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Ethics, Professionalism and the Practice of Law

*Frederick A. Elliston**

I. INTRODUCTION

Does professional lawyering demand that a lawyer act ethically? The legal profession's answer to this question remains ambivalent. Some lawyers treat ethics as a necessary evil, endured as a course in law school but quickly put aside in the daily practice of law. Other lawyers conveniently invoke ethics to buttress their image and prove that lawyers are more than "hired guns."

Ethics should neither exist as an incidental adjunct to the curriculum nor as mere rhetoric used to improve a lawyer's image. Rather, ethics should function as the core of a lawyer's practice. Without ethics, true professionalism and good lawyering escape us.

This article will sketch the recent growth of the field of professional ethics and describe the general role of ethics in professional life. Then it will identify four essential contributions ethics makes to lawyering.

The common view that a good lawyer must first be a good person oversimplifies the issue. This article will examine various hypothetical situations which show that professionals need to be more than technicians. This article will contend that lawyers are frequently pressured to act amorally if not immorally. To combat these pressures and become more than hired guns, lawyers must integrate ethics into their practice and thereby become professionals in the true sense. They must exercise their moral conscience as well as their technical skills. This integration and exercise demands knowledge gained through a continued study of professional ethics.

II. THE GROWTH AND NATURE OF PROFESSIONAL ETHICS

Over the past two decades, the interest in professional ethics has grown dramatically. This growth emerges at several levels — new courses, new texts, new professional societies, new research projects and new journals. Philosophy departments now offer

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courses that were unthinkable fifty years ago.¹ Specialized courses in ethics are offered by many law, medicine, business, and engineering schools.² Over a dozen universities have created centers and institutes to integrate these curricular offerings, to provide student internships and interdisciplinary degrees, and to conduct major research projects.³

1. Topics like civil disobedience, ecology, sport, death, drug use, victimless crimes, and human sexuality are regularly covered.

2. Books have been published on social and political issues such as feminism, euthanasia, homicide, animal rights, energy, immigration policy, parenting, the population explosion, affirmative action, criminal justice administration, and war. See *FEMINISM AND PHILOSOPHY* (J. English, F. Elliston & M. Braggins eds. 1977); *THE DILEMMAS OF EUTHANASIA* (J. Behnke & S. Bok eds. 1975) (an early but still useful collection); P. DEVINE, *THE ETHICS OF HOMICIDE* (1978) (an effort to examine the general practice of killing); *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* (P. Singer & T. Regan eds. 1976); *ENERGY AND THE FUTURE* (G. MacLean & P. Brown eds. 1983); *THE BORDER THAT JOINS: MEXICAN IMMIGRANTS AND U.S. RESPONSIBILITY* (P. Brown & H. Shue eds. 1983); J. BLUSTEIN, *PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY* (1983); *ETHICS AND POPULATION* (M. Bayles ed. 1976); R. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY* (1980); *ETHICS, PUBLIC POLICY AND CRIMINAL JUSTICE* (F. Elliston & N. Bowie eds. 1982); M. WALTZER, *JUST AND UNJUST WARS* (1977).

New societies have been formed in the past two decades on law, ethics, social philosophy, sport, professional ethics, sex, and business. More specifically, these include the American Section of the International Association for the Philosophy of Law and Social Philosophy (AMINTAPHIL), the American Society for Value Inquiry (1970), the Association for the Philosophy of the Unconscious (1971), Colloquium for Social Philosophy (1972), and the Philosophical Society for the Study of Sport (1972). One can also list the Society for Women in Philosophy (1971), the Society for the Philosophy of Sex and Love (1977), the Society for the Study of Professional Ethics (1978), and the Society for Business Ethics (1980). Several journals have appeared to promote this work during the past few years. These include the following: *BUSINESS AND PROFESSIONAL ETHICS*, *THE JOURNAL OF BUSINESS ETHICS*, *ENVIRONMENTAL ETHICS*, *CRIMINAL JUSTICE ETHICS*, *THE WESTMINSTER REVIEW*, two journals called *APPLIED PHILOSOPHY* (one published in England), and most recently *AGRICULTURE ETHICS*. These are in addition to the *HASTINGS CENTER REPORT* on bio-ethics, *PHILOSOPHY AND MEDICINE*, various newsletters on the philosophy of law, philosophy of medicine, and IIT's *PERSPECTIVES ON THE PROFESSIONS*.

3. These projects have been funded by government agencies such as the National Endowment for the Humanities (NEH), joint programs such as Ethical Values in Science and Technology (EVIST), and private foundations such as Ford, Rockefeller, Carnegie and Exxon.

For example, Dr. Albert Flores directed an EVIST project on safety that examined the technical, social and moral problems in setting safety standards in both the private sector at companies like Monsanto, and in the public sector at the National Aeronautics and Space Administration (NASA). His project addressed both substantive questions about the factors that should be used to determine acceptable levels of risk (such as the probability and amount of harm and the cost and effectiveness of alternative measures to reduce it) and procedural questions of who should decide (the engineering profession, a government regulatory agency or representatives of the public). See *DESIGNING FOR SAFETY* (A. Flores ed. 1982). For another example of a project in engineering, see *BEYOND WHISTLEBLOWING* (V. Weil ed. 1983).

Dr. David Luban organized a series of papers on legal ethics with philosophers and

A brief exploration into professional ethics sets the scene for defining the cause of this growth and the importance of ethics in the practice of law. In simple terms, professional ethics explores the philosophical study of the moral problems that arise within a profession. In more theoretical terms, professional ethics articulates a set of ethical principles that systematically resolves the moral problems professionals face. Just as philosophical inquiry might analyze a narrow topic like abortion and examine the moral rights and duties of the mother, father, doctors, nurses, fetus, and other affected parties, a philosophical inquiry can also critique an entire profession, such as law.

Generally speaking, four traits characterize a profession:⁴ a specialized body of knowledge; a commitment to the social good; an ability to regulate itself; and high social status. Consider three professions as illustrations.

The lawyer, engineer, and doctor all have *special skills* that the general public lacks. The lawyer arranges our legal affairs, helps us exercise and protect our rights, and defends those rights against violation. The engineer builds safe bridges, durable houses and economical buildings. The doctor cures us when we become sick and helps us avoid illness when we are well. The unique ability to accomplish these objectives distinguishes these three groups as professionals.

With the professional's specialized knowledge comes power. The public requires that the power be used for the *social good*. All professionals act according to a code of conduct under which they promise to use their special skills for the welfare of others. Business people, for example, have no such code of conduct and hence are often excluded from the ranks of professionals per se. But

lawyers. The series of papers commissioned in this project were published as *THE GOOD LAWYER* (D. Luban ed. 1984). For a different selection, see *ETHICS AND THE PRACTICE OF LAW* (F. Elliston & M. Davis eds., to be published 1986). Dr. Kenneth Kipnis develops the first comprehensive theory of professional ethics for the legal profession in his forthcoming *LEGAL ETHICS* (1985). For a comprehensive listing of materials on moral issues in the practice of law by philosophers, lawyers, and legal scholars, see F. ELLISTON & J. VAN SCHAICK, *LEGAL ETHICS: AN ANNOTATED BIBLIOGRAPHY AND RESOURCE GUIDE* (1984).

This author directed a project with criminologists and sociologists on mechanisms for dealing with professional dissent or whistleblowing. The project produced a series of books: an annotated bibliography *PROFESSIONAL DISSENT* (1983); a casebook *WHISTLEBLOWING* (1985) and a research volume *WHISTLEBLOWING RESEARCH* (1985).

4. A substantial period of formal education, and an interpersonal relationship between the professional and the individual seeking the professional's services have been described as additional traits of the professional. See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUMAN RTS.* 1, 1-2 n.1 (1975).

judges, by contrast, are almost automatically included as professionals, partly because of their avowed commitment to use their special skills for the social good.

Most professions enjoy a significant measure of autonomy, protected through a mechanism for *self-regulation*. Lawyers, for example, have an ethical standard, the Model Code of Professional Responsibility⁵ ("Model Code"), whereby the profession itself may discipline its members. Because of professionals' expertise, the average person hesitates to pass judgment on their conduct and relies instead on the professionals' peers to define the proper standards and qualifications for membership, discipline and expulsion.

Because of the knowledge, power, social commitment, and autonomy that professionals have, the public typically holds professionals in high regard. The elite group's members are *esteemed* and respected by others in the community.

Given these four characteristics of a profession, we can understand why, for example, the practice of law is a profession while plumbing is not. Plumbers, like lawyers, possess a certain measure of specialized skills. Plumbers, however, are not held in as much esteem because they do not possess the same degree of social commitment, and they lack the autonomy that lawyers have in licensing and disciplining their members.

III. ETHICS AS AN ESSENTIAL ELEMENT OF PROFESSIONALISM

What is the relationship between ethics and professionalism? This article claims that to be a professional requires professional ethics and a failure to master the skills of professional ethics signals a failure to be a professional. This claim will be defended by showing that what professional ethics achieves is essential to the conduct of professionals.

Professionals often face harried, pressure-filled days. Why attempt to squeeze ethics into their long list of daily considerations?

5. The American Bar Association House of Delegates adopted a "Code of Professional Responsibility" in 1969, now officially entitled the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) ("MODEL CODE"). The Model Code has been adopted in some form in all of the states. Most federal courts treat the Model Code as at least persuasive authority. For an evolutionary perspective of the Model Code, see generally Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 10 (1970).

The MODEL RULES OF PROFESSIONAL CONDUCT (1983) ("MODEL RULES") are the most recent rules that define improper conduct for disciplinary proceedings and enhance the lawyer's professional responsibilities to others. MODEL RULES OF PROFESSIONAL CONDUCT SCOPE (1983).

A series by the Hastings Center on the Teaching of Ethics in Higher Education serves as a useful point of departure for answering this question.⁶ According to its authors, the teaching of ethics can serve several different goals. At the most modest level, teaching ethics can *raise one's moral consciousness*. Sensitizing people to the language of morals makes them aware of a moral point of view different from a prudential, aesthetic, epistemological or political view. To ask what is morally right or wrong extends the focus beyond an individual client's interests. Teaching ethics makes people aware that they make moral decisions for which they are accountable. Such moral self-consciousness is the first step to self-knowledge and a necessary condition for the responsible behavior we demand of all professionals.

Closely related to this first objective is a second: *values clarification*. Defining good-bad or right-wrong also clarifies what it means, in practical terms, to be a good doctor or good lawyer.

A third task in teaching ethics is *the analysis of moral arguments*. Doctors must understand health, engineers must understand safety, and lawyers must understand justice, if each of these professions is to fulfill its social role. A full defense of an individual's particular moral values and ethical principles demands the integration of the values in a coherent and consistent fashion. The theory underlying the values must clearly distinguish ethical and non-ethical disputes, define the meaning of the moral terms involved, and annunciate the strength of the arguments offered.

As a fourth and final goal, teaching ethics may serve to *provide solutions* to moral problems and teach these solutions as moral lessons. A doctor cannot forego any moral decisions involved in whether or not to operate on a patient. A lawyer cannot avoid a decision whether or not to accept a client. Moral questions are inevitable and moral solutions must be based on clearly stated principles, cogent arguments and well-articulated values.

These are the four purposes of teaching ethics. How do they relate to professional life?

A. *Moral Consciousness Raising and Professionalism*

In the exercise of one's professional expertise, factual judgments and value judgments are inextricably bound together. Profession-

6. See THE TEACHING OF ETHICS IN HIGHER EDUCATION: A REPORT BY THE HASTINGS CENTER (1980).

als are called upon to make difficult judgments in which technical competence and moral values are interwoven.

For example, heart transplants are modern miracles in medical technology. What the appropriate procedures and techniques are for performing such operations can best be answered by surgeons, not sages. Yet *whether* to perform the transplant is not just a medical question, but a moral question about the rights of patients, the importance of personal autonomy and the conflicting rights of others competing for scarce health-care dollars. Questions about the appropriate distribution of limited medical resources go beyond the technical expertise of doctors and health care practitioners and require balancing competing moral rights according to clearly articulated principles of distributive justice.

Similarly, philosophical concepts and principles underlie the entire field of criminal justice. Just as medicine requires a careful understanding of the nature of health, law requires a careful understanding of the nature of justice. One cannot act justly, except inadvertently and sporadically, unless one understands the nature of justice. Just as the doctor has techniques for securing health, the lawyer has techniques for securing justice. The law comprises a powerful set of tools for doing justice in a sometimes unjust society. Lawyers, like other professionals, must be careful to distinguish between the technical questions their training equips them to ask and the ethical questions that inevitably accompany the technical questions.

As a guide through these moral mazes, lawyers have devised a Code of Professional Responsibility.⁷ But a code is a statement of professional standards, not moral principles.⁸ Most of what a lawyer should or should not do cannot be captured in a code.⁹ A code cannot function as the final arbiter for right and wrong inasmuch as it reflects one group's imperfect effort to articulate standards of conduct.¹⁰ The provisions of a code change according to our in-

7. See *supra* note 5.

8. "The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards." MODEL CODE Preamble; see Comment, *The Lawyer's Moral Paradox*, 1979 DUKE L.J. 1335 (1979) (the Model Code is commonly misperceived as an ethical code when it is in effect regulatory, and does not supplant the requirement for independent moral choice).

9. Goldman, *Confidentiality, Rules, and Codes of Ethics*, 3 CRIM. JUST. ETHICS 8, 12 (Summer/Fall 1984).

10. The American Bar Association's current document setting standards of conduct is the Model Rules of Professional Conduct. Rules of ethics have a long history in the

sights into what justice requires, along with economic, ideological and political developments in our society.

Every experienced lawyer has paused at one time or another to reflect on what to do in a morally ambiguous situation. Consider the following cases:¹¹

The will of a recently deceased businessman leaves a substantial estate to your client's young children, the deceased's nieces and nephews. Your client's family is quite poor, while the deceased's own children are well-to-do. But you know the will is technically flawed. You suspect the lawyer who drafted the will should have known better. What should you do?

Your client is an elderly minister who has been a dedicated and self-sacrificing member of the community throughout his life. Because of his past generosity and present hard times, he can no longer afford to make payments on a loan for house repairs. The finance company, which will not negotiate, could be put off for a year or longer by a procedural delay allowing this elderly widower to live in peace. But such a delay, though commonly used, is contrary to court procedures. What should you do?

Your client is seeking damages for four prized cows killed during a neighbor's drunken spree. Although these cows would ordinarily be worth \$2,000 each, they recently became infected and would now fetch no more than \$200 each. In pretrial negotiations the neighbor's lawyer, not knowing the cows were diseased, offers a settlement of \$4,000. What should you do?

Your secretary accidentally destroys the four original, forged checks a local bank had given you, the prosecutor. The attorney for the accused forger, recently separated from her husband and now caught up in a custody battle, assumes that you still have the checks. The accused woman and her lawyer have come to your office to negotiate a settlement. Unknown to her, the bank has indicated that to protect its good name in the community it is reluctant to press the case. What should you do?

These are offered as examples of the moral hazards of lawyering that cannot be overcome simply by the application of technique.

United States. For a brief history of the rules of ethics in the United States, see L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY*, § 1.02 (1982).

11. The first two examples are adapted from *ETHICS AND THE LEGAL PROFESSION* (F. Elliston & M. Davis eds., to be published in 1986). The two cases dealing with the ethics of negotiations are adapted from Norbert Jacker's provocative presentation of the American Bar Association's Tenth Annual Workshop on Lawyer's Professional Responsibility, Denver, Colo., June 8th, 1984. Monroe Freedman has provided other well known examples in his article, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469 (1966).

They raise value questions about the moral weight of economic hardships, moral merit, the obligation to tell the truth, and the moral imperative not to exploit the ill- or uninformed.

B. Values Clarification and Professionalism

The contrast between ethical and technical judgments is not always easy to discern. Certain terms like "person," "guilty," or "good" slide almost imperceptibly back and forth between the ethical and technical judgments. Only through a careful examination of the context can one determine which sense is operative. The study of ethics can help professionals draw this distinction more sharply. It can help them become clearer on the meaning of moral discourse and on the conflicting values in the workplace.

The criminal justice system serves different purposes. It has a rehabilitative function: to teach criminals to mend their ways.¹² It has a retribution function: to maintain respect for the law and to suppress acts of private vengeance.¹³ It has a preventative function: to deter the criminal himself from committing further crimes.¹⁴ It has a general deterrence function: to dissuade others from committing future crimes.¹⁵ These objectives can easily conflict. The habitual pick-pocket, having served his time, still poses a threat to society. Should he be released? Under the retributive principle, the answer is yes. Under the rehabilitative principle, the answer is no. Philosophy helps sort out these conflicting principles, and thereby facilitates the work of professionals, who would otherwise lack an integrated and coherent approach.

Conflicting principles of justice, although somewhat lofty and abstract, impinge on the conduct of lawyers. Consider the following hypothetical case:

In a private talk the county prosecutor, Fred Grim, offers to reduce the charges against your client, Vinnie Krule, from rape

12. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 23 (1972) (under this theory, society gives the convicted criminal appropriate treatment in order to return him to society reformed so that he will not need to commit further crimes).

13. *Id.* at 24 (under this theory, punishment commensurate with the crime is necessary in order to restore societal peace of mind).

14. *Id.* at 22 (under this theory, punishment deters the criminal himself rather than others).

15. *Id.* at 23 (under this theory, punishment deters others from committing future crimes, lest they suffer the same fate). LaFave and Scott discuss two additional theories of punishment: (1) restraint, where society protects itself from persons deemed dangerous by isolating these persons from society; and (2) education, where the publicity that attends the trial, conviction, and punishment of criminals educates the public as to the proper distinctions between good conduct and bad. *Id.* at 22-24.

(which carries a 6-30 year sentence) to gross sexual imposition, provided your client is willing to return a guilty plea. Further, he will recommend probation. But Grim is seriously mistaken in his belief that your client is a first offender who deserves this break. In fact you know that he has two rape charges and an armed robbery conviction against him in another state. What should you do?

If you were concerned with rehabilitation, probation is unlikely to succeed unless stringent conditions are attached. If you were concerned with retribution, your client has gotten off far too lightly for the offense he actually committed, although he may be getting the sentence his offense deserves on Grim's erroneous understanding of it. If you are concerned with specific deterrence, you should reject the plea bargain; if anything it is likely to encourage your client to engage in future misconduct on the grounds that he can easily get away with it. Finally, if you are concerned with general deterrence and protecting society, the punishment may be appropriate to deter the offender Grim has in mind, but it will not deter people like Krule.

The problems of acting justly in an often unjust and imperfect society have been compounded by questions of the moral responsibility of lawyers for ensuring that decisions are made on the basis of facts. Lawyers must grapple with their duty to represent clients zealously within the bounds of the law.¹⁶ They must deal with conflicting obligations to their clients, their colleagues and the system of which they are a part.¹⁷ All professionals, to one degree or another, experience such conflicting obligations.¹⁸ Lawyers must carefully weigh the strength of their allegiance to their client, to their code of professional conduct and to the public. These require delicate judgment calls. Such judgments are an integral part of professional life. They serve individually to define the kind of professional one is and collectively the kind of profession one serves.

C. *Moral Reasoning and Professionalism*

When professionals confront a moral dilemma, they confront a

16. MODEL CODE Canon 7. "In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense." MODEL CODE EC 7-1. "The bounds of the law in a given case are often difficult to ascertain." MODEL CODE EC 7-2.

17. *Id.*

18. One of these dilemmas has become familiar under the rubric "whistleblowing." Upon learning of intended wrongdoing by a client, the lawyer has to make a decision whether to report it, whether to blow the whistle on the client, and, if so, to whom.

series of arguments. The resolution requires a decision about which arguments are good and which are bad. The study of ethics shows professionals how to appraise these arguments against the canons of consistency, coherence, validity and soundness. The study of ethics points out fallacies in reasoning that easily lead one astray. It explains what makes an argument valid and what makes it invalid, and identifies valid and invalid arguments according to their logical form. It dispels some disputes as verbal — merely differences in the use of terms. Additionally, it locates the ground on which the battle must ultimately be waged — the basic value judgments on which the others depend.

By bringing a measure of rationality into disputes within the professions, moral philosophers often keep professionals from being led astray by spurious reasoning. In so doing they have not necessarily led professionals to the truth, but have at least checked them from falling into irrationality, nonsense, and error.

D. Professionalism and Moral Truth

Professionals seek the social good. Doing so requires the ability to identify the social good. Accordingly, one's very status as a professional requires that one know this moral truth.

It requires more, however, for each profession seeks the social good in a different form, according to its particular expertise. The doctor seeks it in the form of health. The engineer seeks the social good in the form of safe, efficient constructions. The lawyer seeks it in the form of justice. Each profession, therefore, must know its own form of the social good. Without such knowledge professionals cannot perform their social roles.

Moral considerations limit the means that professionals can use to achieve the social good. Doctors who lie to a patient run the danger of undermining the trust on which successful treatment depends. Engineers who fail to blow the whistle on a faulty brake design call into question their commitment and that of their peers to public safety.¹⁹ Lawyers who conceal evidence that would incriminate an innocent client use bad means to a good end, and jeopardize their standing as an agent of the court.²⁰ Similarly, if

19. For a provocative critique of the failure of engineers to ensure the safety of the public, see Kipnis, *Engineers Who Kill: Professional Ethics and the Paramountcy of Public Safety*, 1 BUS. PROF. ETHICS 77 (Oct. 1981). For a discussion of the strategies to be used to resolve disputes among engineers about safety and other professional matters, see F. ELLISTON, *WHISTLEBLOWING* (1985).

20. The ABA Model provisions require that a lawyer's statements to the court be truthful. MODEL CODE DR 7-102 (A)(5); MODEL RULES Rule 3.3 (a)(1).

they let stand the perjured testimony of an innocent client, they condone what is prima facie immoral in the name of justice.²¹ Thus, morality imposes restrictions not only on the ends that are sought, but on the ways in which we pursue those ends.

Whether or not one accepts these examples, some restrictions are to be imposed on the means that lawyers can use in the pursuit of justice.²² Establishing even minimal restriction requires some conception of moral truth. To give up moral restrictions invites a no-holds barred war in which lawyers can do whatever works to get "justice" for their client. Such unregulated and unmitigated legal warfare would threaten the very existence of law as a profession.

IV. GOOD LAWYERS AND GOOD PEOPLE: A NEW APPROACH²³

Many hold that to be a good lawyer one must be a morally good person. Indeed, this assumption justifies moral character and fitness tests.²⁴ Such tests presume that if one is not a morally good person, one will not be a good lawyer.²⁵ Consequently, the boards

21. The qualification "prima facie" is needed because although it may seem at first glance to be ethically bad to withhold evidence or to let erroneous testimony stand, many lawyers and legal scholars hold that such actions are not ultimately bad. *See, e.g.*, Freedman, *supra* note 11. Emphasizing the adversarial system within which American law is practiced, it is contended that many seemingly wrong actions are justified. *Id.* The confrontation between the state prosecutor and the accused with a defense lawyer will yield the truth and a fair adjudication, at least more often and more reliably than any alternative system for doing justice. *Id.*

The court in *Dodd v. Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960), took a different view:

In our system the courts are almost wholly dependent on members of the bar to marshal and present true facts . . . as to enable the judge or jury to cook the adversary contentions in a crucible and draw off the . . . decisive facts to which the law may be applied. When an attorney adds or allows false testimony . . . he makes impure the product and makes it impossible for the scales to balance. No breach of professional ethics, or of the law, is more harmful to the administration of justice

22. The law does impose obligations on advocates that may conflict with the client's ultimate objectives. Although a lawyer's paramount duty is to pursue vigorously the client's interests, "that duty must be met in conjunction with, rather than in opposition to, other professional obligations." *Thornton v. United States*, 357 A.2d 429, 437 (D.C. Cir.), *cert. denied*, 429 U.S. 1024 (1976).

23. This section of the article is adapted from portions of an earlier article, Elliston, *Moral Character and Fitness Tests*, 51 BAR EXAMINER, Aug. 1982 at 8.

24. All states make good moral character a condition for admission to the bar. MODEL CODE DR 1-101 (b) provides that "[a] lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute."

25. MODEL CODE EC 1-5 provides that "[a] lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should

of bar examiners disqualify individuals who the boards believe are not morally good people.²⁶

One can debate at length about what attributes make someone a morally good person.²⁷ Many discussions of moral character and fitness tests, which all practicing lawyers have passed, have focused on this issue.²⁸ Case law provides instructive and fascinating examples of the legal profession's own conception of a good person. Bar admission committees and the courts have had to decide whether a homosexual orientation,²⁹ membership in a communist organization,³⁰ declaration of bankruptcy to avoid paying student loans,³¹ or simply brewing beer³² are sufficiently serious moral transgressions to disqualify one as a morally good person, and hence justify excluding a candidate from the legal profession.³³ All these cases and debates are beside the point, however, if it is not necessary to be a morally good person in order to be a good

be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct."

26. See *supra* note 24.

27. For a discussion of what makes a morally good person in the legal setting, see Elliston, *supra* note 23, at 9-14.

28. See, e.g., *Konigsberg v. State Bar*, 353 U.S. 252, 262-63 (1957), where the court observed that the term "good moral character" "by itself, is unusually ambiguous. . . . Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." Good moral character tends to be defined in terms of the absence of certain kinds of conduct. See, e.g., *Reese v. Board of Commissioners of Alabama State Bar*, 379 So. 2d 564 (Ala. 1980) (the absence of conduct constituting acts of moral turpitude); *Pushinsky v. West Virginia Bd. of Law Examiners*, 266 S.E.2d 444 (W. Va. 1980) (the purpose of the good moral character requirement is to ensure that dishonest, unscrupulous, or corrupt individuals will not become lawyers); *In re Alkow*, 64 Cal. 2d 838, 840, 415 P.2d 800, 802, 51 Cal. Rptr. 912, 914 (1966) (excluding "everything done contrary to justice, honesty, modesty, or good morals," along with acts of "baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general").

29. In *Florida Bd. of Bar Examiners re: N.R.S.*, 403 So. 2d 1315 (Fla. 1981), the court held that private, noncommercial sex acts between consenting adults were not relevant to prove fitness to practice law. For a discussion of the moral status of homosexuality, see *PHILOSOPHY AND SEX*, 353-440 (R. Baker & F. Elliston eds. 1984).

30. See *Konigsberg v. State Bar*, 366 U.S. 36 (1960); *In re Anastaplo*, 366 U.S. 82 (1960).

31. Compare *Florida Bd. of Bar Examiners re: Lonnie Neil Groot*, 365 So. 2d 164 (Fla. 1978) with *Florida Bd. of Bar Examiners re: GWL*, 364 So. 2d 454 (Fla. 1978).

32. An attorney was disbarred for three years because he brewed beer. *Bartos v. U.S.D.C. Nebraska*, 19 F.2d 722 (8th Cir. 1927).

33. Although the United States Supreme Court has found no constitutional infirmity in requiring a person seeking admission to the bar to possess "character and fitness requisite for an attorney and counsellor-at-law," *Law Students Civil Rights Research Council, Inc., v. Wadmond*, 401 U.S. 154, 159 (1970), denial of admission to the bar must be based on factors having a rational connection with the applicant's fitness to practice law. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

lawyer. Indeed, if high moral standards are a hindrance in the practice of law, then moral fitness tests and morality generally are pointless. The moral fitness requirement is problematic. In its place two alternative principles are offered:

That a good lawyer is sometimes immoral.
That a good lawyer is amoral.

What can be said in defense of these?

A. A Philosophical Challenge

The work of Allan Goldman challenges the simplistic view that standard moral principles "apply" uniformly across all the professions.³⁴ Rather, he holds that moral principles must be worked out within the context of a professional role. He distinguishes two types of roles. A strongly differentiated professional role requires unique and distinctive moral principles, different from those of morality generally. A weakly differentiated professional role only requires general moral principles that are qualified, but not violated, by the institutional context. In the case of the former, actions which would otherwise be wrong could, for a certain profession, be permissible or obligatory.

For example, it is ordinarily wrong to deceive people. But undercover police officers regularly deceive suspects whom they believe have accepted illegal bribes or serve as fences for stolen property.³⁵ Similarly, in order to uphold the rule of law, judges must defer to legal precedent even when it violates their own moral sensibilities or those of the community at large. The role of these criminal justice officials is thus, according to Goldman, strongly differentiated.

These two examples, and Goldman's underlying arguments, show that one cannot without further ado move from general moral principles to an evaluation of the conduct of professionals. The relation between ethics and the professions is more complicated and must be worked out for each profession.³⁶

Of course, if Goldman is correct, it does not follow that lawyers

34. See A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1978).

35. For a discussion of the ethics of police deception, see *ABSCAM ETHICS* (G. Caplan ed. 1983); see also *MORAL ISSUES IN POLICE WORK* (Part II) (F. Elliston & M. Feldberg eds. 1985).

36. See K. KIPNIS, *LEGAL ETHICS* (1985), for a rigorous and comprehensive effort to work out the relationship between ethics and the legal profession.

are immoral or amoral. But it does follow that if the practice of law is a strongly differentiated profession, then one cannot judge the moral conduct of a lawyer in a simple and straightforward way. Rather, it would be permissible and sometimes obligatory for lawyers to do things which if others did them would be suspect or even wrong.

B. *Challenges from the Profession*

The legal literature on the professional responsibilities of lawyers attempts to establish a detailed structure of professional ethics for lawyers. In so doing many legal scholars have further challenged the assumption that a good lawyer is a good person.³⁷ One of the most famous (or infamous) challenging scholars is Monroe Freedman.³⁸

In a groundbreaking article, Freedman argued that a lawyer must put his client on the stand knowing that the client intends to commit perjury.³⁹ Ordinary moral standards dictate that it is wrong to lie and to help others lie. Yet Freedman's lawyer would not only be allowed to, but would be required to facilitate his client's lying.⁴⁰

Similarly, it is ordinarily wrong to prevent others from discovering the truth. The duty of confidentiality, however, may forbid disclosure in certain situations.⁴¹ In one celebrated case, *People v. Belge*,⁴² a defendant in a murder prosecution told his lawyers the location of the bodies of two others whom he had killed in an unrelated case.⁴³ The lawyers visited the location where the bodies had been hidden and confirmed the client's story. Nevertheless, it was not until six months later, following the client's confession to those crimes, that they informed law enforcement officials of their knowledge concerning the bodies.⁴⁴ Because of the duty of confi-

37. See, e.g., Wasserstrom, *supra* note 4.

38. See M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975); Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978); Freedman, *supra* note 11.

39. Freedman, *supra* note 11, at 1477-78.

40. *Id.*

41. See MODEL CODE EC 4-1, EC 4-2, EC 4-4; DR 4-101; see also Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976).

42. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd mem.* 50 A.D. 2d 1088, 376 N.Y.S. 2d 771 (1975), *aff'd per curiam*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

43. *Id.*

44. *Id.*

dentiality, the lawyers' actions have been defended by writers⁴⁵ and the lawyers were exonerated by the New York State Bar.⁴⁶

As a second case, consider the general moral principle that it is wrong to harm innocent people. But if a defense attorney can discredit a truthful rape victim's testimony, by taking advantage of the fact that she is emotionally distraught, the Model Code of Professional Responsibility would permit and even require a lawyer to do so.⁴⁷

These examples can be multiplied, qualified and questioned. They do point out, however, that the legal profession itself defends actions ordinarily judged wrong. Legal scholars continue to challenge the principle that one must be a good person — in the ordinary moral sense — in order to be a good lawyer.

Lest the implications be misunderstood, it is not being argued here that it is morally permissible for a lawyer to do anything whatsoever. We would not condone a lawyer for killing on behalf of a client, or for committing fraud to help a client avoid repayment of a debt. Moreover, if lawyers charged excessive fees, filed false documents, betrayed confidences indiscriminately or lied to each other regularly, the practice of law would be impossible. Accordingly, there are two constraints on what lawyers can do. The first is what the criminal law prohibits: a lawyer is not morally justified in violating the criminal law in zealous pursuit of a client's interest. The second is what the legal practice as a business requires: a lawyer cannot do what, if generally done, would undermine the practice of law as a business.⁴⁸ Within these constraints,

45. See Armani, *The Obligation of Confidentiality*, JURIS, March 1975, at 3-5; Freedman, *Where the Bodies are Buried: The Adversary System and the Obligation of Confidentiality*, 10 CRIM. LAW 979 (1974); Comment, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers*, 25 BUFFALO L. REV. 211 (1975).

The public, unlike the above writers, reacted with outrage to the lawyer's actions. One newspaper noted in an editorial that "[e]thical conduct by legal representatives is a tenet of our form of justice. In this case, it's impossible to imagine that many people — particularly the parents of the slain girls — would consider that justice has been served." Times Union (Albany), June 21, 1974, at 11, col. 3. In a letter to the editor, a writer saw the incident as "another deplorable example of behavior by members of this so-called profession." Herald Journal (Syracuse), July 2, 1974, at 3, col. 4.

46. *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S. 2d 798, (Onondaga County Ct.), *aff'd mem.*, 50 A.D. 2d 1088, 376 N.Y.S. 2d 771 (1975), *aff'd per curiam*, 41 N.Y. 2d 60, 359 N.E. 2d 377, 390 N.Y.S. 2d 867 (1976).

47. See MODEL CODE Canon 7 (a lawyer should represent a client zealously within the bounds of the law); see also Freedman, *supra* note 11, at 1475 (lawyer is obligated to attack the reliability or credibility of an opposing witness whom he knows to be truthful).

48. For a philosopher's discussion of these constraints on law as a business, see N. BOWIE, BUSINESS ETHICS (1982).

however, lawyers are enjoined to do what would otherwise be immoral. Why?

C. *The Roots of Professional Immorality*

No doubt many would dismiss the above examples as aberrations, exceptions to the rule that good lawyers are good people. However, further examination shows that the adversary structure and the rules regulating lawyers' conduct do not require that lawyers be good people. Indeed, often the profession requires just the opposite.⁴⁹

For example, the basic principle that regulates lawyers' conduct is the injunction to represent their clients' interests zealously within the limits of the law.⁵⁰ However one quibbles over the qualification "zealously," the point remains that the primary determinant of a lawyer's action is supposed to be the interests of the client and the two primary constraints on a lawyer's action are what the criminal law prohibits and what the business practice of law requires.

Beyond these constraints, morality is supposed to be neither a determinant nor a limit on a lawyer's conduct. If it is legal and will help a client, a lawyer is obliged to do it. If it is legal and immoral but will help a client, a lawyer is still supposed to do it. In this view, the lawyer is an agent of the client, and in pursuing the client's interests morality is to play no role.

In helping a client do something legal but wrong, the lawyer's action can be judged in two ways. First, we might say that it is wrong to help others do wrong. The sins of the client are to be visited upon the lawyer and our moral appraisal of the client transfers to the lawyer who is likewise judged to have committed a moral wrong.

Alternatively, we can treat lawyers as mere tools of their clients: their actions are no so much immoral as amoral. In this second interpretation, one tries to save lawyers from immorality by stressing their moral neutrality. But then lawyers cease to be professionals exercising autonomous judgment and are relegated to the status of tools. The implication is clear: lawyers are hired guns.

Whether the lawyer is regarded as occasionally immoral or basically amoral, a paradox is evident in the profession's self-regulation. Upon entry into the profession, the prospective lawyer is

49. See *infra* note 53.

50. See *supra* note 47.

required to be a morally good person. Yet, once admitted, in representing clients the lawyer is required to be immoral if not amoral.

Of course, only the lawyer's role as an agent of the client is being referred to here. As noted earlier, we might very well want morality to require that lawyers — like all business people — be honest in charging clients only for work done and conscientious in reporting all income earned. We might very well condemn lawyers on moral grounds for neglecting to keep clients informed — much as we fault a supplier who does not inform customers about delays in shipping. We might fault lawyers for failure to attend to their client's case — much as we fault a mechanic who does not repair the car we have dropped off for servicing. We might fault lawyers for careless work much as we complain to plumbers who do not fix the drain they were supposed to fix. In all their business dealings with clients lawyers can still be subject to moral praise and blame — just as any business person can.⁵¹ But in their professional capacity as representatives of their clients' legal interests — which is one distinction between lawyers and business people — morality would play no role. The only limits would be imposed by the criminal law and what law as a business requires.

V. TOWARDS A NEW CONCEPTION OF LAWYERING

Certainly this image of lawyers is not especially attractive to either the public generally or to lawyers in particular. But what is the alternative? We need a new conception of lawyering if we are to restore lawyers to their status as professionals. If lawyers are not autonomous moral agents, they are not professionals. If they are just instruments of their clients' will, albeit within the limits of the law and the demands of law as a business, they are technicians, "hired guns," and not fully functioning professionals.

This picture is drawn in bold strokes to emphasize the central dilemma in the practice of law today. One can propose various measures to mediate the conflict between the demands of morality and professionalism on the one hand, and the rights and interests of clients on the other. The most common proposal is rather ad hoc: to remove the lawyer from situations where ethics would otherwise come into play. If a client's actions violate the demands of morality and ethics, the lawyer can withdraw.⁵²

51. See BUSINESS ETHICS (W. Hoffman & J. Moore eds. 1984); N. BOWIE, *supra* note 48.

52. The Model Code currently provides some room for a lawyer to exercise moral judgment in the acceptance of and withdrawal from representation. See MODEL CODE

But this solution displaces the problem without solving it. As long as everyone is entitled to representation, some lawyer will need to assist that person in a legal but immoral act.⁵³ There are two solutions to this root dilemma. The first is to abandon the demand that lawyers be moral persons in representing their clients. But this solution comes at a very high price, one that most would not be willing to pay. It requires that lawyers surrender their claim to professional status. They must concede that they are no more than technicians servicing the legal interests of clients.

The second, and more effective, solution is to recognize the centrality of ethics to the practice of law, and to make a concerted effort to develop the conscience of the lawyer. It requires that we create and protect a sphere of moral autonomy within which lawyers can exercise their ethical skills. It will require that lawyers align themselves more with the courts and their peers and less with their clients.

In this realignment, limits will be placed on the client's use of lawyers to achieve immoral ends. Lawyers will have much more to say about what they, as lawyers, are morally obliged to do — as opposed to what they can do as provided by law. The lawyer's advice to a client will not be limited to what is legally possible given the relevant statutes and the facts of the case. The moral responsibilities of the lawyer, in this new conception of lawyering, will extend to what a decent and fair person could reasonably expect and ask for in a particular case.

This solution, concededly, calls for far-reaching reforms in law as it is practiced today. It would require acknowledging that, as

DR 2-109(A) (1) (mandating refusal to accept employment when the client clearly intends to bring an action "merely for the purpose of harassing or maliciously injuring any person"); MODEL CODE DR 2-109(A)(2) (mandating refusal to accept employment where client seeks to bring an action for which no reasonable legal argument can be made); MODEL CODE DR 2-110(B)(1) (mandating withdrawal when lawyer knows that client is conducting litigation solely to harass); MODEL CODE DR 2-110(C)(1)(a) (allowing withdrawal when client insists upon presenting a claim or defense for which no reasonable legal justification can be advanced); MODEL CODE DR 2-110(C) (1) (b), (c) (allowing withdrawal when client insists upon an illegal course of action). The Model Code rationale seems to be that a lawyer who has scruples about the client's proposed legal action is not likely to adequately serve his client. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 85 (1980).

53. One author suggests that since the rationale behind the Model Code seems to be that a lawyer who has scruples about his client's proposed legal action is not likely to adequately serve his client, the Model Code encourages the lawyer to "steel himself against such moral scruples and to view them as strictly personal feelings which have no place in professional behavior — a kind of unbecoming moral squeamishness." Postema, *supra* note 52, at 85.

professionals, lawyers exercise not just their technical skills but their moral conscience. Not only the legal profession, but the public generally would need to be educated about the broader responsibilities of the legal profession. Lawyers are not to be treated as technicians trained in the martial arts of legal combat, but professionals regularly called upon to exercise their capacity for independent moral judgment. Insofar as lawyers are to function as moral agents, they must have the correct moral beliefs to guide their professional judgment. Like Plato's ancient guardians of the *Republic*, they must know what justice is, a knowledge that can only be acquired through a careful study of ethics.

VI. CONCLUSION

This article has argued that ethics is essential to the practice of law insofar as lawyers are professionals. The practical consequences of integrating ethics into the practice of law are difficult to imagine. But insofar as a lawyer is a person, with a conscience, the tensions between the demands of morality have been felt already, and must be resolved by each individual. Clearly, ethics should be treated as of fundamental importance to the practice of law for, without it, the practice of law is not truly a profession.

