

## IMPORTANCE OF ETHICS AND MORALITY IN

TODAY'S LEGAL WORLD\*

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*Why does a hearse horse snicker hauling a lawyer away?*<sup>1</sup>

— Carl Sandburg

### INTRODUCTION

We snicker at Carl Sandburg's question because of the negative image we have about lawyers. Our image is based on lawyer conduct we observe: opposing counsel of celebrated cases fighting on national morning news shows; lawyers making false public statements about their defenses in tobacco and child molestation cases; and lawyers showing incivility to one another on *Ally McBeal*.<sup>2</sup> Such behavior reflects a decline in recent years in lawyer professionalism, or more specifically, ethical conduct, which is an essential characteristic of the professional lawyer.<sup>3</sup> Many institutions and professional associations have formed committees on committees to address the decline in lawyer ethics, and many law professors have gained tenure writing on the same topic. Yet, despite these efforts, we continue to be faced with Sandburg's ugly question. It is difficult to pinpoint why ethical values underlying professionalism are disappearing. Based on my experiences as a lawyer who practiced briefly in a large law firm and, now, as a law professor, I believe a number of factors contribute to the decline in lawyer ethics.

Most students come to law school without any formal training in ethics.<sup>4</sup> Because of the false notion that ethical precepts are formed

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1. CARL SANDBURG, *The Lawyers Know Too Much*, in THE COMPLETE POEMS OF CARL SANDBURG 189, 189 (1972).

2. *Ally McBeal* (Fox Broadcasting Co. 1998–present) (television series).

3. Not everyone agrees that lawyer professionalism has decreased. See, e.g., Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345, 346 (1998); Ronald Rotunda, *Demise of Professionalism Has Been Greatly Exaggerated*, MANHATTAN LAW., Mar. 28, 1998, at 12.

4. See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31,

early in life,<sup>5</sup> undergraduate schools often lack programs that expose students to ethical and value issues. While in law school, students typically are bound by a student code of conduct that obligates them to act at all times in a manner that is consistent with the highest ethical standards required by the legal profession. These ethical standards, however, are not taught until the second or third year when the student takes a two- or three-credit ethics course, usually the only course offered in the curriculum that is devoted solely to professional responsibility issues. Unfortunately, this course is viewed by many faculty and students as peripheral to the role of the substantive courses in the curriculum, and usually covers only the minimum-standard disciplinary rules of professional conduct governing lawyers, rather than ethical ideals and aspirational ethical goals.<sup>6</sup>

Students are seldom exposed to ethical issues in the substantive courses they take, such as contracts, property, torts, tax, and business law. For varying reasons, law professors fail to incorporate ethics and professionalism issues in these and other doctrinal courses, but instead focus solely on legal principles. And they do so using a traditional method of instruction which, to some commentators, has actually contributed to the decline in lawyer professionalism. According to one commentator, law professors use an “abusive teaching methodology that often demeans and belittles law students and teaches a value-neutral adversarial model of lawyering and an overemphasis on competitiveness and winning which is evidenced by the irrational priority given to grades and class rank.”<sup>7</sup> Commentators have also observed that the “traditional classroom fosters adversariness, argumentativeness, and zealotry,”<sup>8</sup> and that law schools, in general, “instill hierarchical, adversarial, and competitive

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34–35 (1992).

5. See *infra* note 50.

6. See Rhode, *supra* note 4, at 41. For a critique of the basic professional responsibility course in the law school curriculum, see *infra* notes 18–19 and accompanying text.

7. Roger I. Abrams, *Law School as a Professional Community*, ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, SYMPOSIUM PROCEEDINGS, TEACHING AND LEARNING PROFESSIONALISM 53 (1996) (describing how characteristics of legal education undermine the development of professional values).

8. Carrie Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 6–7 (1991).

values that foster incivility.”<sup>9</sup> Although the traditional method of instruction might serve well in focusing on legal principles and teaching students how to think like lawyers, it does not work in focusing on behavioral principles and teaching students how to act like lawyers. While law schools can prepare students well to win national trial and appellate advocacy competitions and to pass the bar exam upon graduation, the schools have no mechanism for ensuring that students have the moral fiber to represent our profession.

Law firms also fail to cultivate ethical values underlying professionalism. Due to increased economic and competitive pressures on law firms, recent graduates learn that the practice of law is a business. At an increasing number of firms, young associates are expected to bill as many hours as possible. Pro bono activities and public service often do not count toward minimum billable hour requirements, which, at some firms, are attainable only with creative time keeping. As a result of the growing emphasis on profit maximization, more and more firms are focusing on aggressive commercial tactics than on mentoring new lawyers on ethical and practical questions. Without some mentoring mechanism to help young lawyers with ethical questions, as existed in earlier years, law firms in today's legal world fail to cultivate professionalism. Because of the way law firms operate and the way legal services are provided, ethical awareness is not enhanced in practice.<sup>10</sup>

We have seen a decline in lawyer professionalism to the point

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9. Abrams, *supra* note 7, at 58.

10. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 353–54 (1993) (“[L]eading firms have become giant industries, marked by an extreme division of labor and aggressive commercial tactics”); Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 *STETSON L. REV.* 305, 311–12 (1998) (noting that in the “fast-paced, billable-hours-conscious, world of today . . . there is no formal or informal mentoring mechanism” to help the new lawyer); Eleanor W. Myers, “*Simple Truths*” *About Moral Education*, 45 *AM. U. L. REV.* 823, 824 (1996) (noting that “commercial pressures have transformed workplaces formerly congenial to training in values, however modest, into soulless businesses, indifferent or actively hostile to ethical practice”); Deborah L. Rhode, *Institutionalizing Ethics*, 44 *CASE W. RES. L. REV.* 665, 710 (1994) (“Experts generally agree that the hourly minimums at many law firms are unattainable without making ‘very liberal allowances’ for the way in which time is recorded.”); Linda Kulman, *Redefining the American Lawyer — Ethics, Values, and Professional Fulfillment*, *U.S. NEWS & WORLD REP.*, Mar. 2, 1998, at 77 (noting “[i]ncreased competition among [law firms] and pressure for lawyers at them to bill as many hours as possible have reduced the amount of time that experienced practitioners have available to mentor new lawyers”).

where lawyers are frequently likened to snakes and sharks. This Essay describes efforts that have been made to increase the level of lawyer professionalism, including attempts at legislating ethical conduct and teaching ethical values underlying professionalism. Recognizing that most efforts have been ineffective, this Essay suggests an approach to enhancing ethical awareness that necessarily recognizes the value of morality in daily practice. This Essay explains the importance of ethics and morality in today's legal world, and concludes with a recommendation to the beginning law student.

### *CULTIVATING ETHICAL VALUES UNDERLYING PROFESSIONALISM*

The current trend in regulating behavior is to codify rules of ethics. Even the nation's largest handgun manufacturer now requires its dealers to sign a code of ethics, under which dealers must obey firearm laws and sell only guns with safety locks.<sup>11</sup> Regarding lawyer conduct, the American Bar Association (ABA) has formulated several ethical codes. The ABA promulgated the *Canons of Professional Ethics* in 1908, the *Model Code of Professional Responsibility* in 1969, and the *Model Rules of Professional Conduct* in 1983.<sup>12</sup> Many states and local bar associations have adopted aspirational civility and professionalism codes and creeds. Many law schools have adopted codes of student conduct governing students' behavior during their years of legal study. A question to which this Essay responds is whether any of these codes are effective in enhancing ethical values underlying professionalism.

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11. See The Associated Press, *Ethics Code for Gun Dealers* (Oct. 22, 1999) <<http://abcnews.go.com/sections/us/DailyNews/smithwesson991022.html>>.

12. Because the *Canons of Ethics* were general moralizations rather than disciplinary rules, the ABA promulgated the *Model Code of Professional Responsibility* to replace the *Canons*. (The *Model Code of Professional Responsibility* contains "Ethical Considerations" and "Disciplinary Rules.") Because of perceived shortcomings with the *Model Code*, the ABA adopted the *Model Rules of Professional Conduct* as an alternative to the *Model Code*. (The *Model Rules* contain both "Rules" and "Comments.") About two-thirds of the states have adopted in whole or in part the *Model Rules of Professional Conduct*; other states have versions similar to the *Model Code of Professional Responsibility*. For a history of the development of these codes, see DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY — ETHICS BY THE PERVASIVE METHOD 41–49 (2d ed. 1998); Nathaniel E. Gozansky, *The Growing Significance of Professional Responsibility Considerations*, 12 STETSON L. REV. 601, 603 (1983); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 905–10 (1995).

Ethical rules generally provide an outside boundary of permissible behavior.<sup>13</sup> To that end, ethical codes can affect certain conduct. For example, ABA Model Rule 1.2 forbids lawyers from assisting clients in criminal conduct, and Rules 3.3, 3.4, and 4.1 prohibit lawyers from making false statements or falsifying evidence.<sup>14</sup> Law school honor codes prohibit students from cheating on exams, disrupting the classroom, plagiarizing, damaging law school property, and making false representations on resumés. The rules in legal ethical codes are disciplinary in nature, demanding some form of reprisal against the non-complying lawyer or student. Therefore, legal ethical codes, written by due-process conscious lawyers, also serve a due process function. Lawyers accused of assisting clients in a crime have rights. Law students accused of cheating on a law school exam have rights. Interestingly, forty percent of my school's honor code is devoted to pre-hearing, hearing, and post-hearing procedures for non-complying students.

Because ethical codes are compilations of minimum standard disciplinary rules and due process provisions, they are not effective at instilling ethical ideals and professional values and, hence, do not help the majority of us become more professional. After all, it is not the typical lawyer who goes out and assists a client in criminal conduct, and it is not the typical conduct of a law student to take someone else's exam. Some codes have tried to codify ethical ideals. For example, the ABA *Canons of Ethics*, promulgated in 1908, set out the Bar's aspirations for preferred lawyer conduct. They were criticized, however, as "little more than a collection of pious homilies."<sup>15</sup>

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13. For a general critique of ethical rules, see Jean Maclean Snyder, *Against the Rules*, 28 STETSON L. REV. 299, 303 (1998) ("[W]hile the rules provide the lawyer with an outside boundary of permissible conduct, they do not resolve most ethical issues. In fact, complying with the rules will not enable lawyers to escape making ethical decisions virtually every day.").

14. See MODEL R. OF PROF'L CONDUCT Rule 1.2 (1999) (forbidding "[a] lawyer from [assisting] a client in conduct that the lawyer knows is criminal or fraudulent"); *id.* Rule 3.3 (providing a lawyer must display candor toward the tribunal and "shall not knowingly make false statements of material fact or law"); *id.* Rule 3.4 (making it illegal for a lawyer "to falsify evidence"); *id.* Rule 4.1 (providing "that when representing a client, an attorney shall not knowingly make false statements of material fact . . . to a third person").

15. Gozansky, *supra* note 12, at 603; see also Strassberg, *supra* note 12, at 908 (noting the 1908 Canons "combined moral exhortation with specific statements of duty or improper behavior, and were mostly too general to act as either a guide for behavior or a basis for discipline").

A mere codification of aspirational ethical goals for lawyers is not likely to enhance ethical conduct, any more than posting the Ten Commandments in a private school, without more, would enhance ethical behavior of high school students. This is because ethical precepts are not disciplinary in nature.

The *Model Code of Professional Responsibility* provides that “every lawyer regardless of professional prominence or professional workload, should find time to participate in service to the disadvantaged.”<sup>16</sup> The *Model Rules of Professional Conduct* similarly provide that “a lawyer should render public interest legal service.”<sup>17</sup> While it appears that lawyers bear a pro bono obligation, many fail to honor this obligation because there is no direct disciplinary action tied to the rules. A lawyer cannot be subjected to sanctions or disciplinary action by the state bar for failing to reach the professional heights to which we all should aspire. Legislating ethical values is impossible. Rules can affect certain behavior (for example, they can control trial publicity); they cannot, however, change attitudes.

Recognizing that the ethical codes it promulgated are ineffective in instilling ethical values underlying our profession, the ABA turned to law schools to implant a sense of professionalism in aspiring lawyers. Shortly after the Watergate scandal during the early 1970s, the ABA required all accredited law schools to provide required instruction “in the duties, values, and responsibilities of the legal profession.”<sup>18</sup> The ABA believed that a basic ethics or professional responsibility course would have had an impact on those involved in Watergate, many of whom were lawyers. Today, the typical professional responsibility course is the only ethics course in the law school curriculum that attempts to teach students how to act like lawyers. In that regard, it is extremely important. Nevertheless, it has proven to be an ineffective means for teaching professionalism and ethical values.

Most schools devote only two or three credit hours to the subject matter, which is not enough time to address adequately all the ethical issues that lawyers confront on a regular basis. The course is often geared to preparing students to pass the Multistate Profes-

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16. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969).

17. MODEL R. OF PROF'L CONDUCT, Rule 6.1.

18. AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(b)(iv) (1999).



sional Responsibility Examination.<sup>19</sup> It is usually taught so that students avoid malpractice liability and disciplinary actions by the state bar. Hence, the course often focuses on minimum standard ethical disciplinary rules governing lawyer conduct, and not on aspirations for preferred lawyer conduct. By focusing on the specifics of the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*, the course does not enhance students' understanding and appreciation of ethics and value issues. It fails to focus on basic principles of ethical decisionmaking, much less the heights to which lawyers should aspire. As a result of focusing on minimum standards governing lawyer conduct, students come to regard ethics as a short subject that can be mastered through rote memorization of a few disciplinary rules. These ethical rules, students learn, can be regurgitated on a final exam, which, at many schools, has to be proctored by a school administrator to ensure no student cheats.

By focusing on minimum standards of behavior, there is a risk that the basic course places too much emphasis on conduct permitted within the rules, rather than on preferred lawyer conduct. If the rules have us focus on the minimum threshold of behavior, below which sanctions and disciplinary actions will be taken, then we necessarily risk that lawyers will learn to rationalize any conduct. Too many lawyers currently believe that zealous representation of a client justifies the use of any device to win the case.

As a faculty member on my law school's admissions committee, I am amazed at the fact that applicants don't merely disclose their past unethical conduct in response to a direct question; they go on to explain at length the reason they committed the act as if doing so will resolve any question I may have regarding the applicant's ethical precepts, or at least make them feel better about themselves. A minor in-possession offense was the result of fraternity peer pressure. A petty theft of clothing from JC Penney was a result of the store clerk being rude to the applicant. I question how many such acts have been justified by the applicant. It seems to me that each

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19. Most states require graduating students to pass the Multistate Professional Responsibility Examination (MPRE), in addition to the state's regular bar examination. The purpose of the MPRE is to test the examinee's knowledge of established rules governing lawyer conduct, including the ABA's *Model Rules of Professional Conduct*. The MPRE does not test an individual's personal ethical values. See NATIONAL CONFERENCE OF BAR EXAMINERS, THE MPRE — 2000 INFORMATION BOOKLET (1999).

time we justify questionable conduct, the easier it is to cross the next line with less moral angst.

If an applicant could successfully explain away unethical conduct on a law school application, then it's going to be a bit easier explaining away cheating on a law school exam or plagiarizing, and even easier explaining why guile or trickery was used as a zealous advocate. It has become common for trial lawyers to justify almost any trial tactic on the grounds that it was committed in loyalty to the client or under the rubric of the extremely important standard of zealous representation. We are in a profession that will rationalize to the extreme. And our ethics rules foster this to a great extent.

Rather than having an ethical system based on ideals and aspirations, we have produced and cultivated a system in which lawyers can do whatever they want, as long as within the rules. If we want to increase the level of lawyer professionalism, more focus should be given to the aspirational values underlying lawyer professionalism and less on the minimum standard ethical disciplinary rules that govern lawyer conduct.<sup>20</sup> Law schools do a good job in ensuring that students understand the ethical rules to avoid sanctions and disciplinary actions by state bars. They do not, however, adequately ensure a high sense of professionalism. This might explain why the ABA has more recently suggested additional steps law schools can take to increase the level of professionalism.

In 1992, the ABA issued the MacCrate Commission Report.<sup>21</sup> The MacCrate Commission Report sought to define in a comprehensive fashion the "lawyering skills and professional values with which

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20. At least one commentator has taken the opposite view and suggested that "one of the worst things that ever happened to . . . ethics in general was the recent emphasis on professionalism" and that "the attention it has garnered has diverted our attention from the fact that the basic ethics rules are being violated far too often and with impunity." Lawrence J. Fox, *Setting the Priorities: Ethics over Expediency*, 28 STETSON L. REV. 275, 275 (1998).

21. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOL AND THE PROFESSION: NARROWING THE GAP, REPORT ON LEGAL EDUC. AND PROF'L DEV. — AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE COMMISSION REPORT]. One section of the MACCRATE COMMISSION REPORT contained a "Statement of Fundamental Lawyering Skills and Professional Values," which has been published separately. See ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROF'L VALUES (1992) [hereinafter STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES].

every lawyer should be familiar.”<sup>22</sup> The report suggests that lawyers should be committed to the values of promoting “justice, fairness, and morality” in their practice.<sup>23</sup> The report recommended that the legal training in ethics should involve more than “just the specifics of the *Code of Professional Responsibility* and the *Model Rules of Professional Conduct*,” but rather should encompass “the values . . . of the profession” (promoting justice, fairness, and morality in practice).<sup>24</sup> As outlined above, law schools have been slow to adopt this approach.

In 1996, the ABA again reviewed the role of law schools in instituting a sense of professionalism in law students and issued a report on law school ethics and professionalism courses and programs.<sup>25</sup> In its report, the committee made several recommendations for improving the level of professionalism both in law school and in the practice of law. The report suggested law schools hire experienced faculty to teach ethics and professionalism.<sup>26</sup> In too many schools the basic ethics course is taught by one who has little practical experience, who cannot offer a real world perspective to ethical issues, and who, therefore, is forced to focus on the obvious disciplinary rules using a conventional casebook that is accompanied by a good teacher's manual. Because of the difference between academic and private sector compensation of lawyers, schools often do not hire lawyers with extensive practice experience as tenure-track faculty. Some schools resort to hiring adjunct faculty, practicing lawyers, and judges who can give a real world perspective to ethics and professionalism issues.

The ABA report also suggested that training in professional responsibility should not be limited to learning the disciplinary rules with the view toward passing the bar exam. Recognizing the shortcomings with the basic law school course on legal ethics, the report suggested, more specifically, that law schools consider adopting the “pervasive method” of teaching legal ethics and professionalism, an

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22. STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES, *supra* note 21, at 2.

23. *Id.* at 10, 93.

24. *Id.* at 3–4, 90–94 (emphasis added).

25. See ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE PROFESSIONALISM COMMITTEE, TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter PROFESSIONALISM REPORT].

26. See *id.* at 14.

approach that integrates instruction on legal ethics throughout the law school curriculum.<sup>27</sup> The report suggested ethical issues should permeate the entire law school curriculum, as ethical issues arise in all substantive areas of law practice.<sup>28</sup> Teaching ethics on a pervasive basis would ensure that every student is exposed to ethical and professionalism issues in a systematic fashion during each year of law school.<sup>29</sup>

In the first-year Civil Procedure course, for example, the instructor might engage the students in a discussion regarding the ethics of filing frivolous law suits. In Family Law, teachers could discuss what a lawyer should do if he or she suspects that a client has concealed assets or misstated their value. Even the course in Constitutional Law could raise interesting ethical issues. Students may, for instance, discuss the ethics of a legislative body enacting laws that conflict with established Supreme Court precedent, or the ethics of Supreme Court Justices using rhetorical methods to reach different outcomes in similar cases. In a basic Income Tax class, the professor could put aside the Internal Revenue Code for a class or two and discuss ethical considerations lawyers must take into account when rendering a tax opinion to a client and the unique standards that govern tax lawyers.<sup>30</sup> Even the course in Computer Law could discuss whether a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the *Model Rules of Professional Conduct*.<sup>31</sup> Ethical issues could be raised in most other law school courses, particularly clinical and skills-oriented courses such as Pre-Trial and Trial Advocacy classes.<sup>32</sup>

A few schools have been innovative in their professional responsibility training. Notre Dame, for example, has three required ethics courses, including a first-year course.<sup>33</sup> Northeastern Uni

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27. *Id.* at 18–23.

28. *See id.* at 18.

29. *See id.*

30. *See* ABA Formal Opinion 85-352; Paul J. Jax et al., *Report of the Special Task Force on Formal Opinion 85-352*, 39 TAX LAW. 635 (1986).

31. *See* ABA Formal Opinion 99-413.

32. *See generally* RHODE, *supra* note 12 (addressing ethical issues in 10 substantive areas, including Civil Procedure, Constitutional Law, Contracts, Corporate Law, Criminal Law and Procedure, Evidence and Trial Advocacy, Family Law, Property, Tax, and Torts).

33. *See* David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL

versity offers a course in which students write a personal mission statement and participate in team building drills designed so that they can explore their own values.<sup>34</sup> The vast majority of schools, however, have not embraced the pervasive approach. I have informally surveyed several law professors at different schools and asked to what extent they raise ethics issues in their courses. Almost all know of the discussion and debate about pervasive teaching of ethics, but few do anything about it. For whatever reason, “many teachers have simply refused to devote the time and intellectual energy to exploring the professional responsibility issues that arise in the substantive courses that they teach.”<sup>35</sup> Some faculty believe that a person's character is set by the time he or she enters law school. Others find discussing social values and morality offensive to the intellectual thrust of legal education. Still others who hold tenure simply do not bother to change their crusty notes.

Although law schools have been slow to adopt the pervasive method of teaching ethics, some appear to be taking small steps toward systematically teaching ethics. I served on an ad hoc committee to rewrite our law school's faculty teaching evaluation form. We added a question: “How well did the professor's method raise issues of legal ethics?” We hope that this change will induce faculty to start raising professional responsibility issues in their substantive courses.

Our school also has developed a series of courses, each termed a “practicum,” in discrete substantive areas. These skills-oriented courses allow students to develop necessary practical lawyering skills by providing them supervised practical application of previ-

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EDUC. 485, 486 (1989); see also Christine Mary Venter, *Encouraging Personal Responsibility — An Alternative Approach to Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 287 (1995).

34. See Kulman, *supra* note 10, at 77. Other law schools have made advances in teaching ethics. See, e.g., Walter H. Bennett, Jr., *The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, 58 LAW & CONTEMP. PROBS. 173 (1995); John S. Dzienkowski et al., *Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas*, 58 LAW & CONTEMP. PROBS. 213 (1995); Carrie Menkel-Meadow & Richard H. Sander, *The “Infusion” Method at UCLA: Teaching Ethics Pervasively*, 58 LAW & CONTEMP. PROBS. 129 (1995).

35. Gozansky, *supra* note 12, at 609–10 (stating “few schools can honestly lay claim to a pervasive method of instruction”); PROFESSIONALISM REPORT, *supra* note 25, at 14 (concluding that “law schools have, for the most part, merely given lip service to this approach”).

ously studied theory. In these courses, students learn many of the lawyering skills identified in the ABA's MacCrate Commission Report, including recognizing and resolving ethical dilemmas. Many schools, including one at which I have taught, require students to complete before graduation a certain number of pro bono hours or public service activities. And, most schools now recommend several books for pre-law school summer reading, many of which, such as *To Kill a Mockingbird*, raise ethical issues.

Law schools alone are not responsible for enhancing ethical values underlying professionalism. Many states have instituted a minimum ethics hour requirement as part of their mandatory continuing legal education (MCLE) program. Unfortunately, few ethics programs are offered on a regular basis. Hence, many lawyers find it difficult to "get their ethics hours in" and come to regard the obligation as a nuisance. Further, many of the ethics MCLE courses offered are subject to the same criticism regarding the basic ethics course in law school. They are too short and focus mostly on the minimum standard rules to avoid malpractice and disciplinary action by state bars. Some states have created "ethics schools for practicing lawyers who have had grievances filed against them that are found not serious enough to justify a disciplinary sanction."<sup>36</sup> Unfortunately, these programs serve mainly to rehabilitate lawyers and prevent more serious ethical and professionalism problems. They do not teach ethical ideals and aspirations for preferred lawyer conduct.

A number of state and local bar associations have professionalism committees that have adopted aspirational civility and professionalism codes and creeds.<sup>37</sup> For reasons noted above, these mere statements of aspirational goals have little impact on lawyers consumed in the economically competitive climate of today's legal world.<sup>38</sup> Some states and bar associations have gone beyond at-

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36. PROFESSIONALISM REPORT, *supra* note 25, at 34 n.108.

37. *See, e.g.*, Joryn Jenkins, *An Open Palm Holds More Sand Than a Closed Fist*, 28 STETSON L. REV. 327, 330 (1998) (noting that many of these standards for civility are surprisingly "specific . . . about what conduct would be considered acceptable to the local bar and judiciary"). For a sample of these codes and creeds, see PROFESSIONALISM REPORT, *supra* note 25, app. C.

38. *See supra* notes 15-17 and accompanying text; *see also* Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 9-10 (1990) (questioning the effectiveness of such creeds, pledges, statements, and codes of professionalism).

tempting to legislate civility and have created ethics or service committees, which are designed to guide lawyers in their actions and resolve ethical questions.<sup>39</sup> Unfortunately, the opinions of ethics committees are generally not binding on disciplinary committees, which leads to “confusion over just exactly what ethics committees do and how attorneys can and should utilize them.”<sup>40</sup>

Many bars have established Inns of Court as part of the American Inns of Court program. According to a strong proponent of the Inns system, “Inns are designed to improve the skills, the professionalism, and the legal ethics with which the bench and the bar perform their functions.”<sup>41</sup> They are intended to instill a “keener ethical awareness” in lawyers.<sup>42</sup> They can be very helpful to young lawyers to whom experienced practitioners pass on the values of civility, ethics, and professionalism. In my opinion, however, the effectiveness of the Inns of Court depends on how they are operated. To the extent they are dinner meetings at which some guest lecturer reads from his notes the importance of pro bono work, which is common in my experience, they are ineffective.

### *THE ROLE OF MORALITY*

Many efforts have been made to increase the level of lawyer professionalism. States have adopted minimum standard disciplinary rules of conduct governing lawyers. The ABA has forced law schools to teach these rules. Law schools have forced students to take an ethics course and participate in pro bono activities. States have forced lawyers to take CLE courses in ethics. Nothing, however, seems to be working. What we really need is a new system for inculcating ethical values and lawyer professionalism. This approach to ethics necessarily must recognize the role of morality: the role of moral conscience in lawyer work and the value of morality in daily practice. A good colleague of mine recently debated with me

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39. See, e.g., Donald Hubert, *Competence, Ethics, and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners*, ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, SYMPOSIUM PROCEEDINGS, TEACHING AND LEARNING PROFESSIONALISM 113 (1996) (describing several service committees of the Chicago Bar Association).

40. Whitney A. McCaslin, Note, *Empowering Ethics Committees*, 9 GEO. J. LEGAL ETHICS 959, 959–60 (1996).

41. Jenkins, *supra* note 37, at 328.

42. *Id.*

that ethics has nothing to do with morality, that morality was a matter of individual preference usually tied in with religious convictions or spiritual beliefs. After all, she claimed, a person who is immoral could, nevertheless, practice law within the ethical rules governing lawyer conduct. She pulled *Webster's Dictionary* only to find the term morality defined as "ethics" and the term ethics defined as "relating to morality of behavior."<sup>43</sup>

I have always believed that ethics and morality were inextricably connected, especially on the subject of preferred lawyer conduct. Others agree that moral conscience is relevant in lawyering. One commentator has suggested that "almost all lawyer client decisions are *moral* decisions."<sup>44</sup> Another commentator has suggested that a lawyer in today's legal world should bring "his or her *moral* conscience to bear on everything done as a lawyer."<sup>45</sup> According to another, "a lawyer should embrace those qualities that have throughout the centuries been compendiously described as *moral* character."<sup>46</sup> Both the *ABA Model Code of Professional Responsibility* and the *ABA Model Rules of Professional Conduct* provide that a lawyer should counsel a client to act in a manner that is "morally just."<sup>47</sup> Recognizing the importance of morality in legal practice, the ABA has suggested schools attempt to enhance skills in moral analysis. In its 1992 MacCrate Commission Report, the ABA suggested that the teaching of ethics or professional responsibility in law school should "encompass the values of the profession which include promoting . . . *morality*."<sup>48</sup> In its 1996 Report, the ABA encouraged

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43. THE NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 324, 649 (2d ed. 1989).

44. Thomas L. Shaffer, *Preface to MAXIMIZING THE LAW SCHOOL EXPERIENCE* 12 STETSON L. REV. 551, 555 (1983) (emphasis added).

45. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 611 (1994) (emphasis added).

46. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring) (emphasis added). For additional sources relating legal ethics and morality, see, e.g., Bennett, *supra* note 34, at 175 ("Ethical decisions for lawyers and judges, as for all of us, involve personal, moral choices."); Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 110 (1996) (stating "legal ethics include moral principles, and that lawyers make ethical decisions with moral reasoning").

47. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8; MODEL R. OF PROF'L CONDUCT Rule 1.2.

48. STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES, *supra* note 21, pt. II (emphasis added).



law schools to develop courses that develop and nurture the students' "capacity for reflective *moral* judgment to the same level as legal knowledge and traditional legal skills."<sup>49</sup>

Despite the importance of morality in legal practice and the notion that moral awareness should be enhanced in the law school classroom, the role of morality in lawyer ethics has never been taken too seriously. In today's legal world, it is viewed by many as a matter of individual preference that cannot be legislated or taught. I agree that we cannot legislate moral character. No formulaic approach, such as the ethical codes and creeds, can tell us how we should act in a moral sense. Similarly, no set of rules could possibly provide us with the answer to every moral dilemma. While it might be possible to legislate certain behavior, it is impossible to legislate morality.

Schools can help, however, in building moral awareness despite the ineffectiveness of ethical codes.<sup>50</sup> For example, in conjunction with the pervasive method of teaching ethics, professors could encourage "open discussion of moral or reflective judgment" in their substantive courses.<sup>51</sup> In a Tax class, for example, the professor could not only spend time talking about the unique minimum ethical standards that govern tax lawyers, but also throw out the hypothetical: How should a lawyer respond when a client asks what her chances of getting audited are? In a Trial Advocacy class, the professor could ask students how a lawyer should respond to a nasty opponent or rude judge. Faculty also could use many of the newer casebooks and instructional materials that incorporate ethical and moral issues.

By focusing on morality, I am not suggesting that we approach

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49. PROFESSIONALISM REPORT, *supra* note 25, at 15, 22 (emphasis added).

50. Some commentators, such as Professor Deborah Rhode, have "challenged the naysayers who claim that morality is a matter of personal integrity that is gained through early socialization and cannot be acquired in later life." Cary, *supra* note 10, at 312 (citing Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 44-46 (1992) ("Through interactive learning, such as problem solving and role playing, individuals can enhance skills in moral analysis and build awareness of the situational factors that skew judgment.")). For evidence that law schools can promote moral development among law students, 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, 267 (1993); Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 527 (1995).

51. This was a recommendation in the PROFESSIONALISM REPORT, *supra* note 25.

ethics based on religious principles.<sup>52</sup> It would be impossible in today's legal world to ground ethics in religion, due to the vast number of religions that have existed for centuries and are now a part of American society. I am suggesting, rather, that we approach legal ethics based on universal principles: keeping promises, being honest, treating others with respect, and getting away from "our habitual preoccupation with self."<sup>53</sup> These are the types of principles I propose we systemically instill in aspiring lawyers, principles that we all will eventually embrace as morally binding. Under such a system, a lawyer could be a zealous advocate for his or her client, but would do so without using insulting behavior or dishonorable practices. Under this approach to legal ethics, schools would necessarily adopt the pervasive method of teaching. More radically, schools could develop a class or some other forum to discuss important hypotheticals involving moral choice, such as: What should society do about a little girl who steals Godiva chocolate to give to her sick mother on Mother's Day? What should the president of a large automobile manufacturer do when studies show that the gas tank in one of its compact cars explodes on slight impact? What should a faculty member, who serves on a law school's admissions committee, do when the law school dean and president of the university place pressure on him to admit a marginal student due to the fact that the applicant's father is a potentially huge donor of the university?<sup>54</sup> These opportunities for reflective moral judgement would, over time, have a greater impact on increasing professionalism than any of the codes or other ethical mandates have had.

I see a focus on morality as the solution to our profession's ethical dilemma in large part due to the fact that I do not believe ethics can be forced down the throats of law students and practicing law-

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52. For commentary that religion plays a role in legal ethics, see Bruce Buckley, *Are Law Schools Holier Than Ever?*, NAT'L JURIST, Nov. 1999, at 20; Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1254 (1998) (arguing that "the academic discipline of religious studies should have equal status in legal ethics with philosophy").

53. In his recent book, *Ethics for the New Millennium*, the Dalai Lama suggests a similar approach to establishing basic ethical principles in our society. See DALAI LAMA, ETHICS FOR THE NEW MILLENNIUM (1999).

54. One ethics instructor raises excellent fictional examples of moral choice in his ethics course, including Huckleberry Finn's internal monologue over whether to turn in his friend Jim as a runaway slave, in Mark Twain's *Huckleberry Finn*. Bennett, *supra* note 34, at 190 n.34.

yers. I do not believe law schools should mandate pro bono activities during law school any more than I believe ethical codes should impose on lawyers an obligation to do public service. A more effective manner of implanting a sense of public service would be for schools and local bars to offer, on a much-more regular basis, opportunities for students and attorneys to help others and serve public interest. Law schools can expand their clinic programs, which often assist the underrepresented in our society. Law schools can participate in the Volunteer Income Tax Assistance Program run by the Internal Revenue Service to assist low income, disabled, and elderly taxpayers with tax return preparation. Law schools can organize 5K or 10K community runs for the benefit of the local legal aid organization. Faculty and staff can pick a day to help build a house in conjunction with the Habitat for Humanity program. By offering these public service opportunities on a regular basis, and by having students reflect in the classroom on moral values, schools will help students develop a keener ethical awareness.

#### *RECOMMENDATION TO BEGINNING STUDENTS*

It pays to be ethical in today's legal world. Violating any of the minimum disciplinary rules can have a direct economic impact, as can acting in a manner unbecoming of our profession. An increasing number of lawyers are being disbarred, suspended, and held in contempt of court both for violations of minimum disciplinary rules governing lawyer conduct and for behavioral misconduct.<sup>55</sup> Lawyers can lose credibility with the practicing bar and the bench by developing a reputation for breaking the rules or acting unprofessionally. Because referrals are so important in our profession, a reputation as the lawyer who is always the subject of motions to compel could result in a costly day-to-day loss of business.

Ethical lawyering offers many intrinsic rewards as well. In his recent book, *Ethics in the New Millennium*, the Dalai Lama suggests that "those individuals whose conduct is ethically positive are happier and more satisfied than those who neglect ethics."<sup>56</sup> Along those lines, those lawyers who practice with strong moral character are

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55. For some examples of outrageous lawyer conduct that resulted in disciplinary actions, see Cary, *supra* note 10, at 306–08.

56. DALAI LAMA, *supra* note 53, at xii.

able to practice more respectably and happily.<sup>57</sup> Those lawyers who act at all times with an ethical awareness and sense of professional responsibility, gain personal satisfaction knowing that they serve a greater purpose in this special profession. Those who regard lawyering as a profession with aspirational ethical values gain more satisfaction than those lawyers who regard the law as a business.<sup>58</sup> The main reason for job dissatisfaction of young lawyers has to do with the expectations that are placed on them.<sup>59</sup> Many law firms, who treat the practice as a business rather than a profession, have high expectations about their young hires in economic terms of productivity and billable hours. Clients have rising expectations that their lawyers will do whatever it takes to win their case. Young lawyers who entered the profession, not as a calling, but as a means to a better financial life, undoubtedly have high expectations about income. With all these expectations grounded in terms of money and the bottom line, young lawyers find it difficult to practice respectably and happily.<sup>60</sup>

Recognizing the importance of ethics and morality in today's legal world, beginning law students must recognize and be prepared for challenges they will face. They should not let the competitive law school culture instill those values that have caused lawyers to be likened to snakes and sharks. If professors encourage moral relativism or use abusive methods in teaching legal technicalities, students should hold onto their moral precepts and avoid becoming jaded in mastering the legal principles. If the Trial Advocacy instructor suggests using a special chalk that won't erase easily after writing damages on a chalk board in front of a jury, students should question that technique from an ethical standpoint. In intra-mural moot court competitions, students should avoid letting the competitive nature of such activities foster incivility among classmates. As one commentator concluded: "The important thing in law school is to

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57. See, e.g., Snyder, *supra* note 13, at 303.

58. See, e.g., Jerome J. Shestack, *Pursuit of the Good Life in Professionalism*, 28 STETSON L. REV. 271, 271 (1998) (recognizing that "to be happy in our profession requires one to regard lawyering as a 'profession' rather than a business).

59. See Paul D. Carrington, *Legal Education for the People: Populism and Civic Value*, 43 U. KAN. L. REV. 1, 31-32 (1994).

60. See generally Patrick J. Schittz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

hold onto and sharpen your moral tools.”<sup>61</sup> In practice, young lawyers should question how law firms operate and the way legal services are rendered. Young lawyers should not give into the practices of fellow associates who engage in the padding of billable hours. When called upon to represent the worst scoundrel in the community, all in the name of liberty, lawyers should be careful not to lose their own sense of identity and integrity. They should be a zealous advocate for the client, but do so “without guile, trickery, insulting behavior, sharp practices, or dishonor.”<sup>62</sup> If beginning students and young lawyers can meet these challenges, then we have a chance of turning the negative image of our profession around.

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61. Shaffer, *supra* note 44, at 556; see also James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 736 (1992) (“Many students puzzle over how to retain their ordinary moral sensibilities as they make their way into the legal profession.”). “Some suggest that law school transforms students from ordinarily moral people, who experience moral feelings and make moral judgments for themselves, into people who become resistant to taking personal moral responsibility for their own actions.” Myers, *supra* note 10, at 855.

62. Edward M. Waller, Jr., *Professionalism: The Client May Come Second*, 28 STETSON L. REV. 279, 280 (1998); see also Elkins, *supra* note 61, at 739 (exploring “the moral conundrum posed by zealousness”).