

10-1-1975

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Recommended Citation

Dallin H. Oaks, *Ethics, Morality, and Professional Responsibility*, 1975 BYU L. Rev. 591 (2013).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1975/iss3/3>

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Ethics, Morality, and Professional Responsibility

*Dallin H. Oaks**

We are not here to start a law school but to recognize the maturity of one that has come of age with the arrival of its third class, the assembling of most of its faculty, and the completion of its magnificent quarters. It is therefore unnecessary to review the formal charges given to the law school faculty and students two years ago at the ceremony commemorating the opening.¹ Rather, these remarks will add one additional charge, which concerns the J. Reuben Clark Law School's special challenges and opportunities for leadership in teaching ethics, morality, and professional responsibility.

During my first month of law studies at the University of Chicago, 21 years ago this fall, Professor Karl N. Llewellyn introduced us to Carl Sandburg's poem, "The Lawyers Know Too Much." I share it with you now because it provides a suitable introduction for my subject.

"The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know
a dead man's thoughts too well.

"In the heels of the higgling lawyers, Bob
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.

"When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?

"Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

*President, Brigham Young University. The research assistance of Ted D. Lewis is gratefully acknowledged.

1. Copies of the addresses delivered at the ceremony of August 27, 1973 opening the J. Reuben Clark Law School are available on request from the Office of the Dean.

"The work of a bricklayer goes to the blue.
 The knack of a mason outlasts a moon.
 The hands of a plasterer hold a room together,
 The land of a farmer wishes him back again.
 Singers of songs and dreamers of plays
 Build a house no wind blows over.
 The lawyers—tell me why a hearse horse snickers
 hauling a lawyer's bones."²

Despite unprecedented demand for admission to law schools and an unequalled record of public leadership and service by graduates of law schools, the legal profession is still the subject of widespread public misunderstanding and mistrust. For example, a recent nationwide survey of adults in all income groups, conducted by the American Bar Association Special Committee to Survey Legal Needs, of which I am a member, shows that more than one-third of our fellow Americans believe that most lawyers would engage in unethical or illegal activities to help a client in an important case, and that more than one-third also believe that lawyers are not concerned about doing anything with "the bad apples" in the legal profession.³ Happily, seven out of eight of those who had personally used legal services gave their own lawyer high marks for his honesty in dealing with them.⁴ In the same survey, persons were asked to identify the personal qualities of greatest importance in their decision whether or not to retain a particular lawyer. The qualities of greatest importance to this decision were the lawyer's general reputation and his ethical standards, including honesty, integrity, and trustworthiness. The number of persons who mentioned these qualities was three times the number who mentioned competence.⁵

While a significant segment of the public persists in its traditional suspicion of the bar, the legal profession haggles over who is to blame. The organized bar criticizes the law schools for failing to be more effective in teaching professional responsibility, while legal scholars charge the organized bar with failing to be effective in professional discipline. In an atmosphere of heightened concern about the ethical standards of the legal profession, we remain unsure of our remedies.

2. Sandburg, *The Lawyer Knows Too Much*, quoted in K. Llewellyn, *The Bramble Bush* 142 (1951).

3. Curran & Spalding, *The Legal Needs of the Public*, ABA SPECIAL COMM. TO SURVEY LEGAL NEEDS 94, 96 (Prelim. Report 1974).

4. ABA Special Comm. to Survey Legal Needs, Responses to Questionnaire, Part IV, Question 40.

5. *Id.* Part V, Questions 4 & 5.

Retired Supreme Court Justice Tom C. Clark, a leader in the move for higher standards at the bar, has declared that "law schools must consciously undertake the one task that they have universally rejected: instilling normative values in their students." Explaining the increasing importance of teaching honesty and integrity in law schools, he observes that the influences of church and family, which formerly developed these virtues, "have drastically diminished in importance in this country, and no other force has arisen to take their place."⁶

In contrast, Dean Albert M. Sacks of the Harvard Law School is quoted as giving his opinion that the law schools do not have any clear sense of how to teach legal ethics.⁷ Voicing a common opinion of legal educators, UCLA Law Dean Murray L. Schwartz argues that formal legal education is not likely to contribute much to the moral and ethical development of law students because their notions of ethics and morality are established before they arrive at law school and because law schools are not organized or conducted to inculcate such standards in any case.⁸ This is because the law teacher is typically theoretical, skeptical, scholarly, and remote from his students, and all of these characteristics inhibit instruction in ethics and morality.

The promotion of moral and ethical concerns among law students is apparently no more effective in church-related institutions. In the words of Dean Thomas L. Shaffer of Notre Dame Law School, "most of the law faculties at what were once thought to be the great Protestant Christian universities appear uninterested in their institutional heritage, if not ashamed of it," and "[l]aw faculties in Roman Catholic universities have rarely passed beyond fruitless phrases about natural law, which long ago became a banner rather than an idea, and is now neither banner nor idea."⁹

Former Stanford Dean Bayless Manning agrees that law schools cannot teach a student to become an ethical human being. He points the finger at the organized bar, charging that "if the bar's disciplinary standards were clear and stringent and en-

6. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 252-53 (1975).

7. Brooks, *The President's Page*, 18 BOSTON B.J. 3, 6 (1974), quoted in Manning, *A Socio-Ethical Foundation for Meeting the Obligations of the Legal Profession*, 5 CUMBERLAND-SAMFORD L. REV. 237, 238 (1974).

8. Schwartz, *Legal Ethics v. Common Notions of Morality*, LEARNING AND THE LAW 40, 47-48 (Spring 1975); see also Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 265-66, 273-74 (1975).

9. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721-22 (1975).

forcement an ever-present reality, the law schools could and would drive home to their students that it is a condition of being in the profession that the lawyer be not only a noncriminal but an exemplar of lawful conduct . . . [which would be] the kind of moral and legal leadership the public is entitled to expect from . . . officers of the court."¹⁰

Our two honored judicial guests and honorary degree recipients have both been leaders in trying to raise the ethical standards of the bar. For example, during his term as President of the American Bar Association, Justice Lewis F. Powell, Jr. made professional ethics a major area of emphasis, launching an ambitious program that was to culminate in a full review of the old ABA Canons of Professional Ethics.¹¹ Chief Justice Warren E. Burger has repeatedly used the weight of his high office, such as in his remarks this morning¹² and in his influential annual addresses on the "State of the Judiciary," to call for and point the way toward increased attention to ethical questions by law schools and to professional discipline by the organized bar.¹³

As a consequence of these efforts and others, we are in a time when ethics, morality, and professional responsibility are among the most important concerns of the legal profession, including practitioners, teachers, and the judiciary.

There are also stirrings of concern about the deeper values from which we obtain our commitments to law, morality, ethics, and professional responsibility. In his recent book, *The Interaction of Law and Religion*, Professor Harold J. Berman of the Harvard Law School comments on the "integrity crisis" of Western society, observing that "[o]ur whole culture seems to be facing the possibility of a kind of nervous breakdown."¹⁴ The major symptom of this threatened breakdown is the apparent widespread loss of confidence in our two most basic institutions, law and religion. He finds one cause of the current disillusionment in "the too radical separation of one from the other."¹⁵ Law helps to give society its cohesive structure, but it is religion that

10. Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821, 823 (1974); see generally Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?* 1974 U. ILL. L.F. 193.

11. Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 825 (1965).

12. Burger, *The Role of the Lawyer in Modern Society*, *supra* this issue.

13. Burger, *The State of the Judiciary—1975*, 61 A.B.A.J. 439, 440-41 (1975); see also Burger, *The Future of Legal Education*, 15 STUDENT LAWYER J. 18 (1970).

14. H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 21 (1974).

15. *Id.* at 23.

gives life and emotional attachment to that structure. In the forthcoming and final book of their *Story of Civilization* series, Will and Ariel Durant observe that "the Twentieth Century approaches its end without having yet found a natural substitute for religion in persuading the human animal to morality."¹⁶ Berman says that the secularists and rationalists, who rely on an intellectual commitment to law, have drained law of its emotional vitality because their utilitarian ethic cannot sustain public support for the law. The emotion that ties us to the law is our belief in its "inherent and ultimate rightness," a belief fostered most effectively by religion. Consequently, Professor Berman concludes that "law and religion stand or fall together; and if we wish law to stand, we shall have to give new life to the essentially religious commitments that give it its ritual, its tradition, and its authority"¹⁷

To me there is a close relationship between the weakening of religious faith and commitment to transcendent values on the one hand, and on the other, the legal profession's current and intense preoccupation with legal rights and procedures, which sometimes seems to hamper our view and pursuit of the ultimate goals of truth and justice. As religious commitments weaken, we are more likely to have our attention diverted from ultimate values to others merely complementary.

While serving as a law clerk for the late Chief Justice Earl Warren of the United States Supreme Court, I read hundreds of handwritten petitions in which persons convicted of crimes sought relief from the Nation's highest court. I was struck with the fact that these prisoners rarely asserted their innocence. While understanding the reasons why an appellate court must focus on the procedural fairness of the trial and does not ordinarily review the question of guilt or innocence, I was nevertheless amazed that nonlawyers convicted of crimes realize so soon that once they are convicted at trial, our criminal justice system focuses on procedure, treating the fact of their guilt or innocence as almost entirely beside the point. The preoccupation with procedure is coming to be predominant, even in the trial court. Justice Walter V. Schaefer of the Illinois Supreme Court is only one of many astute judges who has complained that

[A]lmost never do we have a genuine issue of guilt or innocence today. The system has so changed that what we are doing in the

16. Merry, *The Age of the Durants*, the National Observer, Aug. 2, 1975, at 20, col. 1.

17. BERMAN, *supra* note 14, at 24-25, 36-37.

courtroom is trying the conduct of the police and that of the prosecutor all along the line. Has there been a misstep at this point? at that point? You know very well that the man is guilty; there is no doubt about the proof. But you must ask, for example: Was there something technically wrong with the arrest? You're always trying something irrelevant. The case is determined on something that really hasn't anything to do with guilt or innocence.¹⁸

The operation of the exclusionary rule, which I have criticized elsewhere,¹⁹ provides another example.

Some of you will be saying, "But our procedural guarantees are designed to serve the ends of truth and to protect personal rights of fundamental importance to truth and justice." I agree. I am criticizing, not our concern with procedures, but our preoccupation, in which we may lose sight of the fact that our procedures are not the ultimate goals of our legal system. Our goals are truth and justice, and procedures are but means to these ends. When we lose sight of this relationship, then some procedures can cease to serve their designed objectives. In the long run that result will discredit law and the legal profession. "Too many slippery ifs and buts and howevers," Sandburg says, "[t]oo many doors to go in and out of. . . . Why does a hearse horse snicker [h]auling a lawyer away?"

Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals. It is surely past time for serious consideration of the recent American Assembly charge that

Too often our adversary techniques conceal or distort the truth rather than promote its discovery. The legal profession should consider and explore appropriate modifications of adversary procedures for the purpose of better determining the truth, and should formulate ethical prescriptions embracing a higher professional duty to seek the truth.²⁰

Judge Marvin E. Frankel developed this point brilliantly in "The Search for Truth," his recent Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York. La-

18. Schaefer, *A Center Report/Criminal Justice*, THE CENTER MAGAZINE 69, 76 (Nov. 1968), quoted in M. Frankel, *The Search for Truth—An Umpireal View*, 31st Annual Benjamin Cardozo Lecture to the Association of the Bar of the City of New York, Dec. 16, 1974, at 13-14.

19. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

20. THE AMERICAN ASSEMBLY, *LAW AND A CHANGING SOCIETY* 12 (1975).

menting the fact that the adversary process "often achieves truth only as a convenience, a by-product, or an accidental approximation," Judge Frankel observes that "our relatively low regard for truth-seeking is perhaps the chief reason for the dubious esteem in which the legal profession is held."²¹ And the point reaches beyond reputation to reality. Judge Frankel suggests that we are not likely to promote high moral standards in a dispute-resolving system that focuses on something other than truth: "In a system that so values winning and deplors losing, where lawyers are trained to fight for, not to judge, their clients, where we learn as advocates not to 'know' inconvenient things, moral elegance is not to be expected."²²

To cite a related deficiency, as a profession we are preoccupied with rights and, as Elliot Richardson noted a few years ago, "have increasingly and unceremoniously ignored the subject of obligations. At no time in history have we ever been more deficient in our sense of obligation than we are today. The hoary and hallowed indebtedness of a person to family, to tribe, to customs and gods, seems to have slipped away like a guest at a much too crowded party."²³ The history of the American Bar Association's Section of Individual Rights and Responsibilities provides an illustration. The word "*responsibilities*" was added to the title of that section by some farsighted persons who foresaw what might happen but were unable by that measure to prevent it. As a member of that section from the time of its founding, I have seen it concentrate almost exclusively upon the subject of *rights*. This is the legal profession's instinctive thrust. In relation to rights, we appear as gladiators, guarantors, and enforcers. On the subject of responsibilities, the law is a schoolmaster and the legal profession its faculty. And who would not prefer the role of champion of rights rather than preacher of responsibilities? Clients conventionally retain lawyers to secure an advantage under the adversary system, not to receive a lecture on their own deficiencies and their advocate's higher loyalties to the law. "Perhaps obligations took their quiet departure in the face of the rampant relativism of the day," Elliot Richardson suggests. "A sense of obligation implies, after all, a knowledge of right and wrong, and this in turn implies standards on which a society agrees."²⁴

So what, if anything, can the law schools do?

21. M. Frankel, *supra* note 18, at 12-19.

22. *Id.* at 40.

23. Richardson, *On Behalf of Obligations*, 8 LINCOLN L. REV. 109 (1973).

24. *Id.* at 110.

Responsibilities of both lawyers and clients should be no stranger to the law school curriculum. Law schools can surely sensitize their students to professional problems by identifying and clarifying issues of legal ethics, a conventional and well recognized technique of law teaching.²⁵ To fail in this minimal role is to leave law students to infer that value judgments are not a significant part of a lawyer's function.²⁶ Law faculties must at least overcome their traditional lack of interest in moral, ethical, and professional problems. Conscientious and articulate disagreement among different law teachers on a particular moral and ethical issue is surely preferable to implied pretensions of unanimity that students will disbelieve and read as judgments of indifference on matters of ethics and morality.

But law schools can do more than this, and the J. Reuben Clark Law School has the most promising ideals and circumstances to be a leader in this important area. Notre Dame Dean Thomas L. Shaffer has noted sadly that "Christianity has had too little to do with what is hopeful in the American legal profession. I believe that a motivating reason for that failure is our diffidence in talking about religious commitment; when few talk about religion, personal value is inaccessible and public style becomes irreligious. Too many candles are under too many bushels."²⁷

We have no diffidence in talking about religious commitment at Brigham Young University, and we will have none in the J. Reuben Clark Law School. Religious commitment, religious values, and concern with ethics and morality are part of the reason for this school's existence, and will be in the atmosphere of its study. As President Marion G. Romney,²⁸ our third honorary degree recipient, noted in our opening ceremonies, this law school was established to provide an institution in which students could "obtain a knowledge of the laws of man in the light of the laws of God," and the trustees would like this school to reflect the aura of President J. Reuben Clark: "faith, virtue, integrity, industry, scholarship, and patriotism."²⁹

If it is true that law students cannot be taught ethics and morality in law school because those value commitments are

25. Weckstein, *supra* note 8, at 274.

26. Schwartz, *supra* note 8, at 50.

27. Shaffer, *supra* note 9, at 722.

28. Second Counselor in the First Presidency of The Church of Jesus Christ of Latter-day Saints and Second Vice President of the Board of Trustees of Brigham Young University.

29. Addresses at the Ceremony Opening the J. Reuben Clark Law School, Aug. 27, 1973, at 20-22.

fixed before they enroll, then that fact, an excuse for other law schools, becomes a unique opportunity for this one. Most of the students and faculty at this law school are rooted in the same religious tradition, and that tradition more than any other fact accounts for their choosing this setting to pursue their professional goals. The common ideals, principles, and commitments of that tradition should make this institution superbly effective in strengthening the moral, ethical, and professional foundations that compose the finest heritage of our profession.

Because of our reliance on these common ideals, principles, and commitments, the new building being dedicated today should not be looked on as a place where we apply some unique formula for inculcating ethics and morality. It is, rather, a monument to our determination that the fairness, decency, integrity, virtue, and love of truth taught at the hearthstones of thousands of homes throughout the land shall have a concentrated impact on the legal profession and the Nation's laws. It is in these homes, by God-fearing parents, that the young men and women who will be our graduates have already gained that intangible moral instinct that will bear its fruits in the legislative halls, the courtrooms, the offices, and other private and public places in the years to come. Thus, this consideration of our law school's special challenges and opportunities would be incomplete without some grateful acknowledgement for those homes, those fathers, and those mothers. They may well be the most important teachers our graduates will ever have.

To illustrate what the law school could do with this unique resource, I will borrow and share with you an excerpt from a memorandum that Acting Dean Carl S. Hawkins circulated to the law faculty just a month ago inviting them to begin a process of defining "The Distinctive Qualities of the J. Reuben Clark Law School." That memorandum included the following proposals:

1. We should be distinguished by the degree of our commitment to the development of our individual students, based upon our revealed knowledge as to the unique worth and dignity of each individual as a child of God.
2. The Law School should be distinguished by its efforts to research, publish, and teach the Judeo-Christian value assumptions underlying the development of our legal system.
3. The Law School should be distinguished by its efforts to discover and articulate
 - a. The ultimate spiritual values underlying our Constitutional system and how they may be adapted to different cultures,

- b. The ultimate spiritual values underlying our Common Law legal system, and
 - c. The moral and spiritual values underlying professional responsibility.
4. The Law School should be distinguished by its efforts to research, publish, teach, and work for legal reform in support of family institutions.
 5. The Law School should be distinguished by its efforts to develop lawyering skills as tools to serve the needs of people in the light of their unique worth and dignity as spirit children of God.³⁰

These are only illustrations, but sufficient to highlight the unique opportunities of and challenges to the J. Reuben Clark Law School. Whether or not there is an excess of law graduates now or in the future, the law, the legal profession, and this Nation have need of a law school such as this, and we are proud to introduce you to its faculty, its students, and this magnificent building.

30. C. Hawkins, Memorandum to the Law School Faculty, July 23, 1975, at 4-5.