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COMMENTARY ON JUDGE EDWARDS' "GROWING DISJUNCTION BETWEEN LEGAL EDUCATION AND THE LEGAL PROFESSION"

James L. Oakes*

Perhaps this little piece should be entitled *Grace Notes* rather than *Commentary* because I agree with so much of what Judge Edwards had to say in the *Michigan Law Review*.¹ When I first read his piece, I have to say I was quite skeptical of his methodology, namely, running a survey past a group of former law clerks who, by virtue of their own super achievement, primarily in so-called elite law schools, quite easily could have ethereal points of view. But in typical Edwardsian fashion, the judge made appropriate disclaimers,² and the clerks' comments seemed to me, for the most part, quite practical and realistic. Apart from the article's theorization — with most of which I readily agree — Judge Edwards' reliance on two of my favorite legal education scholars, Paul Carrington and Robert Stevens,³ his reliance on the very same treatises of which I too think most highly,⁴ and his basic put-down of critical legal studies scholarship,⁵ led me to a more sympathetic second reading.

Generalities aside, I shall limit my comments to the article's discussion of the teaching of legal ethics — professional responsibility — and the judge's comments in respect to that portion of legal education. I speak from the experience of having taught Professional Responsibility — with the late Judge Alvin Rubin for several years, with Judge Abner Mikva, Judge David Ebel, Judge John T. Noonan, Jr., and Judge James Logan, at Duke Law School, and, more recently, at Iowa College of Law. It is a twelve- to fifteen-hour, intensive intersession course, lasting one week, with a considerable amount of practical, situational advice thrown in from personal experience or observation or both.

I agree with Judge Edwards that law students need concrete ethical training, including learning why pro bono work is important and

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1. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

2. *Id.* at 42.

3. *See, e.g., id.* at 39 n.9.

4. *See id.* at 43-44.

5. *See id.* at 39-40, 47.

what lawyers' duties are as "officers of the court," with a de-emphasis on the greed and materialism in which the private practice of law has seemed, in recent years, to overindulge. I think he overstates the case a mite, however, when he speaks of "[t]he [law] schools' failure to enhance the teaching of ethics,"⁶ because more and more law schools are teaching ethics, and some are teaching it better. Moreover, I have the distinct impression from the students with whom I have talked and the examination papers I have graded that it is a subject that lends itself to innovation. I think Judge Edwards does make a very good point when he says that ethics should be taught throughout law school; he quite correctly states that "ethics can and should be taught pervasively, in almost every law school course."⁷ But I also think that an intensive course can and should be given, using one of the several fine case and material books now available,⁸ coupled with one of the readily available paperback statutes and standards, including the ABA *Model Rules of Professional Conduct*. The materials in the field are rapidly becoming vast and need winnowing, especially for the teaching of a short course, but they are available. Such an intensive course can be given in the first year, as it has been at Duke, or in the second or third, as the law student prefers and as we just tried at Iowa, where about half of the forty students in my class were second-year students and the rest, third-year. I think such a course is very workable and can furnish just the right background for the pervasive sort of teaching that is necessary. More and more law schools are adopting a more open attitude toward the teaching of ethics — I prefer the more specific and less theoretical term "professional responsibility" — just as law schools have done in respect to clinical programs over the last two decades. And Georgetown University Law Center is into its sixth year of publishing the marvelous *Journal of Legal Ethics*.

I think then that progress is indeed being made. Throughout the 1940s and 1950s, I suspect you could count on the fingers of one hand the number of law schools teaching professional responsibility in any way, but today almost every law school has at least one course. To be sure, some of the schools still teach the course on a one- or two-hour-a-week basis for one semester, and students view it as a gut course or necessary evil; one of Judge Edwards' former clerks considered "[e]thics in most law schools a despised course,"⁹ perhaps because it is one of the only mandatory upperclass classes or perhaps because of signals sent out by his particular law school. Dean Carrington at

6. *Id.* at 38.

7. *Id.* at 74.

8. See, e.g., GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* (1990); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (5th ed. 1991); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (1992).

9. Edwards, *supra* note 1, at 74 n.110 (quoting former law clerk).

Duke and his successor, Dean Pamela Gann, have sent out very different signals, I think, by making the course a mandatory first-year course and by recruiting federal judges with practical, professional experience to teach the course. Consequently, Professional Responsibility is a whirlwind, concentrated one-week — now six-day — proposition, in which the first-year student has no other course distractions and reads considerable amounts, prepares as required, attends two to three hours' worth of lectures a day, and familiarizes himself or herself with the *Model Rules* in advance. Iowa has just tried it. Columbia is undertaking a similar effort, apparently without using federal judges. Fordham has three different courses — Professional Responsibility; Ethics in Public Interest Law; and Professional Responsibility in Corporate, Business and International Transactions — and one seminar on Ethics in Criminal Advocacy; another will be added in the spring of 1994. Three professors at Fordham — including one of my former law clerks — concentrate their teaching and scholarly endeavors in the professional responsibility area.

The good teacher has plenty of material with which to work, drawn from sources other than the case law and materials to which I referred above. I list just a half dozen sample headlines of pieces that I have picked up over the last several years from various newspapers and that I use in classroom discussions: *Despite Big Settlement, Firm Feels Little Pinch*;¹⁰ *Well-Meaning Counsel Must Obey Court*;¹¹ *Counsel's Ethics Bind Foils Inmate's 'Lookalike' Defense*;¹² *Lawyer Subject of Censure by High Court*;¹³ *Lawyer Charged with Soliciting*;¹⁴ *Va. Attorney Ordered To Pay \$7.3 Million for Malpractice*;¹⁵ etc., etc.

Judge Edwards concludes from his survey of law clerks that a "strong foundation in ethics" is not being built in legal education."¹⁶ To the extent this has been the case, it need not be. Rather than think of a course on professional responsibility as "a joke," as one of Judge

10. John H. Cushman, Jr., *Despite Big Settlement, Firm Feels Little Pinch*, N.Y. TIMES, Apr. 23, 1993, at B10 (discussing the Jones, Day \$51 million payment with respect to its representation of Lincoln Savings).

11. Lawrence A. Dubin, *Well-Meaning Counsel Must Obey Court*, NATL. L.J., Dec. 11, 1989, at 13 (attorney threatened with contempt for attempting to withdraw when client was about to commit perjury).

12. Andrew Houlding, *Counsel's Ethics Bind Foils Inmate's "Lookalike" Defense*, CONN. L. TRIB., Jan. 6, 1992, at 1 (criminal defense lawyer with another client as defendant's lookalike).

13. Mark Johnson, *Lawyer Subject of Censure by High Court*, RUTLAND (Vt.) DAILY HERALD, May 13, 1988, at 1 (discussing attorney's censure for deceit in negotiations in child custody case).

14. Henry J. Reske, *Lawyer Charged with Soliciting*, A.B.A. J., Dec. 1991, at 26 (Washington, D.C. plaintiff's lawyer charged with soliciting clients in North Carolina chicken plant fire case).

15. Andrew Blum, *Va. Attorney Ordered To Pay \$7.3 Million for Malpractice*, NATL. L.J., Dec. 11, 1989, at 14 (malpractice case against insurance lawyer who advised settlement by plaintiff client of \$300,000 in suit involving attorney's insurance company client).

16. Edwards, *supra* note 1, at 73 (quoting former law clerk).

Edwards' clerks evidently perceived it,¹⁷ first-year students tell me that it is the first really practical course they have had, giving them a feeling for the real-life practice of law. I question whether the "disjunction" between legal education and the legal profession is "growing," as Judge Edwards sees it, at least in the area of professional responsibility, and I see no reason that it should not be readily reversible. Practical, ethical lawyers can certainly teach the course or phases of it, as adjuncts, as well as adjunct judges. I always quote, with pleasure, the highly ethical North Carolina criminal defense lawyer who, in speaking to some of my Duke students, illustrated his one-hour lecture with four simple rules that are easy to remember and by which one should abide:

1. Always drink coffee with the opposing lawyer (after the case).
2. Never drink coffee with your client.
3. Always drink coffee alone.
4. Always drink wine with your family.

With those four rules you can build a whole structure pertaining to the pitfalls and problems in practicing criminal law.

More law schools should follow Fordham's innovative lead in offering a varied and rich curriculum in professional responsibility. Fordham's faculty deliberately designed the program to provide a range of offerings with courses for students with specialized interests, as well as a general course in which professional responsibility issues and ethical standards can be examined in a variety of settings or legal roles — lawyer as advocate, lawyer as negotiator, lawyer as adviser, lawyer as intermediary or evaluator, lawyer as organizational problem solver, and so forth. Only by offering a variety of teachers and courses can law schools foster the intralaw-school intellectual stimulation that is so important to good teaching. Through such offerings, the law schools can send out the proper signals, upgrade the teaching in this rich area, and help instill a respect for standards that are higher than the minimal norms required by the rules governing professional conduct in most states.

I think Judge Edwards' overall position is good in calling attention to the problem; if his paper has a shortcoming in this area, it is in not calling attention to the innovative solutions that some of the law schools are devising to deal with the situation. The next several years will, I predict, see the blossoming of professional responsibility education, not its withering.

17. *Id.*