticated understanding of "law" must include more than the normative statements embodied in legal rules. Rules by themselves lack definition, depth, and applicability until and unless they are read along with the stories and narratives that illustrate their content, reach, and purpose. Stories illuminate society's commitment—or lack of commitment—to the enforcement of the literal text of rules. At the margins, narratives embodying one principle will inevitably compete with conflicting narratives. The rules, and the narratives that give those rules purpose and direction, must be understood by the persons whose behavior they seek to shape, and by the private and public institutions and officials who are in a position to enforce them. As Robert Cover powerfully argued, a robust conception of law involves narratives and commitment as well as rules.<sup>112</sup> Teaching the law of lawyering through cases in which arguments concerning the meaning and application of legal rules muster competing visions of lawyering helps students to not only learn about the law that will govern them, but to gain insight into the richness of law itself.<sup>113</sup>

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112. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

113. See *infra* notes 116-23 and accompanying text.

## 2. Stories

"Stories" provide the context and detail essential to understanding and applying legal rules.<sup>114</sup> One cannot determine the meaning of rules or the priority among rules that conflict until stories put some flesh on the bare bones of those rules. Stories that provide metaphors for lawyering, such as the lawyer as the champion of individuals who face state or private oppression, are part of the professional personae of all American lawyers. Stories of lawyer-heroes feature in the imagination of all lawyers and figure prominently in the teaching method employed by some.<sup>115</sup> Cases of the more mundane sort, flowing from disciplinary boards, civil and criminal charges against lawyers, agency proceedings, and court-imposed sanctions give meaning to the law of lawyering by providing specific situations and practice contexts that interpret and give life to ethics rules. These cases also contain echoes of metaphor stories lurking in the background. Stories transform the monolithic uniformity of the ethics rules—pretending, in effect, that every lawyer in every context has the same duties and responsibilities—into a much more variegated and discriminating landscape.

The heartland of legal education involves the case method. Students should learn legal ethics within that realm. Major reliance on other techniques, other than by an exceptionally gifted teacher, will likely reinforce students' perception of legal ethics as a marginal, ghettoized subject. Just as students may not respect instruction that is taught by people not on the regular faculty, they are less likely to take seriously instruction that does not use rigorous and familiar teaching methods.<sup>116</sup>

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114. Robert Cover taught us by example and in his writing that law is, itself, a story, and Thomas Shaffer, James Boyd White, and others taught us that stories have much to say about becoming and being a lawyer. The extensive literature on the uses of narrative includes Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990). For a review and critique of the narrative approach, see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

115. Thomas L. Shaffer has authored a teaching book organized around lawyer stories, THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985), and several books discussing lawyer narratives and heroes. See, e.g., SHAFFER, *supra* note 23; SHAFFER, *supra* note 54.

116. Audiovisual materials have a place in the basic course because of the vivid-

The traditional case method prepares law students for practice by developing their sense of practical judgment and honing their analytical and argumentative skills. A concrete case situation presents facts that require confrontation; in cases actual lawyers were representing actual clients in a realistic and generally typical practice setting. The case method forces students to see things from the differing points of view of the antagonists, which cultivates empathy and tolerance. Students also have the opportunity to disengage from the partisan standpoints to reflect on the situation in broader terms of judgment, action, and social policy.<sup>117</sup> The case method teaches what Llewellyn referred to as "situation sense" and conveys understanding of the dynamics of legal decision-making.<sup>118</sup> The case method also cultivates perceptual habits and may be used to cultivate a public-spirited approach to law and legal institutions—what Brandeis referred to as "the opportunity in the law" to lead an admirable life.<sup>119</sup> Case discussion need not focus solely on litigation, but can require students to consider how the underlying transaction or event might have been structured to avoid litigation. While studying cases, students may be asked to play lawyers' roles, which involves considering alternatives (planning), making choices (acting), and, finally, evaluating the consequences (reflecting and judging). Methods that develop other skills and attributes, such as role-playing, small-group discussions, simulations of interviewing, negotiating, and counseling, can supplement the case method, even in large classes.

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ness and immediacy of their presentation of personality, character, and emotion. They should be viewed, however, as a supplement to written narratives, not as the primary material. Unlike Continuing Legal Education programs on ethics topics, law school courses can and do require advance preparation. Heavy reliance on audiovisual materials works against the deep dynamic of legal education, in which rigorous case analysis earns the most intellectual respect.

117. The argument that the training and work of the lawyer develops practical judgment was powerfully and briefly made by Justice Brandeis in a famous talk to law students. Louis D. Brandeis, *The Opportunity in the Law* (1905), *excerpt reprinted in* HAZARD ET AL., *supra* note 8 at 1086-89. For a recent elaboration of this argument, see KRONMAN, *supra* note 54, at 53-162.

118. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 16-66 (1930) (describing the function and purpose of first-year case method teaching); KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed., 1989).

119. Brandeis, *supra* note 117.

The argument positing that case teaching lacks sufficient caring, humanism, or abstraction forgets that we must prepare students to practice law in an unredeemed and often unforgiving world. The law office and the courtroom are not comfortable, "safe" places. They are demanding arenas of stress and required performance. Law school preparation for practice—especially a required course focusing on that practice—should engage the same expectations of diligent preparation, active participation, and competent performance that the law office and the courtroom take for granted.

Stories in the form of cases act as more than a vehicle for understanding rules, honing skills of legal analysis, and developing practical judgment; they are a good avenue for the general exploration of the terrain of ethics. Two separate but interrelated ethical traditions of reflection on morals deserve consideration: rule-based systems<sup>120</sup> and virtue-based<sup>121</sup> systems. Individual teachers will tend to feature prominently one or the other. The dominant ethical tradition in modern times stems from the efforts of Kant's successors to build a structure of rights, duties and moral rules based upon underlying social contract assumptions.<sup>122</sup> Although this approach fits all too comfortably with the contemporary preoccupation with "rights,"<sup>123</sup> we believe it posits an unrealistic degree of individual autonomy and choice.

In any event, rights-based theories constitute only one of the two major ethical traditions of the western world. The second and older tradition emphasizes persons, relationships, and community rather than individual acts of choice by autonomous persons. This tradition, a combination of Aristotelian thought and Judaeo-Christian religion is more virtue-based than rule-

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120. See *supra* notes 102-08 and accompanying text.

121. See *infra* notes 159-63 and accompanying text.

122. For a brief overview see DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 3-12 (2d ed. 1995), distinguishing deontological theories (from Kant's emphasis on moral duties to Dworkin's emphasis on legal rights), consequentialist theories (from Bentham's and Mill's emphasis on utility to Posner's "wealth maximization"), and virtue ethics (from Aristotle to MacIntyre).

123. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (arguing that self-centered preoccupation with personal rights has undermined social concern).

based. The traditional moral virtues—justice, prudence, courage, and fraternity—are viewed as habits or dispositions that are developed in large part by observing and emulating the character and conduct of admirable people. Virtue develops and occurs in community, in relationship with others.<sup>124</sup>

We maintain that this approach better conforms to personal experience. When asked what we believe, most of us explain ourselves by claiming membership in a family, a group, a religion, a region or a society. As Thomas L. Shaffer has put it, "[w]e account for our morals—unintentionally—by naming what we belong to."<sup>125</sup> At the moment of moral choice, we rarely engage in the sort of "ethical dilemma" thinking that pervades teaching of moral and legal ethics—discussion of a moral quandary based on highly abstracted and limited facts. Instead, we remember or discover who we are through a psychological or spiritual homecoming. Then, having remembered or discovered that we belong to a community and are living out a story, we act as if we were members of that community, engaged in that story. Moral action does not rely on "principles" or "choice" as much as it does on the commitments of participation in community. Shaffer said that America is "a society built not on obedience [to principles] but on participation."<sup>126</sup> We believe ethics is a similar project.

Stories have an ability to expose self-deception and get at underlying truths. Storytellers have penetrated the mask of cultural self-deception, from Andersen's fairy tale about the emperor's new clothes,<sup>127</sup> to Mark Twain in the nineteenth century, to Harper Lee in our day with the fictional re-creation of her lawyer-father, Atticus Finch.<sup>128</sup>

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124. See MACINTYRE, *supra* note 54, at 22-34; SHAFFER, *supra* note 54, at 28-32; Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, 13 *MIDWEST STUD. PHIL.* 32, 33-34, 45-47 (1988).

125. SHAFFER, *supra* note 23, at 25.

126. Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 *OHIO ST. L.J.* 703, 707 n.10 (1988) (citing CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE* 25 (1986) (attributing this description of the American dream (without citation) to Alexis de Tocqueville)).

127. See HANS CHRISTIAN ANDERSEN, *THE EMPEROR'S NEW CLOTHES* (M.R. James trans., 1971) (describing how two dishonest weavers trick a vain emperor into paying for an "invisible" set of clothes).

128. See MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (1884); HARPER

Good stories have the advantage of relative truthfulness, and they have the further advantage of showing us how even our moral heroes are self-deceived. Our moral heroes, like the Hebrew prophets, see more clearly than those around them, but still they are in and part of communities [towns, families and religious congregations] that are deceiving themselves. . . . The lawyer-hero is, like the prophet Isaiah, a person of unclean lips, living in the midst of a people of unclean lips. He, like Isaiah, says, "Send me."<sup>129</sup>

### 3. *Commitment and Obligation*

Some rules and stories, it turns out, are taken seriously by officials and enforcement bodies while others receive haphazard attention and still others are ignored entirely. Equally important, the organized bar and the courts have different priorities when rules and stories exist in tension with one another.<sup>130</sup> The organized bar, emphasizing the lawyer's duty of zealous representation to her client, gives a client-protective and client-fulfilling gloss to rules and stories. In the profession's scheme of things, loyalty to one's client is the cardinal priority. As a result, the duty of confidentiality has few exceptions. Confidentiality and client interest subordinate duties to courts, third persons, and the legal system.

The profession's ideology influences courts and administrative agencies, but these bodies also draw on other rules and stories, as well as the broader law of lawyering, in deciding cases. The law of lawyering that these official bodies expound, albeit cautiously and somewhat ambiguously, takes a broader view of the profession's public responsibilities and a narrower view of adversarial zeal than do the rules and stories advanced by the organized bar. Lawyers face uncertainty because competing messag-

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LEE, *TO KILL A MOCKINGBIRD* (1960).

129. Thomas L. Shaffer, *Beyond the Rules: The Responsibility and Role of Continuing Legal Education To Teach Alternative Ethical Considerations*, in ARDEN HOUSE III CONFERENCE, *supra* note 109, at 493, 513.

130. For a comprehensive discussion of the differing commitments of the organized bar and public officials, see Koniak, *supra* note 107.

es come from the hydra-headed sources of guidance—the organized bar, on one hand, and the enforcing agencies and court, on the other. The supposedly authoritative sources commit to violations of lawyering that are largely congruent but have shades of difference on many matters and direct conflict on some. The most obvious illustration involves the lawyer's responsibilities when facts suggest that a client is engaged in prospective or ongoing fraud.<sup>131</sup>

Law students and practicing lawyers often assume that they can approach the law and ethics of lawyering just as they do the law applicable to a client's past conduct, that is, as an advocate dealing with law that bears on someone else but not on themselves. Law students and lawyers often take a vantage point from outside the system of law. Law is something that we, as lawyers, shape, use, support, attack or seek to change on behalf of clients. Law is "out there," applying to our clients but detached from us. Lawyers become so accustomed to viewing law in this abstract manner that they forget that, with respect to the law that governs lawyers, they are its subjects, not its manipulators.

The law of lawyering gives the law student an opportunity to understand law as clients do—as a first-person actor within a system of law rather than as a third-party advisor or advocate. Understanding the law from this perspective is not only essential to retaining one's license to practice, it is also the best way of understanding the situation of one's clients, the risks they face, and the confusion and anger they often feel when confronted with the power and uncertainty of the law.

Lawyers and law students often say, when confronted with uncertainties in the law governing lawyers, that it is unfair to penalize conduct in the face of such uncertainty. Yet every day clients who engage in other activities regulated by law face that same uncertainty. Lawyers frequently advise clients that, "I believe you, but there is a risk that the jury may believe the facts as presented by the opposing party," or that, "I think the

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131. For a comprehensive treatment of this challenging subject, see HAZARD ET AL., *supra* note 8, at 294-323. See also Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993) (arguing that the profession's confidentiality rules do not immunize lawyers from liability for participating in client frauds).



law is on your side, but the judge may take a different view." Clients have to make decisions under conditions of legal risk and uncertainty—and they do not like it. The law of lawyering puts lawyers in that same uncomfortable position, making manifest that we, too, as lawyers and law students, live within a world of law that shapes our identities and relationships, threatens our disobedience with sanctions, and expresses some sense of the collective morality of society.

Commitment grows out of the narratives that inspire us and give meaning to our lives. Yet our narratives must ring true or we will fall into self-deception. In fashioning a personal story of what it means to be a good lawyer, problems arise because of the discrepancy between some of the powerful myths of heroic lawyers celebrated by the profession and the realities of today's world.

First, the single most powerful narrative of the American legal profession is that of "the fearless advocate who champions a client threatened with loss of life and liberty by government oppression."<sup>132</sup> Historical events from revolutionary days to today's headlines repeat and confirm this narrative, and countless movies and television shows celebrate it. A sampling of historical versions of the narrative includes: Andrew Hamilton's defense of Peter Zenger, Abe Lincoln's defense of Tom Robinson, Judge Horton and the Scottsboro case, and Thurgood Marshall's role in the civil rights movement.<sup>133</sup> Yet the work of most lawyers today lacks the elements of this narrative: the lawyer acting to protect the life or liberty, usually in a criminal case, of an innocent individual threatened by governmental oppression.

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132. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1243 (1991). An address by Joseph H. Choate in 1905 provides a classic statement: To be a priest . . . in the Temple of Justice; to serve at her altar[sic] and aid in her administration; to maintain and defend the inalienable rights of life, liberty and property upon which the safety of society depends; to succor the oppressed and defend the innocent; to maintain constitutional rights against all violations . . . ; to rescue the scapegoat and restore him to his proper place in the world—all this seemed to me to furnish a field worthy of any man's ambition.

HAZARD ET AL., *supra* note 8, at 1093 (quoting Joseph H. Choate).

133. For citations concerning these and other narratives of the lawyer as champion of the lonely or oppressed, see Hazard, *supra* note 132, at 1242-45.

Today, as Geoffrey Hazard has stated, the lawyer's partisan endeavors are applied to quite different situations:

The private client is more likely to be a business organization than an individual; the transaction or proceeding is probably civil or regulatory rather than criminal; the outcome is more likely to be a matter of property or money than life or liberty; and the justice of the cause is probably indeterminate.<sup>134</sup>

The lawyer's role defends due process only in the sense that earlier assumptions about the Constitution's sweeping protection of property and privacy no longer assure protection from governmental intrusion.<sup>135</sup> As the old saw puts it, "the practice of law deals mostly with the getting and keeping of money."<sup>136</sup> Can the profession's preference for client interests over the interests of courts, third persons and the public justify the lawyer's partisan conduct? When a party is unrepresented or poorly represented, the invisible hand of the adversary system cannot maximize social good. Moreover, most of what lawyers do—counseling in the law office—does not involve an adverse party. Furthermore, lawyers conduct many negotiations with unrepresented parties. In none of these situations does an impartial arbiter ensure fairness.

Second, the metaphor of the lawyer as a public-spirited statesman, to use Anthony Kronman's concept,<sup>137</sup> sounds a good deal like the earlier narrative of the lawyer as gentleman—a WASP aristocrat who was a pillar of his community, a social architect who practiced *noblesse oblige* as a moral art.<sup>138</sup> In an egalitarian age, this narrative is troublesome because of its connection with white, male, Protestant social power. It is also troublesome

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134. *Id.* at 1244-45.

135. Compare the breadth of the protection provided to property by the interpretation of the Fourth and Fifth Amendments in *Boyd v. United States*, 116 U.S. 616, 630 (1886), to the current partial or total rejection of those views in *Fisher v. United States*, 425 U.S. 391 (1976). The issue is considered in HAZARD ET AL., *supra* note 8, at 243-56.

136. See Hazard, *supra* note 132, at 1239 (attributing the phrase to "An Old Lawyer").

137. KRONMAN, *supra* note 54, at 50-52.

138. See SHAFFER, *supra* note 23, at 30-97 (discussing and critiquing the influential American concept of lawyer as gentleman).

because it suggests that lawyers are an elite group with special responsibilities apart from those of citizens generally. In the age of equality everyone is to have equal rights and equal duties. Notions of elitism carry implicit messages of superiority and paternalism—images of the lawyer as powerful aristocrat. Perhaps we need to rethink our notion of the role of elites as structural elements of a stable, prosperous, and decent society.<sup>139</sup>

Third, some bar leaders, seeking to justify restrictions on competition in legal services, rely upon widely shared narratives of lawyers preying on the plight of the injured or troubled. Real-life stories of plaintiffs' lawyers rushing to accident scenes and victims' homes become a metaphor for many lawyers' profound distaste for the commercial realities of the modern world. They become arguments for anticompetitive measures that are likely to harm consumers: attempts to exclude lawyers from outside the jurisdiction from competing for local business,<sup>140</sup> restrictions on the flow of information about the availability and cost of legal services,<sup>141</sup> and limitations on the provision of useful service by nonlawyers.<sup>142</sup> Avoiding "commercialism" is a major theme of the ABA's efforts over the last decade to regenerate professional morale and repute.<sup>143</sup> Lawyer advertising provides a notable

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139. See Hazard, *supra* note 132 (examining the possibility that a stable and prosperous society may require the work of lawyer elites in the protection of property against majoritarian democratic politics).

140. See, e.g., *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986) (barring an out-of-state lawyer from recovering legal fees for giving tax and transactional advice to an in-state client); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980) (limiting advertising to "the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides").

141. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980) (limiting advertising to "the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1983) (listing restrictions on advertising).

142. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1995) (prohibiting unauthorized practice of law, or assisting others in unauthorized practice); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (prohibiting partnership between lawyers and nonlawyers if any of the partnership's activities include practice of law).

143. See ABA COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, reprinted in 112 F.R.D. 243, 276-77 (1986); Robert W. Gordon & William H. Simon, *The Redemp-*

a notable symbol for this widespread view.

Competition in legal services serves the needs of consumers and the public in producing services of reasonable cost, great variety, and competent quality.<sup>144</sup> Competition rests on principles of efficiency and accountability that the profession must and should honor. Yet recurrent images of "professionalism" assume that the American virtues of risk-taking, private initiative, and competitive markets are vices in the practice of law—a view that does not coincide with either history or reality.<sup>145</sup> Entrepreneurial character has always pervaded the practice of law. A reshaped narrative needs to accept the benefits of competition in legal services, welcome accountability to clients, and provide practical solutions for situations in which competitive forces cannot provide adequate legal services.<sup>146</sup>

Another difficulty for students and lawyers in deciding what kind of lawyer they should commit to being arises from our era's understanding of law as an indeterminate and almost infinitely malleable social construct. Traditional legal ethics involves a tension between lawyers' duties to their clients and lawyers' duties to courts, third persons, and the legal system. Agency law and professional codes specify the responsibilities of lawyers to provide diligent, competent, and loyal representation to clients; they also constrain lawyers' commitments to clients by requiring that lawyers act within the bounds of the law, a concept that includes both the law that is generally applicable to citizens and the special obligations imposed on lawyers by ethics codes and procedural rules.<sup>147</sup>

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*tion of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* 230 (Robert L. Nelson et al. eds. 1992); Nancy L. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773 (reviewing the ABA Report on Professionalism).

144. See, e.g., Roger C. Cramton, *The Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 564-74 (1994).

145. *Id.* at 565-78, 610.

146. *Id.* at 601-12 (1994).

147. A 1958 AALS-ABA report contained a powerful statement of the special obligation of lawyers to maintain the integrity and legitimacy of the legal system. Lon L. Fuller & John D. Randall, *Professional Responsibility: AALS-ABA Joint Conference on Professional Responsibility*, 44 A.B.A. J. 1159, 1162 (1958). A lawyer's efforts for a client, it was said, should not involve means or ends that were inconsistent with the public purposes of the ethics rules, procedural rules, or institutional arrangements. *Id.*

Today's lawyer, however, views the limits on partisan zeal through the lens of legal realism, which casts doubt upon the objectivity, consistency, and legitimacy of formal legal rules. Should a lawyer view the special law governing a lawyer's conduct in the same way that an advocate views legal rules and precedents that are adverse to the client's position, employing the tools of analysis, distinction, and argument that whittle away an unfavorable rule or precedent or expand a favorable one? Even if a rule's application is relatively clear, should the lawyer also consider the practical questions of whether the rule in question will be enforced in the particular situation? Will the violation be discovered and be provable? Will someone with standing to raise the issue pursue the matter? Will an enforcing agency or court devote resources to it? Will the tribunal impose a substantial punishment?

When a lawyer considers these issues in the context of a representation, the lawyer acts as a counselor to herself. A wise counselor deals with the uncertainty of law by staking out a path, as Brandeis put it, that is on safe ground, well-removed from the precipice.<sup>148</sup> Conformity to the most basic ethical principles, however, requires more than prudent caution.<sup>149</sup> Simplistically judging "rights" or "wrongs" cannot resolve moral action in complex situations. Moral action requires a nuanced judgment based on all of the circumstances and relationships.

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148. In testifying before a congressional committee about the asserted difficulties of business clients in dealing with the uncertainties of antitrust law, Brandeis repeated his reply to clients:

"[Y]our lawyers . . . can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, . . . but anybody can tell you where you can walk perfectly safe within convenient distance of that precipice." The difficulty which men have felt . . . has been rather that they wanted to go to the limit rather than that they have wanted to go safely.

HAZARD ET AL., *supra* note 8, at 57 (quoting Louis D. Brandeis).

149. For a discussion of the legal realism problem, see Jamie G. Heller, *Legal Counseling in the Administrative State: How To Let the Client Decide*, 103 YALE L.J. 2503 (1994) (discussing the Zoë Baird situation, in which Baird, President Clinton's nominee for Attorney General, had to explain why she had violated immigration laws by hiring undocumented aliens as domestic workers); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) (adopting a multiple-factor virtue analysis).

Moral discourse with one's client or one's partners may lead to agreement on a course of action, but it may also lead to a parting of ways. If the client or one's partners or superiors within the firm determine to push a matter to the limits of law, perhaps even wanting to go beyond them, or if the lawyer is too rigid in asserting personal moral preferences, both are best served by the client seeking legal help elsewhere or the lawyer seeking new employment. The loss of business or employment may be hard, to put it mildly, but in an unredeemed world, doing good may be costly.

Conflict and selfishness combined with instances of irresponsibility, incompetence and injustice pervade the world of law practice and the administration of justice. This world is, as our friend and colleague, Geoffrey Hazard, has said, "a tricky, brutal, and dangerous place, and will remain substantially so, at least for the foreseeable future, no matter what is done to improve it."<sup>150</sup> The ethics teacher has the dual task of preparing students for these harsh realities, without pretending that they do not exist, while simultaneously motivating each student to be a good lawyer who also seeks to be a good person. The difficult and sometimes intractable problems of "things as they are" energize the missionary zeal of a few students, but run the risk of making cynics of the rest. The legal ethics course is not an easy course to teach.

The problems raised above do not have simple solutions. It is not surprising that we disagree with one another on how to approach some of the more difficult questions presented by the course. We find some solace and common ground, however, in our convictions that legal ethics focuses on a body of "obligations" rather than "rights," and that our students need to discover a vocation that will counsel them as to their obligations in being a lawyer, just as we have had to discover such a vocation.<sup>151</sup>

For at least the last four decades, rights, particularly individual rights, have preoccupied legal analysis.<sup>152</sup> Although rights are important, obligations are equally important but often ne-

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150. Hazard, ARDEN HOUSE III CONFERENCE, *supra* note 109, at 483.

151. See Koniak & Hazard, *supra* note 63, at 127-28.

152. *Id.*

glected. Although obligations are generally correlative of rights, emphasis on one concept or the other makes a difference.<sup>153</sup> Legal thinking today gives pride-of-place to rights: rights define privilege and status; they dignify and ennoble.<sup>154</sup>

In this jurisprudential vision, legal obligations are burdens, the antithesis of rights, things to be avoided when possible and minimized at all other times. Ethics presents a counterpoint to this vision. Ethics begins with obligation as the central category. In ethics, it is obligation that carries the power to dignify and ennoble. Obligations are opportunities, not burdens; they are opportunities to fulfill responsibilities and thus show oneself worthy to be considered an honored member of some community. Our law does manage to dole out responsibilities—taxes, tort law and the like—but only in legal and judicial ethics does it manage to encode the idea of obligation as opportunity, as dignifying and ennobling responsibility. Without strong correlative obligations, rights are weak and vulnerable. With its understanding of obligation as blessing, not burden, legal ethics has much to contribute to “rights theory” and modern jurisprudential thought.<sup>155</sup>

Obligations can also provide commitments that can help shape our aspirations and our character.

### III. WHO SHOULD TEACH LEGAL ETHICS: THE COMMITMENT AND CHARACTER OF THE TEACHER

Inquiring about character is a tricky business in a pluralistic and diverse society such as ours; particularly within subcommunities such as the academy, which take particular pride in honoring freedom of conscience and thought. The fear is that any such inquiry will amount to nothing more than a dressed-up political or cultural loyalty test. We understand that problem. We also understand that writing or speaking about the character of one's colleagues is no way to win friends and influ-

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153. *Id.*

154. *Id.*

155. *Id.*; see Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 (1995) (elaborating the distinction between rights and obligations).

ence people. Collegiality is a central concept in academic institutions and paradoxically, collegiality requires a certain distance, a sphere of personal space that is beyond group review. In our culture, committed as it is to tolerance, liberty and diversity—especially in our peculiar corner of that culture, the law school—character is a highly personal thing. On the streets of Brooklyn, talking about another's mother is a highly personal and thus highly charged event. In the halls of academia, talking about the character of one's colleagues is similarly personal and similarly charged.

That explains the silence in the academy on the commitment and character of those who should teach. But it does not justify the silence. When asked by Socrates whether virtue could be taught, Protagoras, in a lengthy reply, affirmed that it could be.<sup>156</sup> His dialogue with Plato emphasizes that virtue is best taught by example,<sup>157</sup> and that to teach virtue one must know what constitutes virtue.<sup>158</sup> We agree. If this is true, the character and moral vision of the ethics teacher, above all other teachers, is of critical importance. If, that is, we seriously want to create honorable lawyers. How then can we hire or promote in this field without giving attention to matters of character?

What would it mean to pay attention to such things? What would we ask? For what characteristics or qualities would we look? First, we might ask those who desire to teach ethics for an

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156. See PLATO, PROTAGORAS 323a-328d (C.C.W. Taylor trans., 1991); see also Thomas D. Eisele, *Must Virtue Be Taught?*, 37 J. LEGAL EDUC. 495 (1987) (arguing "not only that virtue can be taught, and that it is taught, but that it must be taught" in law schools).

157. According to one commentator's reading of *Protagoras*:

Socrates is an example (or exemplar) of virtue or excellence; he enacts or performs excellence in his incessant questioning and questing. He may not be able to articulate fully what virtue is—but this only shows perhaps that virtue is not a matter of *propositional* knowledge. Socrates is able to *embody* it. And his example *teaches* us what virtue or excellence is. We learn virtue from his examples.

Eisele, *supra* note 156, at 497.

158. Eisele noted further:

Socrates knows what virtue is in that he can perform (display) it, and we too know what it is in that we can recognize it in his actions. Our knowledge of virtue is shown or revealed either in our ability to act virtuously or in our ability to recognize virtue in action.

*Id.* at 498.



example or two of occasions when they strove to live up to a principle they profess to be of importance. It is inconceivable to either of us that anyone whose life is centered by the demands of virtue would not have such examples. Responding to this type of question demands a certain kind of courage and trust. The answer might displease the listeners, and might thereby cost one a job. To answer, therefore, requires some courage. It also requires some trust, not only in the questioners, but primarily in oneself and one's convictions. The query seeks to identify a person of integrity who knows her own identity and allegiances and lives by those commitments. These are important qualities in anyone who would profess to teach virtue to another.

Could such an inquiry be abused? Yes. Our faculties, like the society generally, are divided on many questions of right and wrong. A majority could penalize a candidate for holding some vision of virtue that was outside the mainstream view. It might nonetheless be a worthy vision, for the majority view is not necessarily the right view. There is no getting around this potentially unjust result. On the other hand, faculties deny jobs to people all the time because the legal theories they espouse appear bizarre. Who is to say that those judgments are correct? The real problem in asking about character is not potential injustice. It is that, by opening up the question of virtue at all, the line across the personal has been crossed in a way that makes many of us feel especially vulnerable. But as dangerous and frightening as these questions are, there is something important for the community to gain from taking questions of character out of the closet. It provides the community with an opportunity to examine what common ground we do share on matters of right and wrong, and it invites individuals in the community to question how they live out the virtues they profess to hold. It makes ethics real and a thing of consequence. It celebrates the importance of virtue, courage, and conviction. At the risk of sounding immodest, we have such stories to tell, and we know many of our colleagues in this field do as well.<sup>159</sup>

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159. See, e.g., Roger C. Cramton, *On the Steadfastness and Courage of Government Lawyers*, 23 J. MARSHALL L. REV. 165 (1990) (describing personal experiences with the United States Department of Justice); Susan P. Koniak, *Feasting While the*

We also have stories that demonstrate our own moral weakness—occasions when we acted without the virtue that we aspire to have. As in the case of moral triumphs, we believe that anyone who sets virtue as a goal has similar tales of failure. Although we would not ask a candidate to divulge such failings, we would consider the acknowledgement of moral imperfection as a positive trait. Living with human imperfection, exemplified by instances of failure, is an essential characteristic of a good professional. All of us make mistakes—we are flawed and imperfect. Inquiry into how professionals live with and learn from their failures and imperfections has an important role in the teaching of legal ethics.<sup>160</sup>

We are serious about these areas of inquiry, which does not mean that we believe that our suggestion will be adopted. A more palatable alternative might be to ask the candidate to describe a moral hero from literature or life.<sup>161</sup> This makes the inquiry less personal, although it also renders the answer less informative.

This Article is not meant to resemble a primer on how to hire professors of legal ethics. Our point, rather, is to invite debate on the question of character and its role in teaching, particularly in the teaching of ethics.<sup>162</sup> For when all the specific lessons have been forgotten, the character of the teacher may remain imprinted upon the student's mind. We take that possibility seriously, which means we keep it in mind whenever we decide to act within or without the law school environment. It informs our approach to consulting work and how much of this work to do:

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*Widow Weeps*: *Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1045 n.† (1995) (describing her experience testifying as an expert witness in *Georgine*).

160. See WILLIAM F. MAY, *THE PHYSICIAN'S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS* (1983); see generally CHARLES L. BOSK, *FORGIVE AND REMEMBER: MANAGING MEDICAL FAILURE* (1979) (describing the experiences and teaching of living with failure in medicine).

161. See Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981) (discussing Atticus Finch, the lawyer-hero of Harper Lee's novel, *To Kill a Mockingbird*, and depicting the heroism of Atticus Finch as his insistence upon telling the truth); Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531 (1994) (describing the effect of Atticus Finch's example on his children).

162. For an earlier discussion of the desirability and importance of teachers bringing their moral commitments into class discussion, see Colloquy, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987).

which cases to accept, and which to reject. It informs our positions on law school matters, from hiring to grading curves. We recognize that our students watch us to see whether we mean what we say. Do we mouth principles or mean them? We understand our responsibility to serve as examples. We encourage our colleagues to demand no less of the ethics teachers at their schools and no less of themselves.

One might ask whether we have moved dangerously close to advocating some form of moral zealotry, some unhealthy righteousness that can only lead to extremism and intolerance. In a recent book on the legal profession, Anthony Kronman of Yale warned against the danger of moral zealotry by citizens of a democracy and, in particular, among lawyers.<sup>163</sup> He set up a vision of virtue in lawyering and in law teaching based upon the lawyer role he refers to as the "lawyer-statesman."<sup>164</sup> The lawyer-statesman is that person who, almost above all other qualities, understands that no right or wrong exists on questions of intense public debate such as abortion and the death penalty—two examples mentioned by Kronman.<sup>165</sup> Moral complexity and the incommensurability of values, Kronman argued, necessitate a pragmatic posture.<sup>166</sup> Because "justice" is an "intractabl[e]" and "controversial" subject, the lawyer-statesman need have no vision of justice other than as a description of process-outcomes and a commitment to efficient case management.<sup>167</sup> "Political fraternity" replaces justice as the ultimate

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163. KRONMAN, *supra* note 54.

164. *See id. passim.*

165. *See id.* at 59-62.

166. *Id.* at 61-62.

167. *See id.* at 107-08. Kronman discusses "justice" at two points in *The Lost Lawyer*. First, Kronman states that justice is such an "intractably controversial" topic that it "provides little guidance in resolving the endless controversies" of today's world; an emphasis on political fraternity, he states, is required "precisely because these concepts [of liberty and justice] are so controversial." *Id.* The second discussion of justice criticizes the instrumental concept of managerial judging because it "reinforces the tendency of judges to view the claims before them as commensurable." *Id.* at 342. Because, in Kronman's view, the incommensurability of values makes justice meaningless, the lawyer-statesman's virtues largely reduce themselves to prudence, public-mindedness, and political fraternity. *See id.* at 340-41. Because Kronman places so much emphasis on conciliation and compromise as aspects of the lawyer-statesman, he inevitably suggests that adversarial advocacy, confrontation, and conflict are

virtue.<sup>168</sup>

Kronman's book contrasts his lawyer-statesman with two unacceptable moral alternatives: the lawyer as hired gun<sup>169</sup> and the lawyer as moral zealot.<sup>170</sup> We have great sympathy for Kronman's critique of the morality of the hired gun role, but we part company with him on his denunciation of those he calls zealots and his embrace of the statesman alternative.

We try to teach our students that there is dignity and morality in the role that Kronman mocks with the title of "zealot."<sup>171</sup> Kronman details no lives of lawyer-statesmen in his book. He provides no concrete examples of the virtues he would have lawyers emulate. He does, however, provide a list of lawyers who qualify as statesmen/heroes.<sup>172</sup> Kronman's list includes John McCloy and Dean Acheson.<sup>173</sup> McCloy, at least, does not make our list, which includes instead Thurgood Marshall and Charles Hamilton Houston, two lawyers, one also a judge and the other a law teacher, who strove mightily and at great personal risk to move society forward, to bring a new understanding of justice into the world. The judge/hero on Kronman's list is Justice Robert Jackson.<sup>174</sup> While Justice Jackson is a name, unlike Acheson or McCloy, that might figure prominently on many an academic's list of heroes, he too is not on Susan's list. (Roger, who is perhaps more accepting of human frailty, continues a perverse admiration for Jackson's flawed virtue.) Instead, Susan admires Justice Murphy, who spoke out clearly and eloquently against the racism that caused this country to lock up its Japanese citizens during World War II (and Roger shares this admi-

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inappropriate, even though the short-term use of these measures may serve long-term interests of political community and harmony. *See id.* at 334. Martin Luther King, Jr., Thurgood Marshall, and the civil rights movement come to mind.

168. *Id.* at 108.

169. *See id.* at 113-34, 146-54. Kronman criticizes this model under the rubric of the "narrow view of what counselors and advocates do." *Id.* at 122. Under this narrow view, the lawyer "will end up doing what his client wants in every case and feeling no qualms about it." *Id.* at 145.

170. *Id.* at 144-46.

171. *See, e.g., id.* at 161.

172. *Id.* at 11-12.

173. *Id.* at 11.

174. *Id.*

ration retrospectively, having learned from his own failures).<sup>175</sup> Jackson, the statesman, was more concerned with keeping the Court clear of the matter than with the plight of his fellow citizens.<sup>176</sup> This, to us, fails to reach heroic proportions.

What Kronman denounces as moral zealotry, we understand as moral conviction. One with conviction, however, can be wrong. This danger, and what Kronman sees as the natural tendency of moral conviction to lead to ruthlessness, cause him to denounce conviction.<sup>177</sup> What then of these dangers? The caricature of zealotry that Kronman paints surely raises both questions. His zealot is a simpleton, charging forth while ignoring the opposing commitments of others or the complexity of moral choice, ignoring the details. This is not a prophet but an idiot, a fool.

Any thoughtful person who aspires to bring justice into the world must understand that the world punishes its prophets; so we teach our students. The world does not embrace those who would disturb it and unsettle the settled conditions that make life comfortable for those who are comfortable. False or true, prophets face derision and danger. No prophet can assume her role mindless of its costs or the opposing commitments that make the role so costly. That understanding provides a natural check on prophecy. Only when one is most sure of one's convictions is it sensible to act. Only after careful thought and immersion in detail would one dare take on the costs of becoming a prophet. The only exception is if one is a lunatic, but lunatics by themselves pose little threat, for they need the cooperation of others (perhaps statesmen?) to cause true harm.

As for ruthlessness, prophecy has a long tradition. The mythology and teaching of that tradition is that the most noble

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175. *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

176. *Id.* at 242 (Jackson, J., dissenting).

177. KRONMAN, *supra* note 54, at 104. Kronman argues that "an idealistic commitment to some narrow and exclusive conception of the human good" tends to lead to ruthlessness. *Id.* Kronman's lawyer-statesman avoids ruthlessness because, recognizing the incommensurability of values, he values political fraternity above any vision of justice. *Id.* Kronman's "ideal is an essentially conservative one" that recognizes "to a degree no moral zealot can, the irreconcilable diversity of human goods" and is "comfortable with strategies of compromise and delay." *Id.* at 161.

prophets offer their own bodies in the name of their vision of justice before harming those who oppose them. Christ, Ghandi, and Martin Luther King, Jr. are the most notable exemplars of this tradition. But other, less famous, figures also demonstrate the same point. In teaching students the morality of prophecy, the idea that those who struggle for humanity must put humanity first is and must be a central theme. First, do no harm. Second, strive to do good. Those are central themes of our lives as we strive to live them.

Indeed, we believe that Kronman got it backwards when he argued that the statesman role he celebrated is the surest guard against ruthlessness.<sup>178</sup> Because statesmen must proceed on the presumption that present conditions are not so terrible, that currently existing society is not so unjust, corrupt or violent, they begin with a blindness to the pain of those who have been or are now the victims of society's great wrongs: for example, blacks, women or the homeless. The pain of these groups cannot be so great because society is not so bad, or so the statesman must believe. This picture of the ruthless statesman is no mere abstraction. Justice Jackson, for example, refused to stand up boldly against the wrong in *Korematsu v. United States*<sup>179</sup> and had great difficulty making up his mind<sup>180</sup> in *Brown v. Board of Education*.<sup>181</sup> As Robert Cover asked, why do we revere this man?<sup>182</sup> Perhaps more importantly, why do we not revere someone like Justice Murphy?

One of the names cited by Dean Kronman as an exemplar of statesmanship was John J. McCloy.<sup>183</sup> John McCloy, Assistant

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178. *Id.* at 104-06.

179. 323 U.S. 214 (1944) (upholding the 1942 military order evacuation and detention of all persons of Japanese ancestry from the Pacific Coast area). Justice Murphy dissented on the merits, *id.* at 233 (Murphy, J., dissenting); Justice Jackson argued that the military order should be nonreviewable. *Id.* at 242 (Jackson, J., dissenting).

180. See BERNARD SCHWARTZ & STEPHAN LESHER, *INSIDE THE WARREN COURT* 83-87 (1983).

181. 347 U.S. 483 (1954).

182. Robert M. Cover, *Your Law-Baseball Quiz*, N.Y. TIMES, Apr. 5, 1979, at A23, reprinted in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 249, 252 (Martha Minow et al. eds., 1992).

183. KRONMAN, *supra* note 54, at 11.

Secretary of War during World War II, took the position in 1944 that the United States armed services should not use its resources to bomb the crematoria at Auschwitz nor to bomb the railroad tracks in Poland, tracks leading the Jews of Hungary to slaughter.<sup>184</sup> At the time, McCloy already had in hand ample evidence of the horror of the Nazi camps.<sup>185</sup> After the war, when even more evidence of the atrocities was available to McCloy and all the world, McCloy asked a representative of the World Jewish Congress whether he really believed the Germans did such terrible things.<sup>186</sup> Even then, McCloy seemed incapable of believing that civilized people could do such wrong—the blindness of a statesman. McCloy pardoned Krupp, who had been convicted of war crimes for using Jewish slave labor to make a fortune.<sup>187</sup> McCloy not only pardoned Krupp, but returned Krupp's property to him—assets made on the bodies of tortured and murdered Jews.<sup>188</sup> McCloy actively supported the internment of the Japanese in our country, going to such lengths as to distort the record presented to the Supreme Court in *Korematsu* to ensure that the Court would uphold the internment.<sup>189</sup> In 1981, after the nation had repudiated its treatment of Japanese citizens during World War II,<sup>190</sup> this aged statesman faced two options. McCloy could either admit that he had erred in supporting and lying about the Japanese internment project or continue to rationalize his conduct. He chose the latter path, testifying before Congress in 1981 that the internment was justified as retribution for Pearl Harbor.<sup>191</sup> He thus further disgraced himself. Should he serve as a model?

In *The Present Age*, Kierkegaard told the following story:

If the jewel which every one desired to possess lay far out on a frozen lake where the ice was very thin, watched over by

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184. DAVID S. WYMAN, *THE ABANDONMENT OF THE JEWS* 292-97 (1984).

185. *Id.* at 288-89.

186. *Id.* at 323.

187. KAI BIRD, *THE CHAIRMAN: JOHN J. MCCLOY, THE MAKING OF THE AMERICAN ESTABLISHMENT* 364 (1992).

188. *Id.* at 369.

189. PETER H. IRONS, *JUSTICE AT WAR* 287-302 (1983).

190. *See id.* at 348.

191. *Id.* at 351-54.

the danger of death, while closer in, the ice was perfectly safe, then in a passionate age the crowds would applaud the courage of the man who ventured out, they would tremble for him and with him in the danger of his decisive action, they would grieve over him if he were drowned, they would make a god of him if he secured the prize. But in an age without passion, in a reflective age, it would be otherwise. People would think each other clever in agreeing that it was unreasonable and not even worth while to venture so far out. And in this way they would transform *daring and enthusiasm* into a *feat of skill*, so as to do something, for after all "something must be done." The crowds would go out to watch from a safe place, and with the eyes of connoisseurs appraise the accomplished skater who could skate almost to the very edge (i.e. as far as the ice was still safe and the danger had not yet begun) and then turn back. The most accomplished skater would manage to go out to the furthestmost point and then perform a still more dangerous-looking run, so as to make the spectators hold their breath and say: 'Ye Gods! How mad; he is risking his life.'<sup>192</sup>

And the jewel would remain untouched. We aspire to teach our students that to live a moral life is to strive for the jewel and that to dare in doing so is to go where the danger is greatest. We pray on behalf of our students and all those whose lives our students will touch that these young lawyers will someday have such courage. We thank God for the courage God has given us and for the blessing God has conferred on us by allowing us to strive to serve as examples.

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192. SOREN A. KIERKEGAARD, PARABLES OF KIERKEGAARD 15-16 (Thomas C. Oden ed., 1978).