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STRIVING TO MAKE GREAT LAWYERS — CITIZENSHIP AND MORAL RESPONSIBILITY: A JURISPRUDENCE FOR LAW TEACHING†

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I. INTRODUCTION

Over one-hundred years ago, Oliver Wendell Holmes challenged a Harvard Law School gathering¹ by declaring that the business of legal education is not merely to teach law, or to make lawyers, it is "to teach law in the grand manner, and to make great lawyers . . ."² Whether or not Holmes' timeless exhortation may be considered a moral precept for the law teaching community,³ it surely intimates that law teachers share pedagogic responsibilities

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¹ The occasion was in connection with the 250th anniversary celebration of the founding of Harvard University. See 2 WARREN, *History of the Harvard Law School* 439–40 (1908). Holmes addressed a gathering sponsored by the recently formed Harvard Law School Association. The principal orator for the celebration was James Russell Lowell. See SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 82 (1940).

² O.W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 37, 47–48 (1920).

³ Holmes felt that law and morality should be separated when discussing *legal* concepts. Nonetheless, he acknowledged the pervasive force of morals, even in the development of the positive law. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897). "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." *Id.* at 459. "The practice of [morality] . . . tends to make good citizens . . ." *Id.*

that go beyond instilling doctrinal sophistication and nurturing lawyering skills.⁴

This article sets out one view of what these additional responsibilities entail. This view suggests that, to teach law in the "grand manner," law teachers should continually teach law, lawyering, and citizenship, and also persistently consider claims of moral obligation as well as the nexus between moral and legal obligations.⁵ The argument concludes that law teachers have normative responsibilities in part because their power, positions, and promises engender trust in their students. The trust takes the form of expectations and reliance — expectations that law teachers know best what issues ought to be raised to prepare students for law practice, and reliance by students coming to law school and affording teachers the opportunity to instruct them. Because expectations and reliance serve as cornerstones of moral responsibility, law teachers share moral obligations in law teaching that extend beyond teaching law.

In substance, this article describes a jurisprudence of law teaching. It begins by comparing three related yet distinct teaching pedagogies. Next, it analyzes the derivation of moral obligation. This analysis is followed by a discussion of how moral and legal obligations relate. The discussion responds to the question of why the moral pedagogy of law teaching requires law teachers to address moral issues. This in turn is followed by a discussion of the diffi-

⁴ Having been a full-time law teacher for the past twenty years, I have become convinced that collectively we fail in legal education to address sufficiently the important issues of moral and ethical citizenship. We tend to be satisfied with teaching legal doctrine, rule manipulation, and the techniques of lawyering. Simply having a required course in professional responsibility and a jurisprudence elective seem to me to be insufficient to the challenge. On the other hand, pervasive teaching of legal ethics is one positive development where that occurs. Still, the concept of the pervasive teaching of legal ethics may not be in harmony with the realities at most law schools. For a description of the difficulties of a pervasive ethical or moral pedagogy, see *infra* notes 44–53 and accompanying text. For an interesting analysis of the normative dimensions of the law and their implications to law teaching, see Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CALIF. L. REV. 288 (1984).

⁵ Teaching the claims of morality is not the same thing as teaching virtue. Indeed, educators have long been aware of the problems of whether virtue can be taught at all. Cf. Eisele, *Must Virtue Be Taught?*, 37 J. LEGAL EDUC. 495 (1987) (Eisele sets out a normative argument that virtue can and must be taught). For an amusing yet sobering portrayal of how religious and ethical values are generally absent in the context of the modern American law school, see Shaffer, *Moral Implications and Effects of Legal Education: Or: Brother Justinian Goes to Law School*, 34 J. LEGAL EDUC. 190 (1984); see also Neuhaus, *Law and the Rightness of Things*, 1 CHRISTIAN LEGAL SOC'Y NO. 3, 7 (1980).

culties, real and apparent, of raising moral considerations in the law school context. The article ends with an affirmation of the benefits to society, to the student, and to the individual teacher of bringing moral scrutiny into the law school classroom.

II. TEACHING LAW, LAWYERING, AND CITIZENSHIP

A. *The Doctrinal Pedagogy*

The thesis of this discourse is that law teachers ought to teach law, lawyering, and citizenship. By "teaching law" is meant primarily an examination of the body of legal doctrine consisting largely of prescriptive and proscriptive rules. Teaching law also includes analyses of the policies underlying the doctrine. These changing doctrinal formulations primarily derive from court adjudications, legislative enactments, and administrative agency activities. Throughout this examination the law teacher and his or her students jointly consider the origin, evolution, application, interpretation, and manipulation of these evolved and evolving doctrinal rules. The predominant pedagogic focus is on facilitating the student's understanding of, and an adeptness in making *arguments* about, how the doctrines apply in terms of a person's or other legal entity's legal rights and obligations. This traditional and analytic approach might be called the *doctrinal teaching pedagogy*.⁶ The doctrinal and analytic emphasis often includes a sprinkling of legal history, jurisprudence, and comparative law, but generally only a sprinkling.⁷ To be sure, at certain law schools where law may be taught more as a liberal arts curriculum than a vocational one, perspective or normative courses and content will be emphasized to a greater degree. Nonetheless, doctrinal coverage is still the principal focus.

⁶ As Luban has elaborated:

Doctrinal analysis assumes two main forms. First is the articulation of the meaning of a line of cases: a theoretical description of the development of law as it emerges. I call this "rational reconstruction." Second is the analysis of law in terms of the rational considerations that inform it. I call this "policy analysis."

Luban, *Against Autarky*, 34 J. LEGAL EDUC. 176, 177 (1984).

⁷ "An honest look at the law school world today requires the confession that we rarely fulfill this larger [normative] obligation." Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 510 (1987).

B. *The Practice Pedagogy*

Teaching law also has come to include, especially in recent years⁸ and especially in America,⁹ a deliberate effort to create in the law school environment opportunities for students to be introduced to the skills of lawyering. This might be called "teaching lawyering." The goal is to assist students in developing a minimal proficiency in legal research and writing, appellate advocacy, legal drafting, client counseling, conciliation, negotiation, fact marshalling, and pretrial and trial practice. The pedagogic focus in lawyer training is on the *techniques* of competent lawyering. Consequently, skills training might be labeled the *practice pedagogy*.

Due in part to the high cost of effective skills training, law schools still have a long way to go in developing skills programs that benefit the entire student population. But there is more to the slowness in the development of skills' programs than their cost. The recognition and implementation of this practice pedagogy tends to cause law school faculties to become *de facto* divided into two camps: the substance (or academic) camp, and the skills (or lawyering) camp. This division reflects a nearly two-century-old tension in America between those that view teaching law as an academic mission and those that see it as primarily vocational training.¹⁰ Still, the

⁸ The growth in the teaching of lawyering skills in American law schools has in part resulted from the influence of the 1979 report of the American Bar Association Section of Legal Education and Admissions to the Bar, commonly referred to as the *Cramton Report*. This report recommended that law schools provide instruction in the "fundamental skills of lawyer competence." A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR, TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (1979).

⁹ In Britain the academic and skills training of lawyers, including solicitors and barristers, are separated. The academic segment is normally taught as an undergraduate curriculum at either university or polytechnic institutions. Very little in the way of skills training other than doctrinal analysis is addressed. More specialized lawyering skills are presented in either the Inns of Court School of Law (the barristers' professional school), or at one of the Law Society's various Colleges of Law (the solicitors' professional schools). Even so, the skills of lawyering continue to be learned for the most part in England and Wales through apprenticeships, known as "pupillages" in the case of barristers and "articled clerks" in the case of solicitors. See THE BAR ON TRIAL 68-82 (R. Hazell ed. 1978); M. BERLINS & C. DYER, THE LAW MACHINE 33-54 (2d ed. 1986).

¹⁰ "[T]he law school, as a professional school, performs the twin tasks of teaching substantive knowledge and also of training practitioners. As law professors, we have become accustomed to . . . academic tensions that these roles generate." Redlich, *Law Schools as Institutional Teachers of Professional Responsibility*, 34 J. LEGAL EDUC. 215, 216 (1984); see also R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's 5 (1983). From the time of Litchfield Law School in Connecticut, "the dichotomy between the teaching of law as a liberal and liberating study and the teaching of law as a technical and professional study was already established." STEVENS, *supra*, at 5.

resulting divisiveness is unfortunate, as it taps energy more productively expended in pursuing the shared educational objective of striving to make "great lawyers." Moreover, the occasional sparring between the academics and the skills segments of a law faculty obscures the fact that the law faculty has a shared *obligation* to teach both the skills as well as the substance of lawyering.

Why an obligation, one might ask. Because entering law students, and the public they will soon serve, expect lawyers to have acquired in their formal training both the knowledge and the skills appropriate to lawyering.¹¹

C. *The Moral Pedagogy*

The public also expects that their lawyers "will go to town for them" (to borrow a phrase often used by Professor Thomas L. Shaffer),¹² and will do right by them. To do right means to act as a responsible citizen, which in turn means to act not only competently, but also to act *morally* — to do what is proper, not only what is legal. To be sure, what is right is not always clear. But the question must be raised in the law school classroom because law teachers, as explained below, have a continuing obligation to address the morality of good citizenship as well as the substance and skills of lawyering. Fulfilling this obligation requires persistently raising claims regarding what is right, what is proper, and what is ethical.¹³

Teaching the morality of citizenship also involves the persistent consideration of the normative bases for individual, corporate, and governmental responsibilities. These responsibilities extend beyond the mandates of the positive law. They can be framed best as claims of moral obligation. Throughout this consideration, claims and ar-

¹¹ Although I am unaware of empirical evidence to substantiate these expectations, it is difficult for me to believe that clients, when initially engaging lawyers, do not expect them to be both knowledgeable and skillful. Similarly, I strongly suspect that *entering* law students expect to acquire the requisite knowledge and skills appropriate for lawyering during their law school tenure. Cf. Eron & Redmount, *The Effect of Legal Education on Attitudes*, 9 J. LEGAL EDUC. 431 (1957).

¹² See Shaffer, *Preface* to M. SWYGERT & R. BATEY, *MAXIMIZING THE LAW SCHOOL EXPERIENCE: A COLLECTION OF ESSAYS* iii, v (1983) ("'Attorney' means someone who goes to town for you," quoting Miss Maude, speaking about her attorney, Atticus Finch, in *TO KILL A MOCKINGBIRD*).

¹³ "My defense for putting larger normative questions on our teaching agenda rests on a notion that a university law school has a broader function than a cooking institute, a barber college, or some other trade-oriented technical school." Cramton, *supra* note 7, at 510. Judges decide "who has met the responsibilities of citizenship . . ." R. DWORKIN, *LAW'S EMPIRE* 1 (1986).

guments about the requirements of citizenship are routinely raised by the teacher and by his or her students. The pedagogic focus is on notions of individual, institutional, corporate, and governmental morality.

When considering the moral dimension of a problem, the inquiry should never end with the question of what the appropriate legal doctrine does (or might) require. Rather, a further question — what *ought* the person or corporation do, or have done, under the circumstances — is always relevant.¹⁴ This morally-required dimension to law teaching might be called the *moral pedagogy*. The moral pedagogy foremost involves discussions centering around claims of moral obligation. The sources of these moral obligations are next considered.

III. THE DERIVATION OF MORAL OBLIGATIONS

Notions of moral obligation are often attacked as involving largely an individual's subjective opinions.¹⁵ But these arguments are not well-founded. For one thing, beliefs as to specific moral obligations are widely, although not universally, held. This shared belief is evidenced by various legislative enactments prohibiting discrimination on the bases of gender, race, age, and physical handicap.¹⁶ Moreover, convincing arguments have been put forth that

¹⁴ "Today, even ardent defenders of positivism concede that it is a legitimate function . . . of the law student and law professor . . . to ask of a legal rule, once it is determined analytically what it says and what it means, 'Is it just?'" Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CALIF. L. REV. 779, 784 (1988). In teaching contracts, I often ask whether a litigated dispute could have been avoided if one or other of the disputants had done what was morally right under the circumstances. For representative cases that I discuss in my contracts course, see, e.g., *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825), or *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. 1959). See also *Holcomb v. Zinke*, 365 N.W.2d 507 (N.D. 1985) ("[T]he ancient rule [caveat emptor] is no longer an expression of American mores.").

Moral claims as they relate to the legal issues raised by abortion, privacy, preferential hiring, self defense, and euthanasia, among others, are the focus of a provocative book by Judith Jarvis Thomson titled *RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY* (1986).

¹⁵ Ronald Dworkin has described a community's popular morality as its set of opinions about justice and other political and personal virtues that are commonly held by *most* members of the community or by a "moral elite" within it. See R. DWORKIN, *supra* note 13, at 97.

¹⁶ Under the common law, putative fathers were held only to have a "moral obligation" to support their illegitimate children. Bastardy statutes providing for support payments upon conviction represent one example of the codification of moral obligations. For a discussion of the incorporation process, see *Fiege v. Boehm*, 210 Md. 352, 123 A.2d 316 (1956); see also *Holcomb v. Zinke*, 365 N.W.2d 507 (N.D. 1985).

normative principles are distinct from positive law and from an individual's subjective opinions.¹⁷ These principles have force and effect in society independent of positive law. Professor Ronald Dworkin has argued that these normative principles become the bases for courts' resolutions of "hard" cases.¹⁸ In addition, these principles, when particularized to concrete situations, become the foundations for claims of specific moral obligations. Lawyers should have ample opportunities to make these claims provided they have become aware of their importance.

A normative morality of higher principles includes reasoned beliefs held by most law-trained persons relating to human dignity, human aspiration, procedural fairness, due process, equal treatment, fundamental human rights, and so on. These beliefs, it is submitted, give rise to expectations that take the form of normatively-based moral obligation.

Normatively-based obligations arise primarily in response to the community's expectations in reference to the positions we hold (our positional or role responsibilities); the language we use, particularly the promise (our promissory responsibilities);¹⁹ and the activities we engage in (our participatory responsibilities).²⁰ And although we may disagree over whether moral obligations derive from community-based expectations, universal and immutable principles, an unfolding of reason, utilitarian self-interest, or from divine revelation, there can be little disagreement that at least the perception of moral obligations clearly influences our private, professional, and public lives. Presidential candidates, vice-presidential candidates, lawyers, and yes, law teachers sooner or later learn this truth.

My own view of the derivation of moral obligation relates in part to a person's engendering of trust and in part to religious beliefs and an obligatory responsiveness to the miracle and gift of

¹⁷ See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 26, 97-101 (1978).

¹⁸ R. DWORKIN, *supra* note 13, at 87-89; see also Forer, *Autonomy and Responsibility: A Search for New Bases of Legal Rights and Responsibilities*, 1986 UTAH L. REV. 665, 686-88.

¹⁹ For one argument supporting the moral basis of promissory obligation, see C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACT OBLIGATION* 7-22, 40-43 (1981); see also Swygert & Smucker, *Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation*, 16 STETSON L. REV. 1, 15-19 (1986); Locke, *The Object of Morality, and the Obligation to Keep a Promise*, 2 CAN. J. PHIL. 135 (1972).

²⁰ These activities include such daily routines as driving our cars, going shopping, and socializing with friends and neighbors.

life. The response is my obligation to be caring toward my fellow human beings.²¹

As to the engendering of trust, moral obligations derive from normative expectations about personal, professional, and civic responsibilities that go beyond the mandates or legal duties imposed by positive laws. These responsibilities become obligatory because our positions, language, activities, and group memberships all cause others to depend upon and to place trust in our positions, words, and actions.²² Because dependencies and trust often reach a level of community expectations, each of us in the web of society is relied upon and trusted in countless, specific ways. This trust is a natural, logical, and predictable response to our promises, positions, activities, and associations. The web of trust goes to the heart of our socialization, the result of which is that we are not autonomous human beings, free to do whatever we desire. Rather, we are persons morally responsible to all other persons in our community. We live in a community of relationships with others.²³ These relationships result in reciprocal expectations.

Others may expect me to do or refrain from doing specific things: to participate in games, activities, to go about my business in predictable and definite ways; or, naturally to assume responsibility for a particular state of affairs.²⁴ In turn, I have expectations of those around me. My expectations take the form of beliefs that others with whom I interact will do right by me by fulfilling my expectations of trust, a trust generated by their words, positions, and associations.

As noted earlier, these normative expectations in turn serve as bases for claims about moral obligations. These claims may be general and abstract, or specific and concrete. Examples of general claims include all promises, even gratuitous ones, ought to be kept;²⁵ law teachers ought to deal fairly with their students;²⁶ employers

²¹ Mark 12:31: "Thou shall love thy neighbor as thyself."

²² See Locke, *supra* note 19; MacCormick, *Voluntary Obligations and Normative Powers*, 46 ARISTOTELIAN SOC'Y PROC. 50-59 (Supp. 1972).

²³ "[A] deeper understanding of one's individuality involves an affirmation of the relatedness between the self and the other person." Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089, 1130 (1986).

²⁴ Certain obligations "involve not a duty to act, but instead a responsibility that a state of affairs exists, or will exist." A.M. TETTENBORN, AN INTRODUCTION TO THE LAW OF OBLIGATIONS 1 (1984).

²⁵ Locke, *supra* note 19, at 135-39; see also Swygert & Smucker, *supra* note 19, at 15-19.

²⁶ For a discussion on how to deal fairly with students in the areas of sexual relations, use of student work in research, and in grading and reviewing examinations, see the timely

ought to treat their employees with respect;²⁷ and, good sportsmanship ought to be observed while participating in or coaching games.²⁸

These claims of general and abstract moral obligations should not be ignored or slighted in teaching. This is so because they reflect expectations that not only help shape our conduct, but also serve as a predicate for tomorrow's positive laws. Indeed, a significant segment of our positive law largely incorporates our society's normative expectations and beliefs.²⁹

Nor should normative claims be ignored; it is from general claims or statements about moral responsibilities that specific claims are deduced or interpreted. The general claim, for example, that law teachers ought to treat law students fairly is the basis for the more specific claim that law teachers should use identical evaluative criteria in grading a set of examinations — that it is *right* to evaluate students on the same objective basis and *wrong* not to do so.³⁰ Being treated the same in reference to objective grading criteria is a law school, community-wide normative expectation, one that law students expect law teachers to follow.

Consider for a moment important equal protection and due process decisions of American constitutional law. These cases not only reflect the doctrine of precedent, or *stare decisis*, itself a normative principle, but they also and more significantly are the United States Supreme Court's pronouncements of our nation's highest moral aspirations. The Court's decisions often reflect previously existing normative beliefs and claims of what the positive law ought to be.³¹ As these beliefs and claims change over time, so do the Supreme Court's responses and interpretations. Thus, we have

article by Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986); see also L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* 1-5 (1982).

²⁷ In the marketplace, workers may value respect as much or more than compensation levels. My fourteen years as a part-time mediator and arbitrator have made this clear to me.

²⁸ The fact that certain basketball coaches or tennis pros are not universally admired attests to the validity of this claim.

²⁹ John Rawls in his highly influential discourse, *A THEORY OF JUSTICE* (1971), sets out a contractarian theory of law whereby the persons in the community consent to the law maker's pronouncements because the pronouncements reflect the community's shared principles of justice. See also J.W. HARRIS, *LEGAL PHILOSOPHIES* 11 (1980).

³⁰ See O'Connell, *The Wages of Virtue: Better Symbols for Law School Grades*, 24 J. LEGAL EDUC. 362 (1972); see also Swygert, *Putting Law School Grades in Perspective*, 12 STETSON L. REV. 701 (1983).

³¹ For a description of the United States Supreme Court's normative interpretation of the Constitution, see R. DWORKIN, *supra* note 13, at 355-99.

Plessy v. Ferguson,³² a half-century or so after it was decided, becoming *Brown v. Board of Education*.³³

It is essential to recognize, moreover, that both the general and the particularized claims and expectations about what the law ought to be exist in lawyers' minds prior to a court's (including the Supreme Court's) pronouncements.³⁴ Consequently, tomorrow's judicial rulings may be anticipated by identifying and focusing upon society's, especially the legal profession's, normative beliefs. Future interpretations of existing laws will to a significant degree reflect the community's — certainly the lawyering community's — evolving expectations of the normative responsibilities pertaining to its individuals and to its business and governmental institutions.

If only to shed light on the legal process perspectives of how new legal requirements come into being and why interpretations of existing rules change over time, law teachers should persistently consider claims of normative obligations. But other arguments support the proposition that law teachers ought to routinely consider claims of moral obligations. One argument concerns the nexus between moral and legal obligations.

IV. THE RELATIONSHIP BETWEEN MORAL AND LEGAL OBLIGATIONS

Philosophical explanations of morality, as well as speculations about law, posit the central notion of obligation.³⁵ In a reductionist sense, an obligation may be said to be any source of compulsion that, when disregarded, causes the disobeying party to be put at risk of losing something that society (not necessarily the party at risk) prefers or values. In this sense, obligations may be thought of as externally compelled. They are imposed upon individuals without regard to their consent.

In our Judeo-Christian society, normative preferences typically include the perceived values of freedom, trust, wealth, love, friend-

³² 163 U.S. 537 (1896).

³³ 347 U.S. 483 (1954); 349 U.S. 294 (1955) (*Brown II*).

³⁴ The now somewhat quaint expression, "Brandeis brief," which brings to the Court's attention social data as relevant factors to be taken into consideration in its decision making, underscores this point. Moreover, judges as well as legislators "usually make laws which they believe to be morally right . . ." P.S. ATIYAH, *LAW AND MODERN SOCIETY* 76 (1983).

³⁵ See generally P. DEVLIN, *THE ENFORCEMENT OF MORALS* 12-17 (1965). See also J. HARRIS, *supra* note 29, at 83-85. To achieve results, law "must persuade or compel people to behave in the desired fashion. . . . [C]ompulsion is the more important of these two." P.S. ATIYAH, *supra* note 34, at 53.

ship, divine approval, integrity, power, rectitude, and respect.³⁶ Given these preferences or values, it becomes apparent how moral and legal obligations are related because each represents a societal compulsion one disobeys at one's peril. To act at peril is to risk losing a preferred value. Consequently, moral as well as legal obligations shape conduct. Thus, from a behavioralist perspective, positive law and notions of morality are not separate spheres, but are intertwined.

Limiting our discussion of obligation to legal duties (as many theorists and law teachers do) causes us to emphasize in our teaching the remedial or "rights" side of the law and morality milieu. In turn, lawyers may tend to emphasize their clients' legal rights while neglecting a mutual exploration of their own and their clients' moral responsibilities. This pedagogical imbalance in teaching, which may be later reflected in lawyering, contributes to the notion that a legal cure must exist for every illness, frustration, disgrace, and disappointment. This is a corrupting notion because it teaches the falsehood that we do not have responsibility for our own well-being, let alone our neighbor's.³⁷

The linkage between moral and legal obligations becomes evident when considering the good citizenship responsibilities of lawyers as well as those of law teachers. As suggested above, to be a responsible citizen, one must acknowledge and respond to both moral and legal obligations. This is so because the community expects and trusts that each of us as a citizen of the community will try to fulfill both kinds of obligations. When we do so, we do right by our community. We fulfill its trusts and legitimate expectations not only in reference to our membership in the community, but also and more importantly in reference to our position or role within the community.

The community's trust and expectations are especially acute when it comes to the roles lawyers play.³⁸ In times of trouble, clients come to lawyers for help in response to the special powers, skills,

³⁶ See, e.g., the list of eight values consisting of power, respect, enlightenment, wealth, well-being, rectitude, skill, and affection, set out by Lasswell and McDougal in *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

³⁷ Swygert, *The Moral Basis of Obligation: A Critique of "Obligation-Duty"* *Contemporary Analyses*, 16 STETSON L. REV. 557, 560-61 (1987); see also R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1982) (especially Chapter Three, "Moral Constraints and the State"). Instead of incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done. R. NOZICK, *supra*, at 29.

³⁸ "[T]he public needs lawyers who acclaim the hope and expectation that [their] rights will be enforced." Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 228 (1984).

and influence lawyers are presumed to have. Clients expect (or ought to expect) their lawyers to do right by them by giving them the best advice, legal skills, *and* moral counsel the lawyers are capable of giving. To give moral counsel does not mean preaching morality. Rather, it involves raising and discussing with the client moral issues and the moral ramifications of alternatives. This moral dialogue, according to Shaffer, is the essence of the law office conversation.³⁹

And even if clients do not expect moral guidance, they still get it from their attorneys in positive or negative fashion. For the influence of lawyers extends to their serving as good or bad role models of citizen responsibility. Thus, if clients are to understand fully and respond to their legal and moral obligations, lawyers must give good moral counsel *and* set good examples in their lawyering and in interactions with clients and other persons and institutions.

Likewise, teachers, all teachers, set examples for their students, tomorrow's citizens. Law teachers in their roles as legal educators have special responsibilities to their law students.⁴⁰ Because law teachers, like lawyers, occupy positions of power and influence,⁴¹ they serve as role models to their students of what it means to be good lawyers and good citizens. Because law teachers control the agenda of what is perceived that law students *need to know* (a moral determination), law teachers, like lawyers, are specially trusted, trusted to do right by their students in deciding what ought to be covered both in the curriculum and in the classroom. In short, whether or not we stop to think about it, what law teachers choose to teach, how we teach, and how we choose to act toward our students are moral decisions having far reaching ramifications. The fact is that law teachers are enormously trusted to make the right decisions. And that, of course, raises some nagging and potentially troublesome questions, questions about what law teachers are doing and not doing.

³⁹ Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231, 232 (1979). "The beginning and end of a lawyer's professional life is talking with a client about what is to be done. . . . [T]his is a moral conversation." *Id.* at 231; see also G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 1-14 (1978). It should not be forgotten that "many laws are designed to serve ethical purposes." P.S. ATIYAH, *supra* note 34, at 76.

⁴⁰ "American law faculties are to the American legal profession what the Old Testament prophets were to Israel." T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 177 (1981).

⁴¹ "Law teachers have the power to influence the process by which law students can numb themselves to many of their more desirable human impulses." Carrington, *supra* note 38, at 224.

For one, are we, the nation's nearly five thousand law teachers, even cognizant of (let alone fulfilling) the enormous trust conferred upon us? Are we meeting our moral obligations to our students who depend on us and to the public who will in turn depend upon them?

To do right, to fulfill our trust, we must teach not only substantive doctrinal analysis and rudimentary lawyering skills, but we must also address a lawyer's obligation to be a good citizen.⁴² We can do this in part by persistently raising claims and arguments concerning a lawyer's moral as well as legal obligations. We can also do it by being cognizant of and responsive to our own moral obligations.

To respond to our own moral obligations as law teachers means that we must routinely reexamine matters we take for granted, such as the curriculum and the case books we use. To do right means that we must care, sincerely care,⁴³ about our students' education and preparedness to serve the public competently and morally. We are, as Professor David Vernon has reported it, the "intellectual and moral gate keepers" of the legal profession.⁴⁴

To do right does not require that law teachers teach morality, but it minimally demands that we morally teach. While teaching morality suggests taking a stand for particular claim *of* morality, to teach morally requires taking a stand *for* morality by acknowledging and responding to our own and to others' normative responsibilities.

Moreover, as role models of citizen responsibility for our students, we are morally obligated to live our lives as morally sensitive and responsive individuals, professionals, and legal educators. Moral teaching cannot be separated from moral living. We cannot extol virtue in our professional roles and tolerate immorality in our private affairs. Our acknowledgment, response, and example-setting, I submit, are all required in striving to teach law in the grand manner. In our striving to do right by our students, we will be responding to our own profession's moral obligation to assist law students in their striving to become great lawyers for the benefit of their clients, the courts, the legal profession, and society.

⁴² "Is there not also a commitment, both for the law teacher and student, to search for the good?" Cramton, *supra* note 7, at 511.

⁴³ See Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163 (1984). "Students ought not to be regarded merely as instruments, . . . not even in the setting of a professional school. They are . . . sources of value in their own right." *Id.* at 167.

⁴⁴ Vernon, *Ethics in Academe — Afton Dekanal*, 34 J. LEGAL EDUC. 205, 211 (1984).

V. THE CHALLENGE OF TEACHING BOTH LAW AND CITIZENSHIP

Given the above argument that law teaching ought to include the persistent consideration of claims about moral obligation and citizen responsibility, it is appropriate to raise the question of whether law teachers are, by and large, doing so. Although the evidence is not easily discernible, and even though claims of morality are undoubtedly being raised by law teachers, a few clues intimate that moral discussions are not being persistently emphasized either in our law school classrooms or in our teaching materials.⁴⁵

For one thing, it may be easy, too easy, to restrict one's teaching and writing about law to a positivist view of obligation.⁴⁶ Certainly, the announced doctrinal rules are easier to set out and discuss than are the more confusing, speculative, and at times opposing claims in reference to moral obligations.⁴⁷ (Bar examiners do not ask what the law ought to be. Nor do most law school examinations.) Analytic jurisprudence, or asking what the law "is" and stressing reasoning by precedent — or economic analysis, asking, for example, economically how to best lower the cost of accidents — seem far safer and easier to deal with than discussing the amorphous world of "oughts." Legal and economic "rules" tend to be "hard." Moral "oughts" tend at times to be "soft."⁴⁸ While rules can be coached,

⁴⁵ "[M]ost casebooks and courses, in design and effect, are doctrinally rather than normatively driven." Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155, 159 (1984). Indeed, the absence of any pervasive coverage of morality as related to law is gleaned from perusing published works for law students authored by both American and British law teachers. These casebooks, texts, and legal guides for the most part reveal few references to notions or theories of normative responsibility or moral obligation. There are exceptions, of course, including the extensive writings of American law professor Thomas L. Shaffer. See, e.g., T. SHAFFER, *supra* note 40; T. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985); Shaffer, *supra* note 39, at 231; Shaffer, *The Legal Ethics of the Two Kingdoms*, 17 VAL. U.L. REV. 3 (1983).

⁴⁶ "The prevailing model of law study and law teaching in the United States probably is one of legal positivism (law treated as a system of rules) . . ." Van Doren, *Implications of Jurisprudence to Law Teaching and Student Learning*, in SWYGERT & BATEY, *supra* note 12, at 55.

⁴⁷ "Many teachers find it difficult or inappropriate to raise the fundamental questions in class or in their writing. It is difficult, because they are often hard and controversial questions." Cramton, *supra* note 7, at 512 (citing Shaffer, *Moral Theology in Legal Ethics*, 12 CAPITAL U.L. REV. 179, 184-90 (1982)). "[There are] very real difficulties of discussing fundamental moral issues in the law school classroom . . ." *Id.* at 512 n.11; see also Bartlett, *Teaching Values: A Dilemma*, 37 J. LEGAL EDUC. 519 (1987) ("The dilemma is that we cannot be value-neutral in our teaching . . . , but neither can we teach values . . .").

⁴⁸ Student concerns about justice or fairness are often dismissed in the classroom as founded on "mushy and naive appeals to sentiments, sympathies, or [moral] commitments that [are thought to] have no place in the harder . . . life and mind of the lawyer." Wasserstrom, *supra* note 45, at 159.

oughts tend to be slippery. And law teachers do not like to fumble the ball.⁴⁹

But to shirk our moral responsibilities is dangerous pedagogy. For if we escape or deny responsibility for what is right, best, or good for society in this fashion, in time so will our students likely emulate our isolationism in their roles as lawyers.

Another challenge to teaching a moral pedagogy is the current popularity of the law and economics emphasis, on the one hand,⁵⁰ and the critical legal studies perspective, on the other.⁵¹ The problem is that both of these perspectives, for different reasons, minimize the relevancy of moral obligation and, as a result, do not place moral claims high on their respective agendas. Morality, normative principles, natural law, even social utilitarianism seem to have been pushed aside by many modern legal theorists and academicians in favor of largely economic or political explanations of human conduct and aspiration.

Now these newer perspectives are not necessarily negative developments. These largely American views have widened the intellectual parameters of legal education and have given teachers and students deeper insights into our legal system and its functioning. The problem is that each view attempts to explain too much, and thereby minimizes the role of moral obligations and the nexus between law and morality. Law involves far more than wealth maximization and political manipulations.

Another difficulty of teaching a moral pedagogy is the typical, doctrinally-weighted law school curriculum. The curriculum contains few normative offerings. Many law teachers apparently believe that discussions of moral obligation can be either omitted or left to elective jurisprudence courses and seminars. This approach, however, as others have said, amounts to too little, too late, for too few.⁵²

⁴⁹ "[O]ne of the characteristics of the role of the professor is that it provides a position from which one can be aggressive. . . . [T]he professor may carry on an essentially one-sided battle. . . . I believe this to be highly important as a motivating factor to those who become law professors." Watson, *The Quest For Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 114 (1968).

⁵⁰ See generally R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 1 (1972) (economic reasoning is based on the assumption that "man is a rational maximizer . . . of his self interest"); see also Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

⁵¹ See Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For a bibliography of literature of the critical legal studies movement, see Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

⁵² Wasserstrom, *supra* note 45, at 159.

Given these and other impediments to raising routinely law and morality claims in the law school context, I am left after two decades of teaching law with the uneasy feeling that many law teachers, perhaps by accident more than through intellectual scrutiny, come to believe that legal and moral obligations are distinct worlds and that the claims of morality are best kept outside the law school classroom. But this moral isolationism⁵³ ignores the intertwining of moral and legal obligations, which together establish the responsibilities of citizenship.

As this article has pointed out, moral as well as legal obligations extend to law teachers' professional responsibilities. In response to these obligations, we law teachers have a responsibility to examine routinely the claims of moral obligations in our classrooms, in our writings, and in our roles as citizens and as legal educators. The public's and our students' trust require it.

VI. BENEFITS OF THE MORAL PEDAGOGY

Students exposed to the moral pedagogy in their law school experience will benefit. Most importantly, they will be able to hold on to the normative beliefs that they typically bring to law school. These normative beliefs may include the notion that law is related to, and a means to attain, justice. One who is concerned about justice is concerned about "right" outcomes. In addition, students will see how legal rules often incorporate principles of morality. Indeed, students' normative beliefs in justice, fairness, honesty, and human dignity will not be discarded, but rather will become more fully developed as a result of persistent exposure to discussions centering on normative obligations and responsibilities. Students will perceive how legal and moral obligations are intertwined when it comes to defining one's responsibilities.

Consider a parent's responsibilities to his or her child, responsibilities that include the legal obligations of furnishing care and support.⁵⁴ Various general and abstract normative claims about parental obligations are routinely made in and out of legal contexts. The legal criteria espoused by courts involving decisions mandating

⁵³ Shaffer, *supra* note 39, at 239-40.

⁵⁴ Professor Frank Alexander has noted that insights of religious traditions central to our Judaic-Christian heritage can "provide significant perspectives" on legal relationships including those of the family. Alexander, *supra* note 23, at 1126. The covenant tradition of authority between God and people can be focused on family members, the tradition "stand[ing] as a call for the greatest degree of . . . responsibility." *Id.* at 1128, 1131.

consideration of the best interests of a child are predicated upon notions of moral obligations involving trust, love, and care. At what point do the legal obligations end and the moral responsibilities continue? Can they be separated at all? Family law teachers have to deal constantly with the overlays of legal and moral obligation. The intertwining of law and morality pervades many other segments of the law school curriculum as well — labor, torts, constitutional law, contracts, and so on. Do we as law teachers sufficiently recognize and respond to this social fact? If we do, our students surely benefit.⁵⁵ If we do, those of us who teach will reap personal benefits as well.

In emphasizing normative obligations, the law teacher may come away from his or her teaching and scholarship with a generally positive attitude regarding the potential for people, law, and institutions to operate in mutual harmony. The uplifting aspect of acknowledging that citizens have moral obligations concerning their harmonious well-being and that moral obligations are coterminous only to a point with their legal duties is the resulting affirmation of the existence and importance of human dignity, altruism, love, care, and charity. These acknowledgments also remind us that a society's positive laws can never serve as the all-purpose glue to keep society together. In addition, acknowledging moral obligations in teaching may also reflect a teacher's personal religious beliefs. This can be a personally harmonious, even a joyous, experience as the exercise of religious beliefs through one's thoughts and behavior need not be taboo in the law school classroom.⁵⁶

Law teachers focusing on claims of moral obligation as an ingredient of teaching in the grand manner may or may not perceive law as essentially a tool of class oppression exercised by a nefarious power elite to protect their power, position, and wealth. Although admitting of social and economic injustices, one holding a view of law teaching and law study as including consideration of moral obligations probably will not dwell on the paradox of the claims of law *vis-a-vis* the realities to the point of personal or professional

⁵⁵ "If we can engage one another on the level of our convictions, . . . our views of law will be enriched." *Id.* at 1134.

⁵⁶ "Virtually all of the conceptual pillars of liberal democracy — impartial adjudication, judicial review, . . . the presumption of innocence, habeas corpus, equal protection of the laws, good faith — have an origin or justification in the Judeo-Christian tradition . . ." Gedicks & Hendrix, *Democracy, Autonomy and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1618–19 (1987).

cynicism. A moral perspective looks with hope to the future without being overly judgmental about the past.

Nor does a moral view of obligation isolate one value — maximization of wealth — as underpinning or explaining the entire legal and social system. To the contrary, a view of moral obligation relating to citizen responsibility acknowledges many invisible hands at work in addition to those of Adam Smith's and the proletariat's. The hands at work within society include those normative, moral, and religious forces taking the form of expectations, trusts, and religious beliefs. These beliefs and trusts, along with resulting reliances and expectations, over time help shape a society's normative ethos — an ethos that relates to such values as human life, aspiration, and dignity, and incorporates principles of freedom, justice, and procedural fairness.⁵⁷

VII. CONCLUSION

A law teacher's persistent consideration of normative principles along with more particularized claims of moral obligations is itself a morally obligatory responsibility. It is a necessary ingredient in striving to teach law "in the grand manner" in an effort to "make great lawyers."⁵⁸ A moral pedagogy that explores the responsibilities of citizenship and the moral obligations of the community's members is, in the end, the appropriate jurisprudence for law teaching.

⁵⁷ R. DWORKIN, *supra* note 13, at 404. "Citizens . . . aim to be governed justly and fairly and with due process . . ." *Id.* at 406.

⁵⁸ See Linowitz, *Point of View: Law Schools Must Help Make the Practice of Law the Learned and Humane Profession It Once Was*, *THE CHRONICLE OF HIGHER EDUCATION* A52 (Sept. 14, 1988) ("The test of a system of justice is whether it serves people whose need is great — by their measurement, not ours . . .").

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