"EAT YOUR SPINACH?"

STEPHEN GILLERS*

Pedagogy being biography (to amend Thomas Carlyle[1]), I begin with some facts of life. After law school and a clerkship, I practiced law for nine years in New York City. I did this in various settings; first, with a large firm, and then at a small civil liberties organization. And then I didn't know what to do with myself. I interviewed at big and small firms, but they didn't interest me as the partners who interviewed me surely realized. It was 1972; I was 28 years old and still living in the 1960s. I didn't want a boss. One day, I walked past a tailor shop on the lower east side of Manhattan. Today, the neighborhood is called Noho and has two-million dollar condos and restaurants that feature seven varieties of exotic salad, but then it was home to rent-controlled tenements and ethnic restaurants, mostly Polish and Jewish. I knew it was a tailor shop because "TAILOR" was stenciled on the plate-glass window and because inside sat an elderly man hunched over a sewing machine. A dozen garments hung on a rod beside him. And nothing more.

Right then, I had my epiphany. A lawyer could do what a tailor could do. What mattered was the person. I didn't need to work at a law firm to be a lawyer. I was one already. My education and few years of experience were more than adequate. I had knowledge that people would pay me for. This was instantly liberating. I would open a lawyer shop, although not in a storefront with "LAWYER" stenciled on the window. Instead, a few months later, I rented a room in someone else's small office in lower Manhattan. The building had a bank and a coffee shop on the main floor and a copy shop next door, which was pretty much all the retail I ever expected to need in practice. My room had a picture window with a view of the Hudson River. It was cheap, too. Today the neighborhood is called Tribeca and has three-million dollar condos and a Pan-Asian restaurant on every other block. I bought a used desk, a few chairs, a *ficus benjamina*, stationery, and a portable typewriter (this was BC, before computers). I had no books. I used a bar association library three blocks away.

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1. Thomas Carlyle wrote that the "history of the world is but the biography of great men," a questionable proposition. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 26 (1859).

I practiced this way for more than two years. I earned more each month than ever before. With the overconfidence of a young person, I accepted all kinds of matters. I figured if I worked hard and treated my clients with respect and concern, I would survive, even succeed. That was quite a leap of faith, as I recognize today, but then I felt it as a certainty. Luckily, it turned out to be true. Like all converts, I was fervent about what I was doing and set out to persuade others. I interviewed fifty lawyers who had started their own practice and then wrote a book, *"I'd Rather Do It Myself:" How to Set Up Your Own Law Firm*.[2] It's still in print. Its financial information is dated but the psychological truths remain current.

After two years and three months, my firm doubled. I joined with my friend Ken, who was also in practice alone, and we rented office space on the fifty-fifth floor of a Fifth Avenue office building. My office had a clear view of the Empire State and Chrysler Buildings. The neighborhood was upscale and our expenses multiplied, but the basic idea did not change. What made a lawyer good was not the office or technology. If you worked hard and treated clients with concern and respect, you didn't need much more. If not, you wouldn't last long.[3] Our biggest case, an admiralty litigation in federal court, is Exhibit A. On the eve of trial, the client's prior law firm, an admiralty firm, advised that the case was a sure loser and should be settled for a pittance. Instead, the client found its way to us. The opposing lawyers were also admiralty lawyers. Ken and I didn't know a ship from a boat, let alone the meaning of the nineteenth century Inchmaree Clause in maritime insurance law, on which the case mostly turned.[4] So what? We drew optimism from our energy. We took the case for a small retainer and a contingency. Luckily, the trial was delayed and we had time to thoroughly learn admiralty law and line up our expert witnesses. We won at trial and on appeal.[5] With my share of the fee I was able to buy a condo while they were still cheap. After three years, I was offered a teaching job at New York University School of Law and took it. That was 1978. I'm still there.

What does this brief history have to do with the theme of this symposium? Though it can sometimes seem otherwise, I know there are *not* as many ways to teach professional responsibility as there are teachers of it. But there is

2. STEPHEN GILLERS, "I'D RATHER DO IT MYSELF:" HOW TO SET UP YOUR OWN LAW FIRM (1977).

3. Or so I thought and like to think. Unfortunately, it is not always true.

4. The Inchmaree Clause takes its name from a ship that was the subject of litigation in the British courts in the 1880s. The clause was drafted to overturn the result in that case. It broadens the scope of maritime insurance coverage. *See* Cont'l Cas. Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 519–20 (7th Cir. 1999); Thanh Long P'ship v. Highlands Ins. Co., 32 F.3d 189, 191 (5th Cir. 1994); Antilles S.S. Co., Ltd. v. Members of Am. Hull Ins. Syndicate, 733 F.2d 195, 198 (2d Cir. 1984) (providing a brief history of the clause).

5. The case is Cont'l Ins. Co. v. Hersent Offshore, Inc., 567 F.2d 533 (2d Cir. 1977).

probably a greater variety of approaches to this subject than any other standard course in the curriculum (except law and literature, which I also teach). How it's taught will depend on the experience of the instructor. Of course, all of us who teach legal ethics deal with the ABA's rules, confidentiality and privilege, conflicts, fiduciary duty, and other doctrines that define the work of lawyers. We critically analyze the law and rules we cover. Whose interests do they favor? Do they promote justice? What is justice in this context? (What is "this context" in this context?) Is the rule fair and right? Can it be improved? Who should decide? We do all this, but we may differ in what we aim to accomplish, and we surely differ in our methods. Those differences will be a product of many influences, not least of all experience in practice, or the lack of it.

In 1978, when I started teaching, the ABA had recently adopted a rule requiring accredited law schools to offer instruction in the legal profession and legal ethics.[6] I agreed to teach one section of the class. I was neither eager nor unwilling to teach it. Later in this essay I'll say what I try to accomplish in the course and how, but first I want to say what I've learned about the subject's reputation in American law schools because I think that is also important.

Despite the ABA rule, some law schools, including some of the most prominent, either do not offer a class in legal ethics or offer only one occasional section with too few seats to accommodate all students.[7] These schools purport to fulfill the ABA requirement in other ways, including pervasively, expecting that teachers of other courses will address ethical issues in their syllabi. Surely, some do. But despite the good work of Deborah Rhode to help teachers surface ethical issues throughout the curriculum,[8] I suspect that many, probably most, teachers do not do it. Some classes do not readily lend themselves to discussion of topics in lawyer regulation. Others do, but their teachers have primary (if not sole) allegiance to doctrines in their own field, for which they barely have enough time as it is. And even if every teacher whose class could plausibly include issues of professional regulation

6. The rule now reads: "A law school shall require that each student receives substantial instruction in . . . the history, goals, structure, values, rules, and responsibilities of the legal profession and its members." SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302(a)(5) (2006).

7. *See, e.g.*, REPORT OF THE PROFESSIONALISM COMMITTEE OF THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 40–41 (1996) (reporting on a 1994 survey of 131 law schools that found that 44% offered a required two-credit class with the remainder providing other options both more and less demanding). Eight schools had "no required ethics or professionalism courses." *Id.* at 41. Support for the statement in the text inevitably must also rely on personal knowledge gleaned from conversations with other law teachers.

8. *See generally* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

attempted to discuss one or two of them, there is no way to ensure that they won't all address the same issues. The upshot is that at some schools the ABA directive is seriously slighted.

But most schools do require the class and today many faculty consider it their primary teaching and research subject.[9] This is very gratifying. In my time teaching, there has been an explosion in the number of academic articles written about the regulation of lawyers and judges—from all sources—not just through ethics rules. Paralleling the academic interest is an increased interest in the legal profession generally, including in the courts, sparked in part by the very existence of the required legal ethics class in law schools (as time goes by more and more lawyers and judges will have taken the course), by the focus on the behavior of lawyers and law firms in the popular and legal press, by the nearly universal requirement of continuing legal education ethics credit, and by the highly visible (sometimes raucous) debates surrounding the adoption of the ABA Model Rules of Professional Conduct and amendments to it, state ethics rules, Sarbanes-Oxley and the ensuing SEC regulations, and the Restatement of Law Governing Lawyers. All of this has made for a rich and gratifying soup.

That's the good news. The bad news is that notwithstanding the academic and professional engagement, legal ethics, by whatever name, is the Cinderella of the law school curriculum. It is mostly tolerated, rarely loved. It's not hard to see why. Requiring all students to take the course carries a cost for the law school. A school that admits 300 or more students yearly must offer at least three sections. Even at two credits, that's three full-time faculty members and 600 contact hours yearly. (This assumes the class is not outsourced to adjuncts, another form of benign neglect.) Another shortcoming is that legal ethics is viewed as uncomfortably close to law practice, which means it is too far from theory. Many law teachers see their institutions as graduate schools that happen to train professionals and only incidentally as professional schools that train practicing lawyers. Practice is all right, of course, but it's, well, practice; and practice is not theory. Practicing lawyers rarely have the time or need to ask the big questions, the kind of questions that generations of law teachers spend their lives asking, answering, and then asking in new ways. Too much practice presumably weakens the capacity for theory just as sugar decays the teeth. (A lawyer with my experience would have a nearly

9. In 1978, when I started teaching, the Directory of Law Teachers had about seven columns of teachers under the category Legal Profession. By 1986, it had inched up to about eight columns. The 2006–2007 edition of the book contains nearly sixteen columns under the category Professional Responsibility. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 2006–2007 (2006). More dramatic, the number of teachers with over ten years in the category increased six fold between 1978–1979 and 2006–2007, from two-thirds of a column to more than four columns. This reflects both the entry of new teachers of the subject over this period and their decision to stay in it. *Id.*

impossible time getting hired today, and I'm not so sure about the "nearly.") Even if the material in the course were not viewed as too close to practice, it is not often seen as a subject in its own right, but rather as an amalgamation of doctrines pilfered from other subjects (e.g., agency, constitutional law, fiduciary duty, tort law). A friend who volunteered to teach professional responsibility at his school told me that the trouble with the subject was that it had no theory. What could I say? Certainly, it does not lend itself to broad pronouncements that can explain everything.[10]

Dismissive faculty attitudes are not lost on students, who are rarely eager to take the class in any event. Mostly it's offered in the upper years, by which time in a student's career the word "required" before the word "course" is ground for indictment and summary punishment, not gratitude. Besides, students anticipate that the knowledge they gain in legal ethics—unlike excellence in (say) securities, or antitrust, or bankruptcy—is not the kind of information that will be attractive to employers. It can't be "resold" to clients. An "A" in corporations has palpable market value. An "A" in professional responsibility? Oh, that's nice. Explaining to students that they are learning rules and law that will govern their work lives for the next fifty years—ignorance of which can lead to embarrassment, anxiety, monetary sanctions, loss of status, even professional death—doesn't resonate. In the cocoon of the academy, students may view the rules governing the profession as only remotely connected to the world they are about to enter. Not true, of course, as they'll soon discover. Surely I'm not the only teacher of the subject delighted to learn that practicing lawyers are intellectually, even emotionally, invested in even the minor rules that govern how they may serve their clients.

All this makes the class a real challenge to teach. I've had good years, not so good years, and many in between. It's certainly easier to teach evidence, my other yearly course. I don't blame the material. How could I? Many issues in the class pervade popular culture, high and low. Films, books, and television shows have long been fascinated with the moral ambiguities that define the professional role. These issues also pop up—weekly it seems—in news stories about lawyers, law firms, and judges. I don't mean to say that my classes lack all excitement—I hope they don't—only that it can be a challenge to persuade students to appreciate the intellectual and social importance that I think the subject deserves and which practicing lawyers intuitively grasp. My dilemma may not confound others, who may be able to generate a level of classroom enthusiasm that eludes me. If so, I hope they are contributing to this volume and will share their secrets.

10. This comment, in a tone both genial and dismissive, bothered me. I was able to exorcise it only by writing a brief essay in self-defense. *See generally* Stephen Gillers, *Legal Ethics: Art or Theory?*, 58 N.Y.U. ANN. SURV. AM. L. 49 (2001).

I could stop teaching it. After all, approaching the home stretch of my academic career as I am, haven't I earned the right to just have fun? True, I'm publicly identified with the subject (and with little else), I get more than my share of press calls, and I have a casebook to keep up.[11]

There is also the matter of institutional responsibility. The school needs me to teach the class. Furthermore, I like the subject. I enjoy thinking and talking about it. This is all surely reason enough to stay with it. Indeed, the casebook alone is worth the price of admission. Now in its seventh edition and twenty-second year, it has been on this earth nearly as long as my now adult daughters, to whom each edition is dedicated. Working on the book, writing the problems, choosing and organizing the materials (making them as timely as possible), and getting the occasional e-mail from teachers who use the book (and even from some students) expressing appreciation for its content and "voice," have been among the most fulfilling experiences of my professional life. Although new editions are published only every three or four years, I update my files weekly. The book, you might say, is a member of my extended family. Of course, I could publish it whether or not I continued to teach the class, but I would not remain as close to the subject. The book would suffer.

There is yet another and independent reason to stick with legal ethics. This is where the autobiography comes in most directly. My practice experience tells me that it's the most important class a law student can take. Sure, sure. I anticipate the objections: What about constitutional law? What about corporations? What about contracts? And, anyway, nearly everyone thinks that his or her class is the most important. True, but only one of us is right. My reason is simple. Legal ethics is the only class in the law school curriculum whose content is relevant to the daily professional life of all graduates who practice law, which is nearly everyone. Bankruptcy is important to bankruptcy lawyers, but most lawyers do not need to know much, if any, bankruptcy law. The same point can be made about criminal law and securities and civil procedure. And so on. But all lawyers "practice" legal ethics just by going to work.

The common denominator does not stop there. All lawyers also have clients, at least one, often hundreds or thousands across a career. Indirectly, the class is for clients too. Or to put it another way: How can a law school conscientiously certify graduates as competent professionals without making an earnest effort to ensure that they understand the responsibilities of their profession to clients? And the class is for the courts, adversaries, and the public as well, because every law graduate who practices law has obligations to each group. There's more. Many students will go on to run government law

11. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (7th ed. 2005).

offices, corporate law departments, private law firms, and public interest organizations. In these roles and others, they will make choices that define the culture of their offices. Some students will be active in bar associations or become judges. In these roles, they will influence or decide the content of rules governing the profession. In short, no other law school subject will have as much importance across the population of each graduating class.

Now that I've persuaded you that legal ethics is the most important law school class, let me say something about how I try to teach it. This perspective also informs the content of my casebook and is inescapably a product of nearly a decade in practice with a broad range of clients and legal problems. I approach professional responsibility issues from the bottom up. Every client, every case, every matter is a story. Concepts don't hire lawyers. People with problems do. The people rarely want to be there. Even in the best of circumstances (buying a home? adoption?) getting involved with the law and lawyers is intimidating. And of course for many clients, the circumstances are not the best and the experience is terrifying. Their income, wealth, freedom, relationships, or reputation may be at stake. This is so whether the person with whom the lawyer must deal is the actual client or an officer of an organizational client. Worse, the system in which they're enmeshed is generally foreign to them. They may know only its caricature in popular culture. In their role as clients, their lawyer is the most important person in their life.

So in class, I start by focusing on the facts, the client, the client's problem, the lawyer's problem, whether these appear in an actual case, in the somewhat factually complex problems I try to write, a film clip, or a legal ethics video. I can't offer students an actual client—an experience they'll have soon enough and which will do more than any classroom discussion ever could to concentrate their awareness of the professional role and the relevance of the rules they study. Realizing, as a lawyer, that you have an ethical dilemma, that you have to make a choice about how to act, that your client may suffer unduly if you choose wrong, that you may also pay a professional price or expose yourself and your colleagues to liability if you err—well, that's when you may appreciate, albeit retrospectively, why the class should be required. If only we could reproduce that environment in class. But we can't. In class, the material has to remain abstract. Still, there are degrees of abstraction and we can try for as much immediacy and verisimilitude as the artificiality of the classroom allows.

I begin with the story of the case or hypothetical, but I don't end there. A *bottom up* approach implies both a *bottom* and an *up*. Students may have intuitive reactions to the issues that the cases and problems posed, and those should be identified, nurtured, and discussed. Despite the legal academy's low regard for feelings (along with practice), the truth is that intuition offers valuable information, especially for this subject. Intuition may not be enough

to support a conclusion, but it has pedagogical value. We must next compare our intuition with the requirements of the rules and case holdings (positive law). We must then critique positive law, especially where it diverges from our intuition. That critique will take us into greater abstraction as we attempt to identify and defend governing principles for the problem at hand (we're finally getting close to theory here) and then see where else these principles may lead.

Earlier, I wrote that in my risk-ignoring, highly optimistic dive into solo Manhattan practice only four years out of law school, I told myself that hard work and concern and respect for clients would ensure success. I can't teach hard work, but I do make it a point to emphasize the importance of treating clients with concern and respect. Far too often, lawyers don't do that. (Oh, I could tell you stories!) I ask students to put themselves in the role of a medical patient and appreciate the dependency of the relationship and the need for communication. The more serious the problem, the greater the patient's anxiety, and therefore the need to be able to reach the doctor and to feel secure in his or her concern. I emphasize that a lawyer does not have to like a client as a person—some clients are really awful people—but having assumed the work, a lawyer must be professionally devoted to the client as a client. If you can't do that, step aside.

"Eat your spinach," is the perennial parental injunction. "You may not like the taste, but it's good for you. You'll thank me later." Is that what I sound like? Have I made legal ethics the spinach of the law school curriculum? Unappetizing but required? I hope not. I strive, as we all do, to make the meal as satisfying as possible. I fiddle with the recipe and play with the presentation. But if it doesn't quite work, if the dish will never be as tempting as *Title VII Tiramisu* or *First Amendment Profiterole*, what can I say except "Eat your spinach?" Experience tells me students need this. It's good for them. They'll thank me later. I hope.