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ESSAY

Ethics and the Law School: The Confusion Persists

PETER K. ROFES*

Why we should not be surprised when a former student calls to ask why a grievance has been filed against him just because he borrowed money from his firm's client trust account to purchase property in the Caribbean.

The American law school discovered ethics at about the same time the rest of America discovered how rare a commodity ethics was in our national leaders, most of whom happened to be lawyers. In fact, despite trailblazing work by scholars such as Monroe Freedman, Geoffrey Hazard, and others, it is no stretch of the historical record to conclude that the place and status of ethics in the law school owes more to Richard Nixon and his three legal Johns (Dean, Ehrlichman, and Mitchell) than to any law professor.¹

Yet, two decades after the culmination of Watergate, the law school remains confused about the role ethics plays in its mission of preparing students for practice. At first-year orientation, representatives of most

* Associate Professor of Law, Marquette University Law School. B.A. Brandeis, A.M. Harvard, J.D. Columbia. This Essay is part of a larger project underway in which I explore (in much the same vein as this Essay explores ethics in the law school) a host of aspects of the American law school, among them the admissions process, the classroom, the final examination, grades, a day in the life of a law professor, the role of the Constitution, the job interview, multiculturalism, the faculty meeting, and the graduation speech. As for acknowledgements, candor impels me to disclose that, with one exception, none of my colleagues at Marquette has offered anything but scorn for the project. The one exception is a colleague who has offered what can best be described as derision rather than scorn. I remain grateful nonetheless for their collegiality, congeniality, and conviviality.

1. As Harry Jones noted, it was in the summer of 1974 — the summer of the resignation — that the American Bar Association amended its standards to require all accredited law schools to offer mandatory instruction in what has come to be called professional responsibility. Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 958-59 (1978). See also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 2-3 (1975) (discussing John Dean's testimony before the Senate Judiciary Committee and indicating that Dean "had been struck by the fact" that so many of the Watergate conspirators had been lawyers); Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 261 (1975) (discussing the same testimony). As an aside, I do not mean to minimize the roles played by Gordon Liddy and Donald Segretti, each of whom — at the time Watergate broke — also had a license to practice law.

American law schools tell incoming students that the development of ethical lawyers is central to their mission. At graduation, these same representatives tell the newest members of the profession how diligently the schools have worked to mold ethical lawyers. But the events that unfold in the thirty-three months or so between these announcements reveal a gap between words and deeds, a gap rooted in confusion, uncertainty, and a lack of consensus about what teaching ethics is all about. This Essay addresses three manifestations of that confusion.

One manifestation of the confusion is that law schools are deeply divided over what to call the package of stuff that they deliver in this area. Contracts, Torts, Property, Criminal Law, Constitutional Law — few in the law school quibble about what to call each of these bodies of legal principles or the basic course in each body. When it comes to ethics, however, the consensus suddenly breaks down.

Many schools opt to call this body of rules and regulations “Legal Ethics” — a stately, serious, upstanding name intended to send students a pair of strikingly inconsistent messages. The “Legal” in “Legal Ethics” seeks to appeal to the practical, gung-ho segment of the student body, the student who knew she wanted to be a lawyer from the time she slapped a nuisance suit on the kids next door because they screeched and wailed whenever their parents left them with a baby-sitter. Well aware that students such as these might fall asleep in a required course about the ethics of plumbers or veterinarians, the law school uses the term “Legal” to say to these students: “Hey, Folks: this course is about you — stop snoring and pay attention.” The “Ethics” is meant to appeal to an altogether different kind of student, the student who studied philosophy as an undergraduate and believes deep down that she is smarter than all her peers because, unlike them, she knows that Soren Kierkegaard and Jean Jacques Rousseau are not two National Hockey League rookies. The law school invokes the term “Ethics” to say to these intellectually refined students: “Listen up, boys and girls, because this course is more meaningful than the rest of the dreck we’ve required you to take so far. Trust us.”

Other schools choose the title “Professional Responsibility” — lofty, pervasive, practical. Here again we see an appeal to different student interests. The term “Professional” is used to energize the student who looks forward to a lucrative career doing what professionals do best: billing clients vast sums for services never — or poorly — rendered and defrauding the Internal Revenue Service by claiming the cost of personal travel, meals, and magazine subscriptions as expenses incurred for the production of income. The term “Responsibility” is used to attract the interest of a very different kind of student, the student who begins her professional career believing

that a telephone call from a client seeking to learn about developments in his case should be returned, preferably within six months.²

A second manifestation of confusion concerns the number of credit hours the basic course in Legal Ethics should be allotted.

Many law schools, evidently a majority of those accredited by the American Bar Association, continue to allocate two credit hours to the required course in Legal Ethics.³ A two-credit required course is a law school's way of delivering a quintessential mixed message, a way of saying to students: "Hey, you really should be exposed to this stuff before we give you a degree because it's terribly important, but don't fret: we don't expect you to learn much of it." Empirical studies indicate that recent graduates of schools devoting only two credits to the basic course in Legal Ethics disproportionately lash out at their adversaries with suggestions of some truly difficult acts,⁴ perhaps because the two-credit course is unable to cover issues of professional civility in any depth.⁵

A minority of schools allocate three or more credit hours to the course. These schools send students a different but equally clear message: "Don't bother suing us for educational malpractice when you get caught converting client funds. We spent an entire class session warning you not to do that." The data mentioned above indicate that graduates of schools devoting three credits or more to Legal Ethics get into trouble no less often than their peers. The difference is that when these lawyers commit ethical breaches, they do so with calculated enthusiasm rather than through carelessness or stupidity.

In addition to the confusion about what name to assign the basic course in Legal Ethics and how many hours students should devote to it, disagree-

2. In addition to the pair of names discussed in the text, two others round out the field. One is "Legal Profession." The other is "The Rules and Regulations That Should Keep You From Doing All the Things You Never Should Have Been Doing in the First Place." Each reflects pretty much an exclusive appeal to the practical-minded members of the student body. Because these names fit my thesis a bit less snugly, I have taken the scholarly prerogative to ignore them entirely.

3. The information set forth in this paragraph has been gathered from a series of informal conversations with teachers of Legal Ethics held over drinks at recent conferences of the American Association of Law Schools and the American Bar Association.

4. Think about it.

5. Please do no misunderstand. I make no pretensions to having actually examined those empirical studies to ascertain whether they support the propositions set forth above. After all, that's what research assistants and law librarians are paid to do. As a matter of fact, I have surprisingly little evidence to support the statement that the empirical studies even exist, evidence that amounts to not much more than my intuitive sense that empirical studies of one sort or another exist to support pretty much every proposition that a contemporary law professor wishes to support. Accordingly, I am confident that such studies, were they in existence, would support the proposition. And, hey, even if they were not (or did not), I would represent that they were (and did). After all, I have tenure.

ment exists about the core material to be taught in this required course — the third manifestation of confusion addressed in this Essay.⁶ A recent examination of law school catalogues reveals two dominant approaches to course coverage.

The first approach — the more traditional — is typified by the following course description, a close analogue of which can be found at scores of law schools:

Professional Responsibility
[Legal Ethics]
[Legal Profession]
Two (2) [Three (3)] Credit Hours

An in-depth examination of the law governing the legal profession and the practice of law. Principal topics include: *the regulation of the profession* — why it can prove dangerous to lie to bar admission authorities, tell the state disciplinary agency that you just haven't had time to respond to its inquiry, or fail to make a premium payment on your malpractice policy; *the lawyer-client relationship* — focus on the allocation of decision-making and disparity of power between lawyer and client, with special emphasis on the need for lawyers to refrain from comments such as "Of course I can help you out, darling; after all, you're a woman and I'm a man" in the preliminary interview with a prospective client; *the duty of confidentiality* — advice on how lawyers can avoid situations like those in which they find themselves at parties saying things to local reporters such as "Hell, yes — of course my client kidnapped the kid. He told me that the first time we met"; *conflicts of interests and the duty of loyalty* — why drafters of rules of conduct recommend that, notwithstanding economic efficiencies, a lawyer be discouraged from representing both plaintiff and defendant in the typical civil case; *ethical issues in litigation* — analysis of the risks connected with advising a client that testimony about to be given by him is technically not perjury because the jury suspects he's not telling the truth anyway; and *the delivery of legal services* — an assessment of the pros and cons of introducing yourself to a bleeding accident victim with the words "Hurry, sign this before you expire. Your survivors will love you for it."

This description suggests that the approach to be pursued is one that seeks to prepare lawyers for practice by arming them with knowledge of the law governing the legal profession. As one example, a student exposed to the kind of materials suggested by this description is likely to begin law practice able to distinguish between a client trust account, on the one hand, and her own personal checking or money market account, on the other. This can prove a useful distinction for the practicing lawyer to grasp early in her career.

6. To put this point in the current language of American law professors, there exists a dispute about what "the canon" of legal ethics is and ought to be.

The second approach to the course is captured by the following description. A variation of this approach likewise can be found at many schools, including many that offer the more traditional approach set forth above:

Professional Responsibility
[Legal Ethics]
[Legal Profession]
Two (2) [Three (3)] Credit Hours

A leisurely frolic through novels, films, comic strips, and other aspects of American culture that touch on lawyers and the legal profession. Our goal will be to identify and explore the ethical problems most often encountered by fictional lawyers, regardless of whether non-fictional, real-world, flesh-and-blood lawyers of today encounter issues even remotely connected to those we will discuss. Students are on notice that the body of law that will govern their conduct as lawyers will not be a concern of this course. Instead, the course seeks to achieve a relaxed, pleasurable, and aesthetic experience, leading to rich, meaningful conversations and high student evaluations. Those students seeking to learn the petty details of the disciplinary system, conflicts of interests, confidentiality, and the like are urged to opt instead for an appropriate bar review course. Materials include works by Charles Dickens, Erle Stanley Gardner, Harper Lee, John Grisham, Scott Turow, Berkeley Breathed, and Garry Trudeau and the films *Adam's Rib*, *A Night at the Opera*, *The Fortune Cookie*, *Caddyshack*, *A Fish Called Wanda*, and *My Cousin Vinny*. Choice of espresso, cappuccino, or cafe latte with each session.

The approach reflected in this description reveals the disdain with which the particular school or professor views the traditional course in Legal Ethics. In contrast to the traditional course, this approach prepares students for the ethical problems of law practice not by studying rules of conduct, judicial decisions, or advisory opinions but by exploring the captivating and multi-textured world of literary and cinematic legal heroes. Students who make their way through a course such as this will develop a refined understanding of some of western culture's most prominent fictional lawyers. But they probably will come away having learned little about the application of RICO to lawyers and law firms.

In the American law school as elsewhere, consensus need not always be a virtue, and the absence of it need not always be a vice.⁷ Yet the confu-

7. For the figure of speech in which this observation has been cloaked, I am indebted to Barry Goldwater. It was Goldwater who, at the 1964 Republican convention in San Francisco, etched his name into rhetorical history with the following observation: "I would remind you that extremism in the defense of liberty is no vice! And let me remind you also that moderation in pursuit of justice is no virtue!" Barry M. Goldwater, Acceptance Speech in San Francisco, Cal. (July 17, 1964) in CAMPAIGN SPEECHES OF AMERICAN PRESIDENTIAL CANDIDATES 1948-1984, at 134, 141 (Gregory Bush ed., 1985).

sion within American legal education about the role ethics plays in the development of lawyers continues to wreak substantial harm. Students attending a school that calls the required course “Legal Ethics” or “Legal Profession” have a difficult time ascertaining whether a canned outline entitled “Professional Responsibility” is applicable to their class. Students attending a school at which the required course is only two credit hours feel bitterness and resentment that peers around the nation have the opportunity to develop a more refined understanding of the law governing lawyers. Students exposed to the more traditional course coverage worry that their failure to study the techniques of fictional lawyers such as Whiplash Willie Gingrich⁸ will diminish their chances for professional success.

Two decades after Watergate, it is time for the American law school to speak with one voice about the role of ethics in the development of American lawyers.

8. For the benefit of readers unfamiliar with classic films about lawyers and the legal profession, allow me to explain this reference. *The Fortune Cookie*, Billy Wilder’s 1966 gem, stars Jack Lemmon as Harry Hinkle, a television cameraman for CBS who experiences an unexpected meeting with a punt returner for the Cleveland Browns. That meeting prompts Hinkle’s personal injury lawyer brother-in-law, played by Walter Matthau, to see dollar signs — big green dollar signs. Whiplash Willie Gingrich, Matthau’s character, sues pretty much everyone in sight—CBS, the Browns, Cleveland Municipal Stadium, etc.—in hopes of a recovery that, to indulge in understatement, exceeds the compensatory damages incurred by Hinkle. Matthau’s performance, his first with Lemmon, earned him the Academy Award for Best Supporting Actor.