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Bruce A. Green

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LESS IS MORE: TEACHING LEGAL ETHICS IN CONTEXT

BRUCE A. GREEN*

We who teach legal ethics employ many of the teacher's arts to win our students' appreciation for the course.¹ We do not always succeed. As Deborah Rhode has observed, "[t]here are inherent problems and infinite ways to fail in teaching this subject."² Yet, we continue to seek a method for teaching the course effectively. If nothing else, our efforts have led to the development of a substantial body of literature on teaching legal ethics to which this Article will contribute. Its focus is on what, rather than how, to teach.

This Article asks: What should be the content of the "basic" course in professional responsibility? Many would agree that a law school should offer such a course, although not every law school in fact does so, because law students must receive a basic grounding in the subject. Accordingly, in addition to considering how we should teach the course in "professional responsibility" or "legal ethics"—whether by simulations, videotapes, problems, or cases—it makes sense to consider what we should teach.

Several law schools, supported by generous grants from the W.M. Keck Foundation, have developed interesting and innovative approaches to the teaching of professional responsibility, which are designed to supplement or complement the basic course. These approaches were shared in 1995 at a conference hosted by Duke Law School and then detailed in a special issue

* Louis Stein Professor, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics; A.B., Princeton University, 1978; J.D., Columbia University, 1981. I am grateful to Mary Daly, Russell Pearce, Deborah Schenk, and Rachel Vorspan for their helpful comments on earlier drafts.

1. See, e.g., Mary C. Daly et al., Contextualizing Professional Responsibility: A New Curriculum for a New Century, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 193, 196 (discussing innovative approaches to teaching legal ethics).

of *Law and Contemporary Problems*. These approaches include Columbia's intensive one-week simulation course, North Carolina's oral history project, Houston's eclectic course entitled "Personal and Professional Responsibility," which is based on a family systems theory and quality management principles, as well as the "infusion" or "pervasive" approach championed by Deborah Rhode and undertaken at the University of California at Los Angeles (UCLA) and Stanford. None of these innovations are intended as a substitute for a course of study designed to afford a basic understanding of core concepts of professional responsibility.

As anyone in the field of professional responsibility knows, the focus of energy and attention on these supplementary courses did not signal satisfaction with how basic instruction on this subject is provided. On the contrary, teaching professional responsibility traditionally has presented an intractable problem. The subtext, if not the text, of virtually all the writings on professional responsibility pedagogy argues that it is difficult to teach the basic material in a manner that is cost-effective and that achieves a reasonable level of student satisfaction.


5. See Walter H. Bennett, Jr., The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 173, 180-85.


10. See Liebman, supra note 4, at 85-86; Menkel-Meadow & Sander, supra note 8, at 135-36; Mixon & Schuwerk, supra note 6, at 113; Rhode, supra note 2, at 150.

11. See, e.g., Liebman, supra note 4, at 86 ("Have other schools developed materials that provide both depth and breadth of coverage while attracting better student attention than traditional casebooks?"); William H. Simon, The Trouble with Legal Ethics, 41 J. LEGAL EDUC. 65, 65 (1991) ("At most law schools, students find the
all due respect to the fine efforts of casebook authors and the exceptional teaching abilities of the lucky few, most of us find that the "survey" course just does not work. Especially for those law schools that provide only a basic course in professional responsibility with no "extras," and even for those few that do more, attention must be paid to the challenge of teaching the basic course.

This Article addresses the principal alternative, rather than supplement, to the "survey" course: a "contextual" course in professional responsibility. By this term, I mean a basic course that familiarizes students with "the skills, concepts and processes necessary to recognize and resolve ethical dilemmas" that arise in a limited number of contexts, rather than across the full spectrum of legal matters, practice settings, and client types. Concededly, contextual courses do not give a complete picture. But no single course in professional responsibility can do so. Our experience at Fordham is that "less is more." A contextual course is more effective because it provides a better picture than the survey course and tends to be better received.

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12. See Edmund B. Spaeth, Jr. et al., Teaching Legal Ethics: Exploring the Continuum, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 153, 155 n.4 (acknowledging important contributions of commercially produced casebooks and other writings in the field).

13. See generally id. at 156-63 (describing weaknesses of survey courses in ethics teaching).

14. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 203 (1992) [hereinafter MACCRATE REPORT].

15. ROBERT BROWNING, Andrea del Sarto, in THE POETICAL WORKS OF ROBERT BROWNING 345 (Cambridge ed., 1974). Taking the form of a dramatic monologue, Browning’s poem tells the story of a technically skilled, yet ultimately failed, Renaissance painter. See id. at 345-48. Browning’s del Sarto misdirects his passions toward an artful woman who, though bound to him in matrimony, turns her attention elsewhere. See id. Toward this end, del Sarto permits his wife to deliver to her “cousin” the proceeds of his art. See id. at 348. The painter is resigned to his inability to win her affection, as he is to the betrayal of his own artistic promise. See id. Any comparison between Browning’s artist and legal ethics professors may be imperfect; even so, “less is more,” the credo borrowed from Browning’s poem, seems apt.
I. GOALS

At the conclusion of the 1995 conference at Duke University, Timothy Terrell reminded the participants that relatively little attention had been given to the question of "goals." The 1997 William & Mary Conference, for which this Article was prepared, intended, in part, to redress that problem. The question itself is ambiguous, however. When we ask about goals, we might be asking one of two very different questions. First, what are the ultimate goals of the law school's curriculum, or of the law school experience overall, from the perspective of ethics and professionalism? Second, what are the goals of any particular professional responsibility course? These questions may have different answers—unless, of course, the professional responsibility course is the only place in the law school in which issues of ethics and professionalism are addressed.

A. Goals of the Law School Curriculum

If one were to ask the American Bar Association (ABA), "what do we want our law schools to produce from the point of view of our students and professional ethics?" I assume that the answer would be "ethical lawyers," or something along those lines. After all, the ABA adopted its requirement that ABA-accredited law schools provide "instruction in the duties and responsibilities of the legal profession" in response to the ethical, not to mention legal, lapses of lawyers involved in the Watergate scandal. At minimum, one would thus expect that law schools would turn out lawyers who know their duties and responsibilities and would abide by them. That requires, among other things, familiarity with lawyers' professional obligations, the ability to recognize problems of professional responsibility when they arise in practice, the ability to determine how to act when the answer

18. Cf. Rhode, supra note 7, at 42 ("The rationale for addressing professional responsibility issues in some form is to increase students' awareness, analytic skills, and ultimately, if indirectly, to influence their future conduct.").
is unclear, recognition of the pressures to act inappropriately, and the will to resist those pressures.

Of course, there is more. The ABA would scarcely be satisfied with minimally ethical lawyers. The ABA exhorts lawyers to "aspire" to high standards of professional conduct. This concept was captured in the language of the Code of Professional Responsibility, and the recent calls for "professionalism" reflect the desire for high standards of professional conduct. Law schools should produce lawyers who not only will fulfill their professional obligations, but who also are familiar with and share the aspirations and values of the legal profession. These future professionals will therefore take the right path on many occasions when professional norms offer a choice. At least law schools should "aspire" to produce such lawyers. We must do more than save future lawyers from damnation in the guise of professional discipline or malpractice actions—we have to try to send them to heaven!

What must law schools do to enable our graduates to enter and take their place in heaven? I take my answer from the MacCrate Report, issued in 1992 by a task force of the ABA Section of Legal Education and Admissions to the Bar comprised of prominent lawyers, judges, law school deans, and professors.

19. The question of how to act in areas of uncertainty is, of course, a subject of debate within legal academia and the profession.

20. Lawyers encounter various pressures to deviate from applicable standards of conduct. See, e.g., Rhode, supra note 7, at 46 (acknowledging the influence of situations on ethical choices). Law school simulations can illustrate these pressures and demonstrate their influence. See, e.g., Liebman, supra note 4, at 84 (discussing students' enhanced awareness of and ability to confront ethical issues following a course in legal ethics). Consequently, legal ethics classes often examine the motivations to subordinate professional obligations to the interests of one's client, see id., as well as the personal pressures, such as financial problems or substance abuse, that often contribute to disciplinary infractions.

21. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980) ("The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.").

22. See, e.g., PROFESSIONALISM COMM., AMERICAN BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM 2, (1996) (finding teaching and learning of professional ethics to be a "lifelong" quest) [hereinafter TEACHING AND LEARNING PROFESSIONALISM].

23. See generally MACCRATE REPORT, supra note 14, at xi-xiv (describing the composition of the task force).
The report devotes several pages to outlining "the body of knowledge and skills with which a practitioner must be familiar in order to assure that he or she will consistently conform to ethical conduct," and several more pages to describing the "Fundamental Values of the Profession." This entire discussion, taken together, would fairly fall under the rubric of "legal ethics." As the report suggests, legal ethics encompasses three things: a body of knowledge, a fundamental lawyering skill, and a set of values.

The MacCrate Report expects lawyers to be familiar with a body of "legal ethics" knowledge that includes the nature and sources of ethical standards and the means by which professional standards are enforced. At its most basic, the MacCrate Report defines this body of knowledge to include an understanding of the "concept of law as an ethical profession." As such, it imposes ethical obligations on its members and "[d]efines those obligations in terms which involve their interpretation both by individual attorneys at the level of conscience and by authorized organs of the profession."

More demandingly, the requisite knowledge encompasses an understanding of "[t]he fundamental ethical rules that shape the profession and define what it means to be a legal professional"—for example, the principles involving the allocation of decision making between the lawyer and client, the duty to provide competent representation, the duty of zealous representation, the duty to avoid conflicts of interest, and the duty of confidentiality.

24. Id. at 206.
25. Id. at 207; see id. at 207-12.
26. See id. at 211-12.
27. See id. at 203, 205.
28. Id. at 203.
29. Id. Even this concept, if easy to communicate, may not be easy to appreciate. Students have a tendency to think that insofar as professional obligations are left to be interpreted and enforced by individual lawyers at the level of conscience, these obligations are not taken very seriously by the law or by the legal profession, and so need not be taken very seriously by lawyers or law students. Of course, if these "ethical obligations" need not be taken seriously, why should a course that concerns itself with them be taken seriously?
30. Id. at 205.
Finally, acquiring the requisite knowledge requires lawyers to gain familiarity with what the report, perhaps inartfully, calls "[p]rimary sources of ethical rules"\(^\text{31}\) governing a lawyer's conduct, not only with respect to attorney-client relations, but also with respect to other aspects of lawyering, including relations with courts, other lawyers, and third parties. The sources of the ethical rules identified by the report include, but are not limited to, the enforceable rules of professional conduct and the body of opinions interpreting those rules that have been issued by courts, bar associations, and others.\(^\text{32}\) As sources of "ethical rules," the MacCrate Report also identifies "[c]onstitutional, statutory [and] common-law rules[, and] principles bearing upon the ethical obligations of a lawyer."\(^\text{33}\) Some would think of this material as "legal" as distinguished from "ethical." For example, Professor Hazard and others have counterposed the "law and ethics of lawyering."\(^\text{34}\) No matter what the characterization, the constitutional, statutory, and common law rules are certainly part of the body of knowledge that the "ethical lawyer" must assimilate.\(^\text{35}\) Additionally, the MacCrate Report identifies as sources of "ethical rules": model rules of ethics that have not been adopted by courts, but nevertheless shed light on a lawyer's ethical obligations; aspects of ethical philosophy; and a lawyer's personal morality.\(^\text{36}\) This material would not constitute "rules" in the sense of enforceable obligations, but it would certainly inform interpretations of rules and might otherwise guide a lawyer's professional conduct.

\(^{31}\) Id. at 203.

\(^{32}\) See id. at 204.

\(^{33}\) Id. at 203.


\(^{35}\) Some of this law has significance across broad areas of professional practice. The attorney-client privilege and the law of malpractice are just two examples. Some of this law bears on particular areas of practice—for example, the Sixth Amendment right to effective assistance of counsel influences the work of criminal defense lawyers; partnership law directly affects the conduct of lawyers who work in law firms. Although students address some of this law in other courses, its significance to how lawyers practice is not invariably noted.

\(^{36}\) See MACCRATE REPORT, supra note 14, at 204.
This body of knowledge may sound broad enough—especially considering the ambiguous relationship among different “ethical rules,” e.g., those requiring confidentiality and those requiring disclosure, among the different “sources” of ethical rules, e.g., the fiduciary duty of loyalty and conflict of interest rules, and among the different regulatory mechanisms, e.g., malpractice actions and professional discipline. As envisioned by the MacCrate Report, however, legal ethics entails far more than the accumulation of legal knowledge. It also includes the skill of “recognizing and resolving ethical dilemmas,” which the report places alongside such other fundamental lawyering skills as problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, and litigation. Additionally, the MacCrate Report and others

37. One possible source of student frustration with the subject of legal ethics is that, as a body of “law,” legal ethics seems not only complex, but also disharmonious and indeterminate. In the introduction to their casebook, Professors Morgan and Rotunda give this point a more positive spin, when they observe: “Far from being a unitary profession with a long and consistent tradition grounded in fundamental philosophical ideals, the legal profession is a rich, complex, and often perverse mixture of traditions, roles and standards.” Thomas D. Morgan & Ronald D. Rotunda, Problems and Materials of Professional Responsibility 2 (6th ed. 1995).

Students are not necessarily beguiled by the perversity of this mixture. They come to their courses seeking to understand the subject matter; however, it is a lot to expect of students to understand the interrelationship of legal ethics principles and processes when even their professors must work hard to do so. The very complexity of both the interrelating processes for regulating lawyers and the interrelationship between professional rules and legal norms governing lawyers’ conduct has drawn many legal academics to these topics. See, e.g., Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev. 69 (1995) (discussing the lack of effective discipline for unethical conduct by prosecutors); Bruce A. Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. Rev. 687 (1991) (highlighting the ethical codes’ weaknesses as they relate to the conduct of criminal defense attorneys); Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389 (1992) (asserting that ethical norms are in competition and conflict with the law); Ted Schneyer, Institutional Choices in the Regulation of Lawyers—Forward: Legal Process Scholarship and the Regulation of Lawyers 65 Fordham L. Rev. 33 (1996) (delineating the issues surrounding lawyer regulation); David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799 (1992) (evaluating the debate about whether lawyers should be subject to external regulation designed to detect and deter unethical conduct).

38. MacCrate Report, supra note 14, at 206; see id. at 203.

39. See id. at 138-40. The MacCrate Report appears to envision the skill of resolv-
would say that legal ethics encompasses the fundamental values of the profession. The MacCrate Report identifies four principal values: provision of competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.\footnote{See id. at 206-07.} Others might nominate additional candidates.\footnote{See id. at 207-21.}

Can we seriously expect law schools to achieve all this—to impart all this knowledge, fully develop this skill, instill these values, or, to be more realistic, sufficiently expose students to them—all in the space of three years? We make no pretense that students graduate from law school with all the knowledge and skill they need to carry out most other lawyering tasks. For example, we do not expect them to be able to do anything as basic as counseling a client about contractual provisions, negotiating a contract, or drafting a contract. As the MacCrate Report envisions, law school is an early stage in an "educational continuum."\footnote{See MACCRATE REPORT, supra note 14, at 3-8.} Only over time, with oversight by senior lawyers in one's law office, with the help of mentors, or through professional self-development, is one expected to acquire the requisite skills and knowledge to practice some, but scarcely all, aspects of law competently and independently.

Yet, I suspect that the ABA, if not the public, would be terribly displeased with the concept that we aim not to graduate ethical lawyers—for that would be casting our sights too high—but

\begin{itemize}
  \item \footnote{Certainly, the "values" of the legal profession have changed substantially since the nineteenth century, see, e.g., Anthony T. Kronman, The Fault in Legal Ethics, 100 DICK. L. REV. 489, 501-03 (1996) (discussing different ideals that have influenced the field of legal ethics); Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241 (1992) (contrasting George Sharswood's nineteenth-century view of ethics as for the common good with the ABA's approach), and will continue to change. One might fairly argue that in addition to those values that have gained currency, there are others—such as that lawyers should not discriminate in their law practice on bases such as race, religion, gender, and sexual orientation—that ought to be recognized by the profession, even if their importance has not yet been reflected fully in the professional literature.}
  \item \footnote{See MACCRATE REPORT, supra note 14, at 3-8.}
\end{itemize}
just to nudge our students further down the continuum toward one day *becoming* ethical lawyers. Maybe not in the first year or two, but in time, with the help of a senior lawyer in law practice, our graduates will become "ethical." This concept might relieve bar examiners of the task, which, as Deborah Rhode has argued, might in any event be hopeless, of trying to distinguish between applicants with good and bad character; at least it might justify deferring the task. This is an unappealing concept, however, primarily because we cannot accept the prospect of licensed practitioners who are less than ethical from the start, but also because if law schools cannot be counted on to produce ethical lawyers, those institutions in the real world of law practice are unlikely to do any better.

So, one might conclude, this is an appropriate professional responsibility of law schools. Law schools should turn out ethical lawyers through a combination of means, including pervasive instruction in legal ethics, clinics and simulations, opportunities to hear from real lawyers, noncurricular programs, and, of course, the basic course in legal ethics. To be sure, this is ambitious. "Ah, but a man's reach should exceed his grasp, / Or what's a heaven for?"

**B. Goals of the Basic Course in Legal Ethics**

If law schools have a responsibility to produce ethical lawyers, then what contribution should the basic course in legal ethics

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44. See generally Eleanor W. Myers, "Simple Truths" About Moral Education, 45 AM. U. L. REV. 823, 827-33 (1996) (discussing the perception that professional standards are declining in law practice and the "continuing emphasis on law school as the primary forum for values training").

An additional source of law student resistance to legal ethics instruction derives from the sense of irrelevance or unreality about the course that comes from the disjunction between legal ethics as taught in law school and legal ethics as practiced (or not practiced) in some law practices to which students are exposed during law school through summer employment or part-time employment during the academic year. See *id.* at 824-25.

45. This would include both lawyers who are moral exemplars and lawyers who have strayed.

make toward this goal? No one would seriously suggest that a single course in legal ethics can do all that the MacCrate Report envisions. As we know, many law schools devote only one or two credits to the subject, and some of our finest law schools—Professors Cramton and Koniak list several examples—appear to "require little or no instruction in legal ethics." Moreover, even a required course that devotes three or four credits to the subject is far from adequate. So, how much of these goals can the basic course achieve?

An appropriate goal of one teaching any basic course in legal ethics—be it a "survey" or "contextual" course—is simply to accomplish as much as possible with limited resources. In other words, move students as far as possible down the continuum toward becoming lawyers who are conversant with the body of legal ethics knowledge, skilled at recognizing and resolving ethical dilemmas in light of this knowledge, and familiar with the profession's values. It is liberating to recognize that one class cannot fully accomplish the ultimate goal, which might more fairly be ascribed to the law school curriculum overall, of fully developing ethical lawyers. These limits allow personal choices about which aspects of "legal ethics" knowledge to address and how much emphasis to place on the body of knowledge as opposed to the lawyering skill or the professional values.

How far along the continuum students should be pushed is directly related to one's personal and resource limitations. For, in this respect, we are all teaching legal ethics "in context." That context includes some things that no one can do much about, such as the resistance that many students bring to the course. It includes other things for which law school administrations and faculties bear responsibility, such as class size and credit

49. See MACCRATE REPORT, supra note 14, at 332 (enumerating the recommendations of the task force on how to enhance professional development during law school).
50. Cramton & Koniak, supra note 47, at 162-63.
51. See supra notes 29, 37 & 44; infra notes 121-28 and accompanying text.
hours. It includes limits on one's own time and ability.

To be sure, we need not approve of the context in which we teach, at least insofar as it includes the law school's dedication of inadequate resources to the subject. I am fortunate to teach at one of the law schools that devotes considerable full-time faculty resources to the teaching of legal ethics, but in many law schools legal ethics is limited to one or two credits, if that, and taught predominantly or exclusively by adjunct faculty members. Indeed, in the past, full-time faculty members, particularly before they become tenured, sometimes have been discouraged affirmatively from writing and teaching in the area.

Yet, if we need not approve of them, then we must surely respect our limits. As my own experience has demonstrated, we are limited in what we can accomplish even in a four-credit seminar taught by two professors. We are far more limited in what we can accomplish in a class of eighty to 160 students with fewer credit hours. We teach more effectively if we are realistic about what we can achieve. If we try to teach students everything, both we and they are likely to come away with nothing but frustration. Less is more.

Additionally, the context in which we teach will also influence decisions about how much weight to give to ethics rules versus other legal standards versus unenforceable professional stan-

52. See, e.g., Cramton & Koniak, supra note 47, at 147 (discussing the minor academic role of legal ethics in most law schools); Daly et al., supra note 1, at 195 (discussing ways that law schools denote the second-class status of ethics classes); John S. Dzienkowski et al., Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 213, 213 (observing that large lecture-style survey affords abstract familiarity with legal ethics but includes no examination of topics "in depth, or with any sense of concreteness").

53. See Rhode, supra note 7, at 51-52 (discussing faculty members' reluctance to devote time and effort to the teaching of ethics).

54. See Cramton & Koniak, supra note 47, at 147.

55. Perhaps this is changing. An important accomplishment of the W.M. Keck Foundation was to encourage some prominent law schools to pay greater respect to the subject of ethics. If these law schools continue to take legal ethics seriously by continuing and building on the work supported by the Keck grants, then, other law schools may be influenced to give the subject of legal ethics the importance it deserves.

56. See Dzienkowski et al., supra note 52, at 213.

57. See Myers, supra note 44, at 858.
We will also have to decide how much weight to give to any or all of this material compared with providing experience in identifying and attempting to resolve ethical problems, and exposing students to professional values. To the extent that the law school does some of this work elsewhere in the curriculum, or outside the classroom, there may be less need to do it in the basic legal ethics class. 58

In most law schools today, the basic legal ethics course is expected to carry most of the burden for training students in this area. Where that is the case, three credits is the bare minimum that can be allotted responsibly to the basic course. In such a course, moving students down the continuum would initially include familiarizing students with the core issues of professional responsibility, such as the allocation of decision making between lawyer and client, and the duties of competence, confidentiality, loyalty, and zealous advocacy (and their limits). The course would also include familiarizing students with some of the law and ethics of lawyering, with particular emphasis on some aspects of the body of law and ethics rules that bear on the core issues. Finally, the course would help students to begin developing the skill of recognizing ethical problems as they arise in practice and the ability to resolve ethical problems in light of the history and traditions of legal practice, expressions of professional norms, moral philosophy, and personal morality. I suspect that these goals are fairly conservative and that most legal ethics professors would number them among their own, even if many of our courses would differ in emphasis. 59

58. See generally Daly et al., supra note 1, at 197-98 (discussing the possibility of raising ethical issues in all substantive courses).

59. Those who participated in the conference at Duke University identified varying goals in varying numbers, but a common thread seemed to be the obvious one of teaching students how to understand and determine what is appropriate lawyer conduct. Professor Bundy encapsulated this in a single overarching goal—to impart a “centered, comprehensive understanding of the lawyer’s role.” Bundy, supra note 48, at 33. Professors Menkel-Meadow and Sander suggested two goals: (1) undertaking a “detailed and systematic treatment of rules, codes, and other legal ethics issues” and (2) teaching “students . . . to recognize a legal ethics issue, even if they could not immediately find ‘the right answer.’” Menkel-Meadow & Sander, supra note 8, at 130. Professor Gilders’s course has four aims. Its two primary goals are: (1) “to im-
II. CONTEXTUAL COURSES

In all law school courses, including legal ethics courses, trade-offs must be made. As noted previously, one trade-off is among goals: Do we spend more time in developing familiarity with core concepts and applicable rules, in developing relevant skills, or in exposing students to professional values? Another trade-off is between breadth and depth of coverage: Do we look at multiple issues superficially or at a few more deeply? Although teaching legal ethics contextually does not reflect a judgment about how to strike the balance among competing goals, it does reflect a judgment about coverage. A contextual course in legal ethics,

press students with the special nature of their relationship to clients . . . [and to enable students] to understand the rules that will daily govern their professional lives;” and (2) “to recognize professional responsibility issues that may arise in their working lives.” Stephen Gillers, Getting Personal, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 61, 62-63. Its two secondary aims are: (3) to help “students to understand the organization, governance, and something of the history of the American legal profession;” and (4) “to address issues of race and gender in law practice.” Id. at 63-64. Professor Liebman explained that Columbia’s course has five goals:

[1] to introduce students to the rules that govern professional conduct; [2] to help them develop an analytic framework for making ethical decisions in those broad areas where the rules do not give clear answers; [3] to provoke them to think about what it means to be an ethical practitioner; [4] to help them explore the relationship between their personal morality and professional ethics; [5] and to give them the opportunity to practice ethical decisionmaking.

Liebman, supra note 4, at 73.

This thread also appears to run through the commercially-produced legal ethics casebooks. A possible exception is DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (2d ed. 1995), whose authors indicate that their principal goal is to “explore[] how lawyers forge their professional identities.” Id. at 1. Like other texts, however, this one “takes the law of lawyering as its point of departure,” id., and relies on “short, distilled versions of actual problems.” Id. at 2.

There are differences in emphasis. Whereas some would place greater importance on the body of legal ethics knowledge, others would place greater importance on the “skill” of reflective judgment. See, e.g., Ian Johnstone & Mary Patricia Treuthart, Doing the Right Thing: An Overview of Teaching Professional Responsibility, 41 J. LEGAL EDUC. 75, 102 (1991) (arguing that professional responsibility instruction “should aim to sensitize students to the ethical dimensions of the lawyer’s professional role, provide insight into the nature of the legal profession, and cultivate a willingness to engage in reflective judgment”).

60. This assumes sufficient time for one or the other. Some approaches, however, whatever their other virtues, may not allow adequate time to examine the subject broadly or deeply. See, e.g., Liebman, supra note 4, at 85 (discussing Columbia Law School’s intensive, week-long ethics course).
as distinguished from a survey course, resolves this trade off by looking at problems of legal ethics that arise in a limited number of contexts, rather than across the full spectrum of legal practice.  

A number of law schools, Fordham among them, offer contextual courses either as a substitute for a survey course or as a supplement. The first contextual offerings appear to have been in the area of tax practice. The first and only commercially produced casebook designed for a contextual ethics course, Ethical Problems in Federal Tax Practice, was first published in 1981 and is now in its third edition. The casebook covers essentially the same subjects as the “survey” casebooks, albeit in the context of tax cases, and thus can be used in a basic legal ethics course as well as an advanced course.

More recently, several of the Keck Foundation grant recipients developed course material for contextual courses. For example, Thomas Metzloff, organizer of the conference at Duke University, described the development of such courses to supplement the basic required course that Duke offers in an intensive one-week format during the first year. His article describes in detail his own course entitled “Ethical Issues in Civil Litigation” and notes that Duke has offered more than ten contextual courses, which have “included examinations of ethical issues faced by lawyers principally involved in particular fields such as administrative law, corporate law, criminal law, and family law.” Similarly, Heidi Li Feldman described Michigan’s development of upper-level seminars in legal ethics such as “Selected Problems in Litigation Ethics,” which “concentrated on ethical issues confronting the insurance defense lawyer.”

61. See Daly et al., supra note 1, at 193-94.
63. BERNARD WOLFMAN ET AL., ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE (3d ed. 1995).
64. See Thomas B. Metzloff, Seeing the Trees Within the Forest: Contextualized Ethics Courses as a Strategy for Teaching Legal Ethics, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 227, 228.
65. Id. at 228-38.
66. Id. at 238.
67. Heidi Li Feldman, Enriching the Legal Ethics Curriculum: From Requirement
scribed Texas's development of the "Keck Seminar on the Large Law Firm Practice." 68 Recently, an ABA committee recommended developing additional courses of this nature. 69

Where legal ethics is taught through simulation, the course is particularly likely to be contextual. For example, Robert Burns described Northwestern's integrated program in trial advocacy, evidence, and ethics taken by approximately forty percent of the student body. 70 The course examines ethical problems principally in the context of the work of litigators, work that is not limited to courtroom advocacy, but also entails interviewing, counseling, negotiating, and marketing legal services. 71

At Fordham, where students are required to take a three- or four-credit basic course in legal ethics, students are offered a choice between one of the contextual courses and the survey course. In an article prepared in connection with the Duke conference, my colleagues and I described our initial contextual offerings, which included legal ethics courses focusing on corporate and international practice, public interest law, and criminal advocacy. 72 Supported by a generous grant from the W.M. Keck Foundation, Fordham since has added three other basic legal ethics courses to its curriculum; they are entitled: Professional Responsibility: Regulatory, Tax and International Practice, 73 Professional Responsibility: Corporate Counsel, 74 and Lawyer-

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68. See Dzienkowski et al., supra note 52, at 224-26.
69. See TEACHING AND LEARNING PROFESSIONALISM, supra note 22, at 21 (suggesting "[t]he development of additional elective courses and seminars that focus on ethical and professionalism issues in the context of a particular substantive area of practice (e.g., The Professional Responsibility of the Litigator)").
70. See Robert P. Burns, Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 37, 43-44.
71. See id.
72. See Daly et al., supra note 1, at 200. The article also describes an advanced seminar in ethics and public interest law. See id.
73. This class examines the increasingly complex web of professional standards, statutes, regulations, and common law rights that govern a lawyer's conduct when representing clients in the modern administrative state and in the global business arena. Particular attention is paid to ethical issues in the context of federal securities and tax law, regulatory malpractice, cross-border practice, and representation of business entities such as corporations, general and limited partnerships, and joint ventures.
74. This course explores the ethical implications of the work of in-house corporate
ing for Individuals (originally entitled Ethics in Small Firm and Solo Practice). 75

Teaching legal ethics in context does not presuppose any particular teaching methodology. At Fordham, for example, contextual courses are taught in a variety of ways. Several are offered as classes or seminars, and one is taught principally through simulations. They differ in the nature of the readings; the extent to which they rely on computer instruction, videotaped materials, or outside speakers; and the nature and source of the problems. Indeed, the professors who teach the contextual courses take different approaches, depending on which course is taught. The two basic courses I have offered, Ethics in Criminal Advocacy and Lawyering for Individuals, hardly exhaust the possibilities, but the differences between these courses serve to illustrate that contextual courses place few limits on teaching methodologies.

Ethics in Criminal Advocacy is a three-credit seminar in which students read approximately seventy pages of cases and articles each week, participate in class discussions, and prepare a research paper of at least twenty-five pages. Virtually all the readings relate to the professional conduct of criminal prosecutors or criminal defense lawyers. 76 Following an introduction on attorneys’ roles, rules, and regulations, the material takes up, in order:

(1) confidentiality (including the scope of the attorney-client privilege, the ethical duty and its limits, prosecutorial intrusions into attorney-client relations, and attorney-client confidentiality in the corporate context);
(2) competence of counsel;
(3) counseling and decision making;
(4) client and witness perjury;

75. See infra pp. 375-77 (describing the course). Additionally, with the support of the Keck grant, Fordham added a two-credit advanced legal ethics seminar to its curriculum, which does not satisfy the law school’s professional responsibility requirement, entitled The Judicial Role and Responsibilities.

76. The exception is In re Himmel, 533 N.E.2d 790 (Ill. 1988) (sanctioning a lawyer for failing to report misconduct of client’s previous lawyer).
(5) the duty of candor (including in communications with an adversary, the court, and third parties);
(6) further limits on zealous advocacy (including limits on relations with witnesses, ex parte communications, discovery, trial tactics, and summations);
(7) limits on lawyer speech (including pretrial and trial publicity, and public criticisms of judges and prosecutors);
(8) prosecutorial discretion (including investigating, charging, plea bargaining, and sentencing decisions);
(9) conflicts of interest;
(10) marketing the defense lawyer's services (including advertising, solicitation, and attorney's fees); and
(11) regulation of the prosecutor.

As this list reflects, the materials cover the core issues of legal ethics but exclude peripheral issues covered in the "survey" casebooks, such as the unauthorized practice of law, minimum fee schedules, and judicial ethics. Further, while addressing some aspects of the "law of lawyering"—e.g., the attorney-client privilege, malpractice, cash-reporting requirements, forfeiture law, and obstruction of justice—the course leaves out others—e.g., securities, regulatory, and tax law.

In this seminar, class discussions, including occasional role playing, are organized around problems, or "stories," involving the professional conduct of prosecutors and criminal defense lawyers. Most problems are contained in or suggested by the readings, prompting students both to analyze the problems and to think critically about how the problems are addressed by the legal professional. Because the context is circumscribed, students have considerable opportunity to explore how different legal ethics issues interrelate.

77. See, e.g., Cramton & Koniak, supra note 47, at 177-81.
78. These include relevant provisions of the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, and the Standards Relating to the Administration of Criminal Justice, as well as judicial decisions, ethics opinions, and excerpts from secondary literature.
79. For example, the readings on "confidentiality" include Cesena v. Du Page County, 558 N.E.2d 1378 (Ill. App. 1990), rev'd, 582 N.E.2d 177 (Ill. 1991), a decision involving whether withholding the identity of a lawyer's client, a hit-and-run driver, is protected by the attorney-client privilege. Students are asked to presume they are lawyers, retained by the hit-and-run driver who is subject to the state's
In contrast, during the fall of 1996 Fordham offered for the first time a four-credit course on lawyering for individuals. The course's teaching method combined: simulations that addressed ethical problems in the context of counseling, interviewing, and negotiating exercises; drafting exercises; and independent research assignments. Margaret Flint, an adjunct professor, and I taught the course. Professor Flint previously taught lawyering skills courses for several years at two other New York City law schools. Each of the sixteen students in the course undertook one of four substantial research assignments, carried out various shorter drafting assignments, either independently or in groups of four, and participated in interviewing, counseling, and negotiating exercises both in and out of the classroom.

Unlike the majority of Fordham's contextual courses, which focus on lawyers in the "hemisphere" serving corporations and other large organizations,80 Lawyering for Individuals focused on lawyers in the second "hemisphere"—those in solo practice or small firm settings who serve individuals and small

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mandatory reporting requirement. The students then consider various questions that likely would arise in counseling the client. For example, how should the lawyer counsel the client concerning whether to comply with the statutory obligation to report the accident? On one hand, the possibility exists that the driver will be prosecuted for driving recklessly if he reports himself; on the other hand, the possibility exists that he will never be caught if he does not comply with the reporting requirement. If the client decides to ignore the reporting requirement, then must the lawyer report the client? May the lawyer do so? May or must the lawyer withdraw from the representation? If the representation continues, then how should the lawyer counsel the client concerning the possibility of approaching the prosecutor on behalf of an anonymous client and attempting to negotiate a plea agreement? To what extent should these decisions be influenced by concerns about the lawyer's own criminal liability, and how should the lawyer otherwise address such concerns? How should the lawyer factor in the possibility that the prosecutor will subpoena and question the lawyer about the client's identity? If the prosecutor did so, then would the identity of the client be privileged? Assuming that it might not be, what factors should influence the prosecutor's decision whether to issue a subpoena to the defense lawyer? If the defense lawyer attempts to negotiate a plea agreement, then what representations may the lawyer properly make concerning the causes of the accident? Should the prosecutor enter into such a deal? What considerations are appropriate or inappropriate to consider in making this decision?

The four research projects dealt with problems of professional conduct in the context of: (1) representing a small business in a transaction that may lead to litigation; (2) defending a company and its employee in a personal injury case; (3) representing spouses in estate planning; and (4) representing a plaintiff in a personal injury action. Core issues raised by these problems included: (1) how and when an attorney-client relationship begins and ends; (2) defining the scope of the representation; (3) the duty of competence and its enforcement via malpractice actions; (4) confidentiality; (5) client counseling and the division of decision making authority; (6) conflicts of interest; (7) candor to the courts, opposing counsel, and unrepresented parties; (8) client perjury; and (9) the attorney's fee arrangement. Other issues were explored through shorter writing assignments or role playing. For example, students familiarized themselves with the standards governing advertising and solicitation by working in groups of four to develop marketing plans for a trusts and estates law firm.

The institutional resources committed to the Lawyering for Individuals course permitted a more complete development of the skill of resolving ethical problems, building upon aspects of the requisite body of knowledge. Taking a page from the MacCrate Report, the course envisioned "legal ethics" as a skill that is both comparable to and dependent on the lawyering skills of problem solving, legal analysis and reasoning, research, investigation, communication, counseling, and negotiation. For example, situations involving representation of coclients—e.g., a husband and wife in estate planning or an employer and employee in a personal injury case—may require the lawyer to: recognize the possibility of a conflict of interest; interview both clients to ascertain the facts relevant to the possible conflict of interest; research authorities bearing on whether representation may be undertaken or continued in light of the particular information adduced by the lawyer; analyze the facts

81. See id.
82. The required texts for the course were: David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (1991); Donald G. Gifford, Legal Negotiation: Theory and Applications (1989); Charles W. Wolfram, Modern Legal Ethics (1986); and a collection of standards of professional responsibility.
to determine whether, under the applicable ethics rules and authorities, representation is permissible; explain the problem to the clients; and where appropriate, counsel the clients regarding whether to seek different counsel or to consent to representation notwithstanding the lawyer's conflict of interest. Because the class was small, we were able to place all students in various simulations designed to promote the development of each of these skills. Even with two professors, however, the students were not provided nearly as much feedback as they would have liked and, ideally, should have received.

In addition to reflecting different teaching methodologies, the courses entitled Ethics in Criminal Advocacy and Lawyering for Individuals reflected different emphases on the components of ethical lawyering identified in the MacCrate Report. The differences between contextual courses offered at Fordham and those offered elsewhere probably are even more pronounced. It may be that the "survey" approach affords a similar degree of freedom; certainly, there are significant differences in emphasis among the various casebooks. As discussed below, teaching legal ethics contextually offers other benefits that may make such an approach preferable.

III. THE BENEFITS OF TEACHING IN CONTEXT

If the basic legal ethics course is conceptualized as an early step toward training law students to recognize and resolve legal ethics problems, how should the course be taught? Several pedagogic implications seem obvious and fairly standard. First, the course should engage students in examining situations that raise ethical questions, especially situations involving such core issues as decision making, confidentiality, loyalty, etc. The situations may be presented in various ways, incorporating judicial opinions, bar association opinions, newspaper articles, constructed problems, dramatized monologues and dialogues, or a combination of these. Second, students should be exposed to the body of knowledge relevant to resolving these problems, for ex-

83. See, e.g., Rhode, supra note 2, at 140 (identifying various approaches to teaching legal ethics employed by Professor Rhode over the past 16 years).
ample ethics rules, law of lawyering, etc.\textsuperscript{84} Third, students should be engaged in the exercise of identifying and resolving these problems in light of the applicable sources of "ethical rules."\textsuperscript{85} Although students may be "engaged" in different ways, including lectures, in-class discussion, and student role playing, clearly, as is true of any lawyering skill, the skill of identifying and resolving ethical problems is best learned through doing and with the benefit of feedback.\textsuperscript{86} Lectures may prove to be less expensive but, at the same time, they may prove to be less effective at teaching legal ethics.\textsuperscript{87}

This leaves other questions: How many situations should be examined? And, which ones? The idea of confining legal ethics classes to a limited number of contexts has various attractions, wholly apart from pedagogic concerns. One is that a curriculum comprised of contextual courses may expand the pool of faculty willing to teach legal ethics, by allowing professors to focus on their areas of greatest interest, experience, and expertise.\textsuperscript{88} Another is that these courses may promote scholarship by allowing those faculty members who write about legal ethics to explore more deeply those issues about which they would like to write.\textsuperscript{89}

On the question of pedagogy, however, conventional wisdom suggests that the basic legal ethics course should survey the full range of contexts in which lawyers work.\textsuperscript{90} That is certainly the assumption underlying the commercially produced texts. The thought behind the contextual courses, in contrast, is that it is more effective to limit the contexts in which ethical questions are examined. In seeking to achieve the goals of a basic legal ethics course, as in defining those goals, less is more.

As discussed below, contextual courses have three principal advantages over survey courses. First, they give a more realistic picture of how ethical issues arise and are addressed in law prac-

\textsuperscript{84} See, e.g., Gillers, supra note 59, at 63.
\textsuperscript{85} See, e.g., Spaeth et al., supra note 12, at 159-60.
\textsuperscript{86} See Gillers, supra note 59, at 68-70.
\textsuperscript{87} See Rhode, supra note 2, at 141.
\textsuperscript{88} See Bundy, supra note 48, at 29.
\textsuperscript{89} See Feldman, supra note 67, at 57.
\textsuperscript{90} See Daly et al., supra note 1, at 198.
tice. Second, they allow more time to deal with the material at the heart of the course by reducing the time that must be allocated toward filling in "context." Third, they reduce some of the students' resistance toward the legal ethics requirement.

A. The Importance of Context to Understanding Legal Ethics

A principal advantage of contextual courses is that they give newcomers to the legal ethics field a better picture of law practice because "very few lawyers in the private sector can leg[i]timately [ ] claim the title of 'generalist.'" More importantly, contextual courses afford a truer picture of how lawyers experience legal ethics problems.

To see why this is so, consider each of the following ten lawyers:

1. a partner in a large, Wall Street law firm who concentrates in the area of commercial litigation;
2. an in-house counsel for a bank who is principally responsible for issues of compliance with federal law;
3. a solo practitioner who represents individuals and small businesses in commercial matters, trusts and estates planning, and other transactional and planning contexts;
4. a full-time criminal prosecutor who practices in a rural county;
5. a criminal defense lawyer who practices in an urban public defender's office;
6. a legal services lawyer who serves indigent clients seeking

91. See infra Part III.A.
92. See infra Part III.B.
93. See infra Part III.C.
94. Daly et al., supra note 1, at 211; see MACCRATE REPORT, supra note 14, at 11 ("[I]n virtually every practice setting the individual lawyer is compelled to concentrate in one or several areas of law, while clinging to the traditional image of being a 'generalist'.")

This was true even 70 years ago. See In re Bd. of Law Exam'r Examination of 1926, 210 N.W. 710, 711 (Wis. 1926) ("[I]n harmony with the vastly increasing complexity of our industrial and commercial interests, . . . specialization in the various fields of the [legal] profession has become necessary and common.").

95. As Professor Metzloff put it, "[i]nherent in this pedagogical approach is an assumption that while there are overlapping considerations across various practice areas, the ethical issues faced by lawyers in these different contexts vary to a considerable extent." Metzloff, supra note 64, at 228.
public benefits;
(7) an assistant city corporation counsel who defends the city in
tort and contract litigation;
(8) a small firm practitioner who, concentrating in the area of
family law, frequently represents children by court appointment
in abuse and neglect cases;
(9) a personal injury lawyer who represents plaintiffs; and
(10) an insurance company staff counsel who defends insured
individuals and businesses in personal injury actions.

All ten lawyers have some things in common. They all prac-
tice law, a profession96 with a distinctive history and set of tra-
ditions. They all are licensed practitioners and, consequently,
are subject to rules of professional conduct that, facially, do not
differentiate between practitioners or areas of practice for differ-
ent treatment but appear to apply generally to all lawyers.97
Further, they all are subject to discipline by a disciplinary agen-
cy under judicial supervision.98

But, it is doubtful that one could design effectively a single
course in legal ethics as part of a continuing legal education
program that would be relevant to every one of these lawyers. Fur-
ther, if one were to design ten different professional respon-
sibility courses, specifically directed to each of these ten lawyers,
the courses would look extraordinarily different.99 Each lawyer
would give a significantly different answer to such questions as:
What are the recurring problems of professional conduct that
you face? How do the applicable rules of professional conduct
apply to those problems? What other bodies of law apply to
those problems? By what mechanisms are the ethical rules and
law enforced?

96. For an argument that the practice of law has been transformed from a "pro-
fession" to a "business," see Russell G. Pearce, The Professionalism Paradigm Shift:
Why Discarding Professional Ideology Will Improve the Conduct and Reputation of
97. Most states have adopted ethics rules based on the models promulgated by the
ABA in 1969 and 1983. See MODEL RULES OF PROFESSIONAL CONDUCT (1983); MOD-
98. See supra note 97 and accompanying text.
99. See Daly et al., supra note 1, at 201.
Although the “survey” course remains the dominant approach to teaching legal ethics in law schools, increasing recognition is being given to the profound importance of context. This recognition is reflected not only in legal ethics scholarship, but also in literature concerning legal ethics instruction, including most recently, the collection developed from the conference at Duke University. The particular area of law that a lawyer practices is probably the most relevant context in which legal ethics problems must be resolved. Another important consid-


In contrast, the ABA traditionally has promoted the idea that ethical norms are universal. See Green, supra, at 490 n.146. Within the organized bar, however, there is growing appreciation for the importance of context in determining ethical obligations, to the point that an ABA committee recently recommended “[a]ssigning only faculty with extensive practice experience ... to teach the basic and advanced ethics and professionalism courses” because “it is very difficult for a law professor who has little or no practice experience to understand or to convey to students the context in which these issues arise and must be resolved.” TEACHING AND LEARNING PROFESSIONALISM, supra note 22, at 18.

101. See, e.g., Myers, supra note 44, at 838-48 (recommending that students be taught about the legal profession's diversity stemming from “the nature of the professional work itself, the diversity of the people engaged in practice, and the contextualized nature of ethical decisionmaking”).

102. For example, Professor Burns observed the benefit of “[a] contextual and concrete appreciation of what the law of the profession either requires or allows.” Burns, supra note 70, at 39 (emphasis omitted). Professors Mixon and Schuwerk noted “the engaged, contextual resort to personal and professional values and relationships required for true professional behavior.” Mixon & Schuwerk, supra note 6, at 89. Professors Koniak and Hazard, coauthors of a leading casebook that takes the “survey” approach, acknowledged: “The subject of ‘practical ethics’ is above all contextual. By contextual, we mean that practical ethics addresses specific persons situated in specific settings having to make decisions in real time (of which there is always a shortage) with imperfect information, with real and often irreversible consequences.” Susan P. Koniak & Geoffrey C. Hazard, Jr., Paying Attention to the Signs, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 117, 126.

103. Again, quoting Professors Koniak and Hazard:

[T]he ethical problems confronting lawyers cannot be extricated from the law. First, the problems arise in the practice of some specific area of law
eration is the social context of the lawyer's practice.\textsuperscript{104} This includes the practice setting, whether a solo law practice, law firm, corporation, legal services office, or government law office; the geographical setting, whether urban or rural;\textsuperscript{105} the lawyer's relationship to the client, whether the lawyer is the client's employee, is appointed by the court or retained, or serves for a fee or pro bono.\textsuperscript{106} A third consideration is the nature of the client. Independent of the legal and social context, representing an entity is different from representing an individual; representing the government is different from representing other entities; and representing a child, or an older person with a disability, is different from representing other individuals.\textsuperscript{107}

Context matters in at least four ways. First, particular rules of professional conduct and issues of professional conduct may or
may not be very significant. To give one example, rules governing attorney's fees and marketing deeply affect the conduct of solo practitioners and lawyers in law firms, but do not affect the conduct of in-house lawyers, government lawyers, or legal services lawyers; indeed, the problem for legal services lawyers is not how to get more business, but how to choose from among an overflow of possible clients. To give another example, client capacity issues do not much matter to corporate or government lawyers, but matter intensely for lawyers representing children and those representing older clients. 108

Second, depending on the context, particular aspects of the other "law of lawyering" may or may not be very significant. For example, only the conduct of criminal defense lawyers is subject to the standards of the Sixth Amendment right to effective assistance of counsel. 109 Those who work for a fee need to be concerned about how money laundering statutes and cash reporting requirements effect their own conduct as lawyers; other lawyers need not.

Third, depending on the context, particular regulatory mechanisms may or may not be very significant. Malpractice is meaningless for government lawyers, and historically has been close to meaningless for legal services lawyers, criminal defense lawyers, and in-house corporate lawyers. 110 Malpractice is significant for lawyers representing private clients on a retained basis in litigation and transactional contexts.

Fourth, the ethical rules and laws that seem applicable to all lawyers may have different meanings depending on the context. For example, a jurisdiction may have a single general rule determining whether to disqualify an entire law office when one law-

108. See generally Green & Coleman, supra note 107 (discussing the unique aspects of representing elder clients); Green & Dohrn, supra note 107 (discussing the unique needs of children).

109. See Michael L. Guemple, Note, The Effective Assistance of Counsel Standard as an Analogy for the Medical Malpractice Standard, 3 KAN. J.L. & PUB. POLY 77, 78 (1993) (stating that, with few exceptions, the Sixth Amendment's protection of effective assistance of counsel does not apply to civil cases).

110. See, e.g., Susan P. Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 GEO. J. LEGAL ETHICS 1, 6 (1995) (contrasting the difficulty facing criminal defendants in suing their attorneys for malpractice as opposed to civil plaintiffs or defendants).
yer in the office has a conflict of interest, but the rule may be applied differently to government law offices and public defenders offices than to private law firms. The rule may also apply differently to large urban law offices than to small rural ones. A jurisdiction may have a single rule forbidding all lawyers from engaging in dishonesty, deceit, fraud, and misrepresentation, but the rule may be applied less restrictively to prosecutors and, possibly, to lawyers for plaintiffs in civil rights cases.

So, too, issues that cut across areas of practice must be approached very differently depending on the context. Such cross-cutting questions include: Which decisions are for the lawyer and which are for the client? How should the lawyer counsel the client with respect to those decisions that the client must make? How should the lawyer go about making those decisions that are entrusted to the lawyer? These questions pose very different challenges for a government lawyer (whose duty is to "seek justice"), a child's lawyer, or a corporation's lawyer.

By limiting the contexts in which ethical issues are examined, the contextual courses both emphasize and convey the importance of context in resolving ethical dilemmas and in defining the lawyer's role and responsibilities. The one caveat is that the contexts that are examined must be rich enough to allow consideration of the basic issues of legal ethics: competence, confidentiality, loyalty, etc. Although any lawyering context would be worth exploring in an advanced course, not all standing alone would be suitable for the basic course. The judicial context is an obvious example. The advanced courses offered at Duke entitled Ethical Issues in Judicial Decision-Making and at Fordham entitled The Judicial Role and Responsibilities could not be adapted to provide students a grounding in the basic issues of

112. See generally Green, Policing Federal Prosecutors, supra note 37, at 69 & n.2 (discussing the difference in duties between the public attorney and the private counselor).
113. See generally Green & Dohrn, supra note 107 (explaining the unique nature of juvenile representation).
114. See generally Sporkin, supra note 100 (distinguishing the needs of corporate clients from the representation of individual clients).
professional responsibility and the applicable ethical standards. The judicial role is simply too limited. Nor could this goal be achieved exclusively through an examination of the prosecutorial role.¹¹⁵ Yet, by exploring the role of prosecutor together with that of the criminal defense lawyer, the course in Ethics in Criminal Advocacy does allow consideration of the basic legal ethics issues, while also allowing students to better understand each role through a comparison with other roles. This is only one of the many ways contexts can be limited while still satisfying the appropriate goals of a basic course in legal ethics.

B. Putting Ethics in the Foreground

There is another pedagogic benefit to teaching legal ethics in a contextual, rather than survey, course. Teaching contextually allows more time to impart the body of knowledge and develop the skills that ought to be at the forefront of a basic course in legal ethics. Teaching contextually does so by limiting the amount of time that the class must spend talking about the substantive law and other contextual material that form the backdrop against which legal ethics problems must be viewed.¹¹⁶

In any legal ethics course, the professor must fill in the context if the student is to approach a problem as a lawyer.¹¹⁷

¹¹⁵. George Fisher of Stanford has developed readings for a course on prosecutorial ethics. See Deborah L. Rhode, Annotated Bibliography of Educational Materials on Legal Ethics, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 361, 380.

¹¹⁶. The contextual ethics courses, like substantive law courses that include a component on legal ethics, are premised on the understanding that ethical issues should be examined in the context in which they arise, rather than in the abstract. See, e.g., Scott J. Burnham, Teaching Legal Ethics in Contracts, 41 J. LEGAL EDUC. 105 (1991) (discussing the author's integration of ethics into the curriculum of a contracts course); Monroe H. Freedman, Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course, 21 J. LEGAL EDUC. 569 (1969) (identifying how ethical problems can be brought to the attention of students in a first-year contracts course); Richard A. Matasar, Teaching Ethics in Civil Procedure Courses, 39 J. LEGAL EDUC. 587 (1989) (explaining the inclusion of ethical teaching into the doctrinal analysis of a civil procedure course). The difference, however, is that the contextual ethics courses place the principal emphasis on the ethics problems, rather than on the substantive law.

¹¹⁷. See Burnham, supra note 70, at 38-39 (stressing the importance of combining rules with practice through active methods of dramatization and contextualization).
Otherwise, the student cannot realistically address the problem or appreciate how a lawyer would deal with it in real practice. In a survey course, where the context is constantly changing, there is an overwhelming amount of context to address. As Stephen Bundy discussed in his contribution to the conference at Duke University, the students' limited familiarity with law and law practice was one of the factors that motivated Boalt Hall to move its professional responsibility course out of the first year. Second- and third-year students can gain more from and contribute more to a legal ethics class than first-year students, both because of students' greater familiarity with the law and because of their greater familiarity with practice, developed through work in law offices and law school clinics.

The problem is that even after one or two years of law school, the students' knowledge of law and law practice is still limited. Moreover, the knowledge they have acquired will differ from student to student and may not be easily generalized. For example, a summer internship in a prosecutor's office will give limited insight into the dynamics of in-house corporate counsel's office, while an upperclass course in antitrust law will give limited insight into family law. By limiting the amount of time that must be spent explaining the legal, social, and personal "context," contextual courses afford more time for students to employ the skill of identifying and resolving ethical problems in the limited areas of practice in which, for that semester, they are asked to imagine themselves working.

118. See Bundy, supra note 48, at 28-29 ("[The first-year students'] lack of exposure to relevant advanced courses, such as Criminal Procedure, Corporations, Tax, and Environmental Law, made it more difficult to teach important and conceptually demanding topics, such as compliance counseling, opinion letters, client perjury, and representation of corporations and other organizations.").

119. To quote Stephen Bundy again: [T]here is clearly a sense in which Legal Profession is an advanced course. Its full development is parasitic on students' basic familiarity with critical concepts of legal obligation and procedural regularity and on their emerging awareness, based on exposure to law office work in clinical, part-time, or summer employment, of the practical significance of professional ethics and ethical decisionmaking. Id. at 33.
The concern might be raised that by eliminating some contextual information, one also eliminates part of the body of "legal ethics" knowledge that ought to be transmitted. For example, the challenge might be posed: If a student enrolled in Ethics in Criminal Advocacy studies conflicts of interest in the joint representation of criminal defendants, then what will happen if she becomes a trusts and estates lawyer? Will she be equipped to deal with conflicts of interest in the joint representation of a husband and wife? If she becomes a corporate lawyer, then will she be equipped to deal with conflicts of interest in the joint representation of a corporation and its employee? If she becomes a legal services lawyer, then will she be equipped to deal with the multiple representation of tenants?

To be sure, this new lawyer may not be fully prepared. But, in all likelihood, she will be better prepared by the contextual course than by the survey course. The choice is between examining the problem of joint representation in greater depth as it arises in a single context or examining this problem more superficially as it arises across a wide range of contexts. In the contextual course, more time is available for developing the skill of recognizing and resolving conflict of interest problems because less time is spent exploring the various ways in which these problems may arise in different contexts. Later on, it will be easier for the student to develop the knowledge relevant to a new area of practice than it will be to develop the skill of analyzing an ethical dilemma in depth.

C. Lowering Student Resistance

Many have offered explanations for why students resist the course in professional responsibility, ranging from the idea that legal ethics is too unlike traditional law courses to the ordinary sense—that is, something along the lines of how to get to heaven by doing right. See Bundy, supra note 48, at 30 (discussing Ronald M. Pipkin, Law School Instruction in Professional Responsibility: A Curricular Paradox; 1979 AM. B. FOUND. RES. J. 247). At best, this leads students initially to perceive

120. See Dzienkowski et al., supra note 52, at 215-18 (noting the difficulty in presenting ethical issues without the context of a specific substantive area).
121. See supra notes 37 & 44.
122. Part of the explanation may be that students expect the legal ethics course to be about ethics in the ordinary sense—that is, something along the lines of how to get to heaven by doing right. See Bundy, supra note 48, at 30 (discussing Ronald M. Pipkin, Law School Instruction in Professional Responsibility: A Curricular Paradox; 1979 AM. B. FOUND. RES. J. 247). At best, this leads students initially to perceive
idea that it is too much like traditional courses.\textsuperscript{123} One source of student resistance—perhaps paradoxically because legal ethics is one of the few subjects that cuts across all areas of law practice—is the perception that the legal ethics course is irrelevant to the student's career in the law.\textsuperscript{124} Rightly or wrongly, a course focusing on the area of practice in which the student expects to engage is more likely to be perceived as relevant.\textsuperscript{125}

that the course is unnecessary: As one of my students put it, "I don't need to take this course; I went to Sunday School." It is not a complete answer to observe, as did Professors Cramton and Koniak in an article prepared for the earlier conference at William & Mary, that

the subject of legal ethics is not coextensive with the subject of personal ethics. The restrictions on a lawyer engaging in a business transaction with a client, the rules on safekeeping client property, and the nuances of conflicts of interest are not matters that law students should be expected to intuit based on their otherwise fully developed moral character, however good that moral character might be.

Cramton & Koniak, \textit{supra} note 47, at 152-53. These authors noted later in the same article that, "[a] legal ethics course should include discussion of how to be a good person while being a good lawyer. One aspect of this dimension of lawyering is the proper extent to which a lawyer can bring to bear her own moral values while effectively representing clients." \textit{Id.} at 176. Thus, a course in legal ethics requires students to ask themselves not only, "How \textit{must} I conduct myself as a lawyer?" but also such disquieting questions as, "How \textit{should} I conduct myself as a lawyer, and what kind of lawyer—indeed, what kind of person—do I want to be?"

\textbf{123.} \textit{See} Mixon & Schuwerk, \textit{supra} note 6, at 93-100 (discussing Andrew S. Watson, \textit{The Quest for Professional Competence: Psychological Aspects of Legal Education}, 37 U. CIN. L. REV. 91 (1968)).

\textbf{124.} \textit{See supra} note 44.

\textbf{125.} For example, Robert Burns wrote:

[I]t is fair to say that most of the students who choose this course are at least contemplating professional lives in which litigation will play a role. For them, we believe, litigation-related simulations increase the level of interest even in doctrinal areas that are not necessarily related to litigation.

Burns, \textit{supra} note 70, at 44.

In Fordham's course material, we emphasize that students should not be dissuaded from enrolling in a contextual course for fear that they ultimately might not practice in the area. Each offering explores the core issues in professional responsibility such as confidentiality, conflicts, the role of the lawyer in society, etc., and what students learn in the context of one practice area is transferable to another. This does not mean, however, that one class is likely to be no more relevant than another. There would be an advantage to studying legal ethics in the context of the area of practice in which one seeks to find a career. But the benefit would not be that one acquires a better grounding in legal ethics. It would simply be that one acquires greater familiarity with the particular area of practice that comprises the "context" within which the course is taught.
Consequently, another benefit of contextual courses is that students are generally more receptive to them.\(^\text{126}\)

Where more than one contextual course is offered, the very fact of being afforded a choice is also likely to make students more receptive.\(^\text{127}\) Even if the curriculum affords only one option, at least at the more homogenous law schools, a contextual course may be preferable to a survey course. For example, one can imagine Columbia offering a single course focusing on the representation of corporations and other large organizations in large law firms or as in-house corporate counsel, or Montana offering a single course focusing on the representation of individuals and small businesses in small firm or solo practice. Teaching legal ethics in context, therefore, does not require a menu of contextual course offerings, the development of which might meet various administrative obstacles.\(^\text{128}\) In law schools in

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126. See, e.g., Daly et al., supra note 1, at 194 (discussing the student response to the contextual courses at Fordham University).

127. See, e.g., Bundy, supra note 48, at 29 (noting the benefit of "a range of approaches").

128. Allowing students to satisfy the law school's professional responsibility requirement by taking, as an alternative to the survey course, a legal ethics course chosen from a menu of "contextual" offerings might require more sections of legal ethics and, thus, the dedication of more faculty resources to the subject. This would also require identifying professors who are familiar with, or at least interested in, each of the various areas of practice. Because these professors (unless they would be teaching in the tax area) would not be able to rely on a commercially produced casebook with the accompanying teacher's manual, this might require affording those professors time away from other responsibilities to develop original teaching materials.

Several objections to such a curriculum reform can be anticipated. First, why should faculty resources be dedicated in this manner? This Article is meant to provide some answers to this question, although its answers may or may not be convincing to those who have no stake or experience in teaching legal ethics. Further, where will the law school find professors to teach the course, and where will the law school find the resources to free these professors from other responsibilities, so that they can develop the contextual courses? At law schools such as Fordham, Duke, Michigan, and Texas, the faculties already included members who were interested in developing such courses, and Keck Foundation grants expanded the available resources. Elsewhere, legal ethics professors can build on work that has already been done both by grant recipients and by others who have developed contextual courses. For example, copies of course material developed at Fordham are available from the faculty who offer the respective courses; Deborah Rhode has developed an annotated bibliography of legal ethics materials, many of which would be useful in developing contextual courses. See Rhode, supra note 115, at 361-89 (listing references to legal ethics educational materials). This, however, is an incomplete answer.
which more than one section of legal ethics is offered, students can be given a choice between the survey course and at least one contextual offering with relatively little strain on resources, but with likely gain in terms of student satisfaction.

One might ask, of course, whether winning over students is an important goal. After all, the rewards of teaching legal ethics should not necessarily be in the here and now. In this course, more than any other, our professional responsibility is less to satisfy the consumers of legal education than to protect the public whom they will serve. Nevertheless, in legal ethics as in other courses, we are likely to teach more effectively when our students are more open to what we have to offer.

IV. RESPONSIBILITIES BEYOND THE BASIC COURSE

That law schools have a responsibility to go beyond offering the basic legal ethics course goes without saying. It is one thing for a single legal ethics class to set a limited goal; it is another thing for a law school to do so. Moreover, as Carrie Menkel-Meadow has noted, legal ethics is already taught elsewhere in the law school for better or worse—and, mostly, for worse. For example, “the traditional classroom fosters adversariness, argumentativeness,

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One of the undeniable burdens, as well as pleasures, of teaching contextual courses is the need to put one's personal stamp on the teaching materials.

At the end of the day, the only way for a law school to overcome the obstacles to developing a contextual curriculum—or, really, any kind of reasonably respectable curriculum in the area of legal ethics—is to employ a sufficient number of faculty members who are interested in teaching legal ethics and who, as a matter of professional pride, will want to do so effectively. As Professor Bundy has noted, professional responsibility instruction has tended to evolve, in large part, “incrementally, in accord with faculty energies and interests.” Bundy, supra note 48, at 30. That is certainly how it evolved at Fordham. See Daly et al., supra note 1, at 199-201. That is how it will continue to develop—if it is to develop—at most law schools.

129. See, e.g., TEACHING AND LEARNING PROFESSIONALISM, supra note 22, at 13-25 (recommending that law schools increase training in legal ethics and suggesting how to implement this recommendation); Johnstone & Treuthart, supra note 59, at 103 (arguing for “an integrated and comprehensive program that engages students in the type of thoughtful reflection and interaction that will carry through to their working lives”).

130. See Carrie J. Menkel-Meadow, Can a Law Teacher Avoid Teaching Legal Ethics?, 41 J. LEGAL EDUC. 3, 5-9 (1991) (explaining the realities of the ethical messages that are conveyed to law students today).
and zealotry, along with the view that lawyers are only the means through which clients accomplish their ends—what is ‘right’ is whatever works for this particular client or this particular case.” The pervasiveness of this vision of legal practice is one of the many challenges confronting those of us who teach legal ethics courses. If law schools are to aspire to develop “ethical” lawyers, rather than cynical lawyers, then they must teach legal ethics better both within and outside the curriculum.

Further, law schools should consider working with other institutions, such as courts, bar associations, disciplinary bodies, and, where they exist, state ethics institutes, to complete the task of training practitioners to recognize and resolve ethical dilemmas. In many ways, teaching practitioners is far easier than teaching law students. Practitioners are already “in context.” Additionally, they are likely to recognize the importance of legal ethics as an aspect of law practice. If they would find “survey” courses in legal ethics to be largely irrelevant to their experience, then many would appreciate programs that examined ethical problems in the context in which they worked. These might include not only lectures or panel discussions, but also, perhaps more effectively, directed dialogues with other lawyers who practiced in the same or related contexts and who address similar ethical problems. Those who teach contextual courses in the law school are particularly well equipped to contribute to such professional programs and should do so to the extent that time allows. Perhaps we who teach legal ethics will be forgiven

131. *Id.* at 7.


for accomplishing less at the earlier stages of the "educational continuum" if we contribute a little more at the later stages.

V. CONCLUSION

We who teach legal ethics "in context" start with the premise that legal ethics is a subject worthy of serious academic and professional study combining a body of knowledge, a lawyering skill, and a set of professional values. We accept that students have much to learn and that they will not learn it all after a single course. Our goal is to do our best with limited resources to develop our students’ appreciation of the demands of ethical lawyering. Our experience is that we do this most effectively by leading our students through a deep exploration of the core issues of legal ethics in the context of only a few areas of law practice, rather than by leading them on a tour of all the issues of professional responsibility as they arise across the full spectrum. This is the difference between leading a one-hour discussion of the work of a single artist and leading a one-hour tour of the entire collection of the Metropolitan Museum.

By teaching legal ethics contextually, we at Fordham, and others elsewhere, preserve our passion for teaching legal ethics. Simply put, we better enjoy teaching the course this way. To be sure, not all will share our preference. For those who do, this may be the best reason of all for teaching legal ethics in context. Most of us who teach legal ethics are deeply committed to developing our craft, as this conference shows. But teaching is more than a craft. It is an art. To succeed, we must preserve our passion for this art in whatever way we can.

In the end, that may be the most important lesson of our experience—and of this conference. There are various pedagogically justifiable ways to teach the course. We will be most successful as teachers if we choose the method that we most enjoy. So, if we have adopted the credo, "less is more," it is because "less" is not only more effective, it is also more fun.