Role, Identity, and Lawyering: Empowering Professional Responsibility

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INTRODUCTION: PROFESSIONAL ROLE AND PERSONAL IDENTITY

The Professional Responsibility course has the potential to have the greatest impact on our students’ futures in the profession. Paradoxically, however, it remains one of the most undervalued courses in most law school curricula. The complexity of teaching Professional Responsibility is well documented by scholars.¹ Most teachers in this area, novices and veterans alike, acknowledge the challenge of teaching a course whose subject matter and application is so deeply personal for the students. This course remains challenging due in part to the competing goals of teaching students issue resolution using the law governing lawyers and fostering understanding of the

¹ Recent symposia have explored these challenges from various perspectives. See, e.g., Symposium, Teaching Professional Responsibility and Legal Ethics, 51 ST. LOUIS U. L.J. 935 (2007). Steven Hobbs captures well the delicate balance in trying “to find the appropriate blend of conveying sufficient information, presenting sophisticated analytical processes, and inspiring students to take the ideal of professionalism to heart.” See Steven Hobbs, Hitting the Sweet Spot: Finding the Center in Teaching Professional Responsibility, 51 ST. LOUIS U. L.J. 1269 (2007); see also Anita Bernstein, Pitfalls Ahead: A Manifesto for the Training of Lawyers, 94 CORNELL L. REV. 479 (2009).
normative values that underlie the regulations. Of course, I want my students to gain command of the standards that govern the legal profession. Reducing the course to a rules-only venture, however, excises much that remains vital to their futures as lawyers. I aim to bring harmony to the divergent roles of lawyers as fiduciaries for clients, officers of the court, and individuals with personal identities and interests.

Far too often, legal ethics or professional responsibility is deemed a hopeless oxymoron. The literature on the state of the profession reflects a decline in the public perception of lawyers, a fragile self-image, and low morale across the legal profession.\(^2\) Media outlets and other sources are replete with examples of the role of lawyers in everything from corporate scandals like Enron to liberty deprivations due to wrongful convictions.\(^3\) Structural and market forces heighten the intensity of such pressures in contemporary practice, including billing structures, organizational cultures, and the sheer labor-intensity of the work.\(^4\)

After several years of law practice, observing and experiencing some of the ills and tensions of the profession firsthand, I remain committed to

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changing this perception for the benefit of those whose lives we impact through our professional service. The antidote, I believe, lies at the intersection of professional role and personal identity in the practice of law. I cultivate a mode of ethical reasoning in which identity is not only relevant, but also is integral to sound, professionally-responsible decision making. Thus, I place an identity question at the center of the study of legal ethics and professionalism—what difference will your difference make in law practice in the furtherance of justice? In my view, the ills of the profession will be mediated only if we are willing to engage students in critical examination of the profession and the law governing lawyers in relation to their own identities. This endeavor is particularly relevant in light of the most recent report on legal education, Carnegie Report—Educating Lawyers: Preparation for the Profession of Law (2007), which highlights professional formation as one of three voids in the development of lawyers. This facet involves exposing students to opportunities for exploring “identity, values and dispositions consonant with the fundamental purposes of legal education.”

I.
THE RULES OF PROFESSIONAL CONDUCT:
A PEDAGOGICAL STARTING POINT

The Rules of Professional Conduct (RPCs) serve as the natural starting point in addressing ethical dilemmas using a problem-based method. This technique allows for discussion with little at stake for the students personally, but realistic enough to begin appreciating the various dimensions of the lawyer’s role.

The students begin to learn the mechanics of ethical reasoning as they negotiate scenarios using as guidance the RPCs and other laws governing lawyers. They realize fairly quickly, however, that often the standards fail to appoint a single answer. In fact, on so many key ethics issues, the RPCs are silent, ambiguous, or permissive on including rules that address hallmarks of the lawyer-client relationship like confidentiality. The question becomes not simply, “What is the right solution?” but more subtly, “What can I do and still maintain congruence with my personal integrity within the bounds of my professional obligations?”

5. This query was inspired by some of the work of David Wilkins. See, e.g., David B. Wilkins, Beyond “Bleached Out” Professionalism Defining Professional Responsibility for Real Professionals, in ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION (Deborah Rhode ed., 2000); ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION (5th ed. 2009).
7. Id.
One of the classic scenarios places the student in the role of a young lawyer who has landed a position with a solo practitioner after a year-long job search. The student must decide whether to report professional misconduct under Rule 8.3 of the supervising attorney who may have misappropriated client funds. The scenario routinely evokes strong reactions along with admissions from students that they can rationalize their way out of the reporting requirement in order to keep the new job.9

Occupying this discretionary space often presents the most difficult challenge for lawyers, yet it captures precisely what professional judgment is all about. How does one draw the line in accepting and advocating matters? How does one decide whether to help the elderly woman who wants to disinherit her gay son or to defend the alleged serial child molester with the cognitive ability of an eighth grader? How does one strike the appropriate balance in representing a minor, or the eccentric client who wavers between sharp wit and incoherence? Rather than leaving my students to fend for themselves without a rational roadmap for resolution, I want to prepare them to unpack the dilemma with an acute awareness not only of what is at stake legally and professionally, but also of how their personal identity and function as a lawyer intersect to inform their professional judgment.

II.
FORGING A “SELF-INTEGRATIVE” APPROACH TO PROFESSIONAL RESPONSIBILITY

Once the students have parsed a dilemma using the applicable rules and situated it in the larger context of the profession, it is time to turn inward—to understand how the role of lawyer is cloaked with power and discretionary authority; how who we are drives what we do in particular contexts. The goal is to raise awareness of the power imbalances in the lawyer-client relationship and the role that identity plays in ethical decision making.

I often begin the semester with a discussion of In re Pautler, a case about a prosecuting attorney who impersonates a public defender in a telephone call with the alleged perpetrator of a heinous triple homicide.10 William Neal, the alleged murderer, agreed to surrender if he could speak with a public defender.11 Mark Pautler, a chief district attorney, defended his actions based

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9. Rule 8.3 provides in pertinent part that a lawyer who knows of misconduct by another lawyer “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” The students’ mood often shifts at the realization that simply reporting to a more senior lawyer does not alone provide cover or defense. The ambiguity lies in what constitutes “substantial” and “knowledge” of such conduct. See Model Rules of Prof’l Conduct R. 8.3 (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html (full text of the rule and comments) (last visited Jan. 22, 2012).
10. In re Pautler, 47 P.3d 1175 (Colo. 2002).
11. Id. at 1177.
on an imminent public threat as Neal remained at large.\textsuperscript{12} Notwithstanding Pautler’s protective motives, the court determined that he engaged in misconduct by subordinating his duty as an officer of the court, especially where he had the capacity to contact a lawyer for Neal.\textsuperscript{13} I receive a range of student reactions from admiration for the prosecutor’s covet of his duty to protect the public from harm to outrage that he would lie and deprive the accused of his basic right to counsel. This spectrum of perspectives is typical, especially at the outset when students’ idealism reigns, but by the time we reach the end of the course revisiting their earlier stance on \textit{In re Pautler}, they have shed some veneer of judgment and their rose-colored eyes have widened.

Appreciation of the complexity of ethical choices when balancing various roles as a lawyer is precisely the excavation that I envision for my students. My approach works toward empowering future lawyers to take ownership of their individual contributions and the profession as a whole.

\hspace{1cm} \textit{A. Introducing the “Self-Integrative” Approach: Supplemen ting the Rules with Vivid Artistic Examples}

To further prepare students for this vigorous dissection of professional responsibility and personal judgment, I draw from examples of lawyering from the silver screen. The dilemmas faced by lawyers in the films \textit{To Kill a Mockingbird}\textsuperscript{14} and \textit{Changing Lanes}\textsuperscript{15} provide students with characters and scenarios from which they can begin to answer difficult questions about a lawyer’s role. I use these examples to introduce students to what I call a “self-integrative” approach to professional responsibility. In forging this self-integrative approach, films such as these effectively illuminate the tensions lawyers face as fiduciaries, officers of the court, and self-interested professionals.

The main characters in \textit{To Kill a Mockingbird} and \textit{Changing Lanes} appear to be foils of one another. The adaptation of Harper Lee’s \textit{To Kill a Mockingbird}\textsuperscript{14} involves the archetype of the lawyer statesman, Atticus Finch, who, amid the objection and hostility in his community, takes on representation of an innocent black man wrongly accused of rape. In \textit{Changing Lanes}, Ben Affleck portrays a hot-shot lawyer in a BigLaw firm setting who discovers his participation in defrauding a charity and considers colluding with his partners to cover it up by forging a power of appointment. We juxtapose the actions and impulses of each subject. What begins as a comparative discussion of these polar opposites becomes an exploration of fundamental values and philosophical orientation. Is Atticus Finch as integrated as he appears? Are the two lawyers alike in more ways than are readily apparent? We consider what

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 1179–80.
\item \textsuperscript{13} \textit{Id.} at 1180–83.
\item \textsuperscript{14} \textit{TO KILL A MOCKINGBIRD} (Universal Pictures 1962).
\item \textsuperscript{15} \textit{CHANGING LANES} (Paramount Pictures 2002).
\end{itemize}
import the institutional settings and their attendant cultural influences have on the behavior and motivations of the characters and their capacities to exercise sound judgment.

Over the course of the semester, I refer back to these conversations as we pursue in more depth the tensions that influence ethical decision making and the need for integration of personal and professional identities. For sure, the artistic portrayals of ethical dilemmas enliven the material. Importantly, however, these silver screen narratives allow the students to experience the gravity of ethical tensions visually and emotionally. Their identification with and projection onto the character promotes the ability to connect in human terms unlike reading hypotheticals in the text, and sets the stage for their own identity processing. This internal excavation builds throughout the semester as I ask the students to engage in critical reflection exercises to facilitate their development of a philosophy of lawyering.

B. Developing Critical Capacities

After introducing the students to the self-integrative approach, I then assign critical reflection exercises meant to solidify some of the observations evoked from the Mockingbird and Changing Lanes discussion, as well as our exploration of various ethics scenarios. I first devised the foundations of this framework in my review of and engagement with the late Derrick Bell’s Ethical Ambition, a powerful reflection on achieving success while maintaining fidelity to core values. The title itself appears oxymoronic, yet Bell pulls off a grand job of modeling precisely the kind of internal interrogation necessary for

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16. Sometimes there is an interesting convergence of the realities of practice and the films I use to illuminate the issues when students hear from lawyers who have experienced the seemingly Hollywood moments in real-life law practice. Fiction comes to life each year, for example, when a partner at a prestigious national law firm shares an experience from his days as a new lawyer that sounds hauntingly similar to a scene from Changing Lanes.

17. I cannot take credit for framing the concept of a “philosophy of lawyering,” which is derived in part from the work of Nathan Crystal including his course text that I used for several years. Crystal defines a philosophy of lawyering as a “general approach to dealing with issues of professional responsibility.” See Nathan M. Crystal, PROFESSIONAL RESPONSIBILITY PROBLEMS OF PRACTICE AND THE PROFESSION, 52–55 (5th ed. 2011). For more extensive discussion, see Nathan M. Crystal, Developing a Philosophy of Lawyering, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75 (2000), and Nathan M. Crystal, Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility, 51 ST. LOUIS U. L.J. 1235 (2007). I have developed an approach that advances my goal of fostering deeper reflection on the legal profession and ethical decision making.

18. I integrate these assignments with material on various doctrinal topics of ethics study that I design specifically to encourage personal engagement with the concepts and the broader meaning of what it means to be a lawyer in society.

19. Derrick Bell, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH (2002). Bell devotes a chapter to each of six areas that he deems essential to ethical success—passion, courage and risk taking, faith, relationships, inspiration, and humility. I have asserted that Ethical Ambition “serves as the allegory from the cave” because of Professor Bell’s refusal to sugarcoat ethics and his transparency about the struggle toward authenticity and congruency. Natasha Martin, Allegory from the Cave A Story About a Mis-Educated Profession and the Paradoxical Prescription, 9 LEWIS & CLARK L. REV. 381, 385–86, 399 (2005).
decisive ethical discernment. Through his candid reflections, I draw a direct connection between ethics and self-examination. Thus, the critical reflection process facilitates self-reflection and ultimately nurtures the students’ capacity, as Professor Bell articulated, to “listen and respond to what is actually happening, being said, being felt,” rather than their perceptions or expectations of what ought to be happening.20 This self-integrative approach becomes a pathway to understanding what motivates their discretionary moves in any given scenario.

One such critical reflection exercise pivots the identity question this way:
If I close my eyes and IMAGINE A LAWYER, I expose myself to a ROLE
If I close my eyes and SEE ME, I expose myself to an IDENTITY
If I close my eyes and SEE MYSELF AS A LAWYER, I expose myself to the CONFLICT BETWEEN MY ROLE AND MY IDENTITY21

Consider your personal values, background, identity, and life experiences that shape the person you are today:
a) How might this context assist me in dealing with challenging ethical situations and the daily practice of law?
b) How might this context hinder my ability to resolve challenging situations and to engage in the daily practice of law?22

This inquiry places the student squarely at the center of the exploration. In a profession of well over a million lawyers, it remains largely a homogeneous group.23 Yet, those in need of legal services comprise a diverse mix, both ethnically and socio-economically. This incongruence can result in distortion of the scope of authority between lawyer and client, blurring the lines between a client’s goals, which ought to govern the representation, and the lawyer’s perception of the right objective.24 Notwithstanding the demographic realities,25

20. Bell, supra note 19, at 165.
21. Thomas Shaffer, Christian Theories of Professional Responsibility, 48 S. Cal. L. REV. 721, 731–32 (1975). Per Shaffer, the “role concept is sociological—seen from the outside in; the identity concept is psychological—seen from the inside out.” Id.
22. This inquiry was inspired by my own law school experience and former legal ethics professor Thomas Shaffer. See Thomas Shaffer, On Living One Way at Home and One Way in Town, 31 VAL. U. L. REV. 879 (1997) (exploring these personal and professional tensions).
24. Bell identified this as the “white knight” phenomenon. See BELL, supra note 19, at 155–59.
25. The barrier to entry for women and minorities remained pervasive until well into the twentieth century. And some would say that the net effect of increased diversity has not penetrated the profession, leaving major gaps of unmet needs and a void of perspectives. See, e.g., DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983). See also David B. Wilkins & G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 CALIF. L. REV. 493 (1996); J. Canyon Gordon,
lawyers bring a variety of experiences, backgrounds, and dispositions to the practice of law and to the exercise of ethical prerogative: A first-generation lawyer may bring a different set of sensibilities to ethical decision making than one born with a gavel in his mouth. A female lawyer may decide to represent the mother accused of neglect because she too has embarked upon a career without an adequate support network. A gay lawyer may understand the plight of the teenager injured as a result of bullying. And a lawyer with entrepreneurial roots may identify with the business owner who must file bankruptcy to survive. Significantly, all of them are susceptible to any number of assumptions about their clients, opposing counsel, or the objectives of the representation.

In addition to the critical reflection exercises, this self-integrative endeavor includes consideration of cases involving disciplined lawyers. Thus, we move beyond the hypothetical problems to case studies, which further contextualize the subject. This slate naturally includes bar decisions of the local jurisdiction. The students can more readily see the trappings once they have examined their own values, experiences, as well as the sociological and cultural forces at work in the profession. The point is made that lawyers do not start

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30. A particularly illuminating case is In re Christopher, in which a lawyer with less than five years of practice falsified pleadings, forged her secretary’s signature, and made false declarations. In re Disciplinary Proceeding Against Christopher, 105 P.3d 976, 978–79 (Wash. 2005). I ask the students to consider what made the lawyer proceed down a path of dishonesty and to continue the ruse. We discuss the decision-making process that ultimately led to her downfall.
out with unethical intentions or predilections. Anyone can fall short of the standards of the profession, including each of them.

There is much to learn from studying the pathology of the profession, including bar reports, disciplinary notices, and empirical studies documenting the rampant dissatisfaction in law and the various maladies experienced by lawyers, including substance abuse. This sociological gloss illuminates the complexity of ethics embedded within the structure and realities of contemporary law practice. If I left it here, however, students would emerge demoralized and without the clarity or tools to empower their capacity to make confident choices among what often appear to be less than satisfying alternatives.

C. Supplementing the Self-Integrative Approach with Social Justice Values

Beyond priming the students to engage in self-reflection and developing a philosophy of lawyering, I seek to impart the broader institutional impact of a particular ethical judgment on the profession and on notions of justice by assigning a variety of supplemental materials that coincide with particular doctrinal topics. For example, when we discuss the more theoretical issue of justifications for defending the “guilty,” I show a television clip from a 60 Minutes episode documenting the wrongful prosecution of Alton Logan, an African-American man who was released after unjustly serving twenty-six years in prison. The students observe interviews with Logan who appears nothing like a cold killer, as well as interviews of the lawyers who failed for years to disclose exculpatory information of Logan’s innocence based on a claim of confidentiality. Additionally, there exist numerous colorful examples of incivility among lawyers and other unsavory advocacy tactics. This material bears tremendous fruit in humanizing the effects of law, lawyering, and its inherent tensions.


33. The lawyers came forward only after the death of their client who had admitted years before that he committed the crimes. Rule 1.6 provides that a lawyer shall maintain the confidences of the representation of a client with some exceptions. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010).

CONCLUSION: RECOGNIZING THE EFFECTS OF
EMPOWERING PROFESSIONAL RESPONSIBILITY

I prefer to address issues of ethics and professionalism pervasively in the
context of any subject of the core curriculum. This methodology reinforces
the notion that ethical and professionally responsible decision making remains
a competency integral to the creation, application, and practice of law
generally. Building the students’ capacity for reflective judgment remains a
central objective of any course I teach. Yet, my professional responsibility
course remains the venue for the most intensive self-integrative work.

Through this methodology, I seek to teach and to encourage the skill of
reflection on the lawyering role in relation to one’s identity, values, and hidden
assumptions. The pursuit of integrating the lawyering role and personal identity
addresses the pull towards a technocratic rules-compliance approach to issues
of professional responsibility and emphasizes the self-regulatory nature of the
profession. It affords students a process for developing a reasoned and
thoughtful perspective. There is a tendency toward overconfidence by students
when pursuing ethical dilemmas, a seemingly natural stance for any
prospective lawyer who has not fully experienced the daily pressures of modern
law practice. Moreover, before taking the Professional Responsibility course,
students have been immersed in subject matters that they command while
maintaining a curious detachment. That is, they can treat the substance and the
application of law as externally-derived, remove themselves from its force, and
more easily take the moral high ground (or avoid moral questions altogether).
The Professional Responsibility course does not afford this safe haven,
however. The solutions most often are internally derived, requiring students to
contemplate their own ideals, identities, and moral convictions in order to
untangle the ethical bind.

I realize that what I am asking of the students requires a great deal of
courage, trust, and honesty. My justification is simple—being a responsible
lawyer undoubtedly requires careful attention to rules, but it also demands the
capacity to exercise sound judgment in the midst of the tension and pressures of
contemporary law practice and personal interests. Gaining the confidence to
confront some of the hardest realities of lawyering has become even more
relevant in the current economic climate.

35. Deborah Rhode advanced the pervasive approach in one of her Professional Responsibility
course books. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE
METHOD (2d ed. 1998).

36. Notwithstanding student reticence toward the subject of Professional Responsibility, I often
hear from alumni years later of the lasting impression the orientation has had on their outlooks and
approaches to practice. This anecdotal information confirms that the pervasive approach to
professional responsibility realizes benefits beyond law school after one has been immersed in the
rigors of daily law practice. Interestingly, recent empirical literature reflects that fostering ethical
professional formation correlates to effective lawyering and decision making. See Neil Hamilton &
Verna Monson, The Positive Empirical Relationship of Professionalism to Effectiveness in the
Practice of Law, 24 GEO. J. LEGAL ETHICS 137 (2011).
At the end of the day, Professional Responsibility is a course about the students—individually and collectively—and how they will ultimately deploy their services for the good (or bad) of their clients, the legal enterprise, and the rule of law more broadly. A holistic approach including critical reflection, supplemental material on the state of the profession, and the dramatized depictions of lawyers in film enlivens the topic, and, significantly, creates the pathway for students to begin developing their own philosophies of lawyering. Because the law comprises a complex web of political, cultural, and social forces, lawyers bring the essence of who they are to bear on ethical and professional dilemmas. A “self-integrative” approach prepares them to do so in a measured, informed, and effective way, and without checking their social realities at the door. My course centers on training lawyers who lead by the power of their person, not by the privilege of their positions as lawyers in society.