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Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?

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PROFESSIONALISM'S TRIPLE E QUERY: IS LEGAL ACADEMIA ENHANCING, ELUDING, OR EVADING PROFESSIONALISM?

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"Laws control the lesser man; right conduct controls the greater one."[1]

I. INTRODUCTION

This article addresses legal academia's role in fostering professionalism and seeks to provide suggestions for the enhancement of professional behavior in the legal profession.

Many lawyers govern their behavior to ensure compliance with the rules of ethics—the violation of which dictates specific sanctions. The rules of ethics, however, do not specifically address boundaries for appropriate behavior in other matters of integrity and civility. No guidelines exist on the acceptable standards for rudeness, vulgarity, physical altercations, or plain lackluster behavior (to the point of falling asleep). As such, there is an existing and growing population of attorneys that have yet to cross the line into "unethical hell" by operating under principles exhibiting behaviors which, though not violative of the rules of ethics, are patently unprofessional. The actions of these "line-toers" cross into a realm where their unprofessional pattern of behavior threatens the perceived sanctity of the profession.

Court records document examples of such unprofessional behavior. Take, for example, the following incidents:

(A) On January 30, 1984, Joe Frank Cannon's client, Calvin Jerold Burdine, was convicted of capital murder by a Texas jury and sentenced to death by lethal injection.[2] Following a series of appeals, the Fifth Circuit heard the *Burdine* case en banc[3] and found that Burdine's attorney, Joe Frank Cannon, prejudiced Burdine's case by sleeping during the capital murder trial.[4]

(B) In 1988, during closing arguments to the jury in a criminal case, the defense attorney referred to the "sleazy scum bag tactics" of the prosecutor, and noted a "smelly odor" in reference to said prosecutor.[5]

(C) In 1994, during discovery for the case of *Paramount Communications, Inc. v. QVC Network, Inc.*,[6] the following deposition

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1. Chinese Proverb, www.famous-proverbs.com/Chinese.htm. *See also* www.worldofquotes.com/proverb/Chinese/7/Index.html.

2. Burdine v. Johnson, 719 S.W.2d 309, 309 (Tex. Crim. App. 1986).

3. Burdine v. Johnson, 234 F.3d 1339 (5th Cir. 2000).

4. Burdine v. Johnson, 262 F.3d 336, 357 (5th Cir. 2001).

5. *See* In Re Disciplinary Proceedings against Eisenberg, 423 N.W.2d 867, 870 (1988).

6. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).

testimony was recorded:

> MR. JAMAIL: Don't answer that.
>
> How would he know what's going on in Mr. Oresman's mind?
>
> Don't answer it.
>
> Go on to your next question.
>
> MR. JOHNSTON: No, Joe –
>
> MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go on to your next question.
>
> MR. JOHNSTON: No, Joe, Joe –
>
> MR. JAMAIL: Don't "Joe" me, a**hole. You can ask some questions, but get off that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.[7]

Attorney Jamail's fond use of expletives during depositions has been noted in other cases.[8]

(D) In 1993, during deposition testimony of an insurance adjustor for a major corporation, the following deposition testimony was taken:

> WITNESS: I don't have any copies of the Notice of Injury or the initial doctor's report in this file.
>
> MR. A: You made me drive all the way up here to Tallahassee. You're going to find those reports!
>
> WITNESS: I'm sorry, I don't have them.
>
> MR. A: You're nothing but a liar!
>
> MS. BOOTHE-PERRY: Watch it.

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7. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 53-54 (Del. 1994).

8. *See, e.g.*, M. Rozen, *Hairpiece v. Fat Boy*, AM. LAW, Oct. 18, 1992, at 82.
JAMAIL: You don't run this deposition, you understand?
CARSTARPHEN: Neither do you, Joe.
JAMAIL: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your g*ddamned job, fat boy.
CARSTARPHEN: Well, that's not your job, Mr. Hairpiece.
WITNESS: As I said before, you have an incipient –
JAMAIL: What do you want to do about it, asshole?
CARSTARPHEN: You're not going to bully this guy.
JAMAIL: Oh, you big tub of sh*t, sit down.
CARSTARPHEN: I don't care how many of you come up against me.
JAMAIL: Oh, you big fat tub of sh*t, sit down. Sit down, you fat tub of sh*t.
See also http://www.crazydepos.com/joe_jamail/.

MR. A: This is bull sh*t! I came way up here, you all better find those f***ing reports.

MS. BOOTHE-PERRY: We're not going to sit here and have you curse at my client. You need to tone it down.

MR. A: I don't give a f**k what you want to do.

MS. BOOTHE-PERRY: Okay, I think we're done here.[9]

These examples of attorney conduct are unfortunately not isolated, and highlight the growing trend of behavior not commensurate with the legal profession.[10] Outside the scope of the Code of Ethics, there are some forms of the behavior that are condemned by the Canons of Professional Ethics.[11] However, many instances of unprofessional behavior between lawyers escape the imposition of any meaningful sanctions.[12]

In a profession that takes pride in "professional status" and is hypersensitive about its image, there is increasing discomfort of the profession's members about both the state of professionalism exhibited by the profession and the perception of lack of professionalism held by the general public.[13] This discomfort has spawned a much-needed conversation

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9. The name of the offending attorney has been excluded. The deposition which reflects the noted testimony was filed with the court only as evidence at a Show Cause hearing. Following a public apology by the offending attorney, the testimony was stricken from the formal record.

10. Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147-48 (2001) (providing other examples of ineffective counsel asleep at trial); JOHN BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 5:28, at n.37 (2d ed., 2009) (reporting a number of judicial decisions imposing professional disciplinary measures upon attorney for possessing a disruptive or insulting demeanor in the courtroom). *See generally* George Blum, Annotation, *Propriety of Reciprocal Attorney Discipline for Noncriminal Misconduct Towards Client*, 44 A.L.R 6th 75 (2009) (listing hundreds of cases that have considered the propriety of reciprocal attorney discipline of attorneys for noncriminal misconduct); John J. Michalik, Annotation, *Conduct of Attorney In Connection with Making Objections or Taking Exceptions as Contempt of Court*, 68 A.L.R. 3d 314 (1976) (discussing cases in which the courts have considered whether an attorney's conduct during the course of a trial constituted a contempt of court); John J. Michalik, Annotation, *Attorney's Addressing Allegedly Insulting Remarks To the Court During Course of Trial as Contempt*, 68 A.L.R. 3d 273 (1976) (noting specific instances in which attorneys have allegedly insulted the court during the course of a trial).

11. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-37 (1980) (providing that clients, not counsel, are the litigants, and that ill feelings between clients should not influence counsel's conduct or demeanor towards one another).

12. *See generally* 7 C.J.S. *Attorney & Client* § 59 (2009).

13. *See* CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 17 (1999) [hereinafter CHIEF JUSTICES' ACTION PLAN], *available at* http://ccj.ncsc.dni.us/natlplan/natlactionplan.html (noting how the unethical and unprofessional conduct of a small portion of lawyers has tainted the image of the legal community and diminished public confidence in legal and judicial institutions). *See also* Richard Abel, Book

exploring the causes, effects, and solutions to improve professionalism in the legal arena. The professionalism conversation, in all aspects, repeatedly acknowledges that law schools provide one of the first exposures to professionalism in the practice of law.[14] With so many lawyers acting in an unprofessional manner, just bordering on unethical behavior (i.e. behavior that specifically violates the Code of Ethics), it begs the questions: Are the line-toeing actions a learned behavior? If so, who is teaching our lawyers to toe-the-line up to the point of ethically violative behavior, while simultaneously practicing in a mire of unprofessional behavior? Who is teaching our lawyers to practice with an appropriate level of civility and professionalism? What role, if any, does legal academia play in the promotion of professional behavior? Is academia enhancing a spirit of professionalism in the legal community? Is academia merely alluding to professionalism in a few chosen courses, or is it actively taking steps to enhance standards commensurate with professional behavior?

Despite ostensible promulgation of the principles of professionalism, it is questionable whether those standards and foundations beyond ethical rules are actively eruditional or are simply empty exhortations.

Professionalism as a concept is largely absent from mainstream law school curricula. It may receive cursory to fair treatment at best in Professional Responsibility classes.[15] On this issue, one analyst observed that "law schools do not focus much attention on the ideas that seem to be most popular in the current discussions of professionalism."[16] Few Professional Responsibility professors courageously step beyond the line of straightforward rule memorization and specific ethical and regulatory problems.[17] For example, in traditional law school courses, students are often told that their general ethical objections and concerns are irrelevant to

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Review, 57 J. LEGAL EDUC. 130, 130 (2007) (reviewing MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005)).

14. *See generally* James L. Baillie & Judith Bernstein-Baker, *In The Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education,* 13 LAW & INEQ. 51, 63 (1994) (addressing ABA Standard 302 (a), as written in 1974 and noting that it "reflects the profession's view that learning professional responsibility is a fundamental educational objective of legal education.").

15. *See* Stephen H. Goldberg, *Bringing the Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 419 (2000) (noting that professionalism receives only a "fleeting glance" by professors and students in legal academia resulting in "a group of students, ranging from discontented to aggravated, who will resist with inattention and silence anything beyond black letter recitation calculated to help them successfully traverse the MPRE.").

16. Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 417 (1992).

17. *See id.*

the "legal" issues being discussed.[18] Questions and objections based on professionalism are similarly summarily dismissed.

Ethics and compliance with ethical rules receive a fair amount of discussion with an almost voyeuristic approach taken to violations of such rules.[19] There is an unquestionable need to staunch the flow of unethical behaviors in the profession—a need that has been identified and discussed in both political and pedagogical arenas. From widespread dissertation, rules and models have emerged; state and local bar associations have instituted a variety of support provisions for professionals seeking guidance for ethical behavior and for those disciplined for unethical behavior.[20]

Compliance with the ethics rules, however, is simply insufficient if such compliance ignores acts of vulgarity (such as expletive-filled diatribes) or the lack of respect (for clients and colleagues alike), fairness, and civility in the performance of one's legal skills. An attorney who acts unethically by definition exhibits unprofessional behavior. However, the attorney who acts unprofessionally does not always act unethically. The line between the

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18. David B. Wilkins, *Redefining The "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241, 246 (1995) [hereinafter *Redefining the "Professional"*]. Professor Wilkins observes that the "clear message to law students is that lawyer professionalism, and indeed ethics in general, is [sic] either irrelevant to their lives or something to be deployed instrumentally to further their self-interest." *Id.*

19. *See generally* David B. Wilkins, *Legal Realism for Lawyers,* 104 HARV. L. REV. 468 (1991) [hereinafter *Legal Realism for Lawyers*] (discussing the indeterminacy of ethical rules).

20. Brent Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531, 537 n.49 (1994) (stating that "[i]t is noteworthy that all of these codes were created in the last decade, perhaps indicating recent awareness of the civility crisis, or more appropriately, the shift in focus to the cure of the civility crisis."). *See, e.g.*, STATE BAR OF ARIZ., A LAWYER'S CREED OF PROFESSIONALISM (1989); PULASKI COUNTY (ARK.) BAR ASS'N, CODE OF PROF'L COURTESY (1986); STATE BAR OF CAL., STATEWIDE CODE OF PROF'L COURTESY (1989); BOULDER COUNTY (COLO.) BAR ASS'N, GUIDELINES OF PROF'L COURTESY (1990); DEL. STATE BAR ASS'N, STATEMENT OF PRINCIPLES OF LAWYER CONDUCT (1991); FLA. BAR, IDEALS & GOALS OF PROFESSIONALISM (1990); GA. BAR, ASPIRATIONAL STATEMENT ON PROFESSIONALISM (1990); INDIANAPOLIS (IND.) BAR ASS'N, TENETS OF PROF'L COURTESY (1989); IOWA STATE BAR ASS'N, CODE OF PROFESSIONALISM (1991); JOHNSON COUNTY (KAN.) BAR ASS'N, CREED OF PROF'L CONDUCT (1988); LOUISVILLE (KY.) BAR, CREED OF PROFESSIONALISM (1989); LA. STATE BAR ASS'N, CODE OF PROFESSIONALISM (1991); MASS. BAR ASS'N, STATEMENT ON LAWYER PROFESSIONALISM (1988); MISS. STATE BAR, MISS. CODE OF PROF'L CONDUCT (1990); STATE BAR OF MONT. GUIDELINES FOR RELATIONS BETWEEN AND AMONG LAWYERS (1986); CAMDEN COUNTY (N.J.) BAR ASS'N, CODE OF PROFESSIONALISM (1991); STATE BAR OF N.M., A LAWYER'S CREED OF PROFESSIONALISM (1989); N.C. BAR ASS'N, PRINCIPLES OF PROF'L COURTESY (1989); CLEVELAND (OHIO) BAR ASS'N, A LAWYER'S CREED OF PROFESSIONALISM (1988); OR. STATE BAR, STATEMENT OF PROFESSIONALISM (1990); PA. BAR ASS'N, WORKING RULES FOR PROFESSIONALISM (1989); NASHVILLE (TENN.) BAR ASS'N, STANDARDS OF INTRA-PROFESSIONAL CONDUCT (1987); VA. BAR ASS'N, PRINCIPLES OF PROF'L COURTESY (1988); SPOKANE COUNTY (WASH.) BAR ASS'N, CODE OF PROF'L COURTESY (1989).

unethical and unprofessional is incongruous and dull. Young lawyers must be given the tools that bring that line into focus, enabling them to recognize and avoid professionally abhorrent behaviors. Skills must be developed to enhance behavior replete with civility and responsibility through appearance, actions, words, and deeds.

Given the growth of unprofessional behavior in the legal profession, one may fairly conclude that young lawyers are failing to absorb the importance and practice of professionalism. Numerous limbs comprise the body of the American legal profession: the bench (judiciary), the practicing bar, and the academy. Each limb is as important as the next in fostering professionalism within the legal community, and no one limb can be held solely responsible for the transmission of professionalism values. Yet each limb must bear its fair burden of fulfilling this goal.

The focus of this Article will be law schools' specific role and responsibility in the propaedeutic instruction of professionalism in the legal community.

This article is composed of five sections. Part II of this paper discusses the ubiquitous yet illusory definition of professionalism. Part III addresses the practicing bar's approach to the issue of professionalism, reflecting in Subsection A on the public's perception of lawyers, and discussing in Subsection B the response of the governing bodies to such perception. Part IV highlights the role of legal education in fostering professionalism, discussing in Subsection A the fertile ground for change in the first year of law school, and noting in Subsection B the relationship between law schools and the legal profession regarding the enhancement of professionalism. Part V provides suggestions to increase professionalism "training" in law schools.

II. WHAT IS PROFESSIONALISM?

By watching any one of many available television shows or movies depicting the lives of lawyers, first-semester law students know that "[a] lawyer should represent the client zealously within the bounds of the law."[21] For years, zealous representation once served as a mantra for excellence with adherence to the "zealous" mandate evolving into an excuse for obnoxious, rude, and oftentimes bullying behavior.[22]

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21. MODEL CODE OF PROF'L RESPONSIBILITY, EC 7-37 (1980).

22. Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 767 (1994) (noting that "[z]ealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. . . [it is] the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyer's claim to officer of the court status.").

Many states have recognized that the word "zealous" excused unprofessional behavior among lawyers.[23] Consequently, states have abandoned the idea of "zealous advocacy," and embraced the concept that lawyers "act honorably," not "zealously" in pursuit of clients' interests.[24]

Nonetheless, the "zealous" representation standard persists, both in the learning and practice of law. It therefore remains imperative in legal education that law students recognize that the model of zealous representation does "not countenance unrestrained zeal on the part of an advocate."[25] Such zeal, commendable in itself, is to be exercised within the bounds of the law and within specific professional and ethical considerations.[26] As such, students must be provided both practical and analytical tools to distinguish between "zealousness" and "professionalism."

In 1953, Roscoe Pound articulated a definition of "profession" which serves as a foundational guidepost for entry into the abyss of defining "professionalism."[27] Pound noted that "[t]here is much more in a profession than a traditionally dignified calling" and described the term "profession" as "a group . . . pursuing a learned art . . . in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood."[28] Pound asserted that this "esteemed 'group' should aspire to exhibit behaviors consistent with their professional status: 'professionalism.'"[29] What those "behaviors consistent with the professional status" should look like has not yet been solidified.

While noteworthy attempts have been made, to date no consensus has been reached regarding a firm definition of "professionalism."[30] Fred

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23. Browe, *supra* note 22, at 767.

24. David D. Dodge, *When Lawyers Behave Badly, The "Z" Word, Civility & the Ethical Rules*, 44 ARIZ. ATT'Y 18, 19 (2008), *available at* http://www.myazbar.org/AZAttorney/PDF_Articles/0408EthicsCivility.pdf. Arizona became the first state to abandon the "zealous advocacy" standard. *Id.* Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon and Washington have omitted all reference to zealousness in their rules, preambles and commentary. *Id.* at 20 n.2.

25. Kansas v. Turner, 538 P.2d 966, 970 (Kan. 1975) (acknowledging zealous representation must be carefully measured and exercised with tact).

26. *See id.*

27. *See generally* Roscoe Pound, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953) (Pound was Dean of Harvard Law School at the time of publication of this book).

28. *Id.* at 5.

29. *Id.* at 10. What those "behaviors consistent with the professional status" should look like has not been solidified.

30. *See* Neil Hamilton, *Professionalism Clearly Defined*, 18(4) PROF. LAW. 4 (2008). Professor Hamilton provides a "clear definition" of Professionalism based on analysis of various ABA reports, Chief Justice Reports, and the Preamble to the Model Rules of Professional Conduct, stating that professionalism means that each lawyer:

Zacharias observed that "[n]o term in the legal lexicon has been more abused than 'professionalism.'"[31] It is a "highly contested concept, the symbolic capital of which varies from one part of the bar to another."[32] A lay person, lawyer, or scholar may define professionalism in one word, which necessarily will be dictated by his or her own innate personal beliefs of appropriate behavior for a stated profession.[33]

From competency to candor; adversarial behavior to aspirational behavior; in the legal melting pot, the views of what "professionalism" means may vary and prove to be an illusory or capacious concept.[34] Within the legal profession alone, when the question is posed, the definitions of "professionalism" vary.[35] Any proposed definition would be subjective and

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1. Continues to grow in personal conscience over his or her career;
2. Agrees to comply with the ethics of duty—the minimum standards for the lawyer's professional skills and ethical conduct set by the Rules;
3. Strives to realize, over a career, the ethics of aspiration—the core values and ideals of the profession including internalizing the highest standards for the lawyer's professional skills and ethical conduct;
4. Agrees both to hold other lawyers accountable for meeting the minimum standards set forth in the Rules and to encourage them to realize core values and ideals of the profession; and
5. Agrees to act as a fiduciary where his or her self-interest is overbalanced by devotion to serving the client and the public good in the profession's area of responsibility: justice.
   a. Devotes professional time to serve the public good, particularly by representing pro bono clients; and
   b. Undertakes a continuing reflective engagement, over a career, on the relative importance of income and wealth in light of the other principles of professionalism.

Id. at 8. *See also* Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEX. L. REV. 275, 277-78 (1994) (explaining that the concept of professionalism remains inadequately defined despite passionate support and extensive efforts).

31. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995) (noting that professionalism is an "abused term and is often defined merely as 'to act the way we want lawyers to act'").

32. Austin Sarat, *Enactmnts of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility In Litigation*, 67 FORDHAM L. REV. 809, 814 (1998).

33. The word "civility" is often used interchangeably in describing professionalism. One school of thought believes such use to be misguided, believing that incivility is a symptom of some underlying cause (e.g., out-of-control discovery), and asserts that it may prove harmful to equate norms of civility as precluding challenges to injustices within the legal system. W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S.C. L. REV. 1027, 1031 (2003); *see also* Monroe Freedman and Abbe Smith, *Understanding Lawyers' Ethics* 23 – 25 (3d ed. 2004) (arguing that professionalism's emphasis on civility and courtesy will undermine zealous advocacy).

34. *Id.* at 1029 n.5 ("To make matters even more complicated, "professionalism" as a term, when employed in sociological fields, is defined positively or descriptively, not normatively, and used to identify occupations as professions.").

35. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 37 (1994) [hereinafter PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD]; *see also* Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 731-32 (2001) (noting that the legal profession has grown in size, spread geographically, and become democratized, heterogeneous, and specialized).

constantly changing.[36] Bruce Green states: "'professionalism is a subject on which we lack a shared vocabulary and shared understanding."[37] A word apparently hollow of any moral meaning, it has been suggested that the "language of professionalism" should simply be "jettisoned."[38]

Social academicians have joined the discussion seeking to provide a definition for the term.[39] Eliot Freidson described the "idea" of professionalism as nothing more than a "social label applied to a limited number of occupations considered to be in some way superior to ordinary occupations."[40] Sociologist Bernard Barber espoused a more diverse definition:

> [P]rofessionalism is a matter of degree, varying in terms of such attributes as degree of generalized and systematic knowledge; orientation to community interest rather than self-interest; degree of self-control through internalized codes of ethics and voluntary associations controlled by work specialists themselves; and degree to which a system of monetary and honorary rewards primarily symbolizes work achievement and not individual self-interest.[41]

"Professionalism" has been touted as the "ideology and associated activities in an occupational group whose members aspire to professional status, even though actual professional status may never be achieved.[42]

Others present professionalism as merely a rhetorical device that disguises the pursuit of self-interest as public spiritedness.[43] Simply stated, it is an effort to "assert and protect their own privileged position against the challenges of other lawyers or of outside groups."[44] Professionalism thus

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36. Jack T. Camp, *Thoughts on Professionalism In the Twenty-First Century*, 81 TUL. L. REV. 1377, 1386 (2007).

37. Green, *supra* note 35, at 731.

38. Kevin F. Ryan, *Lex Et Ratio Professionalism And The Practice Of Law (Part One)*, 2001 VT. BAR J. 10.

39. For a general discussion of sociological perspectives on professionalism, see Robert E. Drecshel, *The Paradox of Professionalism: Journalism and Malpractice*, 23 U. ARK. LITTLE ROCK L. REV. 181, 182-83 (2000).

40. Eliot Freidson, Professionalism as Model and Ideology, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 215, 216 (Robert L. Nelson et al. eds., 1992).

41. *See* Bernard Barber, Some Problems in the Sociology of Professions, *in* THE PROFESSIONS IN AMERICA 17-18 (Kenneth S. Lynn ed., 1965).

42. *See* EDITORS' INTRODUCTION TO PROFESSIONALIZATION viii (Howard M. Vollmer & Donald L. Mills eds., 1996).

43. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 12-13 (1976).

44. *See generally* Rue Bucher & Anslem Strauss, *Professions in Process*, 66 AM. J. SOC. 325, 330-31 (1961).

would serve as a device to exclude those groups or marginalize new entrants to the bar.[45] Stephen Goldberg aptly observed that "[p]rofessionalism, ultimately, is no more or less than acculturation into a group with enough in common so its members can identify themselves and each other by what they do and how they do it."[46]

A cross section of state bars were surveyed regarding the definition of "professionalism, resulting in a broad understanding of the word as a "feel-good" concept relating to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors and the public.[47] Harold G. Clarke, Chief Justice of the Georgia Supreme Court, has observed that professionalism "is the kind of thing that you may look at, like the Cheshire cat's grin—you see it now, then you don't see it, but when you finally get through it and see it you have an awfully good feeling about it."[48] The all-encompassing term includes a variety of ideals, traditions, and tenets that have been historically associated with the practice of law.[49] It is a term, however, that can neither be "divorced from nor subsumed by the realities of contemporary practice."[50]

Despite its anomalous nature, one vacuous analogy binds the professionalism debate. As much as one may shudder at the analogy,[51] it is as Justice Potter Stewart remarked in a famous pornography case: "you know it when you see it."[52]

Rather than providing clarification of the types of behavior illustrative of professionalism, the circularity of the definitions tends to increase the

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45. Sarat, *supra* note 32, at 813 (explaining that certain segments of the bar claim a "crisis" in the professionalism area simply to protect their "privileged position").

46. Goldberg, *supra* note 15, at 430.

47. *See* CHIEF JUSTICES' ACTION PLAN, *supra* note 13, at 37.

48. Ellen S. Podgor, *Lawyer Professionalism in a Gendered Society*, 47 S.C. L. REV. 323, 330 (1996) (citing interview with Chief Justice Harold G. Clarke, Supreme Court of Georgia).

49. *See* Wm. Reece Smith, Jr., *Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613, 615 (1997) (defining professionalism as "competence, character, and commitment: competence in serving the client; character in highly principled conduct of professional and civic duty; commitment in service of the client and the public good").

50. *Redefining the "Professional," supra* note 18, at 249.

51. Keith W. Rizzardi, *Defining Professionalism*, 79 FLA. BAR J. 38, 42 (Aug. 2005) (stating that "we should shudder at the realization that pornography and professionalism share a common definition").

52. *See, e.g.,* Jacobellis v. Ohio, 378 U. S. 184, 197 (1964) (Stewart, J., concurring). *See also* Camp, *supra* note 36, at 1379 (noting that "professionalism is a subjective concept, and lawyers are unlikely to agree on a specific definition"); Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 232-34 (2003) (noting that professionalism is incapable of being described in a universally agreed upon manner).

ubiquitous nature of the word.

Lack of professionalism runs the gamut from ill-timed power naps and sleeping habits in courtrooms and inappropriately recorded, expletive-riddled language, to a lack of civility among attorneys and of respect for the judiciary and the practice of law. The list goes on to include inappropriate attire, demeanor, and attitudes which scream "unprofessional" to even the disinterested onlooker.

As ubiquitous the definition of "professionalism" may prove to be theoretically, the broader the definition, the greater the opportunity to flush out unsavory and unacceptable behavior within the profession.[53] As such, any expansive word or term to describe professionalism cannot be banished as undesirable because a narrow term could provide an additional, non-professional arsenal for an espoused "professional." In other words, the "line-toers" would simply then toe-the-line to the defined un-professional behavior.

For lawyers, their desired behaviors must be considered within the constraints of legally and ethically imposed guidelines: namely the Model Rules of Professional Conduct. Professionalism therefore must be viewed as appropriate behavior that enhances a lawyer's adherence to such ethical and legal guidelines in keeping with obligations to clients, the public, and the profession itself. As such, it is not a matter of imposing a "professionalism" standard and providing fodder for the "unprofessional" lawyer to continue his or her line-toeing; rather, it is a necessity to deter those behaviors not conducive to the enhancement of the lawyer's role and to increase behavior commensurate with the profession's societal standing.

While the root of the problem may remain unknown, avenues to change the behaviors need to be established and enforced. Every person in the legal profession, regardless of whether they consider themselves a member of the judiciary, a bar member, or an academician, should have a vested interest in the state of professionalism, however defined.

For its part, the state legal governing regulatory bodies (bar

53. Many states have recognized the danger in limiting the scope of the "professionalism" definition. For example, the Florida Bar Center for Professionalism has been careful to not equate professionalism exclusively with matters of civility. *See* Blan Teagle, Remarks at the University of South Carolina Law Review Professionalism Symposium: Strategies for Bar Associations, *in* 54 S.C. L. REV. 897, 920 (2003); *see also* Gregory N. Smith, *Ethics v. Professionalism and the Louisiana Supreme Court*, 58 LA. L. REV. 539, 546 (1998) (recounting the Louisiana Supreme Court's attempt to define "professionalism" as distinct from "ethics," as that which concerns the knowledge and skill of the law faithfully employed in the service of client and the public good, and entails what is more broadly expected of attorneys).

associations) have aggressively joined the professionalism conversation as they recognize that professionalism "continues to offer a superior approach to influencing the behavior of attorneys in the way most beneficial to society."[54]

III. A SELF-REGULATING PROFESSION THAT IS NOT REGULATING ITS PROFESSIONALISM—THE PRACTICING BAR AND THE JUDICIARY'S APPROACH TO UNPROFESSIONAL BEHAVIOR

Self-regulation is widely viewed as a "hallmark of professional status."[55] By definition, a self-regulatory system allows for vast autonomy over internal affairs, and discretion for the individual members of the profession.

As officers of the court, early English lawyers were subject to the court's direct supervision.[56] In the late 1800s, American lawyers recognized a decrease in public trust of the profession due to a variety of factors, including increasing legal fees.[57] Increasing calls for reform led to the development of a self-regulating bar.[58] By the turn of the 20th century, the American Bar Association (ABA) had embraced the English self-regulating system.[59]

From 1878 until 1902, the ABA was a group of less than 2000 lawyers, selected by local bar organizations and attended by invitation only, who met informally each summer in Saratoga Springs, New York.[60] The stated purposes of this early ABA were: "(1) To advance the science of jurisprudence; (2) To promote the administration of justice; (3) To promote uniformity of legislation throughout the union; (4) To uphold the honor of the profession; and (5) To encourage cordial intercourse among the members of the American Bar."[61]

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54. Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm For Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 35 (1999).

55. *Id.* at 41; RICHARD L. ABEL, AMERICAN LAWYERS 4 (1989) (noting the profession's "exalted social, economic, political and cultural standing").

56. *See* Drake D. Hill, *Balancing the Interests of Lawyers and Non-Lawyers in Regulating Lawyer Conduct*, 43 RUTGERS L. REV. 245, 249 (1991).

57. *Id.*

58. Andrew D. Pugh, *The Antidiscrimination Amendment to Rule 8.4 of the Minnesota Rules of Professional Conduct: An Unnecessary and Unprecedented Expansion in Professional Regulation*, 19 WM. MITCHELL L. REV. 211, 214 (1993).

59. *Id.*

60. *See* GERALD CARSON, A GOOD DAY AT SARATOGA 3-6 (1978); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 3-14 (1953).

61. SUNDERLAND, *supra* note 60, at 17.

In an effort to instigate movement to fulfill the stated purpose, the ABA initially attempted to regulate attorney conduct through promulgation of the Canons of Professional Ethics in 1908.[62] Some sixty years later, the Model Code of Professional Conduct was drafted, which the ABA House of Delegates of the Model Rules of Professional Conduct later adopted in 1983.[63] At the dawn of the new millennium, California, Maine, and New York were the only states that did not have professional conduct rules that followed the format of the ABA Model Rules of Professional Conduct.[64]

The stated purposes of the rules are to protect the public, to preserve the integrity of the legal profession, and to preserve public confidence in the profession.[65] The rules emphasize independent judgment and professional services to every client, and note that "[t]he legal profession is largely self-governing."[66]

Autonomy remains an important hallmark of professionalism. Hundreds of bar associations exist in the United States, including 282 state and local bar associations with at least 300 members.[67] In 2006, the ABA was the largest comprehensive bar association with over 400,000 members.[68] Hundreds of those bar members are subject to disciplinary actions yearly by their state and local bar organizations.[69] Many times, names prominently displayed in the local bar newspaper cite various forms of discipline summarily meted out, from reprimand to disbarment.

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62. *American Bar Association Canon Of Ethics, reprinted in* HENRY S. DRINKER, LEGAL ETHICS 309 (1953). Mr. Drinker was a longstanding member of the American Bar Associations Committee on Professional Ethics and Grievances. He acknowledged that "legal ethics" is impossible, but seemed to adhere to Bouvier's definition that "legal ethics" is that branch of moral science which treats of the duties which a member of the legal profession owes to the public, the court, to his professional brethren, and to his client. *Id.*

63. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY (1980), *available at* http://www.abanet.org/cpr/mrpc/mcpr.pdf; MODEL RULES OF PROF'L CONDUCT (1983), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

64. New York follows the predecessor ABA Model Code of Professional Responsibility, and California and Maine developed their own rules. *See* State Adoption of Model Rules, www.abanet.org/cpr/mprc/model_rules.html.

65. *See* Pugh, *supra* note 58, at 213-14 n.12 (citing cases illustrating courts stating that the critical factor influencing their decisions in legal disciplinary proceedings, is public protection rather than attorney punishment).

66. *See* MODEL RULES OF PROF'L CONDUCT PREAMBLE, para. 10, R. 2.1 (1980); MODEL CODE OF PROF'L RESPONSIBILITY EC 1-1 (1983).

67. ABA DIV. FOR BAR SERVS., 2005 BAR ACTIVITIES INVENTORY (Joanne O'Reilly ed., 2006) [hereinafter 2005 BAR ACTIVITIES INVENTORY].

68. *See* About the American Bar Association, http://www.abanet.org/about/.

69. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 n.1 (2007) (citing statistics from the 2004 Survey on Lawyer Discipline Systems which reported in excess of 125,000 lawyer discipline complaints in 2004 against the 1.3 million lawyers in the United States).

Disciplinary measures are generally provided as a result of behavior, which is not only unprofessional, but also violative of the ethical rules. In a single month one state bar's newspaper reported:

> The [Court] in recent court orders disciplined 34 attorneys, disbarring 12, suspending 14, and placing three on probation. Seven attorneys were reprimanded and four were ordered to pay restitution. Some attorneys received more than one form of discipline.[70]

Disciplinary actions have been instituted for claims stemming from failing to maintain or mishandling trust accounts (including the dreaded co-mingling of funds), neglecting to advise clients of case status, and failing to appear for court hearings, to criminal charges: theft, possession, sale, trafficking of drugs, money-laundering, bank fraud, child pornography, DUI, securities fraud, and aggravated assault. Disciplinary action may also be duly meted out for egregious and unethical violations pursuant to United States Supreme Court's recognition that sanctions for "abusive" litigation may be imposed even when no specific rule is violated.[71]

Despite judicial efforts, the judiciary cannot become the primary source of regulating the behavior of lawyers.[72] The judiciary routinely

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70. *Disciplinary Actions,* THE FLORIDA BAR NEWS, June 1, 2008, at 24.

71. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 50-51 (1991) (upholding an award of nearly one million dollars and holding that explicit textual authority is not a prerequisite to a district court's award of sanctions for litigation abuse).

72. While the judiciary should not be the primary source, it is important to note that it does routinely use its permissive power in that regard. *See, e.g.*, United States v. Ortlieb, 274 F.3d 871, 877 (5th Cir. 2001) (holding that attorney's use of profanity during trial was criminal "misbehavior" that obstructed the administration of justice, warranting conviction for contempt); Lee v. Am. Eagle Airlines, Inc., 93 F. Supp. 2d 1322, 1330 (S.D. Fla. 2000) (reducing Title VII plaintiff attorneys' fee because of his unprofessional and abusive behavior before and during trial, including insulting the court reporter and "trash talk" directed at defendant's lawyers and representatives; the court noted that: "The manner in which a lawyer interacts with opposing counsel and conducts himself before the court is as indicative of the lawyer's ability and skill as is his mastery of the rules of evidence."); Lockheed Martin Energy Sys., Inc. v. Slavin, 190 F.R.D. 449, 461-62 (E.D. Tenn. 1999) (imposing monetary sanctions and sanction of a written apology where defendant's assertion of irrelevant matters to portray plaintiff as an entity of ill repute, and pursuit of a campaign of personal attacks on plaintiff and plaintiff's attorney was found to be violative and undeserving of legal rights and protections, without any legal or rational basis to believe such materials were germane in any way to the court's determination); Edberg v. Neogen Corp., 17 F. Supp. 2d 104, 109-110 (D. Conn. 1998) (noting plaintiff counsel's lack of forthrightness and professionalism in letter sent to her adversary and the threatened use of Rule 11 sanctions to intimidate her adversary into not filing motion to dismiss; noting also defense counsel's curt and uncivil response to letter); In re Ramunno, 625 A.2d 248, 250 (Del. 1993) (lawyer violated disciplinary rules for use of profanity and insulting conduct toward opposing counsel); 5500 N. Corp. v. Willis, 729 So. 2d 508, 514 (Fla. Dist. Ct. App. 1999) (observing that the lack of cooperation between counsel was less than would be expected from "Beavis and Butthead"); Office of Disciplinary Counsel v. Breiner, 969 P.2d 1285, 1294 (Haw. 1999)

comes under attack for using its power to effect social change,[73] and some appellate courts have noted the presence of an outer limit to the judiciary's "inherent powers"[74] to enforce "aspirational civility standards."[75]

(sanctioning attorney to a six month suspension for belligerent behavior at trial, including being argumentative in opening statements, arguing with and being disrespectful to a witness, and making improper comments to the jury, despite repeated warnings by the trial judge); *In re* Wilkins, 782 N.E.2d 985, 986 (Ind. 2003) (statement in footnote of appellate brief impugning integrity of judges by suggesting that court favored opponent regardless of facts or law violated professional conduct rule); *In re* Williams, 414 N.W.2d 394, 397 (Minn. 1987) (en banc) (per curiam) (sanctioning attorney for insults to religious background of opposing counsel); Mink v. Conifer Park, Inc., 531 N.Y.S.2d 400, 403 (App. Div. 1988) (sanctioning plaintiff's counsel for his disruptive tactics and use of coarse and gutter language in addressing opposing counsel); Couch v. Private Diagnostic Clinic, 554 S.E.2d 356, 367 (N.C. Ct. App. 2001) (sanctioning attorney for characterizing defense witnesses and opposing counsel as liars approximately nineteen times during her closing argument); Office of Disciplinary Counsel v. Jackson, 704 N.E.2d 246, 248 (Ohio 1999) (holding that attorney's obscene statement toward opposing counsel warranted a public reprimand); Office of Disciplinary Counsel v. Levin, 517 N.E.2d 892, 893 (Ohio 1998) (per curiam) (issuing public reprimand to attorney who threatened to take his questioner's mustache off his face, to give him "the beating of his life, to slap him across his face, and to break his head;" attorney also addressed opposing counsel in a variety of expletives and otherwise unprofessional terms); Pesek v. Univ. Neurologists Ass'n, 721 N.E.2d 1011, 1017 (Ohio 2000) (finding reversible error where trial court failed to intervene, sua sponte, to admonish counsel for pediatric neurologists and correct the prejudicial effect of counsel's closing argument—in which counsel accused patient's counsel of "half-truths," "untruths," and "the threatening of witnesses, [and] the suppression of evidence," and called patient's expert witness a "second-class expert" who "bought his way into pediatric neurology"); Checker Bag Co. v. Washington, 27 S.W.3d 625, 643-44 (Tex. Ct. App. 2000) (denouncing attorney's attacks on opposing counsel's integrity).

73. *See generally* DONALD L. HOROWITZ, THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS (1977).

74. *See, e.g.*, United Artists Theatre Circuit, Inc. v. Sun Plaza Enter. Corp., 352 F. Supp. 2d 342, 355-56 (E.D.N.Y. 2005) (denying defendant's motion for sanctions where plaintiff had plausible good faith reasons for moving to dismiss the complaint when it did); Maynard v. Nygren, 332 F.3d 462, 471 (7th Cir. 2003) ("There is no authority under the Rules or under the inherent powers of the court to sanction attorneys for mere negligence."); United States v. Johnson, 327 F.3d 554, 562-64 (7th Cir. 2003) (revoking sanction under court's inherent powers where there was no bad faith); New York v. Solvent Chem. Co., 210 F.R.D. 462, 474 (W.D.N.Y. 2002) ("[T]he bad faith standard [for invoking the court's inherent power] is not easily satisfied in the Second Circuit."); Byrne v. Nezhat, 261 F.3d 1075, 1106 (11th Cir. 2001) (affirming Rule 11 sanctions against attorney but vacating sanctions awarded against plaintiff; "Because the court's inherent power is so potent, it should be exercised 'with restraint and discretion.'"); Mathias v. Jacobs, 167 F. Supp. 2d 606, 623-28 (S.D.N.Y. 2001) (holding that magistrate erred in imposing sanctions under court's inherent power against defendant's counsel for taking the deposition of prospective defense witnesses because depositions of witnesses were relevant to asserted defenses and taking of the deposition of one witness did not become sanctionable just because counsel did not reach the issue during the actual deposition); Revson v. Cinque & Cinque, 221 F.3d 71, 83 (2d Cir. 2000) (reversing $50,000 award of sanctions and noting that an award of sanctions under trial court's inherent powers requires both clear evidence that the challenged actions are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes, and a high degree of specificity in the factual findings of the lower courts; a claim is colorable when it has some legal and factual support, considered in light of the reasonable beliefs of the

Hundreds of bar members escape unsavory visits to the judiciary for behaviors that are clearly violative of the Rules, the Models and the Codes; for years they may practice without crossing the boundary into the hedonistic land of the unethical—simply focusing on staying within the bounds of the law. In an effort to stem the steady flow of these "line-toers,"[76] most states now have Rules of Professional Conduct.[77] States have

individual making the claim); Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (noting that there must be a finding of bad faith before a court can exercise its inherent power to sanction); Cooper Tire & Rubber Co. v. McGill, 890 So. 2d 859, 869 (Miss. 2004) (noting that under the rules of civil procedure and the inherent power to protect the integrity of its process, trial court has broad authority to impose sanctions for discovery violations and violations of its orders; however, sanctions of $10,000 against defendant for violating discovery order requiring it to produce or allow inspection of documents reversed because it was a constructive criminal contempt—purely punitive fine which would be paid to the trial court and did not involve rights of plaintiffs or other private parties—therefore, it could not be imposed without procedural safeguards, including that the citing judge recuse himself from conducting the contempt proceeding involving the charges); Walker v. Ferguson, 102 P.3d 144, 147-48 (Okla. 2004) (holding that trial court could not order plaintiff's counsel to pay attorneys fees to defendant as sanction for counsel's causing a mistrial by mentioning in opening statement that defendant driver had been convicted of driving under the influence following the collision giving rise to the action, where the trial court did not find that counsel's conduct constituted bad faith or oppressive conduct); State *ex rel.* Tal v. Oklahoma City, 61 P.3d 234, 247 (Okla. 2002) ("[T]he inherent power was not meant to be a mechanism to sanction or punish parties or their attorneys for raising novel theories or espousing unpopular causes that are neither baseless nor frivolous.").

75. *See* Carnival Corp. v. Beverly, 744 So. 2d 489, 490 (Fla. Dist. Ct. App. 1999) (holding that the trial court abused its discretion in disqualifying counsel because it did not provide clear and unambiguous directions to counsel concerning the conduct requirements at trial); *In re* Lerma, 144 S.W.3d 21, 27-29 (Tex. Ct. App. 2004) (holding that sanctions for filing an allegedly misleading appendix were unwarranted against mandamus petitioner who included in his mandamus appendix a void dismissal order which the trial court signed and faxed to the parties but never filed); Continental Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 189 (Tex. Ct. App. 2000) (holding that Lawyer's Creed provision requiring that a lawyer notify opposing counsel regarding his intent to take a default judgment did not trigger the court's inherent powers, and thus was not enforceable by the courts, so as to require plaintiff that properly served defendant with citation on a sworn account to give further notice).

76. *See* discussion *supra* Part I regarding "line-toers."

77. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming all have Rules or Codes of Professional Responsibility. For an alphabetical or chronological list of states adopting the American Bar Association's Model Rules of Professional Conduct and dates of adoption, *see* American Bar Association, http://www.abanet.org/cpr/mrpc/alpha_states.html. To date, California is the only state that does not have professional conduct rules that follow the format of the American Bar Association's Model Rules of Professional Conduct.

also adopted Creeds of Professional Conduct or some form thereof.[78] Many states and local bar associations have created professionalism committees and commissions.[79] Others maintain professionalism centers created by the state judiciary.[80] At a minimum, most states have continuing education requirements in the areas of ethics and professionalism.[81] As commendable

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78. For example, the Florida Bar's "Creed of Professionalism" (echoing ideals set forth in the Rules of Professional Conduct) states:

> I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each. I will further my profession's devotion to public service and to the public good. I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play. I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone. I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy. I will abstain from all rude disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy. I will respect the time and commitments of others. I will be diligent and punctual in communicating with others and in fulfilling commitments. I will exercise independent judgment and will not be governed by a client's ill will or deceit. My word is my bond.

Florida Bar, Center for Professionalism, *Creed of Professionalism*, *available at* www.floridabar.org/professionalism.

79. *See* PROFESSIONALISM COMMITTEE, AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 2, app. C (1996).

80. For example, the supreme courts of both Florida and Georgia both commissioned Centers for Professionalism. For a general overview of the states leading the professionalism movement, see Thomas E. Richard, *Professionalism: What Rules Do We Play By?*, 30 S.U. L. REV. 15 (2002).

81. *See, e.g.*, ALA. CONTINUING LEGAL EDUC. R. 9.A (requiring lawyers to complete a six-hour course in professionalism within twelve months of being licensed to practice law), *available at* http://www.alabar.org/cle/rules.cfm; ARIZ. SUP. CT. R. 45(a)(3) (requiring a three-hour state bar course every year on professionalism); COLO. CT. C.P.R. 260.2(2) (requiring lawyers to satisfy four of the seven unit continuing legal education ethics requirement every three years by completing a required course on professionalism); DEL. CONTINUING LEGAL EDUC. R. 4(A)(2) (requiring four hours credit every two years in programs which are designated as instruction in legal ethics or professionalism), *available at* http://courts.delaware.gov/cle/rules.pdf; FLA. CT. C.P.R. 6-10.3(b) (requiring five credit hours every three years in legal ethics or professionalism); GA. SUP. CT. R. 8-104(B)(3) (requiring a one-hour course per year on professionalism); KAN. SUP. CT. R. 802(a) (requiring two hours per year in the area of professional responsibility, which includes legal ethics, professionalism, and malpractice prevention); KY. SUP. CT. R. 3.661(6) (requiring two credit hours per year in legal ethics, professional responsibility, or professionalism); LA. SUP. CT. R. 3(c) (requiring one credit hour in professionalism every year); MINN. CONTINUING LEGAL EDUC. R. 3 (requiring three credit hours every three years in "courses in ethics and professional responsibility," defined to include courses specifically addressing professionalism, although not limited to such courses), *available at* http://www.mbcle.state.mn.us/mbcle/pages/rules.asp; MO. SUP. CT. R. 15.05(f) (requiring three credit hours every three years in professionalism, legal or judicial ethics, or malpractice prevention); N.H. SUP. CT. R. 53(A) (requiring two credit hours per year in legal ethics, professionalism, or the prevention of malpractice, substance abuse, or attorney-client disputes); N.Y. CT. R. § 1500.12(a) (requiring newly admitted attorneys to complete a total of three credit hours in ethics and professionalism within the first two years of admission to the Bar, and requiring experienced attorneys to complete four credit hours every two years in ethics and professionalism); PA. R.C.L.E. 105(a) (requiring twelve hours per year of continuing legal

as these rules, committees, commissions and requirements should be considered, the danger still lurks that attorneys rely on the "rule" and not the spirit of professionalism.[82]

Despite an entrenched system of self-regulation, the public's perception of lawyers and their failure to adhere to the spirit of professionalism continues to be a source of primary concern for the profession.[83] Lawyers generally believe that declining public perception is, if not a "crisis," at least a significant problem.[84] The judiciary echoes this lamentable sentiment.[85]

A. THE PUBLIC PERCEPTION OF LAWYERS

"The first thing we do, let's kill all the lawyers."[86]

Scholars have disagreed on the true meaning of the Shakespearean statement; some argue that it was merely Shakespeare's effort to praise the profession as the guardian of states plagued by conspirators.[87] However, its plain language could very well echo the perception of the legal profession held by the public: that the members of the profession, because of their

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education in general; subjects include substantive law, lawyer ethics, professionalism, and substance abuse); TENN. SUP. CT. R. 21(3.01) (requiring three credit hours every three years in ethics and professionalism); VA. SUP. CT. R., pt. 6, § 4, P 17(C)(1) (requiring a course for recent admittees and two credit hours per year in legal ethics or professionalism); WASH. GEN. R 26 (requiring six credit hours every three years in legal ethics, professionalism, and professional responsibility).

82. Don J. Young, and Louise L. Hill, *Professionalism: The Necessity for Internal Control*, 61 TEMP. L. REV. 205, 209 (1988) ("As we rely increasingly upon formalistic rules, we appear to be abandoning the underlying tenets of 'professionalism'" (citing ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953))).

83. Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 947 (2002) (stating that "the perceived decline in lawyer "professionalism" generates anguished cries").

84. *See generally* Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144 (Robert L. Nelson et al. eds., 1992). *See also* Amy C. Black & Stanley Rothman, *Shall We Kill All the Lawyers First? Insider and Outsider Views of the Legal Profession*, 21 HARV. J. LAW & PUB. POLICY 835, 856 (1999).

85. *See, e.g.*, Chevron Chem. Co. v. Deloitte & Touche, 501 N.W.2d 15, 19-20 (Wis. 1993) ("There is a perception both inside and outside the legal community that civility, candor and professionalism are on the decline in the legal profession and that unethical, win-at-all-costs, scorched-earth tactics are on the rise.").

86. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, line 73 (Sylvan Barnet ed., 1989) (1623).

87. *See, e.g.*, Serena Stier, *Legal Ethics: the Integrity Thesis*, 52 OHIO ST. L.J. 551, 552 (1991) (stating that when Shakespeare's words are taken in context, such words "relate the intent of conspirators to take over the state and get rid of those who might protect the peace and the law of the land – the lawyers").

unsavory reputations, are worthy of being first in line for eradication.

Dr. Kenneth Kipnis observed that professions like law and medicine are "interesting" as a result of "three distinct but connected features": a certain claim to maximal competence in some set of pursuits; a specific commitment to the realization of certain social values; and exclusive social reliance upon the profession.[88] The "professionalism" of law and medicine, however, are shaped in different ways and viewed differently by the general public.[89] As far back as Biblical times, law was a disparaged profession.[90] Disparagement turned to near-repulsion during Colonial, Republican, and Jacksonian periods.[91] Nonetheless, public perception of lawyers has

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88. Kenneth Kipnis, *Ethics Expertise in Civil Litigation*, 33 J.L. MED. & ETHICS 274, 277 (2005). The pursuits as noted by Dr. Kipnis are: the certification that practitioners obtain in accredited educational programs, the constant updating of the curriculum, the continuing education requirements, the exams that candidate-professionals must pass. *Id.* He notes that the oversight they must undergo are all intended to ensure a high levels of competency among the profession's membership. *Id.* With regard to the social values, Dr. Kipnis also notes that those values are also referred to as "core professional values." *Id.* Dr. Kipnis explains that core professional values "are the profession's answer to the question: what do we care about?" *Id.* Dr. Kipnis aptly states that "a profession's core values should be ones that practitioners broadly embrace, that the profession's novices are taught how to secure and further, and that the communities served by the profession want practitioners to take seriously." *Id. See also* K. Kipnis, *Medical Ethics Education in a Problem Based Curriculum* 2000 NEWSLETTER ON PHILOSOPHY AND MEDICINE 1 (American Philosophical Association, Newark, Del.), Fall 2000, *available at* http://www.apaonline.org/publications/newsletters/v00n1_medicine_05.aspx. Dr. Kipnis identifies the exclusive social reliance up on the profession stating that "to the extent that a profession's claims to maximal competency are legitimate, and to the extent that the profession is reliably committed to the realization of significant social values, it is reasonable to delegate to the profession exclusive responsibility for the delivery of its distinctive services to the community as a whole." *Id.*

89. *Redefining the "Professional," supra* note 18, at 251-58 (basing observations on a Harvard University professionalism interdisciplinary course). Professor Wilkins notes that professional education [from the feel of the classrooms to the lecturing styles of faculty members], shapes lawyers and doctors in subtly different ways. *Id.* at 255-56. He explains:

> [L]awyers are taught to argue and challenge authority from the moment they arrive, and have limited opportunities to form mentoring relationships with experienced lawyers. . . . Medical students, on the other hand, spend the first two years of their education passively absorbing large quantities of data and immediately enter into complex hierarchical relationships in which they start at the bottom with the expectation that they will eventually work their way to the top. At the same time, these relationships offer medical students an opportunity for mentoring and a real immersion in the medical profession's ideals unmediated (or at least only partly mediated) by the profit motivations that attend mentoring relationships in law to the extent that they exist at all.

Id. at 256.

90. *Luke* 11:46 (New American) ("And he said, 'woe also to you scholars of the law! You impose on people burdens hard to carry, but you yourselves do not lift one finger to touch them."); *Luke* 11:52 (New American) ("Woe to you, scholars of law! You have taken away the key of knowledge. You yourselves did not enter and you stopped those trying to enter.").

91. For a general review of the public perception of lawyers, see Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

actually improved over the years.[92] In surveys taken by actual clients, large majorities report that they are "very satisfied" or "somewhat satisfied" with their lawyer.[93] Despite their perceived necessity[94] and some improvement in public perception, lawyers have continued to suffer some form of unpopularity by the public.[95] As one attorney put it, "[a]s long as there have been lawyers, there have been critics condemning them for their cramped souls, their devotion to lucre, their abusive and uncivil ways."[96]

Once viewed as a profession of prestige, the public perception of law as a profession has steadily declined.[97] An overabundance of lawyer jokes lends to the negative stereotypes and disparaging public perception.[98] The problem with lawyer jokes, however, is twofold: first, "lawyers don't think they are funny"; and second, "everyone else doesn't [sic] think they are jokes!"[99]

Over the years, "the morally ambiguous universe in which lawyers live" has "delighted script writers" and "fascinate[d] the public."[100] Such fascination is rather misplaced, as the public continues to perceive lawyers as "confrontational, manipulative, unscrupulous, arrogant, and greedy."[101]

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92. Galanter, *supra* note 91, at 808 (discussing the perception of lawyers per public opinion surveys; the surveys note that over half of American adults have used lawyers and most report themselves satisfied with the service provided).

93. *Id.*

94. Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1417 (1999).

95. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94-96, 303-04 (2d ed. 1985) (1973); *see also In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 251 (1986) ("has our profession abandoned principle for profit, professionalism for commercialism"?) [hereinafter *In the Spirit of Public Service*].

96. Ryan, *supra* note 38, at 9.

97. *See* Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6. The Harris survey showed that the percentage of the public who viewed the law as very prestigious had dropped from 36% in 1977 to 19% in 1997; for a general review of empirical data concerning public perception see several studies commissioned in the 1980s assessed the declining public perception of lawyers, finding a "surprising level of mistrust and dislike of lawyers and the legal profession in general." *Id.* See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345-46 (1997).

98. Gross, *supra* note 94, at 1405 (recounting typical lawyer jokes, such as "[H]ow many personal injury attorneys does it take to change a lightbulb? Three – one to turn the bulb, one to shake him off the ladder, and one to sue the ladder company.").

99. *Id.*

100. Stephen Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607, 1617 (1989) (discussing the attempt of the show "L.A. Law" to capture morally ambivalent professional dilemmas experienced by lawyers).

101. Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 368 (1996).

Such unpopularity may very well be a result of a number of different factors, including: jealousy; concern that lawyers make matters as unintelligible as possible for laymen in order to enhance the lawyer's own position; association of lawyers with unpopular clients and unpopular causes; and the perception that the wealthy get a different brand of justice than the poor.[102]

In a national survey conducted on behalf of the ABA Section of Litigation, consumer confidence in the legal profession ranked only above the media.[103] Less than one in five of consumers (19%) say that they are "extremely" or "very confident" in the legal profession or lawyers.[104] Slightly fewer (16%) expressed confidence in the media.[105]

A recent Gallup Poll found that when the honest and ethical standards of different occupations were ranked, lawyers ranked near the bottom receiving just 15% of the public vote—well below nurses, doctors, teachers and policemen, and just barely above lobbyists, car salesmen, and state officeholders.[106]

A state survey showed that 44% of people had little or no respect for lawyers; a nineteen percent increase from twenty-five percent eight years earlier.[107] Lawyers had the dubious distinction of belonging to the least liked profession. Attorneys themselves believe that the public has an even worse view of them. Among New Jersey attorneys, 86.2% believe the public is becoming more anti-lawyer; only 12.1% believe that the image of lawyers is not deteriorating and 1.7% have no opinion.[108]

B. THE "GOVERNING BODIES" RESPONSES TO THE TROUBLING PUBLIC PERCEPTION OF THE LEGAL PROFESSION

Under the direction of former president Justin Stanley, the American Bar Association formed its Commission on Professionalism in response to the growing concern of those in the legal profession that the profession was

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102. *See* Gross, *supra* note 94, at 1459.

103. *See* Lee J. Shapiro & Associates, PUBLIC PERCEPTION OF LAWYERS: CONSUMER FINDINGS (Apr. 2002), *available at* http://www.abanet.org/litigation/lawyers/publicperceptions.pdf.

104. *Id.* at 6.

105. *Id.*

106. Gallup Poll, *Honesty/Ethics in Professions*, http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx.

107. *See* Peter Wallsten, *Commission Aims To Help Lawyers Be More Appealing*, ST. PETERSBURG TIMES, Oct. 2, 1996, at 10B.

108. *See* Gross, *supra* note 94, at 1416 (citing Rocco Cammarere, *How Lawyers See Their Image: From Bad to Worse*, N.J. LAW., Apr. 29, 1996, at 1).

"moving away from the principles of professionalism," a shift "so perceived by the public."[109] In large part due to the writings and commentary of Chief Justice Warren E. Burger,[110] one of the earliest professionalism advocates,[111] *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (Stanley Commission Report) was prepared and finalized in 1986.[112] "This report fanned into flames a concern that had been smoldering since the late 1960s," advocating twenty-six recommendations to improve and strengthen the principles of professionalism in the legal profession.[113] Within the Stanley Commission Report are specific challenges that invite action directed to the organized bar, the judiciary, the law schools, and every individual lawyer to restore a high level of professionalism in the spirit of public service.[114]

Six years later (July 1992), the ABA's Section on Legal Education and Admissions to the Bar, chaired by Robert MacCrate, issued a report entitled "An Educational Continuum Report of The Task Force on Law Schools and the Profession: Narrowing the Gap" (also known as The MacCrate Report).[115] The central mission of the MacCrate Report Task Force was stated as follows:

> To identify those skills and values, to describe what law schools and the practicing bar are now doing to advance the professional development of lawyers, and to recommend how the legal education community and the practicing bar can join together to fulfill their respective responsibilities to the profession and the consuming public . . . .[116]

The Task Force dismissed the notion of a "gap" between law schools and the practicing bar.[117] Instead the Task Force observed that "[t]here is only an arduous road of professional development along which all

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109. *See generally In the Spirit of Public Service*, *supra* note 95.

110. Thomas E. Richard, *Professionalism: What Rules Do We Play By?*, 30 S.U. L. REV. 15, 20 (2002).

111. *Id.*

112. *See generally In the Spirit of Public Service*, *supra* note 95.

113. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 260 (1995).

114. *See generally In the Spirit of Public Service*, *supra* note 95.

115. *An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, *available at http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html* [hereinafter *MacCrate Report*]. Robert MacCrate was chair of the task force. *Id.*

116. *Id.*

117. *Id.*

prospective lawyers should travel,"[118] therefore concluding that "[i]t is the responsibility of law schools and the practicing bar [collectively] to assist students and lawyers in developing the skills and values required to complete the journey."[119]

In 1996, the ABA's Section of Legal Education and Admissions to the Bar issued the 1996 Haynsworth Report in an effort to "better inculcate a higher sense of professionalism among American lawyers."[120] The Haynsworth Report noted particularly that there is a "loss of an understanding of the practice of law as a calling" and "the loss of civility."[121]

Concerned about the decline in the public's perception of lawyer professionalism, the Conference of Chief Justices (CCJ) adopted the National Action Plan on Lawyer Conduct and Professionalism in January of 1999.[122] The National Action Plan defined professionalism as follows:

> Professionalism is a much broader concept than legal ethics. . . . [P]rofessionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds minimum ethical requirements. Ethics rules are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic. The bench and the bar can create an environment in which professionalism can flourish, and these recommendations are intended to assist in that endeavor. But it is the responsibility of individual judges and lawyers to demonstrate this characteristic in the performance of their professional and personal activities.[123]

More than a decade after the CCJ adopted the National Action Plan, the Carnegie Foundation for the Advancement of Teaching documented findings that legal education and the profession itself could do substantially

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118. MacCrate Report, *supra* note 115.

119. *Id.*

120. *Teaching and Learning Professionalism*, 1996 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR [hereinafter *Haynsworth report*]. Harry Haynsworth was chair of the task force. *Id.*

121. *Id.* at 3.

122. *A National Action Plan on Lawyer Conduct and Professionalism*, 1999 CONFERENCE OF THE CHIEF JUSTICES, *available at* http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html [hereinafter *National Action Plan*].

123. *Id.* at 2.

better at socializing students into an ethical professional identity.[124] The Carnegie Foundation left no doubt as to the importance of the role of legal academia in the fight to maintain professionalism.

Notwithstanding the widespread dissemination, review, and use of those reports, concerns about a perceived decline in lawyer professionalism and the decline's effect on public confidence in the legal profession and the justice system have persisted.[125] The "tenaciously negative perception" of the legal profession has continually raised concerns about the integrity of the judicial process and the rule of law.[126]

IV. WHAT IS THE LAW SCHOOL'S ROLE IN FOSTERING PROFESSIONALISM IN THE LEGAL PROFESSION?

In most law schools, professionalism is largely identified with the standard version of legal ethics as articulated in the Codes, Models and other official sources through courses such as Professional Responsibility or Ethics.[127] This narrow definition has, as one scholar observed, left such courses vulnerable to the criticism that the rules merely enforce the "self-interested view" of lawyer professionalism or that they "attempt to teach a personal moral code that bears little or no relationship to the competence or the mission of legal education."[128] The confinement of professionalism to Professional Responsibility, an ABA mandated course, marginalizes its importance to malleable law students.[129] As Professor Deborah Rhode

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124. WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126-47 (2007).

125. *See generally* Hamilton, *supra* note 30.

126. Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1257 (1992); *see also* Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531, 531 (1994) (observing that "there exists today a substantial civility deficit in the legal profession").

127. ABA, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE § 302(a)(iv) (2009), *available at* http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf [hereinafter ABA STANDARD 302(a)]. Codified precepts for American lawyers have their genesis in the ABA's Canons of Professional Ethics, adopted in 1908. In 1969, the ABA replaced the Canons with the Model Code of Professional Responsibility which was succeeded by the Model Rules of Professional Conduct in 1983. In 2002, the ABA adopted its most significant modification of the Model Rules since 1983 with the adoption of changes recommended by the ABA's Ethics 2000 Commission. For a historical discussion of these transitions, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249-60 (1991).

128. *Redefining the "Professional," supra* note 18, at 245.

129. In 1974, in part due to the events of the Watergate scandal which involved attorneys in the highest seats of government, the ABA House of Delegates voted to amend the standards to require for the first time a substantive curricular requirement—the teaching of professional responsibility. Standard 302(a) of the American Bar Associations Standard for Approval of Law Schools and Interpretations now reads in part:

eloquently stated, ethics and professionalism have been "ghettoized" into one professional responsibility course."[130]

Law schools provide new lawyers with their first exposure to the appropriate standards of the profession.[131] This exposure therefore holds a centrally important role in development of professional behavior.[132] Law schools necessarily have a responsibility in developing attitudes and dispositions consistent with professionalism, making it "unthinkable today that law schools should be unable or unwilling to accept that responsibility."[133]

In most institutions of legal academia however, law professors focus on teaching scholarly agendas and service entrenched in theory, doctrine, and analysis.[134] This approach leaves little room for reflection and action regarding the importance of professionalism values that may seem tangential.[135] Stephen Goldberg notes that "[t]he faculties responsible for

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> The law school shall offer . . . and shall provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction.

ABA STANDARD 302(a), *supra* note 127. For an overview of the assimilation of Professional Responsibility courses into American law schools, see James L. Baillie & Judith Bernstein-Baker, *In The Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education,* 13 LAW & INEQ. 51, 63 (1994) (addressing ABA Standard 302 (a), as written in 1974, and noting that the standard "reflects the profession's view that learning professional responsibility is a fundamental educational objective of legal education").

130. 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. LAW REV. 495, 521-22 (2003) (noting that ethical issues need to be integrated into the whole curriculum in a pervasive manner).

131. Camp, *supra* note 36, at 1394. *See also* Douglas S. Lang, The *Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism,* 42 S. TEX. L. REV. 509, 511-12 (2001) (explaining that new law students come to school with no knowledge of professional standards).

132. Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue Of Introspection: An Essay on Professionalism In The Law School Environment,* 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 118 (2001).

133. *Id.* at 132.

134. *See id.* at 144-45. The authors acknowledge that amongst law professors, the development and maintenance of professional reputations, both of individuals and of institutions, depend heavily on scholarly publication, making strong incentives to maximize the amount of time spent in scholarship; and illustrating that, despite the appropriately placed emphasis on scholarship, law schools have other purposes as well, including the preparation of students for the pursuit of a profession. *Id.*

135. *Id.* at 144. The authors note that many law professors have somewhat limited awareness of current problems in the profession for a variety of reasons, including the fact that the practice experience of many law professors at many prominent law schools will have been brief, and the life and concerns of practice soon seem far removed from current intellectual interests, even in the

law school curricula have not thought much about professionalism, have not agreed about the existence or the nature of the problem when they have thought about it, and would have little idea of what to do if they could agree."[136] As such in the law school setting, giving effect to these additional aspects of professionalism too often appears to be second-seated to teaching theory, doctrinal principles, and analytical skills.[137]

The life of a law professor, as esoteric as it may be, is not as simple and limited as portrayed in pop culture.[138] The modern law professor fulfills multiple roles. Teaching the law may be a simple task compared to the requirements to juggle demands on time from students (both in and outside the classroom) and institutional demands (from scholarship, service, and committee). Just as importantly, "[law professors] are also individual human beings who must deal authentically with their own values and relationships and the people who depend upon them."[139]

Academicians' stated primary focus rests on scholarly pursuits, with teaching/instruction a close second and oftentimes concordant goal. Clearly, the focus on scholarly pursuits is not misdirected. Hegemonic at their goals and objectives, institutions of higher learning serve to broaden the intellectual landscape of the world by contributing to the enhancement of knowledge and advancement of positively transformative ideas and concepts. The mission of higher education is to create and disseminate knowledge; such creation necessarily includes the scholarship of discovery,

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case of those who practiced for substantial periods. *Id.*

136. Goldberg, *supra* note 15, at 414.

137. Sullivan & Podgor, *supra* note 132, at 118.

138. *See generally* SCOTT TUROW, ONE L 24-26, 32-38 (1977). In addition to literature depicting law professors as aloof and philosophically removed from their craft, television shows and movies also portray law professors as stern and Socratic with little to no other facets about them. *See also* JOHN JAY OSBORN, JR., PAPER CHASE (1971), and the subsequent movie in 1973 and television series based on the movie.

139. Sullivan & Podgor, *supra* note 132, at 137. The many roles of law professors each have "requirements and moral demands that must be given effect and harmonized in some way." *Id.* Professors Sullivan and Podgor espouse the idea that the effectiveness of law professors depends necessarily on their ability

> to recognize the moral challenge of accommodating [the] competing claims, on the attitude with which they approach that task, on the degree of success they have in doing so, and, indeed, on the perception of others that they have actually worked out the conflicting claims in a true and responsible way.

Id. The authors surmise that

> Law teachers cannot be effective teachers of professionalism by example if they place the demands of scholarship or their personal lives over the responsibilities they owe their students, or otherwise demonstrate that they are unable to live lives that take seriously the parts of the morally complex role that they have undertaken to perform.

Id. at 137-38.

integration, application, and teaching.[140] Individual and institutional scholastic endeavors in that vein possess unquantifiable value that cannot be diminished.[141]

Legal academia has ostensibly promulgated principles of professionalism toward fulfilling the obligation to broaden the intellectual landscape. Scholarship focusing on professionalism has been recognized as a necessity.[142] Despite this recognition, the prolific dialogue in academia concerning professionalism has been arguably ineffective.[143]

In his essay *Professionalism Clearly Defined*, Neil Hamilton summarizes the "[d]efinition of [p]rofessionalism in [l]egal [s]cholarship" as three "typical varieties."[144] The first variety assumes the definition of "professionalism" to be self-evident, describing the problems in the profession and equating them with a lack of professionalism.[145] The second variety attempts to define "professionalism" by focusing on one of more specific characteristics, such as the professional standards created by the ABA or individual morality and respect for the human beings and the community the lawyers serve.[146] The third variety summarily dismisses "professionalism" as a misguided concept.[147]

Bolstering any lethargic attitudes regarding the "teaching" of professionalism, it has been critically argued that professionalism education becomes nugatory when new lawyers are faced with the stressors related to practicing law, such as the pressure to generate billable hours.[148] The critics

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140. Neil W. Hamilton, *The Ethics Of Peer Review In The Academic And Legal Professions*, 42 S. TEX. L. REV. 227, 230-32 (2001).

141. *See* Sullivan & Podgor supra note 132, at 145 n.61 (discussing how faculty scholarship is used to measure the success of law schools).

142. *See* Croft, *supra* note 126, at 1342 (discussing the increased academic interest in professionalism in the post-Watergate period).

143. *See generally* Bridget McCormack, *Teaching Professionalism*, 75 TENN. L. REV. 251 (2008) (noting that, "[r]egrettably, current trends in legal education focus little attention on the development of this "everyday professionalism").

144. Hamilton, *supra* note 30, at 5.

145. *See id. See also* Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEXAS L. REV. 275, 277-278 (1994) (noting that professionalism is often treated as a "self-evident concept requiring no definition"); Freedman and Smith, *supra* note 33.

146. Hamilton, *supra* note 30, at 5. The other characteristics include (1) a set of core values, (2) a commitment to public service, and (3) client-oriented service. *Id.*

147. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 263 (1995) (challenging the work of the Bar and scholars on professionalism on grounds that movement has become an altogether too simplistic "crusade" based on an implicit assumption that there is one universal way to be a legal professional which categorically condemns certain conduct).

148. *See* Ryan, *supra* note 38, at 9.

suggest that such programs have "bleak prospects" of improving the practice of law, since unethical (and arguably, unprofessional) behavior results mainly from deep character roots.[149] Admittedly, "character" can be "changed." The change takes a long time, but is possible through "the result of action, reflection on action, and further action."[150]

Action and reflection's underpinning roots should be planted during law school. Yet, as powerful as law schools may be, it cannot honestly be believed that they can change those recalcitrant souls who are "resolutely amoral."[151] As Professor Wendel observed "[for law students and lawyers] who simply refuse to pay any heed to ethical reasoning, there is little that any educational efforts associated with the professionalism movement, no matter how well conceived, can do."[152] The effort still must be made because professionalism begins well before one's first day in court.[153]

Any preconceived ideas that new students possess about the practice of law must be refined and reshaped where necessary in a manner to produce professional behavior.

A. THE IMPORTANCE OF THE 1L YEAR

The most important years of a person's life are infancy—years providing the best opportunity to shape character content and habitually developed behavioral norms.[154] Similarly, the most important years of legal infancy arguably are the three years of law school, with special importance granted to the first year. The comparison is not inapt.

From the moment an individual enters the doors of a law school to commence law school studies, that new student begins to lay the foundation of his or her professional career.[155] Analogizing the first year of law school

149. *See* Ryan, *supra* note 38, at 9.

150. *Id.*

151. *See* W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 602 (2001).

152. *Id.* (quoting White House counsel John Dean on his role in the Watergate scandal: "I knew that the things I was doing were wrong, and one learns the difference between right and wrong long before one enters law school. A course in legal ethics wouldn't have changed anything.").

153. *See* Kara Anne Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815, 825 (1999).

154. *See, e.g.* ARNOLD GESSEL, M.D. ET AL., THE FIRST FIVE YEARS OF LIFE: A GUIDE TO THE STUDY OF THE PRESCHOOL CHILD, FROM THE YALE CLINIC OF CHILD DEVELOPMENT (1940). A summary of Dr. Gessel's findings is available online at http://www.mathcs.duq.edu/~packer/DevPsych/DPmain.html. *See also* SANDY JONES ET AL., BABY'S FIRST YEAR (2007) (discussing the first year of a child's life); REX FOREHAND, PH.D. & NICHOLAS LONG, PH.D., PARENTING THE STRONG-WILLED CHILD 10-12 (2002).

155. Nagorney, *supra* note 153, at 825.

to other institutional initiation, it has been stated:

> [T]he 1L year can be understood as a process of identity homogenization in which students are broken down and "detached" from their connections to the lives they lived before. This process can be a painful one. People come to law school with commitments to ideals and causes, but even more significantly, they come with a sense of self—of being a unique person with a particular history, rhythm of life, perspective on the world, and style of interacting with others. First-year students arrive imagining that they will draw upon these particular features of personal identity through the course of this new challenge. Instead, the lesson learned in the first term of life in the total institution of [the law school] is that personal identity is largely irrelevant to their legal education and careers.[156]

Students and lawyers come to the study and practice of law with their own sources of values and precepts based on those values. A legal education process that provides a platform from which the student-lawyers might conceptualize themselves in relation to the law becomes necessary to provide a perspective which would "reinforce that who they are as lawyers matters as much as legal competency."[157] They then come to realize that law is a logical process involving building blocks, which promote fairness and rationality.[158]

Psychological research indicates that significant changes in an individual's basic strategies for dealing with moral issues occur during early adulthood.[159] Through interactive education, individuals can enhance skills in ethical analysis and increase their awareness of the situational factors that skew judgment.[160]

The first year of a legal career, akin to the first year of life, is a fertile landscape for the enhancement both of analytical skills and professional behavior. The opportunity to educate first year law students beyond the pedagogical and institutional skills should be wholeheartedly embraced by

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156. *See generally* Note, *Making Docile Lawyers: An Essay On the Pacification of Law Students*, 111 HARV. L. REV. 2027 (1998).

157. Natasha T. Martin, *Allegory From The Cave: A Story About A Mis-Educated Profession and The Paradoxical Prescription*, 9 LEWIS & CLARK L. REV. 381, 416-17 (2005).

158. *See* Omar Saleem, *The Physics of Fourth Amendment Privacy Rights*, 43 T. MARSHALL L. REV. 147, 150 (2007) (discussing the connection between the study of law and rationality).

159. *See* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 46 (1992). *See also* James Rest, et al., *An Overview of the Psychology of Morality*, *in* MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY (1986).

160. Rhode, *supra* note 159, at 46. Over 100 studies evaluating ethics courses find that well designed curricula can significantly improve capacities for moral reasoning. *Id.* at 46-47.

legal academia in its esteemed position on the front lines of the professionalism debate.

B. THE RELATIONSHIP BETWEEN LEGAL ACADEMIA AND THE LEGAL PROFESSION REGARDING THE ENHANCEMENT OF PROFESSIONALISM

Despite recognition of the importance of professionalism "education," there is, notably, a growing separation between law schools and the legal profession itself, particularly regarding who bears the burden of professionalism teaching.[161] Such perceived separation, however, has not caused any wavering of the organized bar's focus on legal academia as a primary source to increase professionalism among the bar itself.[162] The bar's focus remains firm despite the varied views on professionalism and the widening abyss separating practicing attorneys from legal academicians.[163]

Over a decade ago, the MacCrate Report admonished that "[l]egal educators and practicing lawyers should stop viewing themselves as separated by a "gap" and recognize that they are engaged in a common enterprise—the education and professional development of the members of a great profession."[164] Having reached the conclusion that the task of educating students to assume the full responsibilities of a lawyer is a "continuing process that neither begins nor ends with three years of law school study," the Task Force sought to identify the role of law schools in assisting prospective lawyers.[165] The Task Force clearly recognized that the skills and values of the competent lawyer are developed "along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career.[166]

Other studies and reports generated during the past few decades (e.g. Clare Proposals,[167] Indiana Supreme Court's Rule 13, Cramton Report,[168]

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161. *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34 (1992) (discussing the growing disfunction between legal education and the legal profession as a recurring theme throughout his article).

162. Goldberg, *supra* note 15, at 417.

163. *See generally* Edwards, *supra* note 161.

164. *See generally* MacCrate Report, *supra* note 115.

165. *Report of the Professionalism Committee: Teaching and Learning Professionalism*, 1996 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR [hereinafter *Teaching and Learning Professionalism*].

166. *Id.*

167. In response to Chief Justice Warren Burger's urgence that lawyers not fully trained in trial law be prohibited from litigating in federal court, a committee appointed by the United States Court of Appeals for the Second Circuit in 1973 circulated the "Clare Proposals" which included

and the Carrington Report[169]) highlighted the disparity between legal academicians and the practicing bar—and the need to improve legal education.

The consensus perception is that legal academia consists of a hermitic group disconnected from the profession. Goldberg notes, law school teachers seemingly lack practice experience and merely provide "lip service" instructions in legal ethics and professionalism.[170] The implication is that law schools have little interest in professionalism instruction of any kind.[171] The assertion is made that "much of law school's pedagogical activity presumes that issues of professionalism are somehow, somewhere, being handled."[172] Summarily, law schools evade and inadequately develop an ethos of professionalism in law students.[173]

The query floats like a dangling participle: Have academicians strayed so far from the actual practice of law to notice the need for increased

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the proposal that only lawyers who had taken trial advocacy, ethics, criminal procedure, civil procedure and evidence in law school could practice in the Circuit's district courts. The Proposals were not adopted, yet they still alerted legal educators across the country of the need for added attention on "practice" training. *See Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 161, 168 (1975) (noting that the Clare Committee proposed that attorneys be required to complete courses in evidence, criminal law and procedure, professional responsibility, trial advocacy, and civil procedure as a prerequisite to practicing law in the Second Circuit). For a general discussion on the Clare Proposals, see Michael I. Swygert, *Valparaiso University School of Law, 1879-2004: A Contextual History*, 38 VAL. U. L. REV. i (2004).

168. *Report and Recommendation of the Task Force on Lawyer Competency: The Role of the Law Schools* 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR, [hereinafter Cramton Report]. Roger Cramton was the chairman of the task force.

169. In 1971, the AALS, funded by a grant from the Ford Foundation, published a report, known generally as the Carrington Report, which concluded that, among other things, "[s]chools should free themselves of received dogmas, such as the conception that all graduates must be trained to omnicompetence, or that the first degree in law can be awarded only after three years of law study within the walls of a law school." CURRICULUM STUDY PROJECT COMMITTEE, ASSOCIATION OF AMERICAN LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971, 1971 ASS'N AM. L. SCH., Pt. 1 § 2, *reprinted in* HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 93, 97 (1972).

170. Goldberg, *supra* note 15, at 418-21 (pointing to the legal faculties' general lack of practice experience, among other things, as a reason why professionalism is not often addressed in classes other than formal professional responsibility or ethics courses).

171. Goldberg, *supra* note 15, at 417.

172. *See generally* John E. Montgomery, *Incorporating Emotional Intelligence Concepts Into Legal Education: Strengthening The Professionalism of Law Students*, 39 U. TOL. L. REV. 323 (2008) (recommending that instruction about emotional intelligence competencies be incorporated into the existing law school curriculum because it would strengthen an ethos of professionalism among law students and better support the profession's efforts to increase the professionalism of lawyers).

173. *Id.* at 323.

professionalism? Undoubtedly, Professional Responsibility as a core subject is taught nationwide in law schools, often as a required course. Law schools appear to, therefore, fulfill their obligations to instruct prospective lawyers in conduct appropriate for the profession. Ethical scenarios are explored, and model rules and canons are oftentimes memorized by Bar-preparing law students.[174] Yet, based on the embarrassing public perception and documented attorney misconduct, evidently, there is a lack of appropriate guidance for mundane day-to-day professional behavior. Although law schools are not geared for in-depth, psychologically-based behavior modification programs, legal academia must seize the opportunity to, at the very least, make an impression on prospective lawyers to enable them to distinguish between professional and unprofessional behavior.

The preparation for the practice of law encompasses learning the law, learning to think like a lawyer, learning how to act like a lawyer, and learning how to be a professional. Accepting their role in this preparation, law professors must realize that "in addition to knowing and liking their subject, professional school teachers must "know the world" in the sense of knowing and respecting—albeit from an appropriately critical perspective—the profession and professional work for which their students are being prepared."[175]

V. SUGGESTIONS TO INCREASE PROFESSIONALISM "TRAINING" IN LAW SCHOOLS

As the definition of the word itself remains indefinite, forming proposals to improve professionalism is inherently difficult. Recognizing the potential for such an excuse, the ABA's Professionalism Committee on Teaching and Learning Professionalism issued a report seeking to negate any excuses for construction and implementation of a plan to increase professionalism in law schools on the grounds that the term itself is ambiguous.[176] The Committee's report contains seven suggestions that offer a detailed outline for fostering an atmosphere of professionalism in

174. It is important to note that the Model Rules employ a two-tier system: one espousing the black letter, enforceable "disciplinary rules" (DR); and one with idealistic "ethical considerations" (EC). This division has frequently been criticized for "creating interpretive confusion." *See* PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, *supra* note 35, at 43-44. However, the ECs continue to provide aphoristic meaning to the discussion of professionalism among law students.

175. Sullivan & Podgor, *supra* note 132, at 134-35 (noting that professional school teachers are not simply preparing their students for "the world" in a general sense; their students are being prepared for "the world" in a very immediate and particular sense, that is, for participation in a profession that aims to make a difference in the world).

176. *See generally Teaching and Learning Professionalism*, *supra* note 165; *see also* Sullivan & Podgor, *supra* note 132, at 134.

law schools.[177] The suggestions range from adopting a method of incorporating professionalism in a pervasive method through the law school curriculum, to having publishers of law books incorporate professionalism and ethics into their publications.[178]

Scholars have also weighed in with suggestions for increasing professionalism in law schools. Bridget McCormack suggests that law schools can begin to bear more responsibility and thereby dramatically improve their current methods of teaching professionalism by making one simple change: requiring clinical education.[179]

Deborah Rhode suggests that teaching ethics and professionalism should be integrated into substantive courses.[180] Professor Rhode posits that such integration is necessary as the issues "arise in all substantive areas."[181] She notes that "faculty who decline, explicitly or implicitly, to address ethical issues encourage future practitioners to do the same."[182] She adds that "[i]t is time to translate rhetorical allegiance into curricular priorities."[183]

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177. *Teaching and Learning Professionalism*, *supra* note 165, at 16-25.

178. *Id.* The seven suggestions posited are:

(1) Faculty must become more acutely aware of their significance as role models for law students' perception of lawyering;

(2) Greater emphasis needs to be given to the concept of law professors as role models of lawyering in hiring and evaluating faculty;

(3) Adoption of the pervasive method of teaching legal ethics and professionalism should be seriously considered by every law school;

(4) Every law school should develop an effective system for encouraging and monitoring its ethics and professionalism programs;

(5) The use of diverse teaching methods such as role playing, problems and case studies, small groups and seminars, story-telling and interactive videos to teach ethics and professionalism, should be encouraged;

(6) Law book publishers should consider adopting a policy requiring that all new casebooks and instructional materials incorporate ethical and professionalism issues. Law book publishers should also publish more course-specific materials on legal ethics and professionalism issues as part of new casebooks, new editions of old casebooks, supplements to casebooks, compilations of supplemental readings, and compendiums; and

(7) Law schools need to develop more fully co-curricular activities, policies, and infrastructures that reflect a genuine concern with professionalism.

Id. at 16-25.

179. McCormack, *supra* note 143, at 257 (noting that in clinical settings students are forced to ascertain the applicable professional expectations and norms as they muddle through solving a client's problems).

180. PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, *supra* note 35, at 53-54.

181. Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139, 140 (Autumn 1995) [hereinafter *Into the Valley of Ethics*].

182. *Id.*

183. *Id.* at 151.

In a similar vein, it has been asserted that beyond the integration of normative and empirical disciplines, the law school curriculum should focus on the values and techniques of ethical decision-making and moral lawyering.[184] Concededly, to design effective instruction regarding professionalism "is extremely difficult since rules regarding ethical behavior do not always provide sufficient guidance."[185] Despite its difficulty, change is still possible. One proposal for change recommends as follows:

> [The] profession would do well to move away from a narrow, "legalistic" conceptualization of professionalism as defined in professional codes of conduct, and to adopt instead an encompassing conceptualization of the profession as a "deliberative moral community" united in its commitment to the overarching norms of respect for truth, fidelity to law, public service, and dedication to serving an increasingly complex society.[186]

A further suggestion advocated by Croft is the reassessment of the current methodology of legal ethics education, addressing more expansive professional and ethical issues in various legal professional contexts than those typically raised in discussion of the Model Code and Model Rules.[187]

Richard Matasar proposes a grassroots organizing campaign by young lawyers, law schools, leaders of the bar, justices of state supreme courts, legal commentators, and other folks influential to law firms and government agencies.[188] Matasar's campaign proposes that organizations should make professionalism personal by adopting missions that explicitly embrace the skills and values contemplated in the MacCrate Report.[189]

There is ambivalence about how law schools can participate. With arguments of insufficient time and resources available for teaching professionalism values, some institutions decry the importance of the law school's role in formulating a sense of professionalism in its students.[190] Despite challenges that may arise from low or lacking financial support, brief dismissal of the law school's importance could prove detrimental to the legal profession.

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184. Anthony V. Alfieri, *(Un)Covering Identity In Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 839-40 (2008).

185. Granfield & Koenig, *supra* note 130, at 504-05.

186. Croft, *supra* note 126, at 1261.

187. *Id.*

188. Richard A. Matasar, *Skills and Values Education: Debate About The Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395, 426 (2002-2003).

189. *Id.* at 427.

190. Sullivan & Podgor, *supra* note 132, at 118-19.

The recognition of such a detriment has been evident as members of law faculties strive to assist in designing the professionalism programs of state bars. Some law firms work closely with faculty members on projects and with law schools sponsoring bridge-the-gap programs, participating in CLE programs, creating externships for their students, and employing leading "practitioners" as law school adjunct and full-time faculty members.[191]

With what they already have, and where they already are, law schools possess the power to delve headfirst into professionalism preparation. Academia is beginning to acknowledge that the auspicious position of educating the nation's future lawyers inseparably involves instilling professionalism values as a core of one's law school career. But, the question remains, where to start?

"*Feather by feather the goose can be plucked.*"[192]

One first "pluckable" feather is provision of experiential learning opportunities.

Students are generally unable to clearly glean any meaning from Professional Responsibility courses outside of the robotic memorization of the rules. This in large part is due to the students' lack of context to apply such rules. Students' inability to "see the forest for the trees" in other doctrinal courses results in part from that same lack of context. Students need both a "window on actual professional practice" and a "vantage point to discuss and evaluate these practices from a critical distance."[193]

Effective programs generally require a strong institutional commitment to the subject, together with well-structured course materials and methods for evaluating student performance.[194] Other important

191. Matasar, *supra* note 188, at 406.

192. French Proverb, www.world of quotes.com/proverb/French/8/index.html.

193. Wilkins, *supra* note 18, at 250-51. *See also* Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659 (2009) (outlining the efforts and outcome of Walter F. George School of Law of Mercer University to teach professionalism).

194. *See* Goldberg, *supra* note 15, at 418. As an alternative to attempting to resolve which "professionalism" is the subject that law schools should teach, Professor Goldberg offers "solutions" for law schools to attack the "professionalism problem":

- Do more to teach the skills and values needed to be a competent professional.
- Teach less about esoteric theory and more about the kind of doctrinal issues that make up the day-to-day concern of the living law.
- Teach more about what it takes to be a good lawyer and a good person.
- Teach more about the philosophy of the law.
- Teach about how the profession can be changed so the legal system will better serve society.
- Study and teach more about the organization and structure of the legal profession.

features include interactive teaching formats, opportunities for faculty and student choice, and tolerant classroom approaches that are neither value-neutral nor overly rule-bound.[195] Studies find that interactive learning, such as problem solving and role playing, is the best way of enhancing skills in moral analysis.[196] Faculty must be encouraged indirectly, or through direct faculty-voted curriculum changes, to incorporate interactive learning tools into doctrinal subjects, providing students with an opportunity to explore the boundaries of professionalism.

Judgment on professionalism (and even ethical) issues can be cultivated through "trial and error and by imitation."[197] As Harvard professor, David Wilkins, noted: "Observing others, although not a perfect substitute for individual effort, can provide valuable insight and encourage the development of both empathy and critical judgment."[198]

Academicians should suppress the urge against application of "war stories." Instead, depictions of realistic legal situations should be used to enhance the understanding of the use and necessity of a spirit of professionalism—not just to the practice of law, but for those who themselves aspire to be law professors. The sharing of the esteemed place behind the lectern with visiting members of the bar should be encouraged.[199] Around the country, law faculty are "studying real lawyers

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• Do more to acquaint students with the life of a lawyer.

Id. Professor Goldberg notes that the "first two are less about teaching professionalism as a course or a body of understanding than they are competing critiques of a perceived general educational gap between the legal academy and the profession." *Id.* Additionally, he indicates that it is "worth noting that experiential learning in clinics, externships, and simulation courses has provided some students an opportunity to develop lawyering skills and, to some extent, lawyering values." *Id.*

195. *See* Rhode, *supra* note 159, at 41.

196. *See* Rest et al., *supra* note 159, at 59-78. *See also* Joseph Volker, *Life Experiences and Developmental Pathways*, *in* MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY 3, 14, 31-42 (1986); James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991); James E. Moliterno, *Teaching Legal Ethics in a Program of Comprehensive Skills Development*, 15 J. LEGAL PROF. 145 (1990); Donnie J. Self et al., *The Effect of Teaching Medical Ethics on Medical Students' Moral Reasoning*, 64 ACAD. MED. 755-59 (1989).

197. David Luban & Michael Millemann, *Good Judgment be Taught? Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 59 (1995).

198. Wilkins, *supra* note 18, at 250-51.

199. *See* Sullivan & Podgor, *supra* note 132, at 150 (suggesting that law school administrators can help foster a professionalism atmosphere by encouraging alumni, lawyers, and judges to participate in the life of the law school in ways that assist students in learning about the aspirations and values of the legal profession. Other suggestions include seeking additional resources, both within the university and from potential donors, to support smaller classes, where law teachers can demonstrate professionalism in the context of small-scale interactions in which substantive issues of ethics and professionalism can be pursued thoroughly.). To quote:

to better understand the profession for which their students are preparing."[200] Some faculty have held "professionalism" seminars as forums to encourage discourse on the subject.[201]

In a standard first year law school curriculum, one class in each topic could be dedicated to having a lawyer (bar member, judiciary, or working in a non-law-related field) with experience in the particular subject matter, address the students regarding real-life application of the knowledge they are accumulating in that subject. In some instances the lawyer could provide a case file depicting facts from a real case, and discuss the lawyer's role in the application of the law governing the case, and the implication of actions of other parties to the case. Dedicating one to two hours in each first-year doctrinal course would not cause any undue disturbance to the curriculum. Instead, such a short time could prove to have a small but powerful impact by (1) bringing attention to (rather than minimizing the importance of) acceptable behavior; and (2) would undoubtedly enhance the student's comprehension of the subject matter. This practice could be implemented in subsequent second and third year courses.

Additionally, use of non-traditional learning tools (current, happening-now cases, pop culture—movies, television shows and books) whose presence will underscore the importance of ethical and thus professionalism concerns in everyday practice, should be employed.[202] Once the importance is accepted, the professionalism possibilities are endless in academia.

It is a necessary element for each law school to create an environment that encourages values of professionalism. Notably, in order for such an environment to exist, it must be a matter of interest to and be valued by the law school as an institution.[203] Although law school administrators can go

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> Law school administrators can also serve as advocates with the central administration, trustees, and prospective donors, carrying the message that law schools are not simply graduate schools, but professional schools which have an obligation to strive for excellence, both with respect to the "scientific" part of the law and with respect to the conversation about moral values that defines the profession and its relationships with other aspects of human life.

Id.

200. Matasar, *supra* note 188, at 406 (discussing New York Law School's New York Center for Professional Values and Practice, which takes as its mission to gain a better understanding of what lawyers do and takes as its vision the need to train lawyers in what they ought to do).

201. *E.g.*, The University of Florida, Levin College of Law, hosts an annual "professionalism" conference, bringing faculty, members of the local bar, and students to the law school together for an all-day symposium. Florida Law Online, http://www.law.ufl.edu/flalawonline/2007/01262009/sports.shtml (reporting on their 2007 symposium); Florida Law Online, http://www.law.ufl.edu/news/releases/2008/080206.shtml (reporting on their 2008 symposium).

202. For a general survey observation on the impact of guest practitioners highlighting the influence of ethical matters in everyday practice, see Rhode, *supra* note 159, at 40.

203. Sullivan & Podgor, *supra* note 132, at 147. Sullivan and Podgor go on to note that

far to foster an environment of professionalism, it is undoubtedly the collective faculty with common commitments that will be the true catalyst to foster such an environment.[204]

Law professors should possess awareness that the conversation of "professionalism" should not involve leaving "ordinary life behind for the hazy aspirational world of the Law Day sermon and the Bar Association after-dinner speech—inspirational, boozily solemn, anything but real."[205]

Most faculty are fully capable of addressing professionalism issues in core courses; the problem, however, is that some (generally already feeling overextended) would prefer not to do so.[206] Others worry about "entrapment in 'touchy feely' or platitudinous discussions."[207] Such marginalization of professionalism discussions convey a message belying the importance of professionalism to students' legal careers.[208] Professor Colin Croft noted that by "fencing off" (law school ethical & professionalism) discourse "with a limited credit, delayed enrollment course, providing precious little time for extending discussions beyond the uninspiring rules of the Model Code and Model Rules, legal education effectively insulates discussions of legal professional standards from the rest of the law school curriculum."[209]

Course materials to familiarize law professors with basic professional responsibility that fits into substantive areas[210] and lends to discussions of

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encouraging the

> values of professionalism within the law school environment enriches the law school environment, and, ultimately, the profession and society, but it must be a matter of interest to the law school because, in the current circumstances, it is only the individual law school that can provide incentives adequate to cause faculty to devote time and energy to this end. If a faculty member's own institution does not value the time that faculty members spend in this way, the time will not be spent.

Id. *See also* Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective, Teaching and Learning Prof.*: SYMP. PROC. 25, 25-26 (1997) (noting how most pervasive ethics programs "rely on voluntary participation of faculty and students").

204. *See* Sullivan & Podgor, *supra* note 132, at 150.

205. *See* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 277 (1992) (quoting Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 13 (1988) (footnotes omitted)).

206. Rhode, *supra* note 159, at 51.

207. *Id.*

208. Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Circular Paradox*, 2 AM. B. FOUND. RES. J. 247, 258 (1979) (finding that students perceive "legal ethics courses as requiring less time, as substantially easier, as less well taught and as a less valuable use of class time than their other course work).

209. Croft, *supra* note 126, at 1339 (citing Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 51 (1986)).

210. *See, e.g.*, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, *supra*

professionalism are available to minimize any discomfort about wading into unfamiliar territory outside their expertise.[211]

The main premise therefore would not require either a divergence from the pedagogical backbone of the class, or any specific expertise in the legal and ethical obligations of the Model Rules; but would instead be illustrative examples of application of the substantive information already being taught by the professor.

A number of law schools now institute some form of an Oath of Professionalism or Ethical Conduct during orientation for incoming law students.[212] The effect of taking the Oath on a law student's academic and subsequent professional career has not been determined to date. Administration of these oaths is, however, a positive start to reshaping the minds of incoming first year law students. Nevertheless, that one "plucked feather," although an excellent starting point, cannot be sufficient to fulfill legal academia's role in attaining the ultimate goal of increasing professionalism.

VI. CONCLUSION

There is no shortage of help for academia to firmly embrace its role in fostering professionalism. No valid reasons exist for any further evasion in embracing this role. It is past time for the academy to simply provide "lip service," alluding to the hallowed tenets of professionalism. Legal academia cannot and should not lose focus of the importance of preaching, teaching, practicing (and enhancing) professionalism.[213]

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note 35, at 3-8; *see generally* Rhode, *supra* note 159.

211. *See also* Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409 (1998).

212. Florida A & M College of Law's Professional Oath reads as follows:

Oath of Professionalism:

> I, _____, promise to live up to the high ideals of the legal profession and to uphold the highest standards of academic honesty, ethical practice, and to demonstrate professionalism throughout my training and for my entire professional life. I understand that as I join this academic community, I have begun my professional career. From this day forward, I will conduct my academic, professional, and personal life to honor the values of the Florida A&M University College of Law, adhering to conduct that is a model of integrity, civility, professionalism, and respect.

Florida A&M College of Law administered its Professional Oath for the first time in August 2009. Each incoming 1L was asked to repeat the Oath and sign and date a written version of it. The law school administration intends to incorporate the oath into a future publication of the student handbook.

213. For an in-depth review of the "Development of Lawyers' Monopoly", see Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 FORDHAM L. REV. 817 (2000) (noting that losing focus on the importance of professionalism will lead to the loss of the monopolistic holding that profession has long strived to strengthen).

Regardless of any actual or perceived shortcomings, lawyers should not practice or teach law at all if lawyers cannot find ideals and objectives with positive values that deserve commendation and support. It has been said a nation without ideals cannot long survive. Neither can the legal profession.[214] Legal academia must uphold its responsibility of increasing professionalism in the legal community and freeing the profession from the clutches of poetical analogies such as that of Samuel Taylor Coleridge:

"He saw a Lawyer killing a Viper

On a dunghill hard by his own stable;

And the Devil smiled, for it put him in mind

Of Cain and his brother, Abel."[215]

214. Wm. Reece Smith, Jr., Teaching and Learning Professionalism, 32 WAKE FOREST L. REV. 613, 619 (1997).

215. Samuel Taylor Coleridge, The Devil's Thoughts, *in* THE COMPLETE WORKS OF SAMUEL TAYLOR COLERIDGE 320 (Ernest Hartley Coleridge ed., 1912).

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