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Recommended Citation

Lisa G. Lerman, First Do No Harm: Law Professor Misconduct Toward Law Students, 56 J. LEGAL EDUC. 86 (2006)

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First Do No Harm: Law Professor Misconduct Toward Law Students

Lisa G. Lerman

Education is what survives after what has been learned has been forgotten.

B. F. Skinner, New Scientist, May 21, 1964

It is very difficult to teach anything without kindness. It can be done, of course, by the exercise of strong compulsion... [but in most cases] the pupils should feel that the teacher wants to help them, wants them to improve, is interested in their growth, is sorry for their mistakes and pleased by their successes and sympathetic with their inadequacies. Learning anything worth while is difficult.... Few things will diminish the difficulty, the pain, and the fatigue like the kindness of a good teacher.

Gilbert Highet, The Art of Teaching (1950)

Since I started teaching in the early 1980s, students have come to me for advice or moral support about problems in law school. Some of the problems have involved health issues, family crises, study skills, or learning styles. But sometimes “the problem” has involved another professor’s behavior toward the student. As a novice law teacher, I started hearing about problems that I did not know how to solve.¹ One early example involved a female law student

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The ideas in this article build from two panel discussions on law professor misconduct. One, organized by the AALS Section on Professional Responsibility, was at the 2005 AALS Annual Meeting in San Francisco. My co-panelists included Carol Needham, Deborah Rhode, and Stephanie Wildman. The other was at the A.B.A. 30th National Conference on Professional Responsibility, June 2-5, 2004, in Naples, Florida. My co-panelists included Judith McMorrow, James Grogan, and Robert Jarvis. Some preliminary thoughts about the issues discussed in this article appear in Lisa G. Lerman, *Misconduct by Law Professors: Why it Matters*, *The Prof. Law.* 21 (2004), and in Lisa G. Lerman and Philip G. Schrag, *Ethical Problems in the Practice of Law* 71-80 (New York, 2005).

1. One survey looking at responses to allegations of faculty misconduct noted that younger faculty were more likely than older faculty to hear from students, and women were more likely than men to hear from other faculty. Jonathan Knight and Carol J. Auster, *Faculty Conduct: An Empirical Study of Ethical Activism*, 70 *J. Higher Educ.* 188, 196 (Mar./Apr. 1999).

who had told the attendees at a women's bar association meeting that one of her law professors had made a disparaging comment in class about women.² Someone at the meeting called the law school dean's office to complain about her "indiscretion." The dean's office called the student in for a meeting with the dean and the relevant faculty member to discuss *the student's* behavior. The student called me, then a visiting assistant professor, to see if I would go to the meeting with her. After consulting with a few colleagues, including *the* other woman on the faculty, I arranged to go to this meeting with the dean *instead of* the student. This was not a great solution, but it was the best I could manage at the time. No one claimed that the student had misrepresented the incident; rather, the dispute was about her disloyalty to the school in reporting this incident to a bar group. During the meeting, I argued that the law school should not reprimand a student for telling a true story about something that happened in class. The dean's office took no further action against the student or the professor.

Over the last twenty years, I have heard numerous anecdotes about law professors who upset or abused one or more students. At many law teachers' conferences, especially the AALS professional development conferences for women law professors, one often hears stories about predatory, abusive, or disrespectful behavior toward students, staff, or faculty. Many stories involve problems that have never been satisfactorily resolved. Some are never reported to the dean's office because the student and/or the professor fear retaliation if they complain. Other incidents are reported to the law school administration or to other authorities. Some institutions investigate and take appropriate measures. But in some cases, administrators do not respond appropriately.

Most law professors are dedicated teachers, scholars, and lawyers who carry out their various responsibilities with great integrity and who treat students and colleagues with care and respect. But some engage in unethical or unlawful conduct. Some of this conduct is harmful to students. We know little about the frequency of either serious or subtle law professor misconduct. Whatever the actual scope of the problem, the legal academy might better articulate its own standards of behavior and improve institutional capacity to deal with misconduct by professors.

In this essay, I will focus mainly on professorial transgressions that might be characterized as "minor." Few would dispute that a coercive sexual encounter with a student is a grave breach of duty, but there may be more disagreement about the line between appropriate classroom rigor and emotional abuse of a student in class. Minor nastiness and abuses of power are more common than serious misconduct and therefore may have a wider impact on the law student population. I hope to invite reflection and dialogue about what should be the boundaries on rude or abusive behavior toward students.

2. The comment was something like "All women are bitches when they are getting divorced."

Harmful Behavior by Law Professors

There is relatively little scholarship focusing on misconduct by law faculty, but there has been abundant research on the distress and discomfort experienced by law students, especially women and members of minority groups.³ Some of these studies mention examples of hurtful behavior by professors, but they focus mainly on the harm suffered by students.

To explore the universe of law professor misconduct, I collected examples of arguably injurious conduct from published sources and from both professors and students. I collected court decisions and newspaper articles about various improprieties involving law professors. I posted queries on a few law professor e-mail lists and received a number of anecdotal responses. I collected examples from message boards where law students share problems and solicit advice and information from one another. I posted a query on one board asking whether students had seen rude or abusive professorial behavior, and received some responses describing unpleasant classroom incidents. I did not attempt to verify the stories I found or to assess the frequency of these events. I simply sought examples of improper, rude, or abusive behavior by law teachers toward students to provide a non-hypothetical basis for discussion of the problem.

Classroom Behavior

Disrespectful, Abusive, and Discriminatory Classroom Behavior

Some law professors say and do things in class that are disrespectful to individual students or groups. They disparage students' intelligence, work habits, or professional aspirations. Certain professors' classroom behavior might be properly characterized as verbal or emotional abuse. One empirical study suggests that substandard classroom behavior by law professors is a significant problem. In a 1995 study, 5,600 first-year students at thirty-one law schools were asked if they agreed that "the faculty at this law school treats students with respect." Seventy-two percent agreed; 22 percent did not agree. In a later survey conducted by the same authors, the same question was asked to 1,100 third year students. Fifty-five percent agreed that the faculty treats students with respect.⁴ Apparently, 45 percent disagreed.

Law professors have a responsibility to model respect for the law and respect for people, and to behave professionally. Students are unlikely to remember much of the legal doctrine that they learn in law school, but they will remember how their teachers treated them. They will observe their teachers' conduct and

3. Research tends to focus on the student's subjective experience, surveying, for example, decline in self-esteem, discomfort with Socratic dialogue, and differences between men and women in class participation and in law school grades. See, e.g., Morrison Torrey, Jennifer Ries, and Elaine Spiliopoulos, *What Every First-Year Female Law Student Should Know*, 7 *Colum. J. Gender & L.* 267 (1998); Lisa A. Wilson and David H. Taylor, *Surveying Gender Bias at One Midwestern Law School*, 9 *Am. U. J. Gender Soc. Pol'y & L.* 251 (2001).
4. Mitu Gulati, Richard Sander, and Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 *J. Legal Educ.* 235, 252-53 (2001).

internalize that behavior as “what lawyers do.” Professor Tom Morgan urged that, although most of our students do not aspire to become law professors, they “do want to live a professional life of which they can be proud. The effort to do that is something that law teachers model—for better or worse.”⁵ Many scholars have urged that teaching professionalism requires that we convey “an attitude of respect and responsibility toward others—what some would call ‘caring’.”⁶ Positive modeling can be enormously beneficial in teaching professionalism, but negative modeling may have an even greater impact. Even fairly subtle disrespectful or dismissive behavior toward a struggling student may be experienced as a profound humiliation. Other students who observe such behavior may absorb the message that lawyers are sometimes harsh toward others. Professors should examine and question their own behavior, both in and out of the classroom. Law schools must implement programs, standards, and hiring criteria that can help to ensure that incoming professors are not only brilliant, but are also positive models.

One assumes that people coming into law school are mature and resilient adults. In fact, however, law students are unusually vulnerable to disrespectful or abusive behavior, perhaps in part because of some features of the law school environment. Law students, especially first-year students, attribute great knowledge and power to their teachers. Consequently, they are more susceptible to harm when the trust they place in their teachers is abused. A barbed remark in class can cause emotional trauma or loss of self-esteem to an individual or to a group of students. A professor who is disrespectful toward students or practicing lawyers, or who makes casual remarks implying that all lawyers are (and perhaps should be) selfish, greedy, or solely concerned with the advancement of client interests, can undermine the evolving professionalism of a whole class.

Teacher Tantrums

Suppose a professor calls on several students, each of whom confesses that he or she is unprepared. The professor, exasperated with his students’ lack of diligence, has a temper tantrum in class, throws down his book, and storms out of the classroom. This tantrum may reverberate among the students for months or longer. If asked, the professor might defend his conduct as justified by the students’ lack of preparation and assert that he was “making a point” about his expectations. Nevertheless, expressions of anger, toward students whether uncontrolled or merely feigned, may be harmful to many students and cannot be pedagogically justified.

5. Thomas D. Morgan, *Law Faculty as Role Models*, 1996 A.B.A. Sec. of Legal Educ. & Admissions to the Bar 37, 38.
6. Barry Sullivan and Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 *Notre Dame J. L. Ethics & Pub. Pol’y* 117, 120 (2001).

Stories about angry law professors are commonplace among law students. One student wrote an e-mail response to a posted query:

We have a prof...(female) who is rude as hell. She humiliates students on a daily basis... She may start out calm, but anything can set her off, then she goes into one of her fits, and starts yelling at the student, and the class. She actually told one female student, who is in her 40s, that, "middle aged women have no business in law school, they all should be home taking care of their families." She went off on me one day, and told me not to come back to her class, screaming, "Go ahead, tell the dean, I don't care." Several students recorded the whole session, and we did in fact go to the dean. Not a darn thing happened. He listened to the tape, concluding, "Well, I have heard judges [who are] worse than that."⁷

This student said that she had had "some very caring profs and...some who would do anything to help students, [but] it is the bad few who spoil the [experience]." She mentioned that "I had a fellow student who was in the military tell me, he would do boot camp over, but not law school." In conclusion, she wrote:

I have seen many intelligent people come in so confident and proud to be there, and unfortunately I have seen many of them leave beaten and reduced to nothing. I also find it sad that I see a total lack of caring among fellow students.

Humiliation of Students

Some law professors deliberately humiliate students who come into class late or who are unable to answer their questions. One law student told this story on an internet bulletin board:

You know what my professor does when you enter the class late? ...He'll say, "Nice that you could make it class. You can do the next case." ... You get to your seat, flip frantically to the page of the book that the case is in and try to compose yourself and...remember what the heck the case is about as the teacher will say "We are waiting." You stand up to brief your case trying to summarize the case in your mind before talking out loud. Horrible isn't it? It's to teach us a lesson, not to be late for class. He's a complete psycho. I fear being in his class every second.⁸

Some of the students who replied were sympathetic, but one said:

7. E-mail from a female law student (Dec. 11, 2005) (on file with author). In my quotation of student e-mail and Internet comments, I have made minor corrections in punctuation.
8. Posting of Cuteprincess to Law School Discussion, Psycho Professor (Nov. 9, 2005), available at <<http://www.lawschooldiscussion.org/students/index.php/topic,3179.o.html>> (last visited July 20, 2006).

What's wrong with that? Do you suppose a judge would hesitate to do the same if you walked into court late?⁹

There's a good chance that this student learned from one of his teachers to react with hostility to a student who was upset and seeking support. Another long anecdote was dubbed "True Horror Story" about a teacher described as a "Socratic Nazi" who was particularly hard on students in class. One student, responding to this tale of humiliation, wrote:

If it makes you feel better, here's a true quote from my 2L Evidence class (about 150 students) which thankfully wasn't directed to me: "If you ever say that to a judge, I hope he tells you to shut the f**ck up and sit down." So don't feel that bad.¹⁰

Part of the protocol of pedagogical humiliation is to punish any expression of uncertainty. One story posted on a law school discussion board provides a vivid example:

Our contracts professor asked a question to the class. A student raised his hand to answer. He answered "Well I guess...." And before he could say anything else, the professor stopped him with the following response: "Lawyers do not answer questions with guesses. If I wanted to hear someone guess, I would go out during the winter and offer homeless people a warm classroom to sit in. I could lecture them about the law and then ask them to guess what they thought the answers were."¹¹

Query whether humiliation of first-year law students is ever appropriate? Most people's analytical skills are not helped by being scared, stressed, or embarrassed. Perhaps there is an argument that those who will be litigators must learn to withstand contentious interrogation. Such training might then be relegated to simulation courses taught to advanced students.

Professors who "teach by humiliation" model a type of noxious conduct that perhaps not coincidentally also is prevalent among practicing lawyers. If professors treat students disrespectfully, these students may replicate this behavior in their subsequent work.¹² Like some professors, they may be most inclined to belittle or abuse those over whom they have authority. They may be respectful toward their bosses or partners, but may be abusive toward clients, paralegals, secretaries, law clerks, and associates.

9. *Id.* at posting of Jumboshrimps, Reply to Psycho Professor (Nov. 30, 2005).
10. Posting of Zippy_zaboo to Law School Discussion, Reply to True Horror Story (Sept. 28, 2004), available at <<http://www.lawschooldiscussion.org/students/index.php/topic,356.0.html>> (last visited July 20, 2006).
11. Posting of Bacchus to Law School Discussion, Today in Contracts (Aug. 30, 2005), available at <<http://www.lawschooldiscussion.org/students/index.php/topic,2656.0.html>> (last visited July 20, 2006).
12. See Patrick Wiseman, Legal Education and Cynicism about the Law: Practicing Ethical Jurisprudence in the Classroom, 25 *Cumb. L. Rev.* 1 (1994).

Discriminatory Behavior

Some law professors display prejudice toward women, people of color, gay and lesbian people, disabled people, and others. They may fail to call on members of certain groups in class or interrupt their comments with disparaging remarks. A few professors make overtly derogatory comments about various groups. Such behavior is one form of professional misconduct.¹³

In a study of law students at five schools in 1987, Professor Taunya Banks found that three quarters of 765 respondents reported that one or more of their professors “puts down” or belittles students. Almost half of the respondents reported that one or more professors told offensive jokes during class.¹⁴ Some of the discriminatory talk in class is flirtatious or sexual in nature. At the 2004 ABA ethics conference discussion of law professor misconduct, a female law student at an elite Southern school stated that one of her law professors had made a series of sexually suggestive remarks in class. She reported that she and many other students had been really upset by his behavior.

Modeling Negative Professional Values

Disparaging Lawyers

Some law professors make disparaging remarks in class about lawyers and the legal profession. Many law professors have become teachers because they had or developed a critical attitude toward lawyers and the legal profession. Such an attitude can be useful in fostering law student reflection on lawyers and the legal profession. However, if a professor’s attitude crosses the line into cynicism and the professor makes derisive comments about practicing lawyers, the remarks may be confusing or hurtful to law students, most of whom intend to pursue careers in the despised profession.

Selfishness and Materialism

Some professors model selfishness and materialism as if these values reflect positive or universal professional norms. Many professors comment in class that they know that most students decided to go to law school to make money. This comment is acknowledged with approval, a wink, and a knowing smile.

13. Some states explicitly prohibit discriminatory conduct in their disciplinary rules. Stephen Gillers and Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 421-27 (New York, 2004). Others interpret more general rules to prohibit such conduct. Some state ethics rules and the Model Rules include a comment after Rule 8.4 stating that a lawyer who manifests bias or prejudice in the course of representing a client would violate Rule 8.4(d) if the conduct is prejudicial to the administration of justice. *Id.* at 419; Model Rules of Prof'l Conduct R. 8.4, cmt. 3.
14. Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 *J. Legal Educ.* 137, 141, 144 (1988). For example, Banks reported that “Several students commented that professors referred to women as ‘bitches,’ and one professor was reported to have said in class, ‘When you sleep with a bitch, you get fleas.’” *Id.*

Some professors model greed or selfish behavior by giving priority to lucrative consulting over their academic responsibilities.

Why is a focus on money not healthy for students? One recent longitudinal study of law students at two schools suggests that during law school, students became more materialistic and more oriented toward external measures of success. They became less altruistic, more depressed, and showed declines in “aggregate subjective well-being.”¹⁵ People whose motivation and satisfaction is rooted in self-esteem, connection to others, and helping others tend to be happier and more satisfied than are people who are motivated and satisfied by acquiring material possessions, being well-regarded by others, succeeding in competition with others, and other extrinsic goals and values.¹⁶

There are many reasons for the unfortunate value shift among law students toward materialism and external measures of success. One is that the students’ odds of earning high incomes are dramatically affected by their performance on final exams during the first year of law school. Another is undoubtedly the competition among law students, and the tendency of the most competitive students to dominate the collective value system. The behavior of the students’ role models is probably another factor in their increasing selfishness and materialism. A materialistic professor, or even one who thinks all lawyers in private practice are too materialistic, may telegraph to his or her students that money is of paramount value. Students who internalize this message may be doomed to dissatisfaction and to a gradual decline in integrity.

Neglect of Teaching Because of Impairment or Outside Activities

Some law professors collect full-time teaching salaries while engaging in extensive (and lucrative) consulting or law practice.¹⁷ Others cancel too many classes because of professional travel. Some justify investing little in teaching by deciding that the students are not worth their time because they are stupid, unmotivated, or money-hungry. Other professors become chronic absentees from their own classes because of mental illness or alcohol or drug addiction. Some professors appear for class but teach little because of impairment, illness, or other problems. An alcoholic or drug-addicted professor may behave disrespectfully toward his or her students in part because of illness. The professor who taught my professional responsibility class, for example, often smelled strongly of liquor during our 9 a.m. class. He often was impatient with student questions, perhaps because he was intoxicated and did not want to be bothered.

15. Kennon M. Sheldon and Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 *Behav. Sci. & L.* 261 (2004).
16. Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity, and Happiness*, 11:2 *Clinical L. Rev.* 425, 429 (Spring 2004).
17. See Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 *S. Tex. L. Rev.* 345 (2001).

Improper Conduct Toward Students Outside of Class

Sexual Harassment

Twenty years ago, one often heard stories of faculty-student dating relationships, and sometimes of faculties at which a high percentage of male professors had intimate relationships with students. More than two decades after the EEOC sexual harassment guidelines were issued,¹⁸ the vast majority of law professors no longer scan their classrooms looking for dates. Even so, sexual harassment of students by professors remains disturbingly common.¹⁹ Some allegations involve flirtation, some involve predatory behavior, inappropriate touching, and sexual assault.²⁰ A few examples illustrate the range of such conduct.

One student responded by e-mail to a general query on the internet:

I am a 2L at a mediocre state school in the Midwest. We have at least two profs who actively engage in sexual relations with students, one male and the other female. Neither one [makes any] effort to hide it, as they hang out at the bar that the law students tend to frequent. One morning, students in my civ pro section were comparing camera-phone pictures of the teacher drunkenly making out with one of her male students. They left the bar together. Everybody knows about what happens, so I can only assume that the administration does not care.²¹

18. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11.
19. For example, one student reported that "My...professor has made inappropriate advances towards me... [H]e was the first person to give me positive feedback at law school and all he wants is to sleep with me. It makes me feel really sad to think about." E-mail from twenty-four-year-old white female student at the University of Illinois College of Law to Danielle Hirsch, student, University of Illinois College of Law (Sept. 12, 2002) (quoted in Danielle Elyce Hirsch, *Recognizing Race in Women's Programming: A Critique of a Women's Law Society*, 19 *Berkeley Women's L. J.* 106 (2004)). A student at a large Midwestern law school described the behavior of one of her male professors toward female students: "He would never look them in the face and he always stared at their breasts...they stopped going to his office. So men, but not women, are getting their questions answered." *Elusive Equality: The Experience of Women in Legal Education*, A.B.A. Comm'n on Women in the Prof. 15 (1996).
20. Perhaps the most notorious recent example occurred in 2002 when John Dwyer, the Dean at Boalt Hall resigned from the deanship and from the faculty in the face of allegations that he had undressed and sexually assaulted an intoxicated law student. Maura Dolan, Stu Silverstein, and Rebecca Trounson, *Woman Sought UC Berkeley's Help Before Accusing Dean*, *L.A. Times*, Dec. 3, 2002, at A1. Dwyer admitted that there had been "a single, sexual encounter, but a) it was consensual and b) there is no allegation that any form of sexual intercourse occurred." However, he acknowledged that his behavior had been inappropriate. Stuart Silverstein, Michelle Munn and Maura Dolan, *Law Dean Quits over Accusation*, *L.A. Times*, Nov. 28, 2002, at A1. In July of 2003, the Board of Regents of the University of California adopted a policy prohibiting romantic or sexual relationships between university faculty and students, if the teacher has "or should reasonably expect to have in the future" any responsibility for teaching, evaluating or supervising the student. Rebecca Trounson, *UC Bans Dating of Faculty, Students*, *L.A. Times*, July 18, 2003, at B1.
21. E-mail from a male law student (Dec. 20, 2005) (on file with author).

This account suggests that the one professor might defend her conduct as “consensual.” Even if a relationship between a first-year student and one of his or her professors could be truly consensual, such behavior would be enormously distracting to the other students and would raise concerns about favoritism.

A law professor responded to my invitation to share anecdotes with the following story from her second year in law school:

A professor came up to me in the law library and whispered a very sexually explicit and dirty story in my ear. As he did it, he held down my shoulder so I could not get up. I was in a quiet, uninhabited area of the library where no one could see. I was shocked, and very frightened. I felt awful—what had I done to inspire this behavior? The thing is, I hadn’t done anything. I was wearing sweat pants and an old t-shirt. I never said much in class. But somehow, he felt he could do this to me. I am ashamed to say this, but I did not scream or ask for help. I looked around me, afraid that someone would see and hear him do it, and think that I was a bad person. I felt powerless and completely unable to move, and I do not know why. . . . I have never told anyone about it until now. I tried to forget about it, pretending that it was all in my imagination. But it was not imaginary; I saw that professor not long ago, and he looked away from me, fearful and ashamed. I knew, and he knew. I am sure he did it to other women. . . . For some reason, I still feel ashamed. . . .²²

This incident remains a vivid and painful memory many years after it occurred.

Survey data suggest that sexual harassment of law students is still commonplace. In the early 1990s, the Ohio Supreme Court and the Ohio State Bar Association established a committee on Gender Issues in Law Schools, which surveyed 1,600 students at all nine law schools in Ohio, of whom just over half responded. Of the respondents, 19 percent of the female students (eighty women) reported that they had been sexually harassed during law school. Sixty-nine percent of the incidents involved improper comments. Twenty-nine of these eighty students said that the perpetrator of the harassment had been a male professor.²³

Plagiarism of Student Work

Some law professors plagiarize the writing of their research assistants, some plagiarize from case law or other published articles, and some claim credit toward tenure for work that was ghost-written for them before they were law professors.²⁴ One student was working as a paid research assistant

22. E-mail from female law professor (Jan. 10, 2005) (on file with author).

23. Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 *J. Legal Educ.* 311, 311, 322, 324 (1994).

24. See Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 *S. Tex. L. Rev.* 467 (2001); Joan E. Van Tol, *Detecting, Deterring and Punishing the Use of Fraudulent Academic Credentials: A Play in Two Acts*, 30 *Santa Clara*

for a professor. The professor asked the student to write a legal memo. The student carefully researched and wrote a fifty-page memorandum. The professor was very appreciative, read the memo and edited it, making perhaps ten or fifteen stylistic changes. The professor then reformatted the memo and published it under his own name as a chapter of a treatise, acknowledging the “able assistance” of the research assistant in a footnote.²⁵ This type of conduct deprives students of much-needed credit for the work they do and models dishonesty and exploitation of others as acceptable professional practices.

Favoritism/Lack of Fairness in Grading and Recommendations

Some teachers use their authority to confer favorable treatment on certain students on some other basis than the quality of their work. In some instances students may be unjustified in claiming that preferential treatment has occurred, but it does sometimes happen.

A few law professors use grading to punish or reward students for matters unrelated to course performance. A professor might give a good grade to a student who plays golf with the professor or to one who confers sexual favors. A law student at Stetson University filed suit against a professor claiming that the professor had offered to hire her as a research assistant and offered to pay her \$15-25 per hour because, he said, his research assistants “do more than the standard assistant.” The student claims that the professor’s behavior suggested that he had in mind sexual services.²⁶ Another professor might abuse grading authority to reward students who share his views or to punish students who hold opposing views. Still another professor might impose a disproportionate number of failing grades on a class for irrational reasons.²⁷ One Midwestern law student reported to an ABA commission that “One professor warned that any student with feminine handwriting should change it, because he would grade those papers down. If writing looked too pretty, even if it belonged to a man, the student wouldn’t score as well.”²⁸

Some professors have given favorable or unqualified recommendations of students to prospective employers or to bar admissions authorities despite knowledge that particular students have evidenced dishonesty, incompetence, or some other lack of fitness to practice. While they might be

L. Rev. 791 (1990); Bill L. Williamson, (Ab)using Students: The Ethics of Faculty Use of a Student’s Work Product, 26 *Ariz. St. L.J.* 1029 (1994).

25. I reported this example in *Misattribution in Legal Scholarship*, *supra* note 24.

26. William R. Levesque, *Suit Accuses Professor of Sexual Harassment*, *St. Petersburg Times* (Fla.), Oct. 2, 2003. It should be noted that this example reports the allegations in a complaint, not proven facts.

27. See *Elusive Equality*, *supra* note 19, at 178; *Davis v. Goode*, 995 F. Supp. 82 (E.D.N.Y. 1998) (lawsuit by C.U.N.Y. law student alleging unfair grading practices by a professor allowed to proceed over defendants’ motion for summary judgment).

28. See *Elusive Equality*, *supra* note 19, at 18.

“giving a break” to the student recommended, the false endorsement might deprive a more qualified student of the job obtained by the recommended one. This also undermines the fairness of the grading system and of law school generally.

Misconduct that Has Indirect Impact on Students

Some law professors engage in unethical or unlawful conduct that has no direct connection with their activities as professors. If they get caught or if their misbehavior otherwise becomes known, however, their behavior may become a public scandal within the law school or the community.²⁹ This presents a negative professional model for students, especially if the institution fails to respond.

Some professors misrepresent their credentials, pad their resumes, or claim authorship of publications that have been written by subordinates.³⁰ Two Harvard law professors were recently accused of plagiarism.³¹ Some law professors receive substantial sums for producing scholarship advocating a particular point of view and do not disclose in the published work that it was paid for by an interest group.³² Like other professionals, many law professors use law school funds to cover personal expenses, representing vacation travel to be business travel, or representing entertainment expenses to be business expenses. These actions model for students subtle forms of lawyer dishonesty, setting the foundation for future “minor” indiscretions by the students in their careers.

One law professor who handled some client matters settled a case without consulting his clients. The principal term in the settlement was a generous fee paid by the potential defendant to the professor and his co-counsel. This led to his suspension from practice.³³ Another professor was recently suspended from teaching for six months after an alleged assault on a staff member that led to

29. A professor at New York Law School, for example, was arrested on charges of possession of child pornography. His pornography was stored on his law school computer, and was found by technicians who were servicing the computer. The professor was a highly respected scholar of copyright law. He had been on the faculty for twenty-six years. His collection included many images of sexual violence against children. Elisabeth Franck, *The Professor and the Porn*, N.Y. Mag., June 23, 2003, at 41.

30. See generally Vincent R. Johnson, and Shawn M. Lovorn, *Misrepresentation by Lawyers about Credentials or Experience*, 57 Okla. L. Rev. 529 (2004).

31. Marcella Bombardieri, *Tribe Admits Not Crediting Author: Harvard Scholar Publicly Apologizes*, Boston Globe, Sept. 28, 2004.

32. See Ronald K. L. Collins, *A Letter on Scholarly Ethics*, 45 J. Legal Educ. 139 (1995) (urging that law professors should be more candid in disclosure of possible conflicts of interest in their scholarship); Richard B. Schmitt, *Rules May Require Law Professors to Disclose Fees*, Wall St. J., Jan. 31, 2000, at B1.

33. *In re Hager*, 812 A.2d 904 (D.C. 2002).

criminal charges.³⁴ These professors' behavior sends a message to students that professionals need not obey the law or the ethics codes.

Empirical Evidence of Law Student Distress

While information about the frequency of misconduct is sparse, there is empirical evidence that law students as a group suffer greater distress than other graduate students.³⁵ Some students report that rude or abusive behavior by professors is one cause of their distress.

One study a generation ago found that while students entering law school have a collectively normal rate of anxiety and depression, about one-third of law students exhibit serious anxiety and depression by the end of the first semester.³⁶ Upon entry into law school, 8 or 9 percent of law students are clinically depressed or are abusing alcohol or cocaine. After one semester, 27 percent are so afflicted. After two semesters, the percentage rises to 34. By graduation, 40 percent of students are suffering from depression or are abusing alcohol or cocaine.³⁷

More recently, nearly 12 percent of the 5,600 first-year law students surveyed in 1995 reported that they felt depressed most of the time during the previous week. Forty-six percent said they felt depressed during a few passing periods in the previous week. All 5,600 first-year students were asked if they had recently experienced certain symptoms of depression: 38 percent reported difficulty sleeping, 13 percent reported crying, 12 percent reported feelings of violence and aggression, and when asked how stressful they had found law school to be, 22 percent said "extremely stressful," and 59 percent indicated "fairly stressful."³⁸

There are many reasons for distress among law students. There is the pressure to get good grades and the challenge of doing a large volume of intellectually challenging work. Some students are distressed by the competitive behavior by classmates, by the one-shot final exam grading system, or by the absence of feedback during the semester. (Are we mistreating our students by allowing these structures to persist?) One cause of law student distress is the disrespectful, abusive, or discriminatory conduct of a small minority of law professors.

34. Mae Gentry, *Emory Suspends King Biographer Following Arrest*, *Atlanta J. Const.*, Oct. 23, 2002, at B1.
35. See generally Ann Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 *J. Legal Educ.* 524 (1998) (explaining how law schools cause emotional dysfunction in law students).
36. See, e.g., 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. See also Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 *Legal Writing* 229, 229 (2002).
37. Benjamin, *The Role of Legal Education*, *supra* note 36, at 240-47.
38. Gulati, *The Happy Charade*, *supra* note 4, at 242, 252-53.

A survey of third-year students found that a high percentage skip class very often and prepare for class only sporadically. Their reported reasons for disengagement differ: boredom, focus on extra-curricular activities, involvement with part-time jobs and other professional activities. Twelve percent of the third-year students surveyed were profoundly alienated from law school. They experienced law school as “unnecessarily competitive.” They did not think the faculty treated students with respect. They perceived “substantial hostility” at their schools based on race or politics. Many had experienced “derisive comments” from students or “derogatory” responses from teachers after speaking in class.³⁹

Defining Harmful Behavior

How can we determine whether a professor’s action is merely a pedagogical device or whether it crosses the line into abuse? Demanding or critical remarks by teachers might be laid out on a spectrum. At one end is a proper articulation of expectations and a commitment to candor in responding to student comments. At the other end are comments and behavior that can traumatize a large group of students and can impair their self-esteem, their ability to concentrate, their motivation to learn, and the like.

Where is the line between constructive rigor and verbal abuse? One yardstick against which to measure such conduct is to ask whether the teacher is in control of his behavior or whether he is unleashing his anger and frustration toward his students as a form of catharsis. Good teachers, like good parents, should aspire to stay in control and to respond to transgressions in a mature way. A teacher who has a temper tantrum in class, one who slams a book closed or storms out of the classroom, bears more resemblance to an angry child than to a professional role model.

Another measure of rigor versus abuse is whether the behavior in question is respectful toward students. Some law professors believe that they are highly intelligent and that most of their students are not very smart or motivated. A teacher with such an attitude might “teach to the top of the class” and might be frustrated with students who need to hear a concept explained (maybe even more than once) or who ask “basic” questions. All of these reflect a disrespectful attitude toward students. A teacher who harbors this sort of attitude is unlikely to listen or communicate well and might say something insulting to a persistent student.

One might sort “demanding” teacher behavior into two categories: that which assists learning or that which has no legitimate pedagogical function. A professor might answer a question with a question, for example, to elicit further thinking from the student. Sometimes this works and a professor is able to lead a student through some useful analytical steps. But what if the student blushes, flounders, and freezes up? A professor who persists in questioning

39. *Id.* at 255.

this student may be crossing the line into verbal harassment.⁴⁰ The professor's behavior is coercive and unfair even if every student in the class studies harder to reduce the odds of humiliation. In subsequent classes, students are more likely to be so anxious about being called on that they will not listen, learn, or think well. They may neglect their other courses because of anxiety about this one. The professor's conduct has a pedagogical purpose, but not a legitimate one.

Deborah Rhode describes a prototypical Socratic dialogue in which "[t]he professor controls the dialogue, invites [the students] to 'guess what I'm thinking,'" and then finds the response inevitably lacking."⁴¹ One might distinguish legitimate from abusive classroom inquiry by asking whether the point of the inquiry is to help the students understand or to show the brilliance of the professor in dramatic contrast to the ignorance or stupidity of the student being questioned. Something is wrong if the teacher feels good when the students feel bad.

Critical, demanding professorial behavior in class is problematic not only for the injury it may cause but for the support that it fails to provide. Our students need our support and encouragement. They are trying to learn a difficult set of skills and to sort through a confounding set of decisions about their professional futures. Many are struggling with a variety of personal and financial stressors. A professor can certainly get students to study harder by raising the prospect that the less-than-fully prepared student may become a laughing-stock in class. This, however, cannot serve any useful mentoring function, unless the intent is to train a new generation of abusive lawyers.

What Can Law Schools Do About Serious and Subtle Misconduct?

Law schools, like many other academic institutions, tend to turn a blind eye to chronic troublesome behavior of certain colleagues. Even when professorial misconduct is reported to the law school administration, in some instances law school administrators tend to under-react. For example, the student who told the story about the female professor who screams at students went to the dean's office with a group of other students to complain. Here's what she reported:

Nothing was done. I had the option of [staying in this] class, the Associate Dean told me, "if you will go back in, I will escort you to the class, and sit there if I have to." I responded: "No...I will not go back into a class when the person who represents the law is doing so in a manner in which I find disgraceful." I

40. Robert Schuwerk notes that most law students who are evaluated using the Myers-Briggs inventory turn out to be introverts. He points out that "[f]ew experiences are more unsettling to introverts than speaking before large groups of people." Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?* 45 *S. Tex. L. Rev.* 753, 771 (2004).

41. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 *Stan. L. Rev.* 1547, 1555 (1993).

found it interesting that I was allowed to leave her class with oh, about 5 weeks left, and received a full refund. (That just does not happen.) I spoke with someone from academic resources, who told me that absolutely nothing was done, and nothing is ever done. She told me that a lot of staff have complained [the professor reportedly was abusive to staff as well as to students].... The dean of the school told her that "I need more evidence."⁴²

There are many reasons for inaction. If the professor in question is tenured, there may be little regular review of his teaching, and no system for routine identification of problems. Administrators and faculty may be unaware of or have little experience with university procedures that exist to respond to faculty misconduct. It may be very difficult to determine if the alleged conduct actually took place, or whether a student or another professor misinterpreted the conduct or overreacted. Some of the allegations involve conduct that takes place in private, which makes it hard to know the facts. Even if the facts are clear, it is difficult to confront misconduct by a colleague. If one professor is investigated, his friends may leap to his defense, perhaps claiming violation of academic freedom. Taking action may risk a fracture in faculty relations. Finally, any action against a professor other than a confidential admonition may become public and harm the reputation of the law professor or the law school.

All of these problems constrain administrators who might otherwise intervene to protect students from harm by professors. Sometimes the dean will simply call the professor in for a chat about his behavior, or take some other informal action. Affected students may not be informed of the law school's response because of concerns about publicity. This can leave injured students thinking that nothing was done. Law schools should consider what policies or procedures would help them to overcome the natural institutional tendency to avoid confronting difficulty. Some problems are far less harmful if the school intervenes early; also, acting early can prevent a public relations disaster.

Adopt Standards of Conduct

Most law schools set specific standards of conduct for students but have shown less interest in setting standards of conduct for professors. Sometimes allegations of professorial misconduct are investigated by the relevant dean's office,⁴³ but most schools have made no systematic effort to articulate standards of conduct for faculty. In 1989, the AALS adopted a set of model rules of conduct for law professors,⁴⁴ but relatively few law schools have adopted them.⁴⁵

42. E-mail from a female law student (Dec. 11, 2005) (on file with author).

43. See John E. Montgomery, *The Dean as a Crisis Manager*, 34 *U. Toledo L. Rev.* 133 (2002).

44. AALS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, available at <<http://www.aals.org/ethic.html>> (last visited Oct. 4, 2004).

45. One exception is Cornell Law School, which adopted *Standards for Professional Conduct*

Law professors are subject to rules of conduct established by universities, the bar, and the state. Many law school faculties are bound by standards of conduct set by their universities, but these are seldom discussed and even less often enforced. In recent years, many universities have adopted specific policies restricting sexual contact between faculty and students; these policies get more attention than most others.⁴⁶

Most law professors are members of a bar and are therefore obliged to comply with the applicable rules of professional conduct. The ethics codes were written with an eye to the issues that arise in practice, not in academia, but the more general professional rules apply also in a law school setting. The prohibition by nearly all states of “dishonesty, fraud, deceit and misrepresentation” and of criminal behavior that “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” applies to conduct in and out of practice. Many of the other ethical rules exclude behavior not related to the representation of clients.⁴⁷

A law school cannot prevent harmful conduct simply by adopting standards of behavior for professors. However, the process of drafting and discussing proposed standards of conduct will allow a law faculty to explore and articulate standards of behavior. This dialogue creates the opportunity to grow the collective consensus about what sorts of professorial conduct are not acceptable. Faculty members whose conduct is out of line may reconsider their own behavior.

An example of such a process is underway at my own school. During the last two years, our Academic Excellence Committee undertook to draft a statement of “best practices” relating to classroom teaching for members of our faculty.⁴⁸ We reviewed the AALS standards, but also made a long list of issues that might be addressed in such a document. This allowed us to tailor our statement to the norms within our law school and to address issues that concerned committee members. These draft standards are being presented to the

Within the Cornell Law School. These standards “suggest some of the contours of professional behavior for law students and faculty” such as avoidance of “epithets and ad hominem attacks” and showing respect and consideration for “the educational and professional aspirations of others.” These guidelines are said to be “aspirational and are not intended to provide authority for the interpretation of...the Campus Code.” These standards are reproduced at <https://support.law.cornell.edu/students/forms/Standards_for_Professional_Conduct.pdf> (last visited Nov. 30, 2005).

46. See Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 *J. L. & Educ.* 411 (2003); Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 *S. Cal. L. Rev.* 777 (1988).
47. Model Rules of Prof'l Conduct R. 8.4(B) - (D) & cmt. 5 (2004). Comment 5 states that discriminatory behavior by a lawyer may violate rule 8.4 but only if the conduct occurs in the representation of a client.
48. The Catholic University of America, Columbus School of Law, Academic Success Committee: Best Practices Project: Classroom Management (Draft of Apr. 18, 2005) (on file with author).

faculty for their consideration. We expect that discussion of these proposed standards will lead all of us to examine our current practices.

Screen Faculty Candidates for Professionalism

To foster a culture of professionalism and to reduce the odds of hiring faculty who will behave badly toward students, law faculties should make one criterion for employment “the possession of high standards of professionalism and integrity.” While many schools consider personal qualities of candidates in making hiring decisions, this is often couched in terms of “collegiality,” focusing on how the prospective faculty member would behave toward colleagues, not toward students. But many law schools’ hiring criteria focus primarily on a person’s potential as a scholar, often measured by whether the person has an outstanding academic record; has obtained a prestigious clerkship, a Ph.D., or an LL.M.; whether the person has published high-quality legal or other scholarship; and whether references use words like “brilliant” in describing the person. Many schools are interested in a candidate’s potential to be a good teacher, but often focus on legal expertise and credentials as a measure of teaching ability.

If each member of a faculty is a role model for the next generation of lawyers, questions of personality and character and standards of integrity should be more prominent on the list of hiring criteria. There may be problems even if a school hires brilliant lawyers with outstanding scholarly potential. Some really smart people are very self-centered and/or arrogant and do not care about or respect their students, except perhaps the very top students. A small number of brilliant law professors have turned out to be predatory, abusive, or just nasty. “Character and fitness” is a criterion for admission to the legal profession; it should be an explicit criterion in hiring faculty as well.

There are many cases of serious law professor misconduct that could have been prevented if the law schools had done more careful screening of a faculty candidate before making an offer.⁴⁹ Some law schools do a thorough investigation of candidates for the deanship, but not for the faculty. Law schools should do a careful reference check on each potential hire, asking not only “Is he brilliant and productive?” but also some of the following questions:

- How would you characterize the candidate’s interpersonal skills? Is he/she someone whom you would choose as a role model for a group

49. One example is Geoffrey Peters, who was Dean of William Mitchell College of Law during the early 1980s. In the wake of two dozen complaints of sexual harassment by staff and students, Peters lost his university post, was reprimanded by the state bar, and was sued for sexual harassment. Before his deanship, Geoffrey Peters was Deputy Director of the National Center for State Courts in 1979. While there, several female employees made complaints that Peters had made unwanted sexual advances. Dave Anderson, *Earlier Sex Harassment by Law Dean is Alleged*, *Minn. Star & Trib.*, Nov. 4, 1983. One wonders if the law school knew about this, and if so, whether those considering this dean candidate appreciated the potential for problems.

of people whose professional education is entrusted to your care? Does the person treat others with respect, including administrative staff? Is the person arrogant, or arguably “a jerk”? Does the person have a bad temper? Is he or she patient with others? Does he or she explain things well? How does the candidate behave when someone else makes a mistake?

- Do you know whether the candidate has ever been arrested, convicted of a crime, disciplined by a school or employer, or otherwise been charged with improper conduct? Independent verification of the candidate’s criminal history should be sought.
- Have you ever seen the candidate behave improperly toward any other person? Has he/she ever engaged in improper flirtation or made unwanted sexual advances toward another person? Has he/she ever thrown a “tantrum” or become unreasonably angry at a colleague or an employee?
- To your knowledge, does the candidate use illegal drugs? If the candidate drinks, do you have any knowledge that the person suffers from alcoholism or abuses alcohol?

These and other similar “nosy” questions can assist a law school in identifying a faculty candidate whose behavior may be problematic for students. To obtain candid answers to these questions, it may be necessary to call more references than those identified by the candidate. Some sources may be reluctant to provide answers to these questions for fear of potential liability. Diligent investigation may nevertheless produce important information. Reference-checking should be done with care (of course) to avoid disrupting the candidate’s current employment situation. The importance of such inquiries cannot be underestimated. It is ever so much easier not to hire someone whose behavior is a problem than it is to find an exit plan for such a person.

Appoint an Ombudsperson to Receive Reports of Misconduct

Students and staff who are on the wrong end of any of the misconduct I have described above are often reluctant to come forward and fear retaliation if they report such misconduct. Every law school or university should designate at least one approachable person as the ombudsperson to whom such concerns should be directed.⁵⁰ This person must be selected based on his or her perceived commitment to help in such situations, and must have the trust and confidence of the dean, so that the concerns that come in will be addressed rather than disregarded. Once the law school has a designated

50. For example, the University of Iowa College of Law designates two faculty members to serve as ombudspersons and who will receive in confidence and assist with problems and grievances relating to students or faculty members. University of Iowa College of Law Website <<http://www.law.uiowa.edu/students/academicadvising-ombudsperson.php>> (last visited July 20, 2006).

ombudsperson, procedures can be established for the investigation and resolution of complaints made to that person.

Use External Enforcement Systems to Address Allegations of Serious Misconduct

It is often nearly impossible for a law faculty to deal effectively with allegations of misconduct by a colleague. Most universities have administrative systems to process grievances against faculty members. It may be a good idea to refer the matter to the university grievance system if a complaint is made against a faculty member that may not be handled well by the internal law school process.

In addition, some allegations of misconduct by law professors must be reported to the disciplinary authorities of any bar to which the faculty member is admitted. Reporting to bar counsel is mandatory in most jurisdictions if the misconduct is a violation of an ethical rule that raises a substantial question as to the honesty, trustworthiness, or fitness of the professor to be a lawyer.⁵¹ This reporting duty would be mandatory for every member of the faculty who knows of the misconduct and who is a member of a bar that has a mandatory reporting rule.

Finally, it may be appropriate to report the matter to the relevant prosecutor if the conduct alleged involves criminal behavior. While reporting to a prosecutor may be required in only narrow circumstances (such as child abuse), if the conduct alleged is criminal and the matter is not reported to a prosecutor, the law school may appear to be seeking to protect itself from adverse publicity.

In considering how to respond to any serious allegation of misconduct, law school administrators must avoid needless damage to the reputation of the school or of any individual, but also must secure proper redress for harm that has been suffered. Likewise, administrators must endeavor to set an example of institutional integrity, modeling for the student population an appropriate response to the situation. When those students become managers of law firms and general counsel's offices, they will remember whatever the law school did or didn't do about misconduct by a faculty member. Those memories may guide them in dealing with whatever issues they confront.

51. See, e.g., Model Rules of Prof'l Conduct, R. 8.3 (articulating the duty to report misconduct by other lawyers). This language has been adopted in most states.