THE PATH TO PROFESSIONALISM

*Michael P. Ambrosio**

The law is a great and noble profession. The lawyer has served human kind as healer, helper, leader, defender, mediator, peacemaker and teacher. As an officer of the court, the lawyer is the guardian of our system of justice and bears special responsibility for improving the law.

Throughout the history of America, lawyers have provided leadership. Thirty-four of the fifty-five delegates who attended the constitutional convention in 1787 were members of the legal profession.[1] In his book *Democracy in America*, published in the nineteenth century, Alex De Tocqueville described lawyers as America's aristocracy.[2] Celebrated lawyers such as John Marshall, Alexander Hamilton, Daniel Webster, Clarence Darrow, Reginald Heber Smith, Ralph Nader, and a host of other mostly anonymous lawyers, devoted their lives to building democratic institutions, defending liberty in all its forms, and protecting and advancing the rights of the working class, the poor, and the unpopular.

The legal profession, however, has been subjected to more than its share of criticism throughout history, from Plato's "sar-

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* Professor of Law, Seton Hall University School of Law. B.A., Montclair State College; J.D., Catholic University. The author delivered the remarks constituting the essence of this article at Seton Hall Law School's new student orientation. He would like to thank Mark J. Oberstaedt for his research assistance and Professor Robert Diab for his editorial help.

[1] J. LIEBERMAN, THE ENDURING CONSTITUTION: A BICENTENNIAL PERSPECTIVE 45 (1987). It should be noted, however, that the eighteenth century definition of "lawyer" referred to anyone who undertook a professional study of law and may not accurately reflect the number of practicing attorneys among the delegates. *Id.*

[2] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 266 (G. Lawrence trans., J. Mayer ed. 1966). In describing the social status of lawyers in a democratic society, de Tocqueville remarked:

> The people in a democracy do not distrust lawyers, knowing that it is to their interest to serve the democratic cause; and they listen to them without getting angry, for they do not imagine them to have any *arriere pensee*. In actual fact, the lawyers do not want to overthrow democracy's chosen government, but they do constantly try to guide it along lines to which it is not inclined by methods foreign to it. By birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes; so he is the natural liaison officer between aristocracy and people, and the link that joins them.

Id. at 487.

castic attack on professional speech-writers,"[3] to Shakespeare's veiled desire to rid society of lawyers,[4] to the charge of wholesale incompetence of the bar by the former Chief Justice of the United States Supreme Court, Warren Burger.[5] Unflattering metaphors for the word "lawyer," such as "hired gun," "mouthpiece," or even worse, "shyster," lend further emphasis to a poor popular image of the legal profession. Lawyer bashing is popular sport these days as indicated in a recent survey conducted by the American Bar Association (ABA) regarding corporate consumers of lawyers' services.[6] Only six percent of those responding thought that all or most lawyers deserve to be called professionals.[7] While public opinion polls indicate that the average American does not have much respect for lawyers in general, almost all the individuals responding to those same polls indicated that they had trust and confidence in their personal lawyers.[8]

The popular image of the American lawyer as portrayed in the media, movies, and television, even when flattering, unfortunately is often inconsistent with reality. Modern television programs depict the practice of law as glamorous, exciting, and financially lucrative. Although contemporary law practice can be all those things it can also be rather dull, tedious and far less rewarding monetarily than might be expected. Now, more than ever, the practice of law requires a vast amount of knowledge and

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[3] PLATO: THE LAWS (T. Saunders trans. 1970). In Athens during Plato's lifetime, individuals conducted their own lawsuits with some assistance from professional speechwriters.

[4] W. SHAKESPEARE, HENRY IV, PART II IV, ii, 86 (1597-98) ("The first thing we do, let's kill all the lawyers.").

[5] Burger, *Remarks*, 70 WOMEN LAWYERS JOURNAL 3, (Spr. 1984). In his annual report to the American Bar Association, the then-Chief Justice Warren E. Burger stressed:

> Ten years ago, I first suggested that up to one-third or one-half of the lawyers coming into our courts were not really qualified to render fully adequate representation, and that this contributed to the large cost and the unreasonable time consumed in litigation. . . .
>
> When surveys and studies were made by the Association and other responsible bodies, it developed that even my estimate of below-standard performance was too low.

Id. at 6. *See also* Burger, *The State of Justice*, 70 A.B.A. J. 62, 64 (Apr. 1984) (revised text of Chief Justice Burger's annual report presented to the midyear meeting of the American Bar Association on Feb. 12, 1984).

[6] *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, ABA Comm. on Professionalism 3 (1986).

[7] *Id.* (citing G. Shubert, Survey of Perceptions of the Professionalism of the Bar (1985) (unpublished survey)). Shubert's study employed a non-random sample of over 230 judges and corporate executives.

[8] *Id.*

skill, a capacity for hard work, the ability to function cooperatively with others, and a willingness to make personal sacrifices to meet professional obligations to clients, the courts, the legal profession, and society. It requires, most of all, a good moral character.

A former dean of Seton Hall Law School, John Irving, liked to refer to lawyers as the "guardians of the temple of justice" and "ministers of justice." I think the language in the Preamble to the Code of Professional Responsibility speaks well of the importance of lawyers in American society and the connection between lawyers and justice:

> The 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. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.
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> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.[9]

Whether law has anything to do with justice or morality is a question that legal, moral, and political philosophers have addressed from the time of Plato and Aristotle in the fourth century B.C. up to this very day. In 350 B.C., Aristotle recognized that man is, by nature, a rational and social being and that what makes a person different from other sentient beings is his or her capacity for morals.[10] For Aristotle, the polity, or political state, is an ethical association where shared ideas of morality form the basis for law.[11] Therefore, law follows from, or is involved with, morality. In other words, because we have morals, we need law to give it concrete expression. Aristotle's legal theory and others like it are referred to as

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9 MODEL RULES OF PROFESSIONAL RESPONSIBILITY Preamble (1980) (citation omitted).

10 H. ARKES, FIRST THINGS 34 (1986); *see also* ARISTOTLE, POLITICS 1253a (Aristotle described those who do not have the competency to understand the law as "either a beast or a god.").

11 *Id.* at 14; *see also* ARISTOTLE, POLITICS 1253a ("[Man] alone possesses a perception of good and evil, of the just and unjust; . . . and it is association in [a common perception] of these things which makes a family and a polis.").

"natural law" theories. Although there are many widely different doctrines that go by the name natural law, the term is used here to mean only a concept of law as a construct of reason and a reflection of morals.

In the thirteenth century, St. Thomas Aquinas, who reconciled Aristotelian thought with Christian thought, defined law as "an ordinance of reason for the common good made by him who has care of the community, and promulgated."[12] From this definition, we can see the natural law perspective that the purpose of law is to achieve justice and to foster the common good. The common good is variously defined as the general welfare, the public interest, or the collective interest. The concept of the common good, however, is not simply an abstraction. It is what is concretely and specifically necessary for the good of the community as a whole and the good of the particular individuals who make up the community.

The connection between law and either justice or morals was accepted as a given until the nineteenth century and the works of John Austin and Jeremy Bentham. Austin and Bentham were founders of "legal positivism," a legal philosophy which rejected the grandiose value-oriented or normative view of law provided in the natural law theories of Aristotle, Aquinas and others. John Austin, in a book entitled *The Province of Jurisprudence Determined*, published in 1832, defined law in narrow descriptive terms as simply "a command."[13] Austin further recognized that failure to comply with that command will result in a "sanction" or "punishment."[14] Positivists assert that to understand the law and legal systems, one must be careful to keep separate and distinct the realm of law from the realm of morals. This separation thesis is the central tenet of legal positivism. In contrast to natural law theories, which focus on justice and reason, legal positivism puts emphasis on the coercive aspect of law. Law is thus conceived as an instrument of political power rather than reasonable regulations for the common good of the community.

Adherents of both schools of thought, natural law and legal positivism, have at times tended toward the exaggeration of their truth and have often misread or read into what earlier thinkers had written. More recently, however, contemporary legal philosophers have started to find ways to bridge the seemingly insurmountable

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[12] T. AQUINAS, SUMMA THEOLOGICA, Questions 90-97, art. IV, obj. iii, *reprinted in* T. AQUINAS, TREATISE ON LAW 10-11.

[13] J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13 (1832).

[14] *Id.* at 15.

gap between these two categories of legal philosophy.[15] These scholars have observed that natural law lawyers, who focus on the point of intersection between law and morals and stress what the law ought to be, can readily affirm that before one may evaluate the moral justification for law, it is necessary to understand precisely what the law is and how it functions in a given legal system.[16] These scholars have further recognized that the positivists, who emphasize the scientific or empirical study of law, can acknowledge that laws should be just and should be subjected to careful and continual moral appraisal. Thus, natural law lawyers and positivists should be concerned with the moral values reflected in legal rules and decisions.

Former Supreme Court Justice and legal philosopher Oliver Wendell Holmes, Jr., claimed by adherents of both natural law and legal positivism as one of their own, attempted to articulate the value of the study of legal philosophy or jurisprudence. Upon defining jurisprudence as simply the law in its most generalized part and noting that the mark of the great lawyer is the ability to apply the broadest rules, Holmes wrote:

> It is through [generalizations] that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[17]

It is rather surprising that this statement came from the same Holmes who later described law as " 'a ragbag of details' to be given order and meaning through the 'highest generalizations,' none of which was 'worth a damn. . . .' "[18] To the end of his illustrious career, Holmes remained skeptical and cynical about the meaning of law and life. Immensely gifted intellectually, widely acclaimed, and highly productive, he was content to live in accordance with the simple principle that "to live is to function. That is all there is in living."[19]

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15 *See* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 25-29 (1980).

16 *Id.*

17 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897) [hereinafter Holmes, *The Path*], *reprinted in* O.W. HOLMES, COLLECTED LEGAL PAPERS 167, 202 [hereinafter O.W. HOLMES, COLLECTED PAPERS] (1920).

18 D. GRANFIELD, THE INNER EXPERIENCE OF THE LAW 11 (1988) (citing O.W. HOLMES, *Introduction to the General Survey by European Authors in the Continental Legal Historical Series*, in COLLECTED LEGAL PAPERS 301 (1920); *see* Holmes, *The Path*, *supra* note 17, 476, *reprinted in* O.W. HOLMES, COLLECTED PAPERS, *supra* note 17, 198; Letter from Sir Frederick Pollock to Mr. Justice Holmes (Nov. 22, 1920), *reprinted in* 2 HOLMES-POLLOCK LETTERS 59 (M. Howe ed. 1961)).

19 Wyzanski, *The Democracy of Justice Holmes*, in OLIVER WENDALL HOLMES, JR. — WHAT MANNER OF LIBERAL? 70 (D. Burton ed. 1979).

Holmes, who inspired the legal realist tradition, a variant of legal positivism, defined law as nothing more than prophesies of what in fact courts do.[20] In a law review article, he suggested that law students can best understand the law if they look at it from the viewpoint of a bad man. Holmes remarked:

> If you want to know the law and *nothing else*, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, inside the law or outside of it, in the vaguer sanctions of conscience.[21]

If this passage seems to be suggesting that law students should learn the law and nothing else, Holmes certainly did not always subscribe to so narrow a view. In *The Common Law*, he wrote "the life of the law has not been logic; it has been experience"[22] and that the "felt necessities of the time, the prevalent moral and political theories, avowed or unconscious,"[23] had a good deal to do with determining "the rules by which men should be governed."[24] He understood the history of law as a history of the moral development of western civilization.[25] There can be no doubt that Holmes was concerned with the coherence or rationality of law, as well as its purposes or ends. He wrote:

> [A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.[26]

Professor Karl Llewellyn, another very famous realist, had a similar view of how best to study law. In *The Bramble Bush*, a book written for first year law students, he writes:

> The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary amnesia. Your view of social policy, your sense of justice — to knock these

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20 Holmes, *The Path*, *supra* note 17, 461, *reprinted in* O.W. HOLMES, COLLECTED PAPERS, *supra* note 17, 173.

21 Holmes, *The Path*, *supra* note 17, 459, 459, *reprinted in* O.W. HOLMES, COLLECTED PAPERS *supra* note 17, 171 171 (emphasis added). *See also* H.L. POHLMAN, JUSTICE OLIVER WENDALL HOLMES AND UTILITARIAN JURISPRUDENCE 15 (1984) (explaining Holmes' "bad-man" theory of law which advocated separating law from morality to improve legal education).

22 O.W. HOLMES, THE COMMON LAW 1 (1881).

23 *Id.*

24 *Id.*

25 Holmes, *The Path*, *supra* note 17, 459, *reprinted in* O.W. HOLMES, COLLECTED PAPERS, *supra* note 17, 170.

26 Holmes, *The Path*, *supra* note 17, 469 (1897), *reprinted in* O.W. HOLMES, COLLECTED PAPERS, *supra* note 17, 186.

> out of you along with woozy thinking, along with ideas all fuzzed along the edges. You are to acquire ability to think precisely, to analyze coldly, [and] to work within a body of [material] that is given . . . .[27]

Perhaps Llewellyn recommends lopping off your common sense because you will read many legal decisions and encounter many legal rules that appear to be, and often are, contrary to a common sense of what is right and just. He would knock your ethics into temporary amnesia and cast aside your view of social policy and sense of justice, because he would encourage you to understand precisely what the law is and not confuse the law with what you think it ought to be. While he does not equate notions of common sense, ethics, social policy, or justice with woozy thinking and ideas fuzzed along the edges, he nonetheless seems to suggest that these notions will interfere with your ability to think precisely and to analyze coldly, at least during your first year of law school. It is unfortunate that, for the most part, the three-year legal education in twentieth century America has reflected the notion that concern for justice and morality is peripheral, if not irrelevant, to the main business of learning the law and the analytical skills required to think like a lawyer.

John Finnis, a contemporary natural law philosopher, argues in *Natural Law and Natural Rights* that the value-free description and analysis of law advocated by Llewellyn and so many others is simply not possible.[28] Finnis asserts that reflection on the methods of social science, including jurisprudence, leads to the conclusion that "a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness."[29] Finnis suggests that the actions, habits, dispositions, practices, and human discourse which constitute the subject matter of law can be completely understood only by comprehending their point — that is, their value, their objective, their importance or significance, as conceived by those who engaged in them. These conceptions of point will be reflected in the discourse of judges and lawyers, "in the conceptual distinctions they draw and fail or refuse to draw."[30]

Lawyers, no less than judges, must be able to analyze and to morally appraise the reasons given to support the imposition of some duties and to justify overriding others. Lawyers must consider

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27 K. LLEWELLYN, THE BRAMBLE BUSH 101 (1930).
28 J. FINNIS, *supra* note 15, at 3.
29 *Id.*
30 *Id.* at 3-4.

whether some duties are absolute or merely *prima facie*. Moreover, the role of the advocate requires the lawyer to possess not only the judge's ability to determine the correct rule, policy, standard, or principle to be applied to a case, but also the ability to justify a choice between the competing grounds or values at stake.

It seems that a hard-nosed empirical attitude toward the study of law, as if the law were just another science like biology or chemistry, misses a major element of the very point and meaning of legal training. A legal education is not simply vocational training, but training for a profession. A recent report of the ABA Commission on Professionalism, after noting that " 'professionalism' is an elastic concept, the meaning and application of which are hard to pin down," recalled the definition offered by Dean Roscoe Pound of Harvard Law School:

> The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of a livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.[31]

The training of lawyers to serve the public should not aim at developing an indifference to the moral, political, and social significance of the ends and consequences of legal decision making. Students should not be encouraged to ignore the way they look at the world and the moral sense that they have acquired during the course of a successful life prior to entering law school. Thinking like a lawyer does not mean putting aside your compassion, your understanding, your common sense, or your sense of self to become coldly logical and analytical, devoid of emotional response to facts, events, and the persons affected by recognizable wrong. Llewellyn, himself, noted that "compassion without technique is a mess; and technique without compassion is a menace."[32] Indeed, it would be a mistake to conclude that courts do or should apply the law without regard for fairness or the moral blameworthiness of the conduct of the parties. Students must be taught that every system of law incorporates the counterbalancing force of equity. Equity is variously defined as natural justice, discretionary justice, individualized justice, or the infusion of morals into the law. Equity means that which is fair, just, reasonable, and in accordance with moral standards and the dictates

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31 *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, ABA Comm. on Professionalism 10 (1986) (quoting R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)).

32 Cramton, *Beyond the Ordinary Religion*, 37 J. OF LEGAL EDUC. 509, 510 (1987).

of the human conscience. Equity jurisprudence has served to correct that which is deficient in the law because of its generality.

A lawyer's sense of justice and professional responsibility is the product of a lifetime of experiences, education and training. I wonder how effectively one can advocate a client's cause without translating that cause in terms of the requirements of fairness and a justifiable morality. I, for one, define myself and my professional life in terms of my morality, the fundamental principles of which include the golden rule, the Kantian imperative to respect every human being as an end in a kingdom of ends, and the Pauline Principle that one should never do evil to achieve good. I stand within the natural law tradition which enables me to reconcile my individual and social reality through rational inquiry and religious experience. With the philosopher Ortega y Gasset, I say I am myself and my experience. I define myself as the sum total of my choices. I make my conscious choices in accordance with conscientiously held moral principles and obedience to the law of God as set forth in the Holy Scriptures.

The ethical relativism and materialism of the modern era that negates the very concept of justice and morality finds ample expression in law schools through the dominating influence of legal positivism. It appears that too much is claimed for the significance of the separation of law and morals. We should not mistake philosophies or statements which contain some truth as being without error. Rather we must discover when, where, and how they fall short of being the whole truth. It seems that the natural law lawyer's insistence on the existence of absolute values and objective principles of justice discoverable through reason has as much claim to truth as moral skepticism or moral nihilism. Whatever our individual morality or conception of law and justice, we inevitably must live and work and contend with others who readily reject what we would affirm. What is most important, however, is that those of us who differ on fundamental questions, such as the all important moral premises which guide one's actions, maintain a decent respect for the opinions of others with whom we disagree and remain committed to continuing dialogue. Only by rational discourse can differences be more clearly understood and perhaps narrowed and points of agreement sought and possibly reached.

Dean Roger Cramton of Cornell Law School argues that when law schools do not make students' life choices part of their explicit agenda, the silence and acquiescence conveys a powerful message. He calls the following the lawyer's ordinary religion that is implicitly conveyed in law schools:

> Each of you is here (that is, in the world) to get ahead in the world. You are here (in law school) to get a job that will help you get ahead in the world. Your job (after law school) is to help your client get ahead in the world. People can relate to each other only instrumentally, as objects, in a world that is characterized by separateness, competition, and scarcity. Justice which is a basic aspiration, is obtained by fair procedures, by following the rules of the game (not lying, for example) and by seeking mutually beneficial exchanges. Justice is obtained, by and large, under present social arrangements; the interaction of individuals seeking to advance themselves produces a reasonably harmonious and legitimate social order.[33]

Dean Cramton argues that since law schools do in fact teach values, they should do it more openly and forthrightly.[34] Although he would go far beyond the ordinary religion of law school, he worries about indoctrination and dogmatism from the podium and the lack of student and teacher readiness to confidently approach ultimate questions such as "Who am I?" "What am I doing in this World?" and "What am I doing in law school?" He notes that in our society fundamental commitments are viewed as intimate or private, and he is concerned about classroom revelations of ideas that define the self. Because of these and other difficulties, issues of love, justice, or ultimate reality are neglected.[35]

One cannot be professionally responsible without being personally responsible. The conversion, or perhaps the transformation, of college graduates into lawyers is a complex and pervasive process. It includes far more than intellectual development and skills training. The process of developing professionalism must include changes in personality, values, work habits, and social roles. Some believe, in contrast, that character is completely formed by the time students enter law school and not likely to change. While family upbringing is undoubtedly the most dominant factor in the development of a person's values and character, I believe that human

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[33] Cramton, *supra* note 32, at 512 (slightly paraphrased quoting of H. Lesnick, *Remarks on Teaching Alternate Dispute Resolution* 1-2 (address by Mr. Lesnick, Harvard Law School (Oct. 9, 1982) (unpublished manuscript)).

[34] *Id.* at 513. Cramton asserts that many law professors find it inappropriate or troublesome to discuss moral questions in the classroom or in their writing. *Id.* at 512. He feels that the difficulty arises in the controversial nature of the questions themselves which often cause both the professor and student to feel uneasy and embarrassed. *Id.* at 512-13. The unfortunate result of this dilemma is that by failing to struggle for effective answers, the questions become answered by ignoring them. *Id.* at 513. As Cramton resolves, "[t]here is (to borrow from Sartre), quite literally, 'no exit.'" *Id.*

[35] *Id.*

beings are free to be what they choose to be and that every person can change and grow to a higher level of awareness and being.

Although it may not be possible to have a precise definition of what constitutes the traits of a good moral character, I think we know it when we see it. It is no easy task for law schools to influence the character development of their students. Just because a task is difficult and complex, however, does not mean that it should not be attempted. In view of the fact that a good moral character is a universal requirement for admission to the bar,[36] law schools would be remiss if they did not attempt to address the question of whether or not virtue can or must be taught.

We, the teachers, must be humble enough to admit that whatever knowledge of the truth we may have acquired, it is far short of the whole truth. If the law school experience is designed to ready students for the rigors of the profession, some effort must be made to provide them with the opportunity for self appraisal and, when necessary, self transformation. We must, therefore, remain committed to dialogue among ourselves and with our students and others outside the law school. The demands of a lawyer's life and the professional obligations imposed by the Rules of Professional Conduct cannot be met without the virtues of honesty, truthfulness, trustworthiness, and justice.

Can the character trait of responsibility be taught? I believe so. One can acquire responsibility by developing the habit of being responsible. The term responsibility encompasses both the general and formal requirements of justifying action. The demand for moral justification emerges when there is some reason for thinking that an act is wrong. An individual is answerable for an act that violates some moral principle or rule, and he or she is expected to offer

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[36] *See* Baird v. State Bar of Arizona, 401 U.S. 1 (1971). In *Baird*, the Supreme Court, per Justice Black, held that moral character is one of the primary qualifications for admission to the Bar. *Id.* at 8. But Justice Black termed the notion of "good moral character" as "unusually ambigous . . . [and] can be defined in an almost unlimited number of ways . . . [to] reflect the attitudes, experiences and prejudices of the definer." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

In a dissenting opinion in *Baird*, Justice Blackmun stated:

> The bar has not enjoyed prerogatives; it has been entrusted with anxious possibilities . . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, even compendiously described as "moral character."

Baird, 401 U.S. at 20 (Blackmun, J., dissenting) (quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring)).

reasons in justification for the act. I believe that lawyers who are trained only to know what the law is and who have neither the training nor interest to explore the reasons underlying legal rules are unlikely to have the disposition or the ability to make moral appraisals, to engage in a moral discourse about existing law, or to perform satisfactorily their professional obligations. What, if anything, the law has to do with the pursuit of justice is a question that perhaps each of us in the profession must answer for ourselves. If legal education is to be in the best interests of both law students and the public, however, it must attempt to teach at least those virtues at the core of professional responsibility and to explore the relationship between law and justice.

Probably no single event has done more to influence the development of the ethical standards of the legal profession than the scandal commonly referred to as "Watergate," in which a host of lawyers at the top rank of the profession were found to have violated the law and their professional obligations in the administration of a President and Vice President who were themselves lawyers.[37] The threatened impeachment of a United States president and the disbarment of a cadre of lawyers who were his closest advisors sent shock waves throughout the American legal profession. Many pointed to the profession's Code of Ethics as a source of the problem. Ironically, only a few years before the Watergate scandal, the ABA had adopted in 1969 the Code of Professional Responsibility to replace the 1908 Canons of Ethics.

In 1977, an ABA Commission was formed to evaluate the Code of Professional Responsibility as a standard of ethics for the legal profession. The Kutak Commission, named after its chairman Robert Kutak, decided that the Code was in need of so much amendment that it was easier to formulate an entirely new set of standards. After two and one-half years, the Kutak Commission produced a Discussion Draft of the new Model Rules of Professional Conduct.[38] The new Model Rules were the subject of debate throughout the following three years until a much watered-down version was adopted by the ABA in 1983. I served as the Reporter and Vice

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[37] *See generally* THE BREAKING OF A PRESIDENT: THE NIXON CONNECTION (M. Miller ed. 1975) (chronicling Watergate events which lead to the ultimate downfall of President Nixon, Attorney General John Mitchell and others).

[38] Model Rules of Professional Conduct, i (Discussion Draft 1980). The Draft was developed after two and one-half years of study which centered on dialogue with academicians and attorneys representing a wide area of practice, written commentary from organizations and individuals, and current events, particularly the 1970's evolution of ethical thought. *Id.* at ii.

Chair of the New Jersey Bar Association committee charged to evaluate the Model Rules. That Committee recommended to the New Jersey Supreme Court that it adopt the stricter standards set forth in the Discussion Draft.[39] Eventually the New Jersey Supreme Court adopted, with significant amendments, the ABA Model Rules as the disciplinary standard for New Jersey lawyers.[40] New Jersey was not only the first state to adopt the Model Rules, but by virtue of the amendments to the final ABA version, it put into place the strictest ethical standards of any state in the United States.

Two very different conceptions of the lawyer's role in the adversary system of justice were given some expression in the original discussion draft of the Model Rules. The standard conception of the lawyer is that of pure legal advocate. There are two principles upon which this standard is based: partisanship and moral neutrality.[41] The principle of partisanship is that the lawyer shall seek to obtain the wants or objectives of the client and use whatever lawful means are available in the pursuit of client interests. The principle of moral neutrality is that the lawyer is neither responsible nor morally accountable for any injustice brought about in pursuit of client interests. In other words, it is not the job of the lawyer to consider whether the client's objectives are ethical or morally justifiable. The lawyer has a professional obligation to subordinate his or her personal morals when acting on behalf of a client. The classic statement of the unyielding partisanship of the advocate is that of Lord Brougham, an English Barrister, who in his 1821 defense of Queen Caroline's divorce case before the House of Lords said:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save his client by all means and expedients, and at all costs to other persons, and among them, himself, is his first and only duty: and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[42]

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39 *Sup. Ct. Comm'n Rept. on the Model Rules of Professional Conduct*, N.J. LAW J. 2 (Supp. July 28, 1983).

40 N.J. Ct. R. 1:14. The Rules of Professional Conduct, as amended and supplemented, were adopted on July 12, 1984, and replaced the Disciplinary Rules of the Code of Professional Responsibility which had been in effect since 1971 and amended in 1975.

41 D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 52 (1988).

42 *Id.* at 54-55 (quoting 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1820-21)).

An alternative conception of the lawyer's role is that of moral activist or moral agent. The lawyer, as moral agent, is responsible for client ends as well as the means to achieve those ends.[43] The practice of law is, in essence, a moral encounter in which the lawyer engages in a dialogue or moral discourse with the client about whether what the client wants is morally justifiable as well as legally permissible.[44] Of course, the lawyer must be open to the possibility that his perception of justice or morality may not be as enlightened as that of the client and, further, the lawyer must attempt to provide the client with what the client needs rather than simply what the client wants. The lawyer should raise with the client all moral, economic, social, and political considerations and not limit his advice and counsel to strictly legal considerations. Lawyers are exhorted to draw upon their sense of morals and wisdom in advising clients in Ethical Consideration 7-8 of the 1969 ABA Code of Professional Responsibility. Model Rule 2.1 of the 1983 ABA Model Rules expressly permits lawyers to take this broader view of their role.[45]

Different philosophies or perspectives of the nature and function of law are more or less compatible with and, perhaps, even lead to different conceptions of the lawyers role in our adversary system. The natural law perspective of law as value laden and as the means to achieve justice would seem to encompass the notion that the lawyer is a moral agent who bears responsibility for the objectives or ends of prospective clients. Conversely, the separation of law and morals that is the central tenet of legal positivism would seem to justify the moral neutrality and partisan loyalty of the pure legal advocate. Pure advocacy may have a legitimate place within the context of the defense of those accused of a crime or, possibly, in the context of civil litigation. It would seem, however, to have no place where the lawyer acts as advisor, counselor or public servant or in some other role removed from a litigation context.

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[43] *Id.* at 167.

[44] T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 21-22 (1934). Shaffer found that such a "moral discourse," as opposed to an "adversary discourse," not only reconciled the client with the lawyer but also with the community as a whole. *Id.* at 127. Finding the moral discourse to be grounded in the "person of the client," Shaffer argues that it is better to work toward serving the person, rather than the client's interests. *Id.* at 132-33.

[45] Rule 2.1 defines the lawyer's role as an "Advisor" as follows:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that my be relevant to the client's situation.

MODEL RULE OF PROFESSIONAL RESPONSIBILITY 2.1 (1989).

The seeming dichotomy between the lawyer as pure legal advocate and the lawyer as moral activist may be more apparant than real. Because lawyers act in roles other than advocate and are not required to accept any and all cases offered them, there is ample scope for the exercise of discretion and independent moral critique of the objectives of their clients and prospective clients. Lawyers who adopt the responsibility of moral agency can, nevertheless, accept the fact that many legal disputes involve no moral questions and that the standard conception of the lawyer as pure legal advocate is appropriate for much of what lawyers do. In those instances where the applicable law (including the law regulating lawyers) is unclear or morally suspect, a lawyer is free to challenge the prevailing legal rules. To challenge and provide reasons for change of existing law, however, the lawyer must be informed by sources beyond the law. The Preamble to the 1983 ABA Model Rules aptly recognizes the limits of legal rules as a guide to lawyers' conduct and to conduct in general. In words that capture the essence of Lon Fuller's distinction between a morality of duty and a morality of aspiration the Preamble states:

> Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.[46]

To anyone who accepts that lawyers need to be sensitized to the moral implications of their conduct and encouraged and trained to engage in moral discourse, it should be apparent that moral philosophy bears as much relevance to the study and practice of law as legal philosophy. Indeed, legal philosophy grew out of moral philosophy.

I want to conclude with a comment from Oliver Wendell Holmes Jr., who ended his remarks on the profession of law as follows:

> And now, perhaps, I ought to have done. But I know that some spirit of fire will feel that his main question has not been answered. He will ask, What is all this to my soul? You do not bid me sell my birth-right for a mess of pottage; what have you

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46 MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

> said to show that I can reach my own spiritual possibilities through such a door as this? How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?[47]

Let me remind you that this is the same Holmes that exhorted us to connect our subject to the universe, to catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law. In an address to law students, Holmes posited that "the law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men."[48]

Though the ranks of lawyers are increasing, for most of you becoming a lawyer will provide you a fuller life. I challenge you today to guard against the affliction that lawyers all too often fall prey to, one that infected as great a lawyer as Oliver Wendell Holmes Jr.: the disease of cynicism. If you view the law as a calling and a vocation rather than as simply a trade or a means to obtain wealth, power, and social status, you can live greatly in the law. As a lawyer you will have ample opportunity to give expression to your deepest convictions of what is good and right as well as your sense of faith, hope and love. As you immerse yourself in the role of law student or lawyer take care to find yourself. If you seek to express the best that is in you as you assume these roles, I promise, you will surely become a richer, fuller, more complete person.

It seems to me that the best thing you can do for your career is to hold on to that part of yourself that is authentic and good and strive to rid yourself of those traits of character that impede your full flourishing as a person. If law school is to change you, and it surely will, let it change you for the better. Strive to generate an ever-increasing understanding of and a passion for justice, improve your ability to engage in moral discourse, be tolerant of the opinions of others, always maintain a capacity for self-criticism, and an openness to emotional, intellectual, spiritual and professional growth.

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[47] E. DWORKIN, J. HIMMELSTEIN & H. LESNICK, BECOMING A LAWYER 47 (1981) (quoting *O.W. Holmes, The Profession of the Law* (lecture delivered to undergraduates of Harvard University on Feb. 17, 1886)).

[48] Holmes, *The Path*, *supra* note 17, 459, *reprinted in* O.W. HOLMES, COLLECTED PAPERS, *supra* note 17, 170.