

William & Mary Law Review

Volume 38 (1996-1997)
Issue 1 *W.M. Keck Foundation Forum on the
Teaching of Legal Ethics*

Article 7

October 1996

Jim's Modest Proposal

Kenney F. Hegland

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Legal Education Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Repository Citation

Kenney F. Hegland, *Jim's Modest Proposal*, 38 Wm. & Mary L. Rev. 125 (1996),
<https://scholarship.law.wm.edu/wmlr/vol38/iss1/7>

Copyright c 1996 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

JIM'S MODEST PROPOSAL

KENNEY F. HEGLAND*

*If curriculum reform be thy plea, consider this—
That in the course of scrutiny, no program, (even the one in
place),
Should see salvation.*

Jim Moliterno hosts a forum on teaching legal ethics and then writes a major piece on why it is best to teach ethics by simulation.¹ If it seems that Jim's desire to teach ethics came first, with simulation the chosen vehicle—don't believe it.

Langdell didn't wake with the sudden flash: "I want to teach law scientifically. How can I?" He didn't jump up, run to his desk, pick up his quill, and list possible teaching methods. No, from the very start, Langdell wanted to use the case method. Who knows why? Perhaps he liked being in the front of the room, prancing around, firing questions.

Only later did he come up with that nonsense about libraries as labs.²

In one split-brain research experiment, the guy wearing the white coat told the subject's nonverbal right-brain "Get up and walk across the room." The verbal left-brain did not hear the instructions—split-brain research works this way. The subject got up and began walking.

"What are you doing?" asked the guy in the white coat.

* The Editorial Board of the *William & Mary Law Review* wishes Professor Hegland much continued success and happiness.

1. James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 Wm. & Mary L. Rev. 71 (1996).

2. For a general discussion of Langdell's teaching methods, see Robert Stevens, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S* (1983); see also Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 161-65 (1965).

"Going to get a drink of water," replied the left-side, not missing a beat.

"Yo, Christopher, how come we're reading cases?"

Excitement precedes analysis; choice precedes justification.

I would love to teach with Jim. He is enthusiastic and has carloads of great ideas. I would love to be involved in the program he proposes. What I like about Jim's proposal, however, has little to do with teaching professional responsibility. What I like is its boldness and, for lack of a more ponderous word, its fun. Learning by simulation is not about students staying at home, highlighting passages with yellow markers; it's students out there struggling with problems, arguing and planning, and laughing with their colleagues.

Jim doesn't light candles; he lights sparklers!

Our students don't envision a future of fun. They're in it for the money, for the justice, or, for their parents. Someone, I believe Orwell, wrote of professional masks: over the years, faces grow to fit them. The lawyer's mask (and law professors') is something of a downer—successful, yes, but a tad staid and stodgy, seldom spontaneous or super. Let's teach our students that they can create their own professional selves—they need not be created by them. Let's eat peaches and teach most that if you don't like things, you can always call a forum.

We work in splendid isolation. Jim calls for collaboration. While I love it when it's just me and WordPerfect, struggling to get through the next sentence, I miss the salad days of Legal Services—the days when the five lawyers in our office would get together and talk cases, everyone on the same side, everyone contributing to the work of others. If there was more of this type of collaboration in law teaching, we would be happier and better. As things are now, as some have said, "going into someone else's class is viewed as an assault."

I would love to go to Jim's class and, as long as he gave me plenty of notice, I would welcome him in mine. (Definitely if I got to choose the day).

The thrust of Jim's proposal is teaching issues of professional responsibility through simulations rather than through a separate ethics course.³ Oh, hum. But don't let him fool you. Jim's proposal goes far beyond teaching ethics; it goes to the heart and soul of legal education.

*Students will take, under his proposal, twenty-five percent of their units in non-Socratic/lecture contexts focusing on daily lawyering concerns.*⁴

A blast of fresh air. The current tide runs against the practical concerns of lawyering. Indeed, it even runs against Langdell's "legal science." "Legal doctrine" is fast becoming an academic embarrassment, as was "apprenticeship" to Langdell.⁵ Interdisciplinary analysis rules the day and black-letter is going the way of the square dance.

Consider the impact of Jim's proposal on law school hiring. Today's "hot prospects" boast Fulbrights and PhDs. On the cutting edge of theory, they leap deep disciplines in a single bound. They know their Public Choice Theory, their Chaos Theory, and their Obscure French philosophers. Don't get me wrong: They do bring important insights. But when it comes to the problems of Smith & Jones, P.C., they have neither the background nor the interest. Jim could force law schools to hire folks who have practiced law and who enjoy lawyering. Service in the trenches would no longer be viewed as an embarrassing interlude between Graduate School and Publication.

Jim's proposal would also force us, for the educational good of our students, to give up some of our vanity. Simulations are very effective; unfortunately, they are also very labor-intensive. Once one has taught a Socratic course a couple of times, preparation time falls to a few hours a day, leaving one with a lot of time to spare for writing. Simulations, by way of contrast, are taught one-on-one, in realtime. Teaching a simulation-based class leaves one with less time to engage in legal scholarship and,

3. See Moliterno, *supra* note 1, at 104.

4. *Eg., id.* at 112.

5. See STEVENS, *supra* note 2.

probably, less interest in doing so. Law professors write in their areas of substantive expertise. Simulations focus on the teaching and learning processes. Professors teaching simulations, therefore, likely will write about teaching or, still worse, practical stuff.

Neither gets the top spot in the *Harvard Law Review*.

Like other forms of great teaching, simulations are silent. In Robert Bolt's play, *A Man for All Seasons*, Sir Thomas More discusses career choices with the ambitious Richard Rich.

[More:] Why not be a teacher? You'd be a fine teacher. Perhaps even a great one.

[Rich:] And if I was, who would know it?

[More:] You, your pupils, your friends, God. Not a bad public that.⁶

Of course, this was before *U.S. News & World Report*.

Essentially, Jim proposes that students be required to take the basic William and Mary legal skills and ethics sequence.⁷ This sequence would consist of six units in the first year, and ten units in the second year, including four of externship.⁸ The sequence would cover legal research and writing, appellate advocacy, trial practice, and, presumably, a healthy dose of ethics.⁹ Jim also proposes that one of the four units allocated to a list of eleven second- and third-year courses should be devoted to professional responsibility simulations.¹⁰ Assuming that students will take six of these upper division courses, they will graduate having spent twenty-five percent of their work in simulated courses.¹¹

6. ROBERT BOLT, *A MAN FOR ALL SEASONS* 8-9 (Vintage Books 1990) (1960).

7. See Moliterno, *supra* note 1, at 106.

8. *Id.*

9. *Id.* at 112.

10. *Id.* at 106.

11. *Id.* at 112.

Again, I love Jim's boldness and his willingness to stir the pot. Disagreement is in the details.

Based on my understanding of what the skills and ethics sequence encompasses, I would vote for it in a second, particularly with its added externships. Jim's intrusion into the second and third years is what gives me pause. First, I'm not sure we need that many simulations. Second, I'm not sure that we should devote so much time to professional responsibility. Finally, though I am uncomfortable with forcing others to be free, if we are to invade the second and third years, I would allow flexibility; although the commandeered unit might be spent on simulations, it could as well be spent on "other stuff."

I. HOW MANY SIMULATIONS DO WE NEED?

If one begins with Jim's "teaching hospital" analogy, we need to employ a great deal of hands-on practical training in law school.¹² Because I find the medical analogy faulty, I doubt that we need so much practical training. The *substance* of medicine is *doing* medicine—better still—there is no "treatment of flu" standing apart from the treatment of flu. By way of contrast, in law, substance exists independent of application: one can know a great deal about contracts without negotiating one, litigating one, or even drafting one. A teaching hospital does not exist to teach "bedside manners" or how to get along with other health care workers.¹³ A teaching hospital exists to teach how to treat the flu. To learn how to do medicine, doctors cannot take one or two hands-on courses, say one in treating flu and the other in treating heart disease, and then learn the rest by reading medical books.

Law is different. Simulated law courses focus on the processes of law—interviewing, negotiation, drafting—rather than the substance of law. These processes of law are transferable. Involving students in two or three simulated experiences should, therefore, do the trick.

12. For a more detailed discussion of the teaching hospital analogy, see *id.* at 84-90.

13. Ironically, medical schools found that interns and residents didn't learn good bedside manner in *clinical* settings; they now have *courses* on patient relationships. NATALIE ROBINS, *THE GIRL WHO DIED TWICE* (1995).

II. WHAT IS THERE TO TEACH ABOUT PROFESSIONAL RESPONSIBILITY?

Before law schools shift a large portion of their curricular effort to enhancing the teaching of professional responsibility, the need for such a change must be clearly established. Are the ethics of lawyers that bad?

My wife does criminal defense and I keep up with the gossip. Unprofessional conduct does not seem rampant in Tucson and, when lawyers do act unethically, it's not because they don't know better.

Recently a few lawyers have been disbarred for stealing client money and one has gone to jail for getting a tad too close to the illegal drug trade. Some lawyers have reputations for demanding a large retainer and then doing next to nothing on behalf of their clients. These lawyers stumble, however, not because of deficiencies in their legal education; they err because they are alcoholics, compulsive gamblers, high rollers, or simply sociopaths.

We can warn law students of the ethical pitfalls lurking in legal practice. We cannot reshape students' personalities to enable them to avoid all dangers. But even if law professors could, only bushels of bad apples would justify a major curriculum reform.

I have noticed a disturbing trend. Lawyers have become increasingly cavalier in their treatment of case law. Frequently lawyers cite decisions for propositions for which they do not stand. Some lawyers, it seems, stop reading cases upon graduation; that's what clerks are for. As for the clerks, they don't read the cases much either; that's what headnotes are for. The demise of case reading is a very sad development, one that is particularly offensive to those of us who dwell in "appellate decision monasteries." It does add, however, an interesting twist to the deconstructionism debate. Cases do not control future decisions, not because teenagers can become President, but because cases aren't read. But I digress.

Not citing cases properly, however, is not an ethical dilemma of Sartrean proportions. The problem would improve if judges would yell more and if opposing lawyers would rat more. A lot of unprofessional behavior would probably benefit from similar action.

III. WHAT SHOULD WE TEACH ABOUT LEGAL ETHICS?

I think, for the lack of better terms, that two kinds of concerns exist: "Cathedral Ethics" and "Trench Ethics." Cathedral Ethics include such topics as: advertising; statements to the media; conflicts; partnerships with nonlawyers and whether the adversary system is such a hot idea.

A traditional legal ethics class does a good job of alerting the students to possible problems embodied in these topics. If students approach such concerns in practice, they can look up the rules. I don't think that simulations in these areas would greatly further students' understanding of these issues. In fact, traditional course will probably cover Cathedral Ethics problems better than simulation-based courses. How is one to ensure that one covers (once) the "Chinese Wall?"

Trench Ethics are of the "thousand natural shocks that flesh is heir to" variety. They include those countless daily dilemmas that lawyers face on little matters, such as: not whether to put a perjurer on the stand, but the degree to which one can avert one's eyes; not whether to lie to an adversary, but how evasive one's answers might be; not whether to represent with "warm zeal," but when it's OK to go home.

Students must face such quandaries where they arise, in the trenches. These problems aren't abstract and "Big Principles" can't solve them. The dilemmas of Trench Ethics are fact-specific and, in simulations or clinical courses, they are urgent: the witness is about to go on the stand.

IV. WHAT SHOULD WE TEACH CONCERNING TRENCH ETHICS?

First, we should teach students and lawyers to look at their own conduct and to not assume that what comes naturally is necessarily right. Second, we should teach that there are ways of thinking about ethical problems other than "What will help me win?"

That's it. I'm a minimalist. I write Nutshells.

We cannot possibly teach proper behavior in every situation. Jim gives a wonderful example of a possible simulation in a

criminal procedure course.¹⁴ It involves representing a snitch, who, it develops, is lying and who, it develops, flees from both the police and the mob.¹⁵ Jim poses a series of difficult choices that the students must make.¹⁶ I can see a great deal of animated discussion as to those choices and I can see that I might change my mind about what I would do based on those discussions. I do not believe, however, that these dilemmas have "correct" answers and I'm sure Jim doesn't think so either. The question about what we can teach is answered: *Be sensitive to the ethical implications of what you do, and think long and hard before you do it.*

Students assume, as Monroe Freedman¹⁷ and William Simon¹⁸ pointed out long ago, that their job is to advance the short-term economic interests of their clients. Questions of ethics tend to collapse into questions of strategy. Students know that they can't "lie," but they assume, as adversaries, that they must bend the truth (but only if it works). Students know that the Federal Rules of Civil Procedure's Rule 11 requires "good faith," but they assume, as adversaries, that everything that is not clearly "bad faith" must be "good faith" (but only if it works). During simulations these assumptions take wing. Simulated situations are absolutely the best place to talk about them.

Consider this teacher/student exchange after a simulation:

"Whoa, your client has gotten a lot better since the accident. He's out playing tennis."

"I didn't say he wasn't playing tennis. All I said was that he was still badly disabled."

The teacher of Trench Ethics is a bird of prey, slowly circling, ready to swoop down on the first glimmer of unethical behavior. Although we all build ethical problems into simulations, I prefer the ones that the students fall into. In Socratic courses, students

14. Moliterno, *supra* note 1, at 115.

15. *Id.*

16. *Id.*

17. See MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 51 n.32 (Matthew Bender 1990).

18. See generally, William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (discussing popular legal conceptions of the goals of client representation).

analyze the ethical lapses of others; in simulated and clinical courses, they analyze their own.

What can we teach about solving Trench Ethics problems? The Model Code of Professional Responsibility is seldom helpful. Trench Ethics questions aren't about making choices to test the outer limits of what is acceptable behavior. Rather, Trench Ethics problems involve making decisions about the kind of person you want to become. The hardest part is recognizing and then factoring out self-interest: "Whatever is best for my client (or me) is ethical." Kant urged the universalization of decisions. That works well with legal ethics: "If you were on an Ethics Committee of the Bar and you had to draft a rule addressing that dilemma, what would that rule be?" Thomas Shaffer advises that you think of a wise person you know and then do as they would do. (If I were to follow his advice, I would follow his advice.)

My quarrel with Jim only involves how much time we must devote to issues of professional responsibility. I absolutely agree with him that simulations are a great way to teach ethics. I also agree that they offer one thing that a traditional ethics course never can: In simulated or clinical courses students have to live with their ethical decisions. Play is continuous.

V. A MANDATORY UNIT OF "OTHER STUFF"

Implicit in Jim's proposal is the notion that the second and third year curricula "suck." Although I would never use that word, I agree that we spend far too much time teaching legal doctrine and that legal education would be far more exciting if professors were required to spend part of their classroom time teaching other things. Jim would invade the upper division curriculum and require that many courses devote one unit of instruction to teaching professional responsibility simulations.

Although I am a tad uncomfortable with unit allocation requirements, if we are going to go down that road, my rule would be: *In all second and third year courses, the professor shall devote one unit of instruction to "other stuff."* Although not a bright-line rule, it would point the way. Flexibility is the key.

I teach legal writing as part of my small-section contracts course. Administrators and disgruntled students always push for

uniformity. Students say, "my friend is in another section and he didn't have to write two briefs! It's not fair!"

Imagine a cartoon of a Curriculum committee meeting on the issue of uniformity.

The "What they say" balloon:

Everyone has strengths and weaknesses. The real value to the student comes from diversity, allowing each of us to do what we do best even if other instructors are doing different things!

The "What they're thinking" balloon:

I'm the only one around here who has a clue about teaching writing. I'd rather quit than follow Bozo.

Returning to Jim's example of the criminal law simulation; it's exciting stuff. Students would love it and they would learn from it. Maybe the professor, however, would like to spend his or her unit on having students do such things as: drafting criminal statutes;¹⁹ going to jails to teach prisoners how to read by helping them read to their kids; riding with on-duty police officers; visiting jails, domestic violence shelters, or Victim-Witness Assistance Centers; reading crime novels such as *Crime and Punishment* or, to plug a current favorite, David Simon's *Homicide*, *A Year on the Killing Street*; or watching relevant movies like *American Me* and *Dead Man Walking*.

I would require professors to use one unit of work to focus on "other stuff." As noted above, that "other stuff" could be simulations, novels, community service (an AIDS class could produce a legal booklet on the legal issues facing people with AIDS; a family law class could produce a video on the legal rights of battered women), or any other "stuff" the professor deems appropriate.

As for the precise pedagogical goals of teaching "other

19. See Kate E. Bloch, *A Rape Pedagogy*, YALE J.L. & FEMINISM 307, 314-34 (1995) (teaching rape law by legislative role-playing).

stuff"—I'm sure we can figure them out if we have to.

"Yo, Prof, how come we're reading *Frankenstein*?"