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Reforming the Legal Ethics Curriculum: A Comment on Edward Rubin’s “What’s Wrong with Langdell’s Method and What To Do About It”

*Lauren Solberg**

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This is a Reponse to Edward Rubin’s Article, “What’s Wrong with Langdell’s Method and What to Do About It.”¹ Legal ethics

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1. Edward Rubin, *What’s Wrong with Langdell’s Method and What to Do About It*, 60 VAND. L. REV. 609 (2007).

training is an important part of the law school curriculum. The American Bar Association mandates that all accredited law schools require students to receive “instruction in . . . the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”² Despite the ABA requirement and the obvious importance of maintaining ethical behavior in legal practice, many students dislike the required professional responsibility course, in which most legal ethics is taught in law schools. Students dislike the course for many reasons, including that it is generally the only required upper-level course in law school. With this one exception, students are otherwise able to construct the remainder of their schedules based on their areas of personal and academic interest, or on the desire to learn from specific faculty members.³ Some students also dislike the discussion method of teaching typically used in professional responsibility courses, preferring the Socratic Method⁴ often used in core courses.⁵ Many faculty members dislike teaching professional responsibility either as a separate course or as part of a core course because it is difficult to teach, they dislike engaging in “value-laden” discussion in areas in which they lack specific expertise, or they think that ethics cannot be taught.⁶ Faculty members also may be concerned that they cannot incorporate additional ethics material into their core course syllabus without sacrificing the material they otherwise planned to teach.⁷ However, legal ethics is too important a topic in the legal profession to be relegated to only one course in professional responsibility.

This Response proposes that legal ethics should be integrated throughout most, if not all, courses in the law school curriculum, and not just confined to one general course on professional responsibility.

2. 2008-2009 ABA Standards for the Approval of Law Schools, Standard 302(a)(5), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf>.

3. Stephen Gillers, “*Eat Your Spinach?*,” 51 ST. LOUIS U. L.J. 1215, 1219 (2007). The desire to prepare for the bar exam may also account for certain course selection.

4. I refer to the “Socratic Method” here as the exchange of question-and-answer dialogue between the professor and a particular student about a case or specific concept covered during class.

5. Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 723 (1998). The term “core course,” as used throughout this Response, refers to substantive law school courses other than the required course in professional responsibility, and includes all first-year courses, and upper-level courses including, but not limited to, Corporations, Evidence, and Criminal Procedure.

6. See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 31 (1992) [hereinafter Rhode, *Ethics*] (discussing the conventional view of most faculties on teaching professional responsibility).

7. *Id.* at 52.

Furthermore, in conjunction with Rubin's proposed idea of law school concentrations, students should be afforded the opportunity to complete a course in ethics that addresses the ethical issues that arise in the substantive area of the law in which the student has a particular interest, or has chosen to concentrate. Part I of this Response debates whether legal ethics can be taught at all in the law school setting, introduces the pervasive method by which legal ethics can be integrated in the law school curriculum, and discusses how legal ethics can be integrated into the curriculum. Part II details an approach for integrating the pervasive method with Rubin's method. Part III addresses some of the shortcomings of the pervasive method, and Part IV discusses how to incorporate ethics courses focused on substantive areas of the law to make legal ethics more relevant and interesting for law students.

In his article in the *Vanderbilt Law Review*, Edward Rubin discusses the need for overall curriculum reform in law schools. Rubin suggests that law schools currently rely on "an antiquated pedagogic approach,"⁸ and law schools must revise their curricula to ensure that the law is taught as a developmental process to provide for more experiential learning and to motivate students throughout all three years of law school.⁹ Rubin proposes to integrate experiential learning by introducing a basic skills component into first-year courses.¹⁰ Indeed, *The Chronicle for Higher Education* recently noted the need for students to learn more practical skills while in law school.¹¹ As an additional part of his suggested curriculum reform, Rubin calls for law schools to develop a range of concentration programs that would be akin to a "major" and would, in Rubin's opinion, provide students with a more "coherent presentation" of a particular area of the law.¹² Because the proposed first-year skills component could not be integrated into upper-level course curriculum easily,¹³ Rubin believes that concentrations offer a logical way to incorporate a practical component into the second- and third-year curriculum.¹⁴

8. Rubin, *supra* note 1, at 648.

9. *Id.* at 648–50, 663.

10. Rubin suggests that this skills component could include exercises such as drafting a contract in a transactions course, or drafting a statute in a regulatory law course. *Id.* at 663.

11. Peter Schmidt, *Law Schools Customize Degrees to Students' Taste*, CHRON. HIGHER EDUC., Jan. 9, 2009, at A1 (discussing the 2007 report by the Carnegie Foundation for the Advancement of Teaching, which noted this need for students to learn more practical skills in law school).

12. Rubin, *supra* note 1, at 656–57.

13. *Id.* at 663–64.

14. *Id.* at 664.

However, Rubin only briefly mentions that the current curriculum includes a professional responsibility component that generally is required at all law schools, but is disliked by many students and faculty members.¹⁵ It seems, therefore, that unmotivated students who currently are subject to a curriculum that fails to teach practical skills would benefit not just from a concentration or otherwise reformed curriculum as Rubin proposes, but also from a reformed professional responsibility, or legal ethics, curriculum.

I. ETHICS CAN BE TAUGHT BY THE PERVASIVE METHOD

Faculty and students often argue that a professional responsibility requirement is ineffective because legal ethics “cannot be acquired through course assignments in professional schools,”¹⁶ as such ethical training is a product of “early socialization.”¹⁷ Rubin explains that “a substantial amount of intellectual development” takes place over the course of a student’s law school career.¹⁸ Thus, although ethics is a value-laden subject, law students’ professional values may be affected by learning new information about professional responsibility, regardless of how it is taught. Professor Deborah Rhode asserts that simply because little can be done to change an individual’s values or ethics does not mean that professional schools should not offer instruction in the area.¹⁹ Thus, law schools must try to instruct students to improve upon some parts of the students’ value systems.

Furthermore, if Rubin is correct in his assessment that what law schools currently teach is socially constructed, and not, as according to John Dewey, experiential, law students would be unable to apply their values correctly to legal, professional situations. Rubin explains that a student who has never drafted a contract cannot truly understand what a contract means or how it will be interpreted.²⁰ Thus, one could analogize that situation to a student who has never seen the impact of a conflict of interest on a client not being able to fully understand the implications of representing two clients with

15. *See id.* at 656 (“Law schools regularly require only one course in the second and third years, professional responsibility, a generally resented requirement imposed by the American Bar Association.”).

16. Rhode, *Ethics*, *supra* note 6, at 44.

17. *Id.*

18. Rubin, *supra* note 1, at 648.

19. Rhode, *Ethics*, *supra* note 6, at 46 (“To acknowledge that we can do little does not mean that we should do nothing.”).

20. Rubin, *supra* note 1, at 649.

potentially adverse interests, despite any grasp of ethics or professionalism that he had prior to beginning law school. A reformed legal ethics curriculum is thus not only useful for, but essential to, producing quality lawyers.

Professor Deborah Rhode is one of the primary advocates of teaching legal ethics by the pervasive method, which “address[es] ethical issues throughout the curriculum [because] they arise throughout the curriculum.”²¹ She argues that “professional responsibility [should be taught] as a course in its own right and as a topic to be addressed throughout the curricula.”²² She explains that a legal ethics curriculum is an important part of legal education because law students need to be aware of issues related to professional conduct and because law students’ understandings of their roles as professionals need to be broadened. Furthermore, law schools need to teach students to analyze situations in which professional, ethical conduct is in question.²³ However, Rhode acknowledges that students will only benefit from learning about this topic if the exposure to legal ethics is mandatory, because many students otherwise will not elect to take a course in professional responsibility.²⁴

Rhode further explains that, given the importance of legal ethics to the practice of law, professional responsibility is a topic that should be addressed not just in one course devoted solely to teaching legal ethics,²⁵ but rather pervasively, i.e., throughout the law school curriculum.²⁶ Isolating legal ethics in one course “marginalizes its significance.”²⁷ Thus, integration of legal ethics throughout the law school curriculum provides one inescapable way for students to learn valuable lessons about relevant ethical issues in legal practice.

21. Rhode, *Ethics*, *supra* note 6, at 50.

22. *Id.* at 32.

23. *Id.* at 42–43.

24. *Id.* at 43.

25. *Id.* at 54 (noting that a good start to reforming the professional responsibility curriculum would be to offer upper-level students either a general professional responsibility course, a substantive ethics course which focuses on one particular area of the law, or a clinic program through which they can learn more—but that this suggestion is merely a “compromise” and the pervasive method is indeed the ideal).

26. *See id.* at 53 (“Faculty who decline, explicitly or implicitly, to address an ethical issue that arises in their field encourage future practitioners to do the same.”).

27. Deborah L. Rhode, *Professionalism in Professional Schools*, 27 FLA. STATE U.L. REV. 193, 195 (2000).

II. INCORPORATING THE PERVASIVE METHOD INTO RUBIN'S APPROACH

Rubin's suggestion to incorporate a skills component into the first-year curriculum²⁸ neatly accompanies Rhode's proposal to teach ethics by the pervasive method, as the skills component presents a practical way for faculty members to integrate discussion of ethical issues in legal practice into the curriculum. Rhode notes, however, that many faculty members are reluctant to make professional responsibility a priority, and she advises that there are dangers associated with this reluctance.²⁹ In her opinion, for professors to ignore ethical issues while teaching core course material imparts the message to students that it is acceptable for them to ignore these issues both in the classroom and in practice.³⁰

Rhode believes that students are more likely to take legal ethics seriously if their professors do, which would be manifested by professors discussing ethical issues in the field in which they are teaching.³¹ It is difficult to say for sure, but perhaps some law students' apathy toward the professional responsibility course supports Rhode's point that their apathy really is learned behavior, rather than distaste for a required course. Thus, integrating legal ethics into each core course's curriculum may reinforce the importance of ethics in legal practice and motivate students to view the professional responsibility course not as an irrelevant nuisance, but as a necessity.

This is not to say, however, that such integration need involve discussions of "mushy pap" or "candid discussion[s] of moral ambiguity or the dark side of practice."³² The integration simply needs to involve candid discussions of real-world scenarios in which a lawyer's conduct may be in question in the area of practice upon which the core course focuses. Furthermore, the assumption that students may ignore ethical issues because their professors do means that students actually are spotting these ethical issues and interpreting the fact that they are ignored to mean that the issues are unimportant. While this may be true for students who spot the ethical problem, what about the

28. See *supra* note 10 and accompanying text (describing the skills component).

29. Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 28 (1999) [hereinafter Rhode, *Professional Responsibilities*].

30. Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1051-52 (2007) [hereinafter Rhode, *Teaching Legal Ethics*] ("Students pick up messages from what is missing or marginal in the core curriculum.").

31. *Id.* at 1051.

32. *Id.* at 1048.

students who fail to spot the issue entirely? These students are just as much, if not more, in need of a legal ethics education.

Perhaps the failure to spot the ethical issues in core course discussion results from the possibility that in a professional responsibility course, students may learn the Model Rules of Professional Conduct but not realize their applicability generally because the rules are not discussed in a sufficient variety of contexts. Alternatively, perhaps the students who fail to spot the issue have not yet completed a professional responsibility course. The problem, then, is that students who have not completed a course in professional responsibility miss out on the opportunity to spot a potential ethical issue in a core course because they otherwise have not been exposed to substantive discussions of legal ethics. Thus, the integration of legal ethics into core courses is essential.

Rhode also notes that faculty members' reluctance to address professional responsibility in their courses "reflects skepticism about the value of discussing values in professional school."³³ There is some concern that faculty members are hesitant to introduce ethics into their core curriculum because ethics discussions are inevitably "value-laden."³⁴ However, aside from lectures on black-letter law, very few topics discussed in core courses involve clear-cut answers, and in a sense are value-laden in and of themselves. Students often learn their professor's perspective on whether a court was correct in its decision and how students, as lawyers, should handle a particular matter brought to them by a client, such as how to draft a particular will provision or how to resolve a potential conflict of interest with other members of a board of directors. These discussions are rarely value-free.

Indeed, Professor James Elkins suggests that all lessons taught in law school are value-laden, not just the lessons related to ethics and professional responsibility.³⁵ One of the first things that law students learn to do is to see and value facts, determining which are relevant, and dismissing all facts that are irrelevant.³⁶ Thus, the argument that legal ethics should be left out of core course curriculum because ethics is value-laden is flawed. Elkins's theory supports the notion that to remove the value-laden elements of law school would be

33. Rhode, *Professional Responsibilities*, *supra* note 29, at 28.

34. *Id.* at 29.

35. James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 *MERCER L. REV.* 511, 520 (1996).

36. *Id.*

to remove the foundation of what law students learn in any law school course.

Teaching legal ethics pervasively also gives students an additional opportunity to understand the adversarial legal system from a practicing attorney's perspective. Absent law school curriculum reformation as Rubin suggests, the traditional method of teaching by reading and analyzing relevant case law will continue to present only the outcome of a case for the client. For example, students typically only learn whether a party to a medical malpractice lawsuit is entitled to both compensatory and punitive damages, or whether a corporation's director breached his fiduciary duty to the shareholders. Rarely do law students learn about the issues that the attorney faced, or the context in which they appeared, while providing representation, such as what the consequences were, if any, for the attorney who discovered that his client made false statements during a deposition. While a course in professional responsibility is a concentrated way of teaching the law from the attorney's perspective, rather than the client's, teaching ethics in the context of a single subject—either as a substantive ethics course focused on a particular area of law³⁷ or integrated in each core course's curriculum—may do more to teach students about the potential ramifications of behavior in a particular field than a general professional responsibility course.

III. SHORTCOMINGS ASSOCIATED WITH THE PERVASIVE METHOD

Although teaching ethics by the pervasive method appears to be an ideal way to integrate ethical issues into core course curricula, there are a few practical issues to consider with respect to its implementation. The first pertains to what materials faculty members should use to introduce these ethical issues into their courses. Although there are various course materials that have been developed for use in teaching legal ethics, law students already incur significant costs in purchasing materials—both required and optional—for each class. To require the purchase of additional course materials that may, in the end, be used sparingly compared to others may draw the ire of students who question the cost-benefit of such ethics lessons. Absent the purchase of such third-party materials, faculty members will have to design the course materials themselves, which is time consuming in schedules already fully laced with school administrative commitments and their own academic pursuits, especially when combined with the

37. See *infra* text accompanying note 43 (discussing the types of substantive ethics courses that a law school might offer).

need to integrate new case law and developments into the substantive material they already teach. Furthermore, depending on the particular expertise and practice experience of a faculty member, such newly developed materials may or may not be effective. However, faculty members are generally experienced enough in a field, and are familiar enough with the material that they teach, to identify and briefly discuss ethical issues that arise.

Furthermore, faculty members have expressed concern about the ability to integrate ethics lessons into a curriculum which is already heavily loaded with substantive, foundational course material. This concern is not unfounded, and even may explain why professional responsibility often is relegated to a separate course. If even two or more hours are spent over the course of a semester just dealing with ethical issues, at least two class periods that could have been, and may need to be, devoted to topics more fundamental to that area of the law have been lost. Thus, while the pervasive method presents some practical difficulties, the failure to integrate ethics into the law school curriculum poses risks that are greater than the risks associated with integration.

IV. AN ETHICS COURSE IN SUBSTANTIVE AREAS OF THE LAW

Rubin believes that concentrations would offer “students a sense of the way that modern law functions, of what lawyers do in their actual practices.”³⁸ If “high ethical standards are essential to professionalism and lawyers’ exclusive privilege to practice law,”³⁹ then some of what students need to learn to be better, more effective lawyers are the types of ethical issues that they will face in that particular area of the law and how to address those issues in practice. Students can acquire this knowledge by completing a required course in ethics that is specific to the area of their concentration. The mandatory nature of the course is essential to ensure that students gain this important knowledge; if the course were optional, students likely would not enroll.⁴⁰

The 2007 Report by the Carnegie Foundation for the Advancement of Teaching “called upon law schools to improve how

38. Rubin, *supra* note 1, at 657.

39. Pearce, *supra* note 5, at 721.

40. See *supra* text accompanying note 24 (noting the need for courses in professional responsibility to be mandatory). Hopefully that attitude on the part of students will change if they consistently have a choice in the type of legal ethics course that they take, are consistently exposed to topics in legal ethics in core courses, and, as a result, understand the value of learning legal ethics.

they teach practical skills and to focus more on ethics and professional responsibility,”⁴¹ although William Sullivan, senior author of the Carnegie Report, said that his “report’s recommendations are advanced little by specialized programs that simply offer new content without changing how law students are taught.”⁴² Whether law schools should offer more concentrations for students is outside the scope of this Response. However, a persuasive argument exists for requiring students to complete successfully a substantive ethics course as part of the concentrations that law schools may currently offer. Such a requirement would present another way for students to obtain more practical skills and focus more specifically on legal ethics in a setting of the students’ choosing, i.e., focused on an area of the law chosen by the student. Indeed, Rhode suggests that resistance to the mandatory professional responsibility requirement may be reduced by giving students a choice about how to fulfill it; for example, through upper-level courses that “situate ethics in particular substantive areas, such as tax, business, family, criminal, poverty, or public interest practice.”⁴³

Of course, the argument may be made that there are no faculty members at the law school who are interested in or knowledgeable enough about legal ethics to teach such a course. If it is possible to offer substantive ethics courses for each concentration through the law school, there is no reason not to do so. However, students should be able to fulfill this course requirement through successful completion of an ethics course outside of the law school. For example, law schools frequently permit students to take courses offered by other schools on campus, and perhaps the ethics requirement is one way in which students can take advantage of this “interdisciplinary” opportunity. For example, a law school that offers a concentration in Health Policy might allow students in that concentration to fulfill the ethics requirement with a medical ethics course at the university’s medical school or with the equivalent of a graduate-level bioethics course. Alternatively, a law school that offers a concentration juxtaposing law and business might require a course on business ethics that can be fulfilled by enrolling in a course on the topic at the university’s business school. Given that attorneys often represent individuals not trained in the law, law students should understand business ethics from a non-lawyer’s perspective, which will thus make them better able to relate to clients. Notwithstanding the desirability of having a

41. Schmidt, *supra* note 11, at A1.

42. *Id.*

43. Rhode, *Teaching Legal Ethics*, *supra* note 30, at 1052.

client's view of business-related problems, law students must understand that lawyers operate under a unique set of ethical rules, with which lawyers must comply. Such a perspective would be provided through the pervasive method, thus ensuring the law student receives a comprehensive view of the ethical dilemmas that may arise.

Furthermore, if the way in which traditional core law school courses are taught is outdated,⁴⁴ perhaps students stand to gain from experiencing a course outside of law school that is relevant to their intended area of practice. Additionally, not every newly minted lawyer intends to practice law upon graduation, whether in a law firm or otherwise. Thus, exposure to a course in ethics in their field of study that is taught from a non-lawyer's perspective may be particularly beneficial to these students. In fact, even law schools without concentrations might consider permitting students to fulfill the professional responsibility requirement through such a course, provided that students receive an education in legal ethics in their core courses. However, such an approach would require that the law school implement the pervasive method and integrate legal ethics throughout the curriculum in order to satisfy the American Bar Association requirement.

To not require students to complete an ethics course within their chosen concentration—especially if it would serve as a substitute for the professional responsibility course requirement—would be to fail to teach students about the reality of the practice area. If, as Rhode suggests, students may shy away from an ethics course because they are unaware of its relevance, because they believe they are already ethical, or because the students otherwise object to completing such a course,⁴⁵ making the ethics course optional likely would lead to a small enrollment in the such a course.⁴⁶

Although a substantive ethics course may not be the best course to learn all, or even some, of the Model Rules of Professional Conduct, which are covered in a section of the bar exam, the purpose of law school coursework arguably is not just to train students to take the bar exam. Bar preparation courses exist, and are successful, because students do not expect law school to prepare them fully for the bar exam. Indeed, many courses in which law students enroll focus more on legal theory relevant to the particular topic than on teaching to the bar exam. Furthermore, some law students take numerous

44. Rubin, *supra* note 1, at 664.

45. Rhode, *Ethics*, *supra* note 6, at 42–43.

46. See *supra* text accompanying note 24.

courses whose content likely will not appear on a bar exam, and some law students refuse to take certain courses during law school even though the subject certainly will appear on the bar exam. Students can afford such approaches because of the crutch that bar preparation courses offer; thus, law schools should not be concerned with the fact that without a general professional responsibility requirement, students may not learn the Model Rules of Professional Conduct in a formal classroom setting. An alternative solution may be for law schools to offer a condensed course just on the Model Rules of Professional Conduct, perhaps as an orientation to the second or third year of law school.

V. CONCLUSION

The notion that students dislike the professional responsibility requirement often is attributed to the fact that, after the first year of law school, it is the only course that is required. Rubin implies as much, and other scholars have noted this fact.⁴⁷ This dislike also can be attributed to the fact that students already think they are ethical, and do not need to learn ethics as a part of their law school curriculum.⁴⁸ However, as Rhode suggests, a professional responsibility course is indeed an integral part of legal education. The idea of reforming the law school curriculum, and in particular the legal ethics curriculum, should not stem from the general lack of enthusiasm that students have for a required course, regardless of the reason for their discontent with the requirement. Very few graduate programs, including professional schools, allow course selection to be entirely unrestricted.⁴⁹ Instead, reformation of the legal ethics curriculum should stem from what Rubin calls the “obsolescence of [legal education’s] existing model.”⁵⁰ Legal education should be reformed to teach legal ethics by integrating it throughout the core course curriculum, and to require substantive ethics courses as part of a chosen concentration’s requirements. Although these suggestions may be difficult to implement even in an ideal world, they may be a

47. See, e.g., Rhode, *Ethics*, *supra* note 6, at 50.

48. See, e.g., Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 906–07 (1999).

49. Medical school appears to be one of the only professional schools to impose an ethics course requirement. Rhode, *Ethics*, *supra* note 6, at 38. This should not, however, detract from the message that students who choose to embark on a particular career path may simply need to comply with specific curriculum requirements, even if they disagree with them.

50. Rubin, *supra* note 1, at 650.

first step towards implementing the more drastic changes that Rubin proposes to the overall curriculum.