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The Aba, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons

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Any hardened observer of modern lawyer regulation cannot avoid the overwhelming sensation of churning. For years now the legal profession,[2] the judiciary,[3] the academy,[4] and bar associations[5] have decried a "crisis" in the profession, and have proposed various solutions, ranging from hortatory to regulatory. For the last twenty years these reform efforts have proceeded along two tracks: increasing

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[2] Bar journals and practitioner publications regularly feature articles decrying a crisis in professionalism, and offering various prescriptions for reform. *See, e.g.,* Sean P. Ravenel, *The Contagion of Example*, FED. LAW., Nov.-Dec. 2002, at 31 (noting that "[t]here is no question that a crisis in professionalism exists within the legal community" and suggesting various law school reforms); Elliott L. Bien, *Toward a Community of Professionalism*, 3 J. APP. PRAC. & PROCESS 475 (2001) (stating that "[m]any judges and lawyers in the United States believe there has been a serious decline of professionalism in the conduct of litigation" and arguing for a closer American emulation of Britain's Barristers); Jill Sundby, *McShane's Helping Montana Lawyers Tune up Their Lives' Anthems*, MONT. LAW., October 2000, at 18 (describing strategies for stress relief in light of "crisis" in legal profession).

[3] Probably the best known example of the judicial reaction to a perceived professionalism crisis is THE CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999) [hereinafter JUSTICES ACTION PLAN.]

[4] Scholarly references to the "professionalism crisis" have become so common that Professor W. Bradley Wendell has described "a burgeoning literature – the 'profession in crisis' jeremiad." *See* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 3 (1999). For a comprehensive overview of the most common complaints, *see* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 1-48 (2000) [hereinafter RHODE, INTERESTS]; MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 17-108 (1994).

[5] The American Bar Association ("ABA") has lead the bar association charge, *see, e.g.,* ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), *reprinted in* 112 F.R.D. 243 (1986) [hereinafter BLUEPRINT], but other bar associations have been heavily involved. Consider, for example, the New Jersey Commission on Professionalism, "a unique cooperative venture of the NJSBA, the state and federal judiciary, and New Jersey's three law schools," *see* New Jersey Commission on Professionalism, *Background, at* http://www.njsba.com/commission_on_prof/ (last visited March 15, 2004), or the professionalism creed of the Dallas Bar Association. *See* Dondi Prop. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 292-95 (N.D. Tex. 1988) (describing Dallas Bar Association's Guidelines for Professional Courtesy and professionalism creed, and adopting them as standing orders for Northern District of Texas).

"professionalism,"[6] and revising and recalibrating the regulations governing the minimum standards of attorney conduct.[7]

Despite the prevalence of the terms "crisis" and "professionalism" in these reform efforts, neither term is particularly well defined. There are actually at least four related, but distinct crises listed in these various accounts of the Job-like woes of the legal profession. First, many lament the public's low opinion of the legal profession.[8] Second, others concern themselves with the unhappy and unhealthy nature of the legal profession itself.[9] Third, many bemoan the loss of "professionalism" amongst lawyers.[10] Lastly, some fret over the legal professions alleged transformation from profession to business.[11]

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[6] Consider, for example, the ABA's extensive national listing of professionalism codes. *See* Center for Professionalism, *Professionalism Codes, at* http://www.abanet.org/cpr/profcodes.html (last visited March 15, 2004).

[7] *See, e.g.,* MODEL RULES OF PROF'L RESPONSIBILITY; ABA Center for Professional Responsibility, *Ethics 2000 Commission, at* http://www.abanet.org/cpr/ethics2k.html (last visited March 15, 2004) (describing efforts of the ABA's Ethics 2000 initiative to amend the Model Rules).

[8] *See, e.g.,* Randall T. Shepard, *Moving the Rock: The Constant Need to Re-Invent the Profession Using the Nation's Judiciary as Leaders*, 32 IND. L. REV. 591, 591-93 (1999) (listing survey data showing shrinking popularity of the legal profession); Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51 (1999) (using lawyer jokes and television portrayals to show public dislike of the legal profession); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808-23 (1998) (using survey data and lawyer jokes to show lawyer unpopularity).

[9] *See, e.g.,* Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874-906 (1999) (attempting to explain "the poor health and unhappiness" of lawyers); Martin E.P. Seligman, et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001) (same); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 296-97 (1998) (describing same); Lawrence S. Kreiger, *What We Are Not Telling Law Students – and Lawyers – That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 17-34 (1998) (describing process whereby lawyers surrender life satisfaction).

[10] As noted below, there is no set definition for "professionalism," either. Some of these complaints center on perceived lawyer incivility. *See, e.g.,* Allen K. Harris, *The Professionalism Crisis – The 'Z' Words and Other Rambo Tactics: the Conference of Chief Justices Solution*, 53 S.C. L. REV. 549, 556-558 (2002) (describing need for increased civility as a portion of the professionalism crisis); Robert C. Josefsberg, *The Topic is Civility – You Got a Problem with That?*, FLA. B.J., Jan. 1997, at 6 (same). Others take the view that lawyers have increasingly rejected any consideration of the broader interests of society or the justice system, and have focused on narrow client interests instead. *See, e.g.,* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 109-37 (1998) (comparing the "meaningful work" of a contextual view of practice with the alienation of blindly representing the clients interests).

[11] *See, e.g.,* David A Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 457-65 (1997) (describing ill effects of "commercialism" on lawyer satisfaction); William R. Smith, *Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613,

Moreover, the term "professionalism" itself has proven abstruse. Most agree that professionalism implies something above and beyond the minimum behavior required under state rules of professional conduct (often referred to as rules of "ethics").[12] What exactly professionalism offers beyond the minimums of legal ethics has proven notoriously difficult to define, and most scholars and bar officials have abandoned efforts at a specific definition.[13]

Thus, reformers of the legal profession have attempted to address a shifting set of problems ("crises"), with a series of reforms based upon an indeterminate concept ("professionalism"). Not surprisingly, there is a sense within the profession and academia that much of the professionalism crusade has fallen short of the mark. Public

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613 (1997) (noting that "professionalism" has been turning into "commercialism"); Levine, *Professionalism Without Parochialism, supra* note __, at 1339-41 ("In recent years, legal scholars and practitioners have engaged in a voluminous debate over the characterization of legal practice as a business or a profession.").

[12] *See* E. Norman Veasey, *Remarks at the Professionalism Conference in Charleston, South Carolina, Enhancing the Accountability of Lawyers for Unprofessional Conduct*, 54 S.C. L. REV. 897, 897 ("And of course ethics is what the lawyer must or must not do, and professionalism is what the lawyer should do and it's a higher calling."); W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S.C. L. REV. 1027, 1028-29 (2003) ("Many commentators identify 'ethics' with a minimum standard of obligatory conduct and 'professionalism' with what lawyers should do, but which is not made mandatory by enforceable disciplinary rules."); Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 930 (2002) (noting that the Ethics 2000 drafters considered making the "ethics code more 'ethical' – rather than strictly legal – by incorporating some form of . . . 'professionalism' concepts"); Melissa Breger, et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 306 (2003) (arguing that "professionalism embraces the realm of ethics, but also reaches far beyond"). For further discussion of the linguistic sleight of hand at work with the use/misuse of these terms, *see infra* notes __ and accompanying text.

[13] Professor Deborah Rhode has long noted a "professionalism problem . . . a lack of consensus about what exactly the problem is, let alone how best to address it." Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 459 & n. 1 (2001); Rob Atkinson, 74 TEX. L. REV. 259, 271-80 (1995) (delineating the "elusive meaning of 'professionalism'" and arguing that there is no meaningful definition); Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 STAN. L. REV. 1491, 1494 (2002) (reviewing RHODE, INTERESTS, *supra* note __) (arguing that professionalism means different things to each lawyer depending on context). Even the ABA's Professionalism Blueprint acknowledged that professionalism is an "elastic concept the meaning and application of which are hard to pin down," and chose to define the legal "profession" instead. *See* BLUEPRINT, *supra* note __ at 261.

opinion of lawyers remains low,[14] lawyer satisfaction has not risen,[15] the law continues its drift from profession to business,[16] and most damningly, there is little evidence of any increase in lawyer professionalism.[17]

The churning sensation arises because of the cyclical nature of the professionalism crisis and response process: the perceived crisis leads to regulatory responses, the responses fail to address the crisis, and the cycle begins again with a renewed sense of frustration and concern. This frustration and concern will likely continue unabated, because the latest reforms look an awful lot like what has already been tried to little effect. These responses include more attention to professionalism in law schools,[18] more voluntary and mandatory professionalism continuing legal education

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[14] The most recent survey data confirms lawyers' relatively low public standing. *See* Dianne E. Lewis, *Ethics*, MIAMI HERALD, January 5, 2004, at 23 (describing a survey rating the honesty of lawyers at the bottom of the professions with car salesmen, HMO managers, insurance salesmen, and advertising executives).

[15] For example, bar journal stories warning lawyers about their increased likelihood of substance abuse or depression are still quite prevalent. *See, e.g.,* Arthur D. Burger, *Dealing with a Colleague's Addiction*, TEX. LAW., Feb. 16, 2004, at 31 ("Lawyers are prime candidates for impairment, whether caused by alcoholism, drug abuse, depression or some other mental disability."); Thomas Adcock, *Despite '93 Report, Substance Abuse Persists at Law Schools,* NEW YORK L. J., June 27, 2003, at 16 (describing continuing problem of substance abuse in law schools).

[16] Professor Russell Pearce has argued that this drift is inevitable and salutary. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

[17] One sign that things have not improved is the continued focus on these issues by lawyer regulators, bar associations, and legal academics. Ten states have commissions on professionalism, *see* A.B.A. STANDING COMMITTEE ON PROFESSIONALISM, A GUIDE TO PROFESSIONALISM COMMISSIONS ix, 4-6 (2001), *available at* http://www.abanet.org/cpr/scop_commission_guide.html (listing Florida, Georgia, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, and Texas as states with professionalism commissions), and more are planned. *See* Roy T. Stuckey, *Introduction*, 52 S.C. L. REV. 443, 443 (2001). At least eleven law schools have legal ethics centers. *See id.* Professor Rhode has collected some evidence of improved professionalism, and makes a persuasive case that while things do not appear any better since the launch of professionalism efforts, there is no evidence that they are any worse. *See* RHODE, INTERESTS, *supra* note __, at 12-13.

[18] These suggestions include requiring a "pervasive approach" to teaching professional responsibility, *i.e.* requiring some consideration of ethical issues throughout the law school curriculum. *See* Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961, 961-63 (2003) (making general case for the importance of a pervasive approach to teaching ethics); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD xxix (1994) (A casebook that "provides coverage of all the basic professional responsibility issues that would be part of a specialized course in the subject, as well as materials for integrating such issues into the core curriculum."). Other suggestions include moving the required professional responsibility class to the first year curriculum,

("CLE") courses,[19] more stringent character and fitness reviews for bar admissions,[20] more civility and professionalism creeds/standards, [21] and more public relations work.[22] The mandatory rules side of the project includes similar rehashes: more tinkering with the

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adding hours to the class, and requiring an additional upper-level ethics class. *See* Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 735 & n. 104 (1998) ("At a minimum, legal ethics education must include a required first year, first semester course of at least three credits, a required advanced course of at least three credits, and pervasive teaching throughout the curriculum."). Given that the two-credit required professional responsibility class is already among the most neglected and disliked law school classes by faculty and students alike, *see infra* notes __ and accompanying text, the efficacy of more required professional responsibility training is open to question.

[19] These CLE classes fall into several categories. At least forty states require every lawyer to regularly attend some type of professionalism CLE. *See* ABA Center for Continuing Legal Education, *Summary of MCLE Requirements, at* http://www.abanet.org/cle/mcleview.html (last visited March 15, 2004) (listing states); Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 230-31 (2003) (noting that "the Louisiana Supreme Court in 1997 amended its Rules for Continuing Legal Education . . . to require that every Louisiana lawyer attend at least one hour of professionalism CLE each year."). Interestingly, many of these states allow classes in substance abuse in lieu of the ethics requirement. *See Summary of MCLE Requirements, supra* note __. Other states, including New York, Louisiana, Kentucky, Idaho, Florida, Maryland, and Delaware require new lawyers to attend a basic skills/professionalism orientation to "bridge the gap" between law school and practice. *See Id.*; Pamela J. White, *Holistic Approach to Professionalism*, MARYLAND B.J., Sept.-Oct. 2003, at 19, 20 (describing the mandatory "Professionalism Course" taken by all new Maryland attorneys). Anyone who has attended or taught an Ethics CLE class will agree that they are more likely to cause an increase in cases of narcolepsy than any increase in ethical lawyer behavior. For a historical view on these courses, *see* REPORT OF THE ARDEN HOUSE CONFERENCE, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY (1959); THE AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL FOR CONTINUING LEGAL EDUCATION: STRUCTURE, METHODS, AND CURRICULUM, DISCUSSION DRAFT (1980).

[20] *See* JUSTICES ACTION PLAN, *supra* note __, at 32-34 (arguing for a beefed up character and fitness evaluation for bar admission, and for greatly enhanced involvement of law schools). Given the long-standing criticisms of these evaluations as ineffective, unfairly applied, and overly burdensome, *see, e.g.,* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 507-46 (1985), a renewed emphasis is of questionable value.

[21] For a listing of these creeds/codes, *see* Center for Professionalism, *Professionalism Codes, supra* note __. Most of the codes are hortatory in nature. *See, e.g.,* MSBA, *Maryland State Bar Association Code of Civility, at* http://www.msba.org/departments/commpubl/publications/code.htm (last visited March 15, 2004) ("MSBA encourages all Maryland lawyers and judges to honor and voluntarily adhere to the standards set forth in these codes."). Other codes are mandatory. *See* U.S. District Court, District of New Jersey, *Rules, Appendix R,* at http://pacer.njd.uscourts.gov/ 101-6 (last visited March 15, 2004) (appending ABA Section of Litigation, Guidelines for Litigation Conduct, to local rules for the district); U.S. District Court, District of New Mexico, Civ. R. 83.9, *at* http://www.nmcourt.fed.us/web/DCDOCS/dcindex.html 26 ("Lawyers appearing in this District must comply with 'A Lawyer's Creed of Professionalism' of the State Bar of New Mexico.").

[22] *See* BLUEPRINT, *supra* note __, at 302-2; JUSTICES ACTION PLAN, *supra* note __, at 39-44; Tom Godbold, *Professionalism: A Goal that is Hard to Reach, but Must be Preached*, HOUSTON LAWYER, Sept.-Oct. 2002, at 8 (suggesting "[w]e stand together as a profession and strive to better educate the public on what it is we do, how we do it and why we do it"). This approach is my personal favorite. A high school anecdote well describes the weakness of this reform. A somewhat unpopular friend of mine launched a "get to know me" campaign in an effort to raise his popular standing. Another friend recommended an immediate cessation of all such activities: "The problem, pal, is that everyone knows you all too well, not the other way around."

rules,[23] more "ethics hotlines" to make compliance easier for lawyers,[24] and more Lawyer Assistance Programs to deal with lawyer addiction problems.[25]

There are a number of explanations for the struggles of the professionalism movement. One possibility that I, among others, have endorsed is that because the legal profession is basically self-regulating,[26] most regulations governing lawyers are self-serving and aimed at increasing the profits and protecting the monopolistic nature of the legal profession.[27] Under this hypothesis efforts at professionalism are best seen as either sops to fend off greater attention from the public or the judiciary, or crass economic protectionism.[28] Others have argued that there is actually no "crisis" at all, the legal

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[23] Ethics 2000 is the latest in a series of revisions to the minimum standards that govern lawyer conduct. For a short discussion of the drafting of Ethics 2000, *see* Margaret Colgate Love, *The Revised ABA Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002) (a description from a member of the Ethics 2000 committee); E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1 (2002) (same from the Chair of the committee). For a less glowing review, consider Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5,* 2003 U. ILL. L. REV. 1181 (2003).

[24] *See* Veasey, *Remarks, supra* note __, at 899 (recommending [a]ssistance with ethics questions, like an ethics hotline"); *See* JUSTICES ACTION PLAN, *supra* note __, at 27-28 (suggesting increased assistance to lawyers for ethical questions, including establishing an ethics hotline).

[25] *See* ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE PROFESSIONALISM COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM 34 & n 109 (1996) [hereinafter LEARNING PROFESSIONALISM] (arguing for additional Legal Assistance Programs); ABA COMMISSION ON IMPAIRED ATTORNEYS, AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES (1991). Bar disciplinary authorities have also been notably lenient of lawyer infractions when substance abuse or depression is involved. *See* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 699-707 (2003) (describing mixed treatment of alcoholism in bar disciplinary proceedings); Todd Goren & Bethany Smith, Note, *Depression as a Mitigating Factor in Lawyer Discipline*, 14 GEO. J. LEGAL ETHICS 1081 (2001).

[26] For an overview of the legal profession's self-regulating nature, *see* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1, 1247-50 (2003).

[27] *See* Benjamin H. Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001) (arguing that current regulatory approaches do not fit economic justifications; the regulation is instead self-serving); RICHARD ABEL, AMERICAN LAWYERS 142-57 (1989) (delivering a crushing indictment of lawyer self-regulation as little more than institutionalized lawyer self-interest); Deborah L. Rhode, *Ethics in Practice, in* ETHICS IN PRACTICE 12-16 (2000) (describing the structure of professional regulation and arguing for more public input); Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 231 (1996) (arguing that "the bar has proved itself to be supremely self-serving in regulating itself").

[28] I have previously argued that continuous efforts to raise the barriers to entry to the profession (*i.e.* the bar examination, the MPRE, stricter character and fitness) are actually most likely consciously or

profession has been publicly disliked and internally pressurized since lawyers have existed.[29] The lack of any actual crisis would thus render any curative efforts moot.

Despite the persuasive force of these explanations they do not jibe with the substantial effort that innumerable lawyers, judges and academics have poured into these concerns, or the very real sense of malaise within the profession.[30] This Article argues that despite the sincerity these efforts, they have failed largely because the profession has divided what was once the single unifying goal for bar associations and lawyer regulators[31] – providing moral, ethical, and practical guidance on how to practice law[32] –

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unconsciously motivated by the desire of existing practitioners to limit competition from new entrants. *See* Barton, *Economic Analysis*, note __, at 445-48.

[29] *See* Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443 (2000) (reviewing ARTHUR L. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY (1998)). Proponents of this theory also frequently rely upon a series of past unflattering depictions of lawyers, from the malefic lawsuit in CHARLES DICKENS, BLEAK HOUSE (reissue ed. 2003) to Carl Sandburg's sardonic lawyer eulogy in "The Lawyer Knows Too Much," *see* CARL SANDBURG, SELECTED POEMS 190 (1996) ("The lawyers—tell me why a hearse horse snickers hauling a lawyer's bones.") to Shakespeare's dictum from WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, "[t]he first thing we do, let's kill all the lawyers." For a discussion of the true meaning and context of the above quote, *see* Benjamin H. Barton, *The Quintessence of Legal Academia*, 92 CAL. L. REV. 585, 600 n. 46 (2004) (reviewing STEPHEN L. CARTER, THE EMPEROR OF OCEAN PARK (2002)) (arguing that despite the efforts of lawyer apologists, Shakespeare in fact meant to disrespect lawyers).

[30] *See, e.g.,* ANTHONY KRONMAN, THE LOST LAWYER (1995); GLENDON, *supra* note __; SOL LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED (1999). My previous scholarship in this area has looked at the multitudinous problems of lawyer regulation from an outsider's point of view, and used economic analysis to elucidate some of the more glaring weaknesses. In this Article I take an insider's point of view, and look at our current worries as a lawyer and law professor. In that regard, I take the bar at its word when it says it has a serious problem and it is earnestly endeavoring to solve it. The question this Article seeks to answer is, why are these efforts so unsuccessful, and how could they be improved?

[31] I use the term "lawyer regulators" with some regularity in this Article. Since the legal profession is largely self-regulated, "lawyer regulators" refers to those in charge of creating and enforcing the regulations that govern the legal profession. Nominally state supreme courts are in charge in all fifty states. *See* Barton, *Institutional Analysis, supra* note __, at 1249. As a practical matter the ABA and state bar associations hold the greatest sway, and since the early 20th century the ABA has drafted the baseline Rules/Codes/Canons that govern lawyer conduct. *See id.* at 1188-1200.

[32] In reading this Article some reviewers have asked for a definition of these three terms, or more pointedly, challenged me to differentiate between them. I use these three terms, "moral, ethical, and practical," in this order purposefully, to express the breadth of guidance the Canons offered to lawyers from the broadest and most personal (moral) to the narrowest and most generally applicable (practical). By "moral" I mean the dictionary definition: "Of or pertaining to human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings." *See* 1 THE NEW OXFORD ENGLISH DICTIONARY

into two quite distinct, and in some ways contradictory goals, thus undercutting the entire project.[33] The original, unified goal is best embodied by the ABA Canons of Professional Ethics, which provided both general moral and ethical advice and specific practical advice for lawyers.[34] This unified statement was first split by the adoption of the ABA Code of Professional Responsibility,[35] which separated the general from the mandatory minimums, and then the Rules of Professional Conduct,[36] which eliminated the broadly moral altogether.

Now there are two distinct goals. On the one hand, the efforts of attorney regulators to draft, redraft, and continuously narrow the minimum rules of lawyer behavior are the *sine qua non* of the last thirty years of the professionalism movement. The goal of these efforts is, most charitably put, to maximize the number of lawyers who know and follow the minimum rules of the profession. Less charitably, the goal is to make it easier to follow the minimum standards.[37] The drafters have largely eliminated the broad, philosophical (and thus harder to apply) standards contained in the predecessor Canons of Professional Ethics and Code of Professional Responsibility and have

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1827 (1993). "Ethical" is explicitly related to the moral, but it refers to a more systematic, or scientific approach to morality, *i.e.* it is less personal and has a structure beyond any single individual's moral leanings. *See id.* at 856. "Practical" specifically refers to the nuts and bolts of lawyering, and is the least personal of the three terms.

[33] While it is clear from an analysis of the regulatory activities that there are two distinct goals, lawyer regulators frequently treat these goals as if they are identical, or conflate them. For an exploration of the hows and whys of this conflation, *see infra* notes __ and accompanying text.

[34] *See supra* notes __ and accompanying text (discussing the structure and adoption of the ABA CANONS OF PROFESSIONAL ETHICS).

[35] *See supra* notes __ and accompanying text (discussing the structure and adoption of the ABA CODE OF PROFESSIONAL RESPONSIBILITY).

[36] *See supra* notes __ and accompanying text (discussing the structure and adoption of the ABA RULES OF PROFESSIONAL CONDUCT).

[37] *See* Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409, 419 (2001) [hereinafter *Professionalism*] ("The effect of the move from general aspirations to detailed standards, however, in the minds of many became a move from a reach for professionalism to a search for loopholes that would justify lower and lower standards of behavior.").

sharpened their minimums into a quasi-criminal set of Rules.[38] They have also set up multiple avenues, through ethics hotlines and ethics committees, for pre-determining the propriety of any questionable actions. Thus, while bar associations and lawyer regulators once sought to offer lawyers moral and ethical guidance for the practice of law, regulators have increasingly focused on minimum standards of lawyer conduct. For purposes of clarity I will refer to this set of goals as the "minimalist" project.

On the other hand, bar associations and attorney regulators have felt a backlash from the legalization of what was once accurately termed "legal ethics," and have attempted to raise the ethical consciousness of the profession as a whole through hortatory or non-binding efforts. In this context "ethics" means the dictionary definition – "a set of moral principles"[39] – not the narrower, minimum rules of conduct meaning regularly ascribed to "legal ethics."[40] In this regard lawyer regulators are actually trying to accomplish a much headier mission; they are trying to make lawyers more moral and ethical. I will refer to this goal as the "broadly ethical" project.[41]

These two goals conflict and undercut each other in several important ways. The broadly ethical project's focus upon a moral world outside of the minimum legal rules actually draws attention to the relatively picayune nature of our current approach to legal

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[38] The ABA MODEL RULES OF PROFESSIONAL CONDUCT have largely replaced the Code, and are based almost solely in terms of the minimum standards of lawyer behavior. *See infra* notes __ and accompanying text.

[39] *See* OXFORD, *supra* note __, at 856.

[40] *See, e.g.,* Thomas E. Richard, *Professionalism: What Rules Do We Play By?*, 30 S.U. L. REV. 15, 18 (2002) ("From these definitions it is apparent that legal ethics provide minimum standards that lawyers must follow, while professionalism establishes lofty standards that lawyers should follow."); Julius W. Gernes, *Professionalism Aspirations: Encouraging Professionalism*, 58 BENCH & B. MINN. 32, 32 (2001) ("Legal Ethics can be defined as the mandated minimum level of conduct required by the Minnesota Rules of Professional Conduct.").

[41] This may actually be paying the "professionalism" movement too much respect. There is a persuasive argument that professionalism is nothing more than increased attention on the minimalist project (virtually all of the mandatory elements of the professionalism movement fall into this category), plus a non-binding emphasis on civility. *Cf.* Thomas D. Morgan, *Creating Life as a Lawyer*, 38 VAL. U. L. REV. 37, 45 (2003) (noting that some have attempted to define "Professionalism" as "civility").

ethics, and breeds cynicism amongst members of the profession and law students interested in considering more than just minimum allowable boundaries.

The continuing effort to eliminate the philosophical or broadly ethical from the Rules themselves further exacerbates this problem. Criminal law theorists have long argued that the criminal law is most effective when its proscriptions track the norms and morals of society.[42] This is because legal proscriptions that fit commonly held morality are generally obeyed regardless of enforcement or the odds of being caught. The efficacy of more "administrative" criminal laws not easily recognizable as common morality relies much more on government enforcement. If these Rules are enforced, they are followed; if not, people generally feel little moral compunction about violating them. This is why many people would not shoplift while a cashier turns her back, although the odds of being caught are not high, but many people violate the speed limit or jaywalk when they sense no police presence. By divorcing the Rules governing lawyers from the broadly moral in favor of a series of technical regulations, the drafters have decreased the odds that lawyers who do not fear reprisals will follow the rules.

The minimalist project, likewise, has choked off much of the broadly ethical effort. Professor Heidi Li Feldman, among others, has persuasively criticized the mode of "ethical deliberation" inspired by the current regulatory structure.[43] The ABA's new, narrower rules of professional conduct encourage, or even require, reductionist and

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[42] *See infra* notes __ and accompanying text.

[43] *See* Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885-89 (1996) (stating that the current Rules inspire, and may require, a "technocratic" approach to ethical dilemmas); *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9-25 (1998) (noting that current approaches to professional responsibility require a severely restricted and "categorical" approach to ethical judgment); Richard Delgado, *Norms and Social Science: Towards a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 953 (1991) (arguing that professional responsibility rules "often function affirmatively to encourage a sort of minimal-ethicality, according to which actors are rewarded for being as 'minimally ethical' as possible.").

simplistic thinking about complicated issues. When confronted by a thorny moral or ethical issue, lawyers are encouraged to consult the black-letter Rules to determine what is allowed, what is mandated, and what is banned. The thought process begins and ends with consultation and application of the Rules, and broader questions of context, personal morality, or a greater duty to society at large can be (and thus frequently are) ignored.[44]

Black letter rules trigger a particular mode of thinking – or heuristic – in lawyers: we are trained to carefully read and analyze rules to find (as precisely as possible) the boundary between legal and illegal behavior.[45] When lawyers apply this same boundary-seeking process to issues of ethics or professional responsibility the search for the border between allowed and proscribed behavior frequently displaces any consideration of the more general ethical question "is this the right thing to do?"

The question of enforcement also becomes critical in this boundary-seeking calculus. Lawyers are trained not only to determine the boundaries of the law, they also consider the worst case scenario of violating any given law, *i.e.* the odds of being caught and the likely punishment. Here the drafters' choice to emphasize the boundary-seeking heuristic is particularly devastating, because the minimum rules governing lawyers are, in fact, notoriously under-enforced.[46]

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[44] *See* Feldman, *supra* note __, at 889-908 (using the example of Lake Pleasant bodies case to demonstrate the shortcomings of a legalistic approach to a complex ethical issue); SIMON, *supra* note __, at 138-69 (comparing the legalistic "dominant view" of legal ethics with "contextual judgment").

[45] For a good working definition of the psychological concept of heuristics, consider the following: "The human brain is extremely efficient, but it is not a computer. The brain has a limited ability to process information but must manage a complex array of stimuli. In response to its natural constraints the brain uses shortcuts that allow it to perform well under most circumstances." Jeffrey J. Rachlinski, *Heuristics or Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 61-62 (2000); *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 19-109 (2000) (discussing special legal heuristics of categorization).

[46] *See* Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501, 1512 (2002) (citing examples of lax lawyer discipline); Leslie C. Levin, *The Emperor's New Clothes, and Other Tales About Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 8-17 (1998) (same); Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of*

As such, the decision of lawyer regulators to divide a single goal – providing ethical, moral, and practical advice to lawyers – into the twin goals of the minimalist and broadly ethical projects has proven internally inconsistent and ultimately self-destructive.[47] I offer a simple, but heretical solution: redraft the Canons with a single goal in mind, giving moral, ethical, and practical guidelines for the practice of law. This will reunite the broad and the narrow goals of legal ethics, will give some needed meaning and attention to the "broadly ethical" project, will fundamentally change the way lawyers approach their minimalist duties (because, like the reading of the Canons, the narrow will be read in light of the broad), and it will make the minimums more explicitly ethical, moral, and naturally followed.

The Article proceeds in four parts. Part I presents a brief history of American legal ethics, and argues that legal ethics once had a single goal – to provide ethical, moral, and practical advice to lawyers – and that since the Rules that goal has been bisected into the minimalist and broadly ethical goals. Part II asserts that this division actually undercuts both goals on multiple fronts. Part III examines a specific recent regulatory effort, the MPRE, and demonstrates how the twin goals undercut the efficacy

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Underenforced Professional Rules, 87 IOWA L. REV. 971 (2002) (describing underenforcement and its results in the area of lawyer advertising); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1998-99 1-8 (2001) (listing Chart I showing that out of a national total of 116,424 complaints received by lawyer disciplinary agencies in 1998 only 3,602 lawyers were formally charged, and Chart II showing that the great bulk of the sanctions imposed were either private or public sanctions, the lowest levels of discipline).

[47] Admittedly, the history of twentieth century lawyer regulation establishes that these two goals have been in tension since courts first began to enforce the Canons. Lawyers complained about being held to broad standards, and the minimalist project, and the never-ending quest for more "guidance" (read more black-letter rules), began. *See infra* notes __ and accompanying text. Although the tension between the hortatory and the mandatory existed under the Canons, I argue that this tension has currently digressed into open conflict. The decision to focus upon enforceability and to jettison the broader ethical framework has resulted in the need for a free standing "professionalism" movement, and a new and more deleterious clash within lawyer regulation.

of the exam. Part IV proposes both a narrow solution (explicitly recognize the two competing goals) and a broad solution (redrafting the Canons).

I. The Historical Division of a Single Goal into Two

The history of American legal ethics begins with the broad moralizations of two nineteenth century law professors, and ends with the black-letter Rules of Professional Conduct that govern the profession today. The origins of legal ethics are explicitly moral: first and foremost discussions of legal ethics were meant to offer non-binding moral, ethical, and practical guidance. As bar associations grew in power, and ethical codes were widely accepted, courts began to use the codes as the basis for attorney discipline. What was once solely hortatory began to have binding, legal effect. Over time this brought increased attention to the ethics codes, and in reaction to growing enforceability, bar associations shifted from broad to narrow, and from ethical and moral to quasi-criminal. When lawyer regulators removed the moral underpinnings from their minimum rules it led inexorably to a bisection of the original goals into the separate minimalist and broadly ethical projects of today.

A. *Stage One: The Rebirth of Bar Associations, the Origins of Legal Ethics, and the First Hortatory Codes*

In the earliest days of American lawyers there was little consideration of "legal ethics" as a distinct entity. The ethical and moral obligations of lawyers derived largely from religious principles,[48] and lawyer conduct was regulated through the natural peer

[48] PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 186-92 (1965) (noting that 19th century lawyers described themselves as a "sanctified" fraternity).

pressure of a small, homogenous group,[49] or the common law "summary jurisdiction" each court retained over the lawyers who practiced before them.[50]

The early focus on legal ethics began in legal academia, and was promulgated by bar associations. In the last third of the nineteenth century organized bar associations rose to prominence,[51] first in city bar associations,[52] and later in state,[53] and national associations.[54] The bar associations had a reform-minded agenda, focusing specifically on the punishment of the "activities of a notorious fringe of unlicensed practitioners" and

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[49] *See* Fannie M. Farmer, *Legal Practice and Ethics in North Carolina 1820-1860, in* THE LEGAL PROFESSION, MAJOR HISTORICAL INTERPRETATIONS 274, 294-99 (Kermit L. Hall ed., 1987) (describing the lack of any formal code of ethics for North Carolina attorneys between 1820-60, and the informal pressures to conform to certain values of the legal profession); William R. Johnson, *Education and Professional Life Styles: Law and Medicine in the Nineteenth Century*, 14 HIST. OF EDUC. Q. 185, 187-92 (noting that in Wisconsin in the nineteenth century "[g]roup standards were defined and enforced in an immediate and personal manner"); Bruce Frohnen, *The Bases of Professional Responsibility: Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 931 -38 (1995) (arguing that early American lawyers learned professional responsibility from other lawyers, as well as the society at large); HENRY WYNANS JESSUP, A STUDY OF LEGAL ETHICS xxiv (1925) (noting that prior to organized statements of ethics "the traditions of the profession were perpetuated and the fundamental principles observed" as a result of "the habit of the tribe").

[50] Under this summary jurisdiction a court could disbar or sanction an errant attorney. *See* EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELORS AT LAW 144-223 (San Francisco, Bancroft-Whitney Co. 1892); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 912-17 (1994); Spevack v. Klein, 385 U.S. 511, 524 (1967) (Harlan, J., dissenting).

[51] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 562-63 (1973); JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 286-87 (1950); ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 253-69 (1953); HENRY DRINKER, LEGAL ETHICS 20 (1953).

[52] *See* WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY 1890-1930 214-15 (1986); Philip J. Wickser, *Bar Associations*, 15 CORNELL L. REV. 390, 396-97 (1930).

[53] *See* POUND, *supra* note __, at 259-69; FRIEDMAN, *supra* note __, at 563.

[54] Among the national bar associations was the ABA, founded in 1878 by "seventy-five gentlemen from twenty-one jurisdictions, out of approximately 60,000 lawyers then practicing in the United States." ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 208 (1921); *see also* John A. Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75-90 (Gerald W. Gawalt ed., 1984) (providing an overarching history of the founding of the ABA). In general the members of these new bar associations were drawn by invitation from the "elite" of practice. *See* FRIEDMAN, *supra* note __, at 563; POUND, *supra* note __, at 255-70.

"shystering and unprofessional conduct,"[55] as well as requiring higher qualifications for admission to practice.[56]

As an aspect of the effort to "professionalize" the legal profession,[57] nascent bar associations turned their attention to "codes of ethics," beginning with Alabama in 1887.[58] The Alabama Code was based primarily on the written work of two law professors: David Hoffman[59] and George Sharswood.[60] Both Hoffman and Sharswood's

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[55] *See* FRIEDMAN, *supra* note __ at 562-63; *see also* Marvelle C. Webber, *Origin and Uses of Bar Associations*, 7 A.B.A. J. 297, 298 (1921).

[56] *See* W. Hamilton Bryson & E. Lee Shepard, *The Virginia Bar, 1870-1900, in* HIGH PRIESTS, *supra* note __, at 171.

[57] *See* KERMIT L. HALL, THE MAGIC MIRROR 214-16 (1989); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 473-76 (1998).

[58] *See* Marston, *supra* note __ (providing a general overview of the history and content of the 1887 code of ethics of the Alabama State Bar Association); CODE OF ETHICS ALABAMA STATE BAR ASSOCIATION, (1887), *reprinted in* DRINKER, *supra* note __, at 352-63 (1953) (hereinafter ALABAMA CODE). Between 1887 and 1906 the Alabama Code was adopted, with minor changes, by bar associations in Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky, and Missouri. *See* 30 A.B.A. REP. 685-713 (1907) (compiling the codes of ethics adopted by the bar associations in Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia Wisconsin and West Virginia).

[59] David Hoffman accepted an appointment as professor of law at University of Maryland in 1814 and remained a professor until 1836. *See* Stephen E. Kalish, *David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54, 59 (1982); Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 678-83 (1979). In 1836 Hoffman published the second edition of his *Course on Legal Study*, which contained a treatment of a subject that Hoffman termed "almost wholly new," the study of a lawyer's professional deportment. *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDY 723 (Arno Press 1972) (1836). As an aspect of this new study, Hoffman included his fifty "Resolutions in Regard to Professional Deportment," *Id.* at 752-75, which has been widely recognized as the first American attempt to boil the issues of professional deportment or ethics down into a single statement. *See* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT READINGS, AND DISCUSSION TOPICS 59 (1985); M. H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 U. KANS. L. REV. 793, 795 (1999).

[60] George Sharswood was elected Professor of Law at the University of Pennsylvania in 1850, and served as Professor and Dean until 1868. *See* GEORGE SHARSWOOD, LECTURES INTRODUCTORY TO THE STUDY OF LAW v (Philadelphia, T & J.W. Johnson & Co. 1870). In addition Sharswood served on the Supreme Court of Pennsylvania as both a Justice and the Chief Justice. *See* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 249 (1992). In 1854, Sharswood delivered a series of lectures to his law class at Pennsylvania concerning legal ethics; these lectures were later published as an essay on legal ethics. *See* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 7-8 (4th ed., Philadelphia, T & J.W. Johnson & Co. 1884). Sharswood's essay proved quite influential, and laid the basis for further codification of legal ethics. *See* Pearce, *supra* note __, at 243-47 (Sharswood's essay formed the basis for the Alabama Code of legal ethics, and eventually the ABA's Canons); Walter P. Armstrong, Jr., *A Century of Legal Ethics,* 64 A.B.A. J. 1063, 1063-64 (1978) (same); DAVID LUBAN, LAWYERS & JUSTICE xxviii (1988) (naming Sharswood the key predecessor to modern legal ethics). This is, of course, a dubious achievement in the eyes of some. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE 41-42 (1976).

writings on legal ethics were explicitly based upon religious faith,[61] but branched out to include both general and specific advice on the ethical, moral, and practical meaning of practicing law.[62] The Alabama Code similarly ran the gamut from the broadly moral to

[61] For example, Hoffman's reading list for the subject of professional deportment includes the Proverbs of Solomon, and the Books of Ecclesiastes, Eccliasticus, and Wisdom. *See* HOFFMAN, *supra* note __, at 724; *see also* SHARSWOOD, *supra* note __, at 55 & 181-82 ("There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."); *see* also Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908* Canons, 24 L. & SOC. INQUIRY 1, 10-13 (1999) (referring to Hoffman and Sharswood's legal ethics approach as "religious jurisprudence"). Given the religious mores of the times and social status of Sharswood and Hoffman it is likely that both were heading off the criticism that any treatment of legal ethics beyond the moral and ethical responsibilities required by their religious faith was either superfluous, or worse heretical.

[62] Hoffman's resolutions are somewhat eclectic, dealing with both specific details of etiquette, s*ee* HOFFMAN, *supra* note __, at 752, 767, 773 (Resolution III, "To all Judges, when in court, I will ever be respectful . . . . Resolution V, "In all intercourse with my professional brethren, I will be always courteous. . . ." Resolution XXXVI, "Every letter or note that is addressed to me, shall receive a suitable response, and in proper time.") and business, *see id.* at 762-63 (Resolution XXV, "I will retain no client's funds beyond period in which I can with safety and ease, put him in possession of them." Resolution XXVI, "I will on no occasion blend with my own, my client's money: if kept *distinctly as his,* it will be less liable to be considered *as* my own." Resolution XXIX, dealing with the treatment of retainers), as well as broad exhortations concerning the nature of law and morality. *See id.* at 759 (Resolution XXXIII, "What is wrong is not the less so from being common. And though few *dare to be singular*, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. . . ." Resolution XXXIV, "Law is a deep science: its boundaries, like space, seem to recede as we advance: and though there be as much certainty in it, as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. . . .").

Likewise, Sharswood's essay verges from specifics of practice, s*ee, e.g.,* SHARSWOOD, *supra* note __, at 124 ("The importance of good handwriting cannot be overrated. A plain legible hand every man can write who chooses to take the pains. A good handwriting is the passport to the favor of clients, and to the good graces of judges, when papers come to be submitted to them."), to generalities of lawyerly virtue. *See, e.g., id.* at 55 ("High moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."). Sharswood's discussion of an attorney's duties to his client is the lengthiest in the essay, and also the most controversial among current commentators, who have claimed that Sharswood both supports and undermines a vision of the lawyer's role as dependent upon the "adversary ethic." *Compare* Bloomfield, *supra* note __, at 687 (arguing that "[w]here Hoffman referred all problems to the practitioner's conscience – that mirror of universal morality – Sharswood opted for the external guidelines provided by the legal process itself.") *and* Marston, *supra* note __, at 495-96 *with* L. Roy Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909, 912-915 (arguing that Sharswood favored duty to the courts and public above duty to clients) *and* Hoeflich, *supra* note __, at 803-7 (arguing that Sharswood favored a "middle road" between duty to clients and duty to the system as a whole).

Both Hoffman and Sharswood have been identified as leaders in the "Law as science" movement in legal education of the mid-nineteenth century. *See* Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 438-39, 450-51 (1999). The influence of the law and science, and codification movements likely led both Hoffman and Sharswood to attempt to inscribe the previously informal norms of legal ethics.

the narrowly practical.[63] Although the Alabama code included an exhortation to expose "Corrupt Attorneys" before "the proper tribunals," the Codes themselves were non-enforceable. Like the academic work of George Sharswood and David Hoffman, these early codes were meant to guide lawyers, not bind them into specific behavior.[64]

Thus, when the ABA first turned its attention to drafting the Canons in 1905, there was already a substantial body of academic writing and State rules to draw from.[65] The impetus for the Canons will sound familiar: a concern over the commercialization of the profession, and its low public esteem.[66] The original call for the canons was explicitly religious and moral.[67] The ABA adopted the Canons in 1908,[68] and like their predecessors, the Canons included both the broadly moral[69] and the practical,[70] and were explicitly hortatory in nature.[71]

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[63] The Code included broad rules such as "No Set Rule for Every Case" and "Must not be a Party to Oppression" ALABAMA CODE, *supra* note __, at 353, 356 and specific practical advice, such as "Reputation of a 'Rough Tongue' not Desirable" and "Promptness and Punctuality." *See, e.g., id.* at 358-59.

[64] *See* Marston, *supra* note __, at 501 ("Despite its legal unenforceability, Jones authored the Code of Ethics for the benefit of practicing lawyers. . . ."). During this period the bar associations were small and selective, *see* FREIDMAN, *supra* note __, at 563, and thus their pronouncements on ethics had little or no effect on practicing attorneys outside of the bar associations (of which there were many) or on disbarment proceedings. *See* THORNTON, *supra* note __ (published in 1914, and featuring an exhaustive listing of standards and cases of disbarment, without mentioning any of the State codes of ethics); WEEKS, supra note __, at 144-223 (same as of 1892).

[65] At the 1905 meeting the Association adopted a resolution forming a committee to report "upon the advisability and practicability of the adoption of a code of professional ethics." *See* 28 A.B.A. REP. 131-32 (1905). The original committee consisted of four members of the ABA and no lay-people. *See* 29 A.B.A. REP. 604 (1906). The eventual committee that drafted the Canons consisted of fourteen male, anglo-saxon, protestant lawyers. S*ee* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & Soc. Inquiry 1, 16 & Appendix A (1999).

[66] *See* 28 A.B.A. REP. 384 (1905). For an exhaustive and excellent overview of every aspect of the drafting and passage of the 1908 Canons, *see* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORD. L. REV. 2395, 2402-9 (2003) (describing the initial impetus for the drafting of the Canons).

[67] *See* Altman, *supra* note __, at 2407 (noting that ABA president Henry St. George Tucker called for the drafting of a code of legal ethics "in an explicitly religious context").

[68] *See* 31 A.B.A. REP. 55-85 (1908).

[69] For example, Canon 16 deals with "Restraining Clients from Improprieties," Canon 18 requires respectful "Treatment of Witnesses and Litigants," Canon 22 requires "Candor and Fairness," and Canon 32 broadly stated "The Lawyer's Duty in the Last Analysis." *See* 31 A.B.A. REP. 576, 579-84 (1908).

[70] The practical prohibitions were among the more controversial, and actually foreshadow the ABA's future definitional struggles for minimum rules. The only Canon that caused any debate concerned

B. *Stage Two: The Transition from Hortatory to Enforceable*

The Canons were extremely successful; by 1914 the Canons had been adopted by thirty-one of the forty-five state bar associations.[72] It is impossible to pinpoint exactly when the Canons first became the basis for disciplinary action in America. The Canons were cited almost immediately by scattered courts around the country, but as persuasive rather than controlling authority.[73] By the 1920's the line was beginning to blur. Courts still noted that the Canons were not "binding obligation," but held that "an attorney may be disciplined by [a] court for not observing" the Canons.[74]

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contingent fees, which were allowed, but only under the supervision of court. Certain members argued that contingent fees should be barred altogether. In the end, the Canon passed with compromise language. *See* Altman, *supra* note __, at 2482-84 The compromise stated "Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges." 31 A.B.A. REP. 578, 579 (1908). In a similar vein, the Canons barred lawyers purchasing "any interest in the subject matter of the litigation which he is conducting" or "stirring up litigation." *See id.* at 582-83. The Canons also explicitly barred lawyer advertising, s*ee id.* at 582, despite the fact that the Alabama Code and other predecessors explicitly allowed it. *See, e.g.,* ALABAMA CODE, *supra* note __, at 356; Altman, *supra* note __, at 2484-91.

[71] *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 55-56 (1986) ("The Canons were probably not intended to have any direct legal effect."); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics,* 100 YALE L. J. 1239, 1250 (1991) (same). Nevertheless, the drafters hoped to have a concrete effect upon the standards for lawyer disciplinary proceedings. *See* 29 A.B.A. REP. 602 (1906) (stating a hope that lawyers entering the bar would have to swear an oath to follow the canons, thus making the canons enforceable); Altman, *supra* note __, at 2499.

[72] *See* 37 ABA REP. 560-61 (1914). The reaction of the press was favorable, *see* AUERBACH, *supra* note __, at 50-51, as were the reactions of various eminent lawyers. *See, e.g.* David J. Brewer, *The Ideal Lawyer*, 98 ATLANTIC MONTHLY 587, 595-96 (1906) (praising the canons in advance of their official adoption). A 1909 casebook relies almost solely upon the Canons to supply its chapter on legal ethics, s*ee* WILLIAM LAWRENCE CLARK, ELEMENTARY LAW 333-343 (1909), and a 1917 Legal Ethics Casebook includes the Canons, as well as Hoffman's fifty resolutions as appendices. *See* GEORGE P. COSTIGAN, CASES AND OTHER AUTHORITIES ON LEGAL ETHICS (1917). Costigan was involved in the drafting of the Canons, *see* Carle, *supra* note __, at 21, and was an early supporter. George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 THE GREEN BAG 57 (1908).

[73] For example, in a 1909 Illinois case, *Wiersma v. Lockwood & Strickland Co.*, the court first cited a number of cases for the specific point of law, and then quoted both "the able and eminent Edward G. Ryan" and the ABA's Canons to establish a general point concerning over-zealous advocacy. Wiersma v. Lockwood & Strickland Co., 147 Ill. App. 33 (1909); *see also* State v. Kaufman, 118 N.W. 337, 338-39 (S.D. 1908) (citing to a number of cases, and also quoting the Canons as "the best thought of the profession"); In re Egan, 123 N.W. 478, 487 (S.D. 1909) (also quoting a local "eminent" lawyer and the ABA's canons for the same general proposition). In these early days courts seemed clear that while the Canons were useful as a general statement of ethical standards, "legislation may perhaps be necessary to carry [them] fully into effect." Ransom v. Ransom, 127 N.Y.S. 1027, 1033 (N.Y. Sup. Ct. 1910).

[74] Hunter v. Troup, 146 N.E. 321, 324 (Ill. 1924); *see also* In re Schwarz, 161 N.Y.S. 1079, 80 (N.Y. App. Div. 1916) (stating that the attorney at issue "has transgressed Canon 27 of the Code of Ethics of the

This trend accelerated under the bar "integration" movement; in the 1920's and 1930's bar association membership became a mandatory prerequisite to the practice of law in many states.[75] The integration movement naturally led to a greater importance for the Canons, because a lawyer who violated a Canon might be removed from the bar association, and thus disbarred from the practice of law.[76]

American Bar Association . . ." and applying the Canon as if it were law); People v. Berezniak, 127 N.E. 36, 39-40 (Ill. 1920) (stating that although Canon 27 "does not have the binding force of a statute in this state . . . but it does set forth very fully the class of advertisements and solicitations of business that is objectionable, unethical, and unprofessional, and is most commendable in all other respects," and applying the Canon's standard as if it were binding law); In re Cohen, 159 N.E. 495, 497 (1928) (stating that "[c]odes of legal ethics adopted by bar associations of course have no statutory force" but also quoting with approval a case stating that the canon against advertising "thus incorporates in the code of ethics an ideal standard of conduct which has been long and well recognized and . . . [t]he attorney who disregards the rule is properly subject to rebuke if not to disbarment"); *but see* In re Clifton, 196 P. 670 (Id. 1921) (stating that "it would be going too far to hold that one may be disbarred solely because he has failed to live up to the ideals which the canons of ethics of a bar association set for its members as attorneys and citizens"). Courts particularly focused on the Canons in the commercial areas of advertising, solicitation and contingency fees. *See, e.g.,* In Re Schwarz, 161 N.Y.S. 1079, 1080 (N.Y. App. Div. 1916) (advertising); People v. Berezniak, 127 N.E. 36, 38 (Ill. 1920) (same); Ellis v. Frawley, 161 N.W. 364, 366 (Wisc. 1917); Ransom v. Ransom, 127 N.Y.S. 1027, 1033 (N.Y. Sup. Ct. 1910) (contingency fees).

[75] ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS 90 (1952) (describing the success of the "integration" effort between 1918 and 1934); WOLFRAM, *supra* note __, at 36-38 (describing "mandatory" bars, and their efforts "to exercise greater control over . . . the discipline of lawyers"). The ABA explicitly endorsed the concept of unified bar associations in 1920, and encouraged state associations to become mandatory if possible. M. LOUISE RUTHERFORD, THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION 32-33 (1937). North Dakota was the first state to integrate its bar in 1921, but by 1930 seven states had integrated, and by 1933 the number had swollen to eighteen. RUTHERFORD, *supra* note __, at 33. By 1954 twenty-five of forty-eight states had integrated bars, *see* ALFRED P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER 240-41 (1954), and by 1980 thirty-three states out of fifty had integrated bars. *See* WOLFRAM, supra *note* __, at 37. For an overview of the integrated bar movement, *see* DAYTON MCKEAN, THE INTEGRATED BAR (1963).

[76] The drafters of the Canons specifically expected that lawyers "failing to conform thereto should not be permitted to practice or retain membership in professional organizations, local or national, formed, as is the American Bar Association, to promote the administration of justice and uphold the honor of the profession." *See* 29 A.B.A. REP. 602 (1906). The 1920s and 1930s also saw the ABA and state bar associations working together to standardize enforcement and interpretation of ethical rules throughout the country. *See* RUTHERFORD, *supra* note __, at 89-92. As of 1924 there was a feeling that "the easy days" for the alleged scofflaws were over: "The Bar is now awake. It has found ways of making its ideals real – its canons of ethics actual governing rules of conduct." *See* JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 156 (1924). As to whether many lawyers were actually disbarred, consider the general history of the American bar's long, and unimpressive, tradition of lawyer discipline, *see* ABEL, *supra* note __, at 143-50.

The ABA and other bar associations reacted to the increasing enforceability[77] of the Canons in two now familiar ways. First, the ABA pursued extensive redrafting and retooling of the Canons in pursuit of "additional guidance" to lawyers[78] in 1928,[79] 1933,[80] and 1937.[81] The tone of these debates and the care taken in drafting the new and revised Canons displays the ABA's recognition of its role in drafting a *binding* ethics code.[82]

Second, bar associations began to establish ethics committees to advise inquirers respecting interpretations of the Canons, starting with the ethics committee of the New York County Lawyers' Association ("NYCLA") in 1912, and the ABA's committee in

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[77] In 1928 the ABA noted that "[t]he influence of the original canons have been very widely extended . . . they have been made the measure of standards in many judicial opinions." *See* 51 A.B.A. REP. 119 (1928).

[78] *See* 56 A.B.A. REP. 153 (1933) (stating that thirteen additional canons were adopted in 1928 as a "specific guide" to situations unforeseen in the drafting of the original canons).

[79] *See* 51 A.B.A. REP. 130-31 (1928) (noting the ABA approval of thirteen new Canons in addition to the original thirty-two, as well as substantial editing of Canon 28 on stimulating business). The new Canons again sought to squelch various entrepreneurial practices including the division of fees with another lawyer, employment by an intermediary (which essentially banned group representation through unions), the acceptance of compensation or commission from non-clients, and paying litigation expenses. *See id.* at 496-98.

[80] In 1933 the ABA altered five Canons, and adopted an additional Canon, which allowed a lawyer to publish, i.e. advertise, a "brief, dignified notice" of the fact of his representation of other lawyers. *See* 56 A.B.A. REP. 155-78, 428-30 (1933).

[81] In 1937 there were additional changes to ten of the forty-six canons, and a new Canon forty-seven was adopted, which explicitly barred any possible involvement with, or aid to, the unauthorized practice of law. *See* 60 A.B.A. REP. 350-52, 761-67 (1937).

[82] The tone of the ABA proceedings over the 1933 alterations was substantially different than the tone of the original adoption of the Canons in 1908, or even the addition of new Canons five years earlier in 1928, and clearly reflects the strain placed upon the ABA in managing the drafting of a *binding* code of legal ethics. In 1908 the only substantial controversy regarded contingent fees, and thirty-two other canons were adopted with little or no discussion, *see* 31 A.B.A. REP. 55-86 (1908), in 1928 there was controversy concerning lawyer bonding and the division of fees by lawyers, otherwise there was no "unfavorable comment [or] criticism of any of the other Canons," 51 A.B.A. REP. 120 (1928). By 1933 the recommendations were "not free from controversy," there was "no general agreement in the profession as to some" of the changes, and "[t]he difference of opinion has extended to the committee meeting this week." 56 A.B.A. REP. 154 (1933). The suggestions received, and the discussion of each change, focused much more carefully on the specific wording of each change, reflecting a recognition that these rules would be binding, and therefore seeking to clarify their meaning as much as possible. *See id.* at 155-80, 430-37.

From 1937 until the adoption of the Code the Canons remained essentially, unchanged, with one notable exception. Canon 27, which dealt with advertising and solicitation, was amended in 1937, 1940, 1942, 1943, 1951 and 1963. *See* DRINKER, *supra* note __, at 25-26; Armstrong, *supra* note __, at 1066. Canon 43 was amended in 1942 and Canon 46 was amended in 1956. Otherwise, the Canons remained the same from 1938 until the adoption of the Code in 1969. *See* DRINKER, *supra* note __, at 25-26; Armstrong, *supra* note __, at 1066.

1913.[83] From the outset the work of these ethics committees was meant to bring clarity and specificity to the ethical duties of lawyers under the Canons.[84] Though the opinions of the NYCLA committee and the ABA committee were advisory and unofficial,[85] they certainly had a strong influence.[86]

C. *Stage Three: The Code Separates the Broadly Ethical from the Minimalist*

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[83] *See* Charles A. Boston, *Practical Activities in Legal Ethics,* U. PA. L. REV. 103, 111 (1913) (discussing NYCLA Committee); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 66 UCLA L. REV. 67, 69 n.4 (1981) (same); 36 A.B.A. REP. 147 & n. 10 (1913) (announcing creation of ABA Committee to gather ethics information). It was not until 1922 that the ABA committee's responsibilities changed from information gathering to more direct interpretation of the Canons. The committee was empowered for the first time to hear and act upon ethical complaints concerning ABA members, 45 A.B.A. REP. 49-51 (1922), and "to express its opinion concerning proper professional conduct, and, particularly concerning the application of the tenets of ethics thereto" when requested by state or local bar associations. *See id.* at 49-51.

[84] The NYCLA committee was meant to be an "educational force, in illustrating the practical application of the principles and sound traditions of legal ethics." *See* Boston, *supra* note __, at 113-14. Interestingly, the NYCLA apparently also had a "Discipline Committee," which handled complaints against lawyers and discipline, that lacked the "resources for vigorous prosecution," *id.* at 108, but attempted to compensate through the "ethical education of the Bar" through the committee's handling of ethical questions. *Id.* This early allocation of resources well illustrates the bar's long tradition of substituting education for enforcement.

[85] *See* OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION xi (1956) (hereinafter NYCLA OPINIONS); Finman & Schneyer, *supra* note __, at 83-88 & n. 67.

[86] *See* NYCLA OPINIONS, *supra* note __; Finman & Schneyer, *supra* note __, at 83-88. Each of the questions and answers were published for review, albeit with the caveat that "the questions are submitted *ex parte*, and the replies are predicated only upon the facts stated." *See* Boston, *supra* note __, at 117. Furthermore, the ABA ethics committee had responsibility *both* for answering questions *and* discipline of ABA members for a lengthy time, *See* 45 A.B.A. REP.49-51 (1922); 56 A.B.A. REP. 404-5 (1933) (describing the ABA ethics committee's dual roles in answering requests for advice from bar associations as well as individuals, and member discipline), so any positions taken by the committee in its advisory opinions would be followed in disciplinary proceedings.

These opinions are unusual in two respects: they were offered before the conduct had occurred, or at least before the issues had been adjudicated (advisory) and were *ex parte* (non-adversarial). The fact that the bar association took, and takes, the effort to produce these opinions, despite the American tradition against advisory opinions, *see, e.g.,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 47-53 (1994); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-72 (3rd ed.1988); HENRY M. HART & ALBERT M. SACHS, THE LEGAL PROCESS 630-647 (1994) or non-adversarial proceedings, *see, e.g.,* MONROE H. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 2-3 (1975); Monroe H. Freedman, *Are the Model Rules Unconstitutional*, 35 U. MIAMI L. REV. 685, 688-89 (1981); Finman & Schneyer, *supra* note __, at 159-67 (criticizing the non-adversarial nature of the ABA committee's work), establishes the lengths that bar associations are willing to travel to clarify and simplify the regulatory duties of lawyers.

Despite these efforts to clarify and distill the requirements under the Canons, there were repeated cries that the Canons were too general.[87] Starting in the 1950s the ABA appointed three separate committees aimed at reform.[88] In the 1960s the ABA began preparing a code based upon an entirely new structure. The Code of Professional Responsibility, adopted by the ABA in 1969,[89] is divided into three portions. The

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[87] *See* 48 A.B.A. REP. 94-95 (1935) (arguing that the Canons offer little concrete guidance, and suggesting "a Code of Practice which will deal not with general principles but with the specific abuses involved"); BLAUSTEIN & PORTER, *supra* note __, at 246-51 (noting that numerous Canons were not being followed, and suggesting specific alterations); Symposium, *A Re-Evaluation of the Canons of Professional Ethics*, 33 TENN. L. REV. 129 (1966); Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 4 (1970) (quoting a 1958 American Bar Foundation report stating that the Canons do not present "sufficient detail" in dealing with "specific situations encountered in actual practice"); *Professional Ethics: Charity & Perjury*, TIME, May 13, 1966, at 81 (quoting Professor Anthony Amsterdam as describing the Canons as "vaporous platitudes . . . which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room"); John F. Sutton, Jr., *Guidelines to Professional Responsibility*, 39 TEX. L. REV. 391, 403-23 (1961) (arguing that the Canons are insufficiently specific to set a reasonable minimum standard); *cf.* E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575 (1961) (arguing that the Canons were not tailored to meet the needs of courtroom advocates).

There were also calls to *broaden* the Canons. In 1925 Henry Jessup criticized the Canons as insufficiently "generic." *See* HENRY WYNANS JESSUP, A STUDY OF LEGAL ETHICS xxx (1925) ("An astute pettifogger, and their name is Legion, may say, and many have said, Canon XY does not prohibit what I did – it specifies just what it prohibits – and he pleads '*Expressio unius est exclusio alterius*.'"). Similarly, Justice Harlan Stone argued for a new conception of legal ethics, "beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of our society as a whole." Harlan F. Stone, 48 HARV. L. REV. 1, 10 (1934) ("[W]e must give more thoughtful consideration to squaring our own ethical conceptions with the traditional ethics and ideals of the community at large."). The ABA retorted that "while it might be more desirable to have the Canons consist of a statement of fundamental principles . . . rather than definite rules," it would be impracticable to change the Canons. *See* 47 A.B.A. REP. 467 (1924); 56 A.B.A. REP. 437 (1933) (stating that a "more comprehensible but concise" statement of "general principles" could be formulated, but rejecting an attempt to state "a philosophic basis of general principles" in lieu or in addition to the Canons).

[88] During the 1950s the ABA formed the Special Committee on Canons of Ethics, *see* Philbrick McCoy, *The Canons of Ethics: A Reappraisal by the Organized Bar*, 43 A.B.A. J. 38 (1957), and the "Joint Conference on Professional Responsibility," which was aimed at formulating "an understanding of the nature of the lawyer's professional responsibilities." *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958). In 1964 the ABA created a Special Committee on Evaluation of Ethical Standards, *See* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY: FINAL DRAFT v (1969) (hereinafter CODE); John F. Sutton, Jr., *Re-Evaluation of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 132 (1966), which was "directed to investigate the existing Canons of Professional Ethics and to recommend any changes therein which may be indicated." 88 A.B.A. REP. 221 (1965).

[89] *See Association's House of Delegates Meets in Dallas, August 11-13*, 55 A.B.A. J. 970. 970-72 (1969). The Code became binding upon ABA members on January 1, 1970. *See id.* at 970.

Canons and Ethical Considerations provide "fundamental ethical principles" for "the aspiring."[90] By contrast, the Disciplinary Rules are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[91]

The Code thus recognized and reacted to a process that began when the Canons began to serve as binding law. Throughout the twentieth century, bar associations sought to clarify and distill the minimum standards of lawyer conduct from the broader pronouncements within the Canons. The Code very consciously makes this distillation patent, the moral and ethical was physically placed in a separate category from the minimum rules.[92] This change aimed to let the broader ethical considerations "serve their proper functions," *i.e.* cease to serve as controlling law, and to avoid "the misuse by

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[90] CODE, *supra* note __, at 1. The Canons are "axiomatic norms, expressing in general terms the standards of professional conduct," the Ethical Considerations are "aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.* at 2; *see also* John F. Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 255-56 (1970) (describing Code's structure). Professor Sutton served as the reporter for the Committee on Evaluation of Ethical Standards. *See* 1965 REPORT, *supra* note __, at 221.

[91] *See Id.*; Levine, *Ethics Codes*, *supra* note __, at 531 (describing the workings of the Code). Despite the change in form, the Code did not attempt to change or expand the minimum standards of professional conduct under the Canons, instead the Code sought to restate and clarify the governing law as represented by the Canons and the ABA Committee on Professional Ethics. *See* Sutton, *supra* note __, at 264; Bernard G. Segal, *President's Page*, 55 A.B.A. J. 893, 893 (1969). In 1969 ABA president Bernard Segal formed a committee to "stimulate adoption and implementation of the code." *See* Segal, *supra* note __, at 893. The committee was extraordinarily successful, and by 1972 all but three states had either adopted, or were adopting, the Code. *See* Moulton, *supra* note __, at 87-88 & n. 52.

[92] The guiding concept behind the new structure was that the "ethical climate of the legal profession is maintained by two forces . . . a lawyers conscience [and] the application of, or threat of application of, legal sanctions." John F. Sutton, Jr., *Re-Evaluation of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 134 (1966); *cf.* Fuller & Randall, *supra* note __, at 1159-60 (arguing that a "true sense" of professional responsibility comes from a broad "understanding of the reasons that lie back of specific restraints" and that lawyers have a "special need of a clear understanding of [their] obligations"). Thus, a code of legal ethics should address both of those restraints, by providing "statements of guiding principles . . . to appeal to the lawyer's intelligence," and also providing "minimum standards made obligatory on all lawyers." Sutton, *supra* note __, at 134-35; *see also*, Wright, *supra* note __, at 10-11. The drafters of the Code recognized that the Canons attempted to reach both of these goals, but argued that the Canons were "an accidental combination of the two" and failed as aspirational statements because of gross "overstatement" and were too confusing to work as clear minimum standards. *See* Sutton, *supra* note __, at 136-37; Wright, *supra* note __, at 10-11.

disciplinary authorities of such generalities."[93] As such, the Code is the ABA's first explicit division between "professionalism" and minimum rules: the Disciplinary Rules govern lawyer conduct, and the Canons and Ethical Considerations are relegated to food for thought.

D. *Stage Four: The Rules and the Triumph of Minimalism*

Despite the high hopes of the Code's drafters for clarity and cohesion, the Code fell under attack almost immediately,[94] and the ABA revised the Code four times between 1969 and 1977.[95] By 1977 the ABA had decided that a more "comprehensive rethinking" of the Code was necessary, and the ABA President appointed the "Commission on Evaluation of Professional Standards."[96] From the outset the drafters of the Rules expressed disdain for the tri-partite format of the Code,[97] and aimed for the "familiar" restatement format of "black-letter Rules accompanied by explanatory Comments."[98]

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[93] *See* Sutton, *supra* note __, at 264.

[94] *See, e.g.,* Symposium, *The American Bar Association Code of Professional Responsibility*, 48 TEX. L. REV. 255 (1970) (including articles criticizing Canons One, Two, Five, and the Code's treatment of lawyer specialization and group legal services arrangements); Charles Frankel, *Book Review*, 43 U. CHI. L. REV. 874 (1976) (reviewing AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY (1970)); LIEBERMAN, *supra* note __, at 64-67; Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); L. Ray Patterson, *Wanted: A New Code of Professional Responsibility,* 63 A.B.A. J. 639 (1977); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW (1978); AUERBACH, *supra* note __, at 286-88; John F. Sutton, *How Vulnerable is the Code of Professional Responsibility*, 57 N.C. L. REV. 497 (1979).

[95] Morgan, *supra* note __, at 703 & n. 10.

[96] This committee was informally known as the "Kutak Commission," after the committee chairman Robert Kutak. AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT 3 (October, 1981).

[97] *See* Robert J. Kutak, *Coming: The New Model Rules of Professional Conduct,* 66 A.B.A. J. 46, 47-48 (1980); Geoffrey C. Hazard, Jr., *The Legal and Ethical Position of the Code of Professional Ethics,* 5 SOC. RESP. 5, 10 (1979) (arguing that legal regulation requires black-letter rules, not ethics); Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task,* 36 THE REC. 77, 85-90 (1981) (arguing against the tripartite division of the Code); L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639 (1977) (arguing that the Code is a "middle stage in the development of the law for lawyers" because it still contains "ethical rules," which should be replaced by "legal rules"); Geoffrey C. Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 571-72 (1980) (arguing that a "comprehensive revision is required because the structure of the present Code has turned out to be disastrous"); Robert J. Kutak, *The Rules of Professional Conduct in an Era of Change*, 29 EMORY L.J.

The Rules thus took "the next logical step,"[99] the Canons intermingled both broad ethical language and specific rules, the Code separated the ethical from the purely legal, and the Rules jettisoned the broadly moral or ethical in favor of black-letter minimums of lawyer conduct.[100] Unsurprisingly, the Rules proved at least as controversial as the

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889, 899 (1979) (arguing that "a constant criticism of the Model Code was that it tended to speak with two voices, creating conflict between its description of aspirations on the one hand and its proscription of certain conduct"); Murray L. Schwartz, *The Death and Regeneration of Ethics,* 1980 AM. B. FOUND. RES. J. 953, 955 (1980) (summarizing the views of the drafters of the Rules).

[98] *See* CTR. FOR PROF. RESP., A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-98, 353 app. D (1999) (hereinafter RULES LEGISLATIVE HISTORY). The Kutak commission's first draft of the Rules attempted to change or add to some of the substantive law in the Code, notably new rules limiting client confidentiality, requiring pro bono work, and new regulations of conflicts of interest. *See* WOLFRAM, *supra* note __, at 61; Moulton, *supra* note __, at 89-90. These new proposals were extremely controversial, *see* Ted Schneyer, *Professionalism as Bar Politics: the Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 702-3 (1989) 702-3, and the Kutak Commission drafted successively milder versions until the approval of the final version in 1983, *See* RULES LEGISLATIVE HISTORY, *supra* note __, at 351-52 app. C; Schneyer, *supra* note __, at 707-24; WOLFRAM, *supra* note __, at 61; Moulton, *supra* note __, at 89-90, which hewed much closer to the black-letter law previously stated in the Code. In fact, the actual baseline minimums governing lawyer conduct have not changed substantially from the Canons through the Code to the Rules. *See* Hazard, *Future of Ethics, supra* note __, at 1246-49; Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 63-71 (1989); W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981).

[99] *See* Kutak, *supra* note __, at 47.

[100] There has been general scholarly agreement that the Rules represent the end of a journey from broader ethical norms to narrower, more legalistic rules. *See* Hazard, *supra* note __, at 1249-52; GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 18-19 (1978); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999) (arguing that the transition from the Canons to the Code to the Rules has marked a transition from standards to rules); WOLFRAM, *supra* note __ at 69-70 (1986) (arguing that the transition from the Canon to the Code to the Rules has marked a separation of ethics from the rules regulating lawyers). The Rules' elimination of the Code's ethical norms, and its increasingly legalistic approach, was not free from controversy at the time of drafting, *see* RULES LEGISLATIVE HISTORY, *supra* note __, at 354 (listing the arguments of opponents of the Restatement format); Alexander Unkovic, *The Current Format of the Code of Professional Responsibility Should Be Amended, Not Abandoned*, 26 VILL. L. REV. 1191 (1981), and has continued to be criticized. *See e.g.,* Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1279-1303 (1998) (arguing that the Code and the Rules show the emergence of a "regulatory approach" to legal ethics and criticizing this approach); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 905-10 (1995) (arguing that the alterations in lawyer self-regulation reflects the emergence of a "positivist" approach to legal ethics and criticizing this approach).

Code.[101] Calls of a crisis in professionalism and the beginnings of various reform efforts began almost immediately.[102]

The contentious debates over the Code, the Rules, and the subsequent reform efforts of Ethics 2000[103] clearly demonstrate the challenges of proposing minimum standards of behavior to a self-regulated profession. The Bar's ever-increasing attention to the ease of compliance is based partially in the somewhat palatable goals of clarity and predictability, but it is also certainly motivated by self-interest.[104] The clashes over these minimum Rules and the concurrent arrival of the latest series of professionalism crises are not unrelated events. To the contrary, they are the natural culmination of almost a century's effort to free the legal profession of any broader ethical requirements, or even any duty to perform ethical deliberations.

Lawyer regulators have now abandoned the unified original goal of the Canons and the legal ethics project – to define the moral, ethical and practical boundaries of

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[101] As noted above, by 1972 all but three states had either adopted, or were adopting, the Code. Eventually forty-nine States adopted the Code with little or no changes. *See* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 339 (1994); Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 679 (1986). By contrast, only two States adopted the Rules by 1984. *See* WOLFRAM, *supra* note __, at 63 & n. 87; *see also* BLUEPRINT, *supra* note __, at 258 ("The proposed Model Rules proved to be more controversial than the model code had been."). The Rules have now been adopted, with varying levels of alteration, in forty-four states. *See* Center for Professional Responsibility, *Dates of Adoption of the Model rules of Professional Conduct, at* http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited March 15, 2004). Rule 1.6, which controls lawyer confidentiality, has been the most modified provision. *See* Moulton, *supra* note __, at 91-92. For an overview of the State-by-State alterations, *see* ABA/BNA, LAWYERS MANUAL ON PROFESSIONAL CONDUCT 01:3 to 01:49 (2004); Moulton, *supra* note __, at 91-96.

[102] For example, the establishment of the ABA's Commission on Professionalism was authorized in December 1984, a little more than a year after the ABA's adoption of the Rules and well before the Rules were widely accepted by the States. *See* BLUEPRINT, *supra* note __, at 248.

[103] For an overview of the work of the ABA Committee charged with drafting the Ethics 2000 changes, *see supra* notes __ and accompanying text.

[104] Consider, for example, the careful consideration of both the possibility for disciplinary enforcement and the possibility for malpractice suits in the drafting of Ethics 2000. *Cf.* Robert J. Kraemer, *Attorney-Client Conundrum: The Use of Arbitration Agreements for Legal Malpractice in Texas*, 33 ST. MARY'S L.J. 909, 921-22 n. 70 (2002) (noting that Ethics 2000 allows lawyers to require arbitration of legal malpractice claims under Rule 1.8(h) for the first time).

lawyering – and are now compelled to pursue two different and conflicting goals simultaneously.

II. The Perils of Dual Goals

This Part argues that lawyer regulators undercut both the minimalist and the broadly ethical projects as they attempt to proceed in two directions at once. It is interesting to note at the outset, however, that lawyer regulators do not always admit that there are two competing goals at work. These two goals are often treated as if they are identical, or at least overlapping. This can be best seen in the use of terminology. The word "ethics" has long since been wiped out of the official standards of minimum behaviors, starting with the replacement of the Canons of Professional Ethics by the Code of Professional *Responsibility,* and later the Rules of Professional *Conduct*.[105] Many (if not most) law schools have renamed their legal ethics course "Legal Profession" or "Professional Responsibility."[106] These linguistic choices reflect a particular truth: the Rules that now govern lawyer conduct are not rules of ethics.

Nevertheless, lawyer regulators and lawyers have yet to eliminate the phrase "legal ethics" from their lexicon. To the contrary, in legal parlance "legal ethics" have become synonymous with the *minimum* rules governing attorney conduct.[107] In light of

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[105] *See* David Luban & Michael Milleman, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 45 (1995) (noting the loss of the charged words "canons" and "ethics" from the ABA's standards). I am always puzzled when I consider the replacement of the word "responsibility" with "conduct." As a linguistic and ethical matter it is an extremely bad sign that the Rules that govern your profession are so narrow that the word "responsibility" is considered too strong and must be replaced by "conduct."

[106] *Cf.* AALS, THE AALS DIRECTORY OF LAW TEACHERS 2003-4 1370-78 (2003) (listing professors who teach "legal profession," with no separate entry for legal ethics).

[107] *See* JUSTICES ACTION PLAN, *supra* note __, at 18 ("Professionalism is a much broader concept than legal ethics. . . . Ethics rules are what a lawyer must obey."); Joseph P. Tomain & Barbara G. Watts, *Between Law and Virtue*, 71 U. CINC. L. REV. 585, 610 ("Clearly, professionalism is a concept broader than legal ethics."); Leslie P. Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66

the explicitly moral use of "ethics" in common parlance,[108] the application of the phrase "legal ethics" to minimum rules carries substantial interpretive freight. The phrase "legal ethics" imbues the Rules with a depth and a meaning they no longer have.

In a further unlikely turn of nomenclature, professionalism has come to embody what a lawyer "should" do, *i.e.* professionalism has come to cover a lawyer's ethical duties.[109] The dictionary and common parlance meaning of professionalism, however, is devoid of any moral significance, it simply embodies the "qualities or features, as competence, skill, etc., characteristic of a profession or a professional."[110]

Some of this confusion can be explained historically. Starting in the nineteenth century lawyers and legal academics first began to separate the category of "legal ethics" from natural law or religious morality, and discuss the particular kind of ethical duties that might arise in legal practice.[111] The original "legal ethics" were thus explicitly moral and ethical, as were the first official statements of legal ethics by various bar associations. Nevertheless, the term lost its moorings and meaning as the legalistic minimums of lawyer behavior replaced the moral or ethical. The term endures, however, because

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FORDHAM L. REV. 1253, 1253-54 (1998) ("Legal ethics usually focuses on lawyers' professional standards, standards promulgated in codes or rules that are adopted by state legislatures and Bar associations."); William Wesley Patton, *Legislative Regulation of Dependency Court Attorneys: Public Relations and Separation of Powers*, 24 J. LEGIS. 3, 4 (1998) (distinguishing the public's definition of legal ethics from the profession's: "Apparently, while many lawyers view ethics as the absence of disciplinary measures and adherence to the profession's own Model Rules of Professional Conduct, the public views ethical conduct on a much broader scope, to include things such as fee disputes, lack of client relations and communication problems.").

[108] *See* OXFORD, *supra* note __, at 856.

[109] *See, e.g.* Frank X. Neuner, Jr., *Professionalism: Charting a Different Course for the New Millenium*, 73 TUL. L. REV. 2041, 2042 (1999) ("The basic distinction between ethics and professionalism is that rules of ethics tell us what we must do and professionalism tells us what we should do."); LEARNING PROFESSIONALISM, *supra* note __ , at 10 ("The bottom line is that the concepts and values underlying lawyer professionalism are aspirational in nature and unlike the minimum standard ethical disciplinary rules the govern lawyers' conduct."); Blueprint, *supra* note __, at 261-62.

[110] *See* OXFORD, *supra* note __, at 2368.

[111] The study and discussion of legal ethics as a distinct topic in America has been traced to two nineteenth century law professors, David Hoffman and George Sharswood. *See* Altman, *supra* note __, at 2422-37; *supra* notes __ and accompanying text.

either consciously or unconsciously the legal profession is unwilling to release the connection between the Rules and some broader conception of "legal ethics."[112]

This linguistic sleight of hand is emblematic of the general conflation in goals and terminology of lawyer regulators. While it is clear that the minimalist goal is quite distinct from the broadly ethical goal, lawyer regulators regularly blur the lines between the two. This conflation serves three purposes. First, it allows lawyers to use ethical nomenclature when discussing the rules with other lawyers, or clients. I know a plaintiff's lawyer who regularly explains to his clients that he cannot "ethically" pay any "financial assistance" to a client ahead of an expected recovery.[113] This turn of phrase allows the lawyer to turn a purely regulatory prohibition (and a rather self-interested one at that)[114] into an "ethical" duty for purposes of client relations and moral *gravitas*.[115]

Second, it draws attention away from the elimination of the ethical and moral from the Rules, and avoids the uncomfortable reality of the minimalist nature of the Rules. Third, it allows regulators to give some real substance to their professionalism efforts. They accomplish this feat by treating their minimalist program as part and parcel

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[112] I refer to the use of the phrase "legal ethics" as a vestigial organ of the legal profession. Legal ethics themselves no longer do any real work on the body of the profession, but like an appendix the concept still lingers on.

[113] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2004); *see also* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 119-21 (2003) (discussing and criticizing Rule 1.8(e) as against client interests); *cf.* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653 (2003) (arguing that the effective hourly rate of contingency-fee lawyers establishes that the market is non-competitive).

[114] *See* James E. Moliterno, *Broad Prohibition, Thin Rational: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 243-57 (2003) (dismissing the stated justifications for the Rule and arguing for its abolition or substantial revision).

[115] Consider also the prevalent use of the phrase "highest standards of ethical conduct" to describe the requirements of the Rules. *See, e.g.,* Allen T. Eaton & La'Vern D. Wiley, *Ethical Traps in Investigating a Case*, AMERICAN LAW INSTITUTE – AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, June 5-7, 2003, *available at* Westlaw, SHO98 ALI-ABA 393; Dennis Archer, *Keynote Address: Why is Accountability Important?*, 54 S.C. L. REV. 881, 885 (2003) ("[T]he ABA will also continue to review and update the Model Rules of Professional Conduct to ensure that we hold lawyers to the highest ethical standards.").

of professionalism, so that all of the activities associated with the minimum rules can be credited as an attempt to raise the ethical standards of the profession.[116] Without the minimalist efforts the professionalism project is a much less impressive collection of non-mandatory activities.[117] It also allows lawyer regulators to imbue the minimalist project with moral heft. For example, the announcement of the Ethics 2000 campaign (which focused mainly on reformulations of the minimum rules) was trumpeted as a crucial move towards "taking professionalism seriously" and the "advancement of the legal profession to a higher moral ground."[118]

Regardless of this linguistic and programmatic confusion, an analysis of the Bar's regulatory efforts since the demise of the Canons shows that lawyer regulators have eliminated a single goal in favor of two distinct and occasionally inapposite goals. I first argue that the Bar's broadly ethical efforts greatly undermine the likelihood that the legal profession will follow the Rules of Professional Conduct. I next maintain that the focus on the minimalist project likewise cripples the broadly ethical effort.

A. The Professionalism Project May be More Influential Than Previously Realized – It May be Undermining the Rules of Professional Conduct

There have been a number of recent studies and articles on the unhappiness and disillusionment of practicing lawyers[119] and law students.[120] Some have argued that law

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[116] *See, e.g.* LAWYERS ACTION PLAN, *supra* note __, at 25-38 (listing activities primarily related to enforcing and teaching the minimal Rules among professionalism initiatives).

[117] *See infra* notes __ and accompanying text.

[118] *See* Jerome J. Shestack, *Taking Professionalism Seriously*, A.B.A. J., Aug. 1998 at 70, 70-72.

[119] *See, e.g.* RHODE, *supra* note __, at 23-48 (discussing the legal profession's many discontents); Deborah L. Rhode, *Ethics in Practice, in* ETHICS IN PRACTICE 4-8 (Deborah L. Rhode ed., 2000) (detailing the economics of legal practice, and their deleterious effect upon lawyer happiness); Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 881-88 (1999) (describing multiple studies showing deep lawyer unhappiness); David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 457-77 (1997) (delineating some of the causes of lawyer unhappiness); *but see* John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735 (1999) (reporting that survey of the Chicago Bar found relatively high job satisfaction).

school itself causes student disillusionment and cynicism,[121] and some have postulated that the current approach to legal ethics has increased student cynicism.[122]

One reason that law students, lawyers and law professors are growing cynical about "legal ethics" is the gap between the minimum standards of lawyer conduct and the broader conceptions embodied by professionalism.[123] Although there are both narrow

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[120] *See* James R.P. Ogloff, et al., *More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 94-97 (2000) (summarizing studies questioning students before and during law school, and finding growing dissatisfaction); Thomas D. Eisele, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, 45 MERCER L. REV. 587 (1994) (arguing that Socratic teaching results in student disillusionment); RICHARD D. KAHLENBERG, BROKEN CONTRACT (1992) (observing that Harvard Law School stripped the author of his idealism and commitment to social justice).

[121] *See* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996) (asserting that law school teaching stresses logic and reason and devalues personal values and moral conviction, creating cynicism); Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, 4 S. CAL. REV. L. & WOMEN'S STUD. 53, 68-71 (1994) (reporting Harvard students' reaction to law school as encouraging cynicism about the law and lawyering); Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1386-87 & nn. 293-301 (1997) (listing examples of studies showing increased law student cynicism during law school); Timothy L. Hall, *Moral Character, The Practice of Law, and Legal Education*, 60 MISS. L.J. 511, 535-41 (1990) (noting that law students are treated as "moral skeletons," stripped of moral faculties and dispositions that give life substance); DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (1983) (describing law school's role in increasing law student cynicism); Barbara Glesner, *Fear and Loathing in the Law Schools*, 23 U. CONN. L. REV. 627, 628-30 (1991) (same).

[122] One recent study of recent law school graduates found that new lawyers struggle mightily with the ethical and moral elements of their jobs, and either find the Rules inapplicable, or even requiring immorality in the name of zealous advocacy. *See* Robert Granfield & Thomas Koenig, *"It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 495-96, 508-19 (2003); *see also* Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579, 591 (2003) (noting that structuring professional responsibility class around "lawyers who were villains . . . increased an already troubling level of law-school-induced cynicism"); RICHARD L. ABEL, AMERICAN LAWYERS 143 & n. 8 (1989) ("Indeed, there is evidence that law school makes students *more* cynical about legal ethics.").

[123] The connection between professionalism and ethics or morals is sometimes based in a historical reference, *see* KRONMAN, *supra* note __, or by a call to shared professional or societal values, Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 737 n.18 (2001) ("It may fairly be argued that most, if not all, of the values conventionally associated with professionalism are simply common values given specific application in the context of legal practice."); Jeffrey M. Vincent, *Aspirational Morality: The Ideals of Professionalism – Part II*, 15 UTAH B.J. 24, 24 (2002) ("Besides a knowledge of and ability to apply principles of the law, the general conception of legal professionalism includes loftier ideals – certain shared moral values – that imply a duty to act in the public good and with the purpose of obtaining justice. Dean Roscoe Pound described the profession as 'a group ... pursuing a learned art in the spirit of public service.'"), or by a more complex philosophical approach. *See* DAVID LUBAN, LAWYERS AND JUSTICE (1988) (presenting a devastating argument against the "dominant view" lawyer role morality and presenting the "people's lawyer" as a palatable alternative); SIMON, *supra* note __.

and broad[124] conceptions of professionalism, the entire project has an overtly ethical/moral dimension that draws a sharp distinction between the minimum rules of professional conduct and ethics writ large.

This distinction encourages cynicism in four interlocking ways. First, a comparison between even the least robust personal version of morality and the minimum requirements of the Rules leads inevitably to the reaction "is that all there is to being an ethical lawyer?"[125] Second, and more depressingly, many practicing lawyers disregard even the minimal Rules we have.[126] Third, actual enforcement of the Rules is relatively rare.[127] Fourth, there is an inherent sadness to the abandonment of the broadly ethical.[128]

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[124] Professionalism has meant as little as simple civility, *see* Morgan, *supra* note __, at 45 (noting that some have attempted to define "Professionalism" as "civility"); Kara Ann Nagorney, Note, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEG. ETHICS 815, 816 (1999) ("Civility is professionalism."); Kathleen P. Brown, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 754-55 (1994) (equating professionalism and civility), and as much as William Simon's "contextual judgment," *See* SIMON, *supra* note __, at 109-37 (arguing that the key to legal professionalism is the "experience of work as the vindication of general norms in particular contexts, of simultaneous social commitment and self-expression, and of grounded-ness conjoined with creativity."); *see also* William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65-66 (1991) ("The attractive implication of this notion of professionalism is that lawyers, not just in exceptional moments of public service, but in their everyday practice, participate directly in furthering justice.") or Deborah Rhode's call for lawyers "to accept personal moral responsibility for the consequences of their professional acts." *See* RHODE, *supra* note __, at 17. But, at a minimum, professionalism attempts to reach outside of the mandatory Rules to reach a broader conception of morality.

[125] *See, e.g.,* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO STATE L. J. 243 (1985) (arguing that Model Rules cover so little ground that they fail to express any real statement of legal ethics); Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839, 844 (2001) ("[T]he Model Rules are an incomplete source of professional obligations because they contain disciplinary rules rather than aspirational guidance . . . ."); James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 795-96 (1997) (describing rise of aspirational creeds in response to shortcomings of the Model Rules). The rules themselves recognize that they do not "exhaust the moral and ethical considerations that should inform a lawyer." MODEL RULES OF PROF'L CONDUCT Preamble: Scope (2002).

[126] *See, e.g.,* Zacharias, *Underenforced Professional Rules, supra* note __ (describing regular, unpunished violations of the lawyer advertising Rules); RHODE, *supra* note __, at 168-83 (describing problems with lawyer over-billing); Richard H. Underwood, *The Professional and the Liar*, 87 KY. L.J. 919, 937-39 (1999) (arguing that Rules covering perjured testimony and attorney lying are rarely followed); Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307 (1998) (discussing regular lawyer noncompliance with the Rules).

[127] *See* RHODE, *supra* note __, at 158-61 (describing infrequency and general leniency of bar sanctions); Leslie C. Levin, *the Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998) (same); Leslie Griffin, *A Clients' Theory of*

Lastly, and paradoxically, all of the attention and reform efforts showered on the professionalism project have created the aforementioned self-fulfilling cycle of perceived crisis, inadequate solution, sense of failure, and further cries of crisis. Observing this cycle certainly fosters a sense of cynicism and despair.

In sum, there is a significant tension between the ideals and study of legal ethics and professionalism and the reality and purposes of the Rules of Professional Conduct, and this tension has a corrosive effect on the entire project: as the Rules get narrower (and therefore easier to follow and enforce) the sense of a shared professional ethic, or a broader set of norms is devalued, and may eventually be destroyed.[129]

Moreover, the decision of lawyer regulators to separate the moral from the minimal Rules in the drafting of the Code and the Rules, and then reintroduce the moral in a series of non-binding "professionalism" efforts, further lessens the likelihood that lawyers will follow the baseline prohibitions. There is a voluminous literature describing the connection or overlap between commonly held morality and the law. Among the

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Professionalism, 52 EMORY L.J. 1087, 1102 (2003) (noting that clients are waiting for "a disciplinary system that effectively sanctions lawyers for their neglect of clients' matters").

[128] Consider for example, David Luban and Michael Milleman's discussion of the rationalization of legal ethics and Weberian sociology:

> Max Weber wrote that 'the fate of our times is characterized by rationalization and intellectualization and, above all, by the disenchantment of the world.' Rationalization, to Weber, meant the process by which ever-growing portions of the world -- the physical world, but also the social world -- are brought under rational and technical control; it is also the process by which non-rational norms are gradually purged from the world. Prominent among these norms are public ideals and moral constraints on the effective pursuit of one's preferred ends, and the phrase 'the disenchantment of the world' refers in part to our reinterpretation of the physical and social worlds as reflections of rational, non-magical and normatively antiseptic forces.

Luban & Milleman, *supra* note __, at 34 (footnotes omitted) (quoting Max Weber, *Science as a Vocation, in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155 (Hans Gerth & C. Wright Mills eds., 1946)).

[129] *Cf.* STEPHEN L. CARTER, THE EMPEROR OF OCEAN PARK 228 (2002) (Arguing that as society grows uncomfortable talking about a particular moral tenet, "within a generation or two nobody will think it either. What survives is only what we communicate. Moral knowledge that remains secret eventually ceases to be knowledge.").

most influential work is the debate between Lon Fuller and H.L.A. Hart.[130] Professor Fuller argued vociferously that at its most fundamental level law was based in, and relied upon, a broad conception of common morality.[131] Hart rejected this explicit connection, and argued that while law and morality intersect, law is not dependent upon morality in its creation or validity.[132]

For purposes of this Article, however, the philosophical question of whether law itself derives from, or is legitimized by, morality is unnecessary. Most agree that when law and morality intersect, the law is at its most powerful and persuasive, and is most likely to be followed. For example, both Lon Fuller and H.L.A. Hart agree that logistically, law works best when it jibes with commonly held morals.[133] As applied to criminal law there is general accord that an intersection of law and morality makes enforcement easier and compliance more likely.[134] Figure 1 uses a Venn diagram to

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[130] *See, e.g.,* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595 (arguing for a critical distinction between "law as it is from law as it ought to be"); Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958) (defending "the morality of law itself" and rejecting Hart's distinction). For general commentary on the Hart/Fuller debate, *see, e.g.,* ALBERT ALSCHULER, LIFE WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 150-58 (2000); Joseph Mendola, *Hart, Fuller, Dworkin and Fragile Norms*, 52 S.M.U. L. REV. 111 (1999).

[131] *See* LON FULLER, THE MORALITY OF LAW 33-94 (1964) (detailing "the morality that makes law possible").

[132] *See* H.L.A. HART, THE CONCEPT OF LAW 155-212 (2d. ed. 1994) (arguing for a distinction between law, justice and morality).

[133] *See* Fuller, *supra* note __, at 639 ("[Laws] derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary."); *id.* at 644 ("Good order is law that corresponds to the demands of justice, or morality, or men's notions of what ought to be."); HART, *supra* note __, at 82-91 (noting that when the "primary rules" are accepted from an "internal" view, *i.e.* morally, most people will obey the law regardless of punishment).

[134] *See, e.g.* Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 15 (1998) (Asserting "that the more the law conforms to prevailing moral opinions . . . the easier it is for lay people to understand and comply with law. The people subject to the law can avoid coming into conflict with it just by acting the part of well-socialized members of their community."); Richard Epstein, *Crime and Tort: Old Wine in New Bottles, in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 247-48 (Randy Barnett & John Hagel eds., 1977) (stating that "the criminal law works best when it deals with conduct of the defendant that the law thinks worthy of moral condemnation"); Jerome Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 771 (1943) (positing that "the most defensible position, stated broadly, is that the more general doctrines of the criminal law are founded on principles of moral culpability"); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the*

show the overlap between morality and the criminal law, with the area of overlap between the two noted as the area of "maximum efficacy." The bulk of criminal law falls within the "maximum efficacy" boundaries: regardless of governmental enforcement the great majority of citizens will follow the law. This makes these prohibitions easier to enforce and more effective.[135]

The area where criminal law diverges from morality has alternatively been named "regulatory offenses" or "*malum prohibitum* crimes."[136] Commentators have argued that the law has begun to "overcriminalize" and that the "*malum prohibitum*" category is ever growing.[137] Enforcement in this category is much more challenging,

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Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 193-94 (1991) ("The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance."); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 38 n. 36 (1989) (contending that "any society that allows its rules of criminal responsibility to diverge too far from such deeply held moral feelings runs the unacceptable risk of severing the criminal law from its moral underpinnings and jeopardizing its moral legitimacy and practical efficacy"); Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1015 (1991) ("To the extent that the criminal law and conventional social morality diverge, members of society are less likely to attach personal sanctions on the basis of illegality . . . weakening allegiance to [the criminal law] and decreasing voluntary compliance."); *cf.* ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY 273-74 (1986) (arguing that self-sanctions and social sanctions may prevent crime more effectively than punishment and enforcement). *But cf.* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1592 n. 192 (1997) (Citing studies and maintaining that "at least for strongly socialized individuals, the threat of sanctions is essentially irrelevant, even in the case of *malum prohibitum*-type violations. For such individuals, moral values and peer pressure are such powerful inhibitors that they preclude the possibility that the motivation to break the law will even be felt.").

[135] Dan Kahan has argued, however, that a critical element of criminal law's deterrent effect is the attempt to actually change societal norms, *i.e.* to move crimes from the *malum prohibitum* category to the "maximum efficacy" category. *See* Dan M. Kahan, *the Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

[136] *See* Green, *supra* note __, at 1556-57 ("The terms 'public welfare,' 'strict liability,' '*malum prohibitum*,' 'petty infractions,' 'economic,' 'white collar,' and 'regulatory' all have been used to refer to a group of crimes claimed to be lacking in moral content."); Dan M. Kahan, *Ignorance of Law is an Excuse – But Only for the Virtuous*, 96 MICH. L. REV. 127, 129-30 (1997) ("Crimes of this sort are often referred to as *malum prohibitum* – wrong because prohibited – and are distinguished from crimes that are *malum in se* – wrong in themselves independent of law."); BLACK'S LAW DICTIONARY 960 (1990) (defining "*malum prohibitum*" as "a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law") (emphasis added).

[137] *See, e.g.,* Coffee, *supra* note __.

since the average citizen may feel unconstrained by moral obligation and base her conduct upon the odds of being caught.[138] As such, many more people speed on a deserted road than drive drunk. Part of this is the penalties involved, but much of it is the moral opprobrium currently associated with drunk driving.[139]

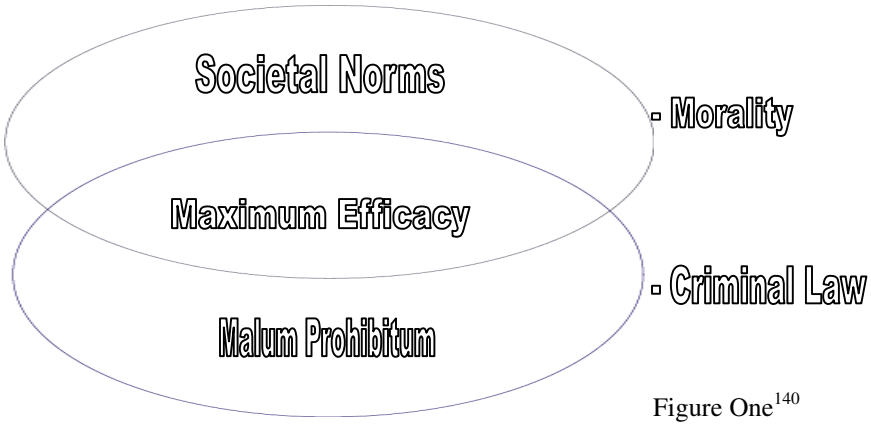

Figure One[140]

The above analysis is highly probative when considering the current approach to lawyer regulation. Bar disciplinary procedures have generally been considered quasi-criminal in nature,[141] and the Rules of Professional Conduct have been described as

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[138] There is some evidence, however, that the moral authority of the law is enough that some will not break even an irrational or amoral law, simply because of the powerful norm against violating any law. *See* Green, *supra* note __, at 1592.

[139] Drunk driving is a particularly apt example, because over the last thirty years or so it has moved from the *malum prohibitum* category to the maximum efficacy category. While enforcement and penalties have been increased, there has been an accompanying *moral* attack on drunk driving. *See, e.g.* Mother Against Drunk Driving, *Homepage, at* http://www.madd.org/home/ (last visited March 15, 2004) (delineating efforts to raise the social opprobrium associated with driving drunk).

[140] The upper circle represents commonly held morality. The lower circle the criminal law. The non-overlapping section of the morality circle is titled "societal norms." For a general discussion of how societal norms, and not the government or laws, govern the great bulk of our activities, *see* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991). Figure one is a Venn diagram. For a general discussion of these helpful diagrams, *see* SUN-JOO SHIN, THE LOGICAL STATUS OF DIAGRAMS (1995); Nancy B. Rapoport, *"Venn" and the Art of Shared Governance*, 35 U. TOL. L. REV. 169, 176 (2003) (describing Venn diagrams generally and using one to show the overlap of "faculty jurisdiction" and "decanal jurisdiction" for law school governance); Stewart J. Schwab, *Limited-Domain Positivism as an Empirical Proposition*, 82 CORNELL L. REV. 1111, 112-4 (using Venn diagram to show the overlap between morality and law, and to depict the debate between positivism and natural law).

[141] The seminal case is In re Ruffalo, 390 U.S. 544, 550-51 (holding that the Due Process Clause applies, and disbarment hearings are "adversary proceedings of a quasi-criminal nature"). *Ruffalo* has not ended the story, however, as some courts hold that disbarment proceedings are "quasi-criminal," *see* Statewide Grievance Committee v. Botwick, 627 A.2d 901, 906 (1993); Levi v. Mississippi State Bar, 436 So.2d 781,

"quasi-criminal"[142] or "statutory."[143] The choice of the drafters of the Code and the Rules to focus upon clearly defined minimum standards was, in fact, an explicit reaction to the prospect of disciplinary actions based upon the ABA's Canons.[144]

As such, the question is where the Rules leave us in Figure 1. At the outset of the ABA's legal ethics program the Canons of Legal Ethics fell largely within the category of generally held norms or morals.[145] The original Canons were chiefly meant to be a statement of commonly held principles. Nevertheless, the decisions of courts applying the Canons in disciplinary situations certainly established the Canons as more than common morality, and as enforceable standards. Because the Canons were drafted for

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783 (1983), others hold that they are "neither civil nor criminal," (which may mean the same thing), *see* Yokozeki v. State Bar, 11 Cal.3d 436, 447 (1974); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 20 (1986) ("Sanctions in disciplinary matters are neither criminal nor civil but *sui generis.*"), or that disciplinary actions can be civil in nature, *see* In re Disciplinary Action Against Hawkins, 623 N.W. 2d 431, 437-38 (2001) (holding that *Ruffalo* does not require a quasi-criminal proceeding, and that disciplinary proceedings can be civil on nature). For a longer discussion of the confusion on this point, *see* Levin, *supra* note __, at 19 & n. 83, and for an overview of modern disciplinary procedure, *see* Geoffrey C. Hazard & Cameron Beard, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 YALE L.J. 1060, 1065-68 (1987), and for a comparison of criminal processes with bar disciplinary processes, *see* Zacharias, *Lawyer Discipline, supra* note __, at 690-92.

[142] *See* Thomas L. Shaffer, *The Irony of Lawyers' Justice in America*, 70 FORDHAM L. REV. 1857, 1867-68 (2002) ("The best the thinkers and drafters have been able to do . . . has been to remove the language of ethics, to call our flabby moral consensus 'professional responsibility,' and to pare our rules down to quasi-criminal law."); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 14-16 (1990) (arguing that the Rules are "quasi-criminal" and take the legal profession to a "fourth-level" of professional status). *But cf.* Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 927 & n. 31 (2002) (quoting, but then partially disavowing her previous statement: "I do not believe, however, that all of the standards either in the current Model rules or in the [Ethics 2000 Commission's proposed amendments are so clear that they constitute merely a 'quasi-criminal code.'").

[143] *See* Hazard, *supra* note __, at 1254 (describing the text of the rules as "statutory"); Feldman, *supra* note __, at 888-89 (same).

[144] *See* Armstrong, *supra* note __, at 1069 (stating that the Code was specifically designed to be "capable of enforcement" and to "facilitate more effective disciplinary action"); Levine, *Ethics Codes, supra* note __, at 530-31; Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 908 (1995).

[145] Some notable exceptions are the Canons governing specific instances of banned conduct, like Canons 13, 27 and 28 dealing with business creation and advertising. Interestingly, these Canons proved the most controversial, while the broadly moral statements generally remained unchanged until the adoption of the Code. *See supra* notes __ and accompanying text.

general ethical purposes, they generally fall within the "maximum efficacy" category: lawyers felt both morally and legally obliged to follow them.

The adoption of the Code began to break down this conjunction of moral and legal obligation by dividing the minimums from the broader conception of ethical lawyering. Nevertheless, the Code at least attempted to make the connection between commonly held legal ethics and the minimum rules, and because they attempted to address the whole process of being a lawyer the Code could honestly claim that it "define[d] the type of ethical conduct that the public has a right to expect of lawyers."[146]

The Rules of Professional Conduct, however, are explicitly a series of "blackletter Rules" in the "restatement format."[147] The bulk of these Rules are so narrow, and so divorced from their original ethical context, that the Rules have clearly lost the over-riding moral suasion that accompanied the Canons and even the Code. Lawyer regulators are thus inviting lawyers to obey the Rules based upon the likelihood of enforcement rather than as a statement of shared moral values.

There are, however, clearly activities barred by the Rules that most lawyers would recognize as violations of a commonly held morality. Stealing from a client, lying to a court, or abandoning your clients all fit in this category. Interestingly, these are exactly the types of violations that actually result in disbarment or license suspension,[148] so the

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[146] *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1983).

[147] *See* Robert W. Meserve, *Chairperson's Introduction, in* ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 9 (1997).

[148] *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 22 (1991) ("The severity of taking away a person's livelihood made disbarment appropriate only in cases of truly reprehensible conduct, and, conversely, such conduct carried a sufficient moral stigma to justify ouster from the profession."); Deborah Rhode, *Ethical Perspectives on Legal Practice,* 37 STAN. L. REV. 589, 641 n. 168 (1985) (reporting results of a survey of public discipline in three jurisdictions and finding that "[o]f the cited offenses, one-third involved neglect. Most of the other offenses concerned commingling (17%), misrepresentation (17%), and criminal convictions (16%)").

moral authority supporting these Rules actually coincides with the possibility of enforcement.

The focus upon enforcement for the non-moral Rules, however, casts serious doubt upon the likelihood of lawyer compliance. Lawyer disciplinary authorities are notoriously underfunded, and actual enforcement of anything beyond substantial violations of the rules is relatively rare.[149] As such, any focus upon enforcement will likely result in reduced compliance.

B. *The Pursuit of Ever-Narrower Rules Likewise Undercuts the Goals of a Professionalism*

The regulatory goal of narrowing the Rules to a theoretically enforceable, quasi-criminal code undercuts the goals of the professionalism movement in several ways. First, in considering the relationship of the mandatory to the hortatory I always consider how my two-year old daughter reacts to requests of each kind. The mandatory is

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[149] The ABA itself has concluded that attorney discipline is, and always has been, a neglected area. RHODE, *supra* note __, at 158-65 (quoting ABA research finding that the public thinks attorney discipline is "[t]oo slow, too secret, too soft and too self-regulated"); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter CLARK REPORT] (Describing attorney discipline as "a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions."); AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT xv-xx (1992) [hereinafter MCKAY REPORT] (noting positive changes since the Clark report, but listing additional necessary steps for improvement). Attorney discipline is underfunded. *See* MCKAY REPORT, *supra* note __, at xviii (detecting that the funding and staffing of disciplinary committees "have not kept pace with the growth of the profession," and that "some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers"); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1121 (1996) (observing that "[d]isciplinary boards are notoriously underfunded and [are] unable or reluctant to mount the effort needed to do battle with wealthy class action lawyers and powerful members of the defense bar"); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 485 (1993) (same). There are backlogs for investigations. *See* Lisa J. Frisella et al., *State Bar of California*, 17 CAL. REG. L. REP. 203, 205 ("In his initial February 1999 report, Justice Lui reported that the Bar's discipline system faces an unprecedented backlog of over 7,000 open complaints and reports against attorneys from consumers and courts."); Mark E. Hopkins, *Open Attorney Discipline: New Jersey Supreme Court's Decision to Make Attorney Disciplinary Procedures Public–What it Means to Attorneys and to the Public*, 27 RUTGERS L.J. 757, 769 (1996) (noting a backlog in New Jersey disciplinary cases in the 1980s).

followed depending on mood and the perceived odds of effective punishment, while the hortatory is generally disregarded out of hand.[150] The bifurcation of legal ethics, with one portion labeled mandatory, and another voluntary places professionalism at a tremendous disadvantage in terms of importance to the bar, attention from individual lawyers, and consideration in law school classes.

Second, by choosing the "familiar" restatement format for the mandatory Rules[151] the drafters are actually triggering a very specific set of lawyer thought processes, or heuristics. A heuristic is a mental shortcut the brain uses to find order and make decisions in multi-faceted situations.[152] Heuristics are particularly important to the legal profession. Law schools regularly boast that they do not simply teach the law, they actually teach a series of heuristics, *i.e.* how to "think like a lawyer."[153] At bottom the critical skill that a lawyer sells is her brain, and a specialized bundle of thought-processes and heuristics. Many clients think that hiring a lawyer entails purchasing rote knowledge of the law. Most practicing lawyers know that the process of learning the operative facts, discerning the law, and applying one to the other, rather than simple knowledge of the law, is the foundational legal skill.

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[150] I realize that lawyers are likely to differ in substantial ways from a two year old (for example, lawyers may have better and more developed excuses for their misconduct), but the two-year old example helps to clarify the reactions one can expect to mandatory and non-binding requests.

[151] *See* RULES LEGISLATIVE HISTORY, *supra* note __, at 353 app. D (1999).

[152] For two excellent applications of the psychological concept of heuristics to the legal mind, *see* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000); Stephen M. Bainbridge & Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002). For a thoughtful consideration of what it means to "think like a lawyer," *see* Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002). While this Article uses heuristics in the broadest sense, most of the research and applications have been in human shortcuts for assessing risks. *See, e.g.,* Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 751-53 (2003) (reviewing THOMAS GILOVICH, ET AL., HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (2002)).

[153] Barton, *Institutional Analysis, supra* note __, at 1196-98.

Black letter rules trigger a particular heuristic in lawyers: we are trained to carefully read and analyze rules to find (as precisely as possible) the boundary between legal and illegal behavior.[154] Boundary seeking is a basic element of the legal mind, and is perhaps the most marketable lawyer skill. Every lawyer – transactional, tax, or litigator – is often hired to find the boundaries of the pertinent law and apply it to the facts and circumstances of a client's needs. Many lawyers leave broader questions of morals or ethics aside: the lawyer explains what actions are allowed or illegal, and the gray areas, and then the client chooses.[155] Some clients have limited interest in paying a lawyer to consider the ethical implications of a given activity. Thus many lawyers have habitually eliminated considering broader issues once the technical process of defining legal boundaries is completed.[156]

When lawyers apply this boundary seeking process to issues of legal ethics the technical legal question (what am I allowed to do) frequently eclipses the broader moral question (what should I do). Under the black-letter rules lawyers confronted with a complex ethical problem are not encouraged to ruminate upon the possible moral, social, and legal implications of any action. Instead, they are encouraged to mechanically apply

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[154] This observation concerning the practice of law was perhaps established most forcefully more than a century ago by the description of Oliver Wendell Holmes' "bad man" in his seminal work, The Path of the Law. *See* Oliver Wendell Holmes, *The Path of the Law, in* OLIVER WENDELL HOLMES, COLLECTED PAPERS 167 (Harold J. Laski, ed., 1920); *see also* David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547 (1997).

[155] There is an ongoing debate over whether lawyers should play a greater ethical/moral role in counseling and representing clients, *see, e.g.,* RHODE, *supra* note __, at 17 (calling for lawyers "to accept personal moral responsibility for the consequences of their professional acts"); KRONMAN, *supra* note __, at 53-108 (discussing lawyer's role in sharing "practical wisdom" with clients).

[156] This narrow approach to client counseling has drawn significant negative scholarly attention. *See, e.g.,* Robert F. Cochran, Jr., et al., *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003); KRONMAN, *supra* note __, at 122-34 (arguing against narrow conception of lawyer as counselor). For a historical version of this debate, consider the words of Elihu Root: "About half the practice of a decent lawyer consists of telling the client he is a damn fool." 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938).

the requisite Model Rule and unless the Rules specifically bar an action, it is presumed acceptable.

The boundary seeking heuristic does not end with a consideration of what the law allows and prohibits. Proficient lawyers also calculate the likelihood of being caught, and the likely punishment if caught. It is this last step to the boundary seeking heuristic that cripples the efficacy of the Rules. Most lawyers can quickly deduce the slim odds that any violation of the rules will be discovered,[157] reported,[158] investigated[159] or punished.[160] As such, the *true* minimum standard of allowable conduct is far below the "minimums" in the Rules. The structure of the Rules in conjunction with the loss of moral suasion, means that the Rules fail even as a baseline minimum.

III. The Clash of the Dual Goals in a Specific Regulatory Act, The MPRE

Thus far I have argued that the last twenty years worth of regulatory efforts by bar associations, state supreme courts, and legal academics have been doomed to failure because of a fundamental clash in goals. This Part applies this theory to a particular, recent regulatory act, the adoption of the Multistate Professional Responsibility Exam

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[157] The bulk of the Rules govern the lawyer, client relationship, so it will most likely be up to the client (who most likely does not know the Rules or understand their requirements) to discover the violation.

[158] Lawyers almost never report violations of other lawyers. Judges are similarly mum. *See* ABEL, *supra* note __, at 144 ("Lawyers . . . are reluctant to turn in their colleagues."); RHODE, *supra* note __, at 159 ("Those with the most knowledge concerning many violations – lawyers and judges – rarely report misconduct."). The great bulk of complaints thus generate from clients. *See* Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEG. ETHICS 1, 10 & n, 39 (2002).

[159] A substantial portion of all complaints are dismissed *without an investigation* because they address lawyer competence, and thus do not trigger an applicable rule of Professional Conduct. *See* Martin A. Cole, *When Malpractice is an Ethics Issue*, 59 BENCH & B. MINN. 10, 10 (2002) (noting that "the Director's Office has for many years routinely dismissed without investigation complaints in which a client is unhappy about the quality of the lawyer's representation – or, as is more often the case, the results achieved – but does not specify any conduct that would violate a Rule of Professional Conduct"); MCKAY REPORT, *supra* note __, at vii; *see also id.* at 9-11 ("In some jurisdictions over ninety per cent of all complaints filed were dismissed. Most of these complaints were dismissed for failing to allege unethical conduct.").

[160] *See supra* notes __ and accompanying text.

("MPRE") as a prerequisite to bar admission.[161] I choose to discuss the MPRE, rather than one of the other regulatory programs that straddles both the minimum Rules and professionalism like civility codes or mandatory ethics CLE classes,[162] because the MPRE is a uniquely important regulatory step, and among the professionalism campaign's most notable successes.[163]

The MPRE is almost nationally required. Law students in forty-seven states must now pass the MPRE prior to bar admission.[164] The timing of the exam makes it likely

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[161] The MPRE is a 125 minute, fifty question, multiple-choice exam that covers ABA Rules of Professional Conduct ("Rules"), the ABA Model Code of Judicial Conduct, and "controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules. *See* NATIONAL CONFERENCE OF BAR EXAMINERS, THE MPRE 2003 INFORMATION BOOKLET 30-31 (2003) [hereinafter BOOKLET]. Note that these subjects represent a recent expansion of coverage beyond just the Rules. *See* Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1303 (2003).

[162] These regulatory efforts are also so much less effective than the MPRE. The quality control, range of available subjects, and potential locations make CLE classes a notoriously ineffective regulatory step. Compare the list of vacation destination/CLE classes offered by the Lawyer Pilot Bar Association, *see LPBA CLE Credits, at* http://www.lpba.org/cle.html (last visited March 15, 2004) (listing Sun Valley, Idaho, Branson, Missouri, and Tuscon, Arizona amongst the destinations), with the State Bar Association of North Dakota's "Winter CLE and sun" in Belize. *See* State Bar Association of North Dakota, *Belize or Bust, at* http://www.sband.org/sband_blast/blast_102303.htm (last visited March 15, 2004), to get a flavor for just how serious the mandatory CLE requirement is.

[163] *See* Hayden, *supra* note __, at 1300-2 (describing the MPRE's prevalence and rapid adoption as an "immediate success"). I am also uniquely familiar with the test, because on March 8, 2003 I took the MPRE together with more than 20,000 other bar applicants across the country. I draw this approximation from the National Conference of Bar Examiners' data on the March MPRE examinations for 1996, 1997 and 1998 (the latest dates available). *See* NATIONAL CONFERENCE OF BAR EXAMINERS, 1996 MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION STATISTICS (2001) (20,278 applicants to the March 1996 MPRE); NATIONAL CONFERENCE OF BAR EXAMINERS, 1997 MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION STATISTICS (2001) (20,117 applicants to the March 1997 MPRE); NATIONAL CONFERENCE OF BAR EXAMINERS, 1998 MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION STATISTICS (2001) (20,940 applicants to the March 1998 MPRE). I was required to take the MPRE, as well as the Tennessee Bar examination, because I was unable to waive in to practice in this jurisdiction. Despite the memory of studying for both exams, *while teaching law students in the same jurisdiction, and practicing law under a temporary waiver,* I have made every effort to remain as impartial as possible in considering the strengths and weaknesses of the MPRE. For a description of the evil ("advocacy scholarship") I am attempting to avoid, *see* Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 155-56 (2002) ("The vice is that much legal scholarship is advocacy scholarship, and therefore rhetorical in the condemnatory sense: it is tendentious, sloppily or even deceptively reasoned, and rests upon unsubstantiated factual claims or the sort of empirical shibboleths that circulate in law schools (for example, that disagreement among the justices harms the Supreme Court's public standing).").

[164] *See* AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR & NATIONAL CONFERENCE OF BAR EXAMINERS, BAR ADMISSION REQUIREMENTS 21 (2000) (showing that the only states that do not require the MPRE are Maryland, Washington, and Wisconsin).

that the MPRE will be a law student's first bar admission experience; every state but Florida allows law students (as opposed to law graduates) to sit for the exam.[165] As a relatively new,[166] freestanding bar admission requirement the MPRE represents a particularly high-profile step in the ongoing lawyer professionalism movement. Between the MPRE and the ABA's accreditation requirement that law schools teach a mandatory professional responsibility class[167] law students receive at least some message that the bar is serious about law students learning the Rules of Professional Conduct. Lastly, the MPRE exemplifies the efforts of bar examiners, lawyer regulators, and bar associations to define and enforce very specific and mandatory minimum rules of lawyer behavior. Given that actual enforcement of these minimum standards among licensed attorneys is minimal, the MPRE may actually be the single most important practical application of the black-letter rules.

While I have generally been skeptical about the professionalism efforts of the bench and bar,[168] there is no question that on symbolism alone the MPRE is an important step in the right direction – students are told "this is important and this is required." Just having the exam, however, is not enough, and the MPRE falls prey to the clash between the twin goals of modern legal ethics. On the one hand the MPRE seeks to produce more

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[165] Hayden, *supra* note __, at 1302 & n. 18.

[166] The first MPRE was first offered on March 14, 1980. *See Letter from the Chairman*, 49 BAR EXAMINER 44 (1980).

[167] *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(b) (1999).

[168] My previous work in the field of legal ethics places me squarely within the camps of the skeptics and cynics, and I have previously argued that the great bulk of lawyer regulation is meant to benefit lawyers rather than the public, Barton, *Justifications, supra* note __, and that State Supreme Courts and bar associations should not be in charge of regulating lawyers. *See* Barton, *Institutional Analysis, supra* note __.

ethical attorneys, in the broad sense of the word.[169] On the other hand, at a minimum the MPRE seeks to bar those entering the profession who are ignorant of the Rules or other governing norms.[170]

After taking the exam and researching this topic, I am convinced that the MPRE belittles serious ethical consideration and likely encourages lawyer cynicism about legal ethics. The idea of a multiple-choice ethics exam well captures the MPRE's fundamental and structural shortcomings.[171] The MPRE fails to encourage more ethical behavior or to test minimal standards effectively for two main reasons: the first is the strictures of designing a multiple-choice ethics exam, and the second is the MPRE's effect upon the teaching of legal ethics.

A. *Multiple-Choice Test Design*

The process of drafting a multiple-choice ethics exam amplifies many of the problems with the Rules. It rewards a "technocratic" approach to legal ethics because the MPRE only tests settled areas of the law with simple fact patterns, and counter-intuitive Rules that must simply be memorized.

1. Settled Areas and Simple Fact Patterns

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[169] The MPRE's purpose is "to insure that [applicants] study and be prepared to cope with the ethical problems of the legal profession." *Letter From the Chairman*, 48 BAR EXAMINER 127, 128 (1979).

[170] *See id.*; SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 98 (1993) (calling MPRE an "awareness test").

[171] Although the MPRE has been the subject of some scholarly opprobrium, *see, e.g.,* Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 403-12 (1998) (arguing that the MPRE tests fictitious "national" law of ethics, and over-emphasizes the Rules at the expense of other sources of law); Mary C. Daly, et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century* 58 LAW & CONTEMP. PROBS. 193, 195-96 (1996) (arguing that MPRE has a deleterious effect on teaching legal ethics); William H. Simon, *"Thinking Like a Lawyer" About Ethical Questions*, 27 HOFSTRA L. REV. 1, 11 (1998) (asserting that MPRE "takes 'thinking like a lawyer' to mean not thinking at all"), there has been no systematic attempt to discredit the use of a multiple-choice format to test legal ethics. There has, however, been an excellent overview of the history of the test, and its place within the legalization of professional responsibility. *See* Hayden, *supra* note __.

A multiple-choice exam can only test settled areas of the law because there must always be a single correct answer.[172] This is a substantial loss, because despite the ABA's effort to reduce and clarify the rules, there are still a number of unsettled and gray areas[173] that would be naturals for a bar exam. Furthermore, choosing the clearest areas of the black-letter law further emphasizes technocratic and legalistic thinking. Any student who finds herself ruminating on a question, or thinking that there are several different applicable moral standards (or Model Rules) can be certain of only one thing: she is on the wrong track for the MPRE. Strategic students taking the exam will *avoid* thinking carefully about the facts presented and their ethical or moral ramifications. Instead, the strategic student recognizes the constraints of a multiple-choice exam and mechanically applies the letter of the law.

A multiple-choice exam also cannot easily test on complex situations where various overlapping legal (let alone moral or ethical) obligations are implicated. The MPRE, in comparison to the Multistate Bar Examination ("MBE"), generally uses simple fact scenarios attached to a single question.[174] This is because the test designers must write questions with clear answers, and a complex fact scenario would muddy the waters.

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[172] *See* Eugene L. Smith, *Can You Test Ethics?*, 50 BAR EXAMINER 25, 29 (1981) (describing process of drafting the MPRE and noting that they "to the extent that it is possible, avoid cloudy areas of law"); LAZAR EMANUEL, STRATEGIES & TACTICS FOR THE MPRE 7 (2001) ("[I]n order for a multiple choice exam to be valid, the answers have to be *unquestionably* correct."); Mary C. Daly, et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROB. 193, 196 (1995) (noting that the MPRE's "multiple-choice format" requires questions "capable of clear, correct resolution").

[173] *See, e.g.,* Garret Glass & Kathleen Jackson, *The Unauthorized Practice of Law: The Internet, Alternative Dispute Resolution and Multidisciplinary Practice*, 14 GEO. J. LEGAL ETHICS 1195 (2001) (discussing multiple unsettled areas under the Model Rules); Lee A. Pizzimenti, *A Post Conference Reflection: In Defense of Fuzzy Rules and Simple Truths*, 37 S. TEX. L. REV. 1263 (1996) (defending Rules against an attack of "fuzziness").

[174] *Compare* NATIONAL CONFERENCE OF BAR EXAMINERS, THE MPRE 2003 INFORMATION BOOKLET 37-57 (2003) (offering twenty-five practice questions, none of which rely on the same fact pattern) *with* NATIONAL CONFERENCE OF BAR EXAMINERS, SAMPLE MBE, FEBRUARY 1991 (1991) (including multiple questions that rely on a common fact pattern).

Nevertheless, as any practicing attorney will attest, professional and ethical dilemmas are rarely simple or one-dimensional. The simplicity of the MPRE's fact scenarios again encourage a technocratic approach; the applicants are encouraged to see each Rule and fact scenario as separate and self-contained, instead of recognizing the kaleidoscopic nature of lawyering.

2. Making the MPRE Hard

The exam designers are thus limited to settled areas of the law and relatively straightforward factual scenarios. Nevertheless, the exam writers have several tools at their disposal to keep the MPRE from being too easy or too commonsense.[175] The exam poses questions that are either based on esoteric rules one would only know if one memorized them, or that have answers contrary to common sense. An advertisement for an MPRE study book warns students that the test makers "set traps that can catch you even if you think you know the rules, by using tricks that make the wrong answers seem right."[176]

The MPRE regularly tests in areas of professional responsibility where the minimum standards are not common sense; these areas require simple memorization of the applicable standards. For example, on my MPRE there was a question about whether a judge could appear as a character witness at a family friend's trial. As Barbri's Conviser Mini Review for the MPRE states the judicial "character witness issue is an

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[175] Note that the MPRE was meant to correct problems with legal ethics essays that did not require "applicants to discriminate in their answers." *See* Joe Covington, *Multistate Professional Responsibility Examination*, 50 BAR EXAMINER 21 (1980). Furthermore, the exam-writers are likely aware of the scuttlebutt that the MPRE is an easy exam. *See, e.g.,* David A. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023, 1029 (1999).

[176] The Law Bookstore, *Strategies & Tactics Series: Strategies and Tactics for the MPRE, at* http://www.lawbooks.com/30090.html (last visited March 15, 2004).

exam favorite."[177] The basic rule is that a Judge may appear as a character witness in a trial only when subpoenaed.[178] The MPRE generally tests the rule by stating sympathetic facts of a close friend or family member in a questionable prosecution, and then states several different rules in the answers: the judge may never appear as a character witness, the judge may appear if subpoenaed, the judge may appear if the other judge approves the appearance, or the judge simply may appear if she chooses to.[179] This is a classic example of a non-intuitive rule. Exam-takers have either memorized the rule or they have not. Other examples of this phenomenon include test questions on when Judges can sit on Boards,[180] and what lawyers must tell legislators when testifying before a legislature.[181]

These sorts of questions further reinforce the technocratic lawyer model. Students are taught that the key to legal ethics is to memorize the tricky rules, and simply apply them. Too often the MPRE reduces legal ethics to the least common-sense rules, rather than a broader notion of shared lawyer values. These questions also invariably lead to student cynicism. After studying for and taking the MPRE I came to compare these

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[177] BARBRI BAR REVIEW, PROFESSIONAL RESPONSIBILITY XLIV (2003).

[178] ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2(B) (2003) ("A Judge shall not testify voluntarily as a character witness.")

[179] *See* BARBRI, *supra* note __, at XLIV ("Often the examiners will give you the opposite rule as a possible choice.").

[180] Consider the following "exam tip" from Barbri: "Be wary of questions where a judge is appointed to the board of a school. A judge may not accept appointment to the board of a public school other than a law school. A judge may, however, accept appointment to the board of any private school. Thus, you must remember that a judge can sit on the board of a public law school and any private school." *See id.* at XLVIII.

[181] Under Model Rule 3.9 a lawyer may appear in a representative capacity before a legislative body, if the lawyer informs the body she is there "in a representative capacity." ABA MODEL RULES OF PROF'L CONDUCT Rule 3.9 (2003). The questions in this area sometimes require the applicant to know the magic language "representative capacity," *see* MPRE INFORMATION BOOKLET, *supra* note __, at 44, or sometimes depend on whether the lawyer is required to name her actual client, or just disclose that she is testifying for an unnamed client (the latter is all that is required). *See* BARBRI, *supra* note __, at 178, 203; ABA MODEL RULES OF PROF'L CONDUCT Rule 6.4 (2003).

questions to the various written driving tests I have taken.[182] I have found that multiple choice driving tests frequently consist of highly technical questions that can only be known by memorizing the pamphlet of rules you receive before the test (questions about how many feet to park away from a hydrant, or how many yards to follow behind another car when you are both going 35 m.p.h.). These questions do little to test whether you are a good driver; they test your memorization skills, or your skills at gaming the test. Similarly, the MPRE memorization questions do little to test whether you will be an ethical lawyer, or even whether you have a good overall grasp on professional responsibility. Instead, they diminish and devalue the entire endeavor.

The MPRE exam writers also tend to draft questions that require answers that cut against the applicant's common-sense ethical instincts.[183] For example, the exam-writers love to ask about the propriety of legal fees (which is humorous in and of itself given the elasticity of Model Rule 1.5, and the rarity of any disciplinary actions under that Rule).[184] One question on my MPRE asked about a grateful client who pays the lawyer her fees, and then gives the lawyer an extremely valuable gift as a thank you. The question was worded to make the reader uncomfortable with the gift, and to imply that Rule 1.5 might be violated. The correct answer is that since it was a gift, and not a fee, it doesn't matter how much it was worth. The exam writers purposely undermine common sense intuition

[182] Over the last seventeen years I have taken a written driving test in New York, Massachusetts, California, Michigan, and New Jersey. I pride myself on the skill of skimming the "Rules of the Road for State X" brochure for ten minutes, and then passing the exam with flying colors.

[183] This may explain Professor Deborah Rhode's MPRE advice: "when in doubt, pick the second most ethical course of conduct." Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEG. EDUC. 31, 41 (1992). Humorously, Professor Rhode is actually an optimist on the ethical standards of the MPRE. *See* Richard Delgado, *Norms and Social Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 953 (1991) (noting that "[s]tudents preparing to take the MPRE . . . often conclude that the correct answer is almost always the third least ethical one").

[184] *See* MODEL RULES OF PROF'L CONDUCT R 1.5 (2004) (listing the eight factors to consider in deciding whether a lawyer's fee is "reasonable").

by using a student's discomfort over receiving an inappropriate gift to lead to an incorrect answer. The MPRE thus teaches students to resist their initial, common sense reaction to an ethical problem, an approach that does little to encourage more ethical behavior among future lawyers.

The MPRE also encourages students to "game" the exam. For example, the Emmanuel's study guide to the MPRE actually covers little substantive law. Instead, it is filled with "strategies and tactics" for taking the MPRE, including a section on bar examiner "traps"[185] and a section on finding the "EZ-pass to the right answer."[186] Although all bar examination methods will likely be subject to such a deconstruction, the MPRE's multiple-choice format is particularly vulnerable to, and specifically invites, game-playing.

The MPRE's focus on non-common sense Rules, and its efforts to pit common-sense moral judgment against the requirements of the Rules further exacerbates the problem of *malum prohibitum* Rules. The MPRE actually reinforces the division between the moral and the Rules, and decreases the likelihood of future compliance based upon a common sense reaction for or against any particular course of conduct.

B. *"Facial Validity" and Legal Ethics*

Educators and psychologists have extensively studied the subjects of assessment and test design. A critical aspect of test design is test validity.[187] "Validity" is a term of

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[185] EMANUEL, *supra* note __, at 28-41. This section includes specific advice about what answer to choose when the answer's modifier is "because," "if," or "unless." *See id.*

[186] *See id.* at 41-44.

[187] *See* STEVEN J. OSTERLIND, CONSTRUCTING TEST ITEMS: MULTIPLE CHOICE, CONSTRUCTED RESPONSE, PERFORMANCE, AND OTHER FORMATS (2nd ed., 1998) ("The concept of validity is the paramount concern in test item construction."); THOMAS M. HALADYNA, DEVELOPING AND VALIDATING MULTIPLE-CHOICE TEST ITEMS 27 (1994) ("The most important consideration in testing is validity.").

art in this context, and is subject to varying definitions,[188] but generally validity involves both content and purpose; a test should actually test what it claims to be testing and then the collected data must be properly used.[189] In evaluating the validity of a test's content, it is critical to canvas the goals of the test, and its subject area coverage. "Face validity" is the most basic kind of comparison between the test's form and content, it "tells us the degree to which a test looks like it measures what it purports to measure."[190] The test should seem appropriate and relevant: "[m]echanical engineers expect tests to assess mechanical engineering problems and catering students expect problems which are set in catering situations."[191]

Technically speaking, the MPRE is valid. The "MPRE is not a test designed to determine an individual's personal ethical values," instead it is an "awareness test," meant to guarantee fluency with the minimum standards of the profession.[192] The MPRE's "facial validity" disconnect, however, is in the gap between legal ethics and the minimum standards of professional responsibility. No matter how many times bar examiners and the ABA avoid the word ethics and substitute the words "professional responsibility," bar applicants and professors still think of the area as "legal ethics." If one considers the MPRE an effort to test legal ethics in any broader sense, the test does not meet the criteria of facial validity, because the test actively ignores and denigrates ethical and moral considerations.

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[188] *See* OSTERLIND, *supra* note __, at 61-62 (quoting various scholarly definitions of validity).
[189] *See* Samuel Messick, *Validity, in* EDUCATIONAL MEASUREMENT 13 (3rd ed., Robert L. Linn, ed, 1988); *see also* JULIE COTTON, THE THEORY OF ASSESSMENT 93 (1995) (stating that "a method of assessment is said to be valid if it measures the intended aims, goals, objectives, performance, or quality").
[190] David Medoff, *The Scientific Basis of Psychological Testing*, 41 FAM. CT. REV. 199, 203 (2003);
[191] *See* COTTON, *supra* note __, at 93.
[192] *See* BOYD, *supra* note __, at 98.

C. *General Weaknesses of Multiple Choice Exams*

Aside from the specific problems with drafting a multiple-choice ethics exam, there are the general problems associated with standardized tests. The flip side to the applicants who successfully game the MPRE is that applicants who do not test well are disadvantaged. There has long been anecdotal evidence that some people simply don't react well to standardized, multiple-choice tests.[193] Studies have shown that the selection of a testing format (typically between multiple-choice and free-response) has a powerful effect on testing results.[194] Standardized, multiple-choice exams test more than their subject matter; they also measure the test taker's abilities within the particular exam format.

Furthermore, recent studies suggest that standardized, multiple-choice tests may be inherently biased. The bulk of the research has focused on the SAT, and the results are powerful and disturbing. SAT scores correlate strongly by gender (males score higher than females),[195] by race (whites score higher than non-whites),[196] and by family

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[193] *See, e.g.,* ANDREW J. STRENIO, THE TESTING TRAP 17-19 (1981) (telling story of bar applicant who excelled at every level of school, but tested awfully on the SAT, LSAT, and MBE, and failed the bar examination multiple times despite graduating in the top 10% of his law school class). There has also been increasing awareness of the serious effects of test anxiety, especially for those taking standardized tests. *See* MOSHE ZEIDNER, TEST ANXIETY, THE STATE OF THE ART 218 (1998) (discussing anxiety and effects on SAT scores).

[194] *See* James L. Outtz, *Testing Medium, Validity, and Test Performance, in* BEYOND MULTIPLE CHOICE (Milton D. Hakel ed., 1998) (gathering various studies showing that test format has a strong influence on test results); Greg Sergienko, *New Modes of Assessment*, 38 SAN DIEGO L. REV. 463 (2001) (comparing various modes of student assessment in law schools); Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 252-59 (2001) (describing various "personal intelligences" and their reaction to differing assessment techniques).

[195] *See* DAVID OWEN, NONE OF THE ABOVE 223-27 (1999) (listing multiple studies showing an SAT gender bias towards males); Marlaine Lockheed, *Sex Bias in Aptitude and Achievement Tests Used in Higher Education, in* THE UNDERGRADUATE WOMAN: ISSUES IN EDUCATIONAL EQUITY (Pamela Perun ed., 1982).

[196] *See* William C. Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 141-54 (2002) (noting gap in SAT scores between whites and minorities); JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT 89-121 (1988) (noting gap in SAT scores between blacks and whites); ALLAN NAIRN, THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS 110 (1980) (observing the "systematic distribution of low scores" for minorities on ETS exams).

income (higher incomes correlate with higher scores).[197] There is also evidence of similar biases in the LSAT.[198] This evidence of bias is even more indefensible because the SAT and the LSAT are actually relatively poor predictors of future academic success.[199] Given the great disparities in bar passage rates by race, there is also evidence to suggest that bar examinations may suffer from similar biases.[200]

There are no similar studies of the MPRE, and without such studies it is impossible to state concretely whether the poor record of the SAT and LSAT can be imputed to the MPRE. Nevertheless, some of the root causes of the biases on the SAT and LSAT are certainly present with the MPRE. The MPRE "is assembled and

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[197] *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 988-89 (1996) (citing various studies and noting the strong correlation between income level and test performance); STRENIO, *supra* note __, at 36-38 (presenting evidence of correlation between SAT scores and income); Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY, Nov. 1993, at 128, 132 ("[W]hat is being measured by the SAT is not absolutes like native ability and merit but accidents like birth, social position, access to libraries, and the opportunity to take vacations or to take SAT prep courses.").

[198] There is evidence of a high correlation between SAT and LSAT scores. *See* Nairn, *supra* note __, at 234 (discussing ETS study showing a high correlation between SAT and LSAT scores). There is also evidence of racial bias, *see* Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359 (1987), William Kidder, *Comment, does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (1991) (concluding that the LSAT systematically disadvantages minority law school applicants), gender bias, *see* William Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education,* 12 YALE J. L. & FEMINISM 1 (2000), and class bias. *See* Richard Delgado, *Official Elitism or Institutional Self-Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 601-6 (2001) (noting correlations between wealth and race in LSAT and other standardized tests).

[199] *See* OWEN, *supra* note __, at 196-203 (establishing the lack of a significant correlation between SAT scores and college grades); WARREN W. WILLINGHAM ET AL., PREDICTING COLLEGE GRADES: AN ANALYSIS OF INSTITUTIONAL TRENDS OVER TWO DECADES (1990) (same); *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (showing the success of African American students admitted to universities under affirmative action programs with SAT below the institution's median score); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 23 n.70, 27 n.74 (1994) (describing the weak relationship between LSAT and first, second, and third-year grades).

[200] *See* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1711-15 (2002) (discussing substantial differences in bar passage rates for blacks and whites); LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 32 (1998) (showing that the "eventual" bar passage rate for blacks, American Indian, and Hispanic were all lower than for whites, and that the rate was 77.64% for blacks and 96.68% for whites).

administered by ACT on behalf of the National Conference of Bar Examiners."[201] The NCBE uses ACT to gather information about test question design, test validity, and test operations.[202] ACT is best known for administering the ACT assessment college entrance exam. Although the ACT assessment has not been as widely studied as the SAT, the few available studies have shown a disparate impact by race,[203] by gender,[204] and a similar lack of success in predicting student outcomes at university.[205] Given the relatively spotty track record of the large-scale testing industry, the involvement of ACT alone inspires suspicion.

The MPRE may well suffer from some of the unconscious class and race bias that has been detected in other standardized test questions.[206] As with other exams, the expense of review materials and courses gives an advantage to those who can afford them. The MPRE almost certainly further rewards those who naturally "test well," and punishes those who do not. In sum, recent research has raised a number of troubling questions about the fairness and efficacy of large-scale, standardized, multiple-choice exams, and this research is germane to analyzing the MPRE.

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[201] *See* MPRE INFORMATION BOOKLET, *supra* note __, at 3.

[202] *See* Frances D. Morrissey, *Report of the Multistate Professional Responsibility Examination Committee*, 50 BAR EXAMINER 18-19 (1981).

[203] *See* Theodore Cross & Robert Slater, *Special Report: Affirmative Action and Black Access to Higher Education*, 17 J. BLACKS HIGHER EDUC. 8 (1997) (displaying results of a study of SAT, ACT, LSAT, and MCAT scores, and concluding that if standardized tests governed admissions decisions at America's leading universities black enrollment would drop by at least one-half and at many schools by as much as 80%).

[204] *See* REBECCA ZWICK, FAIR GAME? THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION 144 (2002) (showing gender disparity on multiple ACT sections).

[205] *See* SACKS, *supra* note __, at 268, 272 (citing two studies showing poor predictive value for the ACT); ZWICK, *supra* note __, at 147 (noting studies establishing that the ACT underpredicts women's university grades).

[206] *See* Delgado, *supra* note __, at 605 (arguing that many standardized "test questions presuppose knowledge that is only common in middle or upper class white communities"); William Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 38-42 app. (2000) (noting results of studies showing upper class bias in standardized tests); Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 121-37 (1993) (examining actual LSAT questions to demonstrate bias).

Lastly, for all of the comforting certainty of a multiple-choice exam, sometimes the "correct" answers are simply wrong.[207] Consider the February 2003 bar exam. After ACT discovered a "clerical error" in the grading of the February 2003 MBE some bar applicants who had already been told that they had passed were told that their scores would be "recalculated," and they might have failed.[208]

D. *Teaching to the Test*

The MPRE requirement closely followed an earlier effort to increase the professionalism of new lawyers: the ABA changed its law school accreditation standards and required that all students take a mandatory class in professional responsibility.[209] At some schools this has meant little more than a grudging effort to teach the Rules themselves.[210] Nevertheless, there has been a growing scholarly attention to the teaching of legal ethics,[211] and multiple commentators have joined the call for a more thoughtful, contextual approach to legal ethics, with a concomitant move away from law school classes that simply drill the students on the Model Rules.[212]

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[207] *See* Delgado, *supra* note __ at 598 & nn.28-30.

[208] *See* Jon Craig, *Bar Exam Error Puts Test Takers on Edge*, COLUMBUS DISPATCH, May 9, 2003, at 3F (reporting that the error could effect the bar passage of approximately 4300 applicants); *see also* NAIRN, *supra* note __, at 139-40 (describing that thirty to forty exam answers were wrong on one multistate bar examination).

[209] *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics & Enron*, 8 STAN. J.L. & BUS. FIN. 9, 34 & n.128 (2002).

[210] *See* RHODE, *supra* note __, at 200 (describing this phenomenon as "legal ethics without the ethics"); *see also* Schlitz, *supra* note __, at 908 ("Most likely, you will devote the majority of the time in your professional responsibility class to studying the rules, and you will, of course, learn the rules cold so that you can pass the Multi-State Professional Responsibility Exam.").

[211] For example, Professor Deborah Rhode has been at the forefront of teaching ethics by the pervasive method, *i.e.* recognizing that ethical questions cut across the law school curriculum, and affect every aspect of teaching and practice. *See* RHODE, PERVASIVE METHOD, *supra* note __, at xxix (arguing that "[p]rofessional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives"); Rhode, *Pervasive Method, supra* note __.

[212] *See, e.g.,* Thomas L. Schaffer, *Using the Pervasive Method of Teaching Legal Ethics in a Property Course*, 46 ST. LOUIS L.J. 655 (2002); W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L.R. 711 (2002); Symposium*, Recommitting to Teaching Legal*

The MPRE, by contrast, tends to turn any law school class on legal ethics into an MPRE review course. The existence of the MPRE places tremendous pressure on legal ethics teachers to teach to the exam.[213] Professors who attempt a more thoughtful approach to legal ethics butt up against students who focus on the MPRE. Moreover, many law students are much more comfortable learning (and many professors are more comfortable teaching) professional responsibility as a series of rules.[214] As one student told me, "teach it to me like the UCC."

Of course, the students who complain that a contextual approach to legal ethics does nothing to prepare them for the MPRE have a fair point, because the MPRE actively punishes such an approach. Students who stop to consider the moral and ethical ramifications of their actions are most likely caught by the structure of the MPRE's questions. Thus, the MPRE itself undermines law school classes in professionalism – probably the Bar's other most notable professionalism effort – by drawing focus away from broader ethical considerations and back towards the minimum rules.

E. *Why Not an Essay?*

The MPRE does serve some salutary purposes. The MPRE probably weeds out bar applicants who know little about professional responsibility, and it does force students to learn at least the minimum behavioral standards of the profession. The MPRE

Ethics--Shaping Our Teaching in a Changing World, 26 J. LEGAL PROF. 101 (2002); Pearce, *Teaching Ethics Seriously, supra* note __; Luban & Millemann, *supra* note __.

[213] *See* Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 819 (2000) (reporting that most students expect their legal ethics course to prepare them for the MPRE); Roger C. Cramton & Susan P. Koniak, *Rule, Story and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 171 (1996) ("Because most law students must take this test, many of them approach their required ethics course with tunnel vision – viewing it as preparation for the MPRE").

[214] *See* RHODE, *supra* note __, at 200.

now also includes law from the ALI's Restatement of the Law Governing Lawyers,[215] which is a helpful recognition of the fuller scope of lawyer regulation.

Nevertheless, as currently structured, the MPRE amplifies much of the worst elements of the clash between the minimalist and broadly ethical projects. Students preparing to take the MPRE memorize non-commonsense Rules, learn to be wary of their natural instincts, and mechanically apply the Rules to every situation. In the parlance of the MPRE, if no rule bars their conduct they are not "subject to discipline,"[216] regardless of any broader ethical or moral ramifications. In short, the format and structure of the MPRE strangles the life out of the law school focus on legal ethics, and inevitably fosters cynicism.

The irony, of course, is that many of the problems with the MPRE could be solved by a state specific essay exam, rather than a national multiple-choice test. A mandatory state essay testing professional responsibility would eliminate many of the MPRE's most glaring faults, and provide the same benefits. An essay question would still require students to study and know the law-governing lawyers, but applicants would be forced to apply the law in context to more nuanced fact patterns. An essay question would also be based in the actual Rules of the jurisdiction, instead of the fictional "national" law tested by the MPRE.[217]

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[215] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). For an overview of the Restatement's drafting process, and its areas of coverage, *see* Lawrence J. Latto, *The Restatement of the Law Governing Lawyers*, 26 HOFSTRA L. REV. 697 (1998).

[216] Anyone who has studied for or taken the MPRE will surely recognize these three underlined words, as they are frequently the call of the question on the MPRE. *See* BOOKLET, *supra* note __, at 37-57 (using underlined phrase "subject to discipline" in 9 of 25 model questions).

[217] The "national" character of the MPRE has been subject to criticism. *See* Levin, *supra* note __, at 404-5.

The MPRE's drafters would surely object that the exam itself was designed to correct the perceived failings of an earlier generation of ethics essays. One of the justifications for a separate ethics exam was the concern that an applicant could fail the ethics essay, and still pass the bar.[218] This is an argument for a separate exam, however, not a multiple-choice exam.

Another difficulty involves coverage issues. A multiple-choice exam can always test on a much broader array of topics than an essay exam in a comparable time period. Nevertheless, there is a difference between breadth and depth, and arguably an essay exam would require students to actually study harder, because they would be expected to analyze a fact situation, apply the relevant Rules, and write a cogent analysis. The MPRE allows applicants to key off of the answers themselves; an essay would require a deeper understanding of the material, and a better facility with ethics as applied to complex situations. Because of an essay exam would involve more analysis and application, it might actually require students to study harder, and more thoughtfully.

A final objection involves bias in grading. The grading of an essay is inherently more subjective than grading a multiple-choice exam. Nevertheless, given the extensive evidence of bias in the drafting and design of standardized tests,[219] multiple-choice exams are hardly a cure-all for subjectivity. In fact, many experts in assessment have been moving away from multiple-choice tests and towards more performance-based

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[218] *See* Morrissey, *supra* note __, at 18 ("Most jurisdictions integrated the results of ethics questions with the results of the entire examination. Thus, an individual could demonstrate absolutely no awareness of ethical principles and no ability to apply ethical principles and yet could receive a license because of high scores in contracts, torts, property and other substantive areas."). This criticism from a bar examiner is a little odd, since it is true of any bar exam subject, and seemingly undermines the whole process. Theoretically any applicant could know nothing about several subjects and still pass the bar (and go on the day after bar passage to practice in the know-nothing area).

[219] *See supra* notes __ and accompanying text.

examinations.[220] While an essay exam would not be a true performance based exam,[221] it would test a broader and more relevant array of skills than a multiple-choice test.

In fact, given the oxymoronic nature of a multiple choice ethics exam, the choice to reject an essay alone tells us a lot about the current approach to lawyer regulation. The MPRE establishes that while both the minimalist and broadly ethical goals are mentioned, the emphasis is on rote knowledge and mechanical application of the rules.

IV. Proposed Solutions – Narrow and Large

This is the third Article in a series that criticizes the goals and programs underlying lawyer regulation, and I inevitably arrive at the "solutions" portion of my projects with hesitancy. It is always easier to point out the flaws in someone else's efforts than to present a coherent alternative.[222] Nevertheless, any critique that does not lend itself to some form of redress is of little use.

This Part offers two proposed solutions, one easy and narrow and the other difficult and broad. The easy solution is for lawyer regulators to recognize that they are pursuing two goals – minimum compliance and ethical lawyering – and to explicitly refocus their efforts based around these two goals. The harder solution is to reunite the twin goals into the single goal of providing ethical, moral, and practical guidance to lawyers and adopt a new approach based more squarely on the model of the Canons.

A. *The Easier Solution – Goal Clarity*

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[220] *See generally* BEYOND MULTIPLE CHOICE, *supra* note __; RUTH MITCHELL, TESTING FOR LEARNING (1992); HOWARD GARDNER, MULTIPLE INTELLIGENCES (1993). By analogy, a recent test procedure for mediators is grounded in performance based measurements, rather than a more traditional exam. *See* CHRISTOPHER HONEYMAN, PERFORMANCE BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS (1995).

[221] For an example of a true performance based approach to bar admission, *see* Glen, *supra* note __.

[222] For a short reflection on the multifarious joys of being a cynic, *see* Barton, *Quintessence, supra* note __, at 593-94 & nn. 21-22.

The easy solution is that lawyer regulators should be much clearer in their thinking about what they are trying to accomplish and how.[223] They now have two distinct goals. Rather than treating these goals as if they are identical or substantially overlapping these goals should be explicitly recognized and jointly pursued in light of their effect on each other.

As noted at the very outset of this Article, lawyer regulators have been fuzzy on almost every aspect of their professionalism project. There is little clarity about the crisis or problem they are trying to solve, or understanding of the meaning of the goal of increased "professionalism."[224] Obviously a clear understanding of the parameters of the problems and the goal are necessary before any real attempts at a solution can be attempted. A first step would be clarity on the underlying problems, and a definition of the goal. A second step would be recognition that bar regulators are pursuing two distinct and sometimes contradictory goals.[225]

Thus far these solutions seem relatively uncontroversial: who is against clarifying underlying problems and the goals for addressing those problems? As it turns out, lawyer regulators are probably consciously or subconsciously against it, because the current fuzziness and conflation of goals serves to hide some rather unpleasant truths about lawyer regulation. For example, any clarity here requires recognizing the great disparity

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[223] Other commentators have similarly pled "for a little more rigor in the use of concepts like professionalism and ethics." *See* Wendel, *Lawyer-Bashing, supra* note __, at 1028-29; Rhode, *Opening Remarks*, *supra* note __, at 458-59 ("A threshold question is whether we are all on the same page, or even in the same book, with respect to what we are trying to fix.").

[224] *See, e.g.,* Vincent, *supra* note __, at 24 ("In spite of the attention devoted to the subject, however, professionalism has no uniformly accepted definition."); Rhode, *Professionalism Problem, supra* note __, at 284.

[225] The debates over the meaning of the word "professionalism" effect *how* ethical lawyers should be, not whether the goal is to raise the bar, *i.e.* lawyer regulators know they want to improve lawyer ethics, the question is whether they want a small improvement (try to be civil) or a large improvement (try to broadly conceive of the lawyer's role to include the interests of justice, the public and the courts).

in the importance of the two goals. One of the reasons that the bar's professionalism efforts have failed is that they are so patently less valued and less rigorously pursued than the minimalist project. Since the 1960s the great bulk of effort has gone into the minimalist project, redrafting the Rules,[226] increasing knowledge of the Rules,[227] offering assistance in complying with the Rules,[228] and attempting to increase enforcement.[229] By contrast the professionalism efforts appear languid, non-mandatory, and hamstrung: civility codes,[230] accelerated public relations,[231] and more professionalism conferences for the bar, law professors and judges.[232] In short, the bar has taken the minimalist project relatively seriously, while paying lip service to the broadly ethical goal.

Lawyer regulators have veiled their lack of effort on professionalism by presenting two goals as one. The only way to justify the claim that lawyer regulators care deeply about professionalism is to argue that both the minimalist and the broadly ethical projects are aimed at professionalism. The explicit disjunction between the Rules and the broadly moral, as well as the minimalist nature of the Rules themselves, however, belies this claim, and leads to the clash in goals described earlier.

Recognizing two distinct goals would also raise the uncomfortable question of why regulatory efforts are so heavily biased towards the minimalist project. As I have noted elsewhere, the surest proof that the regulation of lawyers is self-interested is to

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[226] Ethics 2000 is the most recent example. *See* Symposium, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?*, 2003 U. ILL. L. REV. 1173 (2003).
[227] The MPRE, mandatory law school classes, and mandatory ethics CLE all serve this goal.
[228] The work of ethics committees, ethics hotlines, and Lawyer Assistance Programs all fit this purpose.
[229] *See, e.g.,* CLARK REPORT, *supra* note __; MCKAY REPORT, *supra* note __.
[230] *See* Center for Professionalism, *Professionalism Codes, supra* note __.
[231] *See* BLUEPRINT, *supra* note __, at 302-2; JUSTICES ACTION PLAN, *supra* note __, at 39-44.
[232] *See* TEACHING AND LEARNING PROFESSIONALISM, *supra* note __, at 33-34 (suggesting "[s]ponsoring and participating bench/bar conferences where the current issues of civility, etiquette, and professionalism can be openly discussed").

compare the efforts and treatment of a regulatory area that impinges lawyer self-interest with one that does not.[233] Given that the Rules may be used to discipline or disbar a lawyer, lawyer self-interest dictates that they be as clear, narrow, and easy-to-follow as possible. By contrast, professionalism is a much harder sell on self-interest grounds.[234] Predictably, the regulatory efforts have flowed in the direction of the minimalist project.

In sum, a simple solution is to acknowledge the existence of two distinct goals, and to recognize that they frequently conflict. Because of the inherent benefits of blurring these goals, however, the adoption of even this solution seems unlikely.

B. *The Broader Solution – Redraft the Canons*

This Article has argued that the clash of goals began with the adoption of the Code and the abandonment of the Canons. Prior to the Code, bar associations and lawyer regulators pursued a single goal – presenting moral, ethical and practical guidance to lawyers. With the adoption of the Code and then the Rules the goal was divided in two. The simplest, but most difficult solution, is to reunite the two goals, and focus the efforts of the bar and lawyer regulators on providing the blend of the moral and the practical offered by the Canons and predecessor statements of legal ethics. Representatives from among lawyer regulators, bar associations, judges, law professors, and lawyers (*i.e.* the

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[233] *See* Barton, *Institutional Analysis, supra* note __, at 1208-9 (comparing the treatment of bar admissions (a natural area of lawyer self-interest for economic and anti-competitive reasons) with bar discipline (a natural area of disinterest)).

[234] It may well benefit all lawyers to have the profession be more ethical, but professionalism raises a classic collective action problem. Each individual lawyer might prefer higher ethical standards for all, but will likely resist the work involved in raising her own standards, let alone raising the standards of the profession at large. For the seminal work identifying and explicating collective action problems, *see* MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION 43-52 (1971).

entire profession)[235] could approach this new statement of lawyer principles as an opportunity to unite the profession and agree on common principles of lawyering, ethics, and morality. The profession would start from first principles, broadly stated, and work top-down towards the specific guidance for the practice of law. Many of these principles are already to be found in the abandoned text of the Canons and Code, and others could be added.[236] It is also likely that much of the substance of the practical/minimum standards would also be retained, but in connection with their broader purposes, rather than as free standing regulation.

Other commentators have similarly suggested a common law of legal ethics,[237] or a rethinking of our approach to legal ethics based upon a broader conception of the meaning of lawyering.[238] This solution is both more modest and more radical. It is modest because it does not make any specific claims about the content, methods, or ends of the profession's ethical deliberations. It is more radical because it suggests a rethinking of the entire project of legal ethics around a statement of shared ethical values, requiring an abandonment of our current regulatory focus on clarity and enforceability.

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[235] A welcome addition to the input of the profession would be some meaningful role for the public at large. Deborah Rhode has long argued that the lack of public involvement in the drafting of lawyer regulations has increased their self-serving nature. *See* RHODE, *supra* note __, at 208.

[236] One such norm might be the elimination of discrimination within the profession. The Minnesota Bar requires its members to attend mandatory "elimination of bias" CLEs to "educate attorneys to identify and eliminate from the legal profession and from the practice of law, biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation." *See* Kari M. Dahlin, Note, *Actions Speak Louder than Thoughts: The Constitutionally Questionable Reach of the Minnesota Elimination of Bias Requirement*, 84 MINN. L. REV. 1725, 1725 (2000) (quoting the announcement of the Minnesota Supreme Court).

[237] *See* Feldman, *supra* note __, at 945-46.

[238] The big three in this area are Deborah Rhode, William Simon and David Luban. *See* RHODE, INTERESTS OF JUSTICE, *supra* note __; SIMON, *supra* note __; LUBAN, *supra* note __, although others have joined the fray. *See* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 46-61 (2003) (arguing that professional responsibility should require lawyers to perform some meaningful ethical deliberation); Strassberg, *supra* note __, at 934 (applying Ronald Dworkin's "interpretive integrity" thesis to legal ethics).

This broader solution explicitly rejoins the moral with the regulatory, and would require a reconsideration based explicitly on shared ethical ground, working from the general to the specific, and the ethical to the practical. The resulting standards would be easier to understand and more likely to be followed. The current Rules, by contrast, have worked backwards, continuously retreating from any moral baseline in favor of greater amoral specificity.

The most obvious objection to this suggestion is that there will be "no there there," *i.e.* the legal profession has insufficient shared values to meet the task.[239] The drafters of the Canons were lawyers of remarkably similar backgrounds and practices.[240] I think this objection overstates the challenges involved in finding common ground. The legal profession has certainly diversified in every possible measure, including by gender, race, religion, areas of practice, and political philosophy. Nevertheless, much of the moral content of the Canons and Code would certainly still garner support, and other shared norms might be added.[241]

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[239] *See* Rhode, *Opening Remarks*, *supra* note __, at 459 (arguing that "whatever consensus exists about professionalism at the symbolic level often fades when concrete practices or sanctions are at issue"); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 691 (1991) ("There is reason to question whether there is any longer a 'legal profession,' if by that term one means a group of trained individuals pursuing a set of common goals and united, even if loosely, by shared values."); Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the legal Profession, in* LAWYERS' IDEALS/LAWYERS' PRACTICES 14 (David M. Trubek et al. eds., 1993) (positing that professionalism relies "vague and general invocation of 'shared' values that really aren't shared"); Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Values of Causistry*, 36 U.S.F. L. REV. 659, 681 (2002) (noting the "'moral diversity' of the legal profession and the absence of shared values among lawyers."); *cf.* Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 13 (1990) (stating that the "personal values" of most lawyers are quite distinct from the political values of David Luban). Moreover, some of our shared values may be undesirable. *See* W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV. 967, 981 (2003) (noting that some of the legal profession's "shared values might not be the values we should cultivate among lawyers").

[240] *See* Carle, *supra* note __, at 34-40 (listing extensive background information on the white, male, anglo-saxon, protestant drafters of the Canons).

[241] This objection also verges so closely on the nihilistic as to undercut virtually any approach to lawyer regulation. If we cannot agree at all on the basic principles governing the practice of law, there is no hope

Others may argue that the original Canons themselves were heavily based in self-serving economic protectionism, and even conscious or unconscious racism.[242] Economic self-protection, however, is endemic to each of the ABA's statements of legal ethics,[243] and as long as lawyers dominate the drafting process will remain. The charge of institutional racism is more worrisome, but an inclusive drafting process would hopefully limit any economic or racial bias.

Others might object to the goal of seeking broader ethical advice for lawyers. Critics have referred to the Canons themselves as "empty exhortations"[244] and "pious homilies."[245] I am generally underwhelmed by this objection. As a general rule, I would much prefer to read even empty platitudes – although I prefer the term "uplifting exhortation" – than the narrow hair-splitting, and amoral "ethics" of the current Rules.

The real grist of the above objection, and the main reason the Canons were abandoned, is that a statement of general principles cannot be enforced as a minimum standard of legal behavior, and will not offer guidance to practicing lawyers.[246] In fact,

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that we can ever create any meaningful regulation of the profession, because under this argument *there is no profession to govern*, just a group of people bound together by a government license and nothing else.

[242] *See* Barton, *Institutional Analysis, supra* note __, at 1194-95 (noting that the adoption of the Canons, among other regulatory acts, can be seen as an economic "battle between the 'upper' bar (white middle-class males) and the 'lower,' entrepreneurial bar (immigrants and minorities that had to struggle for business); AUERBACH, *supra* note __, at 40-46 (decrying the Canons, and particularly their treatment of contingent fees, as economically and racially motivated); Alfred L. Brophy, *Race Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons*, 12 CORNELL J.L. & PUB. POL'Y 607, 607-22 (2003) (same).

[243] *See, e.g.,* Barton, *Economic Analysis, supra* note __.

[244] *See* W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 574-75 (2001).

[245] *See* Patterson, *supra* note __, at 639; *see also* John F. Sutton, Jr., *Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132 (1966) (asserting that many lawyers criticized the canons as pious, precatory statements concerning manners and virtue).

[246] *See, e.g.,* Moore, *Drafting Ethics Codes, supra* note __, at 926 & n. 21 (stating that the Canons were rejected because they "were incomplete, ambiguous, impractical for enforcement, insufficient as a guiding and teaching tool, and not up to the challenges of a more complex legal community and society"); Peter A. Joy, *Making Ethics Opinions More Meaningful: Toward More Effective Regulation of Lawyers' Conduct*,

critics of this Article will likely claim that the two goals identified – the minimalist and broadly ethical – were inherently at odds under the Canons, and would again be under my proposed reformulation. It is unquestionably true that the application of the Canons to specific instances of misconduct brought the tension between enforcement and exhortation into stark focus. Nevertheless, given the current sorry state of disciplinary enforcement the "capacity for enforcement" objection is quite ironic. Since only the most serious misconduct currently results in discipline we have little to lose enforcement-wise by moving to a less specific set of guidelines.[247]

It is also interesting to note that both the drafters of the Code and the Rules stated explicitly that their reformulations of the minimum required conduct did little to change the underlying substantive law.[248] In other words, the categories of lawyer behavior that were barred or mandated under the Canons did not change significantly under the Code or the Rules. If the drafters were correct on the substantive law, this admission contradicts the idea that the Canons were unworkable or unenforceable. To the contrary, the Canons set the baselines that were later adopted by both the Code and the Rules.

A lack of guidance is a more substantial question, but not a showstopper. First, it is ironic for the same lawyers that expect the public at large to structure their behavior around the vague iterations of the negligence standard (among other amorphous legal

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15 GEO. J. LEG. ETHICS 313, 325-26 & n. 51 (2002) (arguing that the "vague ABA Canons . . . left open so many questions that lawyers often needed greater guidance beyond the minimal language of the text").

[247] It may, however, that selective enforcement or politically motivated punishment would be more prevalent under a broader standard. *Cf.* WOLFRAM, *supra* note __, at 86 (arguing that this was an occasional problem under the Canons); Morgan, *Professionalism, supra*, note __, at 419 (citing example of politically motivated bar admission refusal). Yet, selective enforcement is certainly also a possibility under the Rules, and after In re Ruffalo, 390 U.S. 544 (1968) any accused would have at least the minimum due process and constitutional protections available in a quasi-criminal proceeding.

[248] *See supra* notes __ and accompanying text.

standards) to complain of a lack of guidance in legal ethics.[249] If there is any group of people in America that should be equipped to operate under a loose, common-law set of guidelines it should be the legal profession.

Second, even after almost a century's effort at narrowing the standards that govern lawyer behavior there are still regular complaints that the Rules are too vague,[250] or not specifically suited to a certain type of practice.[251] This may just be an eternal complaint – regardless of the level of specificity there will always be unseen situations and uncertain applications.

Third, when Courts and lawyer regulators analyzed the original Canons they used the broad as an interpretive aid in determining the narrow, and a substantial common law of legal ethics grew up through court decisions and the work of ethics committees. These interpretations of the Canons themselves yielded the great bulk of the law underlying the Rules and the Code,[252] it just appeared in a different form, with the specific mixed in with the general. While it required more thought from lawyers, there is little evidence that lawyers were disciplined under the Canon's more vague standards, or for unforeseen

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[249] For a discussion of the vagueness of the negligence standard, *see, e.g.* OLIVER WENDELL HOLMES, THE COMMON LAW 88-103 (M.D. Howe ed., 1963) (1881) (arguing that the negligence standard is too vague to properly guide conduct); Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189, 208 (2003) (reviewing ROBERT A. KAGAN, AMERICAN ADVERSARIALISM: THE AMERICAN WAY OF LAW (2001)) ("Concepts such as negligence and the reasonable person standard are vague.").

[250] *See, e.g.*, WOLFRAM, *supra* note __, at 86 (arguing that "if anything is clear, it is that many provisions of the lawyer codes are plainly imprecise"); Levine, *supra* note __, at 538-45 (noting the existence of vague Rules and defending them).

[251] *See, e.g.,* Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993) (asserting that additional ethical codes are necessary for non-litigators); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 49 (1998) ("Bankruptcy needs its own ethics code."); *cf.* Neuner, *supra* note __, at 2051 & n. 47 (listing "specialty" codes adopted by narrower portions of the bar to address specialized interests).

[252] *See supra* notes __ and accompanying text (noting that the substantive law governing lawyers changer very little for the Canons through the Code to the Rules).

reasons.[253] Further, with the application of the Due Process Clause to lawyer disciplinary proceedings in *Ruffalo* and companion cases there is a constitutional baseline protection against punishment without adequate notice or specificity.[254]

Lastly, increasing uncertainty might actually help compliance. Broader, common-sense standards of conduct would be easier to remember, and overlap more with commonly held morality, making compliance a matter of conscience as well as of legal sanction. The thought process involved in analyzing the standards of conduct would also differ greatly from the narrow boundary-seeking heuristic triggered by black letter rules and would more closely parallel authentic ethical deliberation.[255]

In fact, the problem with narrow rules may be that they offer too much guidance. When faced with a fuzzy standard a risk averse actor will err on the safe side and avoid even potentially unlawful behavior.[256] While in many contexts a broad standard may

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[253] *Cf.* DRINKER, *supra* note __ (listing relatively limited interpretations of the Canons).

[254] *See* In re Ruffalo, 390 U.S. 544 (1968); Wilburn Brewer, Jr., *Due Process in Lawyer Disciplinary Cases*, 42 S.C. L. REV. 825 (1991); Hazard & Beardley, *supra* note __ (describing parameters of due process clause requirements for disciplinary proceedings).

[255] *See* Feldman, *supra* note __, at 945-46. Many lawyers would still naturally seek boundaries, but the applicable heuristic would be the analysis of common-law rules, a synthesis of law, policy, and precedents, instead of the strictly linguistic and logical heuristic of boundary finding for black letter rules.

[256] *See* Pierre Schlag, *Rules and Standards,* 33 UCLA L. REV. 379, 385 (1985) ("Because standards do not draw a sharp line between permissible and impermissible conduct, some risk-averse people will be chilled from engaging in desirable or permissible activities."); Judith L. Maute, *Sporting Theory of Justice: Taming Adversarial Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 27-28 (1987) (defending the use of broad standards for litigation sanctions because "[i]n time, the higher standards of reasonableness and good faith enforced by court rules, like other areas of law, will be largely self-executing, in that most risk-averse rational players will comply voluntarily on a regular basis."). This argument about the efficacy of a broad standard versus a narrow rule has been played out *ad infinitum* in the rules/standards literature. For a representative sample, *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1979) (arguing for the general efficacy of black letter rules); Joseph R. Grodin, *Are Rules Really Better than Standards?*, 45 HASTINGS L.J. 569 (1994) (arguing the pro-standards side); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) (presenting a philosophical treatment of the rules/standards division). The dichotomy has been applied in multiple areas of the law, *see, e.g.,* Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275 (2002) (cyberlaw); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (property law); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules Versus Standards Revisited*, 79 OR. L. REV. 23 (2000) (applying behavioral economics to the rules/standards debate); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557

have an unwelcome chilling effect,[257] in an area like legal ethics we may actually be interested in chilling even ambiguously unethical behavior, rather than easing compliance right up against the line of illegal/unacceptable conduct. As Kathleen Sullivan has noted "bright-line rules allow the 'bad man' to engage in socially unproductive behavior right up to the line; on a pessimistic view of human nature, the chilling effect of standards can be a good thing."[258] In an area where Judges and lawyers once expected the profession to avoid even "the appearance of impropriety,"[259] it may be better to have broad standards chill a whole class of possibly unethical conduct.

(1992) (applying law and economics); Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181 (1996) (using dichotomy to explicate payment systems). Mary Daly has persuasively argued that the legal ethics journey from the Canons to the Rules can be best understood as a journey from fuzzier standards to stricter rules. *See* Daly, *supra* note __ (arguing that the transition from the Canons to the Code to the Rules has marked a transition from standards to rules).

[257] Consider Fredrick Schauer's persuasive argument against broad speech prohibitions, their chilling effects, and the related void-for-vagueness doctrine, *see* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685 (1978).

[258] *Cf.* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-63 (1992); *see also* Nicholas L. Georgakopoulos, *The Vagueness of Limits and the Desired Distribution of Conducts*, 32 CONN. L. REV. 451 (2000) (defending vague standards "because they provide customized compliance"). Lawyers may want to argue that they are not "bad men" in the Holmesian sense, but most of the public would certainly disagree. *Cf.* W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 52 S.C. L. REV. 527, 527-30 (2002) (describing public perception that lawyers are particularly untrustworthy and regularly practice "loophole lawyering").

[259] *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1981); ABA Comm. on Prof'l Ethics and Grievances, Formal Ops. 49, 50 (1931), *reprinted in* ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND THE CANONS OF JUDICIAL ETHICS ANNOTATED 134, 137 (1947); *see also* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1998) (ordering judges to "avoid impropriety and the appearance of impropriety"). For a brief history of the "appearance of impropriety standard, *see* Peter W. Morgan, *the Appearance of Impropriety: Ethics Reform and the Blifil* Paradoxes, 44 STAN. L. REV. 593, 595-603 (1992). This standard is not without its detractors, *see* PETER W. MORGAN & GLENN H. REYNOLDS, THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY (1997) (arguing that the standard is harmful in bureaucratic enforcement of ethics rules); Levine, *supra* note __, at 535-36 (summarizing criticisms of the standard in the legal ethics context); Edward C. Brewer, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the "Appearance of Impropriety Disappear*, 39 IDAHO L. REV. 321 (2003), and supporters, *see* Ann McBride, *Ethics in congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 466-67 (1990) (arguing in favor of the appearance of impropriety standard); Lovell v. Winchester, 941 S.W.2d 466, 468 (Ky. 1997) ("Even though the comment to Rule 1.9 specifically rejects the 'appearance of impropriety' standard . . . the appearance of impropriety is still a useful guide for ethical decisions."); Cardona v. Gen. Motors Corp., 942 F. Supp. 968, 975 (D.N.J. 1996) (defending the "much maligned" doctrine).

CONCLUSION

The seeds of this Article, and my overall interest in the field of legal ethics, were actually sewn the very first time I sat down to read the Rules of Professional Conduct. Fall semester of my third year in law school I enrolled in Michigan's two credit Legal Ethics class because it was required for graduation. When I bought my books for the semester I dutifully bought a compendium of ethics rules, and on a whim I sat down and read the Rules of Professional Conduct. I was immediately struck by how little they said. The next day I attended the first day of class, and was greeted by an Adjunct Professor who immediately bombarded the class with a series of war stories and challenged us to apply the applicable Rules to his stories from practice.[260] Ten minutes into class I was consulting my class schedule, and discovered that I could satisfy my ethics requirement by taking one of the law school's clinics. Immediately after class I signed up for the Child Advocacy Clinic, and never saw the Adjunct Professor again. Nevertheless, the fruitlessness of the entire enterprise stuck with me. The Rules were so banal and seemingly useless. The class was supposed to teach us something about ethics, but it would apparently be little more than sitting through a series hypotheticals and mechanically applying the Rules of Professional Conduct.

My very first impressions of the two goals and the professionalism movement stuck with me, and I have now come to think that much of what the bar, legal academia, and lawyer regulators have to offer lawyers is deeply misguided, and actually harmful. But, I have tried resolutely not to fall into full-metal cynicism, because my initial reaction was also tinged with sadness for the loss of possibilities. There is so much that could be,

[260] Note that this description perfectly matches the relative unimportance of the legal ethics curriculum in many law schools. *See* RHODE, *supra*, note __, at 200-03.

and should be, done within the field of legal ethics. Finding the will, the spirit, and the integrity, as well as the clarity of vision to recognize what we are doing and why will be difficult (impossible?) but that does not mean that we should not try.