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Legal Ethics Must Be the Heart of the Law School Curriculum Symposium: Recommitting to Teaching Legal Ethics- Shaping Our Teaching in a Changing World

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LEGAL ETHICS MUST BE THE HEART OF THE LAW SCHOOL CURRICULUM

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Despite what seems to be far greater attention paid to the teaching of legal ethics than to any other law school subject,[1] legal ethics remains no better than a second class subject in the eyes of students and faculty.[2] This essay suggests that all efforts at innovation in legal ethics teaching are doomed to a marginal impact at best. Only recognition that legal ethics is the most important subject in the law school curriculum[3] will lead to real and significant changes in the teaching of legal ethics.

If the commitment of the legal profession and of legal academia to producing ethical lawyers[4] is genuine, legal ethics must be the most important subject in the curriculum. Properly taught, ethics courses should provide the lens through which students view what it means to be a lawyer and discover how to find meaning in their work.[5] From a pragmatic perspective as well, legal ethics is the only subject in law school "which every student [who becomes a lawyer] will encounter in practice."[6] This recognition of the significance of teaching legal ethics would require far-reaching revision of the law school curriculum.

First, in contrast to most law schools where legal ethics is an upper

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1. For examples of the voluminous literature devoted to the topic, see the articles on *Rethinking the Teaching of Legal Ethics* in this volume of *The Journal of the Legal Profession*, which is based on this past year's Section of Professional Responsibility program at the annual AALS meeting; *Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 1 (Summer/Autumn 1995) (Thomas B. Metzloff & David B. Wilkins, eds.); and Report of the Professionalism Committee of the ABA Section of Legal Education and Admissions to the Bar, *Teaching and Learning Professionalism* (1996) [hereinafter *Teaching and Learning Professionalism*].

2. Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 724-25 (1998) [hereinafter Pearce, *Teaching*]. In this piece, I first developed a number of the themes I discuss in this essay.

3. *See generally id.*

4. *Id.* at 721-22 (observing that "[a] fundamental commitment to high ethical standards pervades professional rhetoric").

5. *Id.* at 736 (noting that legal ethics courses "establish[] the foundation for the vital decisions that students will have to make regarding how they will live their lives as lawyers").

6. *Id.* at 735-36.

class course sometimes of only two credits,[7] legal ethics would have to be a first year course of at least three credits to make clear to students and faculty that ethics is a fundamental component of what it means to think like—and to be—a lawyer.[8] While the ethics rules are an essential aspect of such a course, it cannot resemble "Simon Sez" with an exclusive focus on developing facility with the rules. The rules must be taught in the context of their purpose and history. They must be placed in the framework of lawyers' central role in how society distributes justice and maintains order. This consideration must include both an explanation of how the doctrine of professionalism provides the basis for lawyers' privilege to practice law and develop ethics rules for themselves,[9] together with the many critiques of professionalism.[10] It further must explore the dominant conception of the lawyer as advocate, together with alternative perspectives on the lawyer's role.[11]

Second, while most law schools today require only one ethics course,[12] the curriculum would have to require an advanced course in legal ethics in the second or third year.[13] An advanced course would build on what students learned in the first year, emphasize that ethics remains central throughout their studies, and enable students to integrate a broad conception of ethics into their assessment of their practice experiences as students and their formation of their self-image as a practitioner in the particular field they will pursue after graduation.[14] One pos-

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7. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147 (1996) (noting that "[i]n most law schools today legal ethics occupies a minor academic role as a one- or two-credit required course in the upper-class years, often taught by adjuncts or by a rotating group of faculty conscripts"); *Teaching and Learning Professionalism*, *supra* note 1, at 40-41 (finding that only 23% of law schools required a three-credit legal ethics course).

8. Pearce, *Teaching*, *supra* note 2, at 736.

9. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238-42, 1245 (1995) [hereinafter Pearce, *Professionalism*].

10. *See*, e.g., Pearce, *Professionalism*, *supra* note 9, at 1276 (advocating rejection of professionalism); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 16-22 (2000) (proposing reform of professionalism).

11. *See, e.g.*, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS ETHICS (1990) (arguing for advocacy); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (arguing for advocacy); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCHOOL ROUNDTABLE 381 (2001) (describing history of governing class approach); DAVID LUBAN, LAWYERS AND JUSTICE (1988) (urging moral activist perspective); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) (urging moral activist perspective); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (suggesting a feminist perspective); Russell G. Pearce, *The Religious Lawyering Movement: An Emerging Force In Legal Ethics and Professionalism*, 62 FORDHAM L. REV. 1075 (1998) (providing overview of religious perspectives).

12. *See supra* note 7.

13. Pearce, *Teaching*, *supra* note 2, at 737.

14. *Id.*

sible framework for advanced courses is the contextual curriculum offered at Fordham where we have provided students with an opportunity to take courses such as Ethics in Corporate Practice, Ethics in Criminal Advocacy, Ethics in Public Interest Law, and Lawyering for Individuals.[15]

Third, unlike most law schools where the pervasive teaching of legal ethics is either ignored or given lip service,[16] a serious ethics curriculum would indeed be pervasive.[17] Only this approach will educate students that ethical issues arise throughout practice and are not limited exclusively to ethics courses. The pervasive method "teaches students the skills . . . to identify and analyze [ethical questions] in settings where ethics is not the primary focus of attention."[18]

Unfortunately, like all efforts to teach ethics seriously, these simple—and seemingly self-evident—prescriptions will find a tough audience among legal academics who cling to assumptions that legal ethics need not, cannot, and should not be taught.

First, many legal academics believe that legal ethics need not be taught. This belief has at least two sources. Some believe that conventional legal pedagogy—the Socratic method—is sufficient to build moral character.[19] Others believe in the business-profession distinction inherent in professionalism.[20] They contrast the self-interest of business people with lawyers' commitment to the good.[21] Professionalism controls the small number of unethical lawyers through an invisible hand of reputation that rewards ethical practitioners and disciplinary committees that weed out the truly bad apples.[22]

Second, many legal academics believe that legal ethics cannot be taught. They assume that law students are young adults whose values are "fully formed prior to law school and are not likely to change."[23] Perhaps the most extreme (and bigoted) expression of this view was the assertion

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15. Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193 (Summer/Autumn 1995). As taught at Fordham, however, these are introductory ethics courses which seek to combine the advantage of providing students with the context of a practice area of their interest with an overview of legal ethics. *Id.* at 199-201.

16. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 36, 52 (1992).

17. *See generally id.*

18. Pearce, *Teaching*, *supra* note 2, at 737.

19. *Id.* at 727. *See* OLIVER WENDELL HOLMES, *The Use of Law Schools*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 474, 475-76 (Sheldon M. Novick ed., 1995); ANTHONY T. KRONMAN, THE LOST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION 113 (1993).

20. Pearce, *Professionalism*, *supra* note 9, at 1238.

21. *Id.* at 1238-40.

22. Pearce, *Teaching*, *supra* note 2, at 726 n.52; Pearce, *Professionalism*, *supra* note 9, at 1240, 1245.

23. Pearce, *Teaching*, *supra* note 2, at 732.

by Henry Drinker, the leading legal ethicist of the mid-twentieth century, that the biggest ethics problem facing the bar was Russian-born Jews whose disproportionate responsibility for ethical violations resulted from family upbringings lacking in American values.[24] Drinker sought to improve the ethics of the bar by excluding them from admission.[25] While not going as far as Drinker to attribute particular values to specific racial, ethnic, or religious groups, many academics nonetheless accept Drinker's assumption that students' values are fully formed before they begin law school and are not susceptible to change through legal education.[26]

Third, many legal academics believe that legal ethics should not be taught. This view dates from the origin of modern legal pedagogy in Harvard Professor Christopher Columbus Langdell's case method of the late nineteenth century. At that time, higher education generally shifted from a moral paradigm to a scientific one. The scientific paradigm distinguished between facts, which could be taught, and values, which could not. Ethics was in the realm of values. Langdell similarly adopted a scientific approach. He viewed classroom dissection of appellate cases as the equivalent of a chemistry laboratory. While most law professors today would probably not believe themselves to be scientists, they continue to apply the same pedagogical approach as Langdell and to separate legal from ethical questions. The legal literature is full of stories of students who raise their hand to question the ethics of a particular legal doctrine only to be told by their professor that the subject of the class was law, not ethics.[27]

These three sources of resistance to teaching ethics should no longer determine the place of legal ethics in the curriculum. First, the consensus today is that existing methods of teaching law and of lawyer discipline do not adequately ensure that lawyers are ethical.[28] Second, the current literature suggests that ethical learning continues into adulthood.[29] But even if it did not, students would still have to learn in law school how to

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24. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 184 n.41 (1983) (citing 1929 A.B.A. Proc. 622-23).

25. *Id.* at 176, 184 n.41.

26. Cramton & Koniak, *supra* note 7, at 146-47 (1996); Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 265-67; Rhode, *Ethics by the Pervasive Method*, *supra* note 16, at 36.

27. David B. Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241, 246 (Summer/Autumn 1995) (noting that "students who raise general ethical objections in traditional law school courses are often told that these concerns are irrelevant to the 'legal' issues being discussed"); WILLIAM STRINGFELLOW, *A Lawyer's Work*, *in* WILLIAM STRINGFELLOW, A KEEPER OF THE WORD 30, 32 (Bill Wylie Kellerman ed., 1994) (recounting that in the 1950s use of the term justice in the Harvard Law School classroom "evoked ridicule, as if justice were a subject beneath the sophistication of lawyers").

28. Pearce, *Teaching*, *supra* note 2, at 728.

29. *Id.* at 733-35.

apply their existing ethical framework to the practice of law.[30] Third, the fact-value distinction has come into question[31] and ethics "has regained respect as a serious academic subject" throughout higher education.[32] Even the scientific community has rejected the proposition that science and ethics don't mix.[33]

Even though the objections to the serious teaching of ethics lack persuasive support, they persist as widely shared assumptions upon which legal academics unthinkingly rely. Until we confront these assumptions directly, we will not be able to make the fundamental changes necessary to move legal ethics from the periphery to the center of legal education. Incremental changes and teaching innovations alone will have little or no impact. In the midst of the legal profession's current doldrums, we cannot afford to do anything less than transform legal education to make legal ethics the single most important subject.

30. John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 LAW & CONTEMP. PROBS. 87, 98 (Summer/Autumn 1995).

31. Pearce, *Teaching*, *supra* note 2, at 731.

32. *Id.*

33. *Id.*