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Teaching Professional Responsibility in Law School

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I. *Introduction*

After eight years of teaching a three-credit course on The Legal Profession and Professional Responsibility to second- and third-year law students, I am left with a sense of great dissatisfaction with the whole enterprise. So deep is my dissatisfaction that I am questioning whether to continue or move into a different course instead. This paper is an opportunity to take stock of my experience and attempt to map out the causes of my dissatisfaction, and to seek some vision, if possible, of what the course should be about, how to teach it, and why I should bother. To give the conclusion away, I have in this process arrived at the point of renewed hope, even though many problems remain unresolved and many ideals remain to be actualized. The professional responsibility course may be the most problematic one I teach, but I also think it is the most important, and perhaps one day will even be the most personally fulfilling.

II. *What Should We Teach?: Three Approaches to Professional Responsibility*

By asking the question, "What should we teach?" I do not intend to deal with a list of specific topics, like a syllabus for some course. Rather, my intention is to point out that various basic approaches to the subject as a whole may be adopted and I wish to briefly describe three of these approaches and make some evaluative comments on them. These three approaches might be called the "social role morality" model, the "lawyer's law" model, and the "personal moral reasoning in relational context" model. My thesis is that while no single model should be exclusively adopted as the basis for teaching professional responsibility, we should develop the "personal moral reasoning" approach, which I view as more promising than the other approaches. My teaching of professional responsibility has been unsatisfactory partly because it has

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not moved much beyond the first two models of role morality and legalism.

1. *Social Role Morality*

One of the most influential American conferences on the topic of legal education and the professional responsibility of lawyers took place at the University of Colorado in Boulder in 1956. It was sponsored by the Committee on Education for Professional Responsibility of the Association of American Law Schools. Professor Julius Stone wrote a remarkably wide-ranging book based on the conference debates,[1] and even though two other national conferences have subsequently been held — at Boulder again in 1968,[2] and in Detroit in 1977[3] — the issues and ideas generated at the 1956 conference have proven to be some of the most original and durable in the field. At the 1956 conference various foundational models of how to formulate and justify professional norms were posited, but no one model gained acceptance from all participants. This lack of agreement as to the ethical foundations for professional responsibility is undoubtedly as real today, if not more so, as it was in 1956.

One of the most popular models presented to the conference, however, largely attributed to Professor Lon Fuller of Harvard,[4] was the view that the wellspring of a lawyer's duties to clients and to the public flow from the legal profession's unique role in society as the trustee for the forms of social order. The forms of social order include not only legislative, judicial, and administrative forms, but also the process of private ordering through contract, and the negotiation and drafting of the constitutions of private organizations. Thus what the lawyer does in the privacy of the office may be seen as part of the *public* administration of justice, because law is made and applied through lawyer counselling and planning, and often this "private" law has public impacts as great as any ruling of a high court in a litigation matter.[5] To keep *all* the forms of social order working fairly and with integrity is the obligation of the profession, and each lawyer must place that obligation above any particular client interest

1. J. Stone, *Legal Education and Public Responsibility,* (A.A.L.S., 1959).
2. The 1968 conference papers and proceedings are found in D.T. Weckstein, ed., *Education in the Professional Responsibility of the Lawyer,* (University Press of Virginia, 1970).
3. The 1977 conference papers and proceedings are found in P.A. Keenan, ed., *Teaching Professional Responsibility,* (U. of Detroit Press, 1979).
4. *See* Stone, *supra,* note 1 at Chapter II, "Core Values in the Lawyers' Trust" for summary of Fuller's position.
5. On the importance of the law office as part of the administration of justice, *see also* L. M. Brown and E. A. Dauer, *Planning By Lawyers: Materials on a Nonadversarial Legal Process,* (The Foundation Press, 1978) and the autobiography by Louis M. Brown, *Lawyering Through Life: The Origin of Preventive Law,* (Rothman & Co., 1986).

contrary to it. Loyalty to the fair process of law is primary and constrains lawyer behaviour on behalf of clients. Thus Professor Fuller thought that "the trusteeship of the forms of social order" model would place real moral constraints on lawyer conduct whether in the role of advocate, counsellor, lobbyist, negotiator, or whatever. In essence the social role of the legal profession was seen as the normative base to formulate the more particular obligations of the lawyer. Fuller stated:[6]

> A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those embodied in the *Canons*. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and effective.

Professor Fuller, a few years later in 1958, as Chairman of the Joint Conference on Professional Responsibility of the A.B.A. and A.A.L.S., drafted a statement on professional responsibility[7] that had a considerable impact on the development of the A.B.A. *Model Code* of 1969 and the systematic justification arguments of professional morality generally. The statement included a spirited defence of the adversary system and zealous advocacy, but also called for constraints on the lawyer's advocacy so as to uphold the dignity and integrity of the system. Interestingly, however, in the counselling role, where no impartial tribunal was supervising the decision, Fuller suggested:[8]

> Although the lawyer serves the administration of justice indispensably both as advocate and as office counsellor, the demands imposed on him by these two roles must be sharply distinguished. The man who has been called into court to answer for his own actions is entitled to a fair hearing. Partisan advocacy plays its essential part in such a hearing, and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counsellor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality. In saving himself from this unworthy involvement, the lawyer cannot be guided solely by an unreflective inner sense of good faith; he must be at pains to preserve a sufficient detachment from his client's interests so that he remains capable

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6. *Supra,* note 1 at 54-55.
7. *Professional Responsibility: Report of the Joint Conference* (1958), 44 A.B.A.J. 1159-1162, 1216-1218.
8. *Id* at 1161.

> of a sound and objective appraisal of the propriety of what his client proposes to do.

Additional elaboration on the lawyer's responsibility to the public, and not just to the client, in designing the frameworks for collaborative efforts, and the various responsibilities of public service by lawyers was included in the joint conference statement.

Thus one approach to the normative content and scope of professional responsibility, of which Fuller's model is a good example, could be called the social role morality model. I use the term "social role" initially, rather than "professional role," because the individual professional role is seen as first of all rooted in the more fundamental social role of the profession collectively. The social role of the profession gives shape to the institutions, processes and general conventions of the profession and then these in turn shape the various role demands made on the individual professional in the legal system. It might be asked, of course, whether social needs and norms have really determined the shape of the legal institutions and the professional roles within them, or whether instead the institutions themselves have evolved haphazardly and have been shaped more by the professionals themselves than by reference to social needs.

What are some of the implications of such a model for the teaching of professional responsibility? It seems to me that some positive points can be made, but that essentially the model of "professionalism" does not serve as an adequate answer to the problem of goodness in lawyering. To say that this approach is problematic is not to suggest that the teaching of professional responsibility should ignore it. It seems to me to be the dominant conventional way that lawyers justify what they do. When dealing with professional activity that seems at first blush to violate ordinary moral norms, lawyers will point out some allegedly more important collective social good that can only be fulfilled by having lawyers act this way. The irony is that lawyers appeal to the collective social interest for justification for the almost absolute fidelity to individual interests that often harm the collective interest. But even if we disagree with the conventional role justifications, we cannot deny that being in a professional role carries with it structural expectations of behaviour that may not exist outside the role. These expectations that people have of how we should act as lawyers by necessity become factors to consider in moral reasoning. Thus, students must confront the social role morality model.

Positively, one of the implications of this approach, if taught critically, is the wide scope of the inquiry. An examination of legal institutions, the history and sociological characteristics of the profession, the modes of delivery of legal services, and even what the just ordering of society

entails procedurally and substantively could be included. Any focus on the many particular ethical dilemmas involving the lawyer-client relationship should be placed first within the context of a much broader examination of the changing social context and the social role of the profession within it. The focus cannot be only on particular *situations* that raise ethical concerns, but also on the *systems* of the law. Personal integrity alone is not enough if the institutions and processes of the law systemically lack integrity in the first place. The focus cannot be only on the duty of the lawyer, but also must include the duty of the profession collectively.

A second positive implication is that professional norms and practices must be judged not by what the profession wants, but by a "consumer perspective," as it were. As ethical dilemmas or the legal profession's governance and performance are examined, the students must put themselves into the shoes of the layperson and consider what behaviour would best serve and protect consumers of legal services and the public generally. What qualities of behaviour and what activities do we as a society want from lawyers? Are lawyers fulfilling these expectations?

A third positive implication is that focusing on roles should lead to the understanding that lawyers are involved in many different roles in many different contexts. It is thus inappropriate to paint one picture of the ethical duty of lawyers and impose it on every situation without full attention to the very different factors that exist as you move between roles.

Positively we can say, finally, that the idea of finding the normative ground for professional ethics in service to society, in the fulfillment of actual social needs, may provide for some students not only an intellectual framework for professional moral reasoning, but perhaps also some emotional motivation to conform to high ethical standards flowing from having some ideal to identify with, to shape a sense of vocation, to give meaning to one's place in the world. It may provide a larger social vision for lawyering than simply the *ad hoc* service to particular clients.

The central problem with the role morality approach, however, is that we may seriously doubt whether conventional role expectations are worthy of being translated into ethical obligations. Perhaps the role expectations need to be destroyed or transformed before we can treat them as moral obligations. I, for one, doubt that the adversary system is a good form of dispute resolution, and I doubt that liberal individualism provides an adequate base for interpersonal justice. In short, I reject much of the ideology upon which lawyers' role morality is based. This problem is illustrated by the social role morality model popularized by Professor

Monroe Freedman in his classic 1975 book.[9] Again based primarily on the social legitimacy of the adversary system and the ideology of individual legal rights, Freedman clearly illustrated that professional morality could be seen as strongly differentiated from personal morality. The professional role of the lawyer in the legal system sometimes demanded that the lawyer had to pursue immoral but legal ends, had to cross-examine to discredit witnesses that the lawyer knew were telling the truth, and even had to present perjury if required to uphold the higher principle of lawyer-client confidentiality, and so forth. The role of the lawyer in society justified behaviour that ordinary morality would condemn. Of course, the moral justification for this role-differentiated behaviour in specific cases would be found at a "higher level" in the overall justice and morality of the adversary system and the upholding of individual legal rights. Thus professional responsibility under this model involved understanding and finding the moral justification for the role demands of the profession. The need for study of professional ethics was highlighted precisely *because* of the conflict between ordinary morality and professional morality.

However, the problem is that while the current conventions of professional ethics obviously reflect and are rooted, to a considerable degree, in various social realities (the ideology of the adversary system of dispute resolution, the ideology of legalism, the economic base of a free-market system, the socio-political base of democratic liberalism and so forth), any critical reflection on these matters may well lead at least some students to a rejection of some of the current professional norms, as I have done, because the social systems and institutions that justify the norms are seen as fundamentally *unjust* in the first place. To look to the morality of "society" for justification of professional morality does not in itself get very far unless you can justify the morality of "society" in the first place. We have competing visions of what just social ordering entails and thus we have the personal moral dilemmas of the lawyer who finds no higher systemic justification for some of the current hegemonic professional norms that apply to him or her. Even if the social role morality model is seen as a valid process to derive professional norms, it does not provide the content of the norms in any uncontroversial way, due to the wide disagreement as to what the social role of lawyers should be and what the just ordering of the legal system should entail. The amount of discretion that should exist within the profession to base professional norms on competing visions of what the social role of the profession is, or should be, becomes a crucial issue, an issue of

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9. M. H. Freedman, *Lawyers' Ethics In An Adversary System,* (Bobbs-Merrill, 1975).

professional responsibility in its own right. Obviously, at some point the discretion of the professional must end if regulation of the profession is to proceed at all, and if clients are to have some settled expectations of what lawyers do. What that point will be depends on what the dominant hegemonic ideology of the social role of the lawyer in society is. The bottom line, however, is that teachers of professional responsibility will continually find students who do not accept the role-differentiated model, even if the teacher does. These students insist that professional norms should flow more directly out of ordinary personal moral norms, reasoning and sensibilities. The context of being in the role of lawyer may add a lot of situational factors to take into account in ordinary moral reasoning, but basically there should be functional conformity between ordinary morality and professional morality, rather than the discontinuity that appears to exist. Many students do not find any justification for separating their moral identity into two parts, one personal and one professional. Rather, they seek some way of grounding professional morality in personal morality, adjusting of course to the complex realities of legal institutions and the representation of clients, rather than the other way around, of having the institutional demands of professional role overwhelm and displace ordinary morality. Roles may be viewed flexibly as moral opportunities in which different people may take different approaches, rather than inflexibly as *demanding* one course of action from all by some systemic logic of the role.

The need, however, to find a "higher" systemic justification for the apparent conflict between personal morality and professional role morality, between ordinary morality and the behaviour apparently expected of lawyers in their role as professionals, makes some sort of social role morality model popular. Instead of Fuller's or Freedman's model, largely loyal to the present system, Professor Bayles has recently written a provocative and coherent book that argues for a professional responsibility model based on the substantive values of "liberal" society which he posits are governance by law, freedom, protection from injury, equality of opportunity, privacy and welfare.[10] Bayles asserts that professional norms should be formulated to advance these social interests. He then indicates the many ways that current professional ethical rules, principles and practices sometimes do uphold these interests, but often do *not* do so, and he makes suggestions for reform. Thus, adopting some social role morality model is not *per se* to adopt uncritically the current dominant ways that lawyers justify behaviour.

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10. M. D. Bayles, *Professional Ethics*, (Wadsworth, 1981).

However, what tends to happen in my classroom is that the current role expectations are used to *explain* lawyer behaviour and then explanation and moral *justification* all too easily slide into each other. It is too easy and comfortable to assert that lawyers are performing a necessary public service and thus we are doing something worthy with our lives. This avoids asking the deeper personal question of identify and vocation in a world of personal and systemic evil.

2. *Lawyer's Law*

In the 1950's, when Professor Fuller formulated a social role morality model, the then existing A.B.A. *Canons of Professional Ethics* (1908), as amended from time to time, were drafted in very general horatory terms, not unlike the Canadian Bar Association's *Canons of Legal Ethics* (1920). A lawyer faced with an ethical problem would not usually find a particular "answer" by reaching for the *Canons.* In a sense then, the social role morality model provided a context for individual moral reasoning where professional norms had not been crystallized and legalized into detailed, statutory-like forms. Since that time there has been enormous pressure to legalize professional ethics resulting in increasingly detailed codes of conduct, and a plethora of judicial decisions and Bar Association committee opinions. It is now possible to say that the legal profession is a regulated industry with a considerable body of *law* that applies to its members, and it is scandalous for law students to study the law of torts, trusts, contracts or whatever, but not the law of the profession they are joining. However, what might be called the "lawyer's law" model of professional responsibility is also fraught with disagreements and dangers.

On one level, some resistance to the lawyer's law approach may stem from questionable motives. Law students are quick to argue that more legal regulation and enforcement is needed for all sorts of activity, but when they study lawyers as the subjects of legal regulation there is a change in tune. Perhaps lawyers develop some kind of "exemption mentality" where they see themselves as making and applying and manipulating law for everyone else, but standing above it all when it comes to the application of law to their own professional lives. Maximal autonomy to do as one thinks best, and deregulation are argued by the very same students who want so much to channel life into the paths of justice by the force of law.

At another level, however, the movement to the lawyer's law model in the professional responsibility field is quite understandable. First, lawyers as a group may also have a built-in bias by the nature of their calling to

prefer legalism over situationalism.[11] Absent a binding rule, when faced with an ethical situation in which the conflicting interests of client, lawyer, third parties, and the public are at stake, each lawyer must recognize the interests at stake, weigh and balance all the factors and make a decision in each situation. However, the weight to give to the various competing interests involves subjective ambiguity and judgement even within an acceptable social role morality theory. Therefore, the advantages of drafting prior detailed rules, the advantage in short of legalism over situationalism, is that a measure of certainty, predictability, and enforceability is supposedly attainable. By analogy to criminal law and the principal of legality, we adopt the idea that someone should not be found guilty of professional misconduct except by breach of formally promulgated law that one can have prior notice of. The application of the *Charter of Rights and Freedoms* to lawyer disciplinary proceedings will undoubtedly hasten this movement to the legalization of professional ethics.

Secondly, the lawyer's law model arises out of the reality of moral pluralism. If we consider moral values to be subjective and relative, we must then establish some procedure for value positions to be debated and then voted on, and then produce a code of conduct expressing the dominant view, after which time the code is an *objective fact.* Now we can deal with professional rules as *positive facts* (what is), without constantly arguing about subjective values (what *ought* to be). In a sense, legalization arises more out of lack of confidence in morality than it does out of moral consensus.

Thirdly, the lawyer's law model, ironically, is also reinforced by any movement to attempt basic reforms of lawyer behaviour. Any sharp departure from conventional practice and ideology requires legal legitimation and enforcement to be successful. A good example of this is the position taken by Professor Patterson[12] who was a consultant to the Kutack Commission which drafted the new A.B.A. *Model Rules of Professional Conduct.*[13] Professor Patterson objected to the simple agency ideology of professional responsibility that made loyalty to the client not only primary but largely exclusive of other duties, whether to legal

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11. *See* J. R. Elkins, *Moral Discourse and Legalism in Legal Education* (1982), 32 J. of Legal Ed. 11.
12. *See,* L. R. Patterson, *Legal Ethics: The Law of Professional Responsibility,* (2nd ed., Matthew Bender, 1984) and Patterson, *The Function of a Code of Legal Ethics* (1981), 35 U. of Miami L. Rev. 695.
13. *Model Rules of Professional Conduct,* (A.B.A., 1983). These rules as adopted have been substantially revised from the Commission's initial *Discussion Draft* (1980) and the *Proposed Draft* (1981).

institutions, opposing parties, unrepresented third parties, or social interests generally. He would have redressed this unbalanced situation by promulgating rules based on a reciprocal agency model of professional responsibility that contained not just the duties of a lawyer to the client and others, but also reciprocally, the duties of the *client* to the lawyer and to other interests.[14] In other words, he wanted rules of professional conduct that actually applied to the *client* of professional services, as much as to the professional providing the service. For example, details about how the client could not use a lawyer to avoid candor to a court or in negotiation, or how a client could not use a lawyer as an instrument of unfairness to others were proposed. If lawyers can do immoral things by the justification that they are simply upholding a client's legal rights, then all we need to do is change what the client has a legal right to, in terms of lawyers' behaviour on their behalf. However, such a reformist position that breaks sharply with conventional ideology obviously needs a comprehensive legal base to succeed, as Professor Patterson acknowledged.

Given these understandable pressures then, we have witnessed an explosive growth of lawyer's law, particularly in the United States. The A.B.A. *Model Code of Professional Conduct* of 1969 served the dual purpose of regulation and inspiration, by containing, first, merely *directory* ethical considerations that were meant to express the ideals that lawyers should strive for, and then, secondly, detailed disciplinary rules that expressed the minimum and *mandatory* duties that lawyers could be disciplined for breaking. However the new 1983 *A.B.A. Model Rules of Professional Conduct,* replacing the 1969 *Code,* as the change in title indicates, are drafted in "law form." The Canadian Bar Association's *Code of Professional Conduct* of 1974 contains some commentary that is rule-like, but despite being a great advance over the 1920 *Canons,* the 1974 *Code* is not as detailed as even the 1969 A.B.A. *Code* was. Thus we have not as yet attempted to truly legalize professional ethics in Canada. What the current C.B.A. Commission to examine the *Code* will come up with remains to be seen, however.[15]

Of course, the lawyer's law approach also includes the common law developments. Increasingly some areas of professional responsibility, like conflict of interests, are being litigated and principles of professional responsibility are being laid down by the courts. The application of the *Charter* to issues involving the delivery of legal services and the

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14. *Supra,* note 12 and also Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty* (1980), 29 Emory L.J. 909.

15. The National C.B.A. Executive has formed a Special Committee to review and update if necessary the 1974 C.B.A. *Code.*

governance of the profession will add to this trend. Again, however, the scope of the case law in the United States is much greater, not only from courts but also from reported committee hearings. The A.B.A. Standing Committee on Ethics and Responsibility publishes formal and informal opinions on matters referred to it by lawyers who seek advice on an issue.[16] Various state jurisdictions have such committees that publish opinions as well.[17] Finally, the A.B.A. has developed a centralized, computerized information bank collecting the disciplinary hearings and dispositions from every jurisdiction in the country so that precedents and trends in discipline can easily be found.[18]

As can be seen then, with the development of detailed Codes, and volumes of case law, committee opinions, and disciplinary hearings, it is easy to start treating the field of professional responsibility as simply a law course in its own right.[19] However the dangers of such a model are as obvious as the pressures giving rise to it.

First of all, there are a number of pitfalls associated with legalism as an ideology. Judith Shklar defines legalism as, "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[20] To focus on rule finding and following, instead of focusing on the process of critical reasoning in each situation, may ultimately lead to an abandonment of independent personal and moral responsibility and judgement by the lawyer. Even if we assume that many of the *Code* rules are morally justifiable, there is still a problem of minimalism. Instead of striving for the best, the lawyer may go to "lawyer's law" to see what the minimum duty is. This easy practicality of rule following ultimately may lead to conformity with whatever is conventional, rather than the "sweat, tears and prayer" involved in being a morally responsible agent. Professor

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16. *See* Olavi Maru, *Digest of Bar Association Ethics Opinions,* (American Bar Foundation, 1970); Maru, *1975 Supplement to the Digest of Bar Association Ethics Opinions,* (A.B.F., 1977).

17. *Id. See also:* Wayyski and Pimsleur, *Opinions from Committees on Professional Ethics* (Association of the Bar, City of New York, N.Y. County Bar Association, N.Y. State Bar Association).

18. *See* National Centre for Professional Responsibility, A.B.A., *Disciplinary Law and Procedure Research System,* looseleaf.

19. Reflected in such titles as G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct,* (Harcourt Brace Jovanovich, (1985), and Patterson, *supra,* note 12. For criticism of "legalistic" coursebooks, *see* Erwin Chemerinsky, *Pedagogy Without Purpose: An Essay on Professional Responsibility Courses and Casebooks* (1985), A.B.F. Res. J. 189. *See also* T. Schneyer, *Professional Responsibility Casebooks and the New Positivism: A Reply to Professor Chemerinsky,* [1985] A.B.F. Res. J. 943, and a reply by Chemerinsky at 959.

20. J. Shklar, *Legalism,* (Harvard U.P., 1964) at 10.

James Elkins has written a persuasive critique of how the teaching of professional responsibility and legal education generally is mired in legal discourse rather than taking moral discourse seriously.[21]

The legal world view involving the categorization of experience into formal rules, principles and concepts is just one of many points of view through which we see the world. But to elevate this *limited* perspective into a whole way of living our professional lives is to blind ourselves to what it might mean to become a virtuous person and lawyer. We might know about and conform to every law of lawyering, but not live a good professional life. We might still, for example, have no genuine love, concern, or care for anybody affected by our work and we might still perpetuate or create a host of harms as a lawyer while acting fully within the confines of the law of lawyering.

Secondly, the idea that legalism promotes uniform compliance and enforcement may be doubted. Because a rule cannot be drafted in such a way that the rule determines the scope of its own application in terms of the purposes behind it, the rule inevitably has loopholes which will be seized upon to violate the purpose of the law. Legalism not only fosters uncritical minimalistic thinking, but also nihilistic thinking. Ironically, legalism actually can be a kind of lawlessness. Lawyers become adept at finding holes in the law and this applies to lawyer's law too. Although this problem may be overcome to a degree by more sophisticated interpretive techniques, the demand for more rules will often lead to compliance with the letter, but violation of the spirit.

A third pitfall associated with the lawyer's law approach relates not so much to legalism as an ideology but rather to a cluster of problems involving the *process* and *content* of legalization. One of the most pervasive criticisms of the 1969 A.B.A. *Code* was the unbalanced emphasis in the *Code* on the ethics of the adversary system. Even when the lawyer was involved in non-adversarial roles or in practice contexts quite different from advocacy, the principles of ethics derived from the role of the advocate often inappropriately formed the basis for the duties of the lawyer.[22] Furthermore, the context of modern law practice is becoming increasingly complex and specialized. Thus it is difficult in the process of legalization to be sensitive to all the various roles and contexts, and the result will be that even assuming some moral justification for the

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21. *Supra,* note 11. *See also,* Elkins, *The Pedagogy of Ethics* (1985), 10 The Journal of the Legal Profession 37.

22. For criticism of the inappropriate extension of adversarial ethics, *see,* W. Rich, *The Role of Lawyers: Beyond Advocacy* (1980), Brigham Young L. Rev. 767; C. Frankel, *Review of the A.B.A. Code* (1976), 43 Uni. of Ch. L. Rev. 874; R. McKay, *Beyond Professional Responsibility* (1981), 10 Ca. U. L. Rev. 709.

legalized norms, they may well be inappropriately applied to contexts involving significantly different moral considerations.

There is also the controversy regarding the representational nature of any code of conduct. Are the standards passed by the profession truly representative of the profession's view of what is in the public interest, or are they based largely on the views of the powerful interest groups in the profession? Raising this issue implies that the profession is not so unified that standards of conduct can always be justified without attention to plurality of views and interests that transcend mere personal disagreements on controversial issues. Even if the *Code* becomes fairly representative of the profession's view, the point can still be made that it is the *profession* which produces the *Code,* not clients or the public generally. It is thus not hard to imagine how the interests of the profession could predominate over that of other interests in the formulation of the *Code.*[23] Indeed, the *Code* may primarily serve as a legitimation device to make the profession *appear* to be ethical to the public.

Finally, another problem of having detailed and formal rules of professional conduct is the paradox of not covering enough, but at the same time covering too much! Discretion to be immoral may also at times open up discretion to be moral in situations that might otherwise be covered by rules which are in themselves immoral. If we try to formulize a rule for all the ethical dilemmas of law practice we may well end up with some essentially unethical rules. For example, if we pass a rule that prohibits a lawyer from ever disclosing a confidence even when disclosure would prevent severe harm (not just illegality) from occurring, many lawyers would say that it is a good rule. Client confidences should be placed above every other interest (except for the lawyer's own in collecting fees or protecting his or her reputation!). But it might be argued that it is a bad rule and one could marshall some strong moral reasons for allowing disclosure of confidences in some situations that are now arguably prohibited in our *Code.* If a rule is passed saying you *must* disclose, strong disagreement arises from one camp of lawyers. If a rule is passed saying you *cannot* disclose, strong disagreement arises from another camp. If you say you *may* disclose, perhaps no one has been satisfied, but at least the discretion to do what you think is morally right has been granted, but at the cost of uniformity and settled client expectations.

I am not saying here that we do not need codes of conduct, nor am I saying that they should not be studied. However, given the problems with

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23. *See* Morgan, *The Evolving Concept of Professional Responsibility* (1977), 40 Harv. L. Rev. 702.

legalism as an ideology, and the problems with the content and process of legalization, no course in professional responsibility should focus primarily on "lawyer's law" as a desirable approach to the problem of professional decision making. We are constantly thrown back into questions about the moral justification for the law that does exist, about whether we should obey it, and about the continual need for moral reasoning in spite of it.

3. *Personal Moral Reasoning in Relational Context*

The social role morality model looks primarily to some ideal operation of the legal system for the normative ground of professional ethics. Recently there has been a shift of emphasis away from the *systemic* and toward the *relational,* and away from the *professional* and toward the *personal.*[24] The fundamental ground of professional ethics is what the relationship between the lawyer and the client, the lawyer and others, and in a sense the lawyer with himself or herself should be. How we should view ourselves and act toward ourselves, and in turn toward those who depend on us or are affected by our actions is a central moral question for those acting in a professional role as much as for those acting outside it. We might label this approach the "personal moral reasoning in relational context" model. Professional responsibility in this model involves the ability to recognize and reason reflectively and critically on ethical issues as they arise in practice and the ability to arrive at more personally satisfying decisions about what courses of action to take. The development of moral reasoning involves intellectual, emotional and experiential learning. Students must be exposed to some of the literature on ethical theory that relates directly to moral reasoning by lawyers. Fortunately there are now a number of books to turn to.[25] Students must also face actual ethical problems within a context where open debate and feedback from the instructor and fellow students helps the students to

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24. *See* E. Dvorkin, J. Himmelstein, and H. Lesnick, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism,* (West, 1981), and Elkins, *A Humanistic Perspective in Legal Education* (1983), 62 Neb. L. Rev. 494.

25. *See,* Bayles, *supra,* note 10; D. Luban, ed., *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics,* (Rowman and Allanheld, 1983); Goldman, *The Moral Foundations of Professional Ethics,* (Roman & Littlefield, 1980); Reeck, *Ethics for the Professions: A Christian Perspective,* (Augsburg, 1982); Campbell, *Doctors, Lawyers, Ministers: Christian Ethics in Professional Practice,* (Abingdon, 1982); Camenisch, *Grounding Professional Ethics in a Pluralistic Society,* (Haven, 1983); Baumrin and Freedman, eds., *Moral Responsibility and the Professions,* (Haven, 1983); Lebacqz, *Professional Ethics: Power and Paradox,* (Abingdon, 1985); Shaffer, *On Being a Christian and a Lawyer,* (B.Y.U. Press, 1981); Shaffer, *American Legal Ethics,* (Matthew Bender, 1985); Kipnis, *Legal Ethics,* (Prentice-Hall, 1986); Elliston, and Davis, *Ethics and the Legal Profession,* (Prometheus, 1986).

think explicitly about alternative responses, consequences of each response, reasons that could be given to justify each response and awareness of the value preferences that each response expresses. As David Luban has stated:[26]

> The study of legal ethics is part of the study of ethics, and the study of ethics is part of the study of philosophy . . . The role of the legal ethics course should be to attempt to equip students with intellectual skills they can use to pinpoint conflicts, analyze arguments, and discuss the questions of principle that underly various ethical problems . . . What is needed is a literature that is philosophically sophisticated but specific to the legal context.

As students work through the moral dilemmas faced by lawyers, and while doing so clarify their own values and critically examine the conventional positions of systemic role morality in the light of moral philosophy, they may develop a much more reflective and holistic approach to ethical decision-making which they will utilize as lawyers. Of course, moral reasoning must be contextualized and the focus on relationships will still have to deal with the systemic issues and other broad social dynamics in which the relational questions are embedded.

However, moral reasoning sharpened by the discipline of applied moral philosophy is only one part of the approach. At more basic levels we are concerned not just about hard ethical choices that arise in practice, but also with why we are lawyers at all, or what kind of lawyers we want to be, or what we are as persons that lawyering actualizes or destroys.

This focus on the self may lead to the self-acceptance and assurance that propels professional service to others, or it may propel us out of the profession. But the conventional ideology that personal values and professional values are different and separate must be dealt with. Perhaps a satisfactory moral answer to justify role differentiated behaviour can be arrived at, in which case the personal and professional will connect in a satisfactory way. Perhaps not. In any case, I believe that students need to arrive at a sense of how their vocation can be an expression of their own identity and values. To bifurcate the professional and the personal is to diminish both. The myth that lawyering involves the essentially neutral application of a body of doctrine and technique must be shattered. Lawyering is a personal and political activity; law is not a neutral body of norms that equally benefits and protects us all, but is rather often used instrumentally to legitimate and advance certain interests at the expense

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26. D. Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics* (1981), 40 Maryland L. Rev. 451 at 451, 471.

of other interests.[27] A crucial question for a law student then is, "What interests am I going to spend my life serving as a lawyer?" Another crucial related question is, "What kind of lawyer do I want to be?" The choices we make about these questions will to a significant degree determine what we will become as persons, not just as professionals. For example, professional "success" may be defined by somebody as best attained in certain kinds of law firms that irrespective of the questions of the worth of clientele ends served or means used, may operate in an immoral fashion. Lawyers at such firms are required to work inhuman hours, billing competition is rampant, hierarchy of partner-associate-staff is firmly entrenched and somewhere along the way in this context the financially and professionally "successful" lawyer often finds that he or she has "lost their soul." The rate of personal, marital, and family wreckage among professionals is itself a systemic moral question. Why does professional life, so ideally geared to *helping* others, so often translate rather into a *harmful,* hurtful professional lifestyle?

Another fundamental question relating to the self is "Can a good person be a good lawyer?" As Elkins states:[28]

> One who believes that professional morality is a matter of compliance with the disciplinary *Code* fails to ask what it means to be a good lawyer. To ask this question requires that one look more closely at whether a good person can do what lawyers do in their practice — defend guilty clients, take advantage of those whose attorneys inadequately represent them, and help clients pursue aims that are detrimental to the social order. Can a good person justify behaviour which directly harms identifiable third parties and/or the social order *because* he is a lawyer?

Does the role of lawyer *demand* that we harm other interests while advancing our client's interests in a way that no good person could justify? Is it possible to choose clients and the means used to serve them in a personally, morally satisfying way or must the lawyer play by the conventional principles even if he or she disagrees with them? That is, can a lawyer integrate self and professional role in a way that is good for him or her?

Questions like these relating to our own values and how to make meaningful vocational commitments are inherently anxiety provoking, and within the context of apparently diminished personal career choices doubly so. Students do not often see themselves as choosing where they will work. In most cases they believe they have a limited choice as to

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27. *See* Simon, *The Ideology of Advocacy,* [1978] Wisconsin L. Rev. 29; Simon, *Visions of Practice in Legal Thought* (1984), 36 Stanford L. Rev. 469; Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America,* (Oxford U. Press, 1976).
28. Elkins, *supra,* note 11 at 24.

articling positions and often even less choice after articling is over. Students may end up as lawyers specializing in some area of law not by choice, but simply by fate. Students may equally feel that their ethical decision-making is, in particular cases, constrained by the reality that for many years they are not really independent agents but rather working for a more senior lawyer who "determines" what should be done. These are realities, to be sure, but any abdication of ethical freedom and responsibility in the face of circumstances is already a first giant step to becoming morally dead. Circumstances are factors to be taken into account in ethical reasoning, not factors that in and of themselves determine anything. We may indeed sympathize with the students in the face of the economic and sociological realities of the profession, but we must not thereby allow people to disclaim moral responsibility for making life choices.

The second focus in on the lawyer-client relationship. Professor Richard Wasserstrom, for example, has pointed out the irony of how lawyers say they are "hired guns" for the client and yet when you actually analyze lawyer-client relationships you often see that the lawyer is dominant and paternalistic in relation to the client.[29] Professional dominance over clients is a central moral question. Perhaps, for example, lawyers impute ends to clients that the clients do not actually have. We assume that the client always wants to "beat the rap," for example. Perhaps the client really *wants* to confess; wants to take responsibility for what he has done. But we, as lawyers, should we get into the picture early enough, will make sure the client does not talk to the police. Isn't that our job? Lawyering has developed its own substantive value ideology of maximum freedom or wealth that is regularly imputed to clients without meaningful discourse between lawyer and client as to whether the interests of the client actually fit into this simplified maximization scheme. The same problem of imputing our values on the client is seen in terms of the means used to pursue ends. Lawyers often claim that the means questions are their own prerogative. But, how do we know that our clever cross-examination to destroy the credibility of a witness we think is telling the truth is really what the client would want us to do on his or her behalf? Lawyers are too quick to assume that the morally problematic aspects of professional behaviour are just "doing for the client what the client would want to do for himself." The issue of the moral autonomy of the client reciprocally raises the issue of the moral

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29. R. Wasserstrom, *Lawyers as Professionals: Some Moral Issues* (1975), 5 Human Rights 1. *See also* D. Rosenthal, *Lawyer and Client: Who's In Charge?* (Russell Sage Foundation, 1974).

autonomy of the lawyer. Some lawyers are dominated by their clients rather than the other way around, in the sense that the lawyer does not engage in independent moral discourse with the client, or does not have any personal moral standards (aside from legality) that he will not cross on behalf of any client. To retain your own moral integrity as a lawyer does not involve the imposition of your values on a client, but merely establishes the scope in which *you* personally will act on behalf of someone — the scope of ends and means that you can justify as morally worthy of your time and energy. To be sure, this may be theoretically problematic in situations of lawyer scarcity or uniformity of values, but such conditions rarely occur (for a paying client) and when they do, such conditions may or may not be an acceptable moral reason for taking a different approach.

Another moral problem common to the lawyer-client relationship is the need to move beyond a narrow legalistic posture with clients and move to a more holistic one, which takes seriously the emotional and moral dynamics of the client's problem.[30] To quickly reduce a problem to its purely legal dimensions may allow the lawyer to find a legal "solution" that is no solution at all because the problem is essentially non-legal to begin with. Indeed the lawyer may have made the matter worse rather than being of genuine help to the client.

The ethical choices we make are not just matters involving the intellect (the head) but also emotional matters of the heart. Dr. Andrew Watson has shown how not addressing the emotional and psychological side of ethical conflicts leads to both an impoverished ability to reason morally and also negatively affects the lawyer-client relationship which is fraught with emotional dynamics of its own that need to be dealt with.[31] The client is not necessarily served at all if the lawyer has not been sensitive to the client as a whole person and not just as a legal problem. Thus, in a relational model the relationship between lawyer and client in terms of dynamics and decision-making is at the heart of professional responsibility.

A third focus is on the relationship of the lawyer to third parties who are not his clients — opposite parties, or persons who are involved in a case, or persons simply affected by the lawyer's work on behalf of a client. Moral philosophers have started to produce a body of literature

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30. *See,* T. Shaffer, *Legal Interviewing and Counselling in a Nutshell,* (West, 1976).

31. *See* Watson, "Psychological Aspects of Teaching Professional Responsibility" in *Teaching Professional Responsibility, supra,* note 3 at 609; Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education* (1975), 8 U. of Mich. L. R. 248; Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease* (1974), 26 J. of Leg. Ed. 441.

that looks specifically at legal ethics, particularly the issue of the extent to which we can justify harming others in the name of advancing our clients' interests.[32] Central to much of the literature is the denial that lawyers can personally avoid responsibility for harm by hiding behind a client. What we do on behalf of clients is still something that *we* do. Doing what is legal is not necessarily doing what is morally right, and thus the difficult philosophical questions arise about the legal profession's duty, if any, to moral rights in a pluralistic society as opposed to purely legal rights.

All of this relational, psychological, and philosophical discourse may frighten the reader as "soft," "mushy" and above all too "personally subjective" to form any focus to teaching professional responsibility. But this fear itself may be an example of an existing narrow bias we have about the value of that which we label "hard," "objective" and "practical." To focus on the process of moral reasoning in the relational context of lawyering seems to me to be the focus that is most needed and most promising in terms of being meaningful to students.

III. *How Should We Teach?: Informal Context and Formal Course*

If the moral reasoning in relational context approach is desirable, how do you "teach" it? Before confronting the methodological obstacles, we must look at the larger law school experience to see if that is an obstacle in itself.

Professional responsibility should be taught on two fronts at law school. One front is the explicit focus in parts of the curriculum or extracurriculum on the topic of the professional responsibility of lawyers, whether by way of the pervasive method, the separate course method or the clinical method. A second way, equally important, is that the whole law school experience should support moral inquiry and model just relationships. I call this professional responsibility as taught informally by the *context* of the law school. Both of these areas of teaching should be in harmony. The legal education context should support and reinforce the formal teaching of professional ethics. However, I think that overall the informal legal education context does *not* support the formal course, and that is also one of the primary reasons that I am so dissatisfied with the professional responsibility course.

1. *Professional Responsibility Taught Informally by the Context of Law School*

If you take away any specific course on professional responsibility or the

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32. *Supra*, note 25.

explicit discussion of professional responsibility issues in the clinical setting or as part of some other doctrinal course, the rest of the law school experience still indirectly transmits to students a host of messages about professional responsibility issues that may either reinforce or frustrate or negate the explicit teaching of professional responsibility. In this sense the law school cannot avoid transmitting messages about vocational values because any organized activity and institution contains a "collective spirit" that impacts on participants in the institution. If we are going to teach professional responsibility (and I suggest we cannot avoid it), then we must address how the *covert* teaching of it can be made to correlate with any *overt* teaching. If the law school experience covertly impacts on the students' sense of the professional responsibility of the lawyer, the impact will be more positive, I think, when the law school itself fulfills its *own* professional responsibilities and thereby acts as a good role model.

First, the law school obviously has some responsibility for training in professional competence.[33] Even if law schools do not take upon themselves the duty to train lawyers in all the basic skills, doctrines and procedures necessary to start practice, the law degree is still the fundamental entrance requirement into the profession. Many issues involving competence could be looked at, but take evaluation of students' work as just one example. If law schools do not set real standards of adequate performance in regard to what they do teach, what message about competency are students picking up? My experience has been that a paper or examination has to be unredeemably bad before a failing mark is given to it. In other words, it is relatively easy, given a degree of natural talent, to drift through law school and get a law degree by minimal and mediocre work. Fortunately, the vast majority of law students are not satisfied with minimal work. But for some students there is an attitude of carelessness to academic standards that the law school allows. Do we foster an attitude that emphasizes that clients will depend on our skills and judgement, and thus legal education must be a serious life-long process of critical self-education and continuous self-evaluation? Or do we foster an attitude that you can get by with the minimal and the mediocre? In saying this, I do not think that a law school needs to be inhumane or oppressively competitive to uphold real standards of adequate student academic performance.

Of course, the more fundamental point is the quality of work by the law professors. If law professors have a professional responsibility involving scholarship, teaching and public service, the quality of the work they do says much to the students about competence. What is the message when there is a pattern of being unprepared for class, or a lack

33. *See* A.B.A. Task Force, *Lawyer Competency: The Role of the Law Schools* (1979).

of keeping up with changes to the law in the subject matter taught, or an inability to communicate ideas and concepts with clarity, or a superficiality of treatment? The context of legal education as a whole should teach students about the professional responsibility to be competent, and also provide the tools for being competent, by teaching how to learn the law and teaching how to be self-critical about fundamental lawyer skills.

Secondly, legal academics have a special responsibility to *critically* study the law, legal institutions, and legal practices and honestly explain what they find. In a sense, unlike advocates who supposedly may argue for an interpretation of fact or law on behalf of a client that they do not personally believe in, the legal scholar has a coherent obligation to state the truth as he or she finds it, without fear or favour to establish interests.[34] In this sense, legal scholars have a duty to be prophetic about legal affairs — pointing out problems in need of reform and trying to suggest more just arrangements. However, concern for justice and a dedication to reform and a public leadership role in legal affairs is equally the responsibility of the profession generally. Thus, if the law school does not even take justice questions seriously, how can we expect that the students will do so when they get into practice and face the temptations of reducing law practice to simply serving whatever interests may pay them the most?

To take justice questions seriously is to at least move beyond the teaching of what *is*, and focus on the evaluation stage of what *ought* to be. Yet the denial of even superficial moral discourse in legal education can be glaringly overt. Professor Shaffer and Professor Redmount witnessed the following exchange in the first session of a law school Evidence course.[35]

Professor: What's a trial?

Student: An adversary proceeding.

Professor: For what purpose?

Student: To discover the truth. (Silence, then laughter)

Professor: Who cares what truth is?

Student: I care. (Loud laughter)

Professor: Well, in your conversations with God, you can take those questions further. (To a second student): What's the purpose of a trial?

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34. *See* Anthony Kronman, *Foreward: Legal Scholarship and Moral Education* (1981), 90 Yale L.J. 955.

35. T. Shaffer and R. Redmount, *Lawyers, Law Students, and People* (1977) at 181-182.

There is also the legendary story of the professor in a first year class grilling a student about an appellate opinion. After much effort, the student was able to state accurately what the result of the case was. After a pause, the student added: "But that's not *just*!" and the professor answered, "If you wanted to study justice you should have gone to divinity school."[36] This sort of overt cynicism toward moral questions is probably rare, but there is still a covert cynicism that is more common, and the effect is pretty much the same. Even if the "moral moment" is benignly acknowledged, but there is still a systemic exclusion of normative questions in the teaching of law, students will probably develop an attitude like, "I'm too busy learning the law to be worried about the justice of it."

If the primary focus of legal education is on the teaching of craft skills and the acquisition of a body of doctrinal information without any sustained attempt to be critical of this material, then legal education will powerfully retard the formation of critical thinking and judgement on justice issues. If the policy questions of doctrinal justification and the conscience questions of skill utilization are continually treated as peripheral, students are socialized into uncritically believing that law is some neutral body of principles and rules rather than an instrument for justice or injustice.[37] In short, law students may largely accept the conservative status quo of law, legal institutions and legal practices, because legal education essentially accepts the status quo. To the extent, however, that the curriculum is open to interdisciplinary courses and normative analyses of doctrine in traditional courses, the law school can foster the attitudinal foundation necessary for reformist public leadership and involvement by the profession.

Thirdly, if professional responsibility is centrally concerned with the lawyer-client relationship, the context of legal education as a whole may impact on this by the model provided by the professor-student relationship. As Wasserstrom suggests, ". . . the ways in which life (can be) arranged and lived within law school are important because of what they exemplify and teach about justice and goodness in particular individual and institutional contexts."[38] There have been criticisms made that law professors are generally domineering and disrespectful of

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36. T. Shaffer, *On Being a Christian and a Lawyer, supra,* note 25 at 166.
37. *See* Edward Bloustein, *Social Responsibility, Public Policy and the Law Schools* (1980), 55 N.Y.U.L. Rev. 385; Thomas Schaffer, *Law Faculties as Prophets* (1980), 5 J. of Legal Prof. 45; Jerold Auerbach, *What Has the Teaching of Law To Do with Justice?* (1978), 53 N.Y.U.L. Rev. 457.
38. R. Wasserstrom, *Legal Education and the Good Lawyer* (1984), 34 J. of Legal Ed. 155 at 160.

students as persons and this then reinforces in the students the attitude that when they are professionals they can in turn dominate their clients.[39] As well, the kind of relationship between students that the law school subtly reinforces can model later professional stances. For example, if the law school exclusively fosters competition among students rather than having group projects that value cooperation, a normative message about how professionals should operate is sent out. In addition, the way that the administration of the law school deals with students can be a model of a sensitive, humane, responsive legal institution as opposed to a model of a cold bureaucracy.

Fourthly, there is the basic question of whether the professional responsibility of the law professor and the law student is taken seriously in the context of the law school, or whether there is instead an attitude that professional responsibility only exists *after* law school and *outside* it, rather than *in* it. There have been a few voices calling for a code of professional responsibility for law teachers.[40] While I have doubts about professional codes, surely the idea, as we have seen, is that law teachers by their conduct send messages about professional conduct to students. It may seem a petty point to say that a professor should not be late for class, or should have the marks in on time, or should not cancel classes without good reasons, but out of these seemingly petty matters arise important professional responsibility issues. Probably the greatest number of client complaints made against lawyers involve that of delay, lack of diligence, and failure to communicate with the client. Further, if professional responsibility includes generous non-remunerative involvement in professional and public affairs rather than exclusive devotion to remunerative client service, then it is an important issue whether law professors are being professional when they never show up for any extra-curricular events at the law school like guest lectures or panels or social activities. More importantly, if law professors spend a considerable amount of time away from the law school practicing law for money instead of doing scholarship, administration, or being available to students, it may well be asked what kind of example of professionalism they are modelling for students.

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39. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* (1982), 32 J. Legal Ed. 591; T. Pickard, *Experience as Teacher: The Politics of Law Teaching* (1983), 33 U. of T. L.J. 279.

40. Robert McKay, *Ethical Standards for Law Teachers* (1971), 25 Arkansas L. Rev. 44; Norman Redlich, *Professional Responsibility of Law Teachers* (1980), 29 Cleveland St. L. Rev. 623; Norman Redlich, *Law Schools as Institutional Teachers of Professional Responsibility* (1984), 34 J. of L. Ed. 215; Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions* (1986), 39 Vanderbilt L. Rev. 275.

Law professors in reality are more insulated from accountability than practising lawyers are, even with the weaknesses of the client complaint system and the disciplinary procedures in the legal profession. Academic freedom and tenure are crucial in the academic world but an unfortunate side effect may be that, aside from *gross* violations of duty, formal accountability of professors is very weak. Law schools, thus, must find informal ways to encourage compliance with the professional duties of the legal scholar.

It may also be asked whether students of law should not have greater professional responsibility accountability during the whole course of law school, aside from those occasions in clinical courses where the student is representing a client. Various proposals for student codes of conduct have been made.[41] Such codes may deal with a host of issues, from class attendance to matters of personal integrity while in law school. To hold students accountable to any more than the academic passing of examinations is fraught with difficulty, of course. There is still a problem of whether law schools should be seen as training people for professional work only, or whether law school should also be seen as academic units of the university open to students who may never want to join the profession, but nevertheless want to study law. Do we assume that the study of law is not as yet entry into the profession as such, so that only the ordinary university rules of student conduct and no more can be expected of law students? Perhaps this is formally the case, but there is still an attitude that can be advanced in law school — an attitude that students are expected to contribute to the school and take from the law school experience much more than the piece of paper necessary to go to the next step.

In conclusion, the whole context of legal education transmits values. Given that this context is made up by the actions of a diverse assortment of professors and students within a framework of great autonomy of action, it is very difficult to simply change the "collective spirit" if it needs changing. Perhaps just debating our responsibilities collectively will lead to some new understandings and changed behaviours. However, the best hope for this is to foster a community at law school where people can confront each other within the context of genuine care and commitment to each other. Confrontation without a framework of caring community just leads to rounds of defensive warfare. However, genuine community

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41. Donald Weckstein, *Perspective Courses and Co-Curricular Activities* (1968), 41 U. of Col. L. Rev. 398; John Bradway, *Restraints: A Proposal for a Student Code of Ethics* (1976), 3 Northern Kentucky L. Forum 133; L. Biernat, *Why Not Model Rules of Conduct For Law Students?* (1984), 12 Florida State U.L. Rev. 781; F. Snyder, S. Goza, *Law Student Honor Codes* (1983), 76 Law Library J. 585.

does not fit with the reality of liberal individualism as the dominant ideology of the law school. Thus, it would seem that the course in professional responsibility utilizing the personal moral reasoning in relational context approach will likely face a "hostile" reception for some time to come, and we must accept that the course may be partially crippled by this fact.

2. *Professional Responsibility Taught Formally by a Course of Study in Law School*

We move now to the formal or direct teaching of professional responsibility at law school. Despite my current dissatisfaction with the course, my thesis is that the subject of professional responsibility should be a mandatory part of the curriculum in at least three places. First, there should be a required first-year course which includes in it a substantial component on the legal profession and professional responsibility. Usually this will be a legal process course, but perhaps some other first-year course could contain this material as well. Secondly, there should be a required course on the legal profession and professional responsibility in second or third year. Finally, there should be at least one clinical course available to every student who wishes to take such a course, and professional responsibility should be a *primary* focus of such a course. My thesis is that all three of these components are necessary, and that they should not be considered as alternatives by arguing that one component is better than another. A higher level separate course in professional responsibility will not have enough hours in it to adequately deal with both the broad issues of the legal profession — like governance, mechanisms of delivery of legal services, sociology and history of the profession — and the more particular issues of legal ethics — like confidentiality, conflict of interest, candor, competence, and so forth. Some of this material can usefully be taught in first year and indeed ought to be introduced to the student as early as possible and this then would allow the upper-level course to be built sequentially on the material already covered in first year. A clinical course alone would not be able to cover with substantial depth and coherence the field of professional responsibility, given the other pedagogical goals that such courses inevitably have. However, the course in professional responsibility alone will not provide the realistic relational context provided by the clinical experience. Thus, my opinion is that all three forms must be coordinated and are complementary and necessary.

(a) *The Pervasive Teaching of Professional Responsibility*

Aside from these three components, some mention must be made of the

concept of the pervasive teaching of professional responsibility. The label "pervasive" must be clarified first. I would prefer to label the informal teaching of professional responsibility by the whole context of legal education as the true pervasive approach. However, in the literature this label has been given to the approach of *spreading out* the formal teaching of professional responsibility by making it a part of a number of substantive and procedural courses, in distinction to having a separate *concentrated* course in professional responsibility. The pervasive approach has been well defined by Smedley and Thode as follows:[42]

> . . . professional responsibility matters are to be considered as a natural component of the regular law school courses and that the teaching of professional responsibility is to be undertaken as an integral part of instruction in the substantive and procedural law. Though he did not use the phrase "pervasive method," one of our late colleagues stated the idea in general terms more than a dozen years ago when he observed that "training for professional responsibility and for awareness of the role of law in society is not a matter which can be parcelled out and assigned to a certain member of the faculty at a certain hour, but is the job of all law teachers all of the time."
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> The ultimate objective of the program is to introduce law students to some of the situations they may expect to encounter as practicing attorneys, situations which will raise questions as to their obligations to the public, to the profession, to the courts, and to their colleagues at the bar, as well as to their clients. By raising these issues at points of natural relevance in various law school courses, the teacher helps the student view them in the context of a lawyer's over-all professional functions; and the study of legal ethics and the lawyer's broader public responsibilities thus becomes a constituent of legal education. . . .
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> Though this may well be "a job for all law teachers at all times," even a fully structured pervasive approach program would not be expected to extend to all courses in a law school curriculum or to involve all faculty members. Such a broad effort would overload the teachers, require the diversion of too much teaching time, and worst of all, surfeit the student's mind with professional responsibility matters. Instead, it is necessary to select a number of courses whose subjects lend themselves readily to pervasion and whose professors are favorably disposed toward and skillful in pervasive teaching. This might be only a half-dozen courses, or it might be a dozen or more, depending on the preferences of the individual faculty and on the amount of professional responsibility teaching being done by other methods. The main consideration here is that the pervasion takes place in courses from the beginning to the end of the student's law school career and that all students are reached by the program several times

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42. T.A. Smedley and E.W. Thode, "The Pervasive Approach: Summary and Evaluation Report" in *Education in the Professional Responsibility of the Lawyer, supra,* note 2 at 116-117. (Also found in (1969), 41 U. of COl. L. Rev. 365).

> during their three years in school. A sufficiently effective system might call for the pervasion of two or three required first-year courses, and a couple of required or generally elected courses in the second and third years, plus a half-dozen other elective courses which students take during these latter two years.

The pervasive approach in distinction to the concentrated approach was much discussed at the 1956 national conference, but what has sometimes been overlooked is that the two approaches were not treated as alternatives. As Stone said:[43]

> There was, it is believed, no one at the conference so enthusiastic about the potentiality or desirability of pervasive teaching that he thought that this would render unnecessary the continuing development of courses concentrated on the responsibility aspect.

Naturally, however, some schools, notably Vanderbilt, subsequently adopted the pervasive approach as a better way of teaching professional responsibility than having a separate course.[44]

By dealing with professional responsibility issues as they arise in substantive and procedural courses, the student may better appreciate how such issues are directly relevant to all legal contexts and are an integral part of legal reasoning. The importance of professional responsibility is reinforced by having a substantial number of professors address these issues across a number of courses rather than having one time slot for ethics, like a "Sunday morning church service." Given these advantages, interest in the pervasive approach continued at the next national conference in 1968 where the advantages and disadvantages were discussed,[45] and examples of how professional responsibility could be taught in various courses were offered.[46] The conference passed a resolution encouraging casebook editors to develop more segments on professional responsibility in their materials.[47] By the time the 1977 conference, however, the pervasive approach was hardly mentioned at all.[48]

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43. J. Stone, *supra,* note 1 at 252.
44. T. Smedley, *The Pervasive Approach on a Large Scale — The Vanderbilt Experiment* (1963), 15 J. Legal Ed. 435.
45. *Supra,* note 42.
46. Covington, "Experiences in an Insurance Course," A.L. Levin, "The Lawyer's Professional Responsibility in Trial Advocacy and Civil Procedure," M.H. Freedman, "Teaching Legal Ethics in the Contracts Course," L.B. Snyder, "Professional Responsibility in Federal Tax Practice," in *Education in the Professional Responsibility of the Lawyer, supra,* note 2 at 124, 135, 151 and 163.
47. *Supra,* note 2 at 356.
48. *See supra,* note 3.

The reason for this loss in interest is that the pervasive approach as an *alternative* to the concentrated approach will rarely succeed. It is difficult to direct and structure and mandate such teaching in the context of faculty autonomy and thus unstructured *ad hoc* directives to teach pervasively will usually mean that the topic is pervasively ignored within the inevitable struggle to find time to teach more substantive doctrine. Even if a directive is structured and enforced, instead of integrating professional responsibility into legal education, the pervasive approach ironically may isolate it. Little bits of professional responsibility are tacked on here and there rather than teaching the subject as meriting a course in its own right. The fractured nature of the teaching does not allow for a coherent systemic overview of the field. However, use of the pervasive method may be very helpful if coordinated with a concentrated course of instruction.[49]

Most importantly, however, the pervasive approach will likely be legalistic or role-morality oriented. It is likely, for example, that in a class on Wills and the Administration of Estates, various ethical problems like doubts about testamentary capacity or problems involving conflicts when taking instructions from a married couple, and so forth will be discussed. But it is unlikely that the instructor will broaden the conversation into the fundamental issues of being a lawyer in general.

Professor Cotter's survey of the Canadian scene[50] reveals that while a few schools informally encourage all professors to address professional ethics issues, this is perceived as being unsuccessful in implementation. Apparently only the University of Victoria Law School has formally structured a program.[51] As well as offering a course in the legal profession and teaching professional responsibility in the clinical courses, the law school in Victoria teaches professional responsibility as a segment in both the required Legal Process and the required Criminal Law courses in first year, as a segment of the Civil Procedure course required in the second year, and as part of the Evidence course required in the second or third year. There are a number of other courses that include professional responsibility components as well. The Victoria Law School is one of the most recently established in Canada, and as such has perhaps been in a position to structure the curriculum with more colleagial understanding and commitment. Perhaps this is why it has been successful with the

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49. *See,* Rogers, *An Approach to the Teaching of Professional Responsibility to First-Year Law Students* (1977), 4 Ohio N. U. L. Rev. 800.

50. When mention is made of what Canadian law schools are currently doing on the topic of Professional Responsibility, I am very much indebted to the survey conducted by Professor W. Brent Cotter of Dalhousie Law School, in 1984 *(See Appendix* at the end of article).

51. Letter to Professor W. Brent Cotter, from Dean Lyman R. Robinson, June 21, 1984.

pervasive approach. It will be interesting to see whether the approach can be sustained over the long run, however.

While Victoria appears to be the only school that has anything resembling a real pervasive approach, the teaching of a segment on the legal profession and professional responsibility as a component of the first-year Legal Process course is more widespread in Canada. This could hardly be called "pervasive" since it is only one course, but I deal with it here in the sense that a particular course is "pervaded" with some segment on professional responsibility. The law schools of Saskatchewan, Victoria, Manitoba, Calgary and McGill all have first-year Legal Process courses that include explicitly some segment on the legal profession and professional responsibility.[52] There may be other schools that do the same thing that I am not aware of. The University of Toronto law school has a segment as part of the first year Civil Procedure course.[53] So long as the content and quality of the segment is substantial, I think this approach is very useful for several reasons.

First, I would argue that students should be exposed to a substantial segment of materials and classroom discussion on the legal profession and professional responsibility *in first year*. The critical questions of, "What kind of lawyer do I want to be?"; "Can a good person be a good lawyer?"; and "How do I realize myself through a career in law?" are often asked by students from day one in law school. If they are not asked, they should be. Behind the initial excitement and anxiety-ridden process of learning to "think like a lawyer" and make sense of the mass of doctrinal material in first year, students are faced with the underlying role conflicts about becoming lawyers. What student has not heard from a family member or a friend upon being accepted into law school, some comments like the following: "So how are you going to defend people you know are guilty?" "So you are going to join the liars?" "So you have given up on idealism and are finally going into something where you can make a lot of money." Underlying the self-pride in being accepted into a powerful and elitist professional class, the first-year student is also faced with the reality that the public not only envies but also abhors laywers. The fundamental questions about becoming a lawyer should not be "put off" to second or third year but rather critical reflection on them should be welcomed in first year. Devoting some time to the history of the profession, the various roles of lawyers, alternative modes of legal service delivery, basic lawyer-client relationship models and so forth, will give students perspectives as they think about role-related questions.

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52. See Cotter Survey, *supra,* note 50.
53. *Id.*

Secondly, legal education too often lacks any meaningful sequential learning experience. Second and third year can be largely "doing the same thing as first year by just taking more casebook courses." Not only should there be new skills developed from year to year, but also what has been covered before should be reinforced and built upon year by year so that there is a vertical progressive mode, as it were, rather than merely a horizontal passing of three years of discreet courses.

Thirdly, the upper level course in the legal profession is invariably only a two or three-weight one-term course[54] that cannot hope to do justice to the topic. Courses will either focus more broadly on the responsibility of the profession as a whole *vis* delivery of legal services, self-regulation and accountability to the public, law reform, and so forth; or the course will concentrate more on lawyers' ethical dilemmas — conflict of interest, confidentiality, withdrawal, *etc.*[55] In my experience, it has been impossible to cover the field in even a superficial degree within the time constraints. Thus, coordinating a first-year component with a higher-level component seems a more sensible solution to coverage than spreading the subject all over the map.

(b) *A Course in Professional Responsibility*

i. *Manditory?*

While Dean Bowker of Alberta recommended a specific course on professional responsibility back in the 1950's,[56] the modern trend in this direction was pioneered by Professor Harry Arthurs at Osgoode Hall where 20 years ago he began to offer an optional seminal called "The Legal Profession" to second and third-year students. He also wrote an article on why the legal profession should be a field of study in the law school.[57] Since that time, as Professor Cotter's survey shows,[58] most law schools have introduced a course on the legal profession, or on professional responsibility, or as we call it in Manitoba, "The Legal Profession and Professional Responsibility." It appears on the surface level that such a course has gained a firm foothold in Canadian legal education with almost all schools offering it.[59] However, as we move to a consideration of course materials and methods, this foothold is in my

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54. *Id.*, Q. 6.
55. *Id.*
56. W.F. Bowker, *Legal Ethics* (1956), 1 Alta. L. Rev. 71.
57. H.W. Arthurs, *The Study of the Legal Profession in the Law School* (1970), 8 Osg. H. L.J. 183.
58. Cotter, *supra,* note 50, Q. 1.
59. *Id.*

opinion still quite tenuous. In addition, the overall number of students exposed to the course is still quite small, as most schools have one section of the course with approximately 20-25 students enrolled.[60] While overall enrollment varies from school to school, I would estimate that less than 20 per cent of the total Canadian law school population actually enrolls in a course in professional responsibility. Thus the question I pose is not just whether there ought to be such a course in the curriculum, but whether it should be mandatory rather than elective.

That there should be at least an elective course has been answered in the affirmative by the vast majority of Canadian schools. The "academic" study of law, even for a person who has no intention of becoming a lawyer, must include the study of institutions and actors in the legal system. The study of the behaviour of lawyers as actors in the legal system is as important, if not more so, than the study of any body of doctrinal law or the study of judicial actors. One does not have to go to the more usual "practical" arguments about the value of such a course in the training of lawyers to justify the offering, though I believe such practical arguments are legitimate.

Whether the course should be offered or even made mandatory ultimately depends on our view of what the course is about and what the course contributes to legal education and how important that contribution is. A number of arguments for the value of the course arise out of the value of each of the three "content" models of professional responsibility dealt with earlier — that law students should systematically and critically study the *role* of lawyers in society; the *law* applicable to lawyers; and the *moral* considerations of professional practice. Since legal education is not value-neutral and some professional responsibility issues will inevitably be dealt with covertly and often badly, is all the more reason to address such issues explicitly and critically in a formal course of study. That the course has some impact on the future lives of students is a controversial issue that I leave to the last section of this paper.

While arguments for offering the course are not hard to come by, arguments for mandating the course are understandably more controversial. In the wake of Watergate, the American Bar Association in 1974 enacted an accreditation rule that required law schools to teach professional ethics. The *A.B.A. Standards for the Approval of Law Schools* now requires under Standard 302(a)(iii) that the law schools, "offer and provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any

60. *Id.*, Q. 4b, 4c.

pedagogical method as long as the history, goals, structure, and responsibility of the legal profession and its members, including the A.B.A. *Code*, are all covered."[61] Thus, most American law schools now require every student to take a course on professional responsibility as the method to fulfill this requirement. In a 1977 survey of 156 law schools, 137 (85%) mandated a course, while almost all the others had elective offerings of the course.[62] Compare this to the Canadian situation. Only Manitoba and Alberta require the course. However, 60 per cent of the respondents to the Cotter survey thought that the course should be mandatory in Canada.[63] I suppose, however, that if you surveyed teachers in any currently elective course, a good number would recommend that *their* course should be compulsory. We may tend to believe in the importance of the courses we teach more than the importance of the courses others teach. Still, how could I argue for mandating a course that I feel so dissatisifed with?

I suspect that the leaders of the profession might argue that the course should be mandatory out of an expectation that the course will help socialize students into acceptance of conventional ethical positions, thereby reducing to a degree the problems of professional discipline that might otherwise occur without such exposure. But the ultimate effect on the numbers of client complaints and disciplinary costs when we move to a compulsory ethics course in law school is uncertain and probably marginal at best. The reason for mandating the course is not to help *enforce* the profession's ideology, but to broadly *educate* students in a crucial area of legal affairs.

My tentative support for mandating this course arises partly out of a larger curriculum debate about mandatory versus elective approaches generally. The debate has been between the "choice" camp and the "core" camp. Choice has some obvious advantages. Specialization in law is a reality and students should be free to explore the subjects they feel might interest them. Choice may correlate with better learning in the sense that we are often more motivated when we study what we want to, rather than when we study what we have to. Choice avoids a degree of paternalism and domination of faculty over students. Choice avoids to a degree the ideological misrepresentation that may arise from labelling some courses "core" and others not. Choice asserts that it is impossible to rationally argue for what should be in the core and what should not.

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61. *See* M.J. Kelly, *Legal Ethics and Legal Education,* (The Hastings Centre, 1980), note 5 at 55-56.

62. Stuart C. Goldberg, "1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools" in *Teaching Professional Responsibility, supra,* note 3 at 21.

63. Cotter survey, *supra,* note 50, Q. 4(a), and Q. 18.

In Manitoba, the debate has been shifted somewhat by redefining the issue as one of "open choice" versus "balanced choice," rather than only as "choice" versus "core." Choice may still be preserved within a grouping of courses — perspective, clinical, and doctrinal, for example, but you may still require students to choose a number of courses from each grouping so as to achieve a more balanced educational objective.

The eclectic curriculum of mostly free student choice in course selection after the first year was originally viewed as a way of broadening legal education and opening up the development of more interdisciplinary perspective courses and clinical offerings. In this regard, we did a study in Manitoba of the students' selection of second and third-year courses in the graduating classes of 1981 and 1982.[64] All courses were roughly divided into three camps: doctrinal, perspective and clinical. The results of the study indicated that almost a third of the students never elected to take *any* perspective courses in second or third year and another third of the students took only *one* during their last two years of law school. This means that in our elective system the vast majority of students never take Jurisprudence, Legal History, Comparative Law, Law and Economics, Legal Profession, or other "perspective" courses, but rather take almost exclusively doctrinal courses and one or more clinical courses that are perceived as being more "practical." Thus, legal education is overwhelmingly unbalanced. Rather than broadening out to study the more fundamental nature of law in society, legal education becomes focused on a narrow view of what is vocationally relevant. Thus the eclectic curriculum backfires.

Free choice may be "free" only superficially. Some students tell me that they would have liked to take Comparative Law "or whatever," but took Estate Planning "or whatever" instead, for fear of being disadvantaged in getting an articling position. The eclectic curriculum just translates into informal conformity with misperceptions of professional relevance.

In Manitoba the balance camp has temporarily won the victory. Our new curriculum, implemented in 1986, will mandate more balance by having students take a mixture of doctrinal, clinical, and perspective courses in every year of law school. Choice of courses may still exist *within* the categories, but a certain balance of courses is mandated. Thus a middle ground can be found between the choice camp and the core camp by looking to balance. However, we admittedly did add to the "core" by mandating certain courses such as "Interviewing, Counselling

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64. Philip Osborne, "A Study of Student Selection of Second and Third Year Courses: The Graduates of 1981 and 1982," June 1983, on file with the author.

and Negotiation," in second year and, since 1983, "The Legal Profession and Professional Responsibility" in the third year and several doctrinal courses in second year.[65] In Manitoba, then, the degree of choice has been constrained and a movement back to core and balance has taken place. Five years ago this would not have been possible, but the "choice" camp has lost ground, which I believe is a general ideological trend not confined to Manitoba. It is within this general trend to a coherent curriculum rather than to an eclectic one that I support a *mandatory* course in the Legal Profession in second or third year.

While I support mandating the course, ironically my own experience with the movement from elective to mandatory has not been very satisfactory, largely due to class size. In making the course compulsory, Alberta has been able to offer six sections of the course with a maximum of 25 students per section. In Manitoba, however, we only have two sections of the course with around 45 students per section. We admit only about 90 students per year and obviously in the larger enrollment schools the movement to a compulsory course would require much more substantial resource allocations than in Manitoba. In Manitoba a class of 45 is considered very large, while in some schools this would be considered a "small group." Despite the relativity of the matter, however, when the course was elective in Manitoba a small group of students ranging from approximately 10-25 in any given year would enroll. This small size enhanced discussion and except for one "off year," I felt quite satisfied with the dynamics of the class and I interpreted the student feedback as largely positive as well. With compulsion the class size increased to 45, requiring a change in format from seminar to a lecture-problem-discussion mix that has not as yet worked very well, in my opinion. But the student and instructor satisfaction rate is down. Other factors may be at work, of course. As well as instructor "burnout," there may be a considerable difference between the motivations and expectations of students who are concerned about ethics and are asking themselves the questions about how to make lawyering an expression of their deepest commitments and thus *choose* to take the course, versus some who will now take the course simply because they have to. However, this cost of compulsion must be weighed with the benefits of having all students exposed to the course rather than only 20-25 percent of them. While I support mandating the course, given the need for participation and engagement, compulsion should not be purchased at

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65. Curriculum Review Committee, Faculty of Law, University of Manitoba, *Report on a New Curriculum,* June 1983. The first year of the new curriculum came into effect in 1986-87.

the price of pedagogical ineffectiveness in terms of class size. It may not be worth it.

ii. *Materials?*

Despite the proliferation of courses on professional responsibility and the legal profession in Canada, there is still no formally published textbook or materials book for the course and Canadian scholarship in the field is almost non-existent.[66] We thus have a long way to go before the course is placed on a solid base of scholarship. It is partly the lack of critical Canadian scholarship that is to blame for the narrow approach taken to the teaching of the subject.

Particularly after the course was made mandatory for accreditation, scholarship in the field exploded in the United States. There are at least 17 formally published course/casebooks available for the course in the United States,[67] and scholarly articles and books on the legal profession and ethics are pouring off the presses.[68] There is thus a dynamic normative and empirical scholarly debate going on in the field. Because of Canada's much smaller pool of scholars and publishing market, we cannot expect the same volume of scholarship, but we should still expect a lot more than currently exists. A great deal of the American material can of course be utilized in our courses, but we need to critically study our own patterns of legal services, our own governance and disciplinary systems, our own conventional ethical practices and our own ideological assumptions. Why is this not happening and what should be done about it?

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66. Mention should be made, however, of R. Evans and M. Trebilcock, *Lawyers and the Consumer-Interest,* (Butterworths, 1982), and the now dated book by Orkin, *Legal Ethics* (1957). There are also a few Canadian materials on specific issues. For a review of the Canadian scholarship, see Arthurs, Weisman, and Zemans, *The Canadian Legal Profession,* [1986] A.B.F. Res. J. 447.

67. Aronson, Devine, and Fisch, *Professional Responsibility,* 1985; Bellow and Moulton, *Ethics and Professional Responsibility,* 1981; Countryman, Finman, and Schneyer, *The Lawyer in Modern Society,* 1976; Dvorkin, Himmelstein and Lesnick, *Becoming A Lawyer,* 1981; Hazard and Rhode, *The Legal Profession,* 1985; Kaufman, *Problems in Professional Responsibility,* 2nd ed, 1984; Mathews, *Problems Illustrative of the Responsibility of Members of the Legal Profession,* 1976; Mellinkoff, *Lawyers and the System of Justice, Cases and Notes on the Profession of Law*, 1976; Morgan and Rotunda, *Professional Responsibility, Problems and Materials,* 3rd ed., 1984; L. Ray Patterson, *Legal Ethics: The Law of Professional Responsibility,* 2nd. ed., 1984; Pirsig and Kirwin, *Professional Responsibility, Cases and Materials,* 4th ed., 1984; Redlich, *Problems in Professional Responsibility,* 2nd ed., 1983; Schwartz and Wydick, *Problems in Legal Ethics,* 1983; Murray L. Schwartz, *Lawyers and The Legal Profession,* 2nd ed., 1985; Thurman, Phillips, and Cheatham, *Cases on the Legal Profession,* 1970; Gillers and Dorsen, *Regulation of Lawyers,* 1985; Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics,* 1985.

68. *See supra,* note 25.

I would suspect from the lack of scholarly attention to the field that most teachers of professional responsibility do not treat it as their primary scholarly interest. They toil in a different field. Yet without scholarly commitment to the field of professional ethics we will not move out of the narrow role morality and legalistic approaches to the subject.

One step that should be taken is the formation of a new section of the Canadian Association of Law Teachers. C.A.L.T. holds a conference yearly in which scholars in various subsections deliver papers and informally get to know one another and discuss the field. The fact that the vast majority of law schools offer a course in professional responsibility and some may have several professors involved, suggests that a C.A.L.T. subsection is overdue.[69] If teachers in the field would get together, perhaps some new scholarly efforts would be stimulated and even larger co-operative works undertaken. In addition, the field would be given higher visibility and legitimacy in Canadian legal education and scholarship.

Another step worth pursuing is a separate national conference on the teaching of the legal profession and professional responsibility in Canada. A well planned conference would not only stimulate scholarly papers but would bring together law professors, Bar Admission teachers, professional ethicists and lawyers interested in the field. This too is long overdue in Canada

Another step would be the establishment of a Canadian legal profession research institute. This idea came to me during my term for four years as a Bencher of the Law Society of Manitoba. It struck me then that despite the good intentions and sacrificial giving of time by the Benchers in governing the profession, the policy decisions involving critical questions like advertising, specialization, fees, legal aid, reimbursement policy, competency problems and professional disciplinary problems and the like, were being made on an *ad hoc* superficial, impressionistic basis with very little reference to any systematic and coherent study of the problems. The governance of the profession deserves more attention than that. In my view, we need a well funded research institute, perhaps affiliated with a university, undertaking a wide range of interdisciplinary research on the role of lawyers in society, the quality and accessibility of legal services, the governance and ethics of the profession, and so forth. Given that the legal profession plays a pervasive role in society, touching on almost all aspects of human

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69. This has now been accomplished. The first meeting took place at the C.A.L.T. conference in Winnipeg, May 1986, and the second took place in Hamilton, May 1987.

relations in some way or other, research into the ideology, structure, and workings of the profession is needed and is in the public interest. I would hope that such an institute, operating with both a full-time staff of researchers and support from legal scholars in law schools and in the profession, would stimulate research and writing. An institute could sponsor conferences on issues facing the profession, circulate studies to the law societies and government departments who have the power to affect change, build a resource library on studies in the field from other countries, publish a special journal on the legal profession, and support pilot projects, much as the American Bar Foundation does.

If these steps were taken alongside the mandating of the course in law school, then some hope for the scholarly development of the field is possible.

iii. *Qualifications?*

Who is qualified to teach the course? This question deeply troubles me because I do not currently practice law, but rather devote my time to bearing a legal academic, a role that I ordinarily think is a very important one in the legal system. But in the teaching of professional responsibility I do feel defensive about my status and the lack of credibility that it gives me with students. There must be advantages to having a teacher with substantial experience in practice, because the subject involves having much more perspective than can be gained from published codes, cases and commentaries found in the library. I deal with this partly by having several panels of practicing lawyers come to the class and debate a series of problems that I have set on various topics. I also deal with it partly on the belief that the course in the legal profession does not stand alone, but should feed into the teaching of professional responsibility in the clinical setting. Still I am troubled. There are some arguments to be made in my favour, perhaps. The main one is that the perspective of a relative *outsider* is important, after all. To step outside the role of lawyer may lead one to see with more clarity some of the ethical difficulties that those inside the role may be blind to. In addition, being an outsider may allow for an easier identification with the interests of clients and third parties and the general public affected by the behaviour of lawyers. But I am still troubled, so I turn to the idea that we are really dealing with applied ethics and thus ethical theory and moral reasoning become central. However, this only compounds the trouble because, while I am a legal academic, I may not be academic *enough,* in the sense that I am not formally trained as an ethicist in either philosophy or theology. I thus fit nicely in the classic problem of law professors being "divided against

themselves,"[70] being neither sufficiently practice-oriented not sufficiently scholarly.

The Hastings Centre Report on the *Teaching of Ethics and Higher Education* states:[71]

> Ideally, undergraduate programs should have introduced students to ethics so that courses at the professional school level would have a base upon which to build. As a practical matter that is too rarely the case. Hence, courses at the professional school level will ordinarily have to do double duty: provide students with the elements of ethical theory while, at the same time, exposing them to the kinds of moral problems they will encounter as professionals.

Daniel Callahan, the Director of the Hastings Centre, has squarely raised the qualifications issue:[72]

> Whatever the shortcomings of, say, a training in philosophical, or theological ethics, that training may be expected to provide some well-established criteria for the assessing and justifying of moral arguments, and some body of developed theory to provide a grounding for applied ethics; there are disciplinary standards of rigor and quality. Enthusiasm, good will, and interest are not sufficient qualifications for teaching courses in organic chemistry, microeconomics or Greek literature. There is no reason why they should be thought sufficient for the teaching of ethics, a difficult subject with a long history.
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> . . . .
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> What, then, would count as adequate qualification? I want to reject at the very outset that form of disciplinary chauvinism which contends that *only* those with advanced degrees in moral philosophy or moral theology are properly qualified. That is correct in only one respect; they, and only they, are properly qualified to teach courses that fall entirely within their own disciplines. But the matter is very different for the teaching of applied and professional ethics. It is at that point that the field becomes, of necessity, inter-disciplinary, requiring knowledge both of ethics and of the other field or fields to be analyzed from an ethical perspective. It is ethics and law, ethics and biology, ethics and journalism, and so on. A person trained exclusively in ethics will not be fully qualified to teach such courses; other knowledge will have to be acquired. Yet, by the same token, someone trained in a discipline other than ethics can become qualified to teach ethics, if, in addition to training in his or her own field, he or she acquires the necessary ethical training . . .

Callahan then outlines the concept of becoming a "competent amateur"

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70. *See* Bergen, *Law Teacher; A Man Divided Against Himself* (1968), 54 Virginia L. Rev. 637.

71. Hastings Centre Report, *The Teaching of Ethics in Higher Education* (1980) at 33.

72. Daniel Callahan, "Qualifications for the Teaching of Ethics" in Callahan and Bok, eds., *Ethics Teaching in Higher Education* (1980) at 76-77.

in another discipline. Even if law professors who teach ethics do not formally achieve a degree in moral philosophy they should spend at least a year of formal education in that field, suggests Callahan. The alternative is team-teaching the course on professional ethics. But finding the resources to join the law professor and the moral philosopher together in a course is difficult, and finding two people from different fields who really work as a team is difficult.

The reality is that we need to infuse the field of legal ethics with moral theory and reasoning and get away from arid legalism, yet most law professors teaching the course are not formally trained in ethics, even as "competent amateurs." I am certainly not, and law schools are not particularly into promoting release time for re-training in different disciplines. So the qualifications problem is compounded on two sides — I do not have substantial experience in practice nor do I have formal training in ethics.

While I am tempted at this stage to simply pull out, until someone comes along with adequate qualifications, something must be done. There is a growing body of literature on applied ethics by moral philosophers than can be utilized[73] and perhaps self-awareness about the knowledge one lacks may prevent a degree of dogmatism in the classroom. Still, I'm very troubled.

In the end I take some comfort in the fact that the moral reasoning approach in relational context should not be seen as exclusively drawing on moral philosophy as a scholarly discipline for the intellectual framework of the course, though I believe it is important to do so to a degree. There are many other scholarly disciplines to draw on that foundationally deal with personhood, community and values. After all, the focus of the approach is on the moral point of view we take as persons. Even if we are trained moral philosophers, we may have interests in theology, history, literature, sociology, or whatever. Most importantly, we also have our own lives to draw on.[74]

iv. *Methodology?*

How you teach something depends on what you are trying to teach. Aside from the different approaches to the subject, there is an even more basic preliminary issue of defining the overall field of inquiry. One of my frustrations has been how much time to spend on the legal profession generally, and how much time to spend on more specific professional

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73. *See supra,* note 25.

74. This point is well made by Elkins in the review essay, *The Reconstruction of Legal Ethics as Ethics* (1986), 36 J. of Legal Ed. 274.

ethics issues. The law school at Queen's offers two courses, one on the "legal profession" and one on "legal ethics and professional responsibility."[75] Perhaps to do any kind of justice to both sides of the subject matter, the Queen's approach of having two courses makes sense. However, in other schools with only one course, the emphasis, perhaps illustrated by the title,[76] will vary. Methods of teaching will vary between and within the courses as you shift from one area to another. Some material is more descriptive and can be approached by lecture/ discussion. Some material is primarily normative and thus more serious methodological problems arise. I personally find it easier to teach the issues involving the legal profession generally, such as cost, equality, and quality of legal services, for example, because various approaches, including the sociological, provide a solid intellectual framework for the discussion.

If we move away from a concentration on the role morality and lawyer's law approaches and attempt to actualize the moral reasoning in relational context approach, how do we do so? In addition to the problem of lack of support from the law school environment, relative lack of scholarly materials, and a perceived lack of qualifications, there is also the problem of methodology.

Obviously, if a lawyer's law approach is primarily adopted for the content of the course, then the teaching method will likely conform to traditional approaches in doctrinal courses. Some combination of lectures, discussions and socratic interchange based on the readings of codes and cases will likely be the methodology. However, if a "personal moral reasoning" approach is taken, more appropriate methods to fit that content are required.

Can we utilize the case method in teaching moral reasoning? One of the difficulties with a concentration on published cases is the "worst case" syndrome. To illustrate issues of professional responsibility by reading cases where lawyers have been disciplined or sued may give the impression that we are concerned about the bottom line of staying out of disciplinary trouble. But most of the genuine moral dilemmas of the profession are not illustrated in "worst cases" where often the behaviour of the lawyers involved was obviously unethical. We need problems and illustrations involving the need to make decisions about what the "best", or the "better" thing to do is.

Many American casebooks are built on the problem method rather than the case method.[77] Each chapter has a number of hypothetical

75. Cotter survey, *supra,* note 50.
76. *Id.,* Q. 2.
77. *Supra,* note 67.

problems to be discussed in class and then there are court cases or articles or other illustrative materials that relate to the topic of the chapter. The problems then may be used as the "situations" for the application of moral reasoning by the teacher and students. As we shall note in the next subsection, the teaching of professional responsibility in the clinical setting is perceived as far superior to other methods because the students are actively engaged in real situations, while the problem method in a course in professional responsibility involves only hypotheticals. Hypotheticals obviously have limitations as students can easily become disengaged from them or fail to be honest in their responses. However, the weakness in my view of the problem method is not so much the inherent limitation of hypotheticals as much as the general failure to give students some intellectual resources aside from their own intuition and common sense with which to approach problems in the first place.

I have always attempted to use the problem method in some of the course by going over a collection of problems on a topic in class and then later having a panel of lawyers going over the same problems in a later class. The students are in a much better position to be either affirmative or critical of the lawyers' responses during the panel discussion if they have first tackled and discussed the problems themselves. This "double examination" approach has been a very successful way to utilize practitioners in the course without sliding into conventional war stories. However, the lack of any coherent approach to the analysis of ethical problems has been very apparent in my class. Student A says X, student B says Y, and student C says Z, and the instructor prods a little for more clarification of the difficulties. How various interests may be affected by the consequences of deciding one way rather than another may be clarified, but without some more general ethical theory, the weight to be given to the interests is simply left to personal opinion. To move away from pure consequentialism and argue *prima facie* moral duties is an even more tenuous enterprise. Thus, the problem method without more does not lead to a deeper understanding and appreciation of moral reasoning. We need to examine different theories of professional ethical decision-making that provide frameworks in which problems can be dissected and discussed.

The most promising development in the methodology of teaching the professional responsibility course as a course in personal *ethics* is Thomas Shaffer's use of lawyer stories, which he organizes around four different moral points of view or paradigms of professional ethics.[78] In addition to

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78. T. Shaffer, *American Legal Ethics: Test, Readings, and Discussion,* (Matthew Bender, 1985).

the many stories in his coursebook, Shaffer's students also read four novels that have lawyer protagonists and view some films involving lawyers.[79] Even if Shaffer's book does not easily transport into the Canadian setting, I think the approach is extremely promising as a vehicle that drives the students into the depths of their own vision of what they are and want to be as persons and lawyers. As I try to cover more topics and include more of the ever expanding law of lawyering in my course. I find that I move away from the fundamental overall quest of how to become a good person and a lawyer in a legal system that may be bordering on the demonic. Should I at least tell students my own story? Should they reveal their stories? Perhaps something *real* would happen in such a conversation, something that weighs more than all the codes and cases we could study. But why am I so afraid to "get personal" with my students?[80]

The topic of methodology cannot be discussed, however, without raising the problem of indoctrination. I view the ideal goal of a teacher in a professional responsibility course to be that of helping students to *understand* the multiple value questions arising in professional practice, to *understand* the different ethical approaches to problems, and to *understand* more profoundly the meaning of their own personal life in the law. I would hope that this process would make a difference to the decisions and actions ultimately made by the students, but my task is not to *change* behaviour *per se*. Our task is not to *indoctrinate* our own or the conventional values but rather to *educate*.[81] While instructor bias to some degree is inevitable and we should be open about what we personally believe, we should not use the classroom to attempt to socialize a person into conformity with particular practices. Professor May states:[82]

> I propose that the essential task of the applied ethics teacher is what might be called "corrective vision" . . . it implies that ethics in the classroom has as its primary and direct intention not the bending of the will, the stirring of the feelings, or the manipulation of behaviour, but the *illumination of the understanding*. It is directed to insight and vision.

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79. *See* Shaffer, *Teacher's Guide,* (Matthew Bender, 1985).

80. It may be that my fear stems from the perception that my own story is so radically different. I grew up in a Mennonite "colony" where the norms of nonresistance and lifestyle separation from the world dictated the view that you could *not* be a Christian and a lawyer. I have moved away from this position, but my world view is still solidly wrapped up in Anabaptist Christian faith, and my primary interest is how Biblical and theological study illuminates law and legal practice.

81. *See* R. Macklin, "Problem in the Teaching of Ethics: Pluralism and Indoctrination" in *Ethics Teaching in Higher Education, supra,* note 72 at 81.

82. W. May, *"Professional Ethics: Setting, Terrain and Teacher" in Ethics Teaching in Higher Education, supra,* note 72 at 240.

In 1940, Brainard Currie wrote a marvelous paper on what the legal profession course should be about. Unfortunately, the paper was never published until someone found it and anonymously sent it to a journal in 1969. Back in 1940, Currie expressed the educational goals of the course in a way that I believe has rarely been improved on:[83]

> It is, pre-eminently and above all else in this field, the duty of a university law school to help its students to understand the significance of the lifework they have undertaken; to see the ultimate purpose of a lawyer's work; to discuss with him the function of law administration in society, and the part in the administration of law which is played by the legal profession, and the part which will be his as a member of the profession. It is the duty of the law school to help him to adjust himself to his new role, to find satisfaction in it, to orient himself, to see its challenge and its limitations, to discover the ways in which, through it, he can find the means of developing and expressing his own talents and his own personality. This is education. This is not police work, conditioning men against prohibited conduct; it is not training for yeoman service in patrolling the preserves in the traditional manner of the guild. So far as personal conduct is concerned it will raise men above rules, and induce them to form precepts of their own, sanctioned only by their own integrity. So far as the labors of the bar associations are concerned it will, let it be admitted frankly, lead men to despise some of the existing policies as self-serving pseudo-moralities which do not advance the administration of justice and the public interest.
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> Such a plan involves the study of the legal profession, but *from the outside,* and with the emphasis on the individual. The lawyer and his work, the organized bar and its problems, should be regarded as if by a sociologist or an anthropolgist, and always in relation to the ultimate function of law. The consideration should be sympathetic, of course, but entirely devoid of the complacent narcissism which too often accompanies the bar's self-appraisals. The ultimate hope would be to lead the student to a devotion to the higher principles of his calling, to an enthusiasm for its opportunities, and to a faith in the worth-whileness of devoting his life to its pursuit; to inspire him with a desire, not simply to be an ethical lawyer, but to pour out all his energies and talents in living the kind of life he wants to live, and living it through the law.
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> I am convinced, however, that *faith* — the kind that sticks, and consists of more than naive acceptance of the beliefs of others — *comes through doubt.* No amount of eulogistic oratory, glossing over the imperfections of law and the ambiguity of the lawyer's position in certain situations, will do more than temporarily suppress the lurking doubt in the student's mind as to the possibility of fully reconciling law and living. I know of only one way to remove it: it must be brought to the surface, recognized, aired, analyzed, and its causes traced; and then the facts relating to these causes

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83. Brainerd Currie, *Reflections on the Course on the Legal Profession* (1969), 22 J. of Legal Ed. 48 at 55-56.

> must be carefully and honestly examined so that the cdifficulty can be explained away if possible, or at least isolated and identified. If the legal profession is really worth the lives these students propose to devote to it, it will be able to withstand such an examination. No man should ask that the pattern of his life should be perfect. It should be enough if he can see in its plan the imperfections which he wants to avoid and the points at which he will want to fight for improvement.

v. *Evaluation?*

Only one course in this field in Canada is currently marked by pass/fail, while the others are graded, often by some combination of final examination, term paper and classroom participation.[84] The need to grade is sometimes seen as less a matter of evaluation than a matter of motivation. Without grading, students may treat the course less seriously than they do other courses. But evaluation does pose some problems that are heightened in this course. What is the message to potential employers if a student receives a "C" in the ethics course or even a failure as compared to a student who receives an "A" or a "B+"? The problem is that personal integrity is not being directly evaluated at all (if that were possible). A "C" student may have written a lousy paper while the "A" student wrote a very good one. The "A" student may, however, be a person whom I would not personally trust as a lawyer while I may have a great deal of confidence in the integrity of the "C" student. Thus, I find evaluation painful for fear that the mark will be utilized by others in a wrongful way. The pass/fail distinction avoids some of the degrees of this problem but still poses the difficulty of ever failing anyone.

The problem of what we are evaluating arises as well. In papers and examinations we must obviously be careful not to reward those who we agree with and penalize those who we do not agree with. I generally look for how well the student has identified the issues and how well the student has analyzed and evaluated the competing approaches utilizing both conventional sources of professional ethical norms and also moral reasoning generally. In this sense, I do not think that evaluation is really more difficult than in other courses. What is important is that evaluation should be understood for what it is and not be blown into something it is not. A person may have a high degree of moral knowledge and reasoning skill, but I do not believe that this necessarily translates into moral action. To know the right is not necessarily to do it.

(c) *Teaching Professional Responsibility in the Clinical Courses*

It is now orthodox to view clinical education as the *best* method of

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84. Cotter Survey, *supra*, note 50, Q. 7 and 8.

teaching professional responsibility.[85] While I believe that clinical legal education is an essential aspect of the law school curriculum, I take the unorthodox position that clinical education should not be seen as obviously superior to a separate course on the legal profession and professional responsibility, but rather that the clinical and course experience should be coordinated and coequal. The reason for this position is that despite the potential advantages of the clinical setting, there are also problems that reduce the likelihood that professional responsibility will be adequately taught in such a setting *alone*. To make my limited point about affirming the value of the separate course in coordination with a clinical course, I wish to only briefly summarize both the promise and the problems of the clinical setting in teaching professional responsibility. The summary nature of these comments should not be taken to imply that the clinical setting is less important than a separate course, but rather that I simply do not have the experience to give a more expansive treatment to this topic here.

Compared to reasoning with abstract hypotheticals, engaging in actual lawyering experience under supervision and critical reflection is indeed potentially a very effective setting for teaching professional responsibility. The value questions arising from the inter-personal relationships involved in lawyering; the value questions arising out of the techniques of the lawyering process; and the value questions arising out of experiencing certain legal institutions and processes firsthand; all become *real* to the student. Motivational difficulties are largely absent as the student must take personal responsibility and be accountable for decisions made. Moral tensions of the lawyering role are thus *experienced* directly by the student, and experience in a way that engages the whole person, both emotionally and intellectually. Moral reasoning and discussion can take place within the context of facing all the real constraints and situational

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85. *See,* H.R. Sacks, *Student Fieldwork as a Technique in Educating Law Students in Professional Responsibility* (1968), 20 J Legal Ed. 291; H.R. Sacks, *Remarks on Involvement and Clinical Training* (1968), 41 U. of Col. L. Rev. 452; L. Brickman, *Contributions of Clinical Programs to Training for Professionalism* (1971-72), 4 Conn. L. Rev. 437; R.E. Bird, *The Clinical Defence Seminar: A Methodology for Teaching Legal Process and Professional Responsibility* (1974), 14 Santa Clara Lawyer 246; W. Pincus, *One Man's Perspective on Ethics and the Legal Profession* (1974-75), 12 San Diego L. Rev. 279; B. Cooke and J. Taylor, *Developing Personal Awareness and Examining Values: Interconnected Dimensions of Supervision in Clinical Legal Education* (1978), 12 U.B.C.L. Rev. 276; N. Gold, *Legal Education, Law and Justice: The Clinical Experience* (1979-80), 44 Sask. L. Rev. 97; M. Meltsner and P. Schrag, *Report From a CLEPR Colony* (1976), 76 Columb. L. Rev. 581; G.M. Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systemic* (1981), 52 U. of Colorado L. Rev. 409; S.H. Leleiko, *Love, Professional Responsibility and Clinical Legal Education* (1980), 29 Cleve. St. L. Rev. 641; M. Jewell, *Teaching Law Ethically: Is It Possible?* (1984), 8 Dalhousie L. Jour. 474.

factors that most hypothetical problems cannot ever duplicate in richness and ambiguity of detail.

In addition, one dominant theory of how we learn to be virtuous involves the primacy of action and experience over pure intellectual knowledge.[86] Perhaps we know what is good by first doing and experiencing good acts. Intellectual knowledge of what is good behaviour and why, most often comes after the more unreflective and habitual doing of good deeds, often by following the behaviour models of other influential persons — parents or peers. Thus the development of moral dispositions and character involves experiential learning, not just abstract reasoning with hypothetical cases. Clinical legal education involves both experiential learning in the context of the role model provided by the lawyer/professors, and also the reflective critical examination of that experience. Thus, the clinical experience appears to be the ideal setting for critical reflection on the moral and emotional tension between role morality and ordinary morality. Students for the first time are actually experiencing the role adjustments of lawyering. Because much of the focus of the course is on interpersonal skills (interviewing, counselling and negotiation), the teaching of professional responsibility is less likely to follow a narrow "lawyer's law" approach and more likely to examine personal moral identity in the interactive context of lawyering.

Having said all this, however, the clinical setting as such is only a stage on which the activity of teaching professional responsibility must be played out. That the setting has tremendous potential in this regard for the players does not guarantee that they will perform in this area.[87] The play may well take many different forms because clinical education has several goals. The primary focus of clinical course will likely be on the teaching of certain lawyering skills that traditional legal education has ignored. This in itself is very important, and indeed, given that competence is a matter of ethics, the clinical component of the curriculum in this sense already advances professional responsibility. Any clinical program that is worthy of inclusion in the curriculum will give attention to the supervision and analysis of student activity so that methods of self-criticism and reflection on performance will develop and continue in professional life. It is because lawyering skills can be learned

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86. *See* Thomas Lickona, "What Does Moral Psychology Have to Say to the Teacher of Ethics?" in *Ethics Teaching in Higher Education, supra,* note 72 at 103; David Luban, *Epistemology and Moral Education* (1983), 33 J. of Legal Ed. 636.

87. *See* K. Hegland, *Moral Dilemmas in Teaching Trial Advocacy* (1982), 32 J. of Legal Ed. 69; Robert Condlin, "The Moral Failure of Clinical Legal Education" in *The Good Lawyer, supra,* note 25 at 317; Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy* (1987), 37 J. Leg. Ed. 123.

in the context of being exposed to a growing analytic and psychological literature on the dynamics of the skills, of having critical feedback on performance, and on having the time to coherently reflect on performance, that makes clinical education a legitimate alternative to simply dumping students into apprenticeship after law school. The potential problem, however, for the teaching of professional responsibility in this setting is that the focus on skills does not inherently translate into a *critical* focus on values. The focus on skills may be central and professional responsibility *per se* peripheral. Indeed, it may simply be that students are taught how to be better manipulators of people, how to be better assassins in the courtroom, how to start the process of emotionally separating the person from the professional role. This is to say that clinical legal education in the name of skills training may place instrumental technique analysis in the position where it swallows critical moral examination of the use of the techniques in the first place, I think this temptation is greater in the clinical setting than it is in the separate course. As Robert Condlin has put it, "practising law is not the same as critically understanding law practice."[88]

I am not saying that this moral failure in fact happens in every clinical course because when you examine some leading course materials in the clinical setting you actually find some of the most sophisticated writings on professional responsibility to be found anywhere.[89] However, the focus on skills training within the context of assumption of professional role can easily lead to socialization and even indoctrination in particular styles of lawyering, particularly conventional ones, and this danger is more acute precisely because the setting is such a powerful pedagogical tool. All I am suggesting is that the teaching of professional responsibility in the clinical setting must be grounded in ethical theory and be open to sophisticated moral reasoning and literature on professional role ideology, instead of having professional responsibility concerns simply tacked on in an *ad hoc* way to the primary concern with technique for its own sake. Until clinical legal education puts professional responsibility teaching as *the* purpose of the course, rather than just one of eight or nine other legitimate objectives, I do not think we should see it as an alternative to the separate course. In addition, even if a clinical course does consider moral concerns to be as equally foundational as skills

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88. Robert Condlin, *Tastes Great, Less Filling: The Law School Clinic and Political Critique* (1986), 36 J. of Legal Ed. 45 at 77.

89. Particularly G. Bellow and G. Moulton, *The Lawyering Process,* (Foundation Press, 1978). Also the paper by S.R. Ellis, *Parkdale Community Services: Its Clinical Education Aspect: An Analysis* (1979), C.A.L.T. Conference in Saskatoon.

training, the range of ethical issues may be limited by the context of the particular field of law or clientele involved in the clinical setting.

Perhaps then, the most promising approach to the teaching of professional responsibility would be coordinating the separate course and the clinical course in such a way that students could utilize their actual experience in the clinic to bring alive the comprehensive treatment of the subject given in a separate course, and equally bring to the clinical experience the perspectives gained in the separate course. Mandating the separate course as we have done in Manitoba means that all the students in the clinical program will take it. But some will take it before they take the clinical course, some will take it at the same time, and some will take it after they have had the clinical course. It might be better to tie the clinical students into the separate course on professional responsibility so that they take both at the same time. The more difficult problem is how to actually achieve coordination between instructors. At minimum there should be a sharing of materials and a basic understanding of what is going on in both settings. Even better would be a willingness of instructors to team up and participate to some degree in each other's courses. Unfortunately, given the way that teaching duties are often inflexibly allocated and measured, and given other institutional interpersonal constraints, law schools do not regularly foster flexible collaborative teaching. As much of legal practice involves the collaboration of specialists, this lack of collaborative learning by students and collaborative teaching and research by law professors amounts to a serious educational deficiency in itself.

IV. *Why Should We Teach?: Planted Between Cement and Putty*

Despite all the difficulties that I have briefly canvassed in the last section, I have still argued that this subject should be developed and made mandatory. Yet there is a major hurdle that still must be jumped. We must ask whether the teaching of professional responsibility at law school is useful to anyone. Ideally we would like to think that legal education impacts on the world of law. We would like to think that we contribute in some way to the making of a more competent, more ethically responsible, more helpful profession. Even if such collective impacts are hard to believe in, we may ideally believe that at least particular individuals have found in law school some vocational vision that has propelled them into finding law work personally fulfilling rather than profoundly frustrating. But can we think this?

The teaching of professional responsibility at law school can be relegated to a low priority position, or even dismissed altogether, by the argument that the course is useless. In short, the argument can be made

that teaching professional responsibility does not matter in that very little, if any, change in professional attitudes or behaviour results from students having taken such a course. That it does not matter is partly supported by evidence. In a survey of law students in several different schools, Professor Pipkin studied law students' attitudes to the professional responsibility course and discovered that such courses, "to a statistically significant degree were perceived by students as requiring less time, as being substantially easier, as less well taught, and as a less valuable use of class time" in comparison to other courses.[90] The low status given by students to courses in professional responsibility probably translates into low influence on later professional decision-making. Similarly, Zemans and Rosenblum studied the contribution of law schools to the professional development of lawyers and how it compares with that of other socializing agents and experiences by surveying more than 500 practicing lawyers in Chicago.[91] On the issue of resolving questions of professional responsibility, it is notable that the lawyers surveyed did not grant much value to their having taken a course on professional responsibility in law school. The influence of general upbringing and the influence of co-workers were rated as far more important, as the following results indicate:[92]

Rank Order of Sources Contributing to the Resolution of Questions of Professional Responsibility Arising in Practice

Source	% Ranking Most Important	% Ranking Second Most Important
General upbringing	61.6	17.5
Observation of or advice from other attorneys in your law office	21.5	37.4
Law school consideration of these topics	11.0	19.6
Observation of or advice from other attorneys not in your law office	1.7	14.6
Advice from persons other than attorneys	0	4.9
Other	4.1	6.0
	99.9 (N=534)	100.0 (N=514)

The study also notes that lawyers who graduated from prestigious national law schools rated the influence of their law schools on

90. Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox,* [1979] A.B. Found, R.J. 247 at 258.
91. Zemans and Rosenblum, *The Making of a Public Profession,* (American Bar Foundation, 1981).
92. *Id.,* at 172.

professional responsibility issues as even *less* than lawyers who graduated from non-prestigious regional schools. It is evidence such as this that seriously puts to us the question, "Why should we bother to teach professional responsibility?"

Neither Pipkin nor Zemans and Rosenblum are in fact cynical about the *potential* for law school instruction in professional responsibility. However, to oversimplify, a cynical position could easily be arrived at by adopting either of two kinds of arguments about moral development and socialization. I call these the "cement" theory on one hand and the "putty" theory on the other.

The cement theory is the idea that the quality of professional behaviour by a lawyer is determined by the moral character and dispositions of that lawyer, and this disposition is cemented firmly in place by the time the person goes to law school. Ethical analysis and discussion in law school is useless because it cannot penetrate the cemented moral character of the student. If there is a degree of moral failure in the profession the law school can only contribute to prevention by applying a moral screening device upon admission, rather than attempting to teach professional responsibility. But moral screening in itself is obviously fraught with extreme moral dangers and law schools are not about to embark on it.

The putty theory, on the other hand, is the idea that the quality of professional behaviour is *not* determined essentially by moral character or moral reasoning, but rather by *situational* factors. The situation molds the professional, who is like putty, so to speak, under its influence. And the situation that counts is not law school, but the actual practice of law. The "way things are done" within various fields of law, within different firms, within different legal institutions and within various economic constraints, determines how the lawyer will act. The ethical putty is simply molded to the existing role expectations of whatever practice situation the professional ends up in. Like the famous psychological study on obedience to authority where people of "good moral character" on command were willing to apply severe electrical shocks to a person[93], so the lawyer of "good moral character" may under the right situational pressures, act perversely. Instruction in professional responsibility at law school may impact on the putty, but not in any permanent way, as legal practice remolds the person into conformity with its own dynamics. As

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93. S. Milgram, *Behavioural Study of Obedience* (1963), 67 Journal of Abnormal and Social Psychology 371.

Jerome Carlin, who in many ways pioneered the sociological study of the legal profession[94] suggests:[95]

> Law schools have tended to define the task of increasing professional responsibility in the narrow sense of improving the ethics of the Bar. Unethical practice was viewed as the problem. The source of the difficulty was located in the individual lawyer — something was defective in his professional makeup. The solution was for the law school to instill in prospective lawyers appropriate values and commitments. This has been largely a fruitless enterprise because it assumes that professional norms and values can be "internalized" during law school, and fruitless also because it assumes that ethical conduct is determined mainly by the strength of the lawyer's moral or ethical commitments. In fact, degree of conformity with ethical standards is primarily a function of the pressures lawyers encounter in their practice, pressures arising from the nature of their clients and the relations they have with them, the kinds of courts and agencies with which they come in contact and the nature of these involvements. There is, moreover, a pattern to these pressures reflecting the power structure to the Bar.

There have been those, who, like Carlin, in good faith have basically adopted the cement or the putty theory, and thus question the value of teaching professional responsibility in law school.[96] It is more common, however, for educators to adopt a different view, namely that moral character, attitudes, thinking and behaviour are *developmental.* Between the importance of *prior* formation and the importance of *future* situational pressures, there is the significant potential of law school to influence students for good or ill as they form a vocational vision of what law and legal practice can or should be. Some educators find both the support for a moral development theory and the support for a specific agenda for moral education in the work of Professor Lawrence Kohlberg.[97] However, for our purposes the basic point is that moral development need not stop completely in the adult, however important

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94. *See* Carlin, *Lawyers On Their Own,* (Rutgers Univ. Press, 1962); *Lawyer's Ethics: A Survey of the New York City Bar,* (Russell Sage Found., 1966); and *Civil Justice and the Poor* (Russell Sage Found., 1967).

95. Carlin, *What Law Schools Can Do About Professional Responsibility* (1971-72), 4 Conn. L. Rev. 459 at 450.

96. *See* Graham Parker, *The Teaching of Legal Ethics* (1968), 1 Canadian Legal Studies 267; Eugene Smith, *Is Education for Professional Responsibility Possible?* (1968), 40 U. of Col. L. Rev. 509; Philip Shuchman, *The Use of Empirical Data and Field Research for Teaching Professionalism in Procedure Courses* (1971-72), 4 Conn. L. Rev. 447.

97. *See* T. Willging and T. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education* (1981), 31 J. of Leg. Ed. 306; David Richards, *Moral Theory, The Development Psychology of Ethical Autonomy and Professionalism* (1981), 31 J. of Leg. Ed. 359; Lickona, "What Does Moral Psychology Have to Say to the Teacher of Ethics?" in *Ethics Teaching in Higher Education, supra,* note 72 at 103.

upbringing may be in shaping the direction of growth. The analogy to a plant may be appropriate. The ultimate potential for growth and final shape may be determined by genetic predisposition and the place and conditions of early growth, but significant flourishing or retardation is possible by the presence or absence of water, tending, and sunshine. The law school experience may also be a place of moral growth or retardation, of sunshine or darkness, flourishing or stagnation, or probably some combination of them.

Within this developmental view, it may be useful to summarize some of the debate over the socializing effect of the law school experience generally. If the law school does influence the growth of the moral "plant" as it were, how should we interpret and view that influence?

There are numerous studies and opinions on the impact of the law school experience on the values and attitudes of law students.[98] Some studies emphatically deny that significant value change occurs in law school.[99] However, a group of studies conclude that the law school experience does foster change in student attitudes, but this change may be interpreted as going in a negative direction. For example, Rathjen surveyed the general orientation toward law work of law students at the University of Tennessee.[100] Rathjen tested students on their disposition to view law work as being essentially part of an "enterpreneurial" model of pursuit of individual client interests and rights in a market-like context of conflict resolution and bargaining, or on the other hand, as viewing law work as part of a "social welfare" model where law is an instrument for social change and reflects wider group and societal interests. Rathjen found significant shifts of outlook and commitment between first-year students and third-year students in the direction toward the enterpreneurial model and away from social reformist concerns. Thus support for the view that law school dampens commitment to social reform and justice may be found in Rathjen's study.

In another study, Katz and Denbaux administered an attitudinal survey to law students at Seton Hall.[101] Contrary to the assumption of some that entering law students are already more cynical, less trusting of people, and more manipulative than the average person of similar age,

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98. For a summary of the studies up to 1977, *see* K. Barry and P. Connelly, *Research on Law Students: An Annotated Bibliography*, [1978] Am. B.F.R.J. 751.

99. W. Thielens, *The Influence of the Law School Experience on the Professional Ethics of Law Students* (1969), 21 J. of Legal Ed. 587; Willging and Dunn, *supra*, note 97.

100. G. Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes, and Values of Law Students* (1976-77), 44 Tenn. L. Rev. 85.

101. A. Katz and M. Denbeaux, *Trust, Cynicism, and Machiavellianism Among Entering First-Year Law Students* (1975-76), 53 J. of Urb. Law 397.

Katz and Denbaux found that this was not so. However, during the law school experience there does seem to be an attitudinal shift away from social idealism.[102] But in another study, this time at the University of Wisconsin-Madison Law School, Erlanger and Klegon cast doubt on the assumption of significant value shifts in law school away from a "public interest" law model and towards a "business" model.[103] Their survey indicated that there was indeed a political shift in a conservation direction during law school, but the shift was not as significant in degree as most earlier studies assumed. Finally, in a study at the University of Denver Law School, Stover found that a shift away from reformist public interest concerns in law school was noticeable in that legal education in content and form may well influence law students in particular directions so as to make decisions about what kind of law to practice and how.[104]

Attitudinal surveys thus far do not conclusively prove the shape of the socializing effect, if any, of law school education. Still there are those that would nevertheless assert that law school fails precisely because it does *not* influence students significantly in the context where significant potential for professional formation is possible. In a major study, focusing more on the interpersonal side of lawyering, Shaffer and Redmount criticize legal education for fostering narrow "legalistic" attitudes to law practice rather than what might be broadly called "humanistic" attitudes.[105] They suggest that to be of genuine service to clients requires of lawyers a "humanistic" disposition and interpersonal skills to actualize that disposition. Genuine service to clients includes an empathetic concern for how the client feels and what the client experiences and expects. It includes the identification of the real needs of the client and the taking of legal action or the foregoing of such action in reference to those needs. Most lawyers are ministering to the needs of human beings, dealing with hurt and threat and expectation and desire. They should be expected to be reasonably concerned and personally helpful in dealing with their clients. On this level, however, lawyers tend not to feel or care about people, because lawyers narrowly seek legal answers with little reference to the personal feelings of their clients, and little demonstrated concern for what legal solutions do to people. The lawyer's method is to abstract from the situation a pure "legal" solutions, and then to work toward a chosen solution through the use of "legal" problem to be solved,

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102. Unpublished speech by Katz and speech by Denbeaux at Detroit Conference, 1977.
103. H. Erlanger and D. Klegon, *Socialization Effects of Professional School* (1978), 13 Law & Society Rev. 11.
104. R. Stover, *Law School and Professional Responsibility: The Impact of Legal Education on Public Interest Practice* (1982), 66 Judicature 194.
105. T. Shaffer and R. Redmount, *supra,* note 35.

then to formulate alternative "legal" solutions, and then to work toward a chosen solution through the use of "legal" skills. The end of the process may leave the lawyer with a sense of satisfaction but not necessarily leave the client with any sense of having been helped, understood, or cared about. Legal education is the ground from which this withered antihumanistic professional orientation springs. It is in law school where students learn not to be concerned for human experiences in the drive to "think like a lawyer." The law school, in its curriculum, method of teaching, and climate, reinforces in students a bias to intellectual conceptualism, verbal aggression, and competitive manipulation, at the expense of fostering emotive and moral understanding, collaborative problem-solving and humane concern for people.

Shaffer and Redmount administered a sophisticated social science survey to students at three law schools (Notre Dame, Valparaiso, and Indianapolis) as well as to professors and practicing alumni from those schools. By the use of an attitudinal survey and also through the study of problem-solving behaviour in relation to three hypothetical cases, the author's conclude that indeed the vast majority of law students, professors, and lawyers are "tough-minded" rather than "tender-hearted," are "problem-oriented" rather than "person-oriented," and value traditional legal skills rather than skills like determining client feelings and attitudes, formulating a client's problem in non-legal terms, and determining the likely personal and social effect of legal intervention. Through the study of classroom interchange and teaching methodology the authors conclude that indeed legal education does not exhibit "humanism" either.

The unexpected "twist," however, is that attitude and behaviour in relation to "humanistic" concern does not change significantly from entering law student, to second-term student, to senior student and finally to practicing lawyer. In other words, the idea that law school significantly changes disposition is refuted. Legal education does not change character for better or worse, but rather the incoming law student is predisposed to narrow intellectualism, which the law school simply reinforces.

While Shaffer and Redmount express surprise by this lack of law school influence, most of their book, nevertheless, involves a severe criticism of law school curriculum method, and climate. In their view, law school should have an effective — a positive one, by the creation of a learning climate in which human concern is predominant. Shaffer and Redmount attempt to show that incoming students, while predisposed to verbal aggression, competition and intellectualism, have another side, too — concern for social justice, and professional interpersonal skill. This side is not reinforced in law school but should be and can be. Thus, the

law school experience may be seen as the process of watering and tending some branches of the plant and not others.

We may conclude, more by experience and common assumption than by empirical proof, that law students pick up a lot of value messages from the informal and formal context of the law school experience. Most law students, whatever their age and background and previous connections, if any, to law and lawyers, essentially are embarking on a new and intensely important vocational commitment by going to law school. It is inevitable that some process of adjustment and growth in personal identity must take place to accommodate the realities of the role of becoming a lawyer. This identity formation, it seems to me, is very much influenced by how the law school experience deals with law and lawyering — what images and ideologies are presented to the students as possibilities and ideals for the integration of self and professional role.[106] Without denying the importance of the existing self-identity that students have before law school and the powerful influence on the person of experiences in the practice of law, we may reasonably assume that the law school experience does impact on the personal identity of students and thus on what and how they practice. Still, the issue of why we should teach professional responsibility is not satisfactorily answered, it seems to me, by pointing out that such teaching can help socialize students for good or ill, just as law school generally socializes students. A number of other factors must be noted.

First, teaching professional responsibility is *not* a process of somehow influencing those who do not have basic moral integrity into becoming persons with such moral integrity. There will always be some lawyers who will end up being disbarred for stealing from the trust funds or for some other gross violation of professional duty. It may well be that the law school, even if it tried, could not change a person who has a fundamental lack of moral integrity or strength. But this is not the point. The difficult and pervasive questions of professional ethics involve considerations of what "good" people should do — what the best or the better thing to do is, in situations of great complexity and ambiguity. The teaching of professional responsibility is not premised on the question, "How can a bad person be a lawyer?", but rather on the question, "How can a good person be a lawyer?" The course should not be justified as some means of training people to conform nicely with professional standards, particularly minimal ones. Indeed, critical reflection on the conventional role or practice of lawyers may prophetically call into

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106. *See* Watson, *supra,* note 31; Elkins, *Rites de Passage; Law Students "Telling Their Lives"* (1985), 35 J. of Leg. Ed. 27.

question the way things are, and thus be preceived as a threat, rather than a help to the established bar.

Secondly, however interesting, there is a sense, which we embark on the wrong path in focusing on law school *socialization* or on whether *training* in professional responsibility is possible in terms of formation of moral character. Do we even want to imagine law school as some industrial process of taking "raw material" in at one end and spewing out a "product" at the other end and evaluating this "product" in terms of our criteria as to what proper attitudes and dispositions the product should have? While value neutrality is a myth, we may still imagine that the moral influence of law school should operate differently than in an army boot camp. The goal of professional responsibility teaching is not to coerce or manipulate into virtue but to *expose* students to the experience and thoughts of people about this field of inquiry. I want to tell students some of what I know, what I feel, and what I think. I also want students to be exposed to the opinions of many others who have written in the field about what they know, feel and think. I want students to engage, evaluate and react to these opinions in coming to conclusions of their own.

One of the few positive statements made by Jesus about the scribal (scholarly/teacher) role is found in Matthew 13, Verse 52: "Therefore every teacher of the law who has been instructed about the kingdom of heaven is like the owner of a house who brings out of his storeroom new treasures as well as old." We do not exercise authority to mold people or set them on desirable paths, but rather we simply help bring to them treasures both old and new, or more likely we help them to find the treasures. What students do with those treasures is their decision. We should perhaps look more substantively at whether it is really treasure we are presenting, as opposed to straw or dung, and stop worrying so much about effecting behavioural change. Dig for treasure, present it, and somewhere it will be used by someone to enrich the world.

The treasure analogy is important to me because there are periods of time each year where, unable to sleep, I sit in the family room in the middle of the night and contemplate my life. Aside from being haunted by the questions of whether I am a fraud, or whether I am moving forward in knowledge or teaching ability, there is the recurring nightmare that in the world of law I am simply wasting my life in law teaching. Student evaluation forms may include some appreciative comments directed to the instructor, but there is no letter or word, as yet, from some former student who has practised for five years saying something like, "The course you taught me really made a difference to how I practice law." I fantasize that if I were practising law, feedback would be more

direct. A client has a worthy goal or a need and I help the client achieve or fulfill it. My involvement as a lawyer helps to structure or restructure the world (hopefully for good rather than bad) often in very visible direct ways. I recall how one of my own law teachers who was in practice pointed to a new building and said, "I helped build that structure — got development approval, structured and formalized the investment offerings, did the construction contract and so forth." He said it like an architect pointing out with satisfaction the aesthetic form and function of his or her design. Similarly, I fantasize about the feeling of satisfaction that might come from making an argument that I believed in to the Supreme Court and having it adopted by the Court as binding precedent. Even legal scholarship, despite the question of ultimate influence on the world, has at least a small quality of satisfaction associated with it when something you write is published and enters the intellectual marketplace. The writing at least exists; it becomes real in the printing of the words. But teaching seems to be like firing a gun backwards at a target while you are permanently tied in a position where you never see the target to either aim or know whether you are hitting it. Still, I must persuade myself again that teaching law students is worthwhile and does matter somehow and I go back to bed with the expectation of facing another class in the morning. If it does not matter, why do I spend 80 percent of my time in teaching preparation rather than concentrating on scholarship or practice? Perhaps it does matter profoundly. It is not the life of power and glory or fame and fortune, but the way of humble digging for the treasure that speaks to the emergence of a more competent and responsible profession in the service of human justice needs.

APPENDIX

Teaching Professional Responsibility: Survey of Canadian Law Schools

by

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1987

Note:

Responses were received from all of Canada's law schools in 1984. Updated responses were not received from all schools. The updating was prepared on the assumption that old data from non-responding schools was still accurate. In some cases the responses are greater or fewer than the number of schools. In many cases respondents declined to answer particular questions. In some cases, more than one respondent answered on behalf of the law school.

These are unofficial results.

1. Does your school offer a course in Legal Ethics, Professional Responsibility, the Legal Profession or the like?

   No — 5: U. of Toronto
   Ottawa (civil law side)
   McGill
   Université de Moncton
   University of Western Ontario

   Yes — 14

2. If yes, what is the title of the course? (Note: Only those answering Yes to question 1 (*ie.* 13 schools, 15 responses) are included in question 2-23)

Professional Responsibility	— 3
Legal Profession(s)	— 6
Legal Ethics	— 0
Law of Professional Conduct	— 1
Legal Ethics and Professional Responsibility	— 2
The Legal Profession and Professional Responsibility	— 2
Professional Responsibility and the Profession of Law	— 1

3(a). How long has the course been a part of your curriculum?

	Years
Osgoode Hall	21
Windsor	16
Queen's (Legal Profession)	14
Alberta	12
U. Manitoba	11
Dalhousie	10
Ottawa (common law)	10
U. Victoria	9
Saskatchewan	8
UNB	6
UBC	5
Montreal	4
Queen's (Legal Ethics)	5
Sherbrooke	4
Calgary	3

(b). What, if anything, was taught in this subject area before the introduction of this course?

— "Nothing specific"
— "Don't know" — 2
— No answer — 2
— "Nothing" — 3
—"Very little"
— Legal Profession
— Responsibilité Civile des Professionels
— "Course by course interstitial comment"
— "Covered in other courses"
— "P.R. material part of other courses to some extent"
— "Individual non-credit lectures by bench and bar"

4(a). Is the course a requirement for graduation or is it an elective course?

Required — 4 (Manitoba, Alberta, Calgary and Dalhousie (effective 1988-89))
Optional — 10

(b). How many sections of the course are offered at your school?

One section — 9
Two sections — 3 (Manitoba, Queen's and Windsor)
Six sections — 1 (Alta.)
Seven sections — 1 (Dalhousie — 1988-89).

(c). What is the approximate size of the classes?

8-28	— 2
15-20	— 1
20-25	— 5
35-40	— 4
45-50	— 2
Over 50	— 1

average = approximately 30

5. In which academic years and in which terms is the course offered? [Note: All the offerings of the course(s) are included in these results]

Fall term, first year	— 0
Spring term, first year	— 2
Fall term, second year	— 7
Spring term, second year	— 9
Fall term, third year	— 11
Spring term, third year	— 13

6. How many hours per week (in one semester) are assigned to the course?

Two hours	— 6
Three hours	— 1

(Calgary — 30 hours (1 week) in 1 term)

7. How is the course evaluated?

Graded	— 13
Pass/Fail	— 1 (Calgary)

8. What methods of evaluation are used?

— Final exam	— 4
— Final exam, classroom performance and paper	— 3
— Take-home exam and paper	— 1
— Final exam and paper	— 1
— Classroom performance	— 1
— Take-home exam	— 0
— Classroom performance, paper and leading a seminar	— 1
— Paper	— 1
— Take-home exam, paper, classroom performance	— 1
— Final exam, take-home exam, classroom performance, paper	— 1
— Computer-aided exam	— 1

9. What teaching methods are used in the course? [Note: more than one response was often given]

Lecture	— 12
Socratic	— 7
Problems/Simulations	— 11
Siminar discussions	— 5
Class presentations by students	— 3
Discussion of student papers	— 1

10. What teaching materials are used in the course?

— Assigned readings (unspecified)	— 7
— Casebook (unspecified)	— 4
— Materials (specified)	
— Arthurs, Mills & Starr (1984)	— 2
— materials based on "Luban's Model Course"	— 1
— Codes and Handbooks	— 11

11. Approximately what percentage of the course is directed to a consideration of the following topics?

A. History of the profession

0%	— 4	
1-5%	— 6	
6-10%	— 2	Average — 7.9%
11-15%	— 0	
16-20%	— 3	
21-25%	— 1	

B. Code of Professional Conduct

0%	— 1	
1-10%	— 2	
11-20%	— 5	Average — 29.0%
21-30%	— 1	
31-40%	— 3	
41-50%	— 0	
Over 50%	— 2	(65, 80%)

C. Legal Obligations of Lawyers

0%	— 4	
15%	— 2	
6-10%	— 3	Average — 11.7%
11-15%	— 1	

16-20%	— 4	
Over 20%	— 1	(40%)

D. The nature and structure of the profession.

0%	— 1	
1-10%	— 3	
11-20%	— 6	Average — 20.5%
21-30%	— 1	
31-40%	— 1	
41-50%	— 2	

E. Ethics

0%	— 3	(two stated that all topics were ethical in a broad way)
1-10%	— 1	(stated that law teachers can't teach ethics in a Sunday School way)
11-20%	— 5	
21-30%	— 1	
31-40%	— 4	Average — 23.3%
41-50%	— 0	
over 50%	— 1	(75%)

F. Other Responses Given:

Legislation and regulations governing the profession	— 18%
Exposé par les étudiants	— 25%
Legal education	— 10%
Socio-legal issues	— 15%

12. Who teaches the course at your school? (Note: all responses are included.)

Dean	— 1	4.3%
Full Professor	— 9	39.1%
Associate Professor	— 4	7.4%
Associate Professor	— 2	8.7%
Adjunct Professor	— 1	4.3%
Practicing Lawyer	— 4	17.4%
Judge	— 2	8.7%

13. For how many years has this person taught the course? (Note: all responses are listed.)

One year	2	8.7%

Two years	1	4.3%
Three years	5	21.7%
Four years	3	13.0%
Five or more years	12	52.2%

14. Does the person find the teaching of the course to be more, less or equally satisfying than other courses?

More satisfying	8	61.5%
Equally satisfying	4	30.8%
Less satisfying	1	7.7%
No answer	2	

15. For what reasons is it more or less satisfying?

A number of respondents failed to answer this question. The other responses are listed below.

— "I find the students enjoy the course, the material is interesting and I learn a lot."
— "Because of its mixture of precept and practicality."
— "Small groups, integration of legal knowledge, direct confrontation of moral issues."
— "The topics are of current and major interest, particularly to third year students."
— "Small class size, more student involvement and discussion"
— "The students are very interested. They discover a world of which they were ignorant: the history of the bar and the problems it faces today."
— "The lack of structure and doctrine and small class format offer an atmosphere conducive to discussion and exploration."
— "Good discussion of important issues."
— "People not interested — reputation as a 'bird course'."
— "Enthusiastic student response, students more stimulated in discussion, different teaching methods provide variety of experience not found in other more traditional courses."

16. Is it likely that this person will continue to teach in this area in future years?

Yes	14	87.5%
No	2	12.5%

17. To what extent do members of the local practicing bar participate in the teaching of the course?

— "Occasionally as guests"
— "Aucun" (none)

— "Both teachers are practitioners"
— "Frequent participation"
— "As lecturers from time to time"
— "33%"
— "Not at all"
— "5 different practitioners in 5 different seminars"
— "Benchers and others come to 2 or 3 classes"
— "Local practitioners assist in the orientation of clinical law students and participate in the program; they seldom participate in the teaching of Legal Professions course."
— "There are at least three panels of 3-4 practitioners each. Different lawyers each year."
— "Extensively; have comprised majority of teachers since course implemented"
— "A member of the bar eventually assumed the leadership role."
— "Extensively"

18. Ought the course in this subject area be a required course in the law school curriculum? Why or why not?

Yes — 12 70.6%

— "I think many students would like to take it, but after excercising an election of courses they find they have 'run out of options'."
— "All students, whether barristers or notaries, should take the course"
— "Because of its practical application to day-to-day situations"
— "If adequate resources committed, it should be required as it is central to what a lawyer is about"
— "Because of its obvious importance"
— "It should be offered intensively in law, as part of legal writing and research and therefore deliberately be made to pervade all law teaching in upper years: because the ethical-fiduciary component is critical to the role of the legally trained person"
— "Exposure to basic perspectives on the questions 'What kind of lawyer do I want to be?' 'What does lawyering do for clients/ society?' and so forth is surely as important as taking contracts."
— "Too little at present on obligations, ethics, and pitfalls of practice."

No — 5 29.4%

— "As long as further options or variations are available, the course should remain optional"
— "Trop charge" (too emotionally charged)

— "Our policy is to require courses in only those subjects required by the Law Society of Upper Canada, although my personal view is *Yes*!"
— "The Legal Profession course is designed for students who wish to study issues of professional responsibility and ethics in an in-depth fashion" (U. Vic.)
— "Should be taught in all courses."

19. Ought the course to be required by provincial bar societies?

Yes — 11 78.6%

— "Because they can stress what they consider of prime import"
— "Lawyers should know about what they will meet and the responsibilities flowing from them"
— "I speak as an old Bencher!"
— "Same as number 18"
— "Again"
— "Offered for the past 2 years (I think) as part of the Bar Admission course offered by the Law Society of Upper Canada"
— "It is required in Manitoba but not taught with any depth due to the mandatory law school course. Articling is a socialization process. Students should be taught to think critically of the process *before* they get into it."

No — 3 21.4%

— "Because the provincial law societies should not impose on the content of university education"
— one is indecipherable

20. What advantages and disadvantages do you see in what presently constitutes the content of the course?

— "Enables students to study issues in depth" (U. Vic.)
— "I would like to spend more time on the history, sociology and governance of the profession and the ethics and ideology of legal service generally. However, within the time allotted it is hard to do justice to both legal ethics and legal profession. These could be two courses."
— "The course is not taken seriously by students in the course selection process (it is optional) and is seen as a 'bird' course; evaluation made by students following completion of the course, however, indicates satisfaction and gratitude for the opportunity to reflect on aspects of the lawyers' role not provided elsewhere in law school."

— "The emphasis on C.B.A. Code of Conduct."
— "Dearth of Canadian materials."
— "Insufficient time to examine important topics of the history and function of the profession in general."
— "Subject matter intrinsically interesting; material topical and timely."
— "Advantage — course covers practical advice on what to do in everyday matters of practice. Disadvantage — There never seems to be enough time to cover even a majority of situations which deserve in-depth discussion, both professional and class."
— "After 3 years we are getting quite a few 'bugs' out of the course. I plan to revise most of my lectures this eyar and change some of the material."
— "Major disadvantage — no casebook as yet (one in planning stages)"
— "So little writing in the area — hard to make it relevant."

21. What advantages and disadvantages do you see in the way the course is presently being taught?

— "Taught by different teaching methods, less structured than traditional courses."
— "Advantage — enrollment limited to 25 per section, thus greater student involvement"
— "The methodology of presentation (a mixture of lecture/ socratic/problem discussion) is quite adaptable to the material."
— "Disadvantage — no Canadian materials — problems must be devised — no current textbook — cannot be taught to large groups without more resources."
— "Instructor tends to be preachy; difficult to stimulate class discussion since students are expected to 'turn on' on arrival at classroom door; most good discussion and hard thought arises incidentally from discussions on unrelated topics. The short time available does not permit structuring class to permit these to arise."
— "The seminar format is ideal for the purposes of exploring these topics."
— "Because evaluation is done solely by a paper, about 50% skip classes."
— "Lots of input from members of Bar."
— "The emphasis on the C.B.A. Code of Conduct does not compel students to examine in a deeper way the questions of ethics in a

pure sense and then apply these principles to the practices and traditions of the legal profession."

— "I would like to see the course taught in a team teaching format between a full-time member of faculty and perhaps a member of another discipline, such as philosophy or ethics."

22. What changes, if any, would you recommend to the present organization and teaching method?

— "More concrete cases drawn from real life."

— "Few changes, save for more time."

— "Talk 'at' law students; assure that consideration of ethical questions permeates the whole of the law school curriculum and related activities."

— "Greater coordination between Professional Responsibility (third and second year) and Judicial Process (first year) in terms of subject matter."

— "I would insist on the history of the Notariat and use the socratic method."

— "The material could be improved. We use some 'downtown' lawyers and judges to increase diversity of views. We are gradually developing a group of these we know are good."

23. To what extent, if any, is there an expectation of your provincial bar society that:

(a). this course be offered at your school?

Substantial	6	54.5%
Moderate	4	36.4%
Minimal	1	9.1%

(b). the content be satisfactory to them?

Substantial	2	20%
Moderate	3	30%
Minimal	5	50%

(c). there be participation in the course by practicing (non-professor) lawyers?

Substantial	2	18.2%
Moderate	3	27.3%
Minimal	6	54.5%

(d). there be participation by bar society representatives?

Substantial	0	
Moderate	2	20%
Minimal	8	80%

24(a). Is there a faculty mandate or directive at your school that issues of legal ethics or professional responsibility be dealt with "pervasively"?

Yes	6	31.6%
No	13	68.4%

(b). Is there a faculty mandate or directive that it form a "pervasive" part of any one course or group of courses at your school?

Yes	7	38.9%

— Clinical (4), Legal Process, Criminal Law, Trial Advocacy, Civil Procedure, Evidence, Legal Skills, Realty Transaction, Solicitors Practice

No	11	61.1%

25. If there is such a mandate or directive, do you think it has been successful?

Yes	1
No	5