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Teaching Legal Ethics

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TEACHING LEGAL ETHICS

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Teaching professional responsibility poses special challenges; so too, does writing about it. I have generally avoided the topic out of concern that advice might seem presumptuous or platitudinous, and that too much candor about prior follies might depress or discourage new entrants to the field. I can still recall a teaching workshop on legal ethics at which I and other battle-hardened veterans amused our audience with disasters we had aided and abetted. At one end of the spectrum were the death marches through moral philosophy—the functional equivalent of *Cliffs Notes* on Kant. At the other end were bar preparation courses for the Multistate Professional Responsibility Exam—legal ethics without the ethics. And in the middle were many valiant attempts to present real moral dilemmas and regulatory issues that bumped up against student resistance or constraints of classroom size and format. The impression created was that, like Tolstoy's unhappy families, all professional responsibility courses could be unhappy in their own way.

Such confessions may have been good for the soul and may have saved some members of the audience from replicating our own sins of omission and commission. But the net effect may also have been unduly dispiriting. The challenges of teaching professional responsibility are significant, but so too are the rewards. The questions at issue truly matter for the lives our students will live, the profession they will constitute, and the public they will serve. So helping each other teach this course well also matters. We have an opportunity to influence the ethical compass of those who will shape our legal, commercial, and policy settings. We owe it to them, to ourselves, and to the broader community to share and reassess our educational strategies. In that spirit, let me offer a few comments based both on my reading of the literature and on a quarter century's experience teaching with varied formats in schools with somewhat different cultures.

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I. OBJECTIVES

My goals for the course are ambitious, but not atypical. The first is to build understanding of the legal standards and regulatory processes governing lawyers' conduct.[1] A related objective is to help students recognize and analyze ethical issues in light of those standards and broader moral frameworks.[2] Future practitioners need to know where the lines are before they are in a position to cross one. But they also need to consider where the lines should be, and how they will address issues on which the profession's rules are ambiguous or leave ample room for discretion. Building students' capacity for reflective judgment should be a central objective of any course on professional responsibility.[3] Although no classroom setting can fully simulate the pressures of practice, students can be urged to consider recurrent ethical dilemmas against a realistic social backdrop in which peer pressures, client loyalties, financial considerations, and moral convictions may tug in different directions. There is something to be said for having future practitioners confront such questions before they have a vested interest in coming out one way rather than another.

To promote informed analysis, some introduction of interdisciplinary perspectives can be useful. An understanding of the logic and limitations of professional regulatory structures requires a corresponding understanding of market failures, bar politics, and the difficulties of collective action.[4] An evaluation of standards governing confidentiality, client loyalty, and related issues can proceed at a more sophisticated level if students have some

1. *See* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 362–65 (1998) [hereinafter Green, *Less is More*]; Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091 (2007).

2. Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for a Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1339–41 (1992); Douglas N. Frenkel, *On Trying to Teach Judgment*, 12 LEGAL EDUC. REV. 19, 31 (2001); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409 (1998).

3. Croft, *supra* note 2, at 1341; Robert Granfield & Thomas Koenig, "*It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 520 (2003); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 39 (1995).

4. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 728–29, 777 (4th ed. 2004); David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 206 (2004); Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 433 (2001); Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 160–61 (1997).

familiarity with the central traditions of moral reasoning.[5] The challenges of ethical decision-making become clearer if students have some exposure to cognitive bias, organizational culture, situational influence, and additional emotional and psychological factors that can impair judgment.[6] Although no single course can do justice to all of this material, some basic insights on selected issues can enrich coverage.

For example, recent financial scandals can be the occasion for exploring both the psychological predispositions and organizational pathologies that contribute to fraud. These include both lawyers' and clients' tendencies toward overconfidence and the suppression of dissonant information.[7] An escalation of commitment to choices that turn out to be wrong, either factually or morally, can lead to ever more dubious conduct.[8] In organizational contexts where responsibility for a final decision is diffused, and financial and peer pressure work against questioning client choices, the result may be the moral meltdowns recently on display in Enron et al.[9] Enabling students to recognize the cognitive and structural forces that compromise moral judgment may inform their individual decision-making. It may also assist them as advisors, regulators, and policy makers in designing institutional checks and balances that will address those compromising influences.

5. See, for example, the overview of utilitarian, deontological, and virtue-based theories and their application to legal ethics issues in RHODE & LUBAN, *supra* note 4, at 8–12, 389–403.

6. For an overview of the literature on cognitive bias, see Michael B. Metzger, *Bridging the Gaps: Cognitive Constraints on Corporate Control & Ethics Education*, 16 U. FLA. J.L. & PUB. POL'Y 435 (2005); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317 (2006). For organizational culture, see generally the sources cited in ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988); RHODE & LUBAN, *supra* note 4, at 429–57; John M. Darley, *How Organizations Socialize Individuals into Evildoing*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 17 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Rhode, *supra*. For situational influences, see LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 42–49 (1991). For the role of emotions in moral behavior, see Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 817–18 (2001); Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 671–74 (2004).

7. Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition:* Corporate Irresponsibility *and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 971 (2002); David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9, 19 (1996); Metzger, *supra* note 6, at 478–79, 493.

8. *See* Darley, *supra* note 6, at 21.

9. John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1186–87 (2005); David Luban, *Making Sense of Moral Meltdowns*, *in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 57, 69–73 (Deborah L. Rhode ed., 2006); Deborah L. Rhode, *Where Is the Leadership in Moral Leadership*, *in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 1, 27–30 (Deborah L. Rhode ed., 2006).

A final objective of many professional responsibility courses, my own included, is to encourage future lawyers to think more deeply about the kind of life they want to lead, the profession they want to serve, and how both can contribute to their vision of a just society.[10] For some students, this will be their only classroom opportunity to consider how future choices about jobs, clients, public service, and social responsibility will match the values that sent them to law school in the first instance.[11] A wide range of materials can assist that reflective process, such as descriptions of the conditions of practice, the urgency of problems related to access to justice, the rewards of pro bono work, and the career paths of exemplary lawyers. Surveys of young attorneys consistently find that their greatest dissatisfaction with their professional work is its lack of connection to the social good.[12] Getting new entrants to the bar to think systematically about how to mesh their principles with their practice is one step toward addressing that frustration.

Considerable evidence also indicates that a growing number of professionals would like a better work/life balance and would be happier with a different trade-off between income and hours than that now prevailing in many practice settings.[13] Excessive work demands are a major cause of physical and mental health difficulties and related performance problems, as well as inadequate time for pro bono work.[14] An informed discussion of these issues may encourage students not to settle, at least not in the long run, for a

10. Cramton & Koniak, *supra* note 4, at 159–60; Gregory A. Kalscheur, S.J., *Law School as a Culture of Conversation: Re-imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation*, 28 LOY. U. CHI. L.J. 333, 363–64 (1997); Howard Lesnick, *Being a Teacher, of Lawyers: Discerning the Theory of My Practice*, 43 Hastings L.J. 1095, 1101 (1992); Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583, 591–92 (1998).

11. *See* Granfield & Koenig, *supra* note 3, at 498.

12. *See* AM. BAR ASS'N YOUNG LAW. DIV., CAREER SATISFACTION 21, *available at* http://www.abanet.org/yld/satisfaction_800.doc (last visited May 20, 2007).

13. A variety of authors have noted the evidence provided by surveys. *See* SUSAN SAAB FORTNEY, IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 17 (2005) (noting that over seventy percent of supervised attorney respondents reported moderate to major problems in finding time for family needs and other non-work activities); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 26 (2000) [hereinafter RHODE, IN THE INTERESTS OF JUSTICE]; Jonathan Clements, *Money and Happiness: Here's Why You Won't Laugh All the Way to the Bank*, WALL ST. J., Aug. 16, 2006, at D1; Stephanie Francis Ward, *the Ultimate Time-Money Trade-Off*, ABA J., Feb. 2007, at 24; Daniel Kahneman et al., *Would You Be Happier if You Were Richer? A Focusing Illusion*, 312 SCIENCE 1908, 1910 (2006); Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207, 2208, 2212 (2002) [hereinafter Rhode, *Balanced Lives*].

14. For health difficulties, see FORTNEY, *supra* note 13, at 25–27; Rhode, *Balanced Lives*, *supra* note 13, at 2208–09. For the impact of billable hour quotas on pro bono work, see DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 132–35 (2004).

practice setting that leaves too little time for family, friends, and causes to which they are committed. Making future practitioners more aware of how different legal employers accommodate family and pro bono commitments and how those accommodations affect lawyers' satisfaction may help build support for workplace reform.

Not all of these objectives can be fully realized in any single course. Professors will make different choices about where to concentrate attention and what trade-offs to make between depth and breadth. But this agenda identifies the range of issues that schools should aim to address somewhere in their professional responsibility curricula.

II. CHALLENGES

How often legal ethics courses succeed with an ambitious agenda is anyone's guess, but a safe answer is probably much less often than their professors would like. The consensus among experts in professional responsibility is that courses in the subject are among the most difficult to teach.[15] There are a number of reasons why, and the problems are not all readily surmounted.

The first involves a mismatch between institutional resources, student expectations, and faculty aspirations.[16] A threshold difficulty is that most schools meet accreditation standards requiring instruction in professional responsibility through a single upper-level mandatory course.[17] Some schools provide insufficient units, curricular choices, or manageable class sizes to minimize student resistance and reinforce the importance of the topic. After the first year, students expect electives, and a required class in a subject they may not want with a professor they would not choose is bound to evoke some backlash.[18] As Stephen Gillers notes, those with little experience in the legal world they are about to inhabit may fail to see the personal relevance or market value of professional responsibility courses.[19] The problem is compounded by the skepticism that many students bring to discussions about ethics in general

15. Stephen Gillers, *"Eat Your Spinach?"*, 51 ST. LOUIS U. L.J. 1215, 1219 (2007); Frenkel, *supra* note 2, at 22; Luban & Millemann, *supra* note 3, at 38; Green, *Less is More*, *supra* note 1, at 358; Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 457, 459–60 (1998); Cramton & Koniak, *supra* note 4, at 146–47; William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65 (1991).

16. Cramton & Koniak, *supra* note 4, at 147–48; Luban & Millemann, *supra* note 3, at 38–39.

17. The ABA's accreditation standard requires instruction in "the history, goals, structure, values, rules, and responsibilities of the legal profession and its members." ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(5) (2006).

18. *See* Gillers, *supra* note 15, at 1219.

19. *Id.*; *see* Frenkel, *supra* note 2, at 23 (discussing student resistance generally).

and legal ethics in particular. As educators have long noted, law schools' reliance on quasi-Socratic teaching tends to foster a cynical or relativist response to moral issues.[20] The strong message is that "there is always an argument the other way, and the Devil usually has a very good case."[21] This stance makes some students especially skeptical about the value of classroom discussion of values. If everyone's position has a plausible counter position, what is the point of debate? To the most cynical observers, the bar's requirements of ethics instruction and a muliti-state ethics exam seem designed mainly to shore up the profession's public image and should be satisfied with the least effort possible.[22]

These students are predisposed to view any classroom agenda, beyond preparation for the bar exam, as a waste of time. They start the course interested only in the law of lawyering that examiners test.[23] At least initially, they resist attempts to raise issues of personal values and professional identity. They do not want to hear their classmates mouthing off about "mushy pap."[24] Nor are all students interested in a candid discussion of moral ambiguity or the dark side of practice. Ethical uncertainty is an uncomfortable state.[25] And those who have already committed to a particular practice setting may not welcome rain on their parade.[26] Their response to the introduction of disquieting messages may be to shoot the messenger. Even those students who are less resistant to the subject matter may lack sufficient experience with legal practice to engage in the contextual analysis necessary for informed ethical decision-making.

So too, some professional responsibility teachers may be uncomfortable initiating value-laden discussions in which they have no special legal expertise. Many faculty are understandably wary of appearing to pontificate from the podium or to denigrate a practice structure that their students are at pains to enter. As William Simon notes, "Ethics teachers in professional schools worry about their credibility with students. Their students aspire to be practitioners. The teachers do not . . . [and] their knowledge of the circumstances of practice

20. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 262 (1978); Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 878–79 (1985); Alan Hirsch, *The Moral Failure of Law Schools*, WASH. L. & POL., June 1998, at 29; Stewart Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar*, 32 J. LEGAL EDUC. 506, 523–25 (1982).

21. Macaulay, *supra* note 20, at 524.

22. Cramton & Koniak, *supra* note 4, at 151–53.

23. *Id*. at 153–54.

24. *Id*. at 145; *see also* Frenkel, supra note 2, at 23–24.

25. *See* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73–83 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1976) (providing some of the classic accounts of lawyers' discomfort with an unsettled moral universe).

26. RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 13, at 203.

is limited . . . .[27] Other professors are skeptical about the ability of any single course to affect values that may already be well developed by the time individuals reach law school. Even faculty who would like to engage deeper moral questions may find themselves with a class too large to encourage candid dialogue on these issues.

Yet professors who avoid these problems by teaching to the bar exam often end up disappointing themselves and the great majority of their students. The reasons are rooted in the design of the exam and emerged clearly in a panel discussion I once had with one of its architects. In response to concerns that the test's multiple choice format trivialized ethical issues, he explained that the only affordable alternative was worse.[28] The essay questions that preceded the multi-state format and focused on important questions failed to yield a curve. Virtually all bar applicants took the moral high road.[29] By contrast, a multiple choice exam could test knowledge of more obscure rules and frame possible answers in ambiguous or counter-intuitive ways, so that a critical mass of poorly prepared candidates would fail.[30]

To allow bar exams to dictate the agenda of professional responsibility courses would exclude much that is important in the field. On many key issues, bar ethical rules are silent, ambiguous, or permissive.[31] For example, under the ABA's Model Rules of Professional Conduct, lawyers have discretion whether to disclose confidential information to prevent criminal or fraudulent acts, whether to withdraw from representation that has become repugnant, and whether to raise moral, political, or social concerns when counseling clients.[32] Knowledge of what the rules say can only begin, not end, analysis of how discretion should be exercised. Nor do the rules give adequate guidance on what constitutes "competent" representation or "reasonable" fees; much depends on context, and requires a far more nuanced analysis than is necessary or even helpful for passing the bar exam.[33] So too, a large part of the law of lawyering is determined not by bar ethical standards, but by criminal and civil statutes, malpractice doctrine, judicial sanctions, and agency

27. William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985 (2006).

28. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 41 (1992).

29. *Id.*

30. Of course, whether such a screening strategy excludes applicants who are most likely to cause ethical problems is another matter. Few bar disciplinary actions or justifiable client complaints stem from ignorance of relevant rules; most involve felonies, misappropriation of funds, and egregious performance issues that are rooted more in behavioral and office management problems than lack of knowledge of bar ethical standards. RHODE & LUBAN, *supra* note 4, at 825–27, 836.

31. RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 13, at 201.

32. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.16, 2.1 (2007).

33. *See id.* at R. 1.1, 1.5.

regulations that are beyond the scope of the exam.[34] Also excluded by that test are an entire range of critical policy questions, such as how to improve professional regulatory structures, increase access to justice, and encourage pro bono service.

The evolution of the bar's code of conduct over the last century toward a more legalistic formulation also has made it less useful in socializing new entrants to the highest standards of professionalism. Unlike its predecessors, the ABA's Model Rules of Professional Conduct include little by way of ethical aspirations.[35] Limiting a course in professional responsibility to statutory analysis of the Model Rules is bound to be dispiriting, particularly in contexts where the Rules are more responsive to professional than public interests.[36] As David Luban and Michael Millemann put it, if a teacher "tries to draw her [standards] of professionalism from a de-moralized code, she is almost certain to become demoralized."[37] The same is obviously true for students.[38]

Related challenges come from colleagues, who often view the field as an intellectual backwater, which traps participants in a misconceived mission. Judge Richard Posner puts a common assumption with uncommon candor: "As for the task of instilling ethics in law students at . . . law schools, I can think of few things more futile than attempting to teach people to be good."[39] Yet this characterization both overstates the objectives of professional responsibility courses and understates their influence. I have never encountered anyone in

34. Cramton & Koniak, *supra* note 4, at 174; Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 110 n.5 (1996).

35. The ABA's 1969 Code of Professional Responsibility included Ethical Considerations along with Disciplinary Rules. *See* Luban & Millemann, *supra* note 3, at 44. The ABA's Canons of Ethics were entirely aspirational. *Id.* They functioned as guidance to judicial and disciplinary bodies but had no legally binding force; unlike their successors, they were never promulgated as court rules by state supreme courts. *Id.* For a defense of this evolution, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1258 (1991); Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS'N BAR CITY N.Y. 77, 84–85 (1981).

36. *See generally* RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 13, (discussing these contexts).

37. Luban & Millemann, *supra* note 3, at 58.

38. As Cramton and Koniak note, exposing students to "pedestrian and unchallenging instruction," like that of bar preparation courses, may induce the kind of moral indifference that the legal ethics requirement is designed to counteract. Cramton & Koniak, *supra* note 4, at 154; *see also* Frenkel, *supra* note 2, at 24 (noting that focus only on codes "tends to produce a stultifying classroom.").

39. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1924 (1993). For similar views, see Gillers, *supra* note 15; Peter Steinfels, *The University's Role in Instilling a Moral Code Among Students? None Whatever, Some Argue*, N.Y. TIMES, June 19, 2004, at A13 (quoting Stanley Fish's comment to his university colleagues that "You can't make . . . [students] into good people and you shouldn't try").

the field of professional ethics who describes the goal of his or her course as "teaching people to be good." Nor does the evidence available suggest that the less grandiose objectives noted earlier, of making students more informed and reflective about professional responsibilities, are beyond the capacities of law school curricula. Research on ethics education finds that individuals' moral views and strategies change significantly during early adulthood and that well-designed courses can improve capacities for moral reasoning.[40] Many crucial professional responsibility issues involve tradeoffs among competing values in contexts that students will not have considered prior to law school. And many important bar regulatory issues call on conventional techniques of policy analysis that are not distinctive to courses on ethics.

Can students be convinced? In my experience, most of them most of the time, with the help of strategies such as those outlined below. Many graduates also wish their law school classes had given them more help in resolving the difficult ethical issues that confront them in practice.[41] There is, moreover, something to be said for giving students what they will need as lawyers, whether or not it is what they want in law school. But teachers of professional responsibility also need approaches that will reduce resistance. The success of their courses will depend on how they are taught, what choices are available to students, and how the subject is viewed in the academic culture. Let me close with some concrete strategies for meeting the challenges that teaching professional responsibility presents.

III. STRATEGIES

Effective education in professional responsibility requires attention not only to courses specializing in that subject, but also to their institutional context. In an ideal world, the topic would be integrated throughout the core curriculum and given focused attention in a range of upper-level courses, particularly clinics. Students are much more likely to take the subject seriously if other professors do so as well and discuss ethical issues in the context of their own fields of expertise.[42] Students pick up messages from what is

40. See sources cited in RHODE & LUBAN, *supra* note 4, at 996–1005; Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 734 (1998).

41. Granfield & Koenig, *supra* note 3, at 519–20.

42. For the argument for curricular integration, see RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 13, at 203; Rhode, *supra* note 28, at 50–53. How often this occurs is open to question. For a discussion of faculty resistance, see Gillers, *supra* note 15, at 1216–17; Marjorie L. Girth, *Facing Ethical Issues with Law Students in an Adversary Context*, 21 GA. ST. U. L. REV. 593, 597 (2005). For a discussion of law schools' failure to give ethical issues the importance it deserves, see Cramton & Koniak, *supra* note 4, at 146–48, 155–59; Pearce, *supra* note 40, at 720. By contrast, about "three-fourths (76%) of students indicated their school emphasized to a

missing or marginal in the core curriculum. Professional responsibility courses are less likely to be regarded as a diversion from what is really important if the subject is treated with respect by the faculty as a whole.

It is equally important to give students some choice in satisfying the professional responsibility requirement. Resistance to an upper-level mandatory course is less likely if various options are available, including courses that situate ethics in particular substantive areas, such as tax, business, family, criminal, poverty, or public interest practice.[43] These courses can add depth and relevance for students who have identified the field where they are likely to specialize.

One especially effective approach is to link professional responsibility with clinical courses or externships. The best way to improve ethical judgment is generally through engagement with real problems, involving real clients. As Luban and Millemann note, moral decision-making involves more than knowledge of relevant rules and principles; it also demands a capacity to understand how those rules apply and which principles are most important in concrete settings.[44] Clinics and externships can provide the kind of experiential knowledge and guided reflection that are conducive to adult learning, particularly on ethical issues.[45] When cases involve clients from disadvantaged backgrounds, students can gain cross-cultural competence and direct understanding of how the law functions or fails to function for the have-nots.[46] Such exposure brings home the urgent need for pro bono service and greater access to justice in a way that abstract discussion cannot. Although clinics and externships necessarily address ethical issues that arise in placements, not all clinical teachers or practice supervisors have the time,

substantial degree the ethical practice of the law." LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LSSSE 2004 OVERVIEW 4 (2004), *available at* http://lssse.iub.edu/pdf/lssse_2004_overview.pdf.

43. For a discussion of various ways that legal ethics has been incorporated into the law school curriculum, see DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998); Girth, *supra* note 42, at 596–97.

44. Luban & Millemann, *supra* note 3, at 39.

45. Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLINICAL L. REV. 1, 23–25 (1998); Hartwell, *supra* note 40, at 522–28 (1995); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 81 (1997) [hereinafter Moliterno, *Legal Education*]. For a discussion of the value of clinics in teaching legal ethics, see, for example, Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 692–96 (1996); Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35 (2004); Lerner, *supra* note 6, at 694–95; O'Sullivan et al., *supra* note 34; Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996). For a discussion of the linkage to externships see Lerman, *supra* note 15, at 485; Moliterno, *Legal Education*, *supra*, at 107–17; James E. Moliterno, *Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum*, 39 WM. & MARY L. REV. 393, 402–03 (1998).

46. *See* Jane Harris Aiken, *supra* note 45, at 24–27.

interest, and expertise to provide comprehensive coverage. Linking a professional responsibility course to a clinic, or building in additional units to focus on core topics, may be necessary to ensure systematic treatment regardless of what happens to surface in a given semester.

Of course, not all law schools will have sufficient faculty resources to provide most professional responsibility instruction through clinical opportunities or specialized "ethics and . . ." courses. When most students will satisfy their requirement in a professional responsibility survey course, it is helpful if they have some choice among instructors and format. It is also desirable to avoid large classes. Candid discussion on personal, value-laden issues becomes increasingly difficult once enrollment gets over a certain size. But whatever the size, student engagement is likely to be greater if the course includes exercises involving hypothetical problems, role simulations, and breakouts into small groups.[47] Although these exercises lack the immediacy provided in clinics or externships, they permit more systematic, sequential coverage of a wider range of issues for larger numbers of students.[48] As experts have long recognized, such interactive approaches are more effective than pure lectures in promoting sustained learning.[49]

Other materials are also helpful in supplementing a basic textbook. Clips from movies, television, and filmed vignettes can be effective in providing context and catalysts for class discussion, and their vividness is likely to enhance attention as well as retention.[50] Literary portraits can also push conversations to a deeper level and invite students to bring non-legal perspectives to issues that have relevance for legal practitioners.[51] For

47. Lerner, *supra* note 6, at 695–96.

48. *See* Girth, *supra* note 42, at 604; *see also* Moliterno, *Legal Education*, *supra* note 45, at 107–17 (discussing the use of simulations); Morgan, *supra* note 2, 413–19 (1998) (discussing the value of problems).

49. See the literature summarized in DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS AND ACADEMIC CULTURE (forthcoming 2007); Hartwell, *supra* note 40. For one of the early, classic accounts, see Carl R. Rogers, *Toward a Theory of Creativity*, 11 ETC: A REV. OF GEN. SEMANTICS 249, 256 (1954) (noting that the only learning that really sticks is that which is self- discovered).

50. John Batt, *Law, Science and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 J. LEGAL EDUC. 19 (1990); Frenkel, *supra* note 2, at 36; Videotape: Stephen Gillers Adventures in Legal Ethics (N.Y.U School of Law 1994) (on file with the Saint Louis University Omer Poos Law Library) (including a wide range of well-done scenarios); *see also* Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1 (2000) (pointing to television, film, and literature as sources of discussion topics).

51. For a discussion of the value of narrative in legal ethics education and a wide range of examples, see Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2001). For a discussion of the value of literature as an educational strategy more generally, see ROBERT COLES, THE CALL OF STORIES:

example, Leo Tolstoy's *Death of Ivan Ilych* and Margaret Edson's Pulitizer Prize winning play, *W;t*, offer portraits of dying professionals—a lawyer and an academic—who look back on their lives and are not happy with the conventional ambitions that they have pursued.[52] Though both works can make for painful reading, they bring home in powerful ways the importance of thinking, at the beginning of a career, what would seem valuable at the end. A similar message comes through from Kazuo Ishiguro's *The Remains of the Day*, a moving account of a butler's professional role and moral compromise, which has generated a rich secondary legal literature.[53] A more uplifting narrative is Robert Bolt's *A Man for All Seasons*. It offers a heroic profile of Sir Thomas More, a lawyer willing to die for his principles, surrounded by others prepared to trade their integrity for personal advance.[54] Excerpts from films of these works can supplement or substitute for readings.

Case histories and biographies can similarly supply the kind of thick description that enriches understanding of professional roles. *Legal Ethics Stories* offers rich narratives on a range of well-known cases.[55] Celebrated securities scandals including National Securities Marketing and Enron have generated novels, documentaries, and accompanying teaching materials that vividly demonstrate the cognitive biases and organizational pathologies noted earlier.[56] By contrast, profiles of professional courage by American lawyers,

TEACHING AND THE MORAL IMAGINATION (1989); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990); JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS (1994); James Boyd White, *Teaching Law and Literature*, 27 MOSAIC 1 (1994). For a collection of short stories that are relevant to legal ethics, see LAWRENCE J. FOX, LEGAL TENDER: A LAWYER'S GUIDE TO HANDLING PROFESSIONAL DILEMMAS (1995). For a symposium on stories relevant to legal ethics, see Symposium, *Case Studies in Legal Ethics*, 69 FORDHAM L. REV. 787 (2001).

52. LEO TOLSTOY, THE DEATH OF IVAN ILYCH (Ann Pasternak Slater trans., Random House, Inc. 2003) (1886); MARGARET EDSON, W;T (1999).

53. KAZUO ISHIGURO, THE REMAINS OF THE DAY (1989); *see* Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of* The Remains of the Day, 105 YALE L.J. 177 (1995) (discussing *The Remains of the Day*); David Luban, *Steven's Professionalism and Ours*, 38 WM. & MARY L. REV. 297 (1996) (same); W. Bradley Wendel, *Lawyers and Butlers: The* Remains *of Amoral Ethics*, 9 GEO. J. LEGAL ETHICS 161 (1996) (same).

54. ROBERT BOLT, A MAN FOR ALL SEASONS (1962). For a description of how to present character-related lessons from literary portraits such as *A Man for All Seasons*, see JOSEPH L. BADARACCO, JR., QUESTIONS OF CHARACTER: ILLUMINATING THE HEART OF LEADERSHIP THROUGH LITERATURE 142–59 (2006).

55. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS STORIES (2006).

56. For a discussion of the National Student Marketing scandal, see ARTHUR R. G. SOLMSSEN, THE COMFORT LETTER (1975), which was discussed in Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's* The Comfort Letter, 69 FORDHAM L. REV. 1111, 1113–21 (2001). For a discussion of the Enron scandal, see ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004); BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003).

such as John Adams, Charles Houston, Abraham Lincoln, and Thurgood Marshall, can provide positive models of moral decision-making, and in forms more nuanced and memorable than conventional analytic approaches.[57]

Similar payoffs may come from integration of interdisciplinary and practitioner perspectives. Materials and experts from business, medical, journalistic, or engineering ethics give students a window into their own profession and frequently serve to jog otherwise unchallenged assumptions on issues like confidentiality, conflicts of interest, and third-party responsibilities. Courses that combine students and faculty from different disciplines offer particularly valuable settings to explore cross-cutting ethical concerns and prepare participants for an increasingly multidisciplinary legal landscape.[58] Visitors from practice can also be excellent if they are candid and self-reflective and if they prepare something beyond war stories. Involving them as participants rather than lecturers can minimize the risks of turning the course into Anecdote 101.[59]

Strategies for encouraging adequate class preparation are also important. Unlike other more technical subject matter, which cannot be understood unless students have done the reading, ethical issues are relatively accessible. This has the obvious advantage of permitting broad class participation, but the equally obvious disadvantage of reducing students' incentives to prepare. The problem is compounded if professors compensate by summarizing the assigned materials. A more effective option can be to require short weekly reflection papers in lieu of an exam. If the class is a manageable size, professors can comment on these papers on a regular basis. Alternatively, students can form teams and comment on each others' papers. At the end of the semester, the

57. For a discussion of Thurgood Marshall, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 219–24 (Vintage Books 2004) (1975); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994). For a discussion of Charles Houston, see Genna Rae McNeil, *Charles Hamilton Houston: Social Engineer for Civil Rights*, *in* BLACK LEADERS OF THE TWENTIETH CENTURY 221–39 (John Hope Franklin & August Meier eds., 1982). For other examples, including discussions of Hamilton and Lincoln, see Hazard, *The Future of Legal Ethics*, *supra* note 35, at 1243–45. For a discussion of the courage of southern judges in implementing civil rights decisions, see JACK BASS, UNLIKELY HEROES (1981). For a discussion of the value of modeling virtue through example, see ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981).

58. For examples of such approaches, see Erin A. Egan, Kayhan Parsi & Cynthia Ramirez, *Comparing Ethics Education in Medicine and Law: Combining the Best of Both Worlds*, 13 ANNALS HEALTH L. 303, 316 (2004); Girth, *supra* note 42, at 612–14; David B. Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241 (1995).

59. For a description of a systematic effort to involve the organized bar, see Lois R. Lupica, *Professional Responsibility Redesigned: Sparking a Dialogue Between Students and the Bar*, 29 J. LEGAL PROF. 71 (2005).

professor can then read each student's file or a selected sample of the papers. Needless to say, that is a time-consuming process and will not work if the class is too large. But the advantage is that it produces a better quality of discussion throughout the semester and rewards the students who take the material seriously.

Finally, we could do more to assess the effectiveness of our teaching strategies. Course evaluations at the end of the semester give relatively little information about how well we are preparing graduates for the issues they will confront in practice. Law schools have done far too little to address the large knowledge vacuum about the legal profession they launch.[60] Our educational approaches could benefit from systematic research, or even informal surveys of alumni or continuing legal education participants, about what has been or would be most useful from professional responsibility courses.

One central paradox in teaching those courses is that if our strategies have been at all successful, students may end up with more questions than they had when they began. That is not why they came to law school. But it is unavoidable in professional responsibility classes that focus on the ethical questions most worth discussing, where there are strong competing values and interests at issue. On those questions, there may be no single "right" answer, but some are more right than others. A central goal of the course is to help students reason about those issues in ways that are responsive to the full range of relevant concerns and opposing views.

Another strategy, and a point on which the course can close, is to remind future practitioners of the opportunities and obligations that come with membership in a largely self-regulating profession. Lawyers have considerable power over the terms of their own practice and a range of ways to leave the world slightly better than they found it. The same is, of course, true of law professors, especially those who teach legal ethics. The nature of the subject matter imposes special obligations on faculty to consider whether they are modeling the principles they preach in their professional conduct and public service.[61] This, of course, adds to the challenges for professors who are

60. *See* David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76 (1999); Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 26 (1999). For two of the only published studies of graduates' responses to questions about professional ethics education, see Granfield & Koenig, *supra* note 3; James E. Moliterno, *Professional Preparedness: A Comparative Study of Law Graduates' Perceived Readiness for Professional Ethics Issues*, 58 LAW & CONTEMP. PROBS. 259 (1995).

61. As Cramton and Koniak put it, "Do we mouth principles or mean them?" Cramton & Koniak, *supra* note 4, at 193; *see also* Lerman, *supra* note 15, at 479; Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3 (1991). For a representative summary of appropriate practices, see *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, *in* ASSOCIATION OF AMERICAN LAW SCHOOLS, 1997 HANDBOOK 89–94 (1997). For discussion of how faculty

already taking on a difficult teaching task. But students pick up messages in subtexts as well as texts, and faculty members' own commitments inevitably become part of the educational process. Those who profess on professional responsibility have a special responsibility to inspire students and each other to live up to their own best sense of what legal ethics requires.

too often fall short, see Deborah L. Rhode, *The Professional Ethics of Professors*, 56 J. LEGAL EDUC. 70 (2006). For faculty members' pro bono responsibilities, see RHODE, *supra* note 14, at 169–71; David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58 (1999).