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# Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School

Russell G. Pearce\*

## I. INTRODUCTION

In his essay *Taking Rights Seriously*,<sup>1</sup> Ronald Dworkin observes that “the Government will not re-establish respect for law without giving the law some claim to respect.”<sup>2</sup> To paraphrase Dworkin, the legal profession will not re-establish respect for lawyers without giving lawyers some claim to respect.

Re-establishing respect for lawyers is a task of Herculean<sup>3</sup> proportions. Recent polls indicate that society’s respect for lawyers has dropped precipitously during the past twenty years, far more than society’s respect for comparable occupations.<sup>4</sup> Indeed, for at least the last ten years, this drop has continued despite lawyers’ zealous efforts to promote professionalism in response to the recommendations of the 1986 report of the American Bar Association (“ABA”) Commission on

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\* Associate Professor of Law, Fordham University School of Law. This article was originally written for presentation to the faculty of Loyola University Chicago School of Law during my visit to present the 1997 Baker & McKenzie Lecture in Legal Ethics. For their comments, the author would like to thank those faculty who attended presentations of the essay at Hofstra University, Loyola University Chicago, Fordham University Schools of Law, University of Haifa and University of Tel Aviv. The author would also like to thank Sherman Cohn, Mary Daly, Deborah Denno, Tom Geraghty, Steve Gillers, Bruce Green, Geoffrey C. Hazard, Jr., Milton Handler, Harry Haynsworth, Carrie Menkel-Meadow, Carlin Meyer, Tom Morgan, Ronald Rotunda, Tom Shaffer, Jerome Shestack, Ellen Yaroshevsky, Fred Zacharias, and Ben Zipursky for their helpful suggestions.

1. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 184 (1977). See generally Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 926-953 (1995) (applying Dworkin’s analysis to legal ethics jurisprudence).

2. DWORIN, *supra* note 1, at 205.

3. See *id.* at 105-06 (discussing Hercules as “a lawyer [and judge] of superhuman skill, learning, patience and acumen”).

4. Chris Klein, *Poll: Lawyers Not Liked*, NAT’L L.J., Aug. 25, 1997, at A6 (citing, among other statistics, that the percentage of the public viewing law as an occupation “of very great prestige” dropped from 36% in 1977 to 17% in 1997); see also Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62 (finding that only 22% of the public views lawyers as “honest and ethical”).

Professionalism.<sup>5</sup>

One of the many reasons<sup>6</sup> for the failure of the professionalism crusade is the refusal of the legal profession's institutions to match professionalism's lofty rhetoric<sup>7</sup> with forceful actions. One such institution is legal academia. Despite lip service given to the importance of legal ethics,<sup>8</sup> most law schools (with a few notable exceptions) fail to give legal ethics the same respect and attention given to most other courses, let alone a central role in the curriculum.<sup>9</sup>

This Article addresses the importance of ethics instruction in legal academia. It argues that the persistent disregard for teaching legal ethics is grounded in three outdated ideological perspectives: (1) professional and pedagogical practices ensure that lawyers are ethical; (2) legal academia is a scientific project in which ethics is irrelevant; and (3) adult moral development is relatively static.<sup>10</sup> This Article urges that law schools teach legal ethics seriously by requiring a three-credit first year, first semester course, at least one advanced upper-

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5. ABA Comm. on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* 12-13 (1986). For a discussion of the ABA's continuing efforts, see PROMOTING PROFESSIONALISM: ABA PROGRAMS, PLANS, AND STRATEGIES (1998).

6. See generally Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (explaining how professional ideology offers little moral authority to lawyers and the public).

7. See *infra* Part II.A.

8. The term "legal ethics" as it is used refers to ethics rules, bar opinions, the vast body of case law relevant to the conduct of lawyers and "the role of lawyers in our society," as well as development of students' "capacity for reflective judgment." See REPORT OF THE PROFESSIONALISM COMMITTEE OF THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM]. Following common usage, the terms "ethics," "values," and "morals" are used interchangeably. See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 665 (2d ed. 1987) (defining ethics to include "moral principles," as well as "values relating to human conduct"). However, many lawyers and law students limit consideration of ethics to the professional codes which they consider separate from morality. See, e.g., James R. Elkins, *Thinking Like A Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 535-38 (1996) (describing and criticizing the tendency of lawyers to cabin the concepts of professional ethics and morality). This cabining of ethics can be attributed to the perspectives discussed *infra* Part II.

9. See *infra* Part II.B. Related to the disdain for legal ethics is the disdain for teaching lawyering skills. See *infra* Part II.B and text accompanying notes 20-21. For a discussion of legal academics' attitude toward law practice, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) and Richard A. Posner, *The Deprofessionalism of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993), which replies to the Edwards' article.

10. See *infra* Part III.

class course, and pervasive teaching of ethics in all classes.<sup>11</sup>

## II. THE BETRAYAL OF PROFESSIONAL RHETORIC: PROFESSIONAL COMMITMENT AND ACADEMIC DISDAIN

### A. *A Rhetoric of Ethical Commitment*

A fundamental commitment to high ethical standards pervades professional rhetoric.<sup>12</sup> Legal ethics codes exhort lawyers “to maintain the highest degree of ethical conduct”<sup>13</sup> and declare that the “future of the republic” and the “maintenance of justice” depend upon whether “the conduct and the motives of the members of our profession are such as to merit the approval of all just men.”<sup>14</sup> The ABA Section of Legal Education describes “ethical conduct and integrity”<sup>15</sup> as an “[e]ssential characteristic of the professional lawyer.”<sup>16</sup> ABA President Jerome Shestack proclaims “fidelity to ethics and integrity as a meaningful commitment—in the spirit of enlarging and enhancing the practice, and awareness of, ethics” as first among “the elements of professionalism.”<sup>17</sup>

Beyond their inspirational value, these proclamations acknowledge that high ethical standards are essential to professionalism and lawyers’ exclusive privilege to practice law.<sup>18</sup> Lawyers’ privilege rests on a bargain between society and the legal profession. Society permits lawyers to regulate themselves in exchange for the profession’s guaranty that lawyers will be ethical, competent, and place the public’s interest above their own self-interest.<sup>19</sup> If lawyers do not meet these

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11. *See infra* Part IV.

12. The conduct of lawyers is a different matter. *See infra* notes 58-60 and accompanying text.

13. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmb. (1981).

14. A.B.A., 1908 FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, *reprinted in* 33 A.B.A. REP., REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE ABA, at 575 (1908) (quoting the CANON OF ETHICS pmb.).

15. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 8, at 7.

16. *Id.* at 6.

17. Jerome J. Shestack, *Defining Our Calling*, A.B.A. J., Sept. 1997, at 8, 8.

18. While professionalism requires lawyers to meet high moral standards, it is not the only source for such an expectation. Even commentators who reject professionalism hold lawyers to strict standards. *See, e.g.,* Pearce, *supra* note 6, at 1276 (arguing that the moral conduct of lawyers will improve if lawyers replace professionalism with a business paradigm); Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 403-04 (discussing the connection in the legal profession between serving commercial interests and serving the common good).

19. *See* Pearce, *supra* note 6, at 1239-40.

high ethical standards, the rationale for self-regulation and the laws prohibiting unauthorized practice fails.

### B. Academic Disregard for Legal Ethics

Standing in marked contrast to the legal profession's commitment to legal ethics is the law schools' disdain for teaching legal ethics. Professor Deborah Rhode observes that "[t]hroughout the twentieth century, a wide gap has persisted between the bar's official pronouncements and educational practices concerning professional responsibility."<sup>20</sup> She notes that during:

the early twentieth century, such instruction remained quite minimal, usually consisting of lecture series by judges or prominent attorneys. For many of these series, no credit and no grade were given; sometimes, as it turned out, neither were the lectures. Those that did occur were generally short on content and long on platitudes: 'general piffle' was the description offered by one of the first serious scholars in the field.<sup>21</sup>

In the 1950's, leaders of the Association of American Law Schools recommended that law schools offer both ethics courses and pervasive teaching of ethics throughout the curriculum.<sup>22</sup> At the same time, the reality of law school teaching contradicted this aspiration. A survey revealed that most ethics courses "consisted of only one hour of ungraded instruction each week" and that very few, if any, non-ethics courses included pervasive ethics instruction.<sup>23</sup>

The modern era of teaching legal ethics began in 1974.<sup>24</sup> The notorious conduct of lawyers implicated in the Watergate scandal undermined "public confidence in the legal profession."<sup>25</sup> In order to

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20. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 37 (1992).

21. *Id.* at 35.

22. See *id.* at 37; see also MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION, 15-16 (1980); cf. JULIUS STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY 245-46 (1959) (describing the Association of American Law School's discussion of the pervasive method of ethics teaching).

23. Rhode, *supra* note 20, at 36; see also KELLY, *supra* note 22, at 15; James E. Starrs, *Crossing a Pedagogical Hellespont Via the Pervasive System*, 17 J. LEGAL EDUC. 365, 379 (1965).

24. Use of this date to demarcate the modern era of teaching is not intended to suggest that there were not outstanding ethics teachers and scholars prior to that time.

25. Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 248; see also Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 193-94. Rhode explained that "the development of clinical programs, public interest law, consumer consciousness, and activist student bodies encouraged challenges to traditional professional roles and

restore public confidence and bolster the integrity of lawyers, the ABA House of Delegates “mandat[ed] the teaching of professional responsibility in all ABA-accredited law schools.”<sup>26</sup> A late 1970s Doonesbury cartoon summarized law schools’ response to this requirement. Discussing whether a legal ethics course would make a difference, a law student responds “nah—all that ethics stuff is just more Watergate fallout! Trendy lip service to our better selves.”<sup>27</sup> Law schools resented the “ABA’s assertion of curricular authority.”<sup>28</sup> Although these schools may have complied with the letter of the ABA requirement,<sup>29</sup> the course offerings were largely “second class.”<sup>30</sup>

Law students got the message. A 1975-76 American Bar Foundation (“ABF”) study found that law students “perceived [professional responsibility courses] as “requiring less time, as substantially easier, as less well taught, and as a less valuable use of class time.”<sup>31</sup> The courses had “a low status in the latent curriculum hierarchy”<sup>32</sup> because they were more likely to be taught by the discussion method rather than the socratic method<sup>33</sup> and were less intellectually challenging due to the lack of doctrinal complexity.<sup>34</sup> Ronald Pipkin, author of the ABF study, concluded “that the prevailing mode of [professional responsibility] instruction in fact socializes students into the belief that legal ethics are *not* important.”<sup>35</sup>

Since the undertaking of the Pipkin study, however, significant change has occurred.<sup>36</sup> As observed by Roger Cramton and Susan

regulatory structures.” Rhode, *supra* note 20, at 39. However, the Watergate scandal provided “the primary impetus for ethics instructions.” *Id.*

26. Daly, et al., *supra* note 25, at 194. The ABA House of Delegates added Standard 302(a)(iii) providing that each “law school . . . shall provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession.” A.B.A., STANDARDS FOR THE APPROVAL OF LAW SCHOOLS § 302(a)(iii) (1977); *see also* Pipkin, *supra* note 25, at 248. This appears to be the first time the ABA required law schools to offer a “specific course.” *Id.* at 249.

27. GARRY B. TRUDEAU, DOONESBURY (1975), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 1 (5th ed. 1990); *see also* Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 145 (1996) (quoting dialogue from Doonesbury comic strip).

28. Daly et al., *supra* note 25, at 195.

29. Pipkin, *supra* note 25, at 249.

30. Daly et al., *supra* note 25, at 195.

31. Pipkin, *supra* note 25, at 258.

32. *Id.* at 257.

33. *Id.* at 259.

34. *Id.* at 263-64.

35. *Id.* at 274 [italics in original].

36. One recent catalyst for change was the W.M. Keck Foundation’s Law and Legal

Koniak, "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; and the subject we refer to as 'the law and ethics of lawyering' has become a half-way respectable field of academic scholarship."<sup>37</sup> Deborah Rhode has provided an excellent text for making pervasive ethics a reality.<sup>38</sup> Further, schools like Fordham University have developed advanced and contextual ethics courses,<sup>39</sup> and a number of commentators have offered proposals for innovations in teaching ethics.<sup>40</sup> Teaching ethics in a clinical setting has received more focus,<sup>41</sup> and some schools have included ethics as a first year course.<sup>42</sup>

Unfortunately, these developments are not representative of the current state of legal ethics teaching. Cramton and Koniak note that today, "legal ethics remains an unloved orphan of legal education."<sup>43</sup> Echoing the views of a number of commentators, they find that "[i]n most law schools today legal ethics occupies a minor academic role as a one- or two-credit required course in the upper-class years, often taught by adjuncts or by a rotating group of faculty conscripts."<sup>44</sup>

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Administration Grant Program that, from 1991 to 1995, provided almost \$5 million in grants to a number of law schools to improve the teaching of legal ethics. See Thomas B. Metzloff & David B. Wilkins, *Foreword*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 1, 1.

37. Cramton & Koniak, *supra* note 27, at 146.

38. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994); see also Carrie Menkel-Meadow & Richard H. Sander, *The 'Infusion' Method at UCLA: Teaching Ethics Pervasively*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 129, 129.

39. See Daly et al, *supra* note 25, at 199-211; see also Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 372-77 (1998).

40. See, e.g., James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71 (1996); Christine Mary Venter, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 287.

41. See, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 64 (1995); Michael E. Wolfson, *Professional Responsibility as a Lawyering Skill*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 297, 297.

42. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 8, at 40-41.

43. Cramton & Koniak, *supra* note 27, at 146. Not surprisingly, Susan P. Koniak and Geoffrey C. Hazard similarly use a family analogy to describe the status of legal ethics. See Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 117, 117 ("[L]egal ethics remains the step-child of legal education.").

44. Cramton & Koniak, *supra* note 27, at 147; see also TEACHING AND LEARNING PROFESSIONALISM, *supra* note 8, at 40-41 (reporting a 1994 survey finding that 44% of schools offer a required two credit course, with 6% requiring no course at all, 23% requiring a three credit course, and the remainder having a variety of approaches,

They further observe that most schools which claim to teach ethics pervasively in fact offer "little more than tokenism designed to satisfy the [ABA] accreditation requirement."<sup>45</sup> While legal ethics scholarship has advanced "half-way" to respectability, Koniak and Hazard note that "[s]erious scholarship' in legal ethics is still considered somewhat of an oxymoron."<sup>46</sup> In addition, students continue to share the faculty's low opinion of legal ethics. One observer notes that students view legal ethics as "the dog of the law school [curriculum]—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds."<sup>47</sup>

### III. WHY ACADEMICS WRONGFULLY DISDAIN LEGAL ETHICS

What explains the disjunction between the promise of professional aspirations and the failure of the legal academy to honor these aspirations? For years, many law professors have maintained that legal ethics need not and cannot be taught.<sup>48</sup> This view is the product

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including a one credit required course as well as more challenging options).

Professor Deborah Rhode recently conducted an informal survey of ethics teaching at leading law schools. See Rhode, *supra* note 20, at 39-40, n.43 (noting that "slightly over half" of the 92 schools reporting a mandatory ethics course to the AALS Professional Responsibility Section offered a two credit course). In one school, she discovered a "lecturer, known unaffectionately as 'old ether lips,' [who] gained students' attention through multiple choice quizzes, in which much depended on getting the digits of the ABA Code sections in the right sequence." *Id.* at 40. At a different school, "a retired municipal court judge walked his class through the bar's disciplinary rules in taxonomies of three. With the aid of a slide projector, students one day learned three different kinds of conflicting interest; on the next, three reasons for zealous advocacy." *Id.* Throughout these schools, most faculty asserted that "professional responsibility coverage should not be their responsibility." *Id.* at 52.

A powerful testimonial to the second class status of legal ethics is the example of Boalt Hall Law School, where proponents of legal ethics teaching felt they had to trade placement of ethics in the first year curriculum for permission to increase the credit hours of the course from two to three. See Stephen McG. Bundy, *Ethics Education in the First Year: An Experiment*, 58 LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 19, 20-22.

45. Cramton & Koniak, *supra* note 27, at 148.

46. Koniak & Hazard, *supra* note 43, at 117.

47. Rhode, *supra* note 20, at 40 (quoting Dale C. Moss, *Out of Balance: Why Can't Law Schools Teach Ethics?*, STUDENT LAW., Oct. 1991, at 18-19); see also Cramton & Koniak, *supra* note 27, at 145 (noting that "[l]aw 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").

48. See generally Elliot E. Cheatham, *What the Law Schools Can Do to Raise the Standards of the Legal Profession*, 7 AM. L. SCH. REV. 716, 716 (1933) (noting that legal academics consider legal ethics "beneath our notice" or believe teaching legal ethics "transcends our powers"); Cramton & Koniak, *supra* note 27, at 146-47 ("Many law school faculties remain convinced that [legal ethics] is unteachable or believe that it is not worth teaching.").



of three powerfully entrenched perspectives: (1) a faith in the ethical guarantees of professionalism and the methods of legal education; (2) the belief in the scientific basis of legal education; and (3) the assumption that adults lack the capacity for ethical development. While these three perspectives have an imposing pedigree, they have little persuasive force.

A. *The Belief that the Profession and Education Will Ensure that Lawyers Act Ethically*

Despite the diminishing faith of the general public, the faith of legal academics endures based on the belief that venerated elements of professional ideology make the teaching of legal ethics unnecessary. These elements include the professionalism's assertion of lawyer's essential goodness, the legal education's promise of character building, and the legal community's self-policing function.<sup>49</sup> If any of these aspects functioned satisfactorily, law schools would not need to teach legal ethics.<sup>50</sup> Unfortunately, they do not.

Professionalism maintains that lawyers will behave ethically. It presumes that most lawyers act ethically. For these lawyers, articulation of ethical standards in codes of conduct will suffice to ensure ethical conduct.<sup>51</sup> There are two further mechanisms that purport to control those few practitioners who act unethically. The first of these mechanisms is the "invisible hand" of reputation.<sup>52</sup>

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49. See *infra* notes 51-57 and accompanying text.

50. Similar arguments could of course also be made with regard to teaching legal skills. See *infra* Part III.B.

51. See Pearce, *supra* note 6, at 1240; see also Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 259-262 (1992) [hereinafter Pearce, *Republican Origins*].

52. The "invisible hand of reputation" derived from the republican ideology, which preceded professionalism. See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, reprinted in 32 A.B.A. REP. 1, 75 (5th ed. 1907). Writing in 1854, Judge George Sharswood, the father of our legal ethics codes, observed that "[s]ooner or later, the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities." *Id.* at 75; see also Pearce, *Republican Origins*, *supra* note 51, at 260.

While acknowledging the need to create more formal mechanisms for regulating lawyers, professionalism retained the "invisible hand" of reputation. For example, Canon 27 of the ABA Canons of Ethics stated that "[t]he most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust." A.B.A., 1908 FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, reprinted in 33 A.B.A. REP., REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE ABA, at 575, 582 (1908) (quoting the ABA CANONS OF ETHICS Canon 27); see also Pearce, *supra* note 6, at 1242, 1238; Pearce, *Republican Origins*, *supra*

Lawyers who behave ethically earn the respect of their peers; this respect determines whether they succeed in law practice. Conversely, lawyers who behave unethically will not prosper. The second of these mechanisms are the existing formal procedures for preventing unethical people from gaining entrance to the bar and for disciplining the few rotten apples who do become lawyers.<sup>53</sup> With such safeguards in place and with lawyers' success subject to the forces of reputation, the profession guarantees its own virtue, rendering ethics teaching in law school unnecessary.

The character building function of legal education serves as another reason for refusing to make special efforts to teach ethics. Oliver Wendell Holmes, for example, described how legal education imparts moral lessons, both a passion for "profounder thought" and an antipathy against "mean ideals and easy self-satisfaction."<sup>54</sup> More recently, Anthony Kronman praised the case method's "function[] as an instrument for the development of moral imagination."<sup>55</sup> It causes the student "to care with new intensity about the good of the legal system and the community it represents."<sup>56</sup> This faith in legal instruction perhaps explains why many leaders of legal education maintain that "coverage of ethical concerns will occur naturally and pervasively throughout the curricula," even when their schools offer little or no specific instruction in legal ethics.<sup>57</sup>

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note 51, at 271-72; cf. Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989) (suggesting the existence of a base level invisible hand of reputation in the bargaining process).

53. See Pearce, *supra* note 6, at 1245; Pearce, *Republican Origins*, *supra* note 51, at 259-60.

54. OLIVER WENDELL HOLMES, *The Use of Law Schools*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 474, 475-76 (Sheldon M. Novick ed., 1995).

55. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 113 (1993).

56. *Id.* at 119; see also Cramton & Koniak, *supra* note 27, at 178 ("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.").

57. See Rhode, *supra* note 20, at 31. Cramton and Koniak express skepticism for a few high prestige law schools which make such a claim. See Cramton & Koniak, *supra* note 27, at 147. Similarly, studies in the 1950s reported that despite claims of pervasive ethics teaching, only 36 of the thousands of non-ethics courses taught at the 85 law schools across the country discussed ethics. See Rhode, *supra* note 20, at 36. Recently, Deborah Rhode undertook a related survey to determine whether casebooks outside the area of ethics included content relating to ethical issues. She found that in "138 books in fourteen subject areas the median amount of coverage in each volume was 1.4% of the total pages." *Id.* at 41.

Unfortunately, evidence today strongly suggests that neither the promises of professionalism, nor the character building function of legal education, satisfactorily ensure lawyers' ethical conduct. In fact, the overwhelming consensus is that lawyers' ethics are declining, both in compliance with ethical codes and in commitment to the public good.<sup>58</sup> At the same time, the profession has been unable to police itself adequately because its disciplinary system is underfinanced and ineffective.<sup>59</sup> Whatever merit and faith in professionalism and legal education once existed, such merit and faith no longer offers credible support for academia's position that teaching legal ethics is not essential. Indeed, the mounting evidence of unethical lawyer conduct continues to prompt demands for improved ethics teaching by law schools.<sup>60</sup>

*B. The Mistaken Notion that Ethics and the Science of Law Do Not Mix*

The belief that legal training builds character coexists with the somewhat contradictory notion that legal education is a science to which ethics is simply irrelevant. Related to this notion are the views that ethics teaching consists solely of inappropriate proselytizing and that its doctrine is too simple to merit serious consideration.<sup>61</sup>

The model of legal education in today's classrooms, the case method, grew out of Harvard Dean Christopher Columbus Langdell's view of law as a science.<sup>62</sup> Langdell described appellate cases as the

58. See Pearce, *supra* note 6, at 1257 (noting the claims that "lawyers, their ethics, and their professionalism are 'lost,' 'betrayed,' in 'decline,' in 'crisis,' facing 'demise,' near 'death,' and in need of 'redemption,'" as a result of commercialism) (citations and footnotes omitted).

59. See, e.g., GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 893-97 (2d ed. 1994) (explaining why the professional disciplinary system needs significant improving).

60. See, e.g., *TEACHING AND LEARNING PROFESSIONALISM*, *supra* note 8, at 13-25; Thomas B. Metzloff & David B. Wilkins, *Forward to Teaching Legal Ethics*, *LAW & CONTEMP. PROBS.*, Summer-Autumn 1995, at 1 (noting the importance of legal ethics education in law schools at a time when lawyers are plagued with "self-doubts about the nature of [their] profession").

61. See Rhode, *supra* note 20, at 48-49; Cramton & Koniak, *supra* note 27, at 148. Critics are concerned that "[m]oral instruction will amount to moral indoctrination." Rhode, *supra* note 20, at 49.

62. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 52 (1983). These developments in law reflected trends in higher education in the late nineteenth and early twentieth centuries, which moved from a classic liberal education to a more practical curriculum informed by the "scientific spirit." See *id.* at 51-52. This led higher education institutions generally to move moral education from its central place in the curriculum to the periphery. See Rhode, *supra* note 20, at 33-34.

raw materials from which to distill the principles of law.<sup>63</sup> He believed that law libraries are to law professors and students as “laboratories . . . are to the chemists and physicists, the museum of natural history to the zoologists, [and] the botanical garden to the botanists.”<sup>64</sup>

Felix Cohen suggests that this scientific approach made legal academics hostile to teaching ethics.<sup>65</sup> A science emphasizes “facts,” not “moral values,” and those who seek to promote the science of law believe “that law can attain the prestige of science only by showing a thorough contempt for judgments of value.”<sup>66</sup> After all, notes Cohen, “[t]here is no room for ethics in the oldest and most advanced science, physics. Why should those who seek to build legal science concern themselves with ethics?”<sup>67</sup>

Although few law faculty today expressly identify themselves as legal scientists, Langdell’s idealization of science continues to profoundly influence legal academia.<sup>68</sup> While those faculty who identify themselves with a scientific perspective are more likely to draw upon a social science, such as economics, than a hard science, such as physics,<sup>69</sup> these faculty still distinguish between facts and values.<sup>70</sup> Legal positivists, who focus on what law is, similarly

63. See STEVENS, *supra* note 62, at 52. Langdell believed that, law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to apply them with constant facility and certainty . . . is what constitutes a true lawyer . . . and the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied . . . .

*Id.* (quoting Langdell, *A Selection of Cases on the Law of Contracts*, vii) (ellipses in original).

64. *Id.* at 53.

65. See FELIX S. COHEN, *Modern Ethics and the Law*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 17, 19 (Lucy Kramer Cohen ed., 1970). In fact, in the early 1900s, prior emphasis on teaching morals and ethics in higher education “gradually gave way to emphasis on specialized training and ostensibly value-free inquiry.” Rhode, *supra* note 20, at 34.

66. COHEN, *supra* note 65, at 19.

67. *Id.*

68. See KRONMAN, *supra* note 55, at 110 (“The single most prominent feature of twentieth-century American legal education is its heavy reliance on the so-called case method of instruction.”).

69. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 87-88 (1977) (“Where Langdell had talked of chemistry, physics, zoology, and botany as disciplines allied to the law, the Realists talked of economics and sociology not merely as allied disciplines but as disciplines which were in some sense part and parcel of the law.”). Kronman refers to the law-and-economics movement in law schools as “the most powerful current in American law teaching today.” KRONMAN, *supra* note 55, at 226.

70. See KRONMAN, *supra* note 55, at 226.

separate law from morality.<sup>71</sup> Even many faculty who accept that the study of law implicates evaluative decisions do not teach about values. They commonly apply an “instrumentalist” approach that assumes that certain policy goals are worthy of pursuit, and then focuses students entirely on whether the law “provides an appropriate means for the realization of [those] policy goals.”<sup>72</sup>

In short, whether through old-fashioned Langdellian science, through cutting edge Law and Economics, or through policy-based instrumentalism, law professors continue to separate ethical questions from legal questions. Consequently, teachers’ and students’ values appear to become irrelevant. Some faculty view legal ethics as “somehow uninteresting or unworthy of fine minds.”<sup>73</sup> Others assert “that moral instruction will amount to moral indoctrination.”<sup>74</sup> As a result, legal ethics education improperly “becomes an occasion for teachers to impose their values and to penalize students with different perspectives.”<sup>75</sup> As David Wilkins recounts, “students who raise general ethical objections in traditional law school courses are often told that these concerns are irrelevant to the ‘legal’ issues being discussed.”<sup>76</sup>

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71. See, e.g., H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593-95 (1958); Norton, *supra* note 52, at 459 (suggesting that law teachers and students must “dispel a confusion between morality and law” in order to properly master the law).

72. Benjamin C. Zipursky, *Legal Coherencism*, 50 SMU L. REV. 1679, 1692 (1997) (describing instrumentalism).

73. KELLY, *supra* note 22, at 25. A similar dynamic exists with regard to training in legal skills. See, e.g., Edwards, *supra* note 9, at 62-66 (arguing that law schools employ too many “impractical” professors who pay far too little attention to training lawyers to practice law). The move from apprenticeship to law schools as the predominant method for training lawyers rested on the notion that the practical training of apprenticeship was uneven and inadequate preparation for lawyers. See, e.g., STEVENS, *supra* note 62, at 23-24. The scientific approach to lawyering provided the rationale both for minimizing the role of apprenticeship and for “combatt[ing]” the inclination of law students “to be practical.” *Id.* at 93.

74. Rhode, *supra* note 20, at 48. Legal education should be a “rational hard-headed, and no-nonsense analysis of . . . controversial problems,” not a “camp meeting or spiritual retreat.” *Id.* at 49 (quoting James F. Bresnahan, “Ethics” and the Study and Practice of Law: The Problems of Being a Professional in a Fuller Sense, 28 J. LEGAL EDUC. 189, 194 (1976)).

75. Rhode, *supra* note 20, at 48-49.

76. David B. Wilkins, *Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 L. & CONTEMP. PROBS., Summer-Autumn 1995, at 241, 246; cf. William Stringfellow, *A Lawyer’s Work*, in WILLIAM STRINGFELLOW, *A KEEPER OF THE WORD* 30, 32 (Bill Wylie Kellerman ed., 1994) (describing Stringfellow’s experience at Harvard Law School in the 1950s where mention of the word justice “evoked ridicule, as if justice were a subject below the sophistication of lawyers”).

Although these critiques persist, the ideological perspectives from which they derive their force have become an anachronism. The complexity of the law and ethics of lawyering has become undeniable.<sup>77</sup> Moral reasoning has regained respect as a serious academic subject.<sup>78</sup> The idea that law is a science has lost some of its hegemony,<sup>79</sup> as has the distinction between facts and values.<sup>80</sup> Within the academic community more broadly, the notion that science is a timeless and privileged means of discovery has become regarded as philosophically suspect.<sup>81</sup>

Within the scientific community, the notion that science and ethics do not mix has also lost its dominant influence. A recent National Academy of Science publication on “responsible conduct in research” discusses the ethics of “experimental techniques,” the analysis of data, and “conflicts of interest,”<sup>82</sup> as well as “the impact [of research] on society.”<sup>83</sup> The publication notes that “[c]onstruction of the atomic bomb and the development of recombinant DNA—events that grew out of basic research on the nucleus of the atom and investigations of certain bacterial enzymes, respectively—are two examples of how seemingly arcane areas of science can have tremendous societal consequences.”<sup>84</sup> Accordingly, today little support exists for the

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77. See Cramton & Koniak, *supra* note 27, at 159.

78. See, e.g., Elliott M. Abramson, *Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223 (1993) (suggesting that there is “an objective and universal dimension to moral structures and moral reasoning” that “teaching can promote and accelerate”).

79. See, e.g., Andrew M. Jacobs, *God Save this Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1119 (1995) (observing that “Langdell’s ideal of law as a science of reason has broken down generally within the law”); David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 5 (David Kairys ed., revised ed. 1990) (criticizing “the notion of law as neutral, objective, and quasi-scientific”).

80. See, e.g., HILARY PUTNAM, *REASON, TRUTH AND HISTORY* 127-149 (1981) (arguing that the fact/value distinction is untenable within contemporary metaphysics, epistemology, and philosophy of language).

81. See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 1 (2d ed. 1970) (suggesting that scientific knowledge is socially constructed).

82. See COMMITTEE ON SCIENCE, ENGINEERING, AND PUBLIC POLICY, *ON BEING A SCIENTIST: RESPONSIBLE CONDUCT IN RESEARCH* (1995) (joint publication of National Academy of Sciences, National Academy of Engineering, and Institute of Medicine).

83. *Id.* at 20.

84. *Id.*; see also Freeman Dyson, *Can Science Be Ethical?*, N.Y. REV. OF BOOKS, April 10, 1997, at 46 (discussing the ethics of science and research in the 20th century); David J. Mattson, *Ethics and Science in Natural Resource Agencies*, 46 BIOSCIENCE 767 (1996) (describing the ethical dilemmas faced by natural resource agency scientists, and the features of agencies that can exacerbate the already difficult practice of mission-oriented science).

proposition that “contempt” for ethics is necessary in order for “law [to] attain the prestige of science.”<sup>85</sup>

*C. The Belief that Legal Ethics Cannot Make Law Students More Ethical*

Many law faculty believe that law schools cannot improve the moral conduct of students through the teaching of legal ethics.<sup>86</sup> They assert that students’ values have been fully formed prior to law school and are not likely to change.<sup>87</sup> This view, that the ethical capacity of adults is relatively static, appears to be a survival of the feudal concept of status wherein one’s character and place in society was dictated by birth and family status.<sup>88</sup> If birth and family circumstances dictate character, education in ethics can make little or no difference.

This view reflects two major manifestations. The first is the historical proposition that legal education and admission to practice should be limited to the “right kind of people.” As one critic of required legal ethics education stated in 1930, the “‘right kind’ of law student already knows what constitutes moral and ethical conduct, and . . . a formal course in Legal Ethics will not supply the proper sort of character training for students who are not the ‘right kind.’”<sup>89</sup> Henry Drinker, perhaps the most prominent legal ethicist of the mid-twentieth century, reflected this view when he observed that “Russian Jew boys” were disproportionately “guilty of professional abuses” because their family background and education did not inculcate them in

85. COHEN, *supra* note 65, at 19.

86. *See, e.g.*, Cramton & Koniak, *supra* note 27, at 146-47 (“Many law school faculties remain convinced that [legal ethics] is unteachable . . .”). In the 1920’s, for example, leading law schools refused to teach an ethics course on the ground that “it is a fallacy to assume that high ethical standards can be inculcated either by general exhortations or by case method drill in legal etiquette.” ALFRED ZANTZINGER REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 255 n.3 (photo. reprint 1987) (1928).

87. *See infra* notes 93-96. *See also* Rhode, *supra* note 20, at 36; *see also* Pipkin, *supra* note 25, at 265.

88. For example, in his classic observation, Sir Henry Maine described the move “from Status to Contract” as a move from a “society in which all the relations of Persons are summed up in the relations of Family . . . towards a phase of social order in which all these relations arise from the free agreement of Individuals.” HENRY J. S. MAINE, *ANCIENT LAW* 99-100 (Ernest Rhys 1927); *see also* MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 292 (1989) (describing the premodern notion “that family and marriage were the essential determinants of an individual’s economic security and social standing”).

89. Charles H. Kinnane, *Compulsory Study of Professional Ethics by Law Students*, 16 A.B.A. J. 222, 222 (1930) (delineating opposing views on the topic of required ethics courses).

American ideals.<sup>90</sup>

The second manifestation of this view, common in legal academia today, incorporates Drinker's view that family and environmental influences prior to law school determine law students' and lawyers' ethics.<sup>91</sup> Rather than associate unethical conduct with particular groups,<sup>92</sup> it relies on the notion that a person's capacity for moral development maximizes once a person reaches adulthood.<sup>93</sup>

By their own terms, these perspectives are unpersuasive. Even if a student's moral development was generally complete before law school, that student would still have to apply this moral framework to the pursuit of law. John Mixon and Robert Schuwerk observe that "while law students have well-formed personal values stemming from family, church, and society, they nonetheless have relatively unsophisticated and unformed ideas of what it means to be a 'good lawyer.'"<sup>94</sup>

Research demonstrating that values are malleable in adulthood renders these perspectives even less persuasive. Psychologists have shown that adulthood, like childhood, is a time of personal growth and

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90. STEVENS, *supra* note 62, at 184 n.41 (citing 1929 A.B.A. PROC. 622-23). Drinker contrasted foreign born Jews with "many splendid Jewish lawyers and judges" he knew who were born in the United States. *Id.* Drinker's point was that the requirement of a college education for admission to law school served as a proxy for identifying persons of the right class and right values. *See id.* at 176. During the twentieth century, bar leaders sought to raise the prerequisites for law school education in order to limit or abolish the proprietary, often night law schools that admitted large numbers of poor and immigrant students, many of whom lacked high school educations. *See id.* at 99-101. As one bar leader observed, "[y]ou can produce a moral and intelligent bar, by raising the standard, not only of education, but along economic lines so that every Tom, Dick and Harry cannot come to the Bar." *Id.* at 100 (quoting Franklin Danaher, 3 AM. L. SCH. REV. 35 (1911)).

91. *See, e.g.*, Rhode, *supra* note 20, at 31 (describing this perspective, Rhode explains, "Other educator's conclude that postgraduate courses in ethics offer too little, too late: childhood socialization, situational pressures, and practice norms can hardly be offset through occasional sermonizing by academics.").

92. While negative stereotypes similar to Drinker's are not so commonly expressed today, they are not entirely absent from the academy. *See* Verhovek, Sam Howe, *Texas Law Professor Prompts a Furor Over Race Comments*, N.Y. TIMES, Sept. 16, 1997, at A28 (reporting that law professor Lino Graglia stated that "black and Mexican-American students were 'not academically competitive' with white students at the nation's top universities").

93. *See, e.g.*, Pipkin, *supra* note 25, at 266-67 (Pipkin states, "Proponents of this view believe that moral character is malleable only at an early age and that the value systems which underpin ethical judgments (or explain the lack of them) are so deep-seated in adults as to be immutable.").

94. John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 87, 98 (applying insights from Andrew S. Watson, *A Psychiatrist on the Law School Faculty: Influences on Professional Careers*, 16 LAW MED. & HEALTH CARE 240 (1988)).



development.<sup>95</sup> Not surprisingly, studies reveal that moral development continues “after the age of 18.”<sup>96</sup> As the Committee on Professionalism of the ABA Section of Legal Education and Admissions concluded, “[t]he once widely held view that ethical precepts are fully formed before law school has been proven to be untrue.”<sup>97</sup>

Research further confirms that law school in particular is a time when students’ values change. For example, political scientist Robert Stover documented the law school experience and its effect on students as making them less altruistic and less willing to work in a public interest job.<sup>98</sup> Further underscoring the dramatic impact of a law school on a law student’s personal development is an American Bar Foundation study reporting that law students’ rate of significant mental health problems begins at an average rate but rises to as much as four times the average by graduation.<sup>99</sup> Other studies support the specific proposition that ethics can be taught. Deborah Rhode notes that “[m]ore than a hundred studies evaluating moral education courses find that well-designed curricula can significantly improve capacities of moral reasoning . . . .”<sup>100</sup>

The literature on legal ethics education, however, is less definitive. Some commentators have found ethics education to be significant,

95. See, e.g., GAIL SHEEHY, *PASSAGES* (1974) (discussing research that illustrates adulthood as a time of personal growth).

96. Mordecai Nisan & Lawrence Kohlberg, *Universality and Variation in Moral Judgment: A Longitudinal and Cross-Sectional Study in Turkey*, 53 *CHILD DEV.* 865, 869 (1982).

97. *TEACHING AND LEARNING PROFESSIONALISM*, *supra* note 8, at 22. The Committee explained, “[j]udgement is an essential element of lawyering; and the failure to emphasize its importance in the classroom sends out the negative image that it is unimportant.” *Id.*

98. See ROBERT STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* 34-35 (Howard S. Erlanger ed., 1989) (claiming that “during law school the number of . . . students who preferred that their first job be in public interest law declined markedly, and this shift can be explained in terms of changes in the students’ values and expectations”); see also RICHARD D. KAHLBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992) (providing an account of a Harvard law student’s experience); Robert A. Solomon, *Teaching Morality*, 40 *CLEVE. ST. L. REV.* 507 (1992) (advocating the establishment of more legal clinics at law schools).

99. See G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 *AM. B. FOUND. RES. J.* 225, 236 (1986). The researchers explained that, “professional schools are highly invasive institutions which exert intense control by purposely influencing beliefs, values, and personality characteristics of students.” *Id.* at 251-52.

100. Rhode, *supra* note 20, at 46-47. However, she notes that, “[t]he extent to which enhanced capacities for ethical analysis affect ethical conduct is more difficult to assess.” *Id.* at 47.

while others have not.<sup>101</sup> Despite these mixed findings, Deborah Rhode observes that “[t]here is . . . more evidence on the effectiveness of professional responsibility instruction than there is on the effectiveness of most professional education.”<sup>102</sup>

Consequently, the contention that adults do not develop morally is a weak justification for resistance to teaching legal ethics, as is the faith in existing professional structures and the belief that law is purely a science.<sup>103</sup> Whatever authority these three views once had, they possess little viability today. It is now time for law faculties to consider teaching ethics seriously.

#### IV. TEACHING ETHICS SERIOUSLY

A new ethics curriculum must be designed which places legal ethics at the center of the law school curriculum, free of the misconceptions of the past and faithful to a commitment to developing ethical practitioners. At a minimum, legal ethics education must include a required first year, first semester course of at least three credits, a required advanced course of at least three credits, and pervasive teaching throughout the curriculum.<sup>104</sup>

The central role of legal ethics in the curriculum is warranted by its status as the single most important subject in law school.<sup>105</sup> Legal ethics is the only subject taught in law school which every student will

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101. See, e.g., Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 351-57 (1982) (discussing results of various studies which lend support to both sides of the ethics education issue).

102. Rhode, *supra* note 20, at 48. She adds that “the evidence we do have suggests that mainstream courses do a relatively poor job in preparing professionals for the skills that are most crucial in practice.” *Id.*

103. See *supra* notes 93-99 and accompanying text discussing studies indicating that adulthood is a time of personal growth and development, and *supra* notes 78-86 and accompanying text discussing the problems with the belief that law is purely a science.

104. This suggestion is similar to proposals of Cramton, Koniak, and Rhode. See Rhode, *supra* note 20, at 54 (recommending “a required introduction to professional responsibility issues in the first year, an upper-level course that gives them central treatment, and efforts at integration in other core courses and in special supplemental events . . .”). Where it differs is in making the first year course the equivalent of other first year required courses and in making the required upper class course a contextual ethics course. At least one law school, Notre Dame, requires two ethics courses, including a first year course. See David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485 (1989) (discussing the curriculum at Notre Dame Law School); see also Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 393 (proposing a required first year professionalism course). Another teaches two years of legal ethics and professionalism for skills. See Moliterno, *supra* note 40, at 106.

105. See text accompanying notes 10-11.

encounter in practice, regardless of their specialty. It establishes the foundation for the vital decisions that students will have to make regarding how they will live their lives as lawyers. These decisions, in turn, will shape how the public perceives lawyers and the legal system. Within law school, legal ethics connects the entire curriculum. Just as legal ethics issues arise in every class, the teaching of legal ethics includes a broad range of topics drawn from other subjects.

A required first year, first semester, legal ethics course is essential for the implementation of a central role of legal ethics in the law school curriculum<sup>106</sup> because the first year courses signal what it means to think and act like a lawyer.<sup>107</sup> As Howard Lesnick noted, "it is what is imprinted in that initial immersion [in the first semester of the first year], and not any broader message of the three years, that shapes students' consciousness of what is important and not important to being a lawyer."<sup>108</sup> Equally important, the first year provides students with the requisite tools to understand what the law means. Ethical instruction from the start of law school is necessary in order to provide students with an ethical framework to evaluate and question the ethical implications of what they learn in other classes.<sup>109</sup>

Just as important as the placement of this course in the first semester of the first year is the requirement of three or more credits. The designation of credit hours serves both a symbolic and functional

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106. In a recent survey of 131 law schools, researchers found that just five schools offered a two-to-four credit ethics course in the first year, and only another three schools offered lawyering courses with significant ethics and professionalism components. *See* TEACHING AND LEARNING PROFESSIONALISM, *supra* note 8, at 40. Eight other schools offered one credit first year courses, while three more claimed they included legal ethics in substantive law courses. *See id.* at 40-41.

107. *See, e.g.,* Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992) ("[N]early everyone agrees—in an 'indefinable chant whose repetition suggests sacred meaning'—that the purpose of law school is to teach every student to 'think like a lawyer.'").

108. Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1159 (1990); *see also* Elizabeth D. Gee & James R. Elkins, *Resistance to Legal Ethics*, 12 J. LEGAL PROF. 29, 34 (1987) (advocating psychological grounds for "[t]eaching of legal ethics in the first year" because "[t]he first year is a socialization period in which a student's ethical sensitivity and commitment are subject to influence"); Rhode, *supra* note 20, at 51 (commenting that if legal ethics teaching only occurs after the first year, "many students will be too cynical or preoccupied to give it full attention").

109. Rhode, *supra* note 20, at 51. Rhode notes that absent first year instruction, students "will also have lacked the background to raise relevant issues in the other classes." *Id.*

purpose. While three credits is not sufficient to provide mastery,<sup>110</sup> it does afford a reasonable introduction. In contrast, offering less than three credits sends a message that legal ethics is less important than other first year courses. Teaching legal ethics seriously requires that students understand that legal ethics is the most important course.<sup>111</sup>

Sending that message also mandates requiring an upper-class advanced class in ethics of at least three credits. The combination of requiring a first year class and an advanced class would place legal ethics in a unique position of importance in most schools. In addition to affording another opportunity to address basic issues which the first year course cannot cover, the upper-class offering would provide students with lessons which will be more effective once they have gained a greater command of substantive law and some experience in legal work.<sup>112</sup> To prepare the students for the issues they will address in practice and to engage them in the material, the advanced courses should be contextually grounded in practice areas, such as business transactions, criminal advocacy, or public interest law.<sup>113</sup>

Making legal ethics the most important subject also requires the pervasive teaching of legal ethics. Pervasive teaching is essential for both symbolic and substantive purposes. It offers the opportunity to address issues not covered in the required ethics courses and teaches students the skills needed to identify and analyze issues in settings where ethics is not the primary focus of attention. Absent pervasive

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110. See TEACHING AND LEARNING PROFESSIONALISM, *supra* note 8, at 44-45; see also Cramton & Koniak, *supra* note 27, at 166 ("Allocating only one or two credit-hours makes it difficult or impossible to do the subject matter justice.").

111. One of the designers of a two-credit first year course in legal ethics at the University of California at Berkeley School of Law (Boalt Hall) conceded that "[b]y keeping the course at two units, when other first-year courses were taught in three-, four-, or five-unit blocks, we made it clear that Legal Profession was, in our view, the least important of those courses." McG. Bundy, *supra* note 44, at 30.

112. Arguments against teaching legal ethics in the first year often rely on the necessity of work experience and substantive knowledge to learning legal ethics. See, e.g., Cramton & Koniak, *supra* note 27, at 165-66 ("[A] sophisticated discussion of some ethics issues requires substantive knowledge of legal concepts not ordinarily taught in the first year."); Rhode, *supra* note 20, at 51 ("If the course occurs in the first year of training, many students will not yet know enough to grasp the full dimensions of professional dilemmas.").

In light of the traditional perception of legal ethics as doctrinally simplistic, these arguments are somewhat ironic. See *supra* note 55 and accompanying text. Moreover, basic coverage of the rules and cases, professional role, and moral reasoning does not necessarily demand any more special knowledge and experience than other first year courses. Drafting a contract would certainly add to a student's understanding of contracts class, and actually assisting in litigating a case would certainly enrich a student's study of civil procedure, but most schools do not require such prerequisites.

113. See, e.g., Daly, et al., *supra* note 25, at 200.

teaching, the law school sends a message that the “ethical dimensions” of legal education and law practice are marginal.<sup>114</sup>

While this pervasive approach completes the proposal for teaching ethics seriously, a number of pedagogical and political challenges remain. The proposal leaves unanswered the question of which teaching method is most effective.<sup>115</sup> Further, it provides no roadmap to ensure that faculty will make the commitment necessary to sustain a viable, pervasive teaching program<sup>116</sup> or for navigating politics with regard to the allocation of resources and credit hours.<sup>117</sup>

The proposal does, however, offer a possible solution to Pipkin’s curricular paradox.<sup>118</sup> While acknowledging that meaningful ethics education requires attention to the moral development of students, Pipkin asserts that this attention clashes with the socialization students have received at law school, which consequently devalues ethical courses.<sup>119</sup> The proposal for teaching ethics, however, changes the socialization of law students by making legal ethics the most important subject. This shift should change how students perceive the methods and content of their legal ethics lessons.

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114. See Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 5-9 (1990); see generally Rhode, *supra* note 20.

115. The Cramton & Koniak proposal suggests, at a minimum, a required first-year, first-semester course of at least three credits, a required advance course of three credits, and pervasive teaching throughout curriculum. The Moliterno proposal requires two years of legal ethics and professionalism skills courses to be taught. Compare Moliterno, *supra* note 40, with Cramton & Koniak, *supra* note 27.

116. See Cramton & Koniak, *supra* note 27, at 168 (“The pervasive approach . . . will not succeed unless the faculty as a whole commits to it and institutional monitoring ensures that individual faculty members take their responsibility seriously.”); Rhode, *supra* note 20, at 52 (providing that without adequate commitment, pervasive teaching becomes a digression). Fortunately, the availability of Deborah Rhode’s excellent text on teaching ethics pervasively will make this project much easier to facilitate. See Rhode, *supra* note 20.

117. See, e.g., TEACHING AND LEARNING PROFESSIONALISM, *supra* note 8, at 15 (explaining that “[l]aw school curriculum reform is a tedious and often frustrating task and seems to work best when modest changes are made at the margin by adding one or two additional courses”) (footnotes omitted); Cramton & Koniak, *supra* note 27, at 165 (adding that “competition for hours in [the first] year poses a severe obstacle to the introduction of any new course”); Gee & Elkins, *supra* note 108, at 34-48 (discussing “barriers to change” in increasing attention to ethics in law school curriculum).

118. Pipkin, *supra* note 25, at 250-53, 272-75.

119. *Id.* Pipkin points out that “54 percent of [students] enrolled in courses on professional responsibility indicated that other students were ‘not very’ or ‘not at all’ concerned [with professional ethics], in contrast to the 94 percent of students ‘concerned about making money.’” *Id.* at 274.

## V. CONCLUSION

This essay's proposal for teaching ethics seriously will certainly send a message that law schools should consider ethical education to be a high priority. But will it actually make a difference in the ethical conduct of graduates? Although research suggests it will,<sup>120</sup> we will not know for sure unless we try. Derek Bok made a similar point with regard to the introduction of ethics courses. He asked, "Will [students] behave more ethically? We may never know. But surely the experiment is worth trying, for the goal has never been more important to the quality of the society in which we live."<sup>121</sup>

Whatever uncertainty arises from teaching ethics seriously, we can be certain of the consequences of failing to do so. Given the current weakness of the traditional justifications for disdaining the teaching of legal ethics and the perception that lawyers' ethics are in decline, law schools that refuse to make legal ethics the most important subject are sending a powerful message. To paraphrase Ronald Dworkin once again, if the law schools do not teach legal ethics seriously, then they do not take the conduct and reputation of lawyers seriously either.<sup>122</sup>

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120. See *infra* notes 91-96 and accompanying text (discussing whether education can promote ethical conduct).

121. Derek C. Bok, *Can Ethics Be Taught?*, CHANGE, Oct. 1976, at 26, 30; see Rhode, *supra* note 20, at 43 (quoting Derek C. Bok, *Can Ethics Be Taught?*, CHANGE, Oct. 1976, at 26, 30).

122. DWORKIN, *supra* note 1, at 205; see also Cramton & Koniak, *supra* note 27, at 157 (arguing that if law schools do not begin to teach ethics seriously, they should stop "lying" about the importance of legal ethics to the legal profession and the legal academy).

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