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THE PURPOSES OF LEGAL ETHICS AND THE PRIMACY OF PRACTICE

ROBERT P. BURNS*

I. INTRODUCTION

Responsible practice is the goal of learning and teaching legal ethics in law school. The achievement of this goal requires cultivation of the ability to see ethical dimensions of situations as they are likely to arise in practice. It requires the ability to respond to those situations with lawyering *practices* that concretely respect the complex values implicit in the moral dimensions of those situations.¹ By practices, I mean nothing more mysterious than interviewing, counseling, planning, negotiating, preparing and trying cases, and briefing and arguing appeals, among others. In order to practice responsibly, a student must have a contextual understanding of the legal norms that partially control those activities, starting with a largely consensual judgment of competent and decent lawyers as to how to proceed in the face of recurring moral problems. He or she must begin to achieve the moral dispositions that allow him or her concretely to practice responsibly.

The understanding of legal norms must be refined by an analytical appreciation of the *law* of lawyering and how it relates to lawyering practices. It must further be enhanced by a grasp of the range of moral and interpretive stances a lawyer may take toward that law and the circumstances under which these vary-

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1. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 190-91 (2d ed. 1984). MacIntyre writes:

A practice involves standards of excellence and obedience to rules as well as the achievement of goods. . . .

. . . A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.

Id.

ing stances are morally appropriate. Finally, a student should engage some of the deeper questions surrounding sets of relationships: between what may be called common morality and role morality; between personal and public morality; and between morality and law more generally.

I will argue that those purposes of teaching and learning legal ethics can be realized in the range of active learning methods that surround what is usually called simulation. The connection between the purposes of ethics education and the simulation method will be the focus of this Essay, with just enough attention devoted to the details of the method to allow the reader to understand these connections.²

II. A SHORT DESCRIPTION OF THE SIMULATION METHOD

For those unacquainted with the simulation method of teaching legal ethics, a compressed description is probably useful. The method requires students to perform basic lawyering tasks in simulated exercises *while fully in role*. It finds its broadest current application in trial advocacy classes modeled after the methods pioneered by the National Institute for Trial Advocacy (NITA),³ but has been extended to the teaching of other important lawyering tasks, such as negotiation and other pretrial practices.⁴ The problems are structured to provide for a coherent sequence of practical problems that are solved only through a competent performance. Each student effort is followed by some form of critique, that is, a period of constructive criticism addressing the student's performance. The critique contains a consciously structured discipline,⁵ carefully designed to keep the

2. I have explained more of the details of the method in 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. I have explained it at even greater length in ROBERT P. BURNS ET AL., EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY: TEACHER'S MANUAL (1994).

3. See generally ROBERT P. BURNS & STEVEN LUBET, PROBLEMS AND MATERIALS IN TRIAL ADVOCACY AND EVIDENCE 1 (1995).

4. See generally ROBERT P. BURNS ET AL., EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1994) (presenting simulation exercises based on two fictitious case files).

5. This discipline can be taught and learned. In fact, NITA conducts a number of workshops designed to instruct teachers of lawyering skills.

discussion focused on the student's performance; to provide suggestions in a relatively short period of time and in a manner that the student can relate to his or her performance; to relate the specific suggestions to broader considerations; to model better performance; and, thankfully, to suppress self-regarding "war-stories."

Other forms of instruction supplement the simulated workshops that are at the heart of the course.⁶ Lectures serve to provide broader conceptual frameworks within which to place the more contextual learning that occurs in the workshops. The lectures also provide historical and theoretical perspectives on the material. Finally, faculty performances provide models to emulate, imaginable forms of concrete practice, implicit norms that were applied in the critiques, and, when they are particularly successful, a sense of excellence in the particular area.⁷

In our adaptation of this method to the teaching of legal ethics, a simulated disciplinary hearing precedes the period of critique in some of the earlier exercises.⁸ The students once again perform in role: this time as the accused, the prosecutor, the defense counsel, and the disciplinary panel that must hear arguments. They question the advocates, deliberate, and reach a decision.⁹ Otherwise, our adaptation contains the same elements as does traditional simulation instruction. Our reason for including the disciplinary hearings is to place students in the full range of roles, including client, that are relevant to professional responsibility conceived as disciplinary law.¹⁰ In the course of the semester, students experience the issues surrounding the law of professional responsibility from almost all of the important perspectives in the disciplinary process. Students not only learn how their actions may appear to prosecutors and judges, but through these appearances, they can learn important lessons about their own deeply problematic performances that initially may have seemed adequate.¹¹

6. See Burns, *supra* note 2, at 45-47.

7. See *id.* (explaining the use of faculty members in simulation exercises).

8. See *id.* at 46.

9. See *id.*

10. See *id.* at 48 n.32.

11. See *id.* (describing the reflective process students undergo with respect to their

Ideally, this method of learning professional responsibility integrates legal ethics with the learning of important lawyering skills. In the course, students interview and counsel clients; deliberate with firm partners; prepare client witnesses for and present direct examination; interview nonparty witnesses; conduct a long negotiation with frequent intervals in order to counsel clients; cross-examine witnesses; argue and deliberate concerning the admission of candidates to the bar; and deliberate as a firm's management committee.¹² Doctrinally, students address issues including participation in client wrongdoing; relations with the unrepresented persons; distribution of authority between lawyer and client; perjury; obligations of candor in the discovery process; and conflicts in civil and criminal contexts.¹³ Regardless of whether these or similar exercises are employed through the coordination of different courses, through a single lawyering process course, or within a single stand-alone professional responsibility course, the simulation approach has a number of strengths that I have summarized elsewhere as follows:

It can enhance moral vision into the kinds of concrete situations in which ethical issues actually arise. It alerts students to the strong pressures on ethical practice that stem from the adversary system. Pedagogically, it has all the advantages of active learning and offers the promise that ethical norms can become "dyed in the wool," deeply integrated with basic lawyering practices from the start. By focusing on the performances that would or would not be consistent with ethical norms, it enhances an understanding of the meanings of those norms. It dramatizes the philosophical, legal, psychological, and political tensions that constitute the rich complexity of legal ethics. It illuminates the ethical issues that pervade law practice and that ethical rules only partially address. It can make criticism of prevailing norms more incisive and serious. And it offers the students an opportunity to

own performances).

12. See BURNS ET AL., *supra* note 4.

13. See *id.* The course provides full coverage of the usual range of professional responsibility issues, with the greatest emphasis on the issues that arise in the contexts of litigation and dispute resolution. I have defended this concentration on a relatively broad area elsewhere. See Burns, *supra* note 2, at 44. Coverage of other areas is achieved through lecture and problem sessions. See *id.* at 45-47.

integrate ethical norms into their practice in those areas that the disciplinary process will never touch. Finally it is a *method* that is fully compatible with any legal, doctrinal, social scientific, and philosophical literature that the teacher believes important.¹⁴

III. ON GIVING LAW ITS DUE FOR MORALITY'S SAKE

Legal ethics education must provide a contextual understanding of a lawyer's obligations to his or her clients, self, and legal order. This task is as internally complex¹⁵ as are the sources of those obligations. One element of this understanding requires an analytically rigorous study of the law, intertwined with various lawyering practices. I say intertwined because the law of lawyering¹⁶ applies to law practice in different ways. Sometimes the law attempts to state in its own language "an envisioned form of 'good practice.'"¹⁷ Here, rules are a "mere abridgement of the activity itself; they do not exist in advance of the activity."¹⁸ The provisions of the Model Rules of Professional Responsibility (the "Model Rules") requiring a lawyer to defer to a client's definition of the purposes of the representation¹⁹ and to provide his or her client "independent professional judgment and render candid advice"²⁰ are rules of this sort. They are deeply embedded in the

14. Burns, *supra* note 2, at 49-50.

15. See CHARLES TAYLOR, *SOURCES OF THE SELF* 204-05 (1989) (arguing that important changes in social practice inevitably involve the interpretation of fundamental norms).

16. My examples will generally be from the law of professional responsibility, or legal ethics narrowly conceived. I completely agree with the importance of employing a broader "law of lawyering" perspective in the legal ethics course, addressing legal authority from sources that bear on lawyers' work from outside the law of professional responsibility, such as the criminal law of accountability and the law of fraud. This concern simply makes the strictly legal side of the legal ethics course more demanding.

17. Burns, *supra* note 2, at 38.

18. MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 101 (1962); see also *id.* at 62 (applying the concept of comprehending rules when immersed within a practice rather than in the abstract to a child's learning of correct language and behavior).

19. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1996).

20. *Id.* Rule 2.1.

ethos of law practice—they are “defining rules”²¹ in that they make the practice what it is. Lawyers who are good practitioners conform to the rules without consciously advertent to them. Other sorts of rules, usually applicable in the adversary context and only imperfectly distinguished from the former, function differently as limitations on the range of strategic behavior a lawyer may exercise. The requirement that an attorney reveal adverse precedent,²² the prohibitions against alluding to a matter that will not be supported by admissible evidence,²³ or requesting a witness not to come forward²⁴ are these sorts of limitations.

Even when the law of professional responsibility functions as a limitation on strategic behavior, only a good practitioner may be able to identify reliably where the line between appropriate and inappropriate behavior is to be found.²⁵ But, even in those areas where the positive law of professional responsibility provides defining rules that constitute the practice as a moral enterprise,²⁶ there will often be situations in which that law makes a

21. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 24 (1955).

22. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (“A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

23. See *id.* Rule 3.4(e) (“A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . .”).

24. See *id.* Rule 3.4(f):

A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Id.

25. See generally ARISTOTLE, NICOMACHEAN ETHICS 65 (Terence Irwin trans., 1985) (arguing that the judgment of the good man is a sort of ultimate standard on concrete ethical questions).

26. I leave open the possibility that particular rules may be inconsistent with a moral appreciation of the practice, that is, *with the practice itself*. I am following MacIntyre in saying that a practice, including law practice, is at least partially constituted by its internal norms. See MACINTYRE, *supra* note 1, at 190. Some lawyers might say that a course of action “is not good practice” even in the absence of some specific rule clearly disapproving it. They could as well say that it “is inconsistent with the practice.”

determination on a matter that is, from a strictly moral perspective, indeterminate.²⁷ Positive law, especially quasi-criminal law, must be determinate and sometimes bright line, in order to afford those regulated fair notice of its provisions.²⁸ The precise determination may reflect considerations removed from what might be called the fairest expression of the underlying norm, such as considerations of proof and enforceability.²⁹ For example, confidentiality flows from a basic norm of loyalty, but the precise situations in which a lawyer must³⁰ disclose client confidences is very much a matter of positive law. Deference to a client's objectives flows from respect for the client's autonomy, one of the deepest norms of law practice.³¹ But, the question of who has the ultimate decision over whether a criminal defendant should seek a bench trial or testify³² seems to me to be a matter that must be settled by positive law, and in fact, "[l]aw defining the lawyer's scope of authority in litigation varies among jurisdictions."³³

27. See generally 28 ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 121 (Thomas Gilby trans., 1966) ("[I]n contingent matters . . . it is enough to have certitude about what is true in the majority of instances although now and then it may be found wanting.").

28. See H.L.A. HART, *THE CONCEPT OF LAW* 130 (2d ed. 1994) (discussing the need within society for laws that are clear so that citizens may apply them to their daily lives).

29. Considerations of enforceability are especially pressing in competitive contexts where those who ignore unenforceable norms may gain significant advantages. See Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 694 n.59 (1996) (noting that one lawyer may "free ride" on another's observance of ethical constraints).

30. The Model Rules do not provide for any mandated disclosures of otherwise confidential information. Most states do provide for some mandatory disclosures. See, e.g., ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997).

31. See Burns, *supra* note 29, at 685.

32. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1996). The broad distinction is between purposes of the representation, over which the client has authority, and the means by which they are to be achieved, which are within the lawyer's province, subject to the lawyer's obligation to consult with the client over important decisions. As Comment 1 to Model Rule 1.2 notes, "[a] clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking." *Id.* Rule 1.2 cmt. 1.

33. *Id.* Rule 1.2 cmt. 1.

Many of the precise definitions of a lawyer's obligations involve striking a balance among competing considerations that involve important but incommensurable values.³⁴ Here especially, any enforceable norm will have to be supplied by positive law. For example, courts have recognized that the restrictions on a lawyer's taking action adverse to the interests of a former client, rooted in the duty of confidentiality or broader loyalty, may conflict with a potential client's interest in having the lawyer of his choice.³⁵ It is that tension that produces all the twists and turns in the legal definition of the prohibited matters "substantially related" to a former representation.³⁶ And, of course, the extent of imputed disqualification and the protective measures available to law firms, which vary widely, can likewise only be a matter of positive law.

Different morally legitimate reasons exist, then, for a significant body of law to evolve that determines issues of professional responsibility. Often the most serious consequences for the individual lawyer can result from ignoring legal obligations that cannot be considered intuitively self-evident to a person of good will. An important goal of a professional responsibility curriculum must be to acquaint students with those areas in which these difficult casuistical issues³⁷ are likely to emerge, allow the students to work through a number of challenging issues

34. These kinds of compromises among incommensurable values exist in the strictly moral sphere as well:

[W]e naturally think, when uncorrupted by theory, of a multiplicity of moral claims, which sometimes come into conflict with each other

. . . It seems an unavoidable feature of moral experience that men should be torn between the moral claims entailed by effectiveness in action, and particularly in politics, and the moral claims derived from the ideals of scrupulous honesty and integrity: between candour and kindness: between spontaneity and conscientious care: between open-mindedness, seeing both sides of a case, and loyalty to a cause.

Stuart Hampshire, *Public and Private Morality*, in *PUBLIC AND PRIVATE MORALITY* 42-43 (Stuart Hampshire ed., 1978).

35. See, e.g., *Chrispens v. Coastal Ref. & Mktg., Inc.*, 897 P.2d 104, 112-13 (Kan. 1995).

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a)-(b).

37. For a discussion of the dangers and inevitability of making fine distinctions of a legalistic sort even in moral questions, see ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* 5-11 (1988).

under at least one important legal regime, such as the Model Rules, and to alert students to the importance of specific legal provisions that govern in the jurisdictions within which they will practice.

There is a second reason to focus on the "hard law" of legal ethics, one that relates even more closely to a perspective that is careful to emphasize legal ethics as ethics. Only a careful analysis of the law of professional responsibility can disclose those areas that are controlled tightly by positive law and those that positive law leaves to the judgment of the attorney or firm. My experience suggests that students are surprised at the range of decisions that are generally left to attorneys by all codes, including the Model Rules. Most basically, the principle that a "lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities[,]"³⁸ leaves the lawyer with broad discretion as to whom he or she will represent.³⁹ Even if the lawyer chooses to represent a client, he or she "may limit the objectives of the representation if the client consents after consultation"⁴⁰ so long as the agreed upon representation is not so limited as to be incompetent or as to otherwise violate ethical rules or other law.⁴¹ The Model

38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b). See generally Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615-19 (discussing the different moral expectations of a lawyer acting in a professional rather than individual capacity).

39. The "last lawyer in town" problem, the question of whether a lawyer is bound to represent someone whose cause he believes morally repugnant, is itself a moral problem that may pit personal morality against what may broadly be called public morality. In the last lawyer case, the moral justification for a concrete autonomy competes with the obligation of a profession that has a monopoly on practical access to the legal system to provide each person the means to assert legal rights. The issue is complex because the values inherent in public morality are an element of reasonably reflective personal moralities. The problem is usually academic in light of the range of views represented by the legal profession itself. See generally Bernard Williams, *Professional Morality and Its Dispositions*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 259-69 (David Luban ed., 1984) (discussing the complexities inherent in professional morality).

40. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c).

41. Examples of prohibited agreements include those that "surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue." *Id.* Rule 1.2 cmt. 5. The examples again demonstrate the impor-

Rules allow a lawyer to seek to withdraw even if withdrawal cannot "be accomplished without material adverse effect on the interests of the client,"⁴² if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."⁴³ The exceptions to the obligation of confidentiality in effect in most jurisdictions often leave some range for discretion as to which confidences may be revealed.⁴⁴

The *moral* significance of a keen understanding of the broad range of lawyer discretion is the avoidance of a form of bad faith, that is, refusing to take personal responsibility for a decision on the grounds that, for one reason or another, the matter is "out of my hands." Well before a lawyer reaches the point where there is a conflict between the lawyer's individual conscience and his clear legal obligations, a vast range of decisions exist that are not dictated by legal regulation, though they may in some more subtle ways be constrained by those obligations. A lawyer may easily avert his or her eyes from choices that the law of professional responsibility recognizes as the individual's. The often powerful organizations in which the lawyer participates may institutionalize this semideliberate blindness to moral responsibility.⁴⁵ One of the more important tasks of the law school ethics program is to achieve what may be an unwanted clarity on these subjects.

tance of the sometimes subtle intertwining of ethical judgment and legal obligation.

42. *Id.* Rule 1.16(b).

43. *Id.* Rule 1.16(b)(3).

44. The Model Rules, of course, provide that *all* revelations of confidences are discretionary, *see id.* Rule 1.6(b), but even those jurisdictions that require disclosure of confidences under some circumstances often maintain additional categories of discretionary disclosures. *See, e.g.,* ILL. RULES OF PROFESSIONAL CONDUCT 1.6(b)-(c) (1997) (stating that a lawyer must reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm, but is not obligated to reveal a client's intent to commit other crimes).

45. Bernard Lonergan calls these semiwillful refusals to see "dramatic biases" and "scotoses" (blindnesses). BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 191-92 (3d ed. 1970). They can be individual or extend to groups such as professions, classes, or whole societies. *See id.* Alan Donagan calls this self-interested refusal to see the "corruption of consciousness." ALAN DONAGAN, *THE THEORY OF MORALITY* 138-42 (1977).

So much for those decisions that the Model Rules leave unambiguously to the individual lawyer. There is yet another *moral* reason for a law school program that pays attention to the defined law of legal ethics. This concerns what I might call the spirit of interpretation that a lawyer brings to the rules. A range of possibilities exist here. At one extreme, a lawyer may take a strict positivist view of the rules as law. He is Holmes's "bad man": he asks where exactly is the line that I may go up to without an unacceptable risk of sanctions.⁴⁶ In the area of professional responsibility, this is risky business, not only for good positivist reasons: disciplinary authorities are inclined to reject a grudging and self-indulgent attitude toward a lawyer's ethical obligations.

There are, however, circumstances where there are good *moral* reasons to adopt such a view. A lawyer's code, like all law, is inevitably overgeneralized:⁴⁷ there are circumstances in which an expansive reading of a rule may lead in a direction that frustrates its purposes. Like all law, a lawyer's code is the result not only of moral deliberation, but also of the exercise of power. One of the strongest arguments in favor of legal positivism is precisely to keep moral judgment and legal enactment separate, so that the latter is subject to moral criticism.⁴⁸ A lawyer may find himself in a situation where the most obvious interpretation of a provision of the rules leads to a result that is morally repug-

46. See OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTIVE LEGAL PAPERS 167, 171 (1920).

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Id.

47. See PLATO, *Statesman*, in THE COLLECTED DIALOGUES OF PLATO 1018, 1063-64 (Edith Hamilton & Huntington Cairns eds. & J.B. Skemp trans., 1973); see also ARISTOTLE, *supra* note 25, at 144-45 (discussing the inevitable overgeneralization of positive law).

48. See HART, *supra* note 28, at 7-8. The historical roots of positivism are in Augustine's deep pessimism about the limits of moral achievement in the public sphere. See generally GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS 65-112 (1990) (discussing Augustine's views of morality and politics as background for constitutional interpretation).

nant, but where the lawyer's conscientious refusal is inappropriate.⁴⁹ These are the circumstances under which the cold eye of Holmes's character may have its proper place.

A second interpretive style may attempt to locate the fairest meaning of the requirements of the law.⁵⁰ In the run of situations, this style has the most to be said for it. Many of the obligations embedded in lawyer codes are the attempt to balance two or more competing obligations or, as moral philosophers put it, incommensurable interests.⁵¹ The rules concerning confidentiality and their exceptions provide one example.⁵² The rules limiting representation adverse to former clients are an attempt to accommodate the values of confidentiality and loyalty, on the one hand, and the interest of the new client in representation by the attorney of his choice, on the other.⁵³ The rules controlling the proper distribution of decision-making authority attempt to accommodate client autonomy, the proper range of competent paternalism, and perhaps a lawyer's internal professional interest in competent performance.⁵⁴ Because the rules embody this balance of opposites,⁵⁵ the "spirit of the rule" does not nec-

49. See generally David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 285-95 (1996) (discussing the high standard that ought to apply to lawyers' conscientious refusal).

50. I believe that there usually is a fairest meaning, and so I reject a notion of the universal indeterminacy of legal texts. The discipline of discerning this meaning can be quite demanding and does not involve anything like deductive reasoning. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 318-31, 518-21 (Crossroad Pub. Co. 2d ed. 1990) (discussing the different approaches to legal hermeneutics taken by jurists and legal historians).

51. See Hampshire, *supra* note 34, at 1, 5.

52. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1996) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . .") with *id.* Rule 1.6(b)(1) ("A lawyer may reveal such information . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . .").

53. See generally *id.* Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.").

54. Compare *id.* Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . .") with *id.* Rule 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

55. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41,

essarily move in a single direction and only a careful appreciation of where that balance has been struck will be sensitive to all of the values involved.⁵⁶

The final reason to "take law seriously" in the enterprise of legal ethics has to do with the circumstances in which conscience and code, even understood positivistically, appear to clash. I accept the traditional moral doctrine on the primacy of informed conscience over positive law.⁵⁷ There is, however, a distinctively moral obligation to obey the law, and the rules of professional ethics typically have the force of law, imposing a high threshold of moral argument on those who would conscientiously disregard legal provisions.

Finally, there are the related difficulties involved in the relationship between personal morality and the rules that apply in different, more public spheres. Different moral and religious traditions understand these relationships and what might be called the "ethics of public life" in very different ways.⁵⁸ Lawyers, it seems to me, consistently move between the worlds of personal

547 (1983). Easterbrook's argument is within the context of an exclusively interest group conception of the legislative process. The considerations in the text assume, on the contrary, that the ethical rules are the result of a process of genuine moral deliberation, only partially skewed by considerations of interest.

56. The *locus classicus* is Creon's painfully achieved insight at the end of the *Antigone*: obey the *nomoi*, the customary laws that strike a balance between competing principles, most prominently family and state. Creon's tragedy stems in part from taking one (legitimate) principle to extremes. See MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 79-82 (1986).

57. See generally Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 623 (1995) ("Compulsion of an individual to act contrary to his or her conscience is regarded as a violation of the person, something to be avoided except for the most compelling of societal interests.").

58. See generally JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 275-82 (1960) (criticizing some forms of Protestant ethics for failing to respect the "natural" distinctions among the spheres of human life). Alan Donagan criticizes Max Weber's great essay, *Politics as a Vocation*, on similar grounds. See MAX WEBER, *POLITICS AS A VOCATION* (H.H. Gerth & C. Wright Mills trans., 1972). Donagan dismisses as romanticism the notion that an effective politician will have to "save the public rather than his own soul," that is, surrender his personal morality in order to function in the public world. DONAGAN, *supra* note 45, at 184. Such a notion, Donagan suggests, fails to respect traditional moral distinctions. *Id.*

concern, on the one hand, and public right, on the other. From one tradition, a tradition with a developed notion of individual spheres of human action, each with distinctive principles and norms, the demands of an ethical rule that is discontinuous with personal moral sentiments may be emotionally difficult, but may be judged morally unproblematic. Moral obligations are not univocal but are analogous from sphere to sphere. From other traditions, more suspicious of the public sphere as the repository of distinctive and apparently discontinuous norms, the notion that one must do something while occupying a public role that one could not do in private life has the appearance of rationalization.⁵⁹ These are deep disagreements tightly intertwined with alternative cultures and forms of life. There are no once-and-for-all resolutions.⁶⁰ The legal ethics class, however, can help a student begin the process of understanding the important relationship between the resolution of these issues and his or her own identity at a time when a larger measure of personal reflection and serious discussion is possible.⁶¹

59. That is, unless the public sphere is viewed as so God-forsaken that one (1) must act publicly and (2) cannot but sin by so doing. Some have argued that some elements of the Lutheran tradition, themselves developments of Augustinian thought, tend in this direction. Modern German thought contains secularized and rationalized versions of this doctrine. See, e.g., JONATHAN ROBINSON, *Duty and Hypocrisy In Hegel's Phenomenology of Mind* 130 (1977).

60. My own view runs like this:

The most balanced social theory, it seems to me, recognizes the importance of the separation of spheres and sees the corruption that can occur when it is ignored. When the distinction between the political-legal and the moral-religious is ignored, for example, politics can become a "hunt for hypocrites" and "generate a despotism in which every witness box becomes a confessional." Tyrants, great and petty, see every disagreement as an immoral attack on the beloved community. . . .

On the other hand, there exists the danger of fixism: of entitizing the differences among the realms and thus of sealing off one realm from the [other]. There is a moral dimension to politics. There is a political dimension to law. There is a legal dimension to personal relations. Even "domestic" norms such as "brotherhood" must have a (carefully mediated) place in the political and legal world.

Robert P. Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss*, 4 OHIO ST. J. ON DISP. RESOL. 129, 146 (1989) (footnotes omitted).

61. See TAYLOR, *supra* note 15, at 25-52 (noting the relationship between moral judgment, "strong evaluation," and personal identity, including place within traditions). The minority of American law schools that stand squarely within major tradi-

The question of *when* individual conscience, an *informed* conscience, does in fact clash with the public requirements of the codes involves deep questions. Is deference to the client's objectives and resulting representation in pursuit of goals that the lawyer herself would, for moral reasons,⁶² never pursue, still legitimate support for a generally liberal regime that the lawyer endorses, again for moral reasons?⁶³ Or does the student's own moral-religious tradition embody a principle of nonjudgment across a broad range of questionable behaviors that are not utterly indefensible? Or does it elevate the importance of personal relationships, such as the lawyer-client relationship,⁶⁴ over the often debatable issues of public morality?⁶⁵ These are basic questions that the student will answer inevitably in practice, a practice that defines his or her identity. These questions cannot even arise, however, unless the student takes seriously important distinctions between what precisely the codes unambiguously require, what they can be fairly interpreted to require, what seems most consistent with their spirit, and what they allow.⁶⁶ We must take law seriously for moral reasons.

tions on the issues may take a more definite position on these big issues, as may any individual teacher who has a tradition-based position he or she is prepared to defend in the language of public reason.

62. The specific *kinds* of moral reasons may be quite varied. For example, the resort to litigation to further a particular project may be wrong based on a number of reasons: its destructive effects on persons affected by the project, which unjust, or at least overgeneralized, laws permit; the inability of the defendants to finance the litigation; or the time and focus the project may impose on the client to the detriment of his other responsibilities. The Model Rules advert to these matters in Rule 2.1, but, of course, do not prohibit the lawyer from representing a client engaged in an enterprise inconsistent with the lawyer's own moral judgments, unless the conflict rises to the level described by Rule 1.16(a). See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.16(a), 2.1 (1996).

63. See generally PATRICK RILEY, *KANT'S POLITICAL PHILOSOPHY* (1983) (discussing Kant's notion of politics and law in a cautious service to morality).

64. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

65. See *supra* note 34 and accompanying text.

66. I am putting aside questions of the institutional structure of courses in which these interrelated subject matters are considered. Whether it is in one course or in a sequence of courses, it seems to me that a contextual and practice-oriented understanding of a lawyer's legal obligations is a prerequisite to the useful study of these deeper philosophical questions.

IV. THE PRIMACY OF PRACTICE FOR THE MEANING OF LEGAL ETHICAL NORMS

This long argument for the importance of taking the law of professional responsibility seriously may seem odd from someone who has argued that legal practices are far more important than legal rules,⁶⁷ a position to which I still adhere. As the above argument should make clear, even the distinction between the law of professional responsibility and ethical practice must be provisional, and important *moral* reasons exist for providing a rigorous, and at least sometimes detailed, introduction to the applicable law. One cannot be a good lawyer without a reflective orientation toward the law of professional responsibility. I will argue below that one of the advantages of the simulation method of instruction is precisely its ability to foster a rigorous understanding of what the law allows and prohibits in important situations.

Practices are primary. That is self-evident in those situations, described above, where the law is an imperfect attempt to embody some envisioned form of good practice, or in other words, where it is a mere abridgement of the practice.⁶⁸ But, even where the law of professional responsibility serves to impose restrictions on strategic behavior, to render determinate a morally inchoate obligation, or to resolve a tension between conflicting obligations, the precise *meaning* of the legal norm can only emerge by a concrete understanding of the practices that the norm proscribes and the alternative practices that remain legally available to the practitioner.

Just to take one *sort* of example, a very demanding rule against presenting perjurious testimony in criminal cases may evaporate within an impossibly high customary definition of "knowledge" in the local criminal defense culture. It may also disappear by reason of an accepted practice among defense attorneys of avoiding knowledge of the facts or of conducting interviews with clients and witnesses without the serious "confrontation" that might break down a helpful but probably false sto-

67. See Burns, *supra* note 2, at 37-39.

68. See *supra* text accompanying note 18.

ry.⁶⁹ Prosecutors may likewise conduct interviews with police witnesses so as to avoid learning "unhelpful" facts. Under these circumstances, a student's simple reading of a rule and its legislative history may result in a significant misunderstanding of the rule. Meaning is use.

In a local legal culture, there will often exist a question as to what precisely *is* the norm. To continue the same example, some criminal defense lawyers may argue that they are *obliged* to avoid confrontation of helpful witnesses whose stories are likely to survive cross-examination, but whose testimony the lawyer may be in a privileged position to shake during a pretrial interview. A prosecutor's office may routinely explain to possible defense witnesses, often relatives of the victim, that it is their option to speak to defense counsel. The prosecutor may then provide a fully accurate, "flat," and apparently disinterested description of the use to which defense counsel will put the interview, fully understanding that the likely effect of such an accurate description will be to discourage contact with defense counsel.⁷⁰ Some may believe that they must proceed with police or aggrieved witnesses in the described manner because a perceived obligation to justice and public safety, perhaps justified by what I describe as a "positivistic" attitude toward the ethical rules.⁷¹ ("I didn't 'know' that the detective was going to lie!" "I didn't 'request' the victim's brother not to speak to the police!")⁷² In each case, the lawyer proceeds from what he takes to

69. In a perfectly designed system, ethically appropriate behavior will also be tactically necessary. For example, if it is ethically appropriate to confront a helpful but possibly perjurious witness, then the likelihood of a devastating cross-examination of such a witness will counsel the same confrontation. In the real world, however, it is sometimes impossible to provide self-interested motivations for ethical conduct. This is simply to say that legal ethics make a difference.

70. See BURNS ET AL., *supra* note 2, at 17-19 (presenting a demonstration that dramatizes these issues); see also Robert P. Burns, *A Lawyer's Truth: Notes for a Moral Philosophy of Litigation Practice*, 3 J. L. & RELIGION 229, 255-63 (1985) (illustrating an account of the pressures of litigation practice on the moral imagination).

71. See *supra* p. 332-34.

72. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1996) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."); *id.* Rule 3.4(f) (stating the rule pertaining to requests to refrain from giving relevant information). The Rule states:

[A lawyer shall not] request a person other than a client to refrain from

be an explicitly *ethical* understanding of his obligations to his client, on the one hand, or to society, including victims of crime, on the other.⁷³ Where such practices are well known, there are no prosecutions before the local disciplinary boards, nor efforts to change the disciplinary rules to prohibit the practices that greatly limit the effect of the rule. It is at least arguable that the lawyer's behavior is not, in fact, proscribed by the rule. Such a conclusion is even more likely when the behavior is publicly defended on ethical grounds.

My point here is not that law students should understand the ways in which legal practitioners evade their ethical responsibilities. To the contrary, in a given case, a law student may instead come to understand that an apparently overgeneralized and harsh requirement of the rules is, in practice, balanced against other values in forms of practice that are more *ethically* nuanced than a focus on black-letter law suggests. Rather, I am suggesting that a student does not understand the *meaning* of the ethical norm unless he or she has a sense of the extension of the situations to which it applies and the way in which a rule may be balanced against other values in practice. Because the formal disciplinary process reaches such a small number of the situations to which ethical norms apply, and fewer situations still come before appellate courts, the traditional sources of doctrinal material are unlikely to aid students in understanding the meaning of many central ethical norms. Only a mode of instruction that places these norms in the full concreteness of relatively complex factual patterns and exposes students to the prudential reasoning of experienced and decent lawyers⁷⁴ is likely to succeed in illumi-

voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Id.

73. Of course, the parallel between the ethical arguments and a lawyer's competitive interest in winning his or her case may cause us to question the sincerity of the argument, but questions of subjective good faith are, to some extent, secondary to the quality of the reasons for the proposed behavior. A moral position is not false because its strongest advocates are not completely pure of heart.

74. Sometimes quantitative or qualitative social science research may illuminate

nating the prevailing norms of the legal community.

Other examples are less controversial. On the one hand, a lawyer is prohibited from assisting a client in at least some forms of illegal conduct.⁷⁵ On the other hand, a lawyer is "required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct"⁷⁶ even though, despite the lawyer's intentions, that information may sometimes be used to further an illegal enterprise. Yet, "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."⁷⁷ My suspicion is that a student will have virtually no concrete vision of how to go forward under those rules unless he has first watched and questioned a deft attempt and then attempted it in a paradigmatic situation.⁷⁸

Similarly, a lawyer "shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."⁷⁹ In our program, we teach this obligation through a simulated exercise.⁸⁰ The stu-

the actual patterns of norms in a given legal community, though very difficult methodological issues may arise in moving from what aspires to be an explanation of observable phenomena to judgments concerning what is a concrete norm.

75. Model Rule 1.2(d) states:

A lawyer shall not counsel a client to engage, or assist, a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d).

The Model Code of Professional Responsibility DR 7-102(A)(7) states: "In his representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1995).

76. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 6.

77. *Id.*

78. See HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT 47-49 (1972) (explaining that one understands a rule when he can proceed under it).

79. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4).

80. The exercise, entitled "Client Perjury," is set out in *Exercises and Problems Teacher's Manual*. See BURNS ET AL., *supra* note 2, at 25-32.

dent first conducts an interview in which he or she prepares a client in a civil case to testify. The client tells a story that seems designed to aid the case by embellishing the facts surrounding a key legal element. A prepared student will know that the story the client tells might be shown by a competent cross-examiner to be inconsistent with her deposition testimony. Such testimony is probably even a tactical mistake. Under questioning by the lawyer, the client backs off the new version of events. On the stand, however, the client repeats the version of events that she admitted to the lawyer was false. When the lawyer seeks to persuade the client to disclose the falsity of the testimony,⁸¹ she protests that the testimony is true and that she backed off the testimony only because of what the client claims was the lawyer's tactically motivated obsession with consistency. The student-lawyer must then actually proceed from there in both the interview with the client and in the resulting court proceeding.

The student learns the *meaning* of the ethical norm in a way that a story limited to the rule, ethics opinions, and appellate cases could never teach.⁸² The ethical obligation is placed in the context of the lawyer's tactical considerations during the adversary practices in which the ethical norm functions, and the tension between the obligation of candor and that of loyalty and confidentiality is dramatized concretely. Without giving everything away, the exercise transforms and clarifies the student's understanding of what it is that the obligation of candor concretely requires.

V. THE MORAL ADVANTAGES OF EXPERIENTIAL LEARNING

Beyond a richer understanding of the meaning of applicable norms, there are at least three explicitly moral reasons to focus concretely on the ways in which the legal community addresses competing obligations. The first reason relates to students' abili-

81. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 5 ("Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that . . . its false character should immediately be disclosed.").

82. In addition to the student-lawyer, those students who must make a judgment about the propriety of the student-lawyer's conduct also learn the meaning of the norm.

ty to conceptualize the ethical considerations involved in competing obligations. Such obligations treated casuistically can lead to conceptual impasse. Dilemma ethics leads all too easily to extreme skepticism about the entire ethical enterprise. As a *general matter*, there is no way to rank values such as respect for client autonomy, the ethical command to "do no harm," benevolence, and respect for the integrity of one's own practice. It is easy to create general hypotheticals in which those values conflict and in which all abstractly described courses of action seem equally bad. Considered abstractly, these can be matters in which we "think without object," but which can yield to the practical judgment⁸³ of an experienced practitioner charting a course of action that concretely respects and orders the values in tension in a specific situation. One or a small number of courses of action in a concrete situation can be more easily seen as best, or at least better. An overgeneralized theoretical attempt to order competing values will almost always fail. The simulation method can, I believe, preserve the seriousness and integrity of the ethical enterprise even when an experienced practitioner only partially articulates his reasons or a necessarily inexperienced law student is not wholly convinced. The ethics class should focus on actions or performances, either by way of demonstration or student exercises. Serious conflicts among competing considerations will remain, but they are likely to be the *right* conflicts, rooted in deeper tensions in our social life and organization that even good practice can only partially resolve.

The simulation method of instruction contains another distinctively moral strength. The moral sphere is the sphere of *definite action in concrete situations*. This is how Kierkegaard defines the ethical stage of development.⁸⁴ It is the stage of often painful surrender of the youthful world of pure possibility. This latter state he calls the "aesthetic stage," a stage that indulges a dreamy desire to encompass all possibilities.⁸⁵ Classes in which students are asked to assume the role of law "czar," with power

83. See ARISTOTLE, *supra* note 25.

84. See MARK C. TAYLOR, JOURNEYS TO SELFHOOD: HEGEL & KIERKEGAARD 241-52 (1980).

85. See *id.* at 231-41 (discussing Kierkegaard's aesthetic stage and the chaotic aesthetic existence in general).

to rearrange all that is definite, can indulge those illusions, though usually in a harmless enough way. In the simulation method, by contrast, students must make definite choices and must order concretely, and sometimes reject, real human goods. From a moral point of view, they can come to understand that moral identity involves the surrender of possibility. A student, placed in a situation where she must act, must order values. When she finishes performing, she can say: "This is who I am, or at least who I am (in danger of) becoming." Simulation fosters the self-definition that is a key engine for ethical reflection.⁸⁶ Experiential learning fosters the development of moral identity.

Finally, the simulation method offers yet another moral advantage. Ethical lawyering requires not only knowledge of rules, but also ethical dispositions and virtues.⁸⁷ In fact, as I explain below, a glance at the American Bar Association's report addressing ethical education (the "*MacCrate Report*")⁸⁸ shows that even traditionally conceived lawyering skills require the exercise of moral dispositions.⁸⁹ Although simulation surely cannot achieve all of the demands on moral psychology that actual practice can, a well-designed program with the right personnel can do quite a bit. A student can be required to tell a charming client, imperious client, or senior partner what she will or will not do. She can try to remain focused on both effectiveness and ethical obligations while conducting the cross-examination of an unhelpful witness in front of an erratic judge, with the added burden of the presence of her peers and teachers. She can be required to exhibit the

86. Plato's Socrates thus insists that his conversation partners say only what they actually believe. Otherwise moral conversation loses contact with the deeper springs of human judgment and becomes an empty verbal game. See generally PLATO, *Republic*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 47, at 575 (Paul Shorey trans.) (demonstrating Socrates's desire for genuine and truthful discourse).

87. See generally Andreas Eshete, *Does a Lawyer's Character Matter?*, in THE GOOD LAWYER, *supra* note 39, at 270-85 (discussing the effects of a lawyer's personal conduct on his character); Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, in THE GOOD LAWYER, *supra* note 39, at 286-314 (discussing the moral psychology aspect of the lawyers role); Williams, *supra* note 39, at 259-69 (discussing the importance of "professional dispositions").

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

89. See generally *id.* at 135-41 (discussing the need to develop values).

unreviewable singleness of purpose in negotiation that requires seeing and following up on possibilities that actually further the *client's* purposes. These performances require tact, judgment, courage, and selflessness. At the very least, a student can be required and encouraged to understand that these things are hard to do and require the development of a practiced strength of character, the etymology, after all, of our word "virtue."

My own belief is that a number of forms of traditional legal education actually pose threats to those moral dispositions. At a minimum, the *ethics* teacher should seek to do no harm. Numerous authors have described the danger that a traditional Socratic doctrinal class poses to any sense of better or worse *legal* arguments.⁹⁰ The same kind of extreme realist analysis can obviously be applied to case material in professional responsibility. Insufficiently concrete or detailed problem-method hypotheticals can pose difficulties at a level of abstraction where no answer seems better than another. Professors who are inclined toward certain kinds of social scientific explanations of lawyers' behavior can easily project the implicit message that what is *important* about lawyers' behavior is that it can be explained by independent variables—whether economic, psychological, or sociological—of a nonmoral nature. Moral analysis of *purely* dependent variables is trivial. A sophisticated analysis may show deterministic explanation and moral evaluation are not incompatible; however, that analysis is rarely provided, and the implicit message of the method of understanding is corrosive of a moral perspective. Teaching ethics as part of building a normatively understood professional identity through a method that privileges the normative analysis of concrete action elevates the importance of legal ethics as ethics.

90. See, e.g., James Eager, *The Right Tool for the Job: The Effective Use of Pedagogical Method in Legal Education*, 32 GONZ. L. REV. 389, 400-04 (1996) (describing inadequacies of the traditional case method); Russell L. Weaver, *Langdell's Legacy: Living With the Case Method*, 36 VILL. L. REV. 517, 591-94 (1991) (describing limits of the case method); R. George Wright, *Whose Phronesis? Which Phronimoi?: A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817, 828-33 (1996) (discussing the need to supplement the Socratic case method with other teaching methods in order to develop "practical wisdom").

VI. THE PEDAGOGICAL ADVANTAGES OF EXPERIENTIAL LEARNING

It is virtually impossible for a student to move from a set of rules to the practices that embody them. It is far easier to understand the practice, ideally through methods that invoke active learning, and then integrate the rules into the practice. After all, a professional is a person who has a *synthetic* grasp of analytically distinct bodies of knowledge. He or she knows what to do concretely. Those practices are largely habitual. Resort to abstract bodies of knowledge tends to occur when the professional hits a snag—meets an obstacle that the relatively tacit knowing that directs his practices cannot solve. Abstract analysis, therefore, surely has a place. Given the sheer mass of learning that is relevant to a professional's activities, however, it will necessarily always be subordinate to his or her synthetic understanding tacitly embedded in practice.

The surest way for ethical values to stay with a law student is to have them dyed-in-the-wool of his or her practices. As my good friend Steve Lubet likes to say, "Practice doesn't make perfect. Practice makes permanent."⁹¹ Considered negatively, good lawyering skills programs avoid a host of easily made mistakes in the foundation of a lawyer's practice. Considered positively, a good lawyering skills curriculum builds a substantial and generative framework for a lifetime of practice as a reflective practitioner.⁹² Its lessons are the distillations of guidelines and rules of thumb that have proven successful for thousands of practicing lawyers over the years. It certainly does not eliminate the need for judgment, serve as a substitute for experience, nor pretend to teach "everything you need to know" to practice competently. Opposition to skills training because it cannot instantly turn a law student into a superb and responsible trial lawyer sets up a straw man. Skills training can raise the floor of performance, reduce the probability of early disasters, and, for the more tal-

91. Steven Lubet, *Lessons from Petticoat Lane*, 75 NEB. L. REV. 916, 916 (1996) ("Practice makes perfect, it is a great lesson, but it cannot be true The true axiom ought to be that 'Practice makes permanent.'").

92. See DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

ented, increase the probability of excellence and accelerate the process by which excellence is achieved.

Most law schools are now providing skills training through the use of simulated methods of instruction pioneered by NITA.⁹³ As I mentioned, these methods are now used to teach not only trial advocacy, but subjects such as interviewing and counseling, negotiation, pretrial practice, and evidence.⁹⁴ Such courses now occupy a fixed place in legal education. The *MacCrate Report* is likely to enhance this development.⁹⁵ These courses are in fact the places where law students are learning how to practice and are beginning the formation of the habits and the generative frameworks that will set their courses for at least the early stages of their careers. They are, perhaps, the most important places in the law school where the *synthetic* processes distinctive of professional life are being carried out. If the law school is interested in the ethical conduct of its graduates, then I suggest that these are the courses where future behavior is most likely to be affected. Yet, I would go even further. Insofar as the law school accepts the responsibility of teaching basic lawyering skills, it must accept the responsibility of teaching those skills in a manner consistent with ethical principles. In fact, as I will argue in the next paragraph, one cannot even competently teach lawyering skills without an exploration of the ways in which ethical norms structure and limit law practice. Ethics is not something "added on" to lawyering skills: an unethical lawyer is unskilled.⁹⁶

The connection between legal ethics and lawyering practices is then *intrinsic*: an unskilled lawyer is not ethical, and an unethical lawyer is not skilled. It is in the context of legal practice that the most important *kinds* of issues surrounding legal ethics find

93. See Thomas F. Geraghty, *Foreword, Teaching Trial Advocacy in the 90s and Beyond*, 66 NOTRE DAME L. REV. 687, 689 (1991).

94. See generally BURNS ET AL., *supra* note 2 (employing the NITA method in the context of two case files).

95. See MACCRATE REPORT, *supra* note 88, at 236-60 (assessing current legal skills instruction).

96. Bruce Green said provocatively at the William and Mary conference that "ethics is a skill." Bruce Green, Remarks at the W.M. Keck Foundation Forum on the Teaching of Legal Ethics (Mar. 21, 1997). There is much truth in that saying, so long as the distinction between ethical knowledge and technical knowledge is maintained.

their natural homes. I have argued elsewhere that a careful examination of the skills that lawyers ought to master in order to be minimally competent, such as those described in the *MacCrate Report*, demonstrates the close ways in which lawyering skills and legal ethics are intertwined.⁹⁷ For example, the "skill" of developing an appropriate "plan of action"⁹⁸ is structured by the ethical rules on the distribution of authority between lawyer and client.⁹⁹ The skills surrounding delegation are controlled by rules ensuring adequate safeguards against unethical behavior by subordinates. Many of the advocacy skills at the trial and appellate levels are surrounded by different sorts of duties of candor and fairness. Negotiation by lawyers is limited by the sometimes conflicting duties of truthfulness and zealousness, whose sources spring not only from the law of professional responsibility, but also from the law of contract and fraud. Discovery skills are limited by rules controlling communications with represented and unrepresented persons, some of which, especially in the corporate context, can be far from obvious. Tactically attractive delay creates serious ethical problems. Competent client counseling raises explicit, rule-centered issues surrounding control over the representation, as well as larger questions concerning paternalism and what the *MacCrate Report* called "[t]he extent to which it is proper for a lawyer, in counseling a client, to take account of considerations of justice, fairness, or morality, by: . . . [a]ttempting to persuade the client to modify his or her decisions or actions to accommodate the interests of justice, fairness or morality"¹⁰⁰ In this narrow sense at least, one cannot be "skilled" without being "ethical."

Unethical practice is usually, though certainly not always, ineffective practice. This consideration presents another pedagogical advantage of experiential learning in an integrated program. It seems to me that some students have a youthful resistance to being told by their elders what they should do and, therefore, to legal ethics as an enterprise. By contrast, one of the

97. See Burns, *supra* note 29, at 684-92; MACCRATE REPORT, *supra* note 88, at 135-221.

98. MACCRATE REPORT, *supra* note 88, at 144-45.

99. See generally *id.* (detailing the factors involved in developing a plan of action).

100. *Id.* at 177.

secrets of success for a good skills program is that it appeals to a kind of legitimate Promethian desire on the part of young adults to break free of the too often passive role of the student and to begin to achieve the self-respect that comes from competent performance in the public world. In this sense, practicing ethically can be presented legitimately as a skill that appeals to a young lawyer's often powerful desire for competence.¹⁰¹

VII. OBSTACLES TO REALIZING THE POTENTIAL OF EXPERIENTIAL LEARNING

Probably the primary obstacle to realizing the potential of simulation and other experience-based forms of ethics instruction is the discomfort of some professional responsibility teachers, often those without significant practice experience, with their own ability to use the method. For this reason, it would not surprise me if the growth in the use of this method comes from the natural drift of professional responsibility teaching to clinical and skills programs. These programs will be enriched significantly, however, if teachers whose academic center of gravity is in the area of professional responsibility are willing to contribute their learning to the programs. Teaching teams that include professional responsibility teachers, other teachers from the clinical or skills program, and practicing lawyers who are not full-time teachers, especially if they are among the growing numbers of lawyers who have done NITA-style teaching, could accomplish this goal.¹⁰²

In fact, I believe that this sort of team-teaching is ideal:

Participation of practicing lawyers also keeps academic lawyers honest. Academics, whether moral philosophers or doctrinalists, may, in working with the practicing bar, be tempted to adopt the stance of an "[i]ntellectual peace corp"

101. The *MacCrate Report* reemphasizes that many lawyering "skills" are more than purely technical proficiencies. Skillful practice involves the exercise of what can only be called moral dispositions. See Burns, *supra* note 29, at 684-92.

102. I was told at the conference at William & Mary that a successful clinical program in professional responsibility was conducted at the University of Maryland Law School by a teaching team consisting of clinical teachers who are lawyers and a professional responsibility teacher who is a moral philosopher.

to a "morally underdeveloped country"—as a distinguished philosopher once put it in a closely related context. Practitioners may be so immersed in institutionally embedded values that they are tempted not to envision alternatives. There is no once-and-for-all resolution of the question of which perspective has comparative strength. Criticism that does not appreciate the complexity of values and interests embedded in current practice can be abstract and unhelpful. Practices can become distorted by their institutional embodiments. A sustained dialogue among positions that are well represented is what we owe our students¹⁰³

A related obstacle is what might be called the professional horizon that professional responsibility teachers may adopt. As I have suggested above, the teaching of professional responsibility must maintain its close connection with the active practice of law for internal moral reasons.¹⁰⁴ There is no secret that some members of the legal academy value an academic enterprise in inverse proportion to its insistence on context and a detailed appreciation of factual material. Good ethics *as ethics* resists overgeneralized thinking. This suggests that professional responsibility teachers should have an academically unseemly affection for their brethren who are otherwise interested in the practice of law.

This concept suggests a danger from another generally benign development in legal education, the growth of interdisciplinary perspectives on the law. This development has enriched legal education and scholarship. Yet, relevant academic disciplines, as otherwise diverse as moral philosophy or game theory, have their own histories, conventions, and sometimes what can only be called academic fads. The center of gravity of such studies of professional responsibility can come to be dictated by the problematic of the relevant discipline.¹⁰⁵ It would be a mistake for law teachers and law students to surrender what is an enor-

103. Burns, *supra* note 2, at 41 n.15 (citations omitted). The reference to a "distinguished philosopher" is to Alasdair MacIntyre. See Alasdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, PHIL. EXCHANGE, Summer 1978, at 37.

104. See *supra* Part IV.

105. I think of the perspective on legal ethics that would come naturally to emotivism at its zenith or to some versions of postmodernism.

mous strength in comparison with some of their academic brethren: an intimate connection with an important and normatively rich social practice, the practice of law, which can provide both a source of problems, but also, in its concreteness, a check on eccentric and one-sided thinking that can so easily lodge in the contemporary university. Ethicists should stay where the gears engage. It would be a terrible mistake for enthusiasm for interdisciplinary perspectives to lead to the surrender of this great resource for ethical thinking.

VIII. CONCLUSION

Simulation in professional responsibility teaching can enhance the rigorous and contextual understanding of legal norms that is a precondition for serious ethical reflection. It has unique moral and pedagogical advantages. Such teaching stands to gain by integration into the legal skills program, which itself ought to emphasize the importance of professional responsibility. It is worth devoting resources and serious thought to overcoming the obstacles to its wider use.