
Volume 88
Issue 2 *Dickinson Law Review* - Volume 88,
1983-1984

1-1-1984

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Recommended Citation

Robert M. Ackerman, *Law Schools and Professional Responsibility: A Task for All Seasons*, 88 DICK. L. REV. 202 (1984).

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Law Schools and Professional Responsibility: A Task for All Seasons

Robert M. Ackerman*

I. Introduction

Few areas of law school instruction have been the subject of more intense debate than the field of professional responsibility.¹ The American Bar Association's post-Watergate requirement that accredited law schools offer professional responsibility instruction² has hardly resolved the debate. If anything, the imposition of professional responsibility instruction as an academic requirement has in many schools increased the frustration level of students who are required to take the course, as well as that of law school faculty assigned to teach it. Debate continues not only about the manner in which professional responsibility should be taught, but also about whether professional responsibility can be taught at all.³ Among the more prominent criticisms of instruction in professional responsibility are: (1) that the ABA Code of Professional Responsibility, on which much instruction in the field is based, is plagued with ambiguity, inconsistency, and in some instances, hypocrisy; (2) that classroom instruction in professional responsibility rarely reflects conduct in the

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1. Throughout this article, the term "professional responsibility" includes instruction in legal ethics and the legal profession.

2. APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURES § 302(a)(iii) (1977). The standard merely requires that law schools "provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession." It explicitly states that "[s]uch required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered." Nevertheless, the vast majority of law schools fulfill the ABA requirement by offering a required course in professional responsibility. Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, in *TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS AND PROCEEDINGS FROM NATIONAL LAWYERS CONFERENCE 23* (P. Keenan ed. 1979).

3. See, e.g., Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 A.B.F. RES. J. 247, 265-275 (1979) [hereinafter cited as Pipkin]; Smith, *Is Education for Professional Responsibility Possible?*, 40 U. COLO. L. REV. 509 (1968).

“real” world; (3) that it is futile to teach ethics to adult law students whose moral attitudes are already well-formed; and (4) that the material covered in professional responsibility courses is not intellectually challenging. This article addresses each criticism in turn, and notes that, while there may be some truth to these criticisms, they neither make the case for the instruction of professional responsibility less compelling nor strike at the root problems of instruction in this area. The article then addresses the fundamental problems inherent in professional responsibility instruction and concludes with a curricular proposal designed to address those problems.

II. Frequent Criticisms

A. Criticism 1: “The ABA Code of Professional Responsibility,⁴ on which much instruction in professional responsibility is based, is plagued with ambiguity, inconsistency, and in some instances, hypocrisy.”

Much support can be found for this observation, which is only slightly less valid in light of the ABA’s adoption of the new Model Rules of Professional Conduct.⁵ An indictment of the ABA Code, however, provides a very poor rationale for giving short shrift to instruction in professional responsibility. Many commentators believe that the Internal Revenue Code leaves much to be desired as an equitable system of taxation; others believe that the Uniform Commercial Code has its weaknesses. Neither of these propositions has been used, however, to challenge the viability of courses in taxation or commercial transactions. To neglect a subject because of shortcomings in the prevailing law of that subject area reflects an ostrich-like mentality flattering to neither the professional nor the academic.

Indeed, the ABA Code and its successor, the Model Rules, serve as excellent teaching tools, not in spite of their shortcomings but because of them. The Code does play a role in establishing minimum standards with which lawyers in most jurisdictions must comply to avoid professional discipline. If nothing else, instructors owe a duty to their students to acquaint them with these minimum standards of conduct. More importantly, the ABA Code serves as a point of departure for discussion of ethical dilemmas. Gaps and inconsistencies in the Code tend to illuminate those areas that are least susceptible to easy ethical resolution and thus serve as the most potent areas for instruction and discussion. Furthermore, the ABA Code and the Model Rules are products of political compromise. As such,

4. Hereinafter cited as ABA CODE.

5. In August 1983, the American Bar Association gave its final approval to the MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter cited as MODEL RULES].

the Model Rules demonstrate many of the prevailing tensions in the legal profession.⁶ Thus, while the ABA Code and Model Rules are not the be-all and end-all of instruction in legal ethics, they do afford a point of departure for intelligent discourse in this subject area.

B. Criticism 2: "Classroom instruction in professional responsibility rarely reflects conduct in the 'real' world."

This objection frequently is voiced by students, many of whom, without the benefit of much exposure to the real world of legal practice, nevertheless have adopted a "hard knocks" view of life outside the ivory tower of the classroom. The most remarkable aspect of this criticism is that it is heard about the professional responsibility course more than about those courses in which instruction is largely based on appellate cases. As any practitioner quickly realizes, appellate cases are aberrational and represent a minute percentage of cases which not only fail to settle prior to trial, but are not resolved by trial. In the glimpse they afford of only the tail end of the litigation process,⁷ the fringe issues that drove the parties to the appellate courts, and the persistence of the parties or counsel to lock horns rather than to negotiate a settlement, appellate cases present a distorted view of law practice. The real world lies not in the appellate cases, but in the everyday problems of advising clients, drafting documents, negotiating with others and preparing cases for trial.⁸ These are precisely the situations upon which most discussion in professional responsibility focuses. The problem method, and not the appellate case, therefore, is the appropriate and the most frequently

6. For a sampling of the controversy in this area, see Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968); Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1982); Freedman, *Improved, but Unworthy of Adoption*, 69 A.B.A. J. 866 (1983); Moser, *A Major Improvement, The Rules Should be Adopted*, 69 A.B.A. J. 867 (1983).

7. Years ago, Professor Jerome Frank commented:

Langdell invented, and our leading law schools still employ, the so-called "case system." That is, students are supposed to study cases. They do not. They study, almost entirely, upper court opinions. Any such opinion, however, is not a case, but a small fraction of a case, its tail end. The law students are like future horticulturalists studying solely cut flowers; or like future architects studying merely pictures of buildings. They resemble prospective dog-breeders who never see anything but stuffed dogs.

J. FRANK, *COURTS ON TRIAL* 227 (1949).

8. We can stand a little less abstract theorizing in our law schools about the supposed "true" import of appellate decisions and can profit from a little more schooling in the realities of the lawyer's functioning. Whatever else may or may not be accomplished by law school instruction in "the duties and responsibilities of the legal profession," the by-product cannot but be a clearer awareness on the part of law students that law is not only what courts and legislatures say, but also, in its retail phases, what lawyers *do*.

Jones, *Lawyers and Justice: The Uneasy Ethics of Partnership*, 23 VILL. L. REV. 957, 959 (1978) (emphasis in original) [hereinafter cited as Jones].

used vehicle for teaching professional responsibility.⁹

A corollary to the above criticism is that even when the problems discussed in the professional responsibility course reflect reality, the solutions proposed in the course do not. This perception is apparently based upon isolated student exposure through summer and part-time jobs to incidents of ethically questionable conduct in practice, which incidents are then all too conveniently generalized to serve as an "everybody does it" rationale for ignoring ethical standards.

Admittedly, incantations by academics, even those who are former or part-time practitioners, that "not everybody does it" often fall on deaf or disbelieving ears. Perhaps the real point to be made, however, is that notwithstanding the large number of lawyers who observe high ethical standards, a disconcerting large majority do not, because of either choice or ignorance. Indeed, this is the reason that ethical training of lawyers is now mandatory.¹⁰ To the extent that ethically marginal conduct exists, it should serve not as an excuse, but as a challenge for law students, educators and practitioners.¹¹

C. Criticism 3: "It is futile to teach ethics to adult law students whose moral attitudes are already well-formed."

Several commentators have suggested that to the extent that personal views of morality are formed during early childhood, any attempt to indoctrinate young adults in a moral code during law school is futile.¹² This criticism derives from the popular misconception that equates instruction in professional responsibility with an attempt to teach morality. The primary objective of instruction in professional responsibility is not to teach morality, but "to introduce law students to some of the types of situations that they may expect to encounter as practicing attorneys."¹³ It is hoped that through the

9. The profusion of professional responsibility texts employing the problem method demonstrates the apparent utility of this method. See, e.g., A KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (1976); T. MORGAN AND R. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (2d ed. 1981); N. REDLICH, *PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH* (2d ed. 1983).

10. It is generally acknowledged that ABA Rule 302(a)(iii) was enacted in response to the loss of public confidence in the legal profession in the aftermath of the Watergate scandal. Bresnahan, "Ethics" and the Study and Practice of Law: The Problem of Being Professional in a Fuller Sense, 28 J. LEGAL EDUC. 189, 192-93 (1976); Jones, *supra* note 8, at 959; McKay, *Legal Education: Law, Lawyers, and Ethics*, 23 DEPAUL L. REV. 641, 649 (1974).

11. The observation that many ethical rules are often honored in the breach can serve as an invitation to classroom discussion of the problem of a subordinate lawyer who is subject to pressure by supervisors to behave unethically. See MODEL RULE 5.2.

12. See Carlin, *What Law Schools Can Do About Professional Responsibility*, 4 CONN. L. REV. 459 (1971); Pipkin, *supra* note 3, at 265-75.

13. Thode and Smedley, *An Evaluation of the Pervasive Approach to Education for Professional Responsibility of Lawyers*, 41 U. COLO. L. REV. 365, 366 (1969) [hereinafter cited as Thode and Smedley]. Another writer comments as follows:

study of problems and class discussion, students will bring their own personal moral values to bear on problems and will develop their own analyses of the consensus ethical codes developed by the ABA in the Code of Professional Responsibility and Model Rules. While a well taught course in professional responsibility encourages students to think about morality, it need not indoctrinate students in morality any more than do courses in criminal law, torts, contracts or any one of a number of substantive courses composed of legal doctrine reflecting the moral judgments of society.¹⁴

D. Criticism 4: "The material covered in professional responsibility courses is not intellectually challenging."

A 1979 study by Professor Ronald M. Pipkin¹⁵ compared student perceptions of courses in professional responsibility to those of other courses. Pipkin concluded that "courses on professional responsibility have a low status in the latent curriculum hierarchy";¹⁶ that is, the hierarchy of courses "communicated to students through the content of instruction, cues from the faculty, advice from practitioners and other students, feedback from the job market, bar exams, and so forth."¹⁷ Pipkin attributed this low status to perceptions of professional responsibility courses "as requiring less time, as substantially easier, as less well taught, and as a less valuable use of class time."¹⁸ Pipkin also determined that a "pedagogical approach . . . is critical to the evaluation of a subject matter's intellectual challenge," and that "for courses in professional responsibility an important ingredient in their intellectual devaluation by students rel-

For years the cliché ran that by the time a person enters law school he is either ethical or he is not. Whatever was true about the cliché before 1974 remains true. The teaching of legal ethics will surely heighten the sensitivity of the forming "lawyer mind" to the pitfalls that await him, but it will not necessarily dispose him to a more sensitive awareness of his moral responsibilities in the modern world. Nor should it. That is not the function of the law school.

J. LIEBERMAN, *CRISIS AT THE BAR* 226 (1978).

There is, after all, just so much that the law school can be expected to do. One commentator has noted that "[t]he political and social morality of John Ehrlichman or John Mitchell would have been improved by study of the *Code of Professional Responsibility* about as much . . . as study of Robert Louis Stevenson's *Essay on Sportsmanship* would improve the tennis court behavior of Ilye Nastase." Jones, *supra* note 8, at 959. As Professor L. Ray Patterson has observed, "The argument is that rules will not make a bad person a good lawyer, but that contention is based on a false premise. A code of conduct is not for bad lawyers but for good lawyers." Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 642 (1977).

14. Some students fear that a low grade in professional responsibility will be viewed by others as a mark of moral unfitness. This notion, too, is based upon a false premise. A low grade in professional responsibility is no more a reflection of a student's moral worth than a low grade in criminal law is a reflection of a student's predilection for crime.

15. Pipkin, *supra* note 3.

16. Pipkin, *supra* note 3, at 257.

17. Pipkin, *supra* note 3, at 253.

18. Pipkin, *supra* note 3, at 258.

ative to other courses was that the discussion method [and not the "Socratic" or lecture method] was the primary teaching mode used. . . ."¹⁹

Professor Pipkin's findings should be of great interest to those concerned with student perceptions of courses in professional responsibility. The correlation between use of the "Socratic" method, a pedagogical approach used mostly in first year law instruction, and the perception of intellectual rigor, however, may illustrate more about the socializing effects of the first year of law school than about the intellectual challenges of the professional responsibility course. Certainly a course in professional responsibility could be taught through the "Socratic" method, with heavy reliance placed on cases and traditional forms of legal analysis. A glance at one of the more recent casebooks in the field²⁰ quickly dispels the dual contention that there is a dearth of case material and that there are few areas suitable for sophisticated legal analysis in the subject area. Nevertheless, most instructors in professional responsibility choose to use the discussion method and to focus upon problems, rather than using the case-oriented "Socratic" approach. At least two good reasons support this choice. First, the confrontational aspects of the "Socratic" method may tend to exacerbate the unavoidable tension that underlies the course.²¹ Second, the subject matter presents a problem not necessarily present in other courses because it forces the student to come to grips with the impact of his or her personal moral persuasions about the practice of law. Use of the "Socratic" method of case analysis may hamper student efforts to personally confront ethical dilemmas and to undergo the intellectual catharsis fundamental to a course in professional ethics.

Interestingly, Pipkin's study indicated that students perceive their professional responsibility course as at least equal to other courses in terms of career relevance.²² Pipkin saw little relevance in this finding and stated simply that "the lack of significant differences in the measurements of professional relevance supports the hypothesis that longer-range objectives have less impact on the status of this instruction than do academic norms."²³ Thus, Pipkin seems to have equated expenditure of time and difficulty of subject matter, and little else, with status in the latent curriculum hierarchy. His study actually may tell more about the effect of first year pedagogy on

19. Pipkin, *supra* note 3, at 260.

20. L. R. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* (1982).

21. The underlying reason for this tension is discussed *infra*, text accompanying notes 24-26.

22. Pipkin, *supra* note 3, at 258, Table 1.

23. Pipkin, *supra* note 3, at 258.

student perceptions regarding intellectual rigor than it tells about the status of professional responsibility course in the latent curriculum hierarchy.

Undoubtedly, professional responsibility courses tend to employ pedagogical methods different from those traditionally used in legal education, and those methods often are perceived as being less intellectually rigorous. Legal ethics courses, however, do not present intellectual challenges of a lesser degree, but of a different type. Student perceptions of these courses as "intellectually unstimulating" and even "boring" in reality may be attempts to repress other, more intense feelings about such courses. Only by investigating such feelings can law schools and the legal profession begin to address the real problems of instruction in professional responsibility.

III. The Underlying Problems

While the above criticisms of professional responsibility instruction are not entirely without merit, there is reason to believe that they merely represent surface manifestations of two underlying reasons for substantial student resistance to the course. The first is that, above all else, professional responsibility involves law about lawyers. Other courses involve the study of rules regarding criminals, tortfeasors, businesspersons and others, while professional responsibility courses require law students to learn and discuss rules governing their own professional conduct. In other courses issues may be discussed in a detached manner, but the issues raised in the professional responsibility course are more likely to have a direct, personal impact on the students. Students therefore may find the professional responsibility course to be stressful, some because they resent virtually any form of regulation of their professional conduct, others because they perceive the rules to be ambiguous, inconsistent and even hypocritical, and still others because many of the problems require one to choose between two or more admirable but seemingly irreconcilable obligations.²⁴ In other courses students may react to such problems with dispassionate analysis, but in professional responsibility students are more likely to react on a personal level. A law student's reaction to a course in professional responsibility is like the response of a student undergoing a trying divorce to a course in family law.

Students who find the rules of professional conduct disconcerting or who are troubled by the problems that they are told they will confront in practice react in a number of ways. Some attempt to

24. See, e.g., Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (Winter 1975).

grapple with the problems and find themselves enraged or overwhelmed. Stress, depression and disillusionment with the prospect of practicing law are not infrequent by-products. Other students, sensing the onset of stress, attempt to repress it by tuning out.²⁵ These students sit glumly in the classroom, if they enter the classroom at all, taking pains not to engage in any mental analysis of the problems discussed. These students are the ones most likely to describe the professional responsibility course as "boring". Having coped with stress by withdrawing themselves, these students view the course as a painful ordeal through a seemingly endless school term.

As the above problem is inherent in the subject matter of the course, there is probably no way to rectify it fully. Indeed, the feelings of rage, depression or withdrawal with which many students react to a course focusing on problems confronting lawyers, reaffirm the often repeated proposition that "any lawyer who represents himself has a fool for a client." Perhaps the best the instructor can do to cope with this problem is to explain to the students at an early stage that the course involves law about lawyers, that many of the problems place them in a position not unlike that of a client, and that the frustration that they feel about many of the problems mirrors the feelings which many of their clients will experience in their relations with lawyers.²⁶ Efforts to demonstrate that some of the problems confronted in the course, like legal malpractice, are but specialized applications of more general principles of law, like negligence, may also help to develop an understanding that the rules taught in the course are not simply a nefarious scheme to make life miserable for lawyers.

25. See Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963). In another article, Dr. Watson writes as follows:

Dealing with professional and ethical problems is a painful and demanding task, and most persons follow the tendency to avoid such pain if and when they can. Thus, the mouthing or memorizing of ethical codes can provide a person with the belief that he has learned how to behave ethically, although he is in fact using such an exercise to avoid grappling with the core emotional issues. This is known to psychiatrists as the psychological defense of intellectualization, one utilized frequently by those working in the legal profession. While the concept of ethical codes must be learned, the codes should serve primarily as launching points for further discussion. One purpose of such discussion is to highlight emotional conflicts which students (and teachers) generally seek to avoid. It is only through the development of a psychological capacity to deal with these conflicts openly and cognitively that a person can elect to behave with professional propriety.

Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J. L. REFORM 248, 251 (1975)(footnote omitted).

26. For example, many clients complain that "my lawyer is always telling me what I can't do, not what I can do" or that the legal advice which they receive is ambiguous or based on unjust rules. Law students frequently offer the same criticism of instruction in professional responsibility. The instructor perhaps can best cope with this complaint by drawing attention to the student-client parallel and expressing the hope that in neither case will the recipient of bad news find it necessary to shoot the messenger.

Another major reason for student resistance to professional responsibility instruction derives from the fact that most law schools rely on a single required course, usually offered during the second or third year, to bear the burden of teaching professional responsibility.²⁷ After one or two years of law school, during which the consideration of personal values and the lawyer's role in society have taken a back seat, students are herded into a classroom for their obligatory dose of ethics. It is hardly surprising that students react cynically to being told, halfway through law school, that "thinking like a lawyer" means more than the cold, rational application of facts to legal principle and the blind pursuit of available remedies.

Much has been written regarding the socialization process of the first year law school curriculum, in which students are taught to "leave their 'value-laden' illogic behind and learn to 'think like a lawyer.'" ²⁸ During the first year and thereafter, students are taught to analyze cases and rules in accordance with logic and precedent. Students rarely are asked to reflect on personal value systems and the role that the cases and rules play in forming a just society, much less the role the individual lawyer might play in this regard.²⁹ Indeed, a conscious effort is made to rid the first year law student of the "excess baggage" of personal values. A passage from *One L*, Scott Turow's account of his first year of law school, vividly depicts this process:

We all quickly saw that [legal] argument was supposed to be reasoned, consistent, progressive in its logic. Nothing was taken for granted; nothing was proven just because it was strongly felt. All of our teachers tried to impress upon us that you do not sway a judge with emotional declarations of faith. Nicky Morris often derided responses as "sentimental goo," and Perini on more than one occasion quickly dispatched students who tried to argue by asserting supposedly irreducible principles.

. . . .
. . . [W]ith relative speed, we all seemed to gain skill in reconciling and justifying our positions. In the fourth week of school, Professor Mann promoted a class debate on various schemes for regulating prostitution, and I noticed the differences

27. See *supra* note 2.

28. Margolick, *The Trouble with America's Law Schools*, N.Y. Times Mag., May 22, 1983, 20, 22; see also Taylor, *Law School Stress and the "Deformation Professionnelle"*, 27 J. LEGAL EDUC. 251 (1982) [hereinafter cited as Taylor].

29. As for questions of morality, justice, and human feelings, we were told that a stock answer was provided by some faculty members: "If you want to talk about that, the school of religion is just down the street." Such reports suggest that the law student is encouraged by faculty to develop specific attitudes (or "character defenses") with the clear assumption that they will prove adaptive in the practice of law.

Taylor, *supra* note 28, at 265.

in style of argument from similar sessions we'd had earlier in the year. Students now spoke about crime statistics and patterns of violence in areas where prostitution occurred. They pointed to evidence, and avoided emotional appeals and arguments based on the depth and duration of their feelings.

But to Gina, the process which had brought that kind of change about was frightening and objectionable.

“ . . . I don't want to become the kind of person who tries to pretend that my feelings have nothing to do with my opinions. It's not *bad* to feel things.”³⁰

Law students are quick to perceive what their instructors deem important to one's development as a lawyer.³¹ It is therefore not surprising that, after a year or two of absorption in a law curriculum tilted “toward preparing students for legal combat,”³² in which detached analysis is prized and personal moral considerations are placed on the back burner, students react with cynicism to a course in professional responsibility. Rather than recoil at the cynics we face in the classroom, we legal educators should consider the extent to which those cynics are monsters of our own creation. Having trained our students for adversarial combat, why are we surprised to find them prepared for combat and little else?

Some schools have attempted to inculcate an appreciation for ethics and professional responsibility in first year law students through “legal methods” or “lawyering process” courses offered in the first year. While laudable, these courses often fall short of the mark because students view them as departures from the norm. To the students, these courses often lack the substance and rigor attached to the “real” first year courses. Frequently, these legal methodology courses are taught by nontenure track faculty or are offered on a pass-fail or credit-no credit basis, devices that immediately alert students to the importance which the law school attaches to these courses in the latent curriculum hierarchy.³³ Additionally, the relegation of instruction in professional norms to a single course again has elements of the “weekly dose of ethics” for which required upper year courses in professional responsibility have been justly criticized. Thus, what is needed is a means of demonstrating that ethical considerations form an integral part of the lawyering process and that these considerations permeate all fields of substantive law. It is with these thoughts in mind that the following modest and unoriginal pro-

30. S. TUROW, ONE L 91-92 (1977).

31. Professor Pipkin's observations about the latent curricular hierarchy are instructive in this regard. See Pipkin, *supra* note 3, at 252-53.

32. Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38-45.

33. See Pipkin, *supra* note 3, at 250-65.

posal is presented.³⁴

IV. The Pervasive Approach

The proposal is that law professors make a deliberate effort to incorporate the consideration of ethical problems into all substantive courses, particularly in the first year. This approach, known as the *pervasive approach*, is hardly a novel proposition.³⁵ The pervasive approach allows problems in professional responsibility to be studied not in a vacuum, but in the context of the areas of substantive law in which they arise. Students thus are less likely to experience the disaffection and alienation that may arise in a course focusing upon law about lawyers.³⁶ More importantly, “not only does the pervasive approach assure that problems of legal ethics will be considered in the proper context, it also aids students to realize and accept early in their law school careers that professional responsibility is an important and constituent part of all legal problem-solving.”³⁷ Instead of being herded into church for a weekly dose of gospel, students are afforded a view of the role that ethical considerations play in the analysis of substantive areas of law as part of learning to “think like a lawyer.” Attention to ethical concerns also facilitates the adjustment of those students who are disoriented by “the large and impersonal law-school classes, the case study approach, the “Socratic” method of teaching, the harsh competition among students, all [of which] are claimed to create a certain warping of personality and an undermining of ethical or social values.”³⁸

Various methods can be used to facilitate integration of ethical considerations into first year substantive courses. While an analysis of assigned cases can be used to discuss professional concerns,³⁹ the use of hypothetical problems employing concepts drawn from the cases and other course materials is likely to be more effective. Role playing, in which students simulate client interviewing, counseling and negotiation and the examination of witnesses at trial, also may serve as an effective means of wedding ethical considerations to

34. In describing this proposal as both “modest and unoriginal,” one is reminded of Alex Karras, the former NFL defensive lineman, who described himself as “small but slow.”

35. See, e.g., Rogers, *An Approach to the Teaching of Professional Responsibility to First-Year Law Students*, 4 OHIO N.U.L. REV. 800 (1977) [hereinafter cited as Rogers]; Thode and Smedley, *supra* note 13; Woody, *Professional Responsibility Training in Law School and its Philosophical Background*, 7 J. LEGAL PROF. 119 (1982) [hereinafter cited as Woody].

36. See *supra* text accompanying notes 24-26.

37. Rogers, *supra* note 35, at 803.

38. Taylor, *supra* note 28, at 251.

39. For example, an instructor might ask what considerations prompted a lawyer to commence or appeal an action that appears at first glance to have little merit or to join certain parties to an action.

course materials.⁴⁰

Efforts should be made to pose problems and questions in contexts other than the adversarial mode. Rather than confining classroom inquiry to the breakdown stage, instructors might ask how clients should be advised *before* things go wrong. Students thus could be exposed to the lawyer's role as advisor and counselor and gain some understanding of the additional influences, like business considerations, ethical concerns and economic circumstances, that combine with the availability of legal remedies to shape client conduct.

While courses like criminal law, civil procedure and torts are particularly conducive to the integration of ethical concerns, virtually every course in the law school curriculum presents some opportunity for discussion of the ethical ramifications of attorney conduct.⁴¹ A contracts course, for example, might serve as an appropriate forum for discussing the ethics of negotiation and the attorney's role in drafting terms that may prove overreaching or difficult to enforce. Material in a property course covering restrictive covenants or landlord-tenant law may provide a backdrop for a discussion of the dilemma facing a lawyer who is asked to pursue a personally undesirable course of conduct.⁴² In constitutional law,

40. The author's recent experience in his torts course may serve as an example. In conjunction with assigned cases on negligence standards and the doctrine of informed consent, students were assigned to attorney-client teams which negotiated the settlement of a medical malpractice case. A classroom post-mortem focusing on the extent to which the student-lawyers consulted with their clients regarding settlement authority was used to demonstrate, more effectively than by lecture, that the informed consent doctrine applies to lawyers as well as to doctors. It also served to demonstrate that general principles of negligence law often are the basis of "law about lawyers."

41. An excellent discussion of the use of the pervasive method in torts and contracts courses, employing casebooks widely used in these fields, can be found in Rogers, *An Approach to the Teaching of Professional Responsibility to First Year Law Students*, 4 OHIO N.U.L. REV. 800, 804-17 (1977). See also Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 41 U. COLO. L. REV. 343 (1969).

For applications of the pervasive approach to upper level courses, see Covington, *The Pervasive Approach to Teaching Professional Responsibility: Experiences in an Insurance Course*, 41 U. COLO. L. REV. 355 (1969); Snyder, *Teaching Professional Responsibility in Tax Courses*, 41 U. COLO. L. REV. 336 (1969).

42. This problem is not identical but is closely related to the problem faced by an attorney who is asked to argue a position with which he or she is not in sympathy. Substantive law instructors frequently press students into advocating a position or taking a course of action on a hypothetical client's behalf without discussing whether the lawyer may decline to do so. Learning how to argue any side of an issue is an important part of a lawyer's education, but the forcing of students into the adversarial model without discussion works as an implied endorsement of the hired gun philosophy. Students emerge from the first year with the unspoken assumption that the pure adversarial model is the only proper one; a second or third year professional responsibility course comes too late to dispel this attitude or even to suggest that a lawyer has a choice regarding the clients he or she represents and the courses of action he or she pursues on their behalf. Some thought-provoking material has been authored on both sides of this issue. See, e.g., M. GREEN, *THE OTHER GOVERNMENT* 270-88 (1975); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHI. B. REC. 31 (1974).

The argument here is not that the instructor should suggest that the adversarial model is

students might discuss the ethical problems associated with representation of clients whose personal objectives may conflict with the law-reform goals of the attorney or the organization by which he or she is employed.⁴³ Even appellate moot court, a fixture in most first year curricula presents an opportunity to discuss the lawyer's obligations to avoid making a knowingly false statement of law or fact⁴⁴ and to inform a tribunal about legal authority adverse to his or her client's position that has not been disclosed by opposing counsel.⁴⁵

V. Problems Associated with the Pervasive Approach

The pervasive approach is not without its dangers.⁴⁶ One danger is "that students will simply lapse into dormancy or direct their attention to extraneous matters when professional responsibility problems are being discussed in class."⁴⁷ This problem brings to mind the following frequently cited student response to an attempt to introduce ethical concerns in a substantive course:

I remember last year Professor Curtis Berger walked in one day and said, "This is an ethical problem; how do you deal with it?" And half of the class was appalled at the waste of an entire class hour, and they told him so! So we had a make-up class as a result. Because we were talking about something that pertained to the lawyer's role in society, the class literally sat there and said, "You are wasting my time; I don't want to learn this. I want to learn concrete law." And I think that Professor Berger is the only one in any of my classes who has even questioned the fact that there was another side to law besides black letters.⁴⁸

While Professor Pipkin cites the above statement to demonstrate the ineffectiveness of the pervasive approach,⁴⁹ it may better demonstrate that students' perceptions about that which is and is not important in their legal education are developed very early in the first year of law school. Professor Berger's attempt to discuss an ethical problem is viewed by his students as a deviation from the norm, a digression from the "real" subject matter of course. Perhaps less student resistance would be encountered if the discussion of ethical con-

a bad one, but that to force students into the adversarial role without any discussion suggests that it is the *only* role. Thus, certain norms are imposed either subtly or unwittingly.

43. See ABA CODE, EC 5-23, DR 5-107(B); MODEL RULE 5.4(c).

44. ABA CODE, DR 7-102(A)(5); MODEL RULES 3.3(a)(1), 4.1.

45. ABA CODE, DR 7-106(B)(1); MODEL RULE 3.3(a)(3).

46. A summary of both positive and negative aspects of the pervasive approach can be found in Thode and Smedley, *supra* note 13, at 370-72. The discussion in the text touches upon some of the more prominent problems mentioned in the Thode and Smedley article.

47. Thode and Smedley, *supra* note 13, at 371.

48. Mohr and Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 409 (1973).

49. Pipkin, *supra* note 3, at 274-75 n.55.

siderations were seen as a regular component of each course. Professor Berger's problem may have derived from what Professor Roger Cramton calls the "Lone Ranger theory of legal education[.] . . . an implicit compact . . . among faculty members: 'You do your thing in your courses as long as I am permitted to do my thing in mine.'"⁵⁰ The pervasive approach is doomed to almost certain failure if this philosophy reigns.

Another danger associated with the pervasive approach is that it "tends to overload the pervaded course and require omission of substantive matters to which the student should be exposed."⁵¹ This should not be a matter of great concern, at least if law professors wish to remain true to their claim that the purpose of law school is not so much to teach black letter law as it is to teach students how to "think like a lawyer." For years, instructors have attempted to bring the analysis of economic, social and political forces to bear on the first year course material, while obviously sacrificing substantive coverage.⁵² The "Socratic" method likewise is a far less effective means of imparting substantive material than the lecture method, but nevertheless has been utilized as a vehicle for the development of analytical skills. Thus, sacrifices in substantive coverage have been made, and should be made, to accomplish more important goals.⁵³ Exposure to problems in professional responsibility certainly should rank as one of these goals. The discussion of ethical considerations provides an opportunity to add dimension to the substantive material and to demonstrate the manner in which ethical issues pervade the various areas of legal practice. To sacrifice such necessary discussion in the interest of substantive coverage would defeat a central purpose of legal education.

Another criticism of the pervasive method is that "[i]t places the burden of teaching professional responsibility on many teachers who are not sufficiently interested or experienced in this field to be able to deal with the problems effectively."⁵⁴ This objection suggests a very real problem in terms of resistance to instruction in professional responsibility not by students, but by academicians.

50. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 327-28 (1982).

51. Thode and Smedley, *supra* note 13, at 371. See also Woody, *supra* note 35, at 119.

52. Some commentators have suggested that far more could be done to bring the social sciences to bear on legal education. T. SHAFFER AND R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 126 (1977); Halpern, *On the Politics and Pathology of Legal Education*, 32 J. LEGAL EDUC. 383 (1982); Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38, 45.

53. Particularly fitting in this regard is Whitehead's reminder that "information doesn't keep any better than fish." Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 324 (1982).

54. Thode and Smedley, *supra* note 13, at 371. See also Woody, *supra* note 35, at 119, 125.

A June 1983 conference on teaching torts, sponsored by the Association of American Law Schools, may be viewed as an example of the way in which professional responsibility frequently is overlooked by academicians. The five-day program included presentations on computer use, research and publication, substantive coverage and the infusion of economics, jurisprudence, history, comparative and foreign law, social legislation and reform legislation into the torts curriculum.⁵⁵ Not a single item on the official program was devoted to issues of professional responsibility, nor did any of the featured speakers discuss the role of ethics, except for a few comments regarding professors as role models during one early session and a defense of contingent fees offered by a practitioner who spoke at the end of the program. Apparently the planning committee for this otherwise excellent conference, in its attempt to address the concerns of torts professors and to accommodate the interests of the distinguished conference faculty, could not find time on the schedule for a discussion of methods, or even the desirability, of infusing professional responsibility considerations into the torts curriculum.

A perhaps incomplete explanation for this is that torts professors, and in particular, those torts professors who have carved out reputations for themselves in the academic field, would prefer to spend their time on substantive or analytical areas in which they have developed special interests, however esoteric those areas might be to the ordinary law student. For example, an academician with an interest in economics would rather discuss the application of economic theory to tort law than get bogged down in the ethics of charging a contingent fee.⁵⁶ While the desire to master a given subject area and to produce scholarship of publishable quality is laudable, certainly some balance should be struck between these goals and the overriding goal of the law school: to train students to become competent, productive, ethical practitioners. Law school instructors, therefore, periodically should ask themselves whether they are sacrificing their students' professional development to cultivate narrower interests of their own.⁵⁷

55. Torts as Legal Education: A Conference on Teaching "the" Subject, Association of American Law Schools (June 5-10, 1983) (conference program).

56. Interestingly, an imaginative instructor with an interest in economics and professional responsibility might be able to link these two concerns. See, e.g., Schwartz and Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

57. This problem can affect the entire curriculum. Law professors, seeking to augment their knowledge of substantive detail, frequently endeavor to teach electives or to publish in narrow substantive fields, while shunning assignments to teach in basic, but vital, skill areas like legal research and writing, negotiation, advocacy and professional responsibility. At some law schools, skills courses are relegated to LL.M. candidates and nontenure track faculty. The result often is a curriculum that serves the narrow interests of the faculty more than the professional needs of the students and a latent curriculum hierarchy that transmits subtle

Certainly a law professor cannot be faulted for leading to his or her strength. A professor with expertise in economics, for example, might justify using an analytical course framework different from the one used by a former practitioner. Means remain, however, by which all legal educators can inculcate in their students an appreciation of ethical considerations in the study and practice of law. First, it requires no special expertise in the field of professional responsibility for an instructor occasionally to shift out of the adversarial mode to discuss problems in the context of the attorney's role as advisor and counselor.⁵⁸ Second, an instructor who is not particularly adept with ethical issues nevertheless should be able to identify such issues and to call them to the students' attention. For example, a professor may be disinclined to spend an hour or more of precious class time expounding on the strengths and weaknesses of the adversary system, the obligations of attorneys to their clients and to society, and the desirability of the "hired gun" mentality. When a student hesitates to advocate a particular legal position in class because she is not sympathetic to that position, however, the situation need not be ignored. Relevant comments may consist merely of the acknowledgment that lawyers often are faced with the prospect of arguing positions with which they are not in sympathy and that this is a very real problem which the student should consider, even though it will not be discussed at length in class. Thus, the professor does not work at cross purposes with his colleagues by ignoring the ethical issue entirely and implying that no ethical issue exists at all.⁵⁹

Third, all law teachers can make a serious effort to impress upon students the amount of care and discipline necessary to be a competent practitioner of law. In this regard, legal educators can lead best by example. To the extent that the "Socratic" method encourages daily preparation and precise thinking on the part of students, it may also help fulfill this goal. Law faculty should take care, however, not to confuse intellectual rigor with artificially created tension. Indeed, a further way in which all law faculty can foster professionally responsible attitudes is by demonstrating that a professional can disagree without being disagreeable and that a professor can stimulate without being offensive.

The tactics of intimidation in the law school classroom too often have been condoned on the premise that students should be hardened for the rigors of practice and that there is no room for shrinking

messages about the law school's real priorities. Again, Professor Cramton's comments regarding the "Lone Ranger" philosophy are apposite. See *supra* note 50 and accompanying text.

58. See *supra* text accompanying notes 40-41.

59. See *supra* note 42.

violets in the legal profession.⁶⁰ Even though rudeness and insensitivity do exist in law practice, law professors, as the first legal professionals encountered by many law students, are not justified in encouraging such conduct in future practitioners by harsh example. Because law professors serve as role models, they can and should set an example for professional conduct by displaying courtesy to their students.⁶¹ Professor Kingsfield's domineering approach may serve the dubious purpose of intimidating his students. It also might impress the people who vote for the Academy Awards. Such an approach, however, is unlikely to comfort a distraught client or to score points with a jury. Perhaps law faculty can best instill a professional attitude by treating students as a lawyer should treat a client; a client who ought to be prepared for trial, but a client nevertheless.

One final concern regarding the pervasive approach to teaching professional responsibility is that "[i]t makes for haphazard coverage of the field, since some kinds of problems will be dealt with repeatedly in different courses and other kinds of problems will be omitted completely."⁶² While admittedly a problem, overlapping coverage may be an advantage at times because it emphasizes the fact that certain ethical problems appear repeatedly and in a variety of contexts. Nor should the possibility of inconsistent treatment of various ethical issues by different members of the faculty be of serious concern. Indeed, one of the charms of the pervasive method is that it enables the student to look at controversial issues from a number of perspectives.

Nevertheless, unevenness of coverage remains a problem. Only the most delicately coordinated pervasive teaching program could cover adequately all the ethical problems with which one would hope to familiarize the law student.⁶³ A structure for a comprehensive curriculum in professional responsibility addressing this problem is suggested below.

VI. A Proposed Professional Responsibility Curriculum

The pervasive method is not a panacea for the problems of teaching professional responsibility. Rather, the pervasive approach should be seen as but one component of a broadly-based professional

60. See Griswold, *Dedicatory Address: The Vocation of a Law Center*, 29 OKLA. L. REV. 651 (1976); cf. Taylor, *supra* note 28, at 266-67 (acknowledging that stress may play "a useful part in preparing the law student for a career which is occasionally anxiety arousing, and which may contain distasteful elements").

61. One should remember that law professors are human beings, too, and occasionally will exhibit behavior that they will later regret. Such flare-ups should be distinguished from deliberate rudeness. Both types of behavior, however, fall short of the professional ideal.

62. Thode and Smedley, *supra* note 13, at 371.

63. A pervasive program that closely controls content and methodology also might impinge upon academic freedom. See Woody, *supra* note 35, at 125-26.

responsibility curriculum, which would be composed as follows:⁶⁴

1. Early in the first year of law school, students should receive instruction, through a series of lectures and assigned readings, about bar organization, types of law practice and the history, purpose and structure of the ABA Code of Professional Responsibility, the Model Rules of Professional Conduct⁶⁵ and other ethical codes.⁶⁶ Ideally, this instruction would take place during orientation to serve as a background for the discussion of ethical considerations in substantive courses and to impress the student that ethical considerations are important from the very first day. Detailed discussion about the application of ethical codes to particular problems would be deferred to other components of the program.

2. The pervasive method would be used to address problems in professional responsibility throughout the first year curriculum. This instruction could be co-ordinated by one or more faculty members with special expertise in the field; most of the teaching burden, however, would be borne by the substantive course instructors.⁶⁷ While special efforts would be used to integrate ethical considerations into the first year curriculum, the pervasive method would not be abandoned in upper level substantive courses.

3. An upper level required course in professional responsibility should be retained. Greater benefit could be derived from this course because (a) time need not be spent introducing students to bar organization and to the basic structure of ethical codes, and (b) student exposure to the pervasive approach during the first year would lessen resistance to the study of professional responsibility. More time could be spent in lengthy discussion of some of the more vexing ethical problems; the relaxation of time constraints would allow for the assignment of more readings regarding general ethical precepts and particularized applications. Ideally, the required course in professional responsibility would be taught in the second year as a back-

64. C.U.N.Y. Law School at Queens College has developed an innovative curriculum in which traditional courses have given way to an integrated approach, and the pervasive method plays a major role. While the Queens effort is a commendable one, the proposal set forth in this article does not require such a major overhaul of the curriculum. Rather, this proposal is tailored to fit the traditional law school curricular framework.

65. As the Model Rules gain acceptance, the "old" ABA Code would be of decreasing importance, and ultimately would be used in a historical context.

66. See, e.g., the American Lawyer's Code of Conduct (popularly known as the "ATLA Code"), the ABA Standards Relating to the Administration of Criminal Justice, and the ABA Code of Judicial Conduct.

67. While faculty members with special expertise may help coordinate instruction and serve as resources for their colleagues, many of the advantages of the pervasive method are lost if the substantive faculty relinquish the classroom to a "professional responsibility specialist" for discrete periods of time. Such periodic "ethics hours" are vulnerable to being viewed by students as weekly doses that cannot really count for much because, after all, the "real" professor is not there. Moreover, the variety of viewpoints afforded by the pervasive method also is lost when the "ethics expert" takes over the classroom.

ground for the fourth phase of the professional responsibility curriculum.

4. Clinical courses and courses involving simulation (for example, trial and appellate advocacy, negotiation and counseling courses) would heavily involve ethical considerations and other professional responsibility concerns. Ideally, all students would be required to participate in a clinic or simulation course in which ethical considerations would be applied to actual problems.⁶⁸

In this curriculum, no single course would bear the brunt of professional responsibility instruction. Rather than receiving a periodic dose of ethics, students would see a concern for ethics and professional responsibility throughout the curriculum. Professional responsibility would become as much a part of the lawyer's training as learning to brief and analyze cases, to make a convincing argument or to write persuasively. While no curriculum will make an ethical lawyer out of a person who, by his or her nature, is disinclined to become one,⁶⁹ the above curriculum has at its core the notion that early and frequent exposure to problems of professional responsibility will heighten students' sensitivity to problems and encourage recognition of the importance of ethical considerations.

VII. Conclusion

This article, of course, is not the last word regarding the instruction of professional responsibility. Hopefully, this proposal will serve as a springboard for further debate regarding efforts to inculcate an appreciation for ethical values in the practice of law. The time certainly has come for legal educators to take to heart Professor Brainerd Currie's admonition that "training for professional responsibility and for awareness of the role of law in society is not a matter that can be parceled and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time."⁷⁰ The foregoing proposal is submitted with this ideal in mind.

68. A requirement that all students participate in clinical offerings itself would pose an ethical problem. See ABA CODE, EC 2-30; MODEL RULE 6.2. Hence, the alternative is a simulation course with a heavy emphasis on ethical concerns.

69. See *supra* note 13.

70. Currie, *Law and the Future: Legal Education*, 51 Nw. U.L. REV. 258, 271 (1956).