

THE PERVERSIVE APPROACH TO TEACHING PROFESSIONAL RESPONSIBILITY

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An article that deals essentially with pedagogical method may suggest an area of concern unique to the law teacher. Yet the problems of developing professional responsibility through the law school are of vital concern to the practitioner as well as the pedagogue. The American Bar Association, the National Conference of Bar Examiners, and law teachers, through the Association of American Law Schools, have long concerned themselves with the nature and effectiveness of law school instruction in professional responsibility. However, the views of the professional associations and those of the law teachers heretofore have not been characterized by rapprochement regarding the effectiveness of such training.

The American law schools, happily, have gained a monopoly on legal education. That they have not acquitted themselves well in training for professional responsibility has been suggested by Dean Albert Harno, former President Ross Malone, Professor Brainerd Currie, and others. In his epochal survey of legal education, Dean Harno reported, "The statement is frequently made that legal education as administered in law schools is deficient in teaching legal ethics."¹ Legal ethics as used in this quotation probably refers to the broader concept of professional character or responsibility.

Professor Currie, in commenting on the future of legal education, pointed to the lack of progress in effectuating civil rights during the first half of the twentieth century and the related censure of the Supreme Court of the United States by ninety-six senators and congressmen—of whom seventy-four were law-trained individuals representing thirty law schools—as demonstrative of the failure of law schools to train for professional responsibility. His suggested solution was instilling an "indefinable fundamental," an acute awareness of the role of lawyers in society. The responsibility, he observed, "is not a matter that can be parcelled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time."²

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¹ Harno, *Legal Education in the United States* 155 (1953).

² Currie, "Law and the Future: Legal Education," 51 Nw. U.L. Rev. 258, 271 (1956).

In addressing the Michigan Conference on Legal Education in 1959, President Ross Malone commented on the results of a law school survey on teaching legal ethics. "On its face then," he stated, "there is a situation in which no organized effort is being made to teach the subject of professional responsibility and professional ethics in over half of the accredited law schools in the United States today."³ "This is a situation which to me is shocking," he added.⁴

In fairness to the law schools, it should be noted that Malone's comments were evoked by a yes-or-no response to a question going to the existence of a course in legal ethics or legal profession. Instruction in the legal profession may be taught in such a concentrated, single course package or it may be taught pervasively throughout all or a substantial part of the curriculum. Instruction in professional responsibility may likewise be effectuated through honor systems and through extracurricular activities such as legal aid clinics, student bar associations, case clubs (moot court) and legal fraternities. However, the remainder of President Malone's remarks indicated his belief that law schools without a concentrated course on the legal profession were only giving lip service to pervasive treatment of the subject.

HISTORICAL BACKGROUND OF ETHICAL INSTRUCTION

To turn for a moment to the precursors of the modern American law school, the English Inns of Court doubtless instilled the traditions and etiquette of the legal profession by precept and example. Similarly, the apprenticeship system of training in the United States afforded the same method of instruction. "It produced," observed James Grafton Rogers, ". . . a contact between the preceptor and the apprentice which secured some measure of professional outlook, character and ethical training."⁵

The Litchfield Law School, the predecessor of the American law school, did not include among its lectures a course in legal ethics or its equivalent.⁶ Significantly, Professor David Hoffman in 1836 in his memorable outlines for the study of those who read law included moral and political philosophy and professional deportment among his thirteen outlines.⁷ Among the works recommended by Hoffman were those by Bentham, Locke, Grotius and Puffendorf, and *Ecclesiastes*, *The Barrister*, and *The Life of a Lawyer*. Again,

³ Joiner (ed.), *The Law Schools Look Ahead* 73 (1959).

⁴ *Ibid.*

⁵ 61 A.B.A. Rep. 924 (1936).

⁶ For a listing of the subject-matter headings of the Litchfield Law School, see Reed, *Training for the Public Profession of Law* 453 (1921).

⁷ Hoffman, *A Course of Legal Study* (2d ed. 1836).

the technique was to teach by precept and example, albeit vicariously. Hoffman also commended his fifty resolutions of professional conduct to the law student. These resolutions were forerunners of the first code of professional ethics.

In the interim between Hoffman's resolutions and the adoption of the Canons of Professional Ethics in 1908, Judge George Sharswood in 1854 delivered his memorable lectures on legal ethics to the law class of the University of Pennsylvania.⁸ Sharswood postulated proper professional conduct in light of English case law and history, morals and reason. Sharswood's technique is likely to be ridiculed by the modern, sophisticated teacher and law student as sermonizing.

Upon the adoption of the Canons of Professional Ethics, the American Bar Association called upon the law schools to teach a course in professional deportment and legal ethics.⁹ A survey by the Association of American Law Schools indicated that thirty-two schools taught legal ethics as a regular part of the curriculum, whereas sixty schools did not. A typical response by a Dean of a law school that did not teach legal ethics in a concentrated package was:

We hear much about teaching of ethics in law schools. This is well. But it is exceedingly difficult to harangue morality into unwilling ears. The best and most effective course of ethics ever given in any law school is the daily life of a faculty whose members are without fear and without reproach. Teaching ethics is good; living ethics before one's class is incomparably better.¹⁰

The American Bar Association was unimpressed by such argument. In 1917, as a part of a systematic endeavor to elevate the standards of the profession, it resolved that there be instruction of applicants to the bar in proper ethical standards.¹¹

In 1927, the Professional Ethics and Grievances Committee again concluded that the subject of professional ethics did not receive sufficient place in the lawyer's scholastic education.¹² On the motion of that Committee, the Association in 1929 "moved that it is the sense of this Association, and it so places itself on record, that a compulsory course in and the teaching of professional ethics be a part of the curriculum of all law schools."¹³

⁸ Sharswood, *Essay on Professional Ethics* (2d ed. 1860), republished as 32 A.B.A. Rep. (1907).

⁹ "Teaching Ethics in Law Schools" in 2 Am. L.S. Rev. 377 (1910).

¹⁰ Townes, "Organization and Operation of a Law School," 2 Am. L.S. Rev. 436, 439 (1910).

¹¹ Wickersham, "The Moral Character of Candidates for the Bar," 9 A.B.A.J. 617 (1923).

¹² 52 A.B.A. Rep. 351, 355 (1927).

¹³ 54 A.B.A. Rep. 147 (1929).

The Association of American Law Schools gave sympathetic consideration to the resolution, but refused to require of its members the teaching of a formal course in legal ethics.¹⁴ The Professional Ethics and Grievances Committee had concluded earlier that the reluctance of the law teachers' association stemmed from opinions that the law schools had little influence in molding character, that legal ethics were ideals incapable of attainment, and that a required course violated the value of a law student's freedom of choice in selecting his program of study.¹⁵

The resolution of the American Bar Association in 1935 that written bar examinations include questions on legal ethics and that committees on character and fitness orally examine applicants to the bar on their knowledge of professional conduct was probably another, and indirect, attempt to induce the law schools to offer instruction on the subject.¹⁶ The National Conference of Bar Examiners passed a similar resolution.¹⁷

During the years immediately preceding the war and through the war years, the matter lay dormant. But in 1946, the Unauthorized Practice of Law Committee of the American Bar Association unveiled a plan to suppress the unauthorized practice of law. One aspect of the plan was to promote the competency of lawyers in the practice of administrative law by encouraging law school instruction in public law subjects;¹⁸ another was to encourage law schools to stress the importance of eliminating unauthorized practice and of observance of the obligations of Canon 47 of the Canons of Professional Ethics.¹⁹

That Committee entered into discussions with the Committee on Co-operation with the Bench and Bar, Association of American Law Schools. The upshot was the creation of the Joint Conference on professional responsibility composed of five members from the American Bar Association and five law teachers representing the Association of American Law Schools. The Joint Conference resolved to attack the problem on a much broader front than that suggested by earlier surveys and dialogue. The areas of inquiry were professional ethics, unauthorized practice of law, judicial administration and more broadly, "an analysis of the responsibilities of the lawyer in (his) various roles."²⁰ Materials for instruction and instruction itself were to be explored.

¹⁴ See "Report of A.A.L.S. Proceedings for 1929," in 6 Am. L. S. Rev. 722 (1930).

¹⁵ See Wickersham, *supra* note 11.

¹⁶ 60 A.B.A. Rep. 90 (1935).

¹⁷ Bierer, "Retrospect and Prospect," 7 Bar Exam. 131, 134 (1938).

¹⁸ 71 A.B.A. Rep. 207 (1946).

¹⁹ *Id.* at 210.

²⁰ A.A.L.S., 1954 Proceedings 104 (1955).

The breakthrough toward the solution of the problem of training for professional responsibility came through the Boulder Conference on Education of Lawyers for Their Public Responsibilities, called in 1956 by the Special Committee on Education for Professional Responsibility, Association of American Law Schools. That Committee's report well describes the principal items of the agenda: "Values basic to a free society; function of the legal profession in respect to their protection; relation of legal education to them, including obligations, opportunities and obstacles, together with training processes and suggested means for attainment of objectives."²¹

ARTICULATION OF THE PERVERSIVE APPROACH

Although convened by a law teachers' association, the conferees of the Boulder Conference included four practicing lawyers and four laymen—a physician, a political scientist, an officer of a great education fund, and a Professor of Religious Thought, the late Dr. Edwin E. Aubrey of the University of Pennsylvania. Among the recurring problems of the Conference, the most persistent was the extent to which ethical values could be effectively inculcated by means of existing subject-matter courses in contrast to the concentrated approach employed in Legal Ethics, Legal Profession and similarly entitled courses. The difficulty of resolution was not insurmountable once the principle was brought sharply into focus.

The late Dr. Aubrey, speaking from a lifetime of experience in teaching about religion, was perhaps the leading proponent of the former approach. It was he, in fact, who referred to it as the "pervasive approach," a term that commanded immediate acceptance. As he viewed it, any conventional subject-matter course, not necessarily what is known as a "practice course," will provide a succession of opportunities for the introduction of questions and comments on values that are essentially ethical.²²

The Boulder Conference thus identified the central meaning of the pervasive approach—dialogue about ethical and professional problems as the opportunities present themselves in the context of any law school course, rather than the relegation of that dialogue to a single course.

So considered, it may appear that the pervasive approach to teaching professional responsibility is simply old wine in new bottles, for some law schools have been teaching professional responsibility pervasively for years. But what is new in the concept is the notion of planned permeation of all or a substantial part of the law school

²¹ A.A.L.S., 1956 Proceedings 159 (1957).

²² Stone, Legal Education and Public Responsibility 8 (1959).

curriculum with ethical and professional problems. Professor Robert E. Mathews, Chairman of the Boulder Conference, recognized this when he referred to the pervasive approach as the "systematic, planned introduction of ethical values and standards into non-ethics courses."²³ He added, "If (the law teacher) will take a few hours from a busy week and analyze his course case by case and class-note by class-note, he will be amazed at the discoverable number of ethical issues that are implicit in every hour of class discussion . . . that pervade, in fact, the entire course."²⁴

IMPEDIMENTS TO UTILITY

The participants of the Boulder Conference were acutely aware of several possible impediments to the usefulness of the pervasive approach. The law faculty of Vanderbilt University, which is conducting an experiment in this method, was also aware of certain limitations.²⁵ That experiment may reveal on empirical grounds other possible limitations, but three major problems are already too clear.

First, the cardinal value influencing the selection of teaching materials in the law school curriculum is the fitness of the materials "for teaching the tough intellectual methods of technical law" and not the fitness of the materials' ethical content.²⁶ In fact, most casebooks contain little ethical content, although many of the problems that they raise provide the opportunity for ethical discussion. Thus supplementary materials must be prepared by the instructor for use in his course. A brilliant example of what can be done to solve this problem is Professor Murray Schwartz's *Materials on Professional Responsibility and the Administration of Criminal Justice*²⁷ to complement the standard criminal law course and casebook.

A second problem concerns the attitude, receptiveness, and ability of law faculty members to bridge both the technical and ethical problems in a given course. Will Professor X, a specialist in real property, consider himself competent as a teacher of professional responsibility? Does he have the time, or will he take the time, to prepare the ethical content? Is his personality such that he will effectively inculcate professional idealism, or will he cynically denigrate it? Certainly a minimum condition for the success of the pervasive approach is widespread faculty support of it.

²³ Mathews, "Education for Professional Responsibility," 21 La. L. Rev. 140, 148 (1960).

²⁴ *Id.* at 149.

²⁵ Smedley, "The Pervasive Approach on a Large Scale—'The Vanderbilt Experiment,'" 15 J. Legal Ed. 435 (1963).

²⁶ Stone, *op. cit. supra* note 22, at 301.

²⁷ These materials were published in 1962.

A third problem is control and evaluation of the teaching of professional responsibility by the pervasive approach. Control over faculty members' methods of teaching is slight and evaluation of the effectiveness of teaching at any level of higher education is difficult, but control and evaluation are even more difficult when the pervasive approach replaces a concentrated course in ethics.

CURRENT STATUS OF THE PERVERSIVE APPROACH

A recent report by the American Bar Association Foundation showed that about four-fifths of the approved law schools indicate the use of an unplanned pervasive approach in varying degrees, whereas the planned pervasive approach with specially prepared materials is used in less than a dozen schools.²⁸ However, the report suggests that use of the planned pervasive approach is on the increase. The Foundation's report also indicated that the planned pervasive approach does not in fact permeate the entire curriculum, but is most commonly associated with the courses in criminal law, procedure, torts and trusts. In addition to these courses, the University of Chicago has extended the method to courses in administrative law, corporations and federal taxation. The Vanderbilt University School of Law includes conflict of laws, contracts, conveyances, family law, insurance, labor law, security (mortgages) and taxation, as well as criminal law and evidence in the catalogue of appropriate courses. The Harvard Law School has developed problems emphasizing professional responsibility for use in its freshmen Group Work Program, a tutorial program that also deals with legal research, writing and the preparation and trial of hypothetical cases. This catalogue of efforts shows that there is no subject-matter limitation on the application of the pervasive approach.

CONCLUSIONS

The writer agrees that training for professional responsibility is "the job of all law teachers at all times" and not something to "be parcelled out and assigned to certain members of the law faculty at certain hours."²⁹ Training for professional responsibility by the planned pervasive approach offers a teaching technique more effective to instill an appreciation of the role of the lawyer in modern society than the course in Legal Ethics so frequently and vigorously demanded by the bar, because training for professional responsibility includes legal ethics and much more.

²⁸ Lamborn, *Legal Ethics and Professional Responsibility* (1963).

²⁹ See Currie, *supra* note 2.

A rearticulation of a professional educational goal and a technique which tends to implement that goal is, however, only a beginning. The more complex problems of understanding the forces that mold professional character and deciding how the law schools may use this understanding remain. Happily, these areas of inquiry are not being neglected by the law teacher.³⁰ But progress in these areas—and others—is predicated to a large extent upon the profession's understanding the complex process of molding professional character, including the status of new teaching methods, and upon the law schools' abiding concern with the problem of teaching professional responsibility.

³⁰ See Watson, "Some Psychological Aspects of Teaching Professional Responsibility," 16 J. Legal Ed. 1 (1963).