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THE INSTITUTIONAL BARRIERS AND ADVANTAGES PANEL*

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The panel moderator, Thomas Morgan,¹ began by asking the members to identify institutional obstacles to legal ethics curricula reforms and possible strategic responses. Morgan acknowledged that his two general questions actually contained a variety of differing challenges. Although all the panelists teach legal ethics in some format, they have differing teaching objectives and distinctive teaching methods. The diversity of views among the panelists is not surprising given the broad scope of "professional responsibility." Professional responsibility is a mixture of concepts and acts that encompasses the philosophy of Immanuel Kant, the advocacy of Johnny Cochran, and all that lies in between. Consequently, the panelists identified a range of institutional obstacles to innovations in classroom, simulation, and

* In this Article, Professor Michael Millemann summarizes the proceedings of the Panel on Institutional Barriers and Advantages. The panel convened on March 22, 1997, to discuss the institutional barriers and advantages of each of the methods and formats for professional responsibility teaching. Panel members included Robert P. Burns, Professor of Law, Northwestern University; Bruce A. Green, Professor of Law, Director, Stein Center for Ethics and Public Interest Law, Fordham University School of Law; James E. Moliterno, Vice Dean, Professor of Law and Director of the Legal Skills Program, College of William & Mary School of Law; Deborah L. Rhode, Ernest F. McFarland Professor of Law, Director of the Keck Center on Legal Ethics and the Legal Profession, Stanford University; and Thomas L. Shaffer, Robert E. & Marion D. Short Professor of Law, Notre Dame Law School. All remarks attributed to these participants were made during The Institutional Barriers and Advantages Panel discussion unless otherwise indicated.

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1. Professor Morgan has helped to create the "problem method" for teaching legal ethics. This approach uses hypothetical fact situations as the centerpiece for student analysis. Students must select a cause of conduct or predict a court's decision based on a variety of legal and nonlegal material. See Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409-10 (1998).

clinical forms of teaching and proposed differing strategies to overcome these barriers.²

I. THE PANEL DISCUSSION

The panel started with the most concrete constraint: time. Regardless of one's teaching objectives and methods, the number of credits assigned to one's course constrains what can be taught and learned.

Bruce Green, who teaches *contextualized* courses at Fordham University School of Law, has taught one-, two-, three-, and four-credit legal ethics courses.³ He described three credits as "the bare minimum" for the basic survey course. Green's comments, endorsed by others, suggested that many law schools still award as few as one or two credits for the basic survey course and offer very little in the way of formal ethics instruction thereafter, for example, in an integrated legal ethics component of a core course or a second-level seminar.⁴ A general consensus de-

2. For a summary of legal ethics teaching experiments, see Lisa Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457 (1998).

3. "Contextual courses explore ethical dilemmas in the context of a single practice area (such as corporate, public interest, or criminal law) and in multiple employment settings (such as law firm, in-house, government agency, or prosecutors' offices)." Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 193.

4. Roger Cramton and Susan Koniak offer this comparative information, which they obtained from an informal survey:

As of the academic year 1995-1996, based on statements in academic catalogues and conversations with law school registrars, a number of major law schools require little or no instruction in legal ethics: Boston University School of Law (no required course; in the first, second, and third years, three days will be devoted to lectures and discussion groups concerning professional ethics and responsibility); University of Chicago Law School (a 1.5 credit course is required prior to graduation); Columbia University School of Law (a five-day intensive course, receiving one credit and graded on a pass-fail basis, is required at the beginning of the third year); Duke University School of law (a five-day intensive course, receiving one credit and graded on the same basis as other courses, is required during the January intersession of the first year); University of Michigan Law School (students are required to have exposure to legal ethics in some manner, either by taking an elective two-credit or three-credit course in the subject, by taking one of a number of electives that have

veloped that two credits are inadequate, even to just survey (introduce, describe, and begin to analyze) the basic principles and rules in this expanding body of law.⁵

Green's comments suggested that classroom ethics teachers—whether they teach with a “traditional,” “problem,” “pervasive,” or “contextualized” method—continue to struggle with enduring intangible institutional barriers, such as the myth that there is no hard body of ethics law, and the despairing, and self-fulfilling, prophecy that “you just can't teach graduate students ethics or moral values.”

Thomas Shaffer argued that it is not only the number of credits, but how and whether they support sequential learning that is important.⁶ Students can learn a great deal, he contended, even if the initial survey course is undercredited, if it is followed by one- or two-credit upper level courses or seminars. In his view, the absence of an ethics sequence, beginning in the first year and continuing into the second and third years, is a substantial problem.

some legal ethics content, or, in the current year, by a five-day, one-credit “bridge week” involving all first-year classes and graded on a pass-fail basis); Stanford Law School (no required course; first-year faculty are encouraged to include a module on legal ethics in their courses); and Yale Law School (once-a-week lectures or presentations are required during the first term of law school on a non-credit, ungraded basis). Note that none of these schools require that a J.D. candidate take at least two semester hours of instruction in legal ethics.

Roger C. Cramton & Susan P. Koniak, *Rule, Story and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147 n.14 (1996) (citations omitted).

5. See generally Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 110 n.5 (1996) (noting that there are several bodies of law that regulate the behaviors of lawyers in addition to legal ethics codes and rules). In addition to legal ethics codes and rules, other sources of law include common law principles, e.g., those that govern the attorney-client privilege and legal malpractice principles of tort law; constitutional law principles, e.g., those that govern lawyer advertising and solicitation; and the Rule 11 sanctions of the Federal Rules of Civil Procedure. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 53-58 (1995).

6. At Notre Dame, Professor Shaffer conducts a weekly, two-hour seminar in which students are organized into law firms to discuss the ethical dimensions of their cases. See Thomas L. Shaffer, *On Teaching Legal Ethics with Stories About Clients*, 39 WM. & MARY L. REV. 421, 421-33 (1998).

A good curricula sequence would do more than add opportunities for analytic depth and focus. It might provide students with practice *experiences*, as well as new ideas and information. Shaffer contended that when legal ethics classes reach into law practice, they can use the practice experiences and human relationships to motivate students to learn. According to Shaffer, when the motivated students identify, apply, and critically analyze ethical and moral principles to resolve real dilemmas in real cases, they learn vital moral lessons. For Shaffer, introducing students to the moral content of a lawyer's work is a fundamental objective.

Shaffer described the results Notre Dame Law School obtained by integrating a weekly ethics seminar into its clinical law practice. His conference comments tracked what he has written about this experience: "[T]he most dramatic effect from seminar discussions of live, current moral questions within the practice of a single law office [is that] . . . [i]t pushes past some of the modern barriers to moral discourse."⁷

When Notre Dame added nonclinical students to the clinical seminars, the quality of the conversations suffered.⁸ Shaffer ascribed this result, ironically, to the clinical students' *sense of professional responsibility*, specifically, their legitimate fears of breaching client confidentiality and invading client privacy. Additionally, the nonclinical students' inability to use effectively the practice experiences of others to motivate them and inform their ethical analysis also contributed to the decline in quality.

One of the common institutional responses to clinic/ethics courses is that they cost too much, given the low teacher/student ratios. The expense of *adding* this form of legal ethics education to *existing clinical courses*, however, is much less substantial. What Shaffer helped bring to the existing clinical laboratory was structured ethical analysis, in the form of a regular weekly class and teaching expertise. The cost of the Notre Dame innovation, therefore, appears largely to be opportunity costs: Shaffer's lost

7. Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605, 606 (1996). David Luban and I had much the same experience coteaching a clinic/ethics course. See generally Luban & Millemann, *supra* note 5, at 64-83 (relating results of the course).

8. See Shaffer, *supra* note 7, at 617.

opportunity to teach a larger class.

Deborah Rhode described how law schools can enhance and expand legal ethics education without adding credits to the standard survey course. She described the "pervasive method" that she has pioneered.⁹ Through this coordinated approach, teachers in core courses identify and analyze important ethical issues that arise in the appellate decisions, problems, and other teaching materials that they regularly assign. Rhode acknowledged the risk that some of this additional ethics coverage may be superficial, because the teacher has not taught a legal ethics course before, or repetitive, because several different teachers decide which ethical issues to emphasize. Rhode argued that participating faculty can minimize these risks by taking ethics instruction seriously and by generally coordinating their legal ethics coverage.¹⁰

One of Rhode's primary objectives in using the pervasive method is to incorporate ethics education into the "mainstream" law school curriculum and thereby communicate that ethics are "crucial constituents of practice."¹¹ Institutional obstacles include the lone-actor academic culture. Law schools can respond with: "bribes," such as summer grants; "sticks," such as a disapproving dean; and other tangible and intangible support for creative teaching relationships between legal ethics faculty members and others.

James Moliterno described another model of curricula integration: William & Mary's two-year Legal Skills Program of Comprehensive Skills and Ethics Development.¹² The program integrates ethical analysis, problem-solving, and skills-development

9. See generally Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 50-53 (1992) (discussing the rationale for the pervasive method).

10. For more on these points, see Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 139, 150-51.

11. Rhode, *supra* note 9, at 50.

12. See generally James E. Moliterno, *Teaching Legal Ethics in a Program of Comprehensive Skills Development*, 15 J. LEGAL PROF. 145, 149-62 (1990) (describing at length the William & Mary Legal Skills Program, particularly emphasizing the degree to which instruction in ethics is integrated with the teaching of other skills inherent in the practice of law).

instruction.¹³ The courses rely heavily on simulations, small group discussions, and intensive individual instruction.¹⁴ The program helps students to identify and connect recurrent professional responsibility issues with the legal functions—e.g., negotiations, interviews, and counseling sessions—that produce them.¹⁵ Like the pervasive method, Moliterno's approach does not require the teacher to spend substantial time creating an additional context—whether it be an appellate decision or problem—in which to present and analyze an ethical issue.¹⁶

The expense of such intensive instruction, like that of clinical education, may be a potential problem. Moliterno argued, however, that institutional competitions for limited resources, which many legal ethics teachers believe they often lose, are not zero-sum games.¹⁷ "Cross-purpose teaching combinations" can produce efficiencies that reduce costs.

In addition, Moliterno argued, as did panelist Robert Burns, that legal ethics instruction can be improved, and legal ethics teaching resources somewhat increased, by carefully developing coteaching relationships with practicing lawyers. Burns cautioned, and Moliterno agreed, that "practitioners should be used in limited, disciplined, and programmed ways." Both teachers

13. See *id.* at 146-47.

14. See *id.* at 151, 157-59.

15. Through the course, William & Mary seeks to "sensitize students to the ethical issues they will face as lawyers and teach the law governing lawyers," among other goals. See James E. Moliterno, *Professional Preparedness: A Comparative Study Of Law Graduates' Perceived Readiness for Professional Ethics Issues*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 259, 264. Moliterno helped conduct a survey of 1,000 lawyers that indicated that a higher percentage of lawyers who participated in this two-year program of instruction believed they were better prepared to deal with ethical issues than lawyers who had not taken such a course in law school. See *id.* at 261, 271-72.

16. Others have demonstrated how and why students learn legal ethics effectively in courses that integrate skills and ethics instruction. See, e.g., Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 692-96 (1996) [hereinafter Burns, *Legal Ethics*]; 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, 42-44 [hereinafter Burns, *Teaching the Basic Ethics Class*].

17. Webster's defines a "zero-sum game" as "a game in which the cumulative winnings equal the cumulative losses." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2658 (1986).

invested substantial amounts of time and organizational energy in creating and maintaining practitioner teaching relationships.

Thomas Shaffer identified free teaching resources in the Notre Dame clinical seminar, namely, the behaviors and values of opposing lawyers, which produce important opportunities for ethics education. When Notre Dame's clinical students and supervisors approached the opposing lawyers as colleagues, they often engaged them directly in useful teaching conversations. The handful of opposing lawyers who are "jerks" can be important teaching material as well.¹⁸

Robert Burns described the Northwestern University School of Law's Program in Advocacy & Professionalism, which like William & Mary's, combines ethics and skills education.¹⁹ In describing the important roles practitioners play in Northwestern's program, Burns identified and challenged another intangible barrier: the depreciated value the teaching academy continues to accord to law practice and practitioners.²⁰

Seizing the opening, Thomas Morgan asked Burns to assess law professors as ethical role models. Morgan observed that we teach legal ethics, directly or indirectly, by modeling ethical lessons. He argued that too often law professors express unqualified disdain for law practice, which poisons the students' appreciation of the best values and traditions of the profession. Burns's assessment was largely critical: "The discipline and culture of the classroom are inconsistent with those of the practice world. Law professors just don't translate as ethics practice

18. See Shaffer, *supra* note 6, at 435.

19. See Burns, *Teaching the Basic Ethics Class*, *supra* note 16.

20. In his article, *Teaching the Basic Ethics Class Through Simulation*, Burns described the backgrounds of some of the lawyers who have participated in his courses: "Some have taught ethics either in law school classes or in continuing legal education courses, others are the 'ethics experts' in their firms, while others have been generous in devoting their time to continuing legal education enterprises such as the National Institute for Trial Advocacy." *Id.* at 40-41. He argued that:

Bringing practicing lawyers into the classroom also shows that respected and competent members of the bar take ethical requirements very seriously and that "good practice" need not be "slick practice." Indeed, it seems to me that the participation of such people demonstrates to students, in a way that a hundred sermons could not, that effective practice almost always is fully consistent with ethical practice.

Id. at 41.

models." Indeed, the dominant values of the academy can be affirmatively "dangerous" in practice, because they give students little or no "sense of what they should and can do, and of what many will do," to be moral practitioners.

Bruce Green offered an example: law professors who are not adequately "self-conscious about modeling civility." In his view, the "Socratic method often is inconsistent" with civility, a problem that he believes is aggravated by today's overprotective rules of tenure. Green suggested that law professors might become better models of professionalism if faculty councils adopted pro bono guidelines that embodied substantial faculty commitments to unrepresented people, and if law professors complied with the guidelines.²¹

Deborah Rhode responded to these criticisms with "some skepticism," contending that "it is not quite this bleak." She argued that many of the professional obligations of law professors are good "surrogates" for the ethical obligations of lawyers. The Association of American Law Schools' (AALS) *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, which Rhode contended too few law teachers know exist, contains ethical principles that have analogs in the ethical principles and rules that govern lawyers.²² By living up to these standards and discussing them with students, law teachers can model ethics that students need to develop to become ethical lawyers.

James Moliterno agreed: "In front of a class, we *are* role models. One student will remember every single thing you say," and others will come to "appreciate years later the importance of what they learned in the classroom." Although law professors

21. Rhode discussed these and other points in *Ethics by the Pervasive Method*: We model values along multiple dimensions in our individual interactions and collective priorities. The ethics we practice are not necessarily those we profess, and in legal academia a cottage industry of criticism has pointed up the gap. Much has been written about the competitive, combative atmosphere of professional training; the racial, ethnic and gender biases that affect hiring practices and classroom interactions; and the undue hierarchy of workplace cultures, with their inattention to staff or student needs that compete with faculty self-interest.

Rhode, *supra* note 9, at 55.

22. See ASSOCIATION OF AMERICAN LAW SCHOOLS, 1997 HANDBOOK 89-94 (1997).

should "recognize that the work of lawyers is hard and important" and that there are many moral lawyers, law professors have an ethical duty to "fairly critique the profession."

Thomas Morgan identified some potential external constraints on reform, including the pressures to substitute rule-bound and descriptive knowledge for careful analysis. Burns contended that bar examiners, particularly through the new Multistate Professional Responsibility Examination (MPRE),²³ and the American Bar Association, through its accreditation standards and reports, are partially to blame for these pressures. These external forces fuel the sometimes relentless student search for certainty. Deborah Rhode generally agreed and said that by "showcasing" the best legal ethics teaching initiatives, the "AALS can play a far more positive role" than external bodies.

Morgan and Burns both discounted the extent and impact of the external forces. Morgan contended that a legal ethics professor "can respond to the students' anxiety with about two weeks of classes," and Burns added that "good MPRE and bar review courses can allay students' second-thoughts about their legal ethics courses."²⁴

II. COMMENTARY

The thrust of my comment, which I make as an argument, is that legal educators should not view the panelists' differing teaching methods as competitors and select one pedagogical winner. To teach ethics well, we should use, and require students to

23. The MPRE, required for admission to the bar in the overwhelming majority of jurisdictions, uses multiple-choice questions to test student knowledge of disciplinary rules. See Cramton & Koniak, *supra* note 4, at 171. "Because most law students must take this test, many of them approach their required ethics course with tunnel vision—viewing it as preparation for the MPRE." *Id.* See generally *id.* at 170-76 (describing the MPRE and criticizing the MPRE-based approach to the study of legal ethics adopted by some students and the rule-based approach to the teaching of legal ethics favored by some law schools).

24. Rhode has described the intervention of bar examiners as a post-Watergate irony: "[S]tates began requiring more examination on professional responsibility issues, and most eventually moved to the multistate multiple-choice format developed for other core subjects." Rhode, *supra* note 9, at 40-41. She criticized this development because it "tends both to trivialize the subject matter and to encourage law school courses to focus on bar exam preparation." *Id.* at 41.

learn ethics with, the *three major teaching methods of the panelists, which I will imperfectly abbreviate as "classroom," "skills/simulation," and "clinical" teaching.*

My argument presupposes a set of ethics teaching goals. Mine are to help students to understand and critically evaluate the principles of legal ethics, to appreciate the breadth and importance of ethical discretion, and to begin to develop ethical judgment.²⁵

One starting point is to describe a model diversified ethics curriculum, and then justify it. The *composite* ethics curriculum that the panelists' jointly constructed is a wonderfully rich possible model. The composite includes a problem-focused survey course, contextualized and pervasively-taught classroom courses, and combined skills/ethics and clinical/ethics courses. Some might propose that law schools that wish to improve their ethics curricula should simply replicate this multicourse composite. This proposal, however, would flunk the panel's "get real" test for reforms.

Which leads me to this question: Is it possible to reduce the panelists' composite to its essence, and to create a streamlined but still useful curricular model from the core? What follows is the beginning—but just that—of my attempt to do this.

The composite's essential features, I believe, are the *diversity* and *integration* of its pedagogies. In their individual courses, the panelists use one or two of the teaching methods to integrate ethical analysis into other bodies of law, skills-development exercises, and real law practices. These methods connect: 1) analysis; 2) planning to act; 3) rehearsing action; 4) taking action; and 5) evaluating action. In the whole, this is the basic problem-solving method of good lawyers.

I believe we should teach *much* of law in this holistic way, but the argument is strongest in the study of legal ethics. Good lawyers are distinguished by their *qualities* and *actions*. (One can not *be* an ethical lawyer without *acting* ethically.) The bar does not require that lawyers just (or even) *think* ethically. These qualities include a broad array of *behaviors*. Each of the

25. See generally Luban & Millemann, *supra* note 5, at 58-60 (discussing the importance of cultivating ethical judgment).

three teaching methods asks law students to develop the differing lawyer qualities by asking them to think and behave in different ways.

Classroom courses: teach students that legal ethics "law" is complex, comprehensive, and interdisciplinary; invite them to analyze critically principles and rules; require them to think abstractly; and value the quality of detachment in ethical decision-making.

Skills/simulation courses: require students to assume and act out the roles of lawyers; teach students that lawyer's must *act* to execute ethical decisions; illustrate that role expectations can overwhelm detached analysis; teach students that ethical issues usually arise (or are latent) when lawyers exercise basic skills; and teach students that lawyers must think concretely, anticipate possible future events (and prepare preemptive and responsive actions), and sometimes make decisions quickly and with limited information.

In clinical courses, students experience *being responsible* for the life, liberty, or property of people; act, hopefully responsibly, but sometimes irresponsibly, with consequences for clients and others; come to understand the dynamic nature and critical importance of facts and human relationships; often can create (or at least shape) the real world contexts in which they must make ethical decisions; become legal realists; and exercise ethical discretion, thereby beginning to develop ethical judgment.²⁶

Assuming that diversified and integrated learning is essential poses the *hard* question the panelists addressed, rephrased as: What are the institutional barriers to diversifying and integrating ethics education, and how might they be overcome?²⁷

26. I offer these three sets of admitted generalizations as rough benchmarks of the relative strengths of the different pedagogies. I understand that students learn in quite different ways, and that many can and do learn, and begin to develop, a number of good lawyer qualities in just one of the three types of courses.

27. I find very useful John Mudd's analysis of the dynamics of law school curricula reforms, and I use this analysis and his abbreviated descriptions of the reform obstacles in this part of the Article. His major points track many of the panelists' comments about institutional barriers and possible responsive strategies. See John O. Mudd, *Academic Change in Law Schools*, 29 GONZ. L. REV. 29 (1993); John O. Mudd, *Academic Change in Law Schools, Part II*, 29 GONZ. L. REV. 225 (1993).

Only one law school—a hypothetical one at that—has developed such an ethics curriculum. This school, which has forty faculty members and classes of approximately 170 students, requires that a student earn at least *seven ethics credits* during his law school career, *at least four of which must be in skills/simulation and clinical units of instruction*. The school requires students to take a three-credit survey course as well, but gives some students survey course options that add one to seven credits for a range of additional skills/simulation and/or clinical units that are integrated into the survey course.

Ethics “units” include ethics courses, seminars, and one-credit ethics minicourses and seminars, but they primarily are components of other courses and seminars: blocs of ethics classes, skills/simulation exercises, and legal work in active legal matters. The teachers are full-time and adjunct professors who teach primarily with one or two of the methods, but also several who teach with all three methods. Among the latter are two professors whom the law school hired to develop, coteach or teach, and coordinate a number of the ethics units.

Ethics units are distinguished by their educational goals, teaching methods, and subject matters. The school offers roughly equal numbers to first-, second-, and third-year students; recommends several two- or three-year sequences; and gives students the qualified right (subject to enrollment limits) to choose the advanced units they wish to take to satisfy the three-method/seven-credit requirement.

The history of the development of the law school’s ethics program is this:

A. Conflicting Educational Philosophies

The dean and several key faculty members were the leading proponents of the new curriculum. They tried to narrow the range of potential disagreements by pointing out that the major pedagogies would be represented fairly. The real issues, they contended, were about the *relative* strengths of each method in achieving *particular* ethics educational goals and the extent to which the methods could be integrated. The proponents “clarified” that by “integrated” teaching they meant to include less perfect forms of “coordinating” the three pedagogies, and they

acknowledged that there might be overlapping substantive and skills coverage in any one student's total seven-credit ethics education. They added that the amount of any real duplication would be limited, and that what might appear to be repetitive experiences would, in fact, be useful mixtures of different perspectives and different applications of ethics principles.

The proponents pointed out that the four required ethics credits (in addition to the three survey credits) would not compete with basic courses, but instead with the school's elective curriculum, which one proponent said was "a generally irrelevant, largely self-indulgent [for the teachers], and ever-expanding universe." (The speaker later withdrew the "overstated parts" of this comment.)

The opponents contended that eroding course boundaries, creating smaller units of instruction, and adding one or even two new pedagogies into established courses would produce ethical incoherence. Moreover, said one opponent, "the largely instrumental ethics units, which [he assumed] would be taught by practitioners and practice-focused teachers, will lack depth and rigor." (The speaker later apologized for "somewhat overstating my point.")

The reformers promised to build much of the new curriculum on an established and successful foundation: the best problems, materials, simulations, practice protocols, and teaching methods of the panelists. The school would phase in the curriculum over three years, and it would commission an independent external evaluation after eighteen months. The law school had many good teachers among its tenured, tenure-track, contractual, and adjunct faculty, a number of whom had expressed interest in teaching or coteaching the new units.

These features would promote order, coherence, and educational quality, the proponents asserted.

B. Academic Autonomy

This strong institutional value became a double-edged sword in the debates. Opponents invoked it, describing the proposal as a pedagogical "horse collar,"²⁸ not the promised new teaching "op-

28. John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317, 332.

portunities"; however, although the opponents did not "readily give up [their teaching] prerogatives, by the same token [they ultimately were] relatively unconcerned by what [would go] on in other bailiwicks."²⁹

The dean said she would not impose the new units on reluctant faculty members, but rather "would encourage" faculty members to participate. It was the dean who proposed that the school hire the two new faculty members.

C. Limited Institutional Resources

The dean pledged to use some of the already-budgeted summer research grants to support teachers who agreed to develop and teach the new ethics units. The major resource battle was over the new faculty positions. The proponents argued that by devoting two positions to the new ethics curriculum, the school would become a national legal ethics leader by responding to recent and dramatic changes in the legal profession. The dean added that one of the school's major funding sources had indicated that it might fund parts of the new reforms as one- or two-year pilot projects. (This encouraged the proponents and further alarmed the opponents.)

D. Leadership from the Dean and External Events

The law school dean shared one ex-dean's conception of the job:

A deanship is only interesting if the dean has ambitions to make change, to reform legal education, to make something better out of the law and the legal profession. Without that kind of motivation, it is simply a toothless, rather boring public relations office, more like a constitutional monarch than a professional challenge.³⁰

The dean argued, however, that others who have a greater appreciation for the status quo still have plenty of reasons to be

29. *Id.* at 331.

30. Michael Kelly, *Why I Love the Job*, SYLLABUS, Dec. 1988, at 3.

legal ethics curriculum reformers. She offered the following explanation—which even some of her supporters conceded was “too preachy, even for a dean.”

External phenomena have created many of the reform pressures—she noted the importance of external forces in the history of legal education reforms.³¹ Dramatic reductions in applications have caused many law schools to feel the full pinch of the legal education market.³² The economic problems of lawyers dissuade some college students, particularly given the increasing amounts of educational debt that law graduates assume.³³ Others may be disinterested because of the apparent erosion of professional values.³⁴

“If we are going to attract the best, idealistic college graduates to our law school, we must show them in our professionalism curriculum how, as lawyers, they can do good, and do well—redefined to mean repay educational debt,” the dean said.

The dean went on. Within the legal profession, major public and private blocs are breaking up, and the distinctions between private and public interest law careers are disappearing. Private attorneys are now bidding on federally funded legal services contracts, and longtime public lawyers are creating new private practices.³⁵ There will be no growth in, and probably fewer, federally funded legal services positions in the future; in any event, the current funding restrictions diminish the roles and effectiveness of these lawyers.³⁶

31. See J.B. LON HEFFERIN, *DYNAMICS OF ACADEMIC REFORM* 18-19 (1969) (noting the power of external forces to prompt reform).

32. See Chris Klein, *Faced with a Drop in Applicants, Some Schools Resort to Hard Sell*, NAT'L L.J., July 1, 1996, at A19.

33. See M.A. Stapleton, *More Law Grads Finding Debt an Unscalable Cliff*, CHI. DAILY BULL., July 19, 1966, at 3.

34. See Luban & Millemann, *supra* note 5, at 32-37.

35. See David E. Rovella, *LSC Invites Law Firms to the Legal Services Game*, NAT'L L.J., Jan. 27, 1997, at A8.

36. See Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996i (1994); see also Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 501-509(k), 110 Stat. 1321 (describing restrictions on fiscal year 1996 appropriations); Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub. L. No. 104-208, §§ 501-503(b), 110 Stat. 3009 (1996) (continuing the restrictions in the fiscal year 1997 appropriation).

Technological advances and the increased availability of legal information have further fragmented law practice by making it economically possible to practice out of one's home, and by inviting increasing numbers of people to represent themselves, seek help from nonlawyers, or resolve problems outside of our justice systems.³⁷

These developments, the dean said, require law schools to reconceive how they teach professionalism, particularly those schools whose recent graduates practice predominately in solo and small firms, and for whom ethical competence is both a virtue and survival skill.³⁸ The dean concluded that the ultimate goal of the new ethics curriculum, however, would be to improve the quality of justice that lawyers administer in our society.

III. CONCLUSION

This diversified and integrated model incorporates the panelists' innovations. It builds on Deborah Rhode's pervasive model, and emphasizes that although the goal is a pervasive ethics education, the teaching methods should be diversified in the contextualized, simulated, and actual practice forms that the

37. See generally Michael Millemann et al., *Limited-Service Representation and Access to Justice: An Experiment*, 11 AM. J. FAM. L. 1, 1 (1997) (describing growing trend toward pro se or "limited service" representation).

38. Robert Burns has demonstrated the inherent connections between skills and values. He analyzed the *MacCrate Report's* "Statement of Fundamental Lawyering Skills and Professional Values" to identify "the different ways in which ethics pervade the competent practice of law." Burns, *Legal Ethics*, *supra* note 16, at 684-85. Burns found it ironic that "it is the skills section, and not the values section [of the *MacCrate Report*], that demonstrates the importance of legal ethics in the practice of law." *Id.* at 685. He provided three reasons for this conclusion. First, it is the basic ethical obligation of competence that requires lawyers to develop and maintain those skills that are essential to their practices. Second, ethical rules establish limits on the use of skills. Third, traditional conceptions of "virtue" are essential components of many of the "lawyering skills" that the *MacCrate Report* identifies, e.g., human sensitivity, empathy, patience, diligence, and "often courage." *Id.* at 684-90. Deborah Weimer has made a similar argument: "[T]he ability to understand the client's perspective may be an ethically required practice skill." O'Sullivan et al., *supra* note 5, at 133 (coauthored by Deborah Weimer). She links the human capacity for understanding to the lawyer's ethical duties "to identify the client's objectives or to help the client identify them; to identify the decisions that are reserved to the client; to effectively advise the client in making these decisions; and to otherwise practice competently and diligently (which includes the duty of zealotry)." *Id.* at 132.

other panelists described.³⁹

Some will argue that without more substantial resources than I suggest, it is impossible to combine meaningfully either clinical practice or major skills/simulation training components with classroom ethics instruction.⁴⁰ I disagree. When a teacher adds an ethics unit to preexisting skills courses (as James Moliterno and Robert Burns have done), or to clinical courses (as Thomas Shaffer has done), the costs largely are the lost opportunities to teach larger classes or other courses. Although these costs *are real*, for all the reasons that I have stated, I believe law schools should incur them, although I also believe that most schools can "pay for" most of the costs by reducing curricula inefficiencies and—not to put too fine a point on it—fat.

It is harder to bring law practice into larger ethics courses in a meaningful way, but I think it reasonably possible to do so.⁴¹ Students in these larger classes will not be professionally respon-

39. Suggesting legal ethics curricular reforms requires one to navigate between "overclaiming the effectiveness of ethical instruction" and refusing to accept that, because "we can do little . . . we should do nothing." Rhode, *supra* note 9, at 46. Rhode has offered a legal ethics curricular sequence that includes a survey course, an upper-level course that has both an ethics component and a relatively low faculty-to-student ratio, integrated components of other core course, and "supplemental" panel discussions, lectures, and talks. See *id.* at 54.

40. Lisa Lerman argues that "[s]erious thinking about the educational goals of the teaching of Professional Responsibility leads to recommendations that cannot be implemented without substantial additional resources." Lerman, *supra* note 2, at 485. Her conclusion logically follows from the ambitious scope of the reform she discusses: offering "an experientially-oriented seminar . . . to [each student in] a class of 300 students. . . ." *Id.* She also proposes more modest approaches, including several upper-level courses or seminars that could be initiated by one or two faculty members. See *id.* at 485-87. Given Lerman's ambitious model, I agree with her resource assessment. My model is not this extensive, and it relies on new courses and a new teacher or two, but it is based also on refinements of the existing curricula, the dean's leadership, and modest institutional rewards for faculty participants.

41. It is somewhat easier to think about how a law school could add major skills/simulation components to these courses. For example, in one of the law school's large legal ethics survey courses, the students participated in three ethics/skills simulations, in which they played the roles of a client, the lawyer who drafted and negotiated the client's construction subcontract, and the lawyer who subsequently sued the client for breach of contract. Each simulation was part of a five class sequence. In the first and fifth classes, the large group initially analyzed an ethics issue (class 1), and then reconsidered it (class 5). In groups of fifteen and five, the students planned to act (class 2), acted (class 3), and then evaluated their actions (class 4). The students earned one skills/ethics credit for this unit.

sible in all the ways that in-house clinical students are, but they can experience the lawyer's sense of responsibility and act responsibly in important ways, if it is clear that the legal work that they are asked to do is real, and that the teacher and/or primarily responsible lawyer will take their work seriously and use it in the actual matter if it is useful.⁴² Students in even fifty- to sixty-student classes, working in teams of eight to ten, can exercise professional responsibility in actual cases, by researching and writing about legal issues, interviewing and meeting with people who have relevant information, drafting transactional documents, conducting public-domain fact-finding (an expanding investigatory universe), viewing nonsensitive videotaped interviews and counseling sessions, and where ethically appropriate, interviewing clients and potential witnesses, and participating in more formal proceedings.⁴³

42. There are a number of good models that combine two, or all three, pedagogies in somewhat larger classes. Through its Legal Theory and Practice Program, Maryland Law School has added legal work (including litigation, community development, and corporate (nonprofit) counseling), into first year torts, property, and civil procedure courses. The faculty-to-student ratio in the larger classes is 1/28. These faculty members teach the substantive course, and with three additional credits, integrate the legal work and ethics analysis into the course. See generally *Students and Lawyers, Doctrine and Responsibility: A Pedagogical Colloquy*, 43 HASTINGS L.J. 1107, 1107-86 (1992) (describing the University of Maryland Law School's program). Lisa Lerman proposes an excellent clinical seminar model. See Lerman, *supra* note 2, at 485.

43. Admittedly, integrating legal work in active cases into larger classes raises substantial client confidentiality and privacy issues. There are some reasonable answers to these fears, I believe. For example, much of the interesting and important information in a case is public, and by the time pleadings have been filed, usually the arguments on both sides are either apparent or are becoming apparent. One can fully teach with this information.