

## ESSAY

# PITFALLS AHEAD: A MANIFESTO FOR THE TRAINING OF LAWYERS

Anita Bernstein†

*Many entrants into the legal profession decided to become lawyers after they were inspired by improvements in social conditions achieved by lawyers like Abraham Lincoln and Thurgood Marshall or literary heroes like Atticus Finch. The historical record of achievement recursively invites new generations into this occupation. Once these entrants arrive at law school, however, the sense of inspiration with which they began often fades, and an inchoate pessimism, if not full-blown cynicism or depression, takes its place. Critics of contemporary legal education who lament this descent into malaise tend to see no cure for it. When they do offer a fix, it looks uncannily like an agenda they advocated in another context, repackaged as a tonic.*

*This Essay explores a better source of vigor and occupational skill within legal education. Learning about the perils and defeats that their profession experiences would, paradoxically, increase the strengths of new lawyers. In this context, forewarned really does mean forearmed. Informed judgment about this profession includes knowing how and why lawyers lose their licenses; why a lawyer pays out money for malpractice; what constitutes a breach of fiduciary duty; what level of work performance is incompetent or ineffective under the Sixth Amendment; when to struggle against judges; why a lawyer is disqualified from representing clients; and why lawyers forfeit some of their freedoms of speech and association. A command of pitfalls enables individual lawyers not only to defend themselves against the attacks they might someday face but also to advance what is good for their clients and the public. Only from a base of pitfalls-knowledge can lawyers master their own profession.*

INTRODUCTION .....	480
I. FOREWARNED ABOUT WHAT? .....	486
A. Threats .....	486

---

† Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. My thanks to faculty participants at a workshop at the University of Hawai'i School of Law, especially Randall Roth, for their insights, and to my Brooklyn colleagues Joan Wexler, Ed Cheng, and Nelson Tebbe for helpful comments on a draft. My thanks also to the Brooklyn Law School faculty research program for its support. This Essay is indebted to the foresight and creative thinking of Judge Hugh Lawson of the United States District Court of the Middle District of Georgia, who established an endowment to create and support my post as the Sam Nunn Professor of Law at Emory University (2000–07), as well as training for lawyers and law students.

1.	<i>The Vulnerable License</i> .....	486
2.	<i>Civil Liability</i> .....	490
3.	<i>Criminal and Regulatory Liability</i> .....	491
4.	<i>Being Deemed Incompetent or to Have Given a Defendant Less than Effective Assistance of Counsel</i> ..	492
B.	Tangling With Judges.....	494
1.	<i>A Panoply of Sanctions</i> .....	495
2.	<i>Disqualification (by)</i> .....	495
3.	<i>Disqualification (of)</i> .....	496
C.	Abridged Political and Civil Rights for Attorneys....	497
II.	ACCENTUATING THE NEGATIVE.....	499
A.	Risk Aversion.....	500
B.	Assonance with the Rest of the Curriculum.....	502
III.	LEARNING ABOUT ETHICS, AND FULFILLING OTHER MANDATES, USING PITFALLS.....	504
A.	The Centrality of Consequences to Ethics.....	505
1.	<i>Normative Ethics As Professional Responsibility Sees It: Pitfalls As Part of Consequentialism and Deontology</i> .....	505
2.	<i>Pitfalls As a Constituent of Moral Development</i> .....	507
B.	Pitfalls As an Instrument in Other Professional Responsibility Pedagogies.....	508
1.	<i>Clinical Education</i> .....	509
2.	<i>Experiential Instruction Outside of a Clinic</i> .....	510
3.	<i>"Pervasive" Instruction</i> .....	510
4.	<i>Specific Contexts</i> .....	512
5.	<i>A "Philosophy of Lawyering"</i> .....	513
6.	<i>Sociology of the Profession</i> .....	514
	CONCLUSION.....	515

#### INTRODUCTION

Observers of American lawyers and the American legal curriculum who agree on little else come together to find malaise in the legal profession. While he served at the helm of an extraordinarily esteemed school, Anthony Kronman wrote a jeremiad that spoke of "a crisis of morale."<sup>1</sup> This condition, Dean Kronman continued in *The Lost Lawyer*, "is the product of growing doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride."<sup>2</sup>

<sup>1</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (3d prtg. 1995).

<sup>2</sup> *Id.*

This morose assessment, spoken from a locus of relative comfort and ease, appears to be shared at varying levels of privilege within the profession. Whether they choose to address demoralization,<sup>3</sup> depression,<sup>4</sup> dissatisfaction at work and in school,<sup>5</sup> alienation,<sup>6</sup> cynicism,<sup>7</sup> heartlessness,<sup>8</sup> or another pathology that lawyers and law students manifest, commentators on this population are united in their gloom.<sup>9</sup> The empirically inclined among them gather data about lawyers' unhappiness that suggest an intractable problem.<sup>10</sup>

Most of the commentary proposes no solution for the problem, and the cures that have been proposed say at least as much about the prescriber as the disease. Decades ago, a psychiatrist on a law school faculty diagnosed psychopathology in the profession and called for attention to "the psychological dimension" of legal education.<sup>11</sup> An economist on another law faculty, who elsewhere denounced American Bar Association accreditation of law schools, has written that accreditation is a culprit, noting that "the recent malaise"—in contrast,

<sup>3</sup> See Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 113–14 (2002).

<sup>4</sup> See JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 62–64 (2005) (discussing malaise, intellectual confusion, and stifling of creative thought); Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 764–65 (2004) (discussing clinical depression).

<sup>5</sup> See Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 238–43 (2007); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511, 520 (2005).

<sup>6</sup> See Bonita London et al., *Psychological Theories of Educational Engagement: A Multi-Method Approach to Studying Individual Engagement and Institutional Change*, 60 VAND. L. REV. 455, 469–79 (2007) (reporting on a psychological study that found significant alienation in the law school environment, particularly among minority students).

<sup>7</sup> See Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 422 (2005). Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 *passim* (1998).

<sup>8</sup> See Bridget A. Maloney, *Distress Among the Legal Profession: What Law Schools Can Do About It*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 310–16 (2001) (reviewing psychological studies of law students' perceptions of coldness and hostility in their school environment).

<sup>9</sup> See Barton, *supra* note 7, at 414 (finding "at least four related but distinct crises listed in these various accounts of the Job-like woes of the legal profession").

<sup>10</sup> The most commonly cited summaries of these findings were written by Professors Susan Daicoff and Patrick J. Schiltz. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1346–47 (1997); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 873–80 (1999). But see Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971 *passim* (1999) (responding to Schiltz); Robert Nelson, *The AJD Project: The First National Longitudinal Study of Lawyer Careers*, 36 SW. U. L. REV. 355, 361 (2007) (reporting on studies that found an unexpectedly high level of lawyer satisfaction).

<sup>11</sup> Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 *passim* (1971).

perhaps, to what had prevailed in lost Lincolnesque eras of apprenticeship—arose “during the same period that law school training became dominant.”<sup>12</sup> The venerable critic Duncan Kennedy rooted the first of his many condemnations of legal education in the New Left politics that went on to permeate much of his work.<sup>13</sup> Anthony Amsterdam, a lion of clinical legal education, sited the problem in the lecture-and-take-notes classroom tradition.<sup>14</sup> More recently, feminists trace much of the malaise to sexism,<sup>15</sup> while a critic of feminist legal theory has written that feminist critiques of legal education obstruct positive change.<sup>16</sup> Addressing lawyers’ and law students’ discontents, the therapeutic-jurisprudence scholar Marjorie Silver hopes for “affective assistance of counsel”;<sup>17</sup> provocateur Linda Hirshman recommends pugnacity;<sup>18</sup> Paula Franzese revives her call for more humanism.<sup>19</sup> Critical legal scholars and literary enthusiasts Jean Stefancic and Richard Delgado blame legal formalism and the stifling

---

<sup>12</sup> George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 *CARDOZO L. REV.* 2091, 2252 (1998); see also George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 *J. LEGAL EDUC.* 103, 104–08 (2003) (blaming ABA accreditation for preventing African-Americans from entering the legal profession). William Shepherd, like George Shepherd, is an economist.

<sup>13</sup> See Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 *YALE REV. L. & SOC. ACTION* 71 (1970).

<sup>14</sup> Amsterdam called the problem of declining student interest the MOPIE Syndrome, an acronym for Maximum Obtainable Passivity In Education. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1019 (4th ed. 2005) (citation omitted).

<sup>15</sup> See LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 7–8 (1997) (reviewing reports of gender-specific responses to law school); Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 *YALE J.L. & FEMINISM* 389, 391 (2006) (“Despite gender parity in entering J.D. classes, law schools are not adequately preparing female law students for success, particularly in the upper ranks.”); Autumn Mesa, *A Woman’s Climb up the Law School Ladder*, 9 *CARDOZO WOMEN’S L.J.* 379, 389 (2003) (claiming that “feelings of low self-esteem, inferiority, self-doubt, alienation, depression, and anxiety that affect many of the women attending America’s law schools should be a signal that sexism continues to lurk in the law school halls and continues to preserve the hierarchical structure that places women in the lower tiers”).

<sup>16</sup> See Dan Subotnik, *The Cult of Hostile Gender Climate: A Male Voice Preaches Diversity to the Choir*, 8 *U. CHI. L. SCH. ROUNDTABLE* 37, 40 (2001).

<sup>17</sup> *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (Marjorie A. Silver ed., 2007).

<sup>18</sup> LINDA HIRSHMAN, *A WOMAN’S GUIDE TO LAW SCHOOL* 273 (1999) (urging female law students to demand more using a “Questionnaire for Deans”). On the author’s pugnacity, see the contentiously received LINDA R. HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD* (2006).

<sup>19</sup> See Paula A. Franzese, *To Be the Change: Finding Higher Ground in the Law*, 50 *ME. L. REV.* 11, 15 (1998); see also Paula A. Franzese, *E Pluribus Unum—From Many, One: In Unity There is Strength*, 25 *SETON HALL L. REV.* 1460, 1465 (1995) (excerpting a speech before the New Jersey Ocean County Bar Association (May 1, 1995)) (“Let us embrace each other, so that together we nurture strength of spirit and peace of mind.”).

of creativity,<sup>20</sup> while Paul Carrington, an opponent of critical legal studies (CLS), blames those who support CLS.<sup>21</sup>

So much already having been said (and the sickness apparently not going away in response), one might wonder what remains to be written about, or recommended to repair, the blight on American legal education and the legal profession. This Essay makes a few modest claims to novelty. It starts by declaring a more limited agenda than what preceding works have undertaken: I do not propose to locate or comfort the Lost Lawyer, nor lead this profession back to whatever bygone idyll other observers may recall. Writing from the legal academy, I propose a shift in training—the domain I know—that focuses on law students but speaks occasionally to the continuing education of licensed lawyers. I do not here reiterate an oft-stated view of any topic, never having urged attention to pitfalls in any of my other writings. Indeed, “pitfalls” is not entirely my idea; it already pervades the American legal curriculum and informs other analyses of how to tell nascent lawyers about the responsibilities of their profession.

Like any other recommendation for the instruction of lawyers, this “pitfalls” notion joins a sprawling pedagogical menu. Designers of law school curricula have many choices, among them opportunities to omit and abstain. Every American law school could, for instance, quit teaching its fixtures like contracts, torts, property, criminal law, and constitutional law without jeopardizing its accreditation. These seemingly required courses are in fact electives as far as American Bar Association approval is concerned. Tradition, inertia, and prerogative anchor them in place, rather than any rule.

Against this laissez-faire backdrop, one incongruous demand sticks out: according to the accreditation standard, law students must receive instruction in professional responsibility, or on “the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”<sup>22</sup> An “interpretation” in the ABA rules recommends “instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.”<sup>23</sup> More improbable specificity—inside a standard otherwise inclined to tolerate almost anything, and the omission of anything, in the curriculum.

---

<sup>20</sup> STEFANCIC & DELGADO, *supra* note 4, at 29–30.

<sup>21</sup> Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226–28 (1984).

<sup>22</sup> 2007–2008 STANDARDS FOR APPROVAL OF LAW SCHOOLS, ch. 3, Standard 302(a)(5) [hereinafter ABA STANDARDS], available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf>. The other apparently mandatory element in the curriculum is legal writing, but the ABA remains vague about what exactly this requirement means. See *id.* Standard 302(a)(3).

<sup>23</sup> *Id.* interpretation 302-9.

This Essay explores two questions that arise in reaction to the professional responsibility mandate. It starts by undertaking an interpretation, a quest for prescriptive content: what do accreditors want to accomplish by requiring that all law students receive instruction about the profession they will enter?<sup>24</sup> A related question, assuming that law schools share the accreditors' goal, seeks best practices in pedagogy: which factual information about the legal profession should a law school try to deliver?<sup>25</sup>

Engaging the first question, on the reason for the instructional requirement, the Essay emphasizes preparation: American accreditors have deemed information about the profession central to preparing every student to practice law.<sup>26</sup> Unlike graduate schools that grant the Ph.D.—a different kind of doctorate that reflects students' achievements and promise as researchers—law schools teach J.D. students how to perform in an occupation.<sup>27</sup> Other material that does not address preparation for practice is necessarily less fundamental to the study of law. Elective courses remain optional for varying reasons. Most electives pertain to the future work of only a fraction of students. Some classes teach skills that can be taught equally well after graduation or learned on one's own. Some have value but are simply not important enough to warrant mandatory status.

If preparation occupies the heart of legal education, then distinguishing curricular necessities from mere optional studies is helpful. Preparation must occupy the heart of the only required course. An answer to the second question follows: the law school curriculum should strive to tell students what they need to know in order to enter their profession well-prepared to practice law.<sup>28</sup> This mandate calls for instruction in a range of skills—among them analysis, writing, oral advocacy, and the instrumental uses of precedent and quantitative

---

<sup>24</sup> I echo the leading work that undertook to find reasons for an ABA mandate, written during the transition from the Model Code to the Model Rules. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 *passim* (1981).

<sup>25</sup> Although I consider this question in the context of the required course on professional responsibility, much of what I describe or conclude also pertains to other law school courses.

<sup>26</sup> It may bear mentioning that to the extent that legal education prepares students for practice, this preparation will vary from student to student, in response to individual circumstances and career plans. The professional responsibility course is a suitable venue to anticipate needs that pervade all, or most, categories of work for lawyers.

<sup>27</sup> See James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 101 (1996) ("Legal education is, at the end of the day, professional education.").

<sup>28</sup> Jason Dolin argues, as does this Essay, that improvements in preparation-education will improve satisfaction for students. Dolin, *supra* note 5, at 235–42. He focuses on encouraging legal educators to heed the recommendations of the 1992 MacCrate report. *Id.* at 235.

data—as they function in a context of policy and a pursuit of justice. For the professional responsibility training that the ABA requires for accreditation, the quest for preparation becomes more pointed: law schools should teach their students about the dangers and opportunities that await them in this profession.<sup>29</sup> With this approach, instructors fulfill this mandate according to their own priorities, while maintaining focus on three unifying themes: decision points for an attorney;<sup>30</sup> the positive law of lawyering; and viewing pitfalls as opportunities.

*Decision points for an attorney.* A pitfalls pedagogy sees the individual lawyer, usually a person who represents clients or wishes to do so, as the protagonist of the course. Students will typically take the role of this person as they work through problems of professional responsibility.<sup>31</sup> Throughout the semester, our hero faces dilemmas where neither alternative path suggests a pain-free way out. Even before the dilemmas arise, she goes about the day's work with a slight sense of foreboding. Abstractions take on a particularistic cast: not "What is the optimal rule?" or "What would be the best outcome?" but "What, specifically, would you do?" and "What [bad thing] could happen to you in this situation?". Although the pedagogy starts with a measure of sympathy for the lawyer, it does not hesitate to condemn the lawyer's missteps.

*The positive law of lawyering.* In partial contrast to the more general approach announced in the title of a leading casebook, *Law and Ethics of Lawyering*,<sup>32</sup> the positive law of lawyering makes a priority of doctrine. Course materials consider regulation of the profession in broad terms, looking not only at disciplinary law as written in "model" terms by the ABA, but also criminal law, civil law, fiduciary rules, the law of agency, and other sources of regulatory control over lawyers.<sup>33</sup>

---

<sup>29</sup> See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 1–3 (4th ed. 2004) (observing that both the substantive law of lawyering and empirical information about the profession have mushroomed in recent decades, redeeming the course from its past irrelevance). On teaching dangers and opportunities for lawyers, see generally Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics that We Can Learn on the Road*, 15 *GEO. J. LEGAL ETHICS* 75 *passim* (2001) (analogizing the study of professional responsibility to learning how to comply with the law while driving).

<sup>30</sup> Here I follow the convention that all attorneys are lawyers but not all lawyers are attorneys: a lawyer is a person trained to give legal advice, whereas an attorney is a lawyer who advocates for a client.

<sup>31</sup> On the relation between role-taking and legal doctrine, see Anita Bernstein, *How Can a Product Be Liable?*, 45 *DUKE L.J.* 1, 29–30 (1995).

<sup>32</sup> HAZARD ET AL., *supra* note 14, at lxx.

<sup>33</sup> The *Restatement of the Law Governing Lawyers* gives pride of place to pitfalls, installing this warning in its Section One: "Upon admission to the bar of any jurisdiction, a person becomes a lawyer and is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions." *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 1 (1998).

Ethics is very much present in a pitfalls course, but it emerges from a base of doctrine rather than from “what would you do if” hypotheticals that ask students to choose between truth and partisanship in a vacuum, without overt reference to rules or case law.

*Viewing pitfalls as opportunities.* Every occupational pitfall for one lawyer can benefit another lawyer, and pitfalls also function to effect ideals and social goods that extend beyond the interests of this profession. As detailed below, some pitfalls amount to privileges. The opportunities theme is always present in a pitfalls pedagogy. Instructors can return to opportunities—the positive aspect of an accentuate-the-negative pedagogy<sup>34</sup>—whenever class discussions wobble out of balance as too negative, too focused on individual lawyers, too cynical sounding, or not cynical enough.

Whenever it omits pitfalls, the legal curriculum withholds crucial facts, doctrines, policies, and philosophical insights from people who have entrusted educators to prepare them for their vocation. The prevailing promise that graduates will leave the campus positioned to do well and do good—“you can make a lot of money,” schools imply, “and you can also follow in the footsteps of Abraham Lincoln or Thurgood Marshall or Ruth Bader Ginsburg or Atticus Finch or your favorite TV-procedural lawyer; it’s your choice”—is not exactly false; but it conveys only a rosy-side partial description of the profession that does not by itself reassure or satisfy anyone who hears it. Knowing about pitfalls ahead of time makes new lawyers more, not less, fulfilled and secure when they begin their work.

## I

### FOREWARNED ABOUT WHAT?

Joining this profession opens new avenues of danger and opportunity that most students will learn about only fitfully before they graduate from law school. Although the standard curriculum covers some of these contingencies (and extracurricular experiences like summer associateships and conversations with peers deliver relevant informal information), classroom instruction about the legal profession is uniquely well situated to bring together varied constituents to forewarning law students. Pitfalls for lawyers, as surveyed below, range from the exalted to the mundane.

#### A. Threats

##### 1. *The Vulnerable License*

Years (not to mention money) spent in pursuit of a law degree trains the risk-averse mind on the prospect of losing one’s privilege to

---

<sup>34</sup> See *infra* Part II.

work as a lawyer. For law students, the pitfall of becoming disbarred—the most dramatic sanction that the bar imposes on its members—is not obscure. The threat has a grand scope, suited to opera-sized figures like the two lawyer-Presidents of the late twentieth century who lost their licenses shortly after they left office.<sup>35</sup> All the perceived grandeur of this penalty notwithstanding, only a tiny fraction of lawyers will ever face disbarment. Indeed, if one measures the need to forewarn by the probability that a dangerous contingency will occur, then instructors do not need to din their students in the risk of suffering professional sanctions generally. Researchers agree that sanctioning rates fall well below the level of sanction-worthy acts that lawyers commit in the aggregate.<sup>36</sup> On the relatively rare occasion that an errant lawyer receives some form of professional discipline, that form is likely to be the gentlest arrow in the quiver: the admonition or private reprimand.

The pedagogical need to forewarn is, however, not measured adequately by the probability that a particular contingency will happen. Knowing that they could be disbarred does not make law students aware enough of the vulnerability of their license to practice. The authority of licensure casts a shadow wider than the range of sanctions that disciplinarians in fact impose. New lawyers should learn about the breadth of the professional shadow before they graduate and take up their careers under it.

*What can the licensors do to you when you become a lawyer?* Entry to the profession makes a natural starting point. After candidates graduate from law school, perform well enough on written exams, and apply for membership, bar authorities inquire into their moral character and fitness to practice law. Interviews, credit checks, criminal background checks, recitations of past brushes with the law, investigations into the reasons for having declared bankruptcy, and other proxies for rectitude become available to support a past-is-prologue, static character determination about moral status.<sup>37</sup>

---

<sup>35</sup> See *Todd v. Ligon*, 148 S.W.3d 229, 232 (Ark. 2004) (noting the five-year suspension of former President Clinton from the Arkansas bar); *In re Nixon*, 385 N.Y.S.2d 305, 307 (N.Y. App. Div. 1976) (ordering disbarment of the former President). When his Arkansas suspension expired in January 2006, President Clinton took no steps to be reinstated, either in Arkansas or at the Supreme Court Bar. Andrew Glass, *Gonzales Joins List of Conflicted Predecessors*, POLITICO, Aug. 28, 2007, <http://www.politico.com/news/stories/0807/5540.html>.

<sup>36</sup> Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 (2007) (noting that state disciplinary agencies formally sanction only about 5,600 lawyers per year, despite receiving more than 125,000 lawyer discipline complaints per year).

<sup>37</sup> See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985) (describing and offering a reconsideration of the bar's moral character requirement).

Unfair or hypocritical as such scrutiny of the postulant class may be,<sup>38</sup> it does provide initiation into a regime of control where regulators can impose a range of conditions that would look like impertinences outside the professional monopoly. A bar regulator might conclude that a lawyer needs treatment for alcoholism, training on how to keep better financial records, restrictions on his or her practice, more continuing legal education, or any other intervention “that the state’s highest court or disciplinary board deems consistent with the purpose of lawyer sanctions.”<sup>39</sup> This purpose is to protect “clients, the public, the legal system, and the legal profession.”<sup>40</sup> Any lawyer inclined to feel offended by such ministrations should bear in mind that full-blown sanctions would feel worse. In a comment about the tradeoff, the California Bar observes that a lawyer offered an “agreement in lieu of discipline” may be forced “to fulfill nearly any type of remedial condition deemed appropriate for his or her case rather than face an investigation and prosecution.”<sup>41</sup>

The swath of control gets wider because of regulators’ habitual demands of full disclosure about a lawyer’s past. Even the gentle private reprimand forces a lawyer to answer “Yes” on all subsequent documents that ask officially whether the lawyer ever experienced professional discipline. Regulators can treat lack of candor as a worse offense than the offense omitted from an application or declaration: expunged criminal convictions or misdemeanor convictions in juvenile court do not blot a copybook much, but lawyers who have omitted these histories from applications to practice law have been sanctioned for this omission.<sup>42</sup>

Another way to see the power of disciplinary law is from the perspective of client protection. Discipline complements the economic clout that some clients hold and that students who intend to practice in firms may take for granted.<sup>43</sup> Clients who pay their lawyers high fees hold strength from the simple fact that they can walk away, pulling their money with them. This economic leverage gives rich clients

---

<sup>38</sup> The claim of unfairness is that the bar looks closely at new applicants while turning a blind—or at most an indulgent—eye to much misconduct that established lawyers commit. *See id.* at 546–50.

<sup>39</sup> ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 2.8(g) (1986).

<sup>40</sup> *Id.* Standard 1.1.

<sup>41</sup> The State Bar of California, Priorities and Prevention, [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10136&id=1647](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10136&id=1647) (last visited Oct. 23, 2008).

<sup>42</sup> *See, e.g.,* *Ky. Bar Ass’n v. Guidugli*, 967 S.W.2d 587, 589 (Ky. 1998) (suspending an admitted attorney practicing law for 30 days for failure to disclose a material fact on his bar application); *Layon v. N.D. State Bar Bd.*, 458 N.W.2d 501, 512 (N.D. 1990) (denying admission to the North Dakota bar).

<sup>43</sup> *See generally* Symposium, *What Do Clients Want?*, 52 EMORY L.J. 1053 (2003) (addressing neglect, failure to communicate, and failure to represent clients diligently, the disciplinary offenses that dominate enforcement even though rich clients, who presumably have good access to bar authorities, almost never bring complaints about them).

the protections and prerogatives in practice that disciplinary law assigns to all clients in principle. Because well-heeled individuals and entities seldom need to resort to Bar authorities to get what they think is coming to them, “[d]isciplinary proceedings against lawyers in large and even medium-sized firms are very rare.”<sup>44</sup>

Focusing on the vulnerable license reminds new lawyers about their vulnerability before and after they join these large- or medium-sized shelters from discipline. From a pitfalls perspective, the bar governs private-sector lawyers interstitially, fitting itself into spaces the economic power of wealthy clients does not reach. Scrutiny of applicants has ensured a ritual of examination and submission for every newcomer. Over the next several years, young lawyers in this scrutinized cohort will respond to discipline more from the market than the bar.<sup>45</sup> Those who give offense in a way that an economic weapon cannot redress—that is, termination of their employment or a threat of that penalty—may find themselves in its sights. The sanctions apparatus gives pitfalls-power to affronted third parties; aggrieved clients with more spunk than money; enforcers of public law who are willing to report violations incidentally; and other initiators who are not situated to control errant lawyers by threatening to withdraw their business.

As positive law, then, disciplinary rules unite the legal profession under universal conditions of danger and opportunity. Economically privileged lawyers learn that non-enforcement, or at most under-enforcement, characterizes almost every rule on the books<sup>46</sup>—or, as David Wilkins has put the point, regulators interpret disciplinary rules to “mirror the norms of the marketplace.”<sup>47</sup> Lawyers outside the reach of client-controlled market power will experience their danger in disciplinary law. This message, which emerges by degrees in a pitfalls pedagogy and which may sound cynical at first to students, actually affirms a progressive ideal: the lawyer’s license is vulnerable because the bar will listen to complaints and sometimes take action in response. Laypersons who lack material wealth can have power over lawyers.

---

<sup>44</sup> Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 *FORDHAM L. REV.* 817, 820 n.17 (2000). A leading casebook notes the epiphenomenon of “private discipline,” where large law firms impose sanction-like suspensions on their associates for relatively minor infractions. See STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 838 (6th ed. 2002).

<sup>45</sup> Discipline is especially rare during the first ten years of admission to the bar. HAZARD ET AL., *supra* note 14, at 1148 (reporting a study that indicated 82 percent of disciplined lawyers had been in practice more than eleven years).

<sup>46</sup> See Chambliss, *supra* note 44, at 819–20.

<sup>47</sup> David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799, 867 (1992).

## 2. *Civil Liability*

Civil liability is a pitfall of underreported dimensions within the profession generally, not just in legal education. One major segment of civil liability, actions by clients and third parties for legal malpractice, remains especially unseen. “Legal malpractice is a taboo subject,” began one law review article.<sup>48</sup> “It has been ignored by the legal profession, law schools, mandatory continuing legal education (CLE) programs, and even by scholarly and lay publications,”<sup>49</sup> even though the profession has experienced “an unprecedented growth in legal malpractice claims and lawsuits.”<sup>50</sup> Ignoring legal malpractice in these forums continued after this 1994 publication, a period that saw yet another spike in the rate of claims against insured lawyers.<sup>51</sup>

Students who proceed through law school and then graduate without learning anything about legal malpractice may presume that others will shield them from their own ignorance. A minority of them—law clerks, government lawyers, public defenders—are indeed almost perfectly safe from malpractice liability based on the jobs they have chosen.<sup>52</sup> Those who go to work in larger firms might count on the practice of overstaffing to keep them at the bottom of a hierarchy, giving them little chance to breach their duty to anyone until they learn the liability ropes. They might also assume that the experienced managers who run their offices install safeguards against inadvertent malpractice. For those lawyers who serve lower-income clients, a feeling of shelter from malpractice claims might come from the lack of money and privilege in the office: less money and less prestige means less to lose. Lawyers not long out of school, regardless of the kind of work they undertake, might think of themselves as not worth suing because they are too saddled by debt; or new lawyers might feel sure that malpractice insurers will know which behaviors or practices to

---

<sup>48</sup> Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1658 (1994).

<sup>49</sup> *Id.* at 1658–59 (internal citations omitted).

<sup>50</sup> *Id.* at 1661.

<sup>51</sup> See GILLERS, *supra* note 44, at 766 (describing an increase in claims against lawyers, from 22,838 claims in 1990–95 to 35,678 in 1996–99).

<sup>52</sup> Some states explicitly immunize public defenders from malpractice liability. See Amanda Myra Hornung, Note, *The Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 531–33 (2005). On the futility of bringing malpractice actions against criminal defense lawyers, see, for example, *Wiley v. County of San Diego*, 966 P.2d 983, 991 (Cal. 1998) (imposing a requirement that the defendant prove innocence to establish malpractice); *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 498 (Tex. 1995) (rejecting a malpractice claim after a lawyer failed to relay an offer of transactional immunity that would have avoided the plaintiff's criminal conviction).

recommend to them as part of a business plan to keep their payouts down.<sup>53</sup>

These comforting beliefs do contain some truth, but the peril of civil liability for malpractice remains, especially in the longer term. A pitfalls-sensitive pedagogy for legal malpractice would provide a variety of warnings. Foremost, it could tell students that the set of individuals and entities that can bring actions against them is not limited to what they regard as the roster of their own retained clients. Liability to a third-party non-client has been a fixture of malpractice law for decades. A related pitfall of civil liability emerges from agency law and fiduciary principles, which for some students will come up in no other classroom venue. The agency or fiduciary pitfall is the occasional obligation to rank another's interests ahead of one's own or to proceed without seeking gain for oneself or a third party. "Permitting an agent's focus to encompass additional incentives," as the *Restatement of Agency* puts the point, "is inconsistent with the singleness of focus due the principal."<sup>54</sup> Despite typically having studied contract law, students can take up their practices without having encountered case law imposing fiduciary-duty liability on actors who intended no harm,<sup>55</sup> breached no overt agreement,<sup>56</sup> or caused no harm to any victim.<sup>57</sup>

### 3. *Criminal and Regulatory Liability*

Federal courts have upheld convictions for an array of crimes that lawyers committed while representing clients, including obstruction of justice, false swearing, perjury, suborning perjury, aiding and abetting, securities fraud, and mail fraud. Similar pitfalls for lawyers appear in state criminal law.<sup>58</sup> The pitfalls grow larger in those

---

<sup>53</sup> Presumably informed by experience, one provider of legal malpractice insurance wrote a primer to ease this population out of complacency. See Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199 (2006).

<sup>54</sup> RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. b, illus. 2 (2005).

<sup>55</sup> See *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1997) (en banc) (holding that a lawyer can be liable for breach of fiduciary duty without proof of unlawful intent).

<sup>56</sup> See *Estate of Keatinge v. Biddle*, 316 F.3d 7, 8–9 (1st Cir. 2002) (noting that under Maine law, an attorney-client relationship can exist despite an attorney's denial of the relationship).

<sup>57</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 55 cmt. d (1998) ("[I]f a lawyer mistakenly deposits a client's money in[to] the lawyer's own bank account and proceeds to invest it and make a profit, the client is entitled to restitution of the original sum and the profits from its investment.") (citations omitted).

<sup>58</sup> See HAZARD ET AL., *supra* note 14, at 26–46 (reviewing cases that upheld prosecutions of attorneys under both federal and state criminal law); see also STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 651–83 (2008) (titling a chapter "Federal Provisions on Conflicts, Confidentiality, and Crimes").

jurisdictions where conviction of a felony triggers automatic disbarment.<sup>59</sup>

In a pitfalls pedagogy, obstruction of justice warrants particular attention because of the unique vulnerabilities inherent in the practice of criminal defense law. Lawyers, like non-lawyers, ordinarily stay clear of criminal prosecution by heeding their own inclinations to honesty and prudence. For a criminal defense lawyer, however, this law is relatively hard to obey. To start, “obstruction of justice” is vague. Vaguely worded criminal statutes jeopardize anyone the state may want to prosecute for their violation, but obstruction of justice menaces criminal defense lawyers in particular because thwarting the prosecutorial apparatus—or standing against “justice,” as the word appears in the name of this crime—is part of their job; the crime empowers prosecutors as enforcers of law against them.<sup>60</sup> Eschewing criminal-defense work shelters a lawyer from this danger only to the extent that her clients, or the lawyer herself, can avoid interacting with criminal prosecutors.

Another set of pitfalls for the unwary presents itself in the authority of federal agencies to regulate and discipline lawyers who practice before them. Just as obstruction of justice imposes little danger on the majority of lawyers (and imperils mainly the minority who practice criminal defense), agency authority is not a threat for most practitioners. Specialists who practice before the Internal Revenue Service or the Patent and Trademark Office know where they stand with those agencies; for pedagogy, a chief hidden peril of regulatory authority lurks in federal securities law. An attorney’s work can constitute practice before the Securities and Exchange Commission (SEC) whether the lawyer knows it or not.<sup>61</sup> As entities, law firms are vulnerable to SEC-initiated civil and criminal sanctions if they employ individuals who violate fraud and insider-trading laws.<sup>62</sup>

#### 4. *Being Deemed Incompetent or to Have Given a Defendant Less than Effective Assistance of Counsel*

Both the Constitution and state-level disciplinary rules declare that work that lawyers do for their clients can be so bad as to amount

---

<sup>59</sup> See MISS. CODE ANN. § 73-3-41 (West 2004); N.Y. JUD. LAW § 90.4.a (McKinney 2002); see also Laughlin v. United States, 474 F.2d 444, 447 (D.C. Cir. 1972) (interpreting D.C. law to make disbarment following a felony conviction mandatory).

<sup>60</sup> See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 328–29 (1998).

<sup>61</sup> See Roberta S. Karmel, Professor of Law, Brooklyn Law Sch., Panel Discussion: The Evolution of Corporate Governance (Nov. 22, 2002), in Symposium, *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002*, 52 AM. U. L. REV. 613, 634 (2003).

<sup>62</sup> Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 44 n.271 (1991).

to a public disgrace. A defendant convicted of a crime following ineffective assistance of counsel may be entitled to a new trial or the withdrawal of an ill-advised guilty plea.<sup>63</sup> Lack of competence is a disciplinary offense in the Model Rules,<sup>64</sup> and the ABA recommends the disbarment of any lawyer whose “course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures” if this lawyer’s conduct injures a client.<sup>65</sup>

Some observers call the risk of disgrace for incompetent or ineffective work not half-strong enough. In its leading ineffective assistance decision, *Strickland v. Washington*,<sup>66</sup> the Supreme Court construed the right to counsel indulgently in protection of the profession; subsequent courts have deemed an array of egregious behaviors and lapses not bad enough to reverse a conviction under the *Strickland* standard.<sup>67</sup> As for incompetence, bar authorities almost never sanction a lawyer for it,<sup>68</sup> actions for malpractice serve as almost the sole source of external review of attorney competence.<sup>69</sup>

This lax response noted, incompetence and ineffective assistance of counsel do present a pitfall—not the danger that any individual lawyer will suffer disgrace, which is slight, but the pitfall of feeble professional standards. New lawyers ought to know that a *habeas* claim alleging ineffective assistance of counsel will probably fail; that courts generally do not hear claims of ineffective assistance on direct appeal,

---

<sup>63</sup> See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 538 (2003) (invalidating a capital conviction on the ground of ineffective assistance at trial); *Rollins v. State*, 591 S.E.2d 796, 799–800 (Ga. 2004) (permitting petitioner to withdraw the guilty plea that she had chosen to make after receiving ineffective assistance).

<sup>64</sup> Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1220 (1988) (noting that the rule on competence is Rule 1.1, “the place of honor”).

<sup>65</sup> ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 4.5.1 (1991).

<sup>66</sup> 466 U.S. 668 (1984).

<sup>67</sup> E.g., *Burger v. Kemp*, 483 U.S. 776, 777–78 (1987) (holding that a lawyer’s lack of investigation into mitigating evidence for a capital sentencing hearing did not violate the defendant’s Sixth Amendment rights); *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (en banc) (condoning the “assistance” of a lawyer who slept during a trial; the defendant ultimately received a death sentence); *Smith v. Ylst*, 826 F.2d 872, 873–74 (9th Cir. 1987) (denying an ineffective-assistance claim on the ground that the defendant failed to show any prejudicial effect of his lawyer’s having experienced a documented “paranoid psychotic reaction” during his trial).

<sup>68</sup> See Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 *passim* (1981) (surveying pre-Model Rules disciplinary case law).

<sup>69</sup> See *id.* at 732 (“Perhaps because of the void in self-regulation, market sanctions in the form of malpractice suits have become the primary method by which standards of care are defined.”) (citation omitted); see also GILLERS, *supra* note 44, at 743–45 (noting that lawyers are seldom disciplined for their lapses of competence). Lawyers who represent defendants in capital cases “are virtually guaranteed” an accusation of ineffective assistance at some point, see David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 90–91 (1999), but for purposes of this Essay, “virtual[ ]” guarantees are not considered pitfalls.

only collaterally, which forces a defendant to spend years exhausting the appellate route before being heard;<sup>70</sup> that whether a lawyer suffers adverse consequences after injuring a client through incompetent work will depend largely on whether a client sues for malpractice; and that this profession produces, shares, and acts on very little publicly available information about whether a particular lawyer possesses minimal competence.<sup>71</sup> The law school climate of ongoing competition and evaluation can lull students into believing that because lawyers are perpetually judged and found wanting, the truly ineffective or incompetent among them will be eliminated from the profession or at least disabled from doing them harm. (Slackers know better, but most law students are not slackers.)

### B. Tangling With Judges

The Langdellian emphasis on what judges decide still pervades American legal education and will likely remain a central theme, even if reformers who want the curriculum to emphasize something else—drafting, business planning, transactions, negotiation, alternative dispute resolution, the deployment and understanding of statutes, or extrinsic subjects like economics—continue to expand their influence. Law students seldom graduate without hearing about “what the judge had for breakfast”; how a judge hews to (or strays from) precedent; the path of case law on particular topics; the interplay of statutes and the common law; rules of forensics (in courses on evidence and civil procedure); and a few famous Supreme Court decisions. The apex of this profession is a supreme court, and providers outside the professional monopoly of bar-approved lawyers, no matter how liberally indulged when they try to give clients advice about law and business, must always keep a respectful distance from at least one lawyerly function: they may not appear in court on behalf of clients.<sup>72</sup>

As instruction for lawyers who will practice before judges, this hierarchical-institutional view of the courts does not mention the role of the judge as antagonist. Both the judge’s power and the lack thereof can get in a lawyer’s way.<sup>73</sup> A litigator might manipulate her. When it robs the judge in detachment, if not pure neutrality, a pedagogy

---

<sup>70</sup> See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680 (2007).

<sup>71</sup> Levin, *supra* note 36, at 21–22.

<sup>72</sup> HAZARD ET AL., *supra* note 14, at 910 (surveying the debates on what constitutes unauthorized practice, which swirl around one uncontroversial, centuries-old tenet: “that a nonlawyer could not appear in court to represent another person”).

<sup>73</sup> Judges hold other kinds of power over the legal profession, notably through their prerogative to adopt rules of professional responsibility. This section addresses potential clashes between a lawyer and judge in the courtroom.

without pitfalls leaves students who will deal with this person unprepared.

### 1. *A Panoply of Sanctions*

The prerogative to give lawyers orders covers more ground than what emerges with reference to statutes and rules because trial judges hold the inherent power to do much of whatever they see fit to control their courtrooms and dockets.<sup>74</sup> They can fine or incarcerate a lawyer they deem to be in contempt of court. They can sanction lawyers for frivolous pleadings per Rule 11 or its state-law counterparts. Several judges have refused to follow statutes and administrative rules written to authorize non-lawyers to do certain work, contending that judges hold inherent power to determine what constitutes the practice of law.<sup>75</sup> Judges enjoy considerable authority to interfere with the payment of attorneys' fees—some derived from statutes, such as provisions for fee shifting in civil rights cases, and some from (once more, with feeling) their inherent powers.<sup>76</sup> A leading treatise notes that judges will sometimes declare, even “without the complaint of any party,” that attorneys' fees are too high and must be reduced or refunded.<sup>77</sup>

### 2. *Disqualification (by)*

The prerogative to disqualify a lawyer from representing a particular client, typically because of the lawyer's conflicts of interest, likewise derives from the judge's inherent power. This power means that litigators who invest time and money in a case risk being removed by court order at a point when they cannot recoup their investment. Disqualification motions made in federal court have skyrocketed in recent years, on both the civil and criminal sides of the docket.<sup>78</sup> Commentators attribute this growth in part to an increase in real risks of conflicts—law firms fell into the habit of merging; client businesses started to spread their work among multiple law firms; and complex litigation involving corporations expanded—and also to the rise of

---

<sup>74</sup> The Supreme Court first recognized this power in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630–32 (1962). The *Restatement* remarks that judges have used inherent powers to assert “extravagantly broad” authority over lawyers. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1, Reporter's Note on cmt. c (1998).

<sup>75</sup> GILLERS, *supra* note 44, at 759 (summarizing cases).

<sup>76</sup> See, e.g., *In re Goldstein*, 430 F.3d 106, 110 (2d Cir. 2005) (approving fee reduction); *Guralnick v. Supreme Court of N.J.*, 747 F. Supp. 1109, 1118 (D.N.J. 1990) (approving mandatory fee arbitration rules promulgated by the New Jersey Supreme Court).

<sup>77</sup> CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 496 (1986).

<sup>78</sup> See Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. CHI. L. REV. 667, 667 & n.3 (2005).

new law that denies interlocutory review of disqualification under the collateral order doctrine.<sup>79</sup>

Compounding this uncertainty, judges hold divergent views on key points regarding conflicts. At the trial level, some judges seek to enforce the ban on conflicts present in disciplinary law, while others would leave that job to bar authorities, disqualifying lawyers only when the conflict-tainted representation causes harm to the party.<sup>80</sup> At the appellate level, courts disagree about how much interlocutory relief to give conflicts-disqualified lawyers:<sup>81</sup> some courts will view a disqualification motion as, presumptively, a mean and costly trick; others are willing to engage lawyers' adversaries in the fight against representations tainted by conflicts. High stakes and murky doctrine combine to make disqualification a pitfall for litigators.

### 3. *Disqualification (of)*

Conflicts of interest can disqualify judges as well as lawyers. Judicial disqualification is a sword with several edges for litigators. The judge's conflict might be harmful, harmless, or inconsequential to the client's interest. Attempting to disqualify one's assigned judge could help a client in some cases and cause harm to her in others. For a lawyer, informal norms around the courthouse about what constitutes a conflict of interest for a judge and what to do about it likely matter at least as much as phrases in a state code of judicial conduct or the federal disqualification statutes.<sup>82</sup>

Experience and observation will teach this particular pitfall better than a classroom exercise, but the pedagogy that this Essay advocates would include strategy in any classroom discussion of judicial disqualification. The blackletter in 28 U.S.C. § 455, for example, takes on force when read for its provocation to judges. An instructor could broach the topic through role-playing. How would you as a judge react if a lawyer appearing in your court said that you had a conflict of the kinds enumerated in § 455(b)(4)?<sup>83</sup> If you as a litigator were re-

---

<sup>79</sup> See *id.* at 673–78 (summarizing case law and commentary).

<sup>80</sup> For an endorsement of the abstemious latter path that pays due heed to arguments favoring the former, see Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 84–98 (1996).

<sup>81</sup> Epstein, *supra* note 78, at 669–70.

<sup>82</sup> See 28 U.S.C. § 455 (2006) (providing disqualification rules for federal judges); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007) (providing model rules on disqualification of state judges). For an extended argument that this informality and ad hoc decision making needs repair in the form of more determinate procedural reforms, see Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 *U. KAN. L. REV.* 531 (2005).

<sup>83</sup> See 28 U.S.C. § 455(b) (requiring judicial recusal if, among other things, the judge has a personal bias or if the judge worked on the matter in private or government practice).

questing judicial recusal because of a conflict, how would you present your initiative? If the judge were to ask you and your client to waive the conflict, what would you want to know? Do you see strategic perils or opportunities in the judicial disqualification rules?

### C. Abridged Political and Civil Rights for Attorneys

Entry into this profession can curb an individual's freedoms and prerogatives: lawyers impose silence on themselves in numerous rules and norms. The ones most frequently associated with the First Amendment address advertising and solicitation of new business. Lawyers, who compete for work in a market economy, cannot pursue what might be called new business without restraint.<sup>84</sup> Bar authorities forbade lawyer advertising until the Supreme Court struck down this prohibition as part of its expansion of commercial-speech rights;<sup>85</sup> still apparently put off by lawyers' touting themselves to the public, these regulators continue to constrain the practice.<sup>86</sup> Caselaw holds lawyers to stern standards of accuracy and technical compliance when they advertise,<sup>87</sup> and a few states that do not screen other types of advertising compel lawyers to turn in proposed ad copy for clearance by regulators.<sup>88</sup> Most jurisdictions maintain the Model Rules ban on direct in-person solicitation of new clients, although they do not enforce it much<sup>89</sup> and liberalize it with several permissive exceptions.<sup>90</sup> Rules

---

<sup>84</sup> See MODEL RULES OF PROF'L CONDUCT RR 7.1-7.3 (2007).

<sup>85</sup> See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379-82 (1977). The commercial speech era began with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>86</sup> See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 327-28 (1996) (describing increases in scrutiny and skepticism toward advertising from bar authorities in the wake of liberalization from the Supreme Court).

<sup>87</sup> See, e.g., *Haymond v. Lundy*, No. CIV. A. 99-5048, 2001 WL 15956, at \*2-5 (E.D. Pa. Jan. 5, 2001) (applying the Lanham Act to lawyers' advertising); *Comm. on Prof'l Ethics & Conduct v. Humphrey*, 377 N.W.2d 643, 647 (Iowa 1985) (approving detailed restrictions for broadcast advertisements); *Office of Disciplinary Counsel v. Shane*, 692 N.E.2d 571, 573-74 (Ohio 1998) (per curiam) (reprimanding lawyers for an advertisement because it did not tell potential clients that clients are technically responsible for the costs of litigation).

<sup>88</sup> See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4-7.7 (2007) (requiring filing advertisement with the Florida Bar no later than the first dissemination); MISS. RULES OF PROF'L CONDUCT R. 7.5(a) (2007) (requiring submission of proposed advertisements to the Office of the General Counsel of the Mississippi Bar).

<sup>89</sup> I elaborate in *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. (forthcoming 2008).

<sup>90</sup> See MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2007) (permitting solicitation of a new prospective client when the person solicited is a lawyer or a person who has a prior relationship with the lawyer, unless the lawyer's "significant motive" for the solicitation is his or her own pecuniary gain).

also limit what a lawyer can say in public about a case before it comes to trial,<sup>91</sup> and while campaigning to be elected to a judicial office.<sup>92</sup>

Speech-related rules that have escaped First Amendment scrutiny may be seen in pitfalls terms. Take confidentiality: rules in every jurisdiction order lawyers to keep silent about at least some confidential information pertaining to their clients. These restraints on speech give way to some telling exceptions. The Model Rules, for example, include a broad exception for self-protection; a lawyer may reveal client confidences if revelation would establish a claim or defense for the lawyer or in response to allegations about the lawyer's representation of a client.<sup>93</sup> The interests of innocent third parties in disclosure do not rank as high in the Rules.<sup>94</sup> In this slightly sinister light, the silence esteemed so highly in various bans might look more haughty, distant, and self-insulating than dignified. The pitfall of professionally suppressed speech here is for clients, third parties, and the public.

At the same time, the rule about suppressing confidential information endangers lawyers too. Whenever the information in question relates to dangers that threaten third parties, neither silence nor revelation will necessarily keep an advocate out of trouble. Since the passage of the Sarbanes-Oxley Act of 2002, lawyers and businesses have struggled—and spent millions of dollars—trying to find a middle path whereby lawyers can honor confidentiality rules, the organized bar's ideal, while at the same time not withhold disclosure, which securities regulators want from them.<sup>95</sup>

In this context, my assertion that a few curbs amount to “abridged political and civil rights” becomes less hyperbolic. This occupation admittedly enjoys many privileges in the United States—among them wage income above the median—and near-control of many branches of government. Lawyers as a group are not oppressed or silenced. The pitfall to share with students is not a story of their own victimization-to-come but rather a device to think about political and civil rights generally.

---

<sup>91</sup> See *id.* R. 3.6. The First Amendment–based revisions to this rule derive from *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

<sup>92</sup> MODEL CODE OF JUDICIAL CONDUCT CANON 4 (2008).

<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5).

<sup>94</sup> For example, under the Model Rules, a lawyer who knows that misconduct by her client threatens a third party with financial ruin may not reveal the misconduct unless the client used the lawyer's services to further it. *Id.* R. 1.6(b)(3). By contrast, when lawyers assert or defend their own interests, they can reveal all the confidential information they want, limited only by the thin proviso that they confine revelation to what they “reasonably believes [is] necessary” to assert or defend these interests. *Id.* R. 1.6(b)(5). For a critique of this inconsistent stance toward client secrets and confidences, see Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 785–86 (1977).

<sup>95</sup> For an overview of this battleground, see Robert N. Rapp, *Sarbanes-Oxley and SEC Standards of Professional Conduct*, 57 CASE W. RES. L. REV. 365, 367–68 (2007).

Examining the ways in which freedom of speech or freedom of association grants lawyers fewer safeguards from government control than what their fellow citizens enjoy becomes, in this pitfalls pedagogy, a challenge to under-questioned dogma. Perhaps these entitlements are less wonderful or meaningful than their exalters say, if the profession that writes and enforces them does not fully want them for itself. Alternatively—and also more heretically, inside the rights-enthusiastic culture of a law school—lawyers might be enjoying these entitlements at the right level, and non-lawyers might have too much of them. Discussing the reasons that lawyers cannot speak (and associate)<sup>96</sup> as freely as non-lawyers conveys what these rights mean.

## II

### ACCENTUATING THE NEGATIVE

Johnny Mercer's wartime advice to the contrary, legal educators should not allow curricula to "eliminate the negative,"<sup>97</sup> "the negative" being contingencies summarized in the last Part, at least some of which lie ahead of everyone who will practice law. Not, of course, that anybody has eliminated "the negative," in the sense of the ambient misery that pervades legal education. As we have already noted, the coffers of gloom at any law school are probably flush long before any pitfalls pedagogy arrives.<sup>98</sup> Law students suffer from depression at a higher rate than the general population and researchers attribute some of their symptoms of distress to their law school experience rather than their preexisting mental state.<sup>99</sup> Anxiety—an effect of the perpetual rank-and-sort apparatus augmented by job searches, loan repayment prospects, a sense of foreclosed opportunities—is rife inside law schools.<sup>100</sup> Students often perceive employers as categorically disdaining the bottom half, or even the bottom nine-tenths, of their ranked class.

The pitfalls pedagogy seizes this ambient negativity and turns it into strength. The dangers recited in Part I are not quite news to students, who vaguely know that their licenses are vulnerable, judges

---

<sup>96</sup> See, e.g., *Stropnick v. Nathanson*, 19 M.D.L.R. 39, 1997 Mass. Comm. Discrim. LEXIS 12, at \*16–17 (Mass. Comm. Discrim. Feb. 25, 1997) (sanctioning a lawyer for attempting to maintain a women-only client base for her matrimonial practice); MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (prohibiting a lawyer from having sex with a client unless a consensual sexual relationship preceded the representation).

<sup>97</sup> Mercer wrote the lyrics and Harold Arlen the music for the Academy Award-nominated "Ac-Cent-Tchu-Ate the Positive." See Richard Harrington, *Still Another Indictment of Bad Frankie*, CHI. SUN-TIMES, June 5, 2005, at 5, LexisNexis Academic (commending, as does this Essay, the opposite of this advice).

<sup>98</sup> See *supra* notes 1–19 and accompanying text.

<sup>99</sup> Neufeld, *supra* note 5, at 552 & n.123.

<sup>100</sup> Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 J. LEGAL WRITING INST. 229, 229–30 (2002).

can hurt them, legal malpractice exists, and so on. Law schools cannot conceal the general danger of professional unpleasantness ahead. Candor, however, about these facts of occupational life constitutes forewarning. Both by their temperament and the design of the larger curriculum, law students are well positioned to become forearmed when forewarned.

### A. Risk Aversion

As both curricular prescription and a fact on the ground, risk aversion pervades the legal academy. The conventional wisdom that law students are risk averse<sup>101</sup> may be hard to verify<sup>102</sup> but appears sound: as an occupation, law delivers relatively certain payoffs (status, expected income, the approval of one's family) while withholding the higher, though less likely, gains available in other endeavors (business enterprises, the creation of art). One perceived value of a law degree is that it bestows and maintains open options for its holder.<sup>103</sup>

Law schools teach risk aversion to a population inclined in that direction to a degree that goes beyond student temperaments. Paul Brest and Linda Krieger link risk aversion to an unhealthy conservatism built into legal education and the practice of law. Lawyers and legal educators

are viewed—perhaps by ourselves as well as by others—as conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies. There may be substance to this view. The appellate case method and adversarial legal processes

---

<sup>101</sup> For guarded endorsements of this proposition, see Richard L. Hasen, *The Efficient Duty to Rescue*, 15 INT'L REV. L. & ECON. 141, 144, 149 n.12 (1995); Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, 61 LAW & CONTEMP. PROBS. 109, 110–11 (1998).

<sup>102</sup> A 1990 study found that in all graduate fields of study except law, optimists perform better than pessimists. Richard G. Uday, *That Frayed Rope*, 16 UTAH B. J. 8, 9 (2003). One commentator supports the risk-averse construct with evidence that the profession has historically resisted technological innovation, notably the telephone at the end of the nineteenth century. Catherine J. Lancot, *Regulating Legal Advice in Cyberspace*, 16 ST. JOHN'S J. LEGAL COMMENT. 569, 570 (2002). For a law professor's skepticism about the utility of risk utility as a concept, see Victor Goldberg, Columbia Sch. of Law, Risk Management Round Table: Aversion to Risk Aversion (Apr. 12–13, 2002), [http://www.ideo.columbia.edu/chrt/documents/meetings/roundtable/pdf/notes/goldberg\\_vic\\_note.pdf](http://www.ideo.columbia.edu/chrt/documents/meetings/roundtable/pdf/notes/goldberg_vic_note.pdf).

<sup>103</sup> See Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 534 (2007) (lamenting that the authors' innovations demand "a level of intellectual and professional curiosity that is not cultivated by the current default (and often conformist) cultural stance of detached mastery, a stance that both distances students from the object of their learning and leads them to keep their options forever open"). On the lure of open options, see John Tierney, *The Advantages of Closing a Few Doors*, N.Y. TIMES, Feb. 26, 2008, at F1.

in general train lawyers to be more adept at criticizing ideas than at creating them.<sup>104</sup>

Brest and Krieger have a gloomy view of what they see, analogizing lawyers to the farmer who finds a flat tire on his car while on a deserted road near a barn and, hoping to repair it but not having a jack with him, starts a long walk to town, “failing to notice that the barn’s hay lift pulley is positioned to lift up the car. His error was in framing the problem too narrowly. He confused the problem (‘How can I lift my car?’) with one particular solution (‘Find a jack!’).”<sup>105</sup> Such confusion is not unique to lawyers—Brest and Krieger also attribute it to clients and “people”<sup>106</sup> generally—but the authors believe that occupational resistance to creativity and fresh thinking would diminish if law school curricula were to relax about precedent, stare decisis, and hewing to a “narrow, legalistic” approach to client problems. The Brest and Krieger criticism links risk aversion to an imposed mental staleness and rigidity that impedes the advocate’s role.

Pitfalls pedagogy, focusing on similar concerns about giving value to clients, takes a differing view of risk as law students and lawyers perceive it. Brest and Krieger are surely right to suggest that a curriculum mis-educates whenever it uses precedent, the case method, the adversary system, and other mainstays to relate a sense of futility and to teach the power to demolish another person’s ideas, rather than the equally valuable power to create new ones. But this sense of defeat is not part of the pitfalls approach. On the contrary: talking to students about contingencies ahead in the practice of law gives them a boost of vigor and optimism, in the way that athletes planning for a marathon or long bicycle ride seek out and relish any advance information they can get about the hill, the stretch of potholes, or the bad neighborhood on their route. Specifics matter. “You’ll have a rotten time; the road is awful” is not a pitfalls message, especially when it hovers unspoken in the air. “Look out for X, Y, and Z when you take off,” by contrast, anticipates a satisfying journey.

Pitfalls are more than figurative potholes. They offer opportunities. Consider the topics surveyed in the last Part. Involuntary disqualification, for example, functions as a blow to the lawyer with the conflict, but for the initiator it is a weapon. Judicial codes of conduct can serve as weapons too. Retained lawyers prosecute and defend—that is, profit from—claims for legal malpractice. Ineffective assistance of counsel can give a litigator the memorable thrill of invalidat-

---

<sup>104</sup> Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 541 (1994).

<sup>105</sup> *Id.* at 540.

<sup>106</sup> *Id.*

ing a client's criminal conviction. Lawyers endure the penalties of disciplinary sanctions, but they also write, threaten, impose, celebrate, and review them.

## B. Assonance with the Rest of the Curriculum

One problem with the mandate requiring instruction in professional responsibility is that it has given birth to an anomalous course and a burdensome teaching assignment. Most law schools omit this class from their first-year requirements and compel students to take it in the semester of their choice between completion of the first year and graduation.<sup>107</sup> This placement away from most other requirements forces the course to compete for esteem in the schedule with courses that students take because they are interested in a subject.<sup>108</sup> Second-year students enroll in the belief (sometimes misplaced) that the course can help them with the Multistate Professional Responsibility Examination, a test they may take, in a "get it out of the way" fashion, before they graduate. Graduating students enroll having run out of semesters in which they can put it off. No other law school class is regarded—by students, faculty, and associate deans alike—as this much of a chronic nuisance, and instructors who teach it have been resenting its unpopularity in print for years.<sup>109</sup>

Pitfalls can assuage the unpopularity problem by bringing Professional Responsibility or Legal Profession in line with other law school courses. Elsewhere in their schedules, students learn that dangers and obstacles occupy virtually every corner of the law; because references to pitfalls make this class look more like its peers, the burden of being an anomaly in the eyes of students is eased. Once students perceive that this class really does belong on their schedule, those who teach it,

---

<sup>107</sup> See Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 J. LEGAL WRITING INST. 105, 111–12 (2006) (contending that this belated placement causes law students to underrate the importance of the subject).

<sup>108</sup> See Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 655–57 (2007) (noting the isolation of professional responsibility in the curriculum).

<sup>109</sup> See John M. Conley, *How Bad Is It Out There? Teaching and Learning About the State of the Legal Profession in North Carolina*, 82 N.C. L. REV. 1943, 1950–51 (2004); Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 146–47 (1996) ("[L]egal ethics remains an unloved orphan of legal education. 'Serious scholarship' in legal ethics is still considered somewhat of an oxymoron. Many law school faculties remain convinced that the subject is unteachable or believe that it is not worth teaching.") (citations omitted); Mary C. Daly, Bruce A. Green & Russell G. Pearce, *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193, 195 n.6 (1995) (quoting sources calling the class "a blowoff course," a "dog," and "hard to teach, disappointing to take, and often presented to vacant seats or vacant minds"); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65–66 (1991); Dennis Turner, *Infusing Ethical, Moral, and Religious Values into a Law School Curriculum: A Modest Proposal*, 24 U. DAYTON L. REV. 283, 291–92 (1999).

now less vexed by challenges to the legitimacy of their material, become better positioned to advance other pedagogical aims beyond pitfalls.<sup>110</sup>

To see how pitfalls-thinking pervades American legal education, consider first-year required courses as described by the institution that has had the most influence on American law school curricula. At Harvard Law School, the course on Criminal Law puts “special emphasis on the phenomenon of discretion,”<sup>111</sup> a large source of risk for lawyers as well as defendants. In Contracts, instructors ask “whether and when contracts should be voided because of duress, nondisclosure, a failure to read, unconscionability, or immorality.”<sup>112</sup> Civil Procedure notes “tensions underlying an evolving adversarial system of adjudication.”<sup>113</sup> Property warns landholders about the pitfalls of “zoning, health and safety regulations, protection of minority or economically disadvantaged groups, eminent domain, and taxes.”<sup>114</sup> The three “fundamental theories of liability” in Torts—“intentional interference, negligence, and strict liability”<sup>115</sup>—announce that legal responsibility for injury will be governed by three very different, almost mutually exclusive, categorical conceptions, which in turn suggests pitfalls for both actors trying to comport with tort law and lawyers who presumably will suffer if they misapply the rubrics.

Other large-enrollment courses share the same preoccupation with danger and particular trouble-spots to be foreseen. The business curriculum, for example, spends much of its time on failure, bankruptcy, lack of candor, and fights over governance. (By contrast, similarly titled courses in business schools consider methods to attract investment, expand, innovate, and provide returns on capital.) The course on Evidence works with the general pitfall of inadmissibility along with specifics: unreliability, uncertainty, deterioration, privilege, prejudice, impeachment, human frailty, limitations derived from the Bill of Rights, and other vexations. Administrative Law portrays an epic struggle among individuals, legislatures, courts, and agencies, where each sector can be the others’ pitfall. Tax courses see pitfalls everywhere, especially in the happy occasions of reaping profits and income. Law school landmines are under everyone’s feet, and instruc-

---

<sup>110</sup> See *infra* Part III.B.

<sup>111</sup> Harvard Law Sch., Criminal Law 4, <http://www.law.harvard.edu/academics/courses/2008-09/?id=5194> (last visited Oct. 23, 2008).

<sup>112</sup> *Id.* Contracts 1, <http://www.law.harvard.edu/academics/courses/2008-09/?id=5260> (last visited Oct. 23, 2008).

<sup>113</sup> *Id.* Civil Procedure 1, <http://www.law.harvard.edu/academics/courses/2007-08/?id=4719> (last visited Oct. 23, 2008).

<sup>114</sup> *Id.* Property 1, <http://www.law.harvard.edu/academics/courses/2007-08/?id=4723> (last visited Oct. 23, 2008).

<sup>115</sup> *Id.* Torts 1, <http://www.law.harvard.edu/academics/courses/2008-09/?id=5181> (last visited Oct. 23, 2008).

tors teaching a class on professional responsibility who know that their students are taking or have recently taken a particular course can raise pertinent comparisons.

### III

#### LEARNING ABOUT ETHICS, AND FULFILLING OTHER MANDATES, USING PITFALLS

Although the accreditation rule mandates instruction about “the legal profession” rather than lawyers’ ethics,<sup>116</sup> law school curricula see professional ethics as an important constituent of the required course—and so, regardless of whether it fits with the preparation for work thesis of this Essay,<sup>117</sup> ethics in the practice of law warrants attention in any study of professional responsibility pedagogy. The salience of ethics is unlikely to diminish: many casebooks for the course, especially newer ones, have “ethics” or “ethical” in their titles<sup>118</sup> and all pay at least some attention to questions of right and wrong action for lawyers.

A pitfalls approach to professional responsibility strengthens this theme in the course. Pitfalls are always relevant to ethics in the practice of law. As the second section of this Part elaborates, this approach also helps to advance the various pedagogical agendas that innovative instructors have presented in the professional responsibility literature.

Given these large claims about what a pitfalls pedagogy can do, it may be helpful at this point to review the elements of this approach. An instructor depicts the rules and doctrine of professional responsibility in terms of immediate, concrete perils for lawyers. Recurring questions for the classroom may appear inattentive to right and wrong because they focus more directly on getting caught. “What kind of trouble could you get into if you proceed? Has an opponent taken a misstep, and if so, how might the lawyer respond? What can the judge do to the lawyer, and what can the lawyer do to the judge? Suppose you’re the lawyer: if you fail, what adverse consequences might follow?”

---

<sup>116</sup> See ABA STANDARDS, *supra* note 22, Standard 302(a)(5); see also Andrews, *supra* note 29, at 96 n.3 (distinguishing “legal ethics” from the rules of professional conduct); Linda S. Mullenix, *Mass Tort As Public Law Litigation: Paradigm Misplaced*, 88 Nw. U. L. REV. 579, 584 n.16 (1994) (estimating that the large majority of instructors teach “the course as a code course, or a ‘lawyering’ course, not an ethics course”).

<sup>117</sup> See *supra* notes 27–29 and accompanying text. For a cautionary note on conflating legal ethics with disciplinary rules and the law governing lawyers, see W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS 4 (2004).

<sup>118</sup> See, e.g., PAUL T. HAYDEN, ETHICAL LAWYERING: LEGAL AND PROFESSIONAL RESPONSIBILITIES IN THE PRACTICE OF LAW (2003); HAZARD ET AL., *supra* note 14 (entitled *The Law and Ethics of Lawyering*); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (2005); SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY (2d ed. 2008).

If you succeed, what adverse consequences might follow? Now that we have seen the unfortunate story unfold, in hindsight which pitfalls did the lawyer fail to anticipate?" Some instructors might feel more comfortable covering ethics by, so to speak, rushing to judgment: they would truncate analysis by asking the class to condone or condemn an outcome. Yet by inviting participants to take the role of a lawyer and thereby develop a sense of dangers, this pedagogy starts with the particulars necessary for thorough evaluation.

#### A. The Centrality of Consequences to Ethics

"In the philosophical tradition," writes W. Bradley Wendel, "ethics is the study of concepts such as goodness, right action, duty, and what ends we ought to choose and pursue, as rational beings."<sup>119</sup> Philosophy classifies ethics for lawyers under the aegis of normative ethics (rather than the more abstract "metaethics"), also known as "morals" or "substantive ethics."<sup>120</sup> The philosophical endeavor may be stated in the overlapping questions it seeks to answer: What is right and wrong? What is blameworthy and praiseworthy? What is desirable or worthwhile? How should we live?<sup>121</sup>

##### 1. *Normative Ethics As Professional Responsibility Sees It: Pitfalls As Part of Consequentialism and Deontology*

When considering problems of ethics, the professional responsibility tradition is to look at two sources in the philosophical tradition: "competing alternative visions of moral theory, dividing largely along consequentialist and deontological lines,"<sup>122</sup> or "utilitarianism and Kant's categorical imperative."<sup>123</sup> Our custom is to note both alternatives without favoring one, staying neutral on which is more compelling because "[w]e have . . . no 'thick theory of the good.'"<sup>124</sup> Happily for a defender of pitfalls pedagogy, this approach to professional responsibility comports with both alternatives. The link between the pitfalls notion of consequences and the philosophical notion of consequentialism is easier to see, because the words align, but a pitfalls pedagogy is equally central to deontology and Kant.

<sup>119</sup> WENDEL, *supra* note 117, at 3.

<sup>120</sup> 3 ENCYCLOPEDIA OF PHILOSOPHY 118 (Paul Edwards ed., 1967).

<sup>121</sup> *See id.* at 121.

<sup>122</sup> Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2505 n.126 (1999).

<sup>123</sup> *Id.* (citing MORTIMER D. SCHWARTZ ET AL., *PROBLEMS IN LEGAL ETHICS* 3–26 (4th ed. 1997)). For an argument that hewing only to these two traditions has impoverished the study of legal ethics, see Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 *S. CAL. L. REV.* 885, 887–88 (1996) (arguing that the traditional dichotomy slights the contributions available from virtue ethics).

<sup>124</sup> Tremblay, *supra* note 122, at 2505 n.126 (quoting William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 *MD. L. REV.* 213, 225 (1991)).

Putting the terms consequentialism and utilitarianism together for this purpose, we can readily identify the value of using pitfalls to convey fidelity to the prescriptions of utilitarianism. Teaching rules to students through a utilitarian lens invokes “rule utilitarianism,” which invites judgments of a rule with reference to the criterion of how much good will occur when the rule is followed.<sup>125</sup> Virtually every rule of professional conduct is amenable to this analysis, and a pitfalls approach makes the study concrete. One could teach the Model Rules of Professional Conduct entirely as rule utilitarianism, asking students to imagine universal acceptance of its provisions and anticipating the consequences for the profession, clients, and the public.

Rule utilitarianism and pitfalls come together in course material beyond the Model Rules. For example, as mentioned above, some fields of work make lawyers vulnerable to legal malpractice claims while for other groups of lawyers, this sanction is entirely hypothetical; in some jurisdictions public defenders enjoy immunity from malpractice liability.<sup>126</sup> Justifying the status quo of divergences in this pitfall requires a rule-utilitarian conclusion that the threat of malpractice liability is either a good or a bad thing depending on what kind of work the lawyer does. Rule utilitarianism also engages the pitfalls tenet that dangers also constitute opportunities (for example, the filing of a Rule 11 motion for sanctions is of itself subject to Rule 11)<sup>127</sup> and that absences of danger constitute absences of opportunity (no, you probably cannot get your client’s conviction overturned on ineffectiveness grounds).<sup>128</sup> Danger, lack of danger, opportunity, and lack of opportunity for classes of lawyers amount to distribution of utilities.

Some authorities regard the rule-utilitarian strand of utilitarianism as “a modified version of deontological ethics,”<sup>129</sup> which brings us to Kantian thought, or deontology. Pitfalls are central here too, the supposed disdain for consequences in this tradition notwithstanding.<sup>130</sup> One cannot omit consequences from the Kantian injunction “never to act except in such a way . . . that [one’s] maxim should

---

<sup>125</sup> THE PENGUIN DICTIONARY OF PHILOSOPHY 543–44 (Thomas Mautner ed., 2d ed. 2005).

<sup>126</sup> See *supra* note 52.

<sup>127</sup> See *Bennett v. Prime TV, LLC*, No. 1:02CV0611, 2003 WL 21077130, at \*1–2 (M.D.N.C. May 9, 2003); *Curto v. Smith*, 248 F. Supp. 2d 132, 143 (N.D.N.Y. 2003); *Fashion House, Inc. v. K Mart Corp.*, 124 F.R.D. 15, 22 (D.R.I. 1988).

<sup>128</sup> See *supra* notes 67–69 and accompanying text.

<sup>129</sup> 2 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 120, at 343.

<sup>130</sup> IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 18–19 (Thomas Kingsmill Abbott trans., Arc Manor 2008) (1785) (contending that the moral worth of an action cannot be measured by its consequences).

become a universal law.”<sup>131</sup> The rightness or wrongness of an action depends on the outcome of an analysis.

Legal scholars and philosophers have worked hard to correct the erroneous notion that Kant did not care about outcomes.<sup>132</sup> “The conclusion that consequences are foreign to the Kantian way of thinking about crime and punishment represents a total perversion of Kantian thought,” writes George Fletcher, reacting to “sophisticated thinkers” who misread Kant to say that attempts should be punished as severely as consummated offenses.<sup>133</sup> Indeed, unless one wishes to halt deontological inquiry at the actions that Kant himself pondered in the nineteenth century—killing, lying, robbery—and thereby have nothing to say about dilemmas raised in contemporary life, any question of legal ethics needs to attend to consequences (if only to investigate whether considerations of duty are present) before a “universal law” of how to act can emerge.

## 2. *Pitfalls As a Constituent of Moral Development*

The sometimes-controversial developmental theorist Lawrence Kohlberg can make a noncontroversial contribution to a study of pitfalls as pedagogy.<sup>134</sup> Kohlberg laid out a famous sequence of six moral development stages through which human beings pass.<sup>135</sup> The sequence becomes controversial in the middle: some critics contend that the fourth stage may not represent an advance over the third.<sup>136</sup> We may bypass the quarrel here by focusing on the first two stages and treating the third and fourth, “conventional morality,” as a unit. The lesson from Kohlberg is that human beings move from the preceding two stages of moral development, united as “preconventional moral-

<sup>131</sup> IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 15 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785).

<sup>132</sup> See JACQUES THIROUX, *ETHICS THEORY AND PRACTICE* 47–48 (6th ed. 1998) (discussing Kant’s attention to consequences); Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 848 n.7 (1988) (“Certainly Kant noted consequences.”); *id.* at 856 n.30 (observing that in several writings Kant took “notice of the results of doing one’s duty or even the results in determining one’s duty”); David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 440 (1990) (noting that “a Kantian applying the generalization test must look to the real-world consequences of a universal permission to act in a certain way”).

<sup>133</sup> George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 696 (2000).

<sup>134</sup> See Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 794 n.113 (2006) (proposing to “put aside controversy-Kohlberg and stay within consensus-Kohlberg”). On the relevance of Kohlberg to understanding lawyers’ ethics, see Elliott M. Abramson, *Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 223 *passim* (1993).

<sup>135</sup> Abramson, *supra* note 134, at 224.

<sup>136</sup> See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 18 (35th prt. 1998).

ity,” to the conventional-morality understanding that they are members of society.

The pitfalls pedagogy, presented here as a graduate-level technique to teach intelligent and motivated adults, rests on the earliest stage of moral development, Stage One, the level characterized by a “punishment and obedience orientation.”<sup>137</sup> In this first stage, young children understand wrongness by the punishments they encounter. As they develop, they become aware that other people hold moral status (Stage Two), and later become positioned to recognize the necessity of social order when they move to the third stage. Law students outgrew Stage One long ago, of course.<sup>138</sup> At a minimum they once wrote (or at least turned in under their own name) a good-enough personal statement or application essay that made some reference to law, politics, social order, or communal welfare. In its frequent references to law as a source and instrument of “policy”—heard throughout the academy, not only in elite institutions—legal education presupposes that students have reached the fourth stage and are headed higher than “conventional morality.”<sup>139</sup>

The pitfalls pedagogy reaches the same heights as legal education generally, while also keeping its feet on the ground. It always engages with what lawyers perceive as their own occupational punishments and rewards. With these responses to antecedents at the fore, students are able to think concretely about the function of motives and incentives for lawyers as constituents of policy. At the same time, the pitfalls pedagogy does not hold students back (unless the pedagogy is misapplied) in a primitive “whatever you do, don’t get caught” perversion of ethics: teaching pitfalls does not stop at saying what these pitfalls are, but also opens discussions about why, how, and at what cost they loom.

#### B. Pitfalls As an Instrument in Other Professional Responsibility Pedagogies

The pitfalls approach serves as both a pedagogy of its own and a device that supports other approaches in the classroom. Experienced and distinguished instructors have published an array of strategies for teaching students about this profession that make reference to occupational hazards but do not focus on them explicitly as pitfalls. Here I focus on six of the best-known approaches to the professional respon-

---

<sup>137</sup> RONALD DUSKA & MARIELLEN WHELAN, *MORAL DEVELOPMENT: A GUIDE TO PIAGET AND KOHLBERG* 45–47 (1975).

<sup>138</sup> See generally Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 *CLINICAL L. REV.* 115, 118–20 (2004) (describing the gap in legal pedagogy between conventional morality and postconventional morality, located beyond Stage Four).

<sup>139</sup> I draw this conclusion from my own experiences of speaking and teaching at a range of law schools ranked in all four tiers of a notorious hierarchy.

sibility course—clinical education, experiential instruction, pervasive instruction, specific contexts, philosophy of lawyering, and sociology of the profession—to suggest uses for pitfalls in classes that gather the material under a variety of rubrics.

### 1. *Clinical Education*

Some observers deem law school clinics the ideal venue for teaching legal ethics and professional responsibility.<sup>140</sup> Representing real clients while also receiving traditional classroom instruction unites theory and practice: “Judgment is the product of this ongoing synthesis of experience and reflection.”<sup>141</sup>

Writers who find the law school clinic well suited to furnishing instruction about legal ethics and professional responsibility offer examples that look like pitfalls. Just as clinical legal education generally delivers instruction in the form of student experiences, clinical legal education about pitfalls presents burdens, dilemmas, and tough questions to students as action items that need action *now*, by *them*. For example, overlapping work in a school clinic with work for an outside employer gives the student a chance to fulfill mundane yet crucial duties relating to conflicts of interest. A clinic can facilitate creation of documents and systems to gather information about each student’s concurrent and recent employment and also relay information about the clinic’s clients for students to share with their outside employers.<sup>142</sup> When traditional faculty collaborate with students and clinical instructors on work for the clinic’s clients, sometimes at the behest of a student—for example, one might ask the tax professor whether a client’s anticipated award is taxable income—the student is exposed to vivid pitfalls concerning the attorney-client relationship, confidentiality, and unauthorized practice, among other possibilities.<sup>143</sup>

---

<sup>140</sup> See, e.g., Anthony V. Alfieri, *Teaching Ethics/Doing Justice*, 73 *FORDHAM L. REV.* 851, 857 (2004) (describing one clinic “devoted to the values of ethical judgment, professional responsibility, and public service in law and society”) (citations omitted); William Berman, *When Will They Ever Learn? Learning and Teaching From Mistakes in the Clinical Context*, 13 *CLINICAL L. REV.* 115, 136 (2006) (emphasizing the relation between legal ethics and clinical education). Much of this literature comes from Canada, see Hartwell, *supra* note 138, at 143 n.75, an unsurprising pedigree given the Canadian practice of requiring “articling,” or apprenticeship, before a law school graduate can join the bar.

<sup>141</sup> David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *GEO. J. LEGAL ETHICS* 31, 64 (1995).

<sup>142</sup> Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 *CLINICAL L. REV.* 493, 572–78 (2002) (providing two appendices for clinics to share with enrolled students).

<sup>143</sup> This “(not so) hypothetical situation” occupies much of the analysis in Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 *U. CIN. L. REV.* 1113, 1121 (2007).

## 2. *Experiential Instruction Outside of a Clinic*

Some instructors applaud the theory and practice pedagogy of a law school clinic as a vehicle for teaching ethics, yet insist that clinics alone cannot cover the subject. For them, simulations or pre-scripted exercises have the real-time, trench-like advantages of clinical education at a somewhat lower cost and with more instructor control.<sup>144</sup> The leading advocate of experiential instruction in professional responsibility has gone further, proposing “the near-total elimination of live-client, in-house clinics”<sup>145</sup> in favor of an experience rich, multi-semester sequence consisting of “(1) a long-term comprehensive simulation; (2) case, rule, and material reading with attendant classroom discussion; and (3) live-practice placements.”<sup>146</sup> A friendly reviewer of this suggestion estimated that it allots 25 percent of students’ total time in law school to simulations courses.<sup>147</sup>

As with clinical education, the principal mode taught in experiential learning is pitfalls.<sup>148</sup> By focusing on specific junctures as a representation progresses, this pedagogy conveys ethics and professional responsibility primarily via “the thousand natural shocks that flesh is heir to,” the “daily dilemmas that lawyers face.”<sup>149</sup> The pedagogy is particularly strong in teaching what James Moliterno calls “trade usage,” which is another key pitfall in the practice of law that can, for example, render a particular statement in negotiation acceptable in family practice but unacceptable in labor practice or vice versa.<sup>150</sup>

## 3. *“Pervasive” Instruction*

The belief that good law schools teach professional responsibility day in and day out along with the rest of their curricula—making segregation of the subject in its own separate course superfluous at best—

---

<sup>144</sup> Dennis Turner notes that in clinics, time crunches arise if a student hurrying to finish a complaint or the preparation of a witness barely has time to reflect on ethics, and instructors lack control of the ethics issues that will reveal themselves over the academic year; moreover, high faculty/student ratios in clinics make these programs too expensive as a means to teach a required subject. Turner, *supra* note 109, at 292–93; *see also* Moliterno, *supra* note 27, at 116–17 (arguing that every educational advantage that clinics now deliver can be delivered better by a combination of simulations and externships). Experiential education gained national attention in March 2008 when Washington & Lee University School of Law announced that the third year of its J.D. program would henceforth be entirely experiential. *See* Dean Rod Smolla, Wash. and Lee Univ. Sch. of Law, A Message from the Dean, <http://law.wlu.edu/thirdyear>.

<sup>145</sup> Moliterno, *supra* note 27, at 77.

<sup>146</sup> *Id.* at 106.

<sup>147</sup> Kenney F. Hegland, *Jim’s Modest Proposal*, 38 WM. & MARY L. REV. 125, 128 (1996).

<sup>148</sup> At one point Moliterno says as much. *See* Moliterno, *supra* note 27, at 105 (suggesting that the experiential mode in a torts or products liability class should emphasize “the potential pitfalls inherent in personal injury representation or insurance defense”).

<sup>149</sup> Hegland, *supra* note 147, at 131.

<sup>150</sup> Moliterno, *supra* note 27, at 103–04.

has a long history.<sup>151</sup> Deborah Rhode has led a movement advocating the teaching of lawyers' "ethics by the pervasive method," a deliberate effort to instill what had been seen as an ambient condition, occurring naturally, before the onset of a required course in the 1970s.<sup>152</sup> Rhode turns the old description of professional responsibility into prescription: "Professional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives."<sup>153</sup>

Like the experiential education proposed by Moliterno, this statement of purpose strenuously rejects business-as-usual in a law school: instructors who teach "all substantive courses" must either cooperate voluntarily with the "pervasive" plan or be ordered to comply. After they fall in line, questions of what and how to teach in their classrooms arise.<sup>154</sup> Few American law faculties have been open to this costly investment.<sup>155</sup> Those that make this choice would find pitfalls an effective way to isolate topics for attention in each substantive course: pitfalls and the pervasive method are united by their common desire to align professional responsibility instruction with the larger curriculum.

For any course, the pervasive method of instruction would begin with pitfalls from the law of lawyering<sup>156</sup> and then link these dangers to the substantive ends that a particular body of law pursues. The study necessarily encounters collisions. For example, judicial applications of contract doctrine to construe a disputed agreement are impeded, rather than enhanced, by the advocate-witness rule. The ban on contingent fees in matrimonial cases appears to advance some of the aims of matrimonial law (encouraging reconciliation, reducing

---

<sup>151</sup> See MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 8 (1980) (describing Harvard's "disdain" for teaching a single ethics course). For a survey of the same themes in business education, see Thomas R. Piper, *A Program to Integrate Leadership, Ethics, and Corporate Responsibility into Management Education*, in *CAN ETHICS BE TAUGHT? PERSPECTIVES, CHALLENGES, AND APPROACHES AT HARVARD BUSINESS SCHOOL* 117, 117 (Thomas R. Piper et al. eds., 1993).

<sup>152</sup> See DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (2d ed. 1998).

<sup>153</sup> University of San Francisco Center for Applied Ethics, *How Do Others Teach?*, <http://www.usfca.edu/legalethics/methods.html> (summarizing Rhode's method).

<sup>154</sup> Rhode's sympathetic dean, to whom *Ethics by the Pervasive Method* is dedicated, reviews some of these difficulties in Paul Brest, *The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasive Method*, 50 *FLA. L. REV.* 753, 754-55 (1998).

<sup>155</sup> For accounts from people who have tried it, noting its limitations and its promise, see *id. passim*; Carrie Menkel-Meadow & Richard H. Sander, *The "Infusion" Method at UCLA: Teaching Ethics Pervasively*, 58 *LAW & CONTEMP. PROBS.* 129, 135 (1995).

<sup>156</sup> This phrase comes from a casebook title. See HAZARD ET AL., *supra* note 14.

overt strife) and to defeat others (fostering fairness for the poorer party, enhancing zeal).<sup>157</sup>

The pervasive method is stellar—much better than a stand-alone course—at remembering that issues of professional responsibility arise when a lawyer is trying to do something else. In a course on corporations, for instance, the instructor mandated to include topics covered in the Model Rules (for example, confidentiality and conflicts of interest) will be inclined to present them in contexts where lawyers will face trouble when they hew to the disciplinary rule. Part of what is pervasive about pitfalls is that they extend beyond disciplinary law; both the pitfalls approach and the pervasive method seek out breadth.

#### 4. *Specific Contexts*

This approach to teaching professional responsibility, as announced by leaders of one noted ethics center, calls for “a new genre of courses” to “join the pervasive method and the traditional survey course.”<sup>158</sup> Students focus on the legal profession in particular specialty. Examples of contexts that have filled freestanding alternative classes on professional responsibility at Fordham Law School include public interest law, criminal advocacy, and business transactions.<sup>159</sup> Robert Granfield and Thomas Koenig make a different plea for context, more polemical and less specific, in that it focuses overtly on justice and politics. They find the professional responsibility curriculum hollow—and also bad at preparing students for practice—whenever it ignores the force of external pressures on a lawyer’s work.<sup>160</sup>

Any reference to context, including these two near-opposites, necessarily brings in pitfalls. The Fordham experience nicely illustrates the two sides of the danger/opportunity coin by noting the function of student choice in fulfilling the graduation requirement. The choice to take the basic survey course gives students a sense of freedom to follow their own interests, but also might make them worry that they have chosen the wrong context or opted too soon for specialization. Instructors and curriculum designers savor the chance to dig deeper but wonder whether they are failing to convey some urgent point that the survey course would have covered.<sup>161</sup> Overt at-

---

<sup>157</sup> See RHODE, *supra* note 152, at 697–99.

<sup>158</sup> Daly, Green & Pearce, *supra* note 109, at 193.

<sup>159</sup> *Id.* at 202–06.

<sup>160</sup> See Robert Granfield & Thomas Koenig, “It’s Hard to Be a Human Being and a Lawyer”: *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 520 (2003).

<sup>161</sup> See Daly, Green & Pearce, *supra* note 109, at 200–01.

tention to political power, as commended by Granfield and Koenig, also comports with pitfalls pedagogy.<sup>162</sup>

### 5. A “Philosophy of Lawyering”

Nathan Crystal has urged instructors and students of professional responsibility to reflect on what he sees as an imperative to each lawyer: to form “a philosophy of lawyering” that guides the lawyer through dilemmas that are “not clearly answered by the rules of professional conduct or the law governing lawyers,” brings together the lawyer’s professional role and personal life, and involves the lawyer “in institutional issues facing the profession.”<sup>163</sup> For Crystal, “the necessity for lawyers to develop a philosophy of lawyering” was the “fundamental theme” of his popular casebook.<sup>164</sup> Elaborating on this theme in a law review article, Crystal proposed that each state should compel lawyers to state in writing his or her philosophy of lawyering as a condition of bar admission, to re-certify this statement each year when paying bar dues, and to furnish clients and prospective clients with a written statement explaining this philosophy.<sup>165</sup> The last portion of the proposal, notice to clients about one’s philosophy of lawyering, is the most important to Crystal.<sup>166</sup>

Notice to clients is central because, as stated by the architect of this pedagogy, the chief issue that “a philosophy of lawyering” raises for lawyers is their discretion to veer from the partisan interests of the persons and entities they represent.<sup>167</sup> Before clients sign a retainer agreement, Crystal wants lawyers to tell them several things: on what basis the lawyer takes and declines new work; the scope of counseling he or she will provide; which circumstances would impel the lawyer to withdraw from representing a client on the ground that the client is “acting immorally”; whether the lawyer would prevent a client from doing harm to others or act on behalf of a client in a way that would harm others; and on what basis the lawyer would exercise “professional discretion on behalf of a client.”<sup>168</sup>

---

<sup>162</sup> Granfield & Koenig, *supra* note 160, at 507–09, 523 (recommending that the course convey some of the “management strategies” recounted to the authors in their study of forty graduates of Harvard Law School asked to describe their own professional encounters with political power and social injustice).

<sup>163</sup> NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 51 (3d ed. 2004).

<sup>164</sup> *Id.* at xxv.

<sup>165</sup> Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75, 94–97 (2000).

<sup>166</sup> Crystal offered to withdraw the condition-of-licensing part of his proposal should critics deem it too much of an affront to lawyers’ free speech rights. *Id.* at 101.

<sup>167</sup> *Id.* at 86–92.

<sup>168</sup> *Id.* at 96.

When we discard for this purpose one extra item at the end of Crystal's list—"[p]articipation in pro bono, law reform, and other professional activities to improve the law"<sup>169</sup>—which comes across (to me at least) as an anodyne afterthought that most prospective clients would not especially care to know about, we see the strong overlap between "a philosophy of lawyering" and pitfalls. Crystal worries that inattentive readers might dismiss his proposal as "touchy-feely nonsense,"<sup>170</sup> which is what it would amount to if complying lawyers were permitted to file boilerplate rhetoric that extolled excellence, integrity, high standards, justice, public service, and so on. Only the specifics about lawyer discretion that Crystal raises—"What would you do? Who would you turn away at the door? When would you quit?"—give meaning to "a philosophy of lawyering," which would otherwise be as bland and hollow as the old buzzword "professionalism." An individual's philosophy of lawyering can include many parts, but its center is a concatenation of predictions about what this lawyer would do in a tight spot when no course of action offers safety and the stakes are high.

#### 6. *Sociology of the Profession*

Before the reader leaps to infer that a pitfalls pedagogy will fulfill any and every agenda with respect to the teaching of professional responsibility, a word about one potentially discordant approach is in order. Several commentators commend the teaching of professional responsibility in a sociological context.<sup>171</sup> Of the six pedagogies reviewed in this section, the sociological one may hew most closely to the ABA mandate that launched this Essay; it provides overt instruction on "the history, goals, structure, values, rules, and responsibilities of the legal profession and its members."<sup>172</sup>

Legal sociologist Elizabeth Chambliss argues that attention to the sociology of this profession does not neglect lawyers' ethics. On the contrary, she says: the pressures and constraints that fill this milieu are unintelligible unless one takes into account the force of groups and organizations:

[T]he sociological approach *does* expose students to important moral issues, but it focuses on the moral responsibilities of the profession as a whole, and of lawyers as members of a profession, rather

---

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 98.

<sup>171</sup> See Chambliss, *supra* note 44, *passim*; Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 85–86 (1991); Posting of Bill Henderson to Empirical Legal Studies, A Plug for the Economics and Sociology of the Legal Profession, [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/04/a\\_plug\\_for\\_the\\_.html](http://www.elsblog.org/the_empirical_legal_studi/2006/04/a_plug_for_the_.html) (Apr. 30, 2006, 9:09 EST).

<sup>172</sup> See *supra* note 22 and accompanying text.

than treating individual lawyers as if they operated independently of any organizational or professional context. The sociological approach thus makes explicit the organizational, professional and societal implications of lawyers' individual actions, as well as alerting students to the external pressures that can lead to unethical behaviors. In my view, this approach better-equips students to identify and address the moral implications of their individual practice than a course organized around abstract issues of individual morality.<sup>173</sup>

Never having tried the sociological approach in the classroom, I sense that it may appear to eschew pitfalls but actually sees them everywhere in this profession. Attention to groups and systems rather than individuals may seem static to outsiders habituated to think of change or stress as originating in a person's consciousness. The cohort of individualists may be pleased to read about legal sociologists that disagree and attribute stasis and resistance to misguided beliefs about "individual professional autonomy."<sup>174</sup>

An instructor could teach a sociology-of-the-profession version of professional responsibility without any mention of pitfalls that lawyers face as they do their jobs. More likely, however, this instructor would embrace pitfalls. In one version of a sociology-informed course, for example, an introduction about comparative sources of regulation—including disciplinary law, civil liability, legislation, and agency oversight—segues into an extended exercise in which class participants write an ethics code for law students (or, alternatively, an explanation of why no such code is necessary) along with an enforcement scheme. This pedagogy uncannily resembles the beginning of this Essay, which also started with institutional controls.

#### CONCLUSION

When songwriter and social critic Tom Lehrer found himself sharing hotel space with a convention of Boy Scout leaders, he was inspired to laugh at their notion of anticipating what might go wrong:

Be prepared! That's the Boy Scouts' marching song,  
Be prepared! As through life you march along  
Be prepared to hold your liquor pretty well.  
Don't write naughty words on walls if you can't spell.

---

<sup>173</sup> Chambliss, *supra* note 44, at 854.

<sup>174</sup> See Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773, 794 (1998) (lamenting the tendency of managing partners at large law firms to regard attorney misconduct as an individual aberration); see also Chambliss, *supra* note 44, at 854 (identifying situational sources of unethical behaviors); Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 487, 491 (1999) (referring to "the new institutionalism" to argue that rules "shape cognition and enact meaning").

....

If you're looking for adventure of a new and different kind  
And you come across a Girl Scout who is similarly inclined  
Don't be nervous, don't be flustered, don't be scared! Be  
prepared!<sup>175</sup>

Urging law teachers to warn students about what lies ahead of them in the practice of law may seem as risible as the Scout motto or a curriculum of Don't Get Caught. Where's the aspiration? Whatever happened to our lofty ideals?<sup>176</sup>

The pitfalls pedagogy has several responses to this hypothetical rhetorical dismay, all of which share the premise that instruction in professional responsibility should, indeed, teach high principles. For starters, we who teach law can look in the mirror when we answer one book's query: "Who among us will do the right thing?"<sup>177</sup> Enjoying as we do the fruits of tuition revenue and professional status—and having constrained our students' prerogatives by requiring them to study their profession—we owe instruction in how lawyers can look out for their own occupational welfare. Manifesting concern about the opportunities and dangers that students face after graduation presents legal educators as lawyers working to fulfill their own professional responsibility, thereby providing students a model of the client service that instructors are training them to render.<sup>178</sup>

In the classroom, speaking about pitfalls offers small building blocks that an instructor can assemble to create a structure of considerable loft. Take for example a pitfalls approach to one topic covered in virtually every version of the required course in professional responsibility: former-client conflicts of interest. Under-enforcement of Model Rule 1.9 and its neighboring Rule 1.10 makes the blackletter less than a real pitfall for the lawyer with a conflict, but other dangers and opportunities related to conflicts abound—as class time spent on the malpractice-liability or judicial-disqualification pitfall will indicate. From these particulars an instructor can move to abstractions, ideals, and policy on the subject, knowing that students have envisioned themselves as lawyers burdened with conflicting representations. Without the guidance of pitfalls for individual lawyers, this topic is a place for students to get bored and lost in the mists of pseudo-algebra: "Okay, lawyer *L* in firm *X* represented corporation *C*, and now attor-

---

<sup>175</sup> Tom Lehrer, *Be Prepared*, on TOM LEHRER REVISITED (Warner Bros. & Reprise Records 1990).

<sup>176</sup> See *supra* notes 1–2 and accompanying text (finding nostalgia in writings about the decline of the profession).

<sup>177</sup> HAZARD ET AL., *supra* note 14, at 3.

<sup>178</sup> See Schuwerk, *supra* note 4, *passim* (arguing that law professors owe their students fiduciary duties).

ney A, the partner of lawyer L in firm X, wants to represent business B . . . .”

A pitfalls pedagogy gives law students the vantage point from which to see any topic of professional responsibility both as a quick prod for a lawyer and in all its depth. By talking about problems for lawyers as sources of strategy and strength, and commending vigor in response to a setback, the pedagogy combats a tendency toward anxiety and unhappiness that wafts through law schools.<sup>179</sup> Making reference to pitfalls functions as an approach of its own to professional responsibility and also an adjuvant to other designs for teaching the subject.<sup>180</sup> This approach unites the American legal curriculum.

---

<sup>179</sup> See *supra* notes 99–100 and accompanying text.

<sup>180</sup> See *supra* Part III.B.

