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Authority of the Law? The Contribution of Secularized Legal Education to the Moral Crisis of the Profession

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AUTHORITY OF THE LAW? THE CONTRIBUTION OF SECULARIZED LEGAL EDUCATION TO THE MORAL CRISIS OF THE PROFESSION

JESSICA J. SAGE*

I. INTRODUCTION

"So why did you go to law school?" This question is typically asked of every first-year law student countless times. The answers to this question fall across a spectrum as diverse as any law student body. Some law students pursue law because they want to protect the defenseless and oppressed, others to serve justice, others for financial aspirations, and others for reasons too vast to mention. Despite these varied motivations, there simply is an essence about the law that intrigues, inspires, and draws many people to its study.

At one time, the practice of law was viewed as a noble profession,[1] but over the last century the study of law has undergone a significant transformation and earned itself a reputation amongst the public as

* J.D. Candidate, Florida State University College of Law, 2003. B.S., United States Air Force Academy, 1995; M.B.A., Colorado State University, 1999. I first thank God, the source of all wisdom and knowledge. Next, I extend my sincere thanks and gratitude to John Eidsmoe, Tahirih Lee, Don Rubottom, and Michael Schutt for their insightful reviews and constructive critiques of my earlier drafts. I further thank the Florida State Law Review, and I finish with my warmest appreciation to my husband, Chris, who endured numerous versions and offered incredible support and encouragement.

1. *E.g.*, DAVID HOFFMAN, A COURSE OF LEGAL STUDY; RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES iii, xi-xii (1817) (discussing the virtuous vocation of law and quoting William Blackstone, who stated that law is a profession "which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its *theory* the noblest faculties of the soul, and exerts in its *practice* the cardinal virtues of the heart").

one of being unethical and greedy, and internally as one composed of unsatisfied and unhealthy individuals.[2] As a result, many legal educators, ethicists, psychologists, philosophers, and theorists have spent significant time and resources to assess and comment on the current condition of the legal profession.[3] The consensus is that the profession is mired in a dramatic decline of professionalism, a plummet of public opinion, and an increased number of dissatisfied and dysfunctional attorneys.[4] Susan Daicoff calls this the "tripartite crisis," of the profession.[5] Although the existence of the *tripartite crisis* is agreed upon, discussion still indicates that a consensus has not been reached as to the cause or proper response.[6] As one professor-practitioner team observed, "[L]awyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes. We want to be happy in our professional lives without investigating seriously

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2. *See, e.g.*, Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUTGERS L.J. 143, 148 (1998) (discussing the hundreds of articles and books written about the "crisis" in the legal profession and quoting one prominent judge who cited causes of the crisis to be the commercialization of law as simply a business, the advent that lawyers are amoral "hired guns," and the lost sense of a calling within the profession).

3. *See, e.g.*, Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1340 (1997) (documenting the research and commentary that supports the basis of the "tripartite crisis"); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (citing numerous studies that document the level of depression, anxiety, alcoholism and drug abuse, divorce, suicide, and overall poor physical health prevalent within the legal profession); Schutt, *supra* note 2, at 147-51.

4. I borrow the label of the "tripartite crisis" from Susan Daicoff as an encompassing term to describe the current state of the legal profession. Daicoff, *supra* note 3, at 1340; *see also* Lawrence Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing the Profession From Its Roots*, 13 J.L. & HEALTH 1 (1999) (highlighting the studies showing the large number of legal professionals experiencing emotional distress, depression, anxiety, and addictions and proposing ten things that law schools should communicate to students in order to promote a healthy, happy, and balanced life in the practice of law); Schiltz, *supra* note 3, at 915-20 (discussing the well-documented social ills caused or fueled by the environment of the big law firm practice); Schutt, *supra* note 2, at 147 (citing startling poll results revealing the public opinion of lawyers' ethical standards to be "low" or "very low" and the fact that only twenty percent of lawyers were "very satisfied" with work).

5. Daicoff, *supra* note 3, at 1340-41.

6. *See, e.g.*, Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 626 (2001) (calling for the recommitment of law as a learned profession under Karl Llewellyn's "Grand Tradition of the Common Law" and proposing a combined social science and humanities approach to legal education); Subha Dhanaraj, *Making Lawyers Good People: Possibility or Pipedream?*, 28 FORDHAM URB. L.J. 2037 (2001) (discussing competing views of moral development, but concluding that moral education is critical to the legal profession); Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403, 424-32 (1992) (identifying the need for professionalism and "tradition" and proposing they consist of six interrelated values: excellence, integrity, respect for the system and rule of law, respect for other lawyers, commitment to accountability, and responsibility to adequately distribute legal services).

why many of us are unhappy. We want, in short, to moralize without examining our morals."[7]

Many commentators note the role law schools and the bar have played in perpetuating the *tripartite crisis* and the responsibilities they should assume in addressing it.[8] One clinical professor presents ten propositions that "collectively represent an approach to life and law," an approach that this professor states is currently undermined by law schools.[9] He discusses how law schools err by emphasizing a necessary disconnect of a student's conscience from the practical study of law.[10] I agree that this noted disconnect is a critical component cause of the profession's crisis state, but I would extend this proposition by suggesting that law schools commit an even greater error by not only disconnecting one's conscience, but by also disconnecting the authority of the law from the study of law.

The shift to a scientific and amoral approach to the study of law manifested by the current legal academia has caused many legal professionals to deny an external moral authority and rely upon themselves to discover and define an individual or relative sense of morality. This reliance upon self-enlightenment has created a tremendous burden on the conscience of the legal professional and, in application permits lawgiving by the judiciary and compromises the fidelity of law. This idea, exemplified primarily in *legal positivism*, is the premise upon which I enter the *cause of crisis* discussion. I submit that the *tripartite crisis* is a direct result of a concerted effort by institutionalized legal education to separate the study of law from its external moral authority, and I offer that the only hope to alleviate the *tripartite crisis* is to reintegrate the conscience and reconnect the lawgiver to the study of law.

While I am not an expert in legal education, I do offer a pertinent perspective of this law student's experience, research, and disappointment in the current legal curriculum and philosophy taught by many American Bar Association (ABA) accredited institutions. When I decided to go to law school, I entered as a citizen wanting to know more about the laws that affect every aspect of American life. I ex-

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7. Terrell & Wildman, *supra* note 6, at 403.

8. *See* Krieger, *supra* note 4, at 8 (crediting the assumptions by law schools and attorney communities that promote the notions: "only the 'best' will reliably find success in their lives," and discussing the pressures to perform); Terrell & Wildman, *supra* note 6, at 404 (crediting the Bar with directing law schools to focus on moral diversity and economic competition versus teaching professionalism and assigning the responsibility to invigorate the discussion of professionalism to the Bar).

9. Krieger, *supra* note 4, at 7-8. Clinical Professor Lawrence Krieger is the Director of Clinical Externship Programs at the Florida State University College of Law. He has written and made many presentations on the role legal education has played and should be playing in making healthy and happy legal professionals.

10. *Id.*

pected to learn the rule of law and develop the skills necessary to seek justice and uphold *right*. Admittedly naive, I expected law school instruction to include a basis from which law finds its authority beyond the bench and beyond man. I expected to approach graduation inspired and motivated about entering the profession of law, but instead my expectations remain overwhelmingly unfulfilled by the legal positivism and moral relativism endemic in law school today.

In the first part of this Paper, I address the contribution law schools have made to the *tripartite crisis* by instructing that man is the sole creator and authority of the law and that law evolves through the synthesis of man's wisdom. I begin by reviewing the history of American legal instruction and its acceptance of a scientific approach to the study of law. I discuss the transition from traditional legal philosophy to a moral relativism that permeates today's legal curriculum. As a result of this departure, the legal profession consists of lawyers and judges practicing law with no moral compass and without the authority to set standards of ethical conduct.

In the second part of this Paper, I review the ABA's impact on the profession through its accreditation of legal education and its evolution of expected standards of conduct. The ABA's concern over the profession's current status has brought about ethics commissions, committees on professional responsibility, and increasingly more model rules. However, these attempts to address the crisis do not penetrate the heart of the issue: that many ABA-accredited legal institutions teach as if morality and truth are separate from law and that law is ever-evolving through the enlightenment of men. This legal philosophy leaves no one, including the bench and the bar, with the moral authority to say what is right and what is wrong, despite the perpetual efforts of both the bench and bar to do so. I discuss the impact of this legal philosophy on the rule of law. I identify the moral authority missing from current legal instruction and suggest that without acknowledgement of this authority the legal profession will simply continue its demise deeper into the *tripartite crisis*.

II. HISTORY OF LEGAL INSTRUCTION

A. America's Early Legal Instruction

Before the establishment of law schools, the American lawyer began with a legal apprenticeship and the study of the *Commentaries on the Laws of England* by Sir William Blackstone.[11] Blackstone's in-

11. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Wayne Morrison ed., Cavendish Publishing Limited 2001) (1756); ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 19, 21 (1953); HOFFMAN, *supra* note 1, at xiv; JOSEF REDLICH, THE

struction reflected the 18th Century consensus that human law is subordinate to "the law of nature and the law of revelation."[12] His legal instruction began with these foundations before even mentioning the law of nations or municipalities.[13] This premise evidenced Blackstone's belief in God and eloquently articulated the development of the English Common Law from the Holy Scriptures.[14]

COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 7-8 (1914); s*ee* HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 4 (Institute in Basic Life Principles 1999) (1994) (summarizing the history of American legal instruction).

12. 1 BLACKSTONE, *supra* note 11, at 31-32.

13. *Id.* Municipal law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is 'right' and prohibiting what is wrong" that governs districts, communities, or nations. It is distinguished from natural, or revealed law "which is the rule of moral conduct." *Id.* at 33.

14. *Id.* at 29-32. The following excerpt from *Commentaries on the Law of England*, Volume 1, Section 2, is William Blackstone's premise of the law of nature and the revealed law. A premise that he found absolutely necessary to ensure the proper subordination of civil law to the superior:

> Law, in its most general and comprehensive sense, signifies a rule of action . . . . [a]nd it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.
>
> Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. . . .
>
> Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependant being. A being independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. . . . And consequently, as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.
>
> This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.
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> Considering the creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law.
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> But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their enquiries, and the greater part of the world would have rested content in mental indolence, and ignorance its insepa-

rable companion. As therefore the creator is a being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the role of obedience to this one paternal precept, 'that man should pursue his own true and substantial happiness'. This is the foundation of what we call ethics, or natural law. . . .

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the talk would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, has been pleased, at sundry times in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they are revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority: but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. . . .

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal,

Blackstone taught that man was "subject to the laws of his creator" and that "man depends absolutely upon his maker for every thing," making it necessary for man to "conform to his maker's will."[15] He spoke of "eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he [the creator] has enabled human reason to discover."[16] Blackstone approached the study of law with the underlying belief that "the imperfection, and the blindness of human reason" limited man's ability to attain knowledge of truth separate from God and the Holy Scriptures.[17] He professed that the divine law of infinite authority is not attainable by reason, but only by revelation; and stated that:

> [T]he revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers . . . . [b]ecause one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be at law.[18]

Blackstone further instructed:

> This law of nature . . . dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[19]

This submission to God, creation, and revelation cited by Blackstone was the foundation of law that dominated legal education and guided America's Founding Fathers.[20]

> without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse called "the law of nations,": which as none of these states will acknowledge a superiority in the other, cannot be dictated by either; but depends entirely upon the rules of natural law . . . being the only one to which both communities are equally subject: and therefore the civil law very justly observes . . . .

1 BLACKSTONE, *supra* note 11, at 29-32.

15. *Id.* at 29.
16. *Id.* at 30.
17. *Id.* at 30.
18. *Id.* at 31-32.
19. *Id.* at 30-31.
20. *Id.* at 29-32; *see* DECLARATION OF INDEPENDENCE (1776):

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands . . . and to assume among the powers of the earth,

The study of *Blackstone's Commentaries* and apprenticeships remained the primary means of legal education in America until the late 1800's despite the founding of Tapping Reeve Law School in 1784, and the subsequent establishment of Harvard Law School in 1817 and Yale Law School in 1843.[21] These institutions were the first to implement a systemized legal curriculum including the study of the Bible, Common Law, Moral and Political Philosophy, Elementary and Constitutional Principles of Municipal Law, and the Law of Nations.[22] Schools typically used the traditional lecture or textbook methods for instruction, which organized the law in definite courses and systematically presented the law in a methodical and comprehensive manner to relay the principles of common law and equity.[23] Students also read court opinions and studied cases, not to discover what the law is, but "always in a purely illustrative way" to better understand the principles of law as they applied to specific legal controversies.[24]

B. From Blackstone's Commentaries to Langdell's Case Method

When Charles William Eliot assumed the presidency of Harvard College in 1869, he set out to propagate his belief that man's knowledge increased through a scientific mind. To propagate this belief, he fashioned a new faith for American education, a faith in man and his ability to gain knowledge through scientific discovery independent from the Creator. Eliot began the secularization process of legal education at Harvard Law School by offering a professorship to Christopher Columbus Langdell.[25] Eliot selected Langdell because he shared

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> the separate and equal station to which the Laws of Nature and of Nature's God entitles them . . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . . And for the support of this Declaration, with a firm reliance on the protection of Divine Providence.

Id.; HOFFMAN, *supra* note 1, at xi-xvii, 31 (stating "[t]he common law of England, which forms the great body of our own [American] law"); *see also* JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 417 (6th prtg. 2003) (examining the education faith of the founding fathers and documenting that the principles relied upon by Blackstone were the same principles the Founding Fathers relied upon to declare independence from England and begin a new nation).

21. REDLICH, *supra* note 11, at 7-8; Tapping Reeve and the Litchfield Law School, *at* http://www.jud.state.ct.us/lawlib/History/tappingreeve.htm (last visited Oct. 14, 2003); Welcome to Harvard Law School, *at* http://www.law.harvard.edu/about/tour (last visited Oct. 14, 2003); Yale Law School, *at* http://www.law.yale.edu (last visited Oct. 14, 2003).

22. Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 308 (2003); s*ee* HOFFMAN, *supra* note 1, at xvi-xvii, xxxi (outlining the curriculum for law students in 1817).

23. REDLICH, *supra* note 11, at 8.

24. *Id.*; TITUS, *supra* note 11, at 5.

25. When Harvard College received its first charter in 1634, it adopted the seal of "three open books on the field of an heraldic shield, with the motto 'Veritas' (Truth) inscribed." The president of Harvard early in the nineteenth century, Josiah Quincy, ex-

his commitment to convert education, more particularly legal education, to an inductive science.[26] Langdell expressly designated his approach as a "scientific method" and enunciated:

> First, that the law is a science; secondly, that all the available materials of that science are contained in printed books. . . . If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it.[27]

After ten months of his professorship, Langdell was elected as the first dean at Harvard Law School and served as dean for twenty-five years.[28] During his deanship he implemented this scientific method by championing the case study method and appointing professors that agreed with this approach.[29] The case method revolutionized legal philosophy by equating the science of law with the evolutionary principles manifested by Charles Darwin's theories on the origins of life. Langdell stated that "[l]aw, considered as a science, consists of certain principles or doctrines. . . Each of these doctrines has arrived at its present state by slow degrees; in other words; it is a growth, extending in many cases through centuries."[30]

At the time, this philosophy directly contradicted the current philosophy and jurisprudence of Blackstone and traditional legal educators.[31] Langdell replaced the lecture method of imparting law as logically connected principles and norms with the case study method, instructing law students to derive the rules of law step-by-step through

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plained that "the books were probably intended to represent the Bible; and the motto to intimate, that in Scripture alone important truth was to be sought and found, and not in words of man's devising." A few years later, Harvard changed its motto to "In Christi Gloriam" (In Christ Be Glory) and then again to "Christo et Ecclesiae" (For Christ and Church). But nearly 200 years later, President Charles William Eliot, 1869 to 1909, removed any reference to Christ and the church and adopted "Veritas" (Truth) alone, separate from the divine. Eliot believed that man's knowledge increased through man's scientific discovery alone, and recruited professors who shared this belief. TITUS, *supra* note 11, at 1-2 (quoting from JOSIAH QUINCY, THE HISTORY OF HARVARD UNIVERSITY 48 (1840)).

26. REDLICH, *supra* note 11, at 15; TITUS, *supra* note 11, at 3.

27. REDLICH, *supra* note 11, at 15 (quoting Langdell's explanation of his scientific approach to legal studies during a speech to the Harvard Law School Association on November 5, 1886).

28. TITUS, *supra* note 11, at 4.

29. *Id.*

30. *Id.* at 11 (quoting C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS, PREPARED FOR USE AS A TEXT-BOOK IN HARVARD LAW SCHOOL vi (1871)); TITUS, *supra* note 11, at 4.

31. *See* 1 BLACKSTONE, *supra* note 11, at 40 (stating that the laws laid down by God are "eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms"); REDLICH, *supra* note 11, at 45 (defining jurisprudence as the leading fundamental principles that are more or less common to the modern law of every civilized people).

the analysis of court opinions.[32] Langdell taught that cases "were the 'original sources' of legal doctrines and principles" and acted as the samples for the legal scientist's study.[33] Therefore by studying these samples, the law student could systematically extract the rule of law.[34] The student's analytical decomposition of each case was to be done as independently as possible with guidance from the teacher.[35] This approach, known as the "Socratic Method," forbade the student from simply accepting any legal doctrine.[36] Rather, it held that legal doctrines are in a constant state of flux and are continually to be brought into question.[37] Langdell's legal instruction expressed a certain social order in judicial form.[38] He did not simply introduce a new teaching method or technique, but rather he introduced a faith in man's ability to discern law apart from the Creator and the authority of the law.[39]

By design, Langdell set out to eliminate both God and the Holy Scripture from the study of law. His case study method approach brought about a change not only in the method of instruction, but also in the law school curriculum. The first year curriculum involving the Bible, common law, and moral and political philosophy was replaced with fields of law including contracts, torts, property, civil procedure, and criminal law. He replaced the belief in moral truth and a lawgiver with the positivist belief that legal doctrines and principles of law were "living" and developed by men over a long period.[40] The underlying presumption of Langdell's case study method was the belief that law is merely a body of rules laid down by human lawmakers, and therefore the legal analysis of cases is the best manner in which to learn. With this presumption, the case study approach was thought to be the only way to create predictability in the application of evolving legal principles. By 1880, Langdell's scientific approach gained momentum and began to form the benchmark for institutionalized legal education.

Dr. Redlich, prominent member of the Austrian Parliament and Professor of Law at the University of Vienna, conducted a study of America's legal education in 1913.[41] His task was to assess the methods of instruction used within law schools. He spent a great deal of

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32. REDLICH, *supra* note 11, at 13; Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 128 (1994).
33. REDLICH, *supra* note 11, at 11; TITUS, *supra* note 11, at 5.
34. REDLICH, *supra* note 11, at 11; TITUS, *supra* note 11, at 5.
35. REDLICH, *supra* note 11, at 13.
36. *Id.* at 12-13.
37. *Id.* at 13.
38. *Id.*
39. TITUS, *supra* note 11, at 5.
40. *Id.* at 5-6.
41. REDLICH, *supra* note 11, at vi.

time examining the case study method and its apparently sudden, almost inexplicable triumph in American legal education.[42] He stated that the "development of the case method in American law schools has produced a far-reaching change in the general conception of the nature and purpose of legal education."[43] He found that the case study method truly imparted legal knowledge by allowing students to work through abstract legal thoughts for themselves.[44] However, he feared that too much "is demanded and expected of a novice in the law school." He discussed that students are assumed to "study for themselves the standard works of English and American law, such as Blackstone, Story, [and] Anson," but concludes that under the case study method "students never obtain a general picture of the law as a whole," nor do they get the historical survey necessary to comprehend legal concepts and doctrines.[45]

Despite these shortcomings, nearly all law schools in the nation implemented Langdell's case study method as the primary approach to legal studies by 1914.[46] Later developments in the case study method recognized the need for students to be exposed to the broader context of law and attempted to address this by inserting non-case materials in casebooks.[47] Nonetheless, varying forms of the case study method and legal positivism have remained relatively unchanged within America's legal institutions since.[48]

I do not disparage the reason and scientific discovery practiced within the case study method, for in themselves they effectively engage and challenge students of the law. But when they are combined with legal positivism, left without historical perspective, and independent from the principles impressed by the Creator, they provide no limits on the legal profession and no constant for the rule of law.[49] By eliminating a divine authority, Langdell directed American legal institutions down a wide path lacking eternal truths. Many protested Langdell's beliefs and method of instruction, but his scientific approach gained influence and momentum as it trained the next generation of legal professionals and recruited many faithful supporters, particularly Oliver Wendell Holmes, Jr.[50]

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42. *Id.* at 15.
43. *Id.* at 25.
44. *Id.* at 29.
45. *Id.* at 30, 41-43.
46. *See id.* at 29-35 (discussing the penetration and success of the case method in American law schools by 1914).
47. HARNO, *supra* note 11, at 68-69.
48. TITUS, *supra* note 11, at 5-6.
49. *See* 1 BLACKSTONE, *supra* note 11; HOFFMAN, *supra* note 1, at xxxi.
50. TITUS, *supra* note 11, at 6.

C. Influence of Holmes

Oliver Wendell Holmes, Jr. is an icon within late-twentieth-century-American jurisprudence and has been credited as one of the greatest influences in the divergence from classical legal philosophy and legal instruction.[51] Holmes graduated from Harvard Law School and was nominated to the Supreme Court of the United States by President Theodore Roosevelt in 1902.[52] Between his twenty-nine years on the Court, his professorship at Harvard, and publications on the common law, Holmes, as one of the first legal pragmatists, propagated his beliefs in the evolutionary, scientific approach to law:

> The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development through many centuries . . . . In order to know what it [law] is, we must know what it has been, and what it tends to become.[53]

Under this belief, Holmes declared *The Common Law* "dead" claiming that "the theories and points of view that were new in it, now have become familiar to the masters and even to the middle-men and distributors of ideas—writers of textbooks and practical works."[54] In other words, Holmes now considered *The Common Law* a classic and dismissed it as an originating source of legal theory.[55]

Holmes' legal philosophy, developed under Langdell, served as the mentor and guide for generations of progressive legal scholars, including Roscoe Pound, Karl Llewellyn, and Richard Posner.[56] His legal philosophy defined the role of lawyers and judges as engineers for the "good" of society. Holmes believed the "scientific" legal scholar or judge should dismiss deductive reasoning for the evaluation of competing social ends in light of statistics, economics, and social desires.[57] He intertwined the "scientific" quest with the social engineer-

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51. Mark DeWolfe Howe, *Introduction* to OLIVER WENDELL HOLMES, THE COMMON LAW, at xi (Mark DeWolfe Howe ed., 1963); *see* John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471, 489 (2000) (referring to Justice Holmes as Justice Story's "positivist counterpart" and as the one leading American legal thought away from natural law. Baker goes on to cite Holmes as the creator of "substantive due process," which relied upon the assumption that "federal courts have the power to use their judgment as to what the rules of common law are" as a means to substantiate state economic regulations); Schutt, *supra* note 2, at 155-58 (stating that Holmes' view of law as a tool for social engineering "was the initial break with the traditional view of the legal profession").

52. The Legal Information Institute, Biographies of the Justices, Associate Justices, *at* http://supct.law.cornell.edu/supct/cases/judges.htm (select: Oliver W. Holmes (1902-1932)) (last visited Feb. 6, 2004).

53. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963).

54. Howe, *supra* note 51, at x (quoting Autograph Letter from Holmes, to Joaquim Nabuco (January 3, 1908) (on file with Harvard Law School)).

55. *Id.*

56. Schutt, *supra* note 2, at 153-58, 176.

57. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-159, 300-01 (1995); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 113 (1993).

ing quest and instructed that "legal rules and other forms of law are most essentially tools devised to serve practical ends, rather than general norms laid down by officials in power, secular embodiments of natural law, or social phenomena . . . . As a social instrumentality, law exists to serve those ends."[58]

Since the 1920s, Holmes' legacy has trained three generations of lawyers, law professors, and judges and continues to do so in today's legal academy. Holmes' influence has transformed law into a social engineering tool. The tool that, by neglecting all others, designates the judicial bench and the bar as the primary social engineers, and lawyers as the ones responsible to shape and direct society into conformance.[59] Within this design, legal education has played the purposed role of training and directing the next generation of social engineers by teaching law students to "think like lawyers"—an "ends-means thinking" critical to the survival of a pragmatic approach to law.[60] The lawyer does not begin with general principles and reason "forward" to an existing and inevitable conclusion. Rather, the lawyer starts with a claim or desired outcome—the client's goal. The lawyer's role is to develop or design justificatory strategies to reach the client's goal, "reasoning backward through a process akin to 'reverse engineering.'"[61]

The pragmatism of John Dewey and the utilitarianism of Jeremy Bentham and John Stuart Mill sculpted Holmes' legal theory and justified his rejection of morality as a fundamental aspect of law. Holmes discredited the idea that commonly shared moral values serve a significant role in the law:

> It remains to be proved that, while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.[62]

Accordingly, Holmes rejected morality as a source for establishing social objectives and claimed that the will of the majority was the better determinate. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the

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58. Schutt, *supra* note 2, at 156 (quoting ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20-21 (1982)).

59. *Id.* at 158-59.

60. CLARENCE MORRIS, HOW LAWYERS THINK 123, 126-44 (1937) (stating that "as values change, and as unthought-of situations arise, and as new analytical abilities develop," the rules of law change. This premise is to support his proposed method of problem-solving that judges and lawyers should use to fulfill their role of assessing public policy and of correcting and elaborating on the "vagueness" within the rule of law).

61. Saunders & Levine, *supra* note 32, at 183.

62. HOLMES, *supra* note 53, at 33.

community, whether right or wrong."[63] Therefore, Holmes believed that there is no moral authority by which to determine something to be "right" or "wrong,"[64] essentially eliminating any standard by which the law and the legal profession is to be governed.

Langdell's scientific approach to law, denying any divine authority and lacking historical perspective, made it possible for Holmes to dismiss the moral dimension of law and redefine the role of lawyers in society. This radical departure from the philosophies and jurisprudence of Blackstone and early-American lawyers left the profession with no basis or authority to address morality and professional responsibility. The transformation of the legal profession over the last century and a half creates a great hurdle for legal education to overcome if it intends to adequately address the *tripartite crisis*.

III. CONSEQUENTIAL EFFECTS ON CURRENT LEGAL INSTRUCTION

Despite the prominence Blackstone's *Commentaries* held in early American legal education, they remain relatively unknown in contemporary legal study. Rather, the secular study of law developed by Langdell and Holmes is known to generations of law students, including those currently in attendance. Modern law students are intimately familiar with the prestige of Harvard Law School and the case study method that originated therein. Students generally do not begin with introductory courses on the common law or jurisprudence. Rather, they are thrust into the varying fields of law and indoctrinated with the case study method of reading and analyzing court opinions to discover original principles of law. These principles of law, governing judicial decisions, are not explicit in the court opinion; rather, the student is expected to scientifically derive the principles from the holdings and supporting rationales. Through analytical reasoning, the student discerns the origination and evolution of the legal principle via the chronological study of cases.[65] The abandonment of authority does not arise from the analytical reasoning itself, but rather the exclusive use of cases and absence of other sources of law.

Current legal instruction dictates legal positivism and the concept of the "living" law, and also promotes the lawyer's role as an advo-

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63. HOLMES, *supra* note 53, at 36; Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

64. *See* Howe, *supra* note 51, at xxvi:

> [Holmes urged] that morals, like law, must take account of the teaching of Darwin and recognize that so long as nature preserves man's instinct to survive and prosper, it has endorsed the self-preferring impulse. Neither a scheme of morals nor a philosophy of law will be true to the facts of history and psychology if it classifies an instinct endorsed by nature as "unjustified."

65. Harold J. Berman & Charles Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 514 (1996).

cate. Students are taught that courts make law and that the court's holding creates a binding law on all persons and lower courts within its jurisdiction. As a result, students understand that learning and developing the rule of law is a slow process, and the positive law of today may or may not drastically change with the next opinion. If a different court reviews the case, or if slightly distinguishable facts arise to which that case law is being applied, or if an advocate simply makes a compelling policy argument, the governing law may change. Yes, the law student is instructed on the duty of candor to the tribunal and the duty to introduce jurisdictional case law both in support and opposition to the position taken, but any boundaries beyond those are left open to argument. And this argument is dependent upon the lawyer's strategy and persuasiveness, and often tailored to the leanings or reputation of the judge. The law student is instructed to be a zealous and loyal advocate for the client. The craft of persuasiveness becomes the challenge and goal in this adversarial process, not justice or what is right. What remains absent from legal instruction is any authority or lawgiver to which the law is submissive and the lawyer accountable.

Within the walls of the legal academy, it has become common to hear "law is what we make it" and "morals have nothing to do with law." The only instruction students receive in the moral dimension of law is at best found in the context of how the lawyer must detach individual moral principles and advocate for the client. Such moral content is far from explicit. There is no discussion of an authoritative base of law or eternal principles that guide the law beyond human thought and philosophy.[66] In this absence, legal instruction perpetuates an understanding among law students, and in turn practitioners, that the profession of law is conducted in a "simplified ethical world, one in which ordinary moral principles are cleared away by the hegemony of doctrines unique to the practice of law."[67] These doctrines do not call the lawyer to engage his moral conscience, but instead call the practitioner to amorality.

A Harvard Law School student describes the first-year experience as a process of separation, where a student is taught that "law is infinitely malleable, a collection of indeterminate rules and guidelines, the meaning of which is never fixed," and that the "process of profes-

66. My criminal law instruction included discussion of the principles guiding criminal law as: 1) Harm Principle; 2) Offense Principle; 3) Paternalism; 4) Immorality; and 5) Deterrence. The discussion on criminal law theory included H.L.A. Hart, Kent Greenawalt, Jeremy Bentham, and a lot of general discussion on retributivism, utilitarianism, and consequentialism; but there was no discussion of who gives man or the state the authority to justly punish crimes.

67. Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 38 (2001).

sionalization" requires a detached or "neutral" attitude toward the law.[68] This Harvard Law student's experience is not an anomaly. The Dean of Yale Law School asserts that the profession of law now demands the lawyer-mechanic versus the noble ideal of the lawyer-statesman.[69] The lawyer-statesman served truth while the lawyer-mechanic serves the client with narrow, technical expertise.[70] Dean Kronman's duty to prepare the modern law student for the practice of law focuses on advocacy, which in his words, "corrupts the soul by encouraging a studied indifference to the truth."[71]

By contrast, one law school holds itself out as unique among the ABA-accredited law schools because it is "committed to the proposition that there is truth—eternal principles of justice—about the way we should practice law and the law itself. . . . [W]e discuss not only what the law is, but also where it came from, and what it ought to be."[72] This position should not be unique among law schools but rather the standard. In fact, *new* law schools sharing this commitment to eternal principles are springing up in an effort to fill the void left by secular law schools.[73]

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68. *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2029 (1998).

69. Kenneth W. Starr, *Truth and Truth-Telling*, 30 TEX. TECH L. REV. 901, 902 (1999) (discussing Dean Kronman's significant shift in models for the practice of law from the lawyer-statesman to the lawyer-mechanic).

70. *Id.*

71. *Id.* (quoting ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION vii (1993)).

72. Dean Brauch's Welcome Message to Regent University School of Law, *at* http://www.regent.edu/acad/schlaw/welcome/home.html (last visited Oct. 12, 2003).

73. There is a movement to establish more faith-based law schools that meet ABA accreditation requirements including: Ave Maria School of Law, opened in August, 1998, which states, "[f]aith seeking understanding through reason is essential to discovering truth in its fullest sense. Both faith and reason have their origin in God and both are necessary in the pursuit of justice." *Fides et Ratio*, Ave Maria School of Law's motto, expresses the Law School's conviction that faith and reason enhance the study of law and lead to the "full attainment of truth." Ave Maria School of Law, *Fides et Ratio*, *at* http://www. avmarialaw.edu/prospective/Philosophy/phil.cfm (last visited Oct. 12, 2003); University of St. Thomas School of Law opened in August of 2001 and states that its mission "is dedicated to integrating faith and reason in the search for truth through a focus on morality and social justice." University of St. Thomas School of Law, *at* http://www.stthomas.edu/lawschool/mad/mad_mis.cfm (last visited Oct. 12, 2003); Liberty University's School of Law, to open in August, 2004, professes to be committed to "academic and professional excellence in the context of the Christian intellectual tradition. . . . We believe the rule of law is rooted in transcendent principles and objective moral order." Liberty University School of Law, *at* http://www.liberty.edu/Academics/Law/index.cfm?PID=4932 (last visited Oct. 12, 2003).

Also, Jones School of Law was founded in 1928 and is a non-ABA-accredited law school that professes to be a Christian law school. It explains that:

> [b]ecause law is the foundation of society and Biblical truth is the foundation of just law, the mission of the School of Law is to maintain a distinctively Christian environment an academically rigorous program of legal education achieved through a collaborative effort in which faculty engage students in active, per-

IV. STANDARDIZATION AND ACCREDITATION

Since its founding in 1878, the ABA has been a proponent of institutionalized legal education, with the standardization of law school curriculum central to its purpose. It created the Committee on Legal Education and Admissions to the Bar in 1893 despite the fact that in 1891 only one of every five lawyers admitted to the practice of law even attended law school.[74] In 1921, the ABA promulgated its first Standards for Legal Education, marking the first step toward the ABA's role as a law school accrediting agency.[75] Shortly thereafter, in 1921, the ABA published its first list of approved law schools that met ABA requirements.[76] Between 1921 and 1928 there was a dramatic increase in the number of law schools, from 142 to 173 schools, with only half of them meeting the ABA standards.[77]

In 1927, no state required graduation from an ABA-accredited law school,[78] but all states except Indiana required its applicants to pass a written exam.[79] The ABA initiated the creation of the National Conference of Bar Examiners (NCBE) in 1930 with the purpose of standardizing the education and admission requirements for the practice of law across the nation.[80] Within a decade, twenty states required its applicants to graduate from an ABA-accredited law school; by the late 1970s nearly all states adopted the requirement.[81]

> formance-based learning to equip students for their role in the institutions of justice and to do justice through competent ethical lawyering . . . .

Thomas Goode Jones School of Law, Mission Statement, *at* http://www.faulkner.edu/law/welcome/jsl_mission1.cfm (Sept. 25, 2001).

74. Paul T. Hayden, *Putting Ethics into the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1329 (2003).

75. *Id.* ABA standards for law schools included minimums relating to teacher-student ratio, library volumes, student pre-law experience, and number of full-time professors; *see also* Ariens, *supra* note 22, at 310 (detailing the Special Committee on Legal Education, known as the Root Committee, named after committee chairman Elihu Root, who opposed differences amongst law schools and state bars).

76. Hayden, *supra* note 74, at 1330.

77. *Id.*

78. Ariens, *supra* note 22, at 310.

79. *Id.* at 310-11.

80. National Conference of Bar Examiners, Mission Statement, *at* http://www.ncbex.org (last visited Oct. 12, 2003). The NCBE states that its mission is to:

> [D]evelop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law, and to assist bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law, disseminating relevant information concerning admission standards and practices, conducting educational programs for the members and staffs of such authorities, and providing other services such as character investigations and conducting research.

Id.

81. Ariens, *supra* note 22, at 311.

The ABA professes that "every candidate for admission to the bar should have graduated from a law school approved by the ABA."[82] The basis of this belief seems unfounded since this nation began training lawyers through self-study and apprenticeship, a method that was quite suitable to prepare students to pass the bar exam and be admitted into the practice of law for nearly 150 years.[83] But the ABA-driven transition from oral to written bar exams, and subsequently from essay to multiple-choice questions, changed the nature of bar exams and created great duplication of efforts across the states.[84] To address this inefficiency, the ABA proposed and promoted the concept of a national bar exam in 1941.[85] But it was not until 1972, with the offering of the Multistate Bar Exam (MBE), that the ABA's standardized testing began to grow its roots.[86] Opposition immediately met the MBE, but the ABA understood the challenges facing a national exam. The ABA recognized the independence of state bars and defended the exam as just an option to each state board, the "master of its own examination."[87] This approach led to timid but eventual acceptance of the MBE and paved the road for the Multistate Professional Responsibility Exam (MPRE).[88] These national exams, as well as the ABA accreditation requirements, have unquestionably furthered the uniformity of legal education and effectuated the secularization process and widespread acceptance of legal positivism.

V. FROM CANON TO CODE TO MODEL RULES

In 1905, the ABA chartered the Committee on Code of Professional Ethics to study the feasibility of drafting a clear set of uniform rules that could be used to discipline unethical lawyers.[89] The ABA Committee noted that "[o]nce possible ostracism by professional brethren was sufficient to keep from serious error the practitioner with no fixed ideals of ethical conduct; but now the shyster, the barratrously inclined, the ambulance chaser . . . pursue their nefarious methods with no check."[90] Following the committee's study, commit-

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82. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AMERICAN BAR ASSOC., STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, FOREWORD, *at* http://www.abanet.org/legaled/standards/foreword.html (last visited Oct. 12, 2003).

83. *See* Hayden, *supra* note 74, at 1314-17 (detailing the tradition of oral bar exams and the introduction of written exams by most states between 1890 and 1914).

84. *Id.* at 1317-21.

85. *Id.* at 1322.

86. *Id.* at 1323.

87. *Id.* at 1324 (quoting John Eckler, *The Multistate Bar Examination—August 1974*, 43 BAR EXAMINER 125, 129-30 (1974)).

88. *Id.*

89. *Id.* at 1306 (citing 29 A.B.A. REP. 600 (1906)).

90. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look At the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 8 (1999) (quoting COMMITTEE ON CODE OF

tee member Justice David Brewer stated that the plan was to establish "a body of rules, few in number, clear and precise in their provisions, so there can be no excuse for their violation, to be given operative and binding force by legislation or action of the highest courts of the states."[91] Therefore, the committee set out to crystallize a standard of ethics in a written code, not purely for aspirational purposes, but rather to effectuate a means of discipline and preserve the reputation of the legal profession.

American University Law Professor Susan D. Carle summarized the four impetuses cited by historians for the crystallization of the 1908 Canon of Ethics as: 1) The ABA's desire to follow the American Medical Association's lead in drafting professional ethics; 2) The inspiration of the Progressive Era belief that the population itself could improve its moral standards; 3) The declining public opinion of lawyers; and 4) The concern over the growing "commercialization" of the practice of law.[92] In response to these prompters, the ABA set out to establish the 1908 Canon of Ethics.

The ABA committee began by studying two early-nineteenth-century American treatises on legal ethics, David Hoffman's 1836 *Fifty Resolutions for Professional Deportment* and George Sharswood's 1854 treatise titled *Legal Ethics*.[93] The committee also referenced the ethical codes enacted by various state bar associations, particularly the 1887 Alabama code of ethics drafted by Thomas Goode Jones.[94] During her examination, Professor Carle concluded that Hoffman and Sharswood similarly approached legal ethics from a tradition based on "religious conviction and a belief that a divine intelligence gave human beings moral faculties."[95]

As a result of these references, the drafting of the 1908 Canons properly reflected the moral dimension of law prevalent in America's legal studies and relayed a high moral tone. However, the Canons also evidenced the differing views of committee members on the proper role and duties of an attorney. Professor Carle concluded that rather than "wrestling with the fundamental jurisprudential issues underlying their disagreement, the committee members glossed over their dispute in their public reports and adopted ineffectual compromise language in the Canons."[96] She further concluded that this com-

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PROFESSIONAL ETHICS 1906); *see* Hayden, *supra* note 74, at 1307 (citing 29 A.B.A. REP. 600 (1906)).

91. Carle, *supra* note 90, at 9 (quoting COMMITTEE ON CODE OF PROFESSIONAL ETHICS 1908, *at* 570).

92. Carle, *supra* note 90, at 7-8.

93. *Id.* at 9.

94. *Id.*

95. *Id.* at 10.

96. *Id.* at 3.

promise evinced movement toward a "nonaccountability view" that separates concerns of justice and morality from client advocacy.[97]

The Canons begin with lawyer's first duty to the courts premised by the preamble professing that "[t]he future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."[98] However, the Canons later signal the conflicting views on the lawyer's role in Canon 15 titled *How Far a Lawyer May Go in Supporting a Client's Cause*:

> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. . . . In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.[99]

Throughout the nineteenth century, the number of legal professionals educated within law schools dramatically increased and effectually intensified this conflict between serving justice and serving the client.

Professor Carle noted a shift in legal ethics that "corresponded roughly with the introduction of positivism and scientistic models of the legal system in American jurisprudence."[100] She explains that the religiously based jurisprudence of Hoffman and Sharswood "imbued lawyers with the power—and thus the duty—to preserve the tenuous connection between human affairs and a divinely inspired moral system, [but] the [positivists'] new legal ethics paradigm disavowed any such connection between law and morality."[101] While at the same time, the social science theories taught that the legal system depends

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97. *Id.* at 3-4.

98. CANONS OF PROF'L ETHICS Pmbl. (1908), *reprinted in* 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 793 (Thomas D. Morgan & Ronald D. Rotunda eds., Foundation Press 2002).

99. CANNONS OF PROF'L ETHICS Canon 15, *supra* note 98, at 797.

100. Carle, *supra* note 90, at 13.

101. *Id.*

upon impersonal, invisible laws; and therefore an advocate must fulfill his role without concern for his beliefs or justice.[102]

The ABA's adoption of the 1969 Model Code of Professional Responsibility (ABA Code) reflected this shift in legal ethics and predominant trend in twentieth-century legal education. The Code retained some of the familiar terms of the Canons, but the legal academy's rejection of a moral authority and revamping of a lawyer's role in society called for a new framework of principles to guide legal ethics.[103] The preamble began by establishing a reliance on man's knowledge that "[t]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government."[104] It goes on to define the lawyer's role as a social engineer:

> Lawyers, as guardians of the law, play a vital role in the preservation of society. . . .
>
> In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.[105]

The preamble then directs that "the Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor."[106] The ABA Code is to provide the standards, but the onus is on the lawyer because "[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above the minimum standards."[107] However, if the lawyer's own conscience is insufficient, than "it is the desire for the respect and confidence of the members of his profession of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct."[108]

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102. *Id.* at 13-14.

103. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1253 (1991).

104. MODEL CODE OF PROF'L RESPONSIBILITY Pmbl. (1981), *reprinted in* 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 154 (Thomas D. Morgan & Ronald D. Rotunda eds., Foundation Press 2002)

105. *Id.*

106. MODEL CODE OF PROF'L RESPONSIBILITY Pmbl., *supra* note 104, at 155.

107. *Id.*

108. *Id.*

The 1969 Code detailed the responsibilities, duties, and obligations for the legal professional and thus amplified the discussion of legal ethics. Harvard Law School professor Lon Fuller asserted that "the morality of aspiration starts at the top of human achievement, [while] the morality of duty starts at the bottom."[109] He attached a moral scale "starting at the bottom with the conditions obviously essential to social life and ending at the top with the loftiest strivings toward human excellence. The lower rungs of this scale represent the morality of duty; its higher reaches, the morality of aspiration."[110] He envisioned a pointer that marks the balance between the pressures of duty and the challenges of aspiration.[111] And he referenced "the inner morality of law" that is clearly and coherently known in nature, an inner morality that presents both a morality of duty and a morality of aspiration.[112] He acknowledges that if society asserts a duty, the lawmaker will always "confront the responsibility of defining at what point that duty has been violated."[113] He concludes that the "inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman."[114] Nevertheless as the legal profession evidenced more and more signs of the *tripartite crisis*, the 1969 Code gained favor in the aftermath of the Watergate scandal and in consideration of the low regard for the legal profession.[115]

As the *tripartite crisis* seemed to escalate into the early 1980s,[116] the ABA did not attempt to reintroduce ethical aspirations but rather descended further toward the morality of duty by adopting the 1982 Rules of Professional Responsibility and the Model Rules of Professional Conduct. The Model Rules provided authoritative regulation in statutory language and interpretative guidance in comments. The Model Rules were similar to a restatement and "affirmed that the standards of professional conduct were [now] legal obligations and not merely professional ones."[117] With organized campaigning, the ABA successfully enticed many states to adopt the Model Rules.[118] This wide acceptance signified a monumental decision of the American legal profession to submit itself to binding legal standards and represented a unique step in the history of the American judiciary by

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109. LON L. FULLER, THE MORALITY OF LAW 5 (1964).
110. *Id.* at 27-28.
111. *Id.* at 42.
112. *Id.*
113. *Id.* at 43.
114. *Id.*
115. Hayden, *supra* note 74, at 1332.
116. Daicoff, *supra* note 3, at 1344-46.
117. Hazard, Jr., *supra* note 103, at 1254.
118. *Id.* at 1251.

formulating and enacting a legal code without legislative ratification.[119]

More recent modifications and the proposed revision of the Model Rules, by the 2000 ABA Ethics Commission, move further away from moral aspiration and reduce professional conduct to mandatory responsibilities and duties of lawyers. This evolution from Canons to Rules, from moral aspirations to regulated duties, remarkably coincides with the dissemination of legal positivism and the escalation of the *tripartite crisis*.[120]

VI. MANIFESTATIONS OF LAW WITHOUT AUTHORITY

As a result of the Harvard benchmark for the philosophy and method of legal education and the ABA's regulation through accreditation, America's legal profession bears the fruit of jurisprudence void of a divine lawgiver and an inherent moral dimension. One law professor poses the following questions as to what happens to the rule of law when the source or authority of that law is dismissed. "What principled limits exist to civil authority; what pre-existent, known precepts supply rules for new cases; what gives rise to the equality of all before the law; what warns men from pretending to the prerogatives of the perfect?"[121] These relevant questions introduce the unavoidable issues arising from a century of legal instruction that breeds the moral, and thus legal, relativism evident today. This relativism is not neutral, but preferences secularism. It prohibits professionals from acknowledging any external moral authority and creates a new morality that threatens the fidelity of the law and contradicts traditional moral belief.

A. Law Prohibiting Acknowledgement of God's Authority

In Thomas Jefferson's most famous work, the *Declaration of Independence*, he referenced the "Creator" and "Divine Providence," thus revealing his and the other Founding Fathers' belief in God.[122] Regardless, the U.S. Supreme Court has memorialized Jefferson's comment in a non-authoritative letter to the Danbury Baptist Asso-

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119. Hayden, *supra* note 74, at 1311-13; Interview with Don Rubottom, Judiciary Policy Coordinator, Florida House of Representatives, in Tallahassee, Fla. (Aug. 8, 2003) [herinafter Rubottom Interview].

120. *See* Carle, *supra* note 90, at 13 (stating "[t]he shift in legal ethics thinking about lawyers' duties to monitor the justice of their clients' causes corresponded roughly with the introduction of positivism and scientistic models of the legal system in American jurisprudence").

121. Craig A. Stern, *The Common Law and the Religious Foundations of the Rule of Law*, The Philadelphia Society National Meeting (April 26, 2003), *at* http://www.townhall.com/phillysoc/craigstern.htm.

122. THE DECLARATION OF INDEPENDENCE para. X (U.S. 1776).

ciation opining that the First Amendment[123] was intended to build a "wall of separation between Church and State."[124] Based primarily on this one comment, the Court has established extensive and intricate First Amendment case law governing the relation between the church, state, and individual.[125] For purposes of context, I narrow this discussion to the Court's demand for religious *neutrality*, a demand that in practice denies the legal professional's freedom to acknowledge a divine authority of law.

The underlying positivist philosophy directing twentieth-century constitutional interpretation is the idea that the Constitution is a *living* document and that constitutional principles evolve with the enlightenment of man. This jurisprudence dismisses the original intent of constitutional provisions and permits foundational principles to change with the modern *wisdom* of the Court. The effect: a judiciary that overreaches its jurisdiction and becomes the lawmaker.[126] As James Madison warned in *Federalist 47*, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[127] Madison goes on to reference the maxims of Montesquieu and quotes, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."[128]

Today's Court is doing exactly this. It is exercising arbitrary control and dictating what the legal professional can think and believe. The most vivid display of this jurisdictional abuse is in the case involving Alabama's Chief Justice, Roy Moore.[129] As Chief Justice and custodian responsible for decorating the Alabama Supreme Court Judicial Building, Chief Justice Moore ordered a monument of the

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123. The First Amendment reads, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

124. Reynolds v. United States, 98 U.S. 145, 164 (1878); *see* JAMES H. HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 92 (1998) (detailing the historical relationship between religion and the federal government based upon original documents from the Library of Congress and examining the impact of this "wall of separation").

125. *See* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religions Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 588 (1995) (providing a detailed discussion and compilation of First Amendment law in relation to the Establishment Clause).

126. Rubottom Interview, *supra* note 119.

127. THE FEDERALIST NO. 47 (James Madison).

128. *Id.*

129. Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003), *cert. denied*, 2003 U.S. LEXIS 7973 (2003).

Ten Commandments for the rotunda. He clearly stated his intent in selecting this display was to depict the moral foundation of law:[130]

> This monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, [and] the members of the bar . . . of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance of Almighty God."[131]

Within days of its placement, three Alabama ACLU attorneys filed suit asserting that the display violated the Establishment Clause of the First Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment.[132]

In applying the *Lemon*[133] test and other governing Supreme Court case law,[134] the federal district court held that the display was unconstitutional because it was non-secular with the primary effect of advancing religion.[135] On appeal, the Eleventh Circuit affirmed the district court decision stating, "[t]he Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith."[136] The Court goes onto say that "Chief Justice Moore's proffered definition of religion is inconsistent with the Supreme Court's because his presupposes a belief in God."[137]

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130. *Id.*

131. *Id.* at 1286.

132. *Id.* at 1288. This suit is not the first time Chief Justice Moore has faced this battle. In 1995, Judge Moore withstood two suits seeking a declaratory judgment prohibiting his hanging of a Ten Commandments plaque above his bench in the courtroom. The state courts dismissed both suits on grounds of justiciability.

133. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court established a three-prong test to guide Establishment Clause inquiries. The test required that the "challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion." *Glassroth*, 335 F.3d at 1295.

134. *See* Lee v. Weisman, 505 U.S. 577 (1992) (finding that nonsectarian prayers by clergy at high school graduations violates the Establishment Clause); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding the display of a crèche in the Christmas display for the lobby of a courthouse violates the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (holding that a daily period of silence in public schools was a violation of the Establishment Clause and declaring the First Amendment to protect an individual's freedom to "select any religious faith or none at all"); Stone v. Graham, 449 U.S. 39, 41 (1980) (finding the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths"); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (declaring that the First Amendment requires the state to be neutral in its relations between religious and nonreligious groups and holding that the use of tax funds to pay for the busing inclusive of parochial school pupils does not violate the Establishment Clause).

135. *Glassroth*, 335 F.3d at 1288.

136. *Id.* at 1294.

137. *Id.* at 1295.

The Eleventh Circuit qualifies that not "all recognitions of God by government are per se impermissible"[138] and cites the Supreme Court approved exceptions that permit the acknowledgement of religion in "the Declaration of Thanksgiving as a government holiday, our national motto 'In God We Trust,' its presence on our money, and the practice of opening court sessions with 'God save the United States and this honorable Court.'"[139] However, the court distinguishes all of these cases because these contextual references to God serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[140] Whereas Chief Justice Moore unequivocally testified that this display is not just historical, symbolic, or ceremonial, but a monument meant to "acknowledge the law and sovereignty of the God of the Holy Scriptures" and to mark "the return to the knowledge of God in our land."[141]

Under the umbrella of the First Amendment Establishment Clause, the court assumes the jurisdiction to prohibit Chief Justice Moore from believing that there is a moral basis of law that resides with the Divine. The court implies that if Chief Justice Moore would state that the monument signifies the historical role of the Ten Commandments in the development of American jurisprudence, the display would pass scrutiny.[142] But the court determines that since Chief Justice Moore is non-neutral and non-secular in his beliefs, his Ten Commandments display and decision to decorate the rotunda with the "theme of the moral foundation of law" violates the First Amendment.[143] Thus the court is not ruling on his placement of the monument, but rather on what he thinks and believes.

This is the same First Amendment that permitted the Supreme Court of 1827 to rely upon the higher law to interpret the constitutional duty of upholding contracts:

> The constitution meant to preserve the inviolability of contracts, as secured by those eternal principles of equity and justice which run throughout every civilized code, which form a part of the law of nature and of nations, and by which human society, in all countries and all ages, has been regulated and upheld. It is said that the obligation of contracts is derived from the municipal law alone . . . . This is what we deny. It springs from a higher source: from those

138. *Id.* at 1301.
139. *Id.*
140. *Id.* (quoting Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984)).
141. *Id.* at 1296.
142. *Id.* at 1299.
143. *Id.* at 1287.

> great principles of universal law, which are binding on societies of men as well as on individuals.[144]

The 1827 Court supported its interpretation by referencing the famous Dutch lawyer and statesmen Hugo Grotius:

> On this subject we are supplied with noble arguments from the divine oracles, which inform us that God himself, who can be limited by no established rules of law, would act contrary to his own nature, if he did not perform his promises. From whence it follows, that the obligation to perform promises, springs from the nature of that unchangeable justice, which is an attribute of God, and common to all who bear his image in the use of reason.[145]

The 1827 Supreme Court's constitutional interpretation leaves no question that the moral foundation of American law lies with God himself, yet Chief Justice Moore has been ordered to remove his supposed "unconstitutional" display of God's law, an order that he views as unlawful. Chief Justice Moore took an oath of office to the Constitution of the United States and to the Constitution of the State of Alabama, invoking God's help to uphold this oath. The Preamble to Alabama's Constitution states:

> We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, *invoking the favor and guidance of Almighty God*, do ordain and establish the following Constitution and form of government for the State of Alabama.[146]

Acting in accordance with his oath, Chief Justice Moore did not remove the Ten Commandments display, but left it for the federal court to remove the monument itself. Based on this refusal, a Judicial Inquiry Commission charged Chief Justice Moore with six violations of the Canons of Judicial Ethics, including:

(1) failing to uphold the integrity and independence of the judiciary;
(2) failing to observe the high standards of conduct so that the integrity and independence of the judiciary might be preserved;
(3) failing to avoid impropriety and appearance of impropriety;

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144. Ogden v. Saunders, 25 U.S. (2 Wheat.) 213, 222 (1827).
145. *Id.* at 223 n.p.
146. ALA. CONST. pmbl. (emphasis added), *at* http://www.legislature.state.al.us/CodeOfAlabama/Constitution/1901/CA-245529.htm (last visited Feb. 6, 2004).

(4) failing to conduct himself in a manner promoting public confidence in the integrity and impartiality of the judiciary;
(5) failing to conduct himself in a manner promoting public confidence in the integrity and impartiality of the judiciary; and
(6) failing to avoid conduct prejudicial to the administration of justice so as to bring the judicial office into disrepute. [147]

The ethics commission made these allegations without first addressing whether the federal court order was in fact lawful.[148]

On November 13, 2003, a nine-member panel of the Alabama Court of the Judiciary concluded that Chief Justice Moore should be removed from office. Chief Justice Moore did not perjure himself, did not accept a bribe, did not issue a court opinion contradicting the Constitution, but rather in his discretion as the Chief Justice of the Alabama Supreme Court, he attempted to acknowledge God, maintain high standards of conduct, and educate citizens by memorializing the moral foundation of American law. And for this he is guilty and faces not only removal from the bench, but possibly disbarment.

Chief Justice Moore is not the only legal professional under attack for believing in a higher authority. As demonstrated in the judicial nomination process today, this assault on belief threatens that any legal professional who speaks of his faith in God will be found unfit for the bench. The current filibustering of judicial nominations clearly reflect the bias against legal professionals that acknowledge God in their practice. Regardless of the individual's integrity or impeccable qualifications, the mere fact that a judicial nominee is vocal about his faith and belief in the moral authority of God brings into question his fitness for the bench.[149] In his restatement of the Supreme Court's law on religious freedoms, Professor Carl Esbeck states that the First Amendment "does not command a separation of individual believers from their government—an impossibility, unless

147. Court of the Judiciary Case No. 33, In the Matter of: Roy S. Moore, Chief Justice of the Supreme Court of Alabama at 4, Nov. 13, 2003, *available at* http://www.lc.org/attachments/mooreorder.pdf.

148. The determination of lawfulness would highlight the collision of two distinct views of law: one that believes that a court order is law because the court declares it as such and one that believes that no law has any validity if it contradicts divine law no matter what court (or man) declares it.

149. *See, e.g.*, *Pryor Blocked from U.S. Appeals Court by Democrats*, nbc13.com, July 31, 2003 (reporting on the blocking of President Bush's judicial nomination of Alabama Attorney General William Pryor, Texas Judge Priscilla Owen, and District of Columbia lawyer Miguel Estrada), *at* http://www.nbc13.com/news/2372338/detail.html.

one is prepared either to cleave in half the human heart or to disenfranchise all religious citizens."[150]

Institutionalized legal education's rejection of the Lawgiver, which is reflected in the courts today, is in essence an attempt to cleave the heart of the law student and the legal professional by mandating neutrality. In reality, neutrality is an illusion that presumes that secularism, naturalism, scientism, or atheism is not a religious belief. One who places his faith in God as sovereign is neither more nor less religious than one who places his faith in himself as sovereign. Both are religious. One worships God and the Creator while the other places faith in himself and the created. The manifestation of legal positivism exemplified by the demand for neutrality in Establishment Clause case law is in practice awarding more protections and preference to the religion of humanism or secularism and forcing the legal professional who believes in God to deny His authority.

B. Law Contrary to Moral Beliefs

Postmodernist author Sanford Levison acknowledges that "[t]he transition of the basis of law from principle to will has the effect of analytically separating law from morality; there is the dissolution of any guarantee that fidelity to law necessarily will mean equal fidelity to principles of moral conduct."[151] The alarming truth is that this separation is not only accepted, but taught within the majority of America's legal institutions. It is a common occurrence for a law student to be told that morals have nothing to do with the study of law. This belief combined with the instruction that legal principles continually evolve through appellate opinions raises the question: If there is no moral dimension to law and no authority to say what is *right* and *wrong*, what non-moral compass guides the judiciary's application and development of the legal principles and who is to say they are not *wrong*? The answer: It is relative and discretionary to the sitting bench.

Within this philosophy lays the positivist's principles of precedent and stare decisis.[152] These principles in proper context do promote consistency and predictability. However, when the bench selectively adheres to these principles and dismisses any external authority for the law, the court assumes the role as the lawmaker. It operates as if the judicial opinion is subordinate to nothing beyond the judiciary, which in practice gives cases preemptive power over legislated codes such as constitutions and statutes and produces an unwarranted fa-

150. Esbeck, *supra* note 125, at 588.
151. SANFORD LEVINSON, CONSTITUTIONAL FAITH 64 (1988).
152. Berman & Reid, Jr., *supra* note 65, at 514.

vor for judges over the authoritative lawgivers.[153] Legal positivism combined with an obvious judicial supremacy fundamentally permits legal principles to become manipulative tools for the judge or advocate to advance his individual or personal sense of *right* and *wrong*. Despite the asserted role of precedent and stare decisis,[154] this jurisprudence results in an unpredictable "rule of law" riddled with inconsistencies and contradictions. The manipulation of positivist principles leads to the degeneration of the law's fidelity, which is evidenced in recent court decisions involving the moral issues of homosexuality and abortion.[155]

In *Lawrence v. Texas*,[156] the U.S. Supreme Court held the Texas sodomy statute unconstitutional, but in order to do so it needed to address its former opinion in *Bowers v. Hardwick*[157] and the principle of stare decisis. Justice Kennedy cites a few cases and concludes that, "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[158] He goes on to declare that Justice Steven's dissenting opinion "should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent . . . . and now is overruled."[159] Justice Kennedy selectively determined that the dissenting opinion in *Bowers* would govern and adopted the

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153. Rubottom Interview, *supra* note 119.

154. Precedent is a modern doctrine that establishes judicial decisions as an authoritative source of law—law that is binding on the courts in analogous future cases. Precedent requires one to dissect an opinion and differentiate between judicial statements necessary to the decision and those that are extraneous, otherwise known as dictum. It is only the reasons or rationale cited that is essential to the decision that constitutes the binding legal principle. The holdings and supportive legal arguments form the precedent that is binding in similar subsequent cases. Traditionally, precedent is differentiated from the narrow doctrine of stare decisis that developed in the nineteenth century. The strict doctrine of stare decisis treats a particular case or decision as binding authority within its jurisdiction in any following analogous cases. Neither precedent nor stare decisis finds its roots in the natural law theory with the understanding that law conforms to a set of transcendent standards imposed by a Divine. Rather both principles root in a legal positivist philosophy based on the idea that the connection or relation of one legal rule with another will provide judicial integrity and seemingly raise the judicial decision above the level of sheer expediency. Berman & Reid, Jr., *supra* note 65, at 447-50.

155. *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (holding the Texas sodomy statute unconstitutional under the Due Process Clause of the Fourteenth Amendment); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (distinguishing virtual child pornography from child pornography and declaring virtual child pornography lawful, protected speech under the First Amendment); Stenberg v. Carhart, 530 U.S. 914 (2000) (holding unconstitutional a Nebraska statute prohibiting partial birth abortion as creating a "substantial obstacle" for a women to get an abortion).

156. 123 S. Ct. 2472 (2003).

157. 478 U.S. 186 (1986) (upholding the Georgia sodomy statute and stating that the Constitution does not confer a fundamental right for homosexuals to engage in sodomy).

158. *Lawrence*, 123 S. Ct. at 2483.

159. *Id.* at 2484.

reasoning that "the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[160]

Justice Kennedy chose to disregard the majority opinion of Justice White in *Bowers* which reasoned that the law, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[161] Kennedy further ignores Justice Burger's concurring opinion in *Bowers* that stated:

> [T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. . . .
>
> This is essentially not a question of personal "preferences" but rather of the legislative authority of the State.[162]

He also rejects Justice Powell's statement in *Bowers* that "I cannot say that conduct condemned for hundreds of years has now become a fundamental right."[163] Justice Kennedy's intentional departure from stare decisis is permissible under the philosophy of legal positivism—a philosophy that permits inconsistent application and manipulation.

Justice Kennedy's treatment of stare decisis in *Lawrence* differed greatly from that in the 1992 case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[164] In *Casey*, Justice Kennedy concurred in Justice O'Connor's opinion that the "principles of institutional integrity, and the rule of stare decisis"[165] required that the essential holding in *Roe v. Wade*[166] be retained and reaffirmed. The adherence to the principle of stare decisis in *Casey* permitted the Court to dissect a Pennsylvania statue regulating abortion and hold that particular parts of the statute created an "undue burden" on the woman's right to an abortion.[167] Justice Scalia counters the majority opinion in his pointed dissent:

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160. *Id.* at 2483.
161. *Bowers*, 478 U.S. at 196.
162. *Id.* at 196-97 (Burger, C.J., concurring).
163. *Id.* at 198 n.2 (Powell, J., concurring).
164. 505 U.S. 833 (1992).
165. *Id.* at 845-46.
166. 410 U.S. 113, 117 (1973) (holding the Texas criminal abortion statute unconstitutional because the woman's fundamental right to an abortion, at certain stages of pregnancy, exceeded the state's compelling interests to protect "the health and safety" of the mother and protect "the potential future human life").
167. *Casey*, 505 U.S. at 833. In the same fashion, the Florida Supreme Court demonstrated the inconsistent application of stare decisis and selective following of precedent when it recently held a one-parent notification statute, with judicial bypass for a minor seeking an abortion, unconstitutional. Justice Shaw wrote, "[t]he doctrine of *stare decisis*, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for

> The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.[168]

The Florida Supreme Court has also demonstrated this version of stare decisis noted by Justice Scalia. In *North Florida Women's Health and Counseling Service v. Florida*,[169] the court held a one-parent notification statute, with judicial bypass for a minor seeking an abortion, unconstitutional. Justice Shaw wrote, "[t]he doctrine of *stare decisis*, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries."[170] He concludes, "[t]he presumption in favor of *stare decisis* is strong, and where the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith."[171]

Contrary to Justice Kennedy's dismissal of stare decisis in *Lawrence*, Justice Shaw declares stare decisis as the "zenith" in the con-

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centuries." He concludes, "[t]he presumption in favor of *stare decisis* is strong, and where the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith." N. Fla. Women's Health & Counseling Serv. v. Florida, 2003 WL 21546546, at *17-*18 (Fla. July 10, 2003).

Contrary to Justice Kennedy's dismissal of stare decisis in the context of the "divisive societal controversy" of homosexual sodomy, Justice Shaw declares stare decisis as the "zenith" in the context of abortion, permitting reliance upon the precedent set by *In re T.W.*, 551 So. 2d 1186 (Fla. 1989). In *T.W.*, the Florida Supreme Court held a parental consent statute unconstitutional and stated that it imposed "a significant restriction on a minor's right of privacy."

Justice Shaw states that the court must rely upon the trial court's faithful application of the controlling law from *T.W.* and consequently affirms the trial court's decision holding the statute unconstitutional. *N. Fla. Women's Health & Counseling Serv.*, 2003 WL 21546546, at *19. Justice Shaw provides this holding despite the fact that in 1990, the U.S. Supreme Court held that either a one-parent or two-parent notification requirement is constitutional as long as the statute provides a judicial bypass option for the minor. Hodgson v. Minnesota, 497 U.S. 417 (1990). The Court reaffirmed this finding in 1992, when it held that a Pennsylvania abortion statute requiring one-parent consent with a judicial bypass option did not create an undue burden on an unemancipated minor's right to privacy. *Casey*, 505 U.S. at 833.

The Florida Supreme Court dismisses U.S. Supreme Court jurisdictional precedent by declaring that the Florida Constitution provides for a "broader, more protective right" than the federal Constitution. *N. Fla. Women's Health & Counseling Serv.*, 2003 WL 21546546, at *5. This presumption gives the Florida Supreme Court the liberty to claim a *broader* privacy right for Floridian minors to justify its distinct evaluation of compelling state interests and to disguise its unwillingness to submit to the authoritative federal case law. *In re T.W.*, 551 So. 2d at 1192.

168. *Casey*, 505 U.S. at 993 (1992) (Scalia, J., dissenting).

169. 2003 WL 21546546, at *17-*18 (Fla. July 10, 2003).

170. *Id.*

171. *Id.*

text of abortion and relies upon the precedent set by *In re T.W.*[172] In *In re T.W.*, the Florida Supreme Court held a parental consent statute unconstitutional and stated that it imposed "a significant restriction on a minor's right of privacy." Justice Shaw insists he must rely upon the trial court's faithful application of the controlling law from *T.W.* and consequently affirms the trial court's decision holding the statute unconstitutional.[173]

Justice Shaw decided to *keep-what-he-wanted* from the Florida Supreme Court *In re T.W.* opinion, and *threw-away* the U.S. Supreme Court case law. In 1990, the U.S. Supreme Court held that either a one-parent or two-parent notification requirement is constitutional as long as the statute provides a judicial bypass option for the minor.[174] The Court reaffirmed this finding in 1992, when it held that a Pennsylvania abortion statute requiring one-parent consent with a judicial bypass option did not create an undue burden on an unemancipated minor's right to privacy.[175] The Florida Supreme Court dismisses this precedent by declaring that the Florida Constitution provides for a "broader, more protective right" than the federal Constitution.[176] This presumption gives the Florida Supreme Court the liberty to claim a *broader* privacy right for Floridian minors and justifies its *own* evaluation of compelling state interests.[177] These cases exemplify the courts' response to efforts that have been made by Congress and state legislatures to pass laws confining the *courts'* interpretation of constitutional protections—particularly First Amendment protections. In reviewing these legislated acts, the courts tend to exploit stare decisis and assume the role of assessing public policy. By framing an issue as a constitutional question, they assert their authority to weigh the compelling interests of the state and to determine what interests are to be protected and when.

In another effort to regulate abortion, Congress recently passed the Partial Birth Abortion Act of 2003. The intent of the Act is to limit the procedures performed when carrying out the judicially declared woman's right to an abortion. After signing the Act, President Bush stated, "[T]he most basic duty of government is to defend the life of the innocent . . . . The right to life cannot be granted or denied by government, because it does not come from government [including the courts], it comes from the Creator of Life."[178] Yet the courts have

172. 551 So. 2d 1186 (Fla. 1989).
173. *N. Fla. Women's Health & Counseling Serv.*, 2003 WL 21546546, at *19.
174. Hodgson v. Minnesota, 497 U.S. 417 (1990).
175. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
176. *N. Fla. Women's Health & Counseling Serv.*, 2003 WL 21546546, at *5.
177. *In re T.W.*, 551 So. 2d at 1192.
178. The White House, President George W. Bush, President Bush Signs Partial Birth Abortion Ban Act of 2003, Nov. 5, 2003, *at* http://www.whitehouse.gov/news/releases/2003/11/20031105-1.html (last visited Feb. 6, 2004).

assumed the authority to declare when life begins and when it should end.[179] The President and Congress seem to disagree with this presumption.[180]

Current American jurisprudence invoking legal positivism disengages morality and corrupts the fidelity of the law by permitting a judicial elite to exercise moral superiority and to disparately apply *evolving* principles. This approach to law is exactly what Justice Curtis warned about 146 years ago in his dissenting opinion from *Dred Scott v. Sanford*:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[181]

In the same fashion, when the institution of legal education abandons the Lawgiver and a fixed set of moral truths, it results in a profession with no moral compass that advocates a rule of law that is individualistic, inconsistent, uncertain, and at times unconscionable.

VII. EFFORTS TO REDEEM A FALLEN PROFESSION

As legal positivism seeped into the realm of legal ethics and manifested the new paradigm that disavowed any connection between law and morality, the legal profession continued in ethical decline. By the 1980s, the legal profession was in a recognized crisis state. The ABA and law schools sensed the urgency to respond to the profession's ethical crisis. But their response was seemingly constrained by two fundamental premises. The first is that legal ethics is different from ordinary ethics, in that it eliminates the moral conscience. The second is the premise that the legal system is adversarial and demands a lawyer to fulfill his role as an advocate first and foremost, without invoking personal beliefs or sincere pursuits of justice. Under these self-imposed constraints, the ABA responded to the crisis by promul-

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179. The Sixth Judicial Circuit in Pinellas County, Florida ordered the removal of the gastronomy tube that provided fluids and nourishment to Terri Schiavo, a thirty-three year old woman that is in a persistent vegetative state following a cardiac arrest. The expectancy of the order was that she would die within seven to ten days from starvation and dehydration. Brief of Amici Curiae Florida Governor Jeb Bush at 2, Schiavo v. Schiavo (No. 8:-3-CV-1860-T-26-TGW), *available at* http://www.myflorida.com/myflorida/government /laws/documents/ terri_schiavo.pdf (last visited Jan. 6, 2004).

180. The Governor and Legislature of Florida took immediate action "to stay the court-ordered starvation and dehydration" of Terri Schiavo. *House Passes Legislation to Save Terri Schiavo*, Oct. 20, 2003, *at* http://www.myfloridahouse.com/NewsDetails.aspx?pkItem =2d66b6d1-bbb0-4c9a-876b-56903b303a60 (on file with author).

181. 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting).

gating the Model Rules and including the accreditation requirement to instruct on the Model Rules.[182] As a cohort in the effort to redeem the profession and to meet the new accreditation standard, law schools began to construct the field of professional responsibility.[183]

A. Emergence of Professional Responsibility

The ABA's Model Rules of Professional Conduct "provide a framework for the ethical practice of law"[184] and create the substance of the field of Professional Responsibility. The ABA's dictates on duties, values, and responsibilities are its attempt to fill the void left by the dismissal of a higher authority. In the absence of divine authority and ordinary morality, the ABA assumes the position of authority to which the legal professional's moral conduct is guided and accountable. The preamble to the Model Rules explains that:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.[185]

According to the ABA, the legal professional is to focus on being a "zealous advocate" and just "assume that justice is being done." They are not to pursue or seek justice, but rather "assume" that justice will always occur when one upholds the "harmonious" responsibilities to the client, court, and public. However, the ABA goes on to state that although these responsibilities are "usually harmonious":

> Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living . . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.[186]

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182. The current ABA accreditation Standard 302(b) requires that:

> A law school shall require all students in the J.D. degree program to receive instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association.

SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AMERICAN BAR ASSOC., STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, CHAPTER 3: PROGRAM OF STUDY, *at* http://www.abanet.org/legaled/standards/chapter3.html (last visited Feb. 1, 2004).

183. *See* Baron & Greenstein, *supra* note 67, at 76-77 (discussing the law school's construction of professional responsibility as a field of law).

184. MODEL RULES OF PROF'L CONDUCT Scope para. 14 (2001), *reprinted in* 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 5 (Foundation Press 2002) [hereinafter ABA MODEL RULES].

185. MODEL RULES OF PROF'L CONDUCT Pmbl. para. 7, *supra* note 184, at 4.

186. MODEL RULES OF PROF'L CONDUCT Pmbl. para. 8, *supra* note 184, at 4.

As a lawyer, I should ask what are the basic principles that underlie the Rules, the ones that I should use to guide my moral judgment. The ABA Ethics 2000 Commission specifies these principles in the proposed revision of the Model Rules. "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."[187] The Model Rules outline the rules governing the client-lawyer relationship and emphasize the roles and responsibilities of the advocate.[188] The ABA's guiding principles rest on loyalty to the client and lead to an indictment of the legal profession: All cases of injustice derive from a lack of being "well represented."[189] Although the intent is to bolster demand for legal representation, the ABA actually makes the lawyer guilty of every injustice perpetuated upon a person with counsel and causes the profession to bear an inappropriate burden.[190]

In turn, the field of Professional Responsibility holds true to the ABA's underlying principles as it instructs on the Model Rules. Two law professors discuss the effects of the ABA's directed professional responsibility movement.[191] They equate the law student's approach to the "law of professional responsibility" to any other body of legal doctrine—an approach that entails strategic pursuits in furtherance of the interests of both the client and the lawyer.[192] They observe that the specific rules governing ethical problems promulgated by an external rule-maker, disengaged from ordinary morality, diverges the study of ethics from what is right and good to mere compliance[193]—mere compliance to a set of rules that relies upon extrinsic versus intrinsic motivations for ethical conduct. They conclude that this approach to ethics frees the law student and legal professional from a moral authority and issues the liberty to strategically maneuver the rules as a zealous advocate.[194]

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187. MODEL RULES OF PROF'L CONDUCT Pmbl. para. 9 (proposed rules, Aug., 2001), *reprinted in* 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 300 (Foundation Press 2002).

188. ABA MODEL RULES, *supra* note 184.

189. Rubottom Interview, *supra* note 119.

190. *Id.*

191. Baron & Greenstein, *supra* note 67.

192. *Id.* at 76-77.

193. *Id.*

194. *Id.* at 77-79. Baron and Greenstein discuss four characteristics of the field of professional responsibility that cause the law student to approach the code of ethical rules strategically. First, the source of rules is external to the individual, and the rule-maker is not presumed good. Second, the meaning of the ethical rules is variable. Third, the ethical rules are both under- and over-inclusive. Fourth, ethical rules are not unique in that they have qualities of vagueness and open-texture. They conclude that these characteristics make the rules of professional conduct subject to interpretation and exploitable by the legal advocate.

This liberty and duty of advocacy accounts for the prevailing question posed in my Professional Responsibility class: "Can a good person be a good lawyer?"[195] To address this question, the professor began with an overview of the influential, humanistic theories on ethics.[196] But since none of them provided any absolute moral authority, the discussion quickly proceeded to the regulation of the legal profession and instruction on the ABA's Model Rules. By means of a casebook, the curriculum introduced fact scenarios and prompted application of the governing Model Rules. Interpretive comments, case law, and ABA opinions guided the proper application of the Model Rules, and for discussion purposes, the professor used a model of the three lawyer types to assess the lawyer's conflicting responsibilities.[197] But the purpose of the discussion was not to instruct on a preferential way to prioritize the conflicting responsibilities. Rather the model was to reveal the characteristics associated with each lawyer type. Upon the conclusion of the semester the question of "Can a good person be a good lawyer?" was answered in light of Harper Lee's character Atticus Finch;[198] an example intended to permit the law student to reconcile ethical conduct with zealous advocacy.

Thus, the field of Professional Responsibility is evidently designed to simply advise the student on the conflicts that may arise in the practice of law and offers the Model Rules as the moral authority and incentive for professional conduct. Yet the Model Rules do little more than inform the lawyer on how to avoid civil liability and bar discipline. As a result, the professional responsibility movement fails to re-introduce the conscience or an authority beyond the profession, and seems to serve only to necessitate the Multistate Professional Responsibility Exam.[199]

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195. Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992).

196. The theoretical discussion included sets of three. First, the three models of human interaction of altruism, exploitation, and mutualism. Second, the three moralities of "left," "right," and "old." Third, the three schools of thought entailing meta-ethical realism, interpretivist, and skepticism. There was also mention of Lon Fuller's discussion of his two moralities relating to law, the morality of aspiration and the morality of duty. Two Bible stories were introduced, but they were flippantly discussed with the professor drawing misconstrued lessons from them.

197. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 304-17 (1995). The three types of Lawyers are: Type I is the Neutral Partisan; Type II is the Public Partisan; and Type III is the Partisan-Partisan. The Neutral Partisan is the most zealous advocate that will do all that the law allows for the client and nothing else matters. The Public Partisan is the advocate for public policy and will only utilize the law as intended and in conformance with social norms. The Partisan-Partisan is the private/sectarian advocate that will employ the "Rambo" tactics of the Neutral Partisan, but only for issues in accordance with his own beliefs or norms.

198. Harper Lee's character Atticus Finch from *To Kill a Mockingbird* was noted as a Type II Public Partisan Lawyer and one that exemplified how a good person can be a good lawyer.

199. Hayden, *supra* note 74, at 1335.

B. Multistate Professional Responsibility Exam

Following the ABA's adoption of the 1969 Code of Professional Responsibility, the ABA began to discuss the imposition of a nationally standardized measure for legal ethics based on its promulgated rules.[200] In furtherance of this idea, the NCBE created the MPRE "to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct."[201] The NCBE acknowledges that "the MPRE is not a test to determine an individual's personal ethical values"[202] and is a limited measure of ethics. "Passing the test does not signal that the successful examinee will be an ethical practitioner; 'The most unethical individual in the world can study the Code and tell you what it is they are not supposed to do.'"[203] Because the MPRE is not a reliable measure of an ethical practitioner and does nothing more than motivate law schools to meet ABA accreditation standards, it does little to alleviate the ethical crisis within the profession.

The ABA and law schools have gone to great measures through the Professional Responsibility movement and MPRE requirement to regenerate the concept of professional conduct within the study and practice of law. However, without reference or accountability to an external moral authority, these efforts to redeem the fallen profession are and will continue to be futile and self-serving. The Model Rules and the systematic construction of Professional Responsibility and the MPRE in place of applying ordinary moral principles do nothing more than acknowledge and evidence the *tripartite crisis*.

VIII. IDENTIFYING THE AUTHORITY OF LAW

St. Paul reminds the Colossian Christians to "[S]ee to it that no one takes you captive through hollow and deceptive philosophy, which depends on human tradition and the basic principles of this world rather than on Christ."[204] This passage highlights the battle between humanistic philosophies, depicting man as generally good and capable of achieving perfection, and the truth of divine revelation, depicting man's depravity and incapacity to achieve the perfect.[205] Today's institutionalized legal academia relies strictly on

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200. *Id.* at 1301.

201. National Conference of Bar Examiners, Description of the Examination, *at* http://www.ncbex.org/tests/mpre/mpre.htm (last visited Feb. 1, 2004).

202. *Id.*

203. Hayden, *supra* note 74, at 1336.

204. *Colossians* 2:8.

205. *Psalm* 14:1-3.

> The fool says in his heart, "There is no God." They are corrupt, their deeds are vile; there is no one who does good. The Lord looks down from heaven on the sons of men to see if there are any who understand, any who seek God. All have

theories and philosophies of law that abrogate God and presume that man, or at least the embodied legal elite, is generally good and enlightened. These presumptions are contrary to the foundational belief of the Common Law and the Constitution.[206] James Madison, the Father of the Constitution, explained the need for proper checks and balances between the branches of government in *The Federalist No. 51*:

> It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[207]

The Founding Fathers recognized the necessity of external controls within government and the same checks are necessary within the legal profession.[208]

It was the Founding Fathers' acknowledgement of God's sovereignty and the necessity for humble submission to God's authority, law, and wisdom that underlaid and inspired the law of this land. This inspiration is evident in the *Declaration of Independence*. Stating basic American principles, the Declaration served as the foundation for the Constitution's construction of a government purposed to secure the liberty of the unalienable rights endowed by the Creator.[209] The practical application of the Constitution without the principles of the Declaration causes instability and threatens the liberty envisioned by the Founding Fathers.[210]

> turned aside, they have together become corrupt; there is no one who does good, not even one.

Id.; *Romans* 3:22-23 ("There is no difference, for all have sinned and fall short of the glory of God."); *see* 1 BLACKSTONE, *supra* note 11, at 30 (stating "[a]nd if our reason were always . . . clear and perfect, unruffled by passions, unclouded by prejudice, . . . we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error."); THE FEDERALIST NO. 51 (James Madison); EIDSMOE, *supra* note 20, at 369-72.

206. 1 BLACKSTONE, *supra* note 11, at 41; HOFFMAN, *supra* note 1; DECLARATION OF INDEPENDENCE, *supra* note 20.

207. THE FEDERALIST NO. 51 (James Madison).

208. *See generally* Jennifer M. Kraus, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy*, 84 MARQ. L. REV. 273, 284-300 (2000) (discussing the criticisms of attorney discipline systems and the shortcomings of self-regulation, concluding that, "[s]elf-regulation by the legal profession is criticized and distrusted, both by the public and by members of the profession").

209. EIDSMOE, *supra* note 20, at 62.

210. *Id.* at 361-62.

From where did the Founding Fathers learn these principles about law and jurisprudence? Whom did they read, study, and reference? The Founding Fathers made thirty-four percent of all their references to the Bible. And they turned to Montesquieu, Blackstone, and Locke as their most significantly cited "thinkers."[211] Men not known as deists and philosophers, but men known as conservative legal and political thinkers, also known to be Christians.[212] John Adams stated, "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other."[213] John Adams recognized that without moral accountability America's vision of "Life, Liberty, and the pursuit of Happiness"[214] would be lost.

In *Federalist No. 51*, James Madison acknowledged that "a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties."[215] The legal profession in America and more specifically the judiciary is endangering the masterwork of the Founding Fathers by assuming a "power independent of society" and rejecting any external authority, specifically the Divine. Just as Moses, King David,[216] Montesquieu, Blackstone, and Locke[217] understood that God was the source of wisdom and law, the Founding Fathers established a nation founded on biblical principles and adopted much of the English Common Law rooted in those same principles.[218] President George Washington declared, in his Proclamation of the First National Thanksgiving Holiday, "[I]t is the duty of all nations to acknowledge the Providence of Almighty God, to obey his will, to be grateful for his benefits, humbly to implore his protection and favor."[219]

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211. Two Professors, Donald Lutz and Charles Hyman, conducted a study to determine the references made in writings by the Founding Fathers between 1760 and 1805. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 189-97 (1984), *reviewed in* EIDSMOE, *supra* note 20, at 51-53.

212. EIDSMOE, *supra* note 20, at 2.

213. *Id.* at 381 (quoting John Adams, 1789).

214. DECLARATION OF INDEPENDENCE, *supra* note 20.

215. THE FEDERALIST NO. 51 (James Madison).

216. *Exodus* 34 (documenting Moses' interaction with God when he received the Ten Commandments on Mount Sinai); *Psalm* 1:1-2 (This Psalm journals King David's counsel with the Lord. "Blessed is the man who does not walk in the counsel of the wicked or stand in the way of sinners or sit in the seat of mockers. But his delight is in the law of the Lord and on his law he meditates day and night."); *Proverbs* 1:7 (King Solomon expresses the wisdom for "right living." "The fear of the Lord is the beginning of knowledge; but fools despise wisdom and discipline.").

217. EIDSMOE, *supra* note 20, at 54-62.

218. HOFFMAN, *supra* note 1, at xvi, 38-47.

219. EIDSMOE, *supra* note 20, at 118.

IX. CHARGE TO LAW STUDENTS

In an imagined law school graduation address to the class of 2035, one commencement speaker shares his hope for the revival of the legal profession. "It is not surprising, then, that the revival of the American legal profession this century has coincided with the gradual return of religion and sound theological thinking."[220] He shares that the revival must first begin with the individuals before it can penetrate the culture and the American institutions. In the end though, "even in our law schools, the language of religion and theology, so strongly rooted in the law and justice, was again part of, first, the ethical curriculum, and then gradually the substantive courses."[221]

I too share this hope and challenge law students to use the power of the consumer to spark revival within the institutions of the ABA-accredited law schools; a revival that instructs the law student about the moral dimension of law; a revival that permits the legal professional to candidly acknowledge the Sovereign. As law students and future legal professionals, we must begin to call the bluffs of our legal educators.[222] We must ask from where does the law gain its authority. We must acknowledge and propagate what we know to be true—that transcendent moral principles govern law. We must not accept a philosophy that instructs law to be ever evolving and reliant on the enlightenment of man. We must rely on what we know to be *right*. And we must exercise discretion in the institution and professors we select to provide our legal education.[223]

The obstacles to overcome are high, but I make these challenges fully aware of how entrenched modern jurisprudence is. It is intimidating to raise your hand in class and make yourself vulnerable to the attacks of the legal academy. The encouragement I offer to students is that you can speak with authority. Your reasoning and approach to law is rational and creditable. And there is a place for it in legal education.[224] It does rely on faith in God, but what is faith?

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220. Schutt, *supra* note 2, at 206.

221. *Id.* at 207.

222. *See* JAY BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW (2003). In his book, Budziszewski discusses the rejection of common truths and makes a compelling argument that there are foundational moral principles that are "not only right for all, but at some level known to all." *Id.* He argues that in order to recognize what we can't not know, we may have to forget some of the things we are taught. *Id.* People do not enter a state of moral confusion without some level of deception and the willingness to be deceived. To counter this "cannibalizing of the conscience, of moral knowledge," he solicits for people to call the bluff of those that reject basic moral principles and deny what they can't not know. *Id.*

223. *See* HOFFMAN, *supra* note 1, at v-vii (discussing the millions of volumes of books available and the importance of a student to judiciously select the material read to gain knowledge. The first book he recommends students to read is the Bible.).

224. 1 BLACKSTONE, *supra* note 11; HOFFMAN, *supra* note 1.

Faith is the "confident belief in the truth, value or trustworthiness of a person, idea or thing"[225]—belief that does not rest in what is seen. Your faith is in the omnipotence and omnipresence of God. But remember the positivist's position too relies on faith—faith in man and the created. Man's knowledge is limited and imperfect, while God's is infinite and infallible. When engaged, the reasoning of a legal positivist can be overcome because it is circular and inconsistent. Yet the goal is not spiritual conversion. Rather it is the acknowledgement that the laws of this nation rely upon an external authority greater than man and greater than the bench.

X. CONCLUSION

By implementing the scientific method, premised on the notion that man can discover the rules of law independently of God, Langdell, Holmes, and their devout disciples undermined the revealed law and redefined the role of the legal profession—contrary to early American jurisprudence and legal instruction.[226] Their secularization of legal education furthered by the ABA has had a lasting impact on America's legal institutions through the spread of legal positivism. Legal positivism manifests manipulation and arrogance, while the legal philosophy that acknowledges a divine lawgiver demands submission and humility—a humility that was once known within the noble profession of law.[227] This humility is desperately needed within America's legal community today.

After nearly a century of institutionalized legal positivism, much of the legal profession is captivated by a philosophy that dictates there is no external authority or accountability in the law beyond that which is judicially acknowledged. As a result, the courts have abused their jurisdiction and created law that denies the sovereignty of God and contradicts traditional moral belief. The ABA's Model Rules and law schools' construction of Professional Responsibility fail to properly identify the cause of the *tripartite crisis* and attempt to moralize without introducing an external, absolute source of morality. Without acknowledgment of an external lawgiver to whom the lawyer is accountable, the ABA and law schools will continue to produce legal professionals that further exacerbates the *tripartite crisis*.

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225. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), *available at* http://dictionary.reference.com/search?q=faith.

226. 1 BLACKSTONE, *supra* note 11, at 38-44; Howe, *supra* note 51, at xi-xii; *see* EIDSMOE, *supra* note 20 (discussing the faith and educational influences on the Founding Fathers); Schutt, *supra* note 2, at 145 (contrasting Holmes' view that "lawyers and judges are engineers of a societal 'good,'" to Alex de Tocqueville's role-based vision for American lawyers, and noting the impact of Holmes' pragmatic jurisprudence on the virtues of the profession).

227. HOFFMAN, *supra* note 1.

So why did you go to law school? As one who went to law school with a high regard for the rule of law and the authority from which it originated, I do have hope that the future of legal education and practice is not beyond the reintegration of the moral conscience and the reconnection of the authoritative lawgiver to the law.[228]

228. *See* 1 BLACKSTONE, *supra* note 11, at 41. Blackstone states that the law of nature:

> dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

Id.