

ARTICLES

"SIMPLE TRUTHS" ABOUT MORAL EDUCATION

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'Tis a gift to be simple
'Tis a gift to be free
'Tis a gift to come down to where we ought to be¹

INTRODUCTION

There is a paradox in professional responsibility education today.²

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1. *Simple Gifts*, in *GO IN AND OUT THE WINDOW, AN ILLUSTRATED SONGBOOK FOR YOUNG PEOPLE* 120 (Dan Fox ed., 1987). "This old Shaker hymn expresses the belief that to be pure in heart and true to oneself, or, 'simple' as the Shakers would say, is the greatest gift." *Id.*

2. Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1 AM. B. FOUND. RES. J. 247, 274-75 (1979) (defining professional responsibility as "a curricular paradox"). Professor Pipkin's point was that while many in the legal profession and the organized bar perceived professional responsibility education to be very important for producing ethical lawyers, both the manner in which it was taught in law schools and the subject matter chosen for emphasis defeated the goal of having law students take it seriously. *Id.* at 274. Rather, law students perceived professional responsibility and education as a low status course in the law school's implicit learning hierarchy and, therefore, came to believe that professional ethics was not important to lawyering. *Id.* at 265, 274-75. Professor Pipkin argued that law school ethics instruction as it was then was self-defeating. *Id.* at 274. "Ethical instruction in legal education . . . must be destroyed in its present form in order to be saved." *Id.* The self-defeating modes of instruction that he identified may continue to characterize at least some teaching of professional responsibility today. See, e.g., William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65-66 (1991) [hereinafter Simon, *Trouble with Legal Ethics*] (describing predominant methods of teaching legal ethics as disappointing, boring, dispiriting and insubstantial). I think, however, that there has been substantial improvement in our efforts. See *infra* note 27.

I mean to highlight a different paradox in this Article. In response to a perceived crisis in professionalism, the organized bar continues to call for enhanced attention to professional

For the past twenty years or so, professional concern for declining values has prompted repeated calls for increased attention to teaching professional responsibility in law schools.³ The object of these calls is to restore ethical behavior in legal practice. But, at the same time that law schools have been called on to intensify their focus on ethics education, there is growing appreciation that it is workplace experiences that have the greatest impact on shaping professional behavior.⁴ Ethical education may be eclipsed if law students encounter workplaces that are unsympathetic to ethical practice. Complicating the problem is a widespread perception that commercial pressures have transformed workplaces formerly congenial to training in values, however modest, into soulless businesses, indifferent or actively hostile to ethical practice. The declining emphasis on professional values in the workplace makes our job in law school both more difficult and more important.

If our educational efforts are to make a contribution to the revival of professionalism,⁵ our teaching should be informed by an apprecia-

responsibility education in law school. Yet, there is growing recognition of the impact that workplace experiences have on professional behavior, particularly those experiences that occur early in a lawyer's career. If those experiences depart substantially from what students come to expect about lawyering from law school, the impact of law school education is likely to be diminished or overwhelmed. The paradox, in my view, is to emphasize law school ethics instruction as a remedy for declining standards of professional behavior without understanding that workplace experiences will have the predominant effect on actual behavior.

3. See AMERICAN BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 16 (1986) [hereinafter STANLEY REPORT] (recommending that law schools give attention to teaching of ethics and include discussions of professionalism and ethics throughout curriculum); TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 235 (1992) [hereinafter THE MACCRATE REPORT] (noting that "[l]aw schools also have an important, and varied role to play in developing the skill of 'recognizing and resolving ethical dilemmas'"); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 502-03 (1993) [hereinafter Garth & Martin, *Construction of Competence*] (noting improved teaching of professional ethics in response to widespread fears of decline in professional standards); Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 537-38 (1991) (observing that legal education is often seen as both cause and solution to decline of professionalism).

4. See Hellman, *supra* note 3, at 539-45; Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL ETHICS 31, 42-48 (1992) [hereinafter Rhode, *The Pervasive Method*]. See generally, Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 2 nn.2-3 (1995) (suggesting that work experiences of law students are "educationally rich" and that students learn by doing).

5. Professionalism is an elusive notion. In this Article, I use the term professionalism to mean fidelity to one's own informed sense of right and wrong. Because I believe that one's internal sense must be informed, my notion of professionalism encompasses attention to formal rules of professional conduct and adherence to basic community standards of decency. I believe that lawyers ought to interpret these rules and norms to be consistent with their own internal sense of morality and act accordingly. Therefore, I ordinarily use the terms "ethical," "moral,"

tion for the dominant role that the culture and values of the workplace have on the way that lawyers behave professionally. The challenge for us today is to determine how to assist our students in reconciling aspirations for an improved profession with the current realities of practice.⁶ What messages should we convey to our students about legal practice if we are to help them to develop a desire to behave professionally, while giving them a realistic sense of the pressures that make the achievement of that ideal difficult?⁷

This Article suggests that the emphasis by the organized bar on a unitary profession with a dominant conception of practice is counter-productive.⁸ By promoting the ideal that there is a uniform vision of professional lawyering to which law students should aspire, the bar's unitary conception of the profession undermines the revival of professionalism it seeks to encourage. The bar's approach implies an ethic of obedience rather than personal responsibility.⁹ It discourag-

and "professional" interchangeably. I believe that I share the views of others in using the terms in this way. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 3 (2d ed. 1995) (treating terms "ethical" and "moral" as synonymous because there is no important difference between them); DANIEL R. COQUILLETTE, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1272 (1994), reprinted in DANIEL R. COQUILLETTE, *LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY* 314-18 (1995). Professor Coquillette suggests that "[i]t is a delusion of young, inexperienced lawyers to think that they can separate their personal from their professional lives and their personal from their professional morality. . . . You cannot be a bad person and a good lawyer, nor can you be a good person and a lawyer with sharp practices." *Id.* See generally ROBERT L. NELSON & DAVID M. TRUBEK, *New Problems and New Paradigms in Studies of the Legal Profession* [hereinafter Nelson & Trubek, *New Problems*], in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 5 (ROBERT L. NELSON et al. eds., 1992) [hereinafter *LAWYERS' IDEALS*] (defining professionalism as "the set of norms, traditions, and practices that lawyers have constructed to establish and maintain their identities as professionals and their jurisdiction over legal work"); RHODE, *The Pervasive Method*, *supra* note 4, at 33 (observing that commonly shared perceptions both inside and outside legal profession fuel debate over professional responsibility).

6. Rhode, *The Pervasive Method*, *supra* note 4, at 33 (stating that "[u]ntil we come to a clearer understanding of the capacities and limitations of professional responsibility education in universities, we will miss opportunities for inspiring greater professional responsibility in practice").

7. This dissonance is inherently uncomfortable. See DANIEL S. KLEINBERGER, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 381 (1989) (stating that "[c]riticizing the profession one is working so hard to enter is an inevitably unpalatable task"). This discomfort apparently was the impetus for Professor Anthony T. Kronman's recent book. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* vii (1993) (discussing conference where he was confronted with question whether practicing lawyers' requirement to engage in persuasive advocacy corrupted their desire for truth and, if so, how he, in good conscience, could continue to train lawyers for practice).

8. See, e.g., THE MACCRATE REPORT, *supra* note 3, at 8 (emphasizing need for law schools and bar to work together in identifying skills and values that are critical to professional development of lawyers).

9. See generally REBECCA T. ALPERT, *Ethical Decision Making: A Reconstructionist Framework*, RECONSTRUCTIONIST, June 1985, at 15 (criticizing rule-based approach to ethical decisionmaking for limiting individuals' freedom and responsibility to make moral choices).

es students from understanding that they have significant power to choose and create a legal identity that is congenial with their personal orientation and their values.

Instead, I propose that we openly proclaim the variety and diversity of professional work¹⁰ so our students can seek a practice that fits their personal styles and utilizes their skills.¹¹ They should not leave law school believing that there is a single conception of being a good lawyer that requires them to suppress their best instincts.¹² In their search for a practice that suits them, they should be guided by the understanding that questions of ethics are profound and difficult. They should not be reluctant or shy about raising those questions. Because the circumstances of their work and the context in which ethical questions arise will significantly influence the resolution of questions of professional behavior, beginning lawyers should seek out mentors in practice with whom it is possible to discuss ethical questions. Moreover, they should have confidence in using their own moral intuitions and ordinary sense of decency to assist in recognizing and resolving those questions. I believe that these themes should animate our work as law teachers throughout the curriculum.

In this Article, I begin by describing the widespread perception that professional standards among lawyers are declining. Accompanying that perception is an emerging realization that the task of reversing that decline lies primarily in the domain of workplaces, which exert the primary influence on shaping actual professional behavior. In the final portion of the Article, I suggest themes that we who teach in law school might incorporate in our teaching to respond to the perceived crisis in values, while simultaneously taking account of the reality that law schools' influence on actual professional behavior is likely to be superceded by our students' workplace experiences.

10. THE MACCRATE REPORT, *supra* note 3, at 29-102 (describing variety of lawyers' work).

11. One of the fundamental values of the profession set forth in *The MacCrate Report* is "Selecting and Maintaining Employment That Will Allow the Lawyer to Develop As a Professional and To Pursue His or Her Professional Goals." THE MACCRATE REPORT, *supra* note 3, at 219. Commentary to *The MacCrate Report* suggests that the lawyer find "employment that is consistent with his or her professional goals and personal values." *Id.* at 221.

12. ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 83 (1992) (stating that law school experience causes students to define initial views of law and society as inferior to alternative views developed in school, and to attribute inferiority of old views to their own immaturity); see RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 44 (1989) (describing process of "distancing the personal self from the newly emerging professional self" as predominant feature of law school); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 204-05 (1991) (evaluating effect on students of clash between personal morality and institutional values produced by law school environment).

I. DESCRIBING THE PROBLEM

A. *Abiding Concerns About Professionalism*

For those of us who worry about professionalism, these are dispiriting times. The academic and the popular presses proclaim a crisis in the legal profession, the demise of professionalism, and the loss of professional values.¹³ Many claim that lawyers, clients, and market conditions have transformed the practice of law from an honorable calling to an ordinary business.¹⁴ It has, they say, become increasingly commercial¹⁵ and specialized,¹⁶ resulting in legal representation that is almost solely devoted to serving clients' short-term interests.¹⁷ Lawyers today do their client's bidding unconstrained by any obligation to the public interest or to the system of justice.¹⁸

13. ABA COMM'N ON ADVERTISING, *LAWYER ADVERTISING AT THE CROSSROADS* 7 (1995) [hereinafter *LAWYER ADVERTISING*] (stating that "[t]he legal community has a strong and increasing sense that over the past several years the image of the profession has declined dramatically in the eyes of the public"); KRONMAN, *supra* note 7, at 1 (stating that "[t]his book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul"); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 21-46 (1994) (offering prescription for restoring respect for legal profession); Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 949 (1995) (characterizing decline of professionalism in law as of "epidemic proportions"); Nelson & Trubek, *New Problems*, *supra* note 5, at 11 (discussing "demise of professionalism"); Paul L. Stevens, *Good Client Relations Are Essential to Restoring Public Confidence in Lawyers*, *PA. LAW.*, July 1994, at 4 (concluding that level of criticism of legal profession is greater now than at any previous time).

14. See Nelson & Trubek, *New Problems*, *supra* note 5, at 2 (relating history of criticism of legal profession as too commercial).

15. See *LAWYER ADVERTISING*, *supra* note 13, at 7 (discussing commercialization as factor often mentioned by lawyers as causing poor public image of legal profession); Nathan M. Crystal & Gregory B. Adams, *Introductory Remarks to the Conference on the Commercialization of the Legal Profession*, 45 *S.C. L. REV.* 883, 883 (1994) (suggesting that fears of commercialization of legal profession are not new, but there are some new and worrisome aspects to problem including that lawyers are now subject to pressures of market forces and face loss of professional autonomy); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 *S. CAL. L. REV.* 1231, 1232 (1991) (discussing how increased commercialization of legal profession has lead to dissatisfaction among lawyers who were not expecting it); see also *Howard v. Babcock*, 863 P.2d 150, 157 (Cal. 1994) (upholding noncompetes clause in partnership agreement in recognition of increasingly commercial nature of profession).

16. See KRONMAN, *supra* note 7, at 275-76 (noting trend in large law firms toward specialization partially due to increased size and sophistication of in-house law departments).

17. See KRONMAN, *supra* note 7, at 286; Coquillette, *supra* note 5, at 1273.

18. In *The Lost Lawyer: Failing Ideals of the Legal Profession*, Professor Kronman describes the lost professional ideal of a lawyer as someone who is more than a servant of others. KRONMAN, *supra* note 7, at 14.

He cares about the public good and is prepared to sacrifice his own well-being for it Whether acting as the representative of private interests or as a counselor in matters of state, one important part of what he does is to offer advice about ends. . . . The lawyer-statesman is a paragon of judgment, and others look to him for leadership

This crisis has many symptoms. Lawyers are increasingly dissatisfied with practicing law because it makes extraordinary demands on them without providing compensating satisfactions.¹⁹ Many no longer feel the loyalty that traditionally led to an association with one law firm for their entire careers.²⁰ Many no longer expect that clients will look to them for advice either on a long-term basis or with respect to a broad range of issues.²¹ Lawyers and the public view legal representation as excessively preoccupied with short-term client goals and with winning at any cost,²² as well as leading to a breakdown in ordinary civility and decency.²³ Responding to questions about declining standards, one lawyer characterized the problem:

The law profession is now a competitive business with enormous pressures on lawyers to meet large payrolls and carry a large overhead. I have found a "kill or be killed" attitude between lawyers who will probably never see an opposing counsel in another case. Clients also seem to want lawyers who take the "Rambo"

on account of his extraordinary deliberative power.

Id. at 14-15.

19. See Nancy C. Dart, *The First Five Years of Practice*, 21 CONN. L. REV. 81, 83-86 (1988) (listing sources of dissatisfaction as including narrow specialization, fewer long-term relationships with clients, fewer meaningful contacts with other firm lawyers, and escalating number of billable hours required); Johnson, *supra* note 15, at 1249-51 (stating that dissatisfaction occurs because expected glamorous jobs are actually trivial and boring and high salaries do not compensate for difficult and demanding aspects of job); Manual R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1715 (1994) (citing 1991 ABA Young Lawyer's Division study that documented complaints about daily stress, time and work pressures, and competition, among other things).

20. See KRONMAN, *supra* note 7, at 277-78 (attributing lack of loyalty to increased size of firms that make it difficult to relate to firm in personal way).

21. KRONMAN, *supra* note 7, at 276. One reason for the decline in loyalty between clients and their lawyers is growth in the size and expertise of corporate in-house legal departments. *Id.*; Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 489 (1989).

22. Robert C. Cumbow, *A Learned Profession*, 81 A.B.A. J. 104, 104 (1995) (stating that "law today is merely a process for achieving desired ends. The successful litigant does not win because he is right: He is right because he wins").

23. Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 513 (1994) (documenting "widespread dissatisfaction . . . among judges and lawyers with the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations").

In *Florida Bar v. Went For It*, 115 S. Ct. 2371 (1995), the Court upheld a Florida Bar regulation imposing a 30-day prohibition against sending targeted direct-mail to accident victims and their families on grounds that such regulation served a substantial state interest in protecting against further erosion of the flagging professional reputations of Florida's lawyers. *Id.* at 2376-77.

"Lawyer jokes" exploiting this theme abound, e.g., Question: Why are scientists substituting lawyers for rats in mazes? Answer: They were becoming too attached to the rats. Another lawyer joke is the definition printed on a \$5.00 mug, "Attorney—one who pleads, objects, challenges, argues, swears, and is paid for it."

approach and lawyers give in to this pressure.²⁴

Whether the crisis in professionalism is new or an intensified version of historical discontent,²⁵ the concerns seem to be deeper and more widespread than in the past.²⁶

It is ironic that this outcry about declining values comes at the same time that law schools have been paying increased attention to teaching professionalism and ethics. The increase in law review articles and other research about values education is one such indication.²⁷ Another indicator is a 1991-92 American Bar Foundation (ABF) survey.²⁸ In that survey, lawyers ranked their perceptions of the relative contributions of law school and practice to the development of skills and values.²⁹ The results showed that young lawyers, whether practicing in a big city or a rural setting, ranked law school, along with advice from other lawyers, as their most important sources for learning "sensitivity to professional ethical concerns."³⁰ The vast majority of hiring partners, the study showed, expected that newly hired lawyers would bring such sensitivity from law school rather than

24. Aspen, *supra* note 23, at 517 (quoting *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 392 (1991)).

25. Professor Rayman Solomon describes the period from 1925 to 1960 as "marked by nearly continuous crisis for the legal profession." See Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS*, *supra* note 5, at 144, 145. Themes that bar leaders used during that period to characterize the crisis included concerns about an increasingly commercialized profession and the absence of lawyers' independence, particularly from wealthy clients. *Id.* at 152-53, 168-69.

26. See Nelson & Trubek, *New Problems*, *supra* note 5, at 1-2 (stating that "until the recent campaign [by the organized bar to revive professionalism] it has been unusual for leaders to see commercialism as something affecting the profession as a whole, or for such analyses to prompt such a general response").

27. See, e.g., RHODE & LUBAN, *supra* note 5, at 2 (describing "[o]ne of the most striking changes in the legal world over the past two decades has been the increasing attention to professional responsibility and regulation"). Rhode and Luban state that "[s]ince the 1970s, the law of lawyering has developed at an explosive rate; empirical research has expanded at a corresponding speed; and the philosophical underpinnings of professional roles have attracted more searching examination." *Id.*; see also, e.g., Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1952 (1993) (stating that "[d]uring the past several decades, legal ethics has been transformed from an academic backwater to the subject of much excellent scholarship, showing it to be a field every bit as intellectually challenging as most others in the curriculum"). See generally Symposium, *Teaching Legal Ethics*, 41 J. LEGAL EDUC. 1 (1991) (discussing ethical responsibilities of lawyers and legal ethics education); Robert A. Gorman, *Introduction, Curriculum Developments: A Symposium*, 39 J. LEGAL EDUC. 469 (1989) (examining various approaches to law school curriculum design and reform).

28. See Garth & Martin, *Construction of Competence*, *supra* note 3, at 471-72. But see Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 508-10 (1994) (describing survey of University of Washington Law School alumni that suggests law schools devote insufficient attention to teaching professional ethics and social responsibility).

29. Garth & Martin, *Construction of Competence*, *supra* note 3, at 478-88.

30. Garth & Martin, *Construction of Competence*, *supra* note 3, at 483-86.

develop it on the job.³¹ In fact, "sensitivity to professional ethical concerns" was one of two areas of knowledge (of a total of seventeen areas surveyed) for which partners ranked new associates as better or somewhat better than their predecessors.³² The authors of the 1991-92 ABF survey concluded:

There has been a dramatic increase in the role of law schools in the teaching of legal ethics. . . . Our figures demonstrate that professional responsibility is now very much in the mainstream of a legal education. [Law] partners report that it is supposed to be brought to the law firms; recent graduates tell us that it is taught in the main law school curriculum and is learned essentially through law school.³³

Inasmuch as increased attention to teaching professional responsibility in law schools apparently has not alleviated concerns about declining professionalism,³⁴ perhaps we need to shift our focus.³⁵

While there is surely a role for education in influencing moral or ethical behavior, that role should be properly understood. Even the finest moral education—one that teaches the rules of the profession,

31. Garth & Martin, *Construction of Competence*, *supra* note 3, at 490. Those findings provide an interesting contrast with the 1981 study on which it was modeled. See FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 172-76 (1981) (finding that lawyers perceived their personal upbringing along with observation and advice from other lawyers in practice as more significant than law school instruction in forming ethical behavior).

32. Garth & Martin, *Construction of Competence*, *supra* note 3, at 503.

33. Garth & Martin, *Construction of Competence*, *supra* note 3, at 493; see also Joanne Martin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 447 (1994) [hereinafter Martin & Garth, *Clinical Education*] (finding law school to be generally successful in teaching sensitivity to professional ethical concerns).

34. There is no shortage of attention to the perceived problems in the methods by which professional responsibility is taught in law school. A 1979 study by Ronald Pipkin found that law school professional responsibility classes were ranked by students as "requiring less time, as being substantially easier, as less well taught, and as less valuable" than other courses. Pipkin, *supra* note 2, at 258. He characterized such teaching as often encompassing war stories, and moral preachments. *Id.* at 259-65. Although there may well be some improvement since then, professional responsibility teaching is still criticized. See, e.g., Brest, *supra* note 27, at 1950-52 (suggesting that professional responsibility be more strongly stressed in law school); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175, 1176-77 (1992) (criticizing individualistic and competitive approach to legal education); Rhode, *The Pervasive Method*, *supra* note 4, at 40-42 (discussing limitations in professional responsibility instruction); Simon, *Trouble with Legal Ethics*, *supra* note 2, at 65-66 (finding that law students considered classes in legal ethics boring and insubstantial). I do not mean to overlook those criticisms in this Article. Undoubtedly, those of us with direct responsibility for teaching professional responsibility can do better. My focus here, however, is to highlight the important effect that workplace experiences will have on professional behavior, no matter how skillful our educational efforts, and to suggest some things we might do in law school to address that reality.

35. See Rhode, *The Pervasive Method*, *supra* note 4, at 32 (stating that "[b]y casting professional responsibility instruction as an all-purpose antidote for professional lapses, advocates have misconceived its role").

attempts to cultivate the capacity for reflective moral judgment, and actively engages students in values clarification and moral choice³⁶—is likely to be undermined if the workplaces in which our students practice systematically undercut expressions of personal values or constrain the exercise of judgment.³⁷

B. The Workplace Is the Primary Influence on Professional Behavior

If we law teachers hope to have an impact on the manner in which our students practice, our teaching should be informed by an appreciation for the importance of workplace experiences in influencing professional behavior.

A recent study, designed to assess the effect of student work experiences on the formation of professional values, showed that, notwithstanding the documented expectation that sensitivity to ethical concerns would be learned in law school,³⁸ workplace experiences more strongly influence professional behavior, particularly those experiences that occur early in one's career.³⁹

This study demonstrated that a student's practice environment quickly supersedes law school as a source of reference for demarcating professionally acceptable behavior. . . . [T]here appears to be some real limits to what the law schools can be expected to accomplish in terms of inculcating professional responsibility values that will actually affect the behavior of students when they get into practice.⁴⁰

This study is consistent with other empirical data about the factors that exert the strongest influences on moral conduct. Situational conditions such as stress, time constraints, competition, economic need, workplace pressures, and peer influences substantially influence moral behavior.⁴¹

36. Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 75-81 (1991).

37. See Rhode, *The Pervasive Method*, *supra* note 4, at 46 (stating that empirical evidence on lawyers' ethics suggests that situational pressures play important role in shaping commitment and conduct). Studies show that "unethical behavior depends heavily on exposures to temptation, workplace pressures, and collegial attitudes." *Id.*

38. See Garth & Martin, *Construction of Competence*, *supra* note 3, at 482-91 (conducting American Bar Foundation survey of lawyers' and hiring partners' perceptions of ethical training); see *supra* notes 28-33 and accompanying text.

39. Hellman, *supra* note 3, at 611.

40. Hellman, *supra* note 3, at 616.

41. See Rhode, *The Pervasive Method*, *supra* note 4, at 44-48 (citing studies which found that even if moral education had some effect on moral values, moral conduct is substantially affected by self-interest and situational pressures such as stress, competition, authority, peer influence and time); D. L. Rosenhan, *Moral Character*, 27 STAN. L. REV. 925, 929-33 (1975) (examining justification and situational conditions as determinants of moral behavior).

The American Bar Association (ABA) has acknowledged the importance of workplace experiences in shaping professional behavior,⁴² but has nevertheless continued to emphasize law school education as the primary remedy for problems regarding professional values.⁴³ Recently, *The MacCrater Report*, which focused explicitly on the perceived gap between law school education and professional practice, referred to the possibility that workplace experiences and culture might overwhelm education in the area of values, particularly if such experiences departed substantially from what was learned in law school. "[A] young lawyer's ethical standards are likely to be shaped far more by his or her mentors in the early years of practice than by the experiences one acquires in the limited practice setting available in law school."⁴⁴ Nevertheless, *The MacCrater Report* still primarily emphasized the law school's important role in teaching skills and values, which were treated together throughout the report.⁴⁵

42. In the 1980s, ABA studies about the legal profession acknowledged the possibility that workplace experiences could decisively shape professional behavior. See LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 62 (1980) [hereinafter FOULIS REPORT]; STANLEY REPORT, *supra* note 3, at 19.

Of course, the sensitizing of law students about ethical issues is not only the responsibility of law schools. Often, law students' first exposure to the world of practicing lawyers comes when they clerk for law firms at the end of their first year in law school and thereafter. If what they see in these firms is inconsistent with the ideals taught in law school, the best academic effort may be for naught.

STANLEY REPORT, *supra* note 3, at 19.

43. Hellman, *supra* note 3, at 537-38 ("Much of the profession's self-analysis has focused on legal education, which is viewed as either a major cause of any perceived problems in the profession or the logical place to turn for solutions—or both."); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context* [hereinafter Nelson & Trubek, *Arenas of Professionalism*], in LAWYERS' IDEALS, *supra* note 5, at 177, 192 (describing that "emphasis on education [in the *Stanley Report*] creates the impression that the decline in professionalism comes from a lack of understanding of what the obligations of a lawyer are, rather than from any conflict between idealized notions of desirable conduct and everyday work pressures").

44. THE MACCRATER REPORT, *supra* note 3, at 235. It is particularly telling that *The MacCrater Report* concedes the law school's limited role in instilling ethical standards because the report otherwise focuses heavily on the importance of law school education in the teaching of skills. *Id.* at 233-68.

45. Indeed at one point, *The MacCrater Report* refers to "recognizing and resolving ethical dilemmas" as a *skill*, rather than a value. THE MACCRATER REPORT, *supra* note 3, at 235. Treating the teaching of skills and values together exemplifies one point in this Article, that values education is essentially experiential and must be embedded in context to be meaningful. On the other hand, blurring the distinction between skills and values education implies that teaching values involves teaching techniques, rather than habits of thought and judgment. See Timothy L. Hall, *Moral Character, The Practice of Law and Legal Education*, 60 MISS. L.J. 511, 514-17 (1990) (arguing that character of law students is important element in ethical decisionmaking that cannot be replaced). *The MacCrater Report* addressed this concern: "The Statement of Skills and Values emphasizes the essential linkage between lawyering skills and professional values. It is hoped that this holistic approach to lawyering will in the future help avoid the perpetuation of the notion that competence is simply a matter of attaining proficiency in specified skills."

The probable reason for a continuing emphasis on law school as the primary forum for values training is that it is the only focused educational experience that affects all lawyers.⁴⁶ The diversity and autonomy of the profession make it unlikely that there will be another systematic opportunity to address those issues in practice.⁴⁷ As a matter of default, law schools will undoubtedly continue to be the focus for institutional reform efforts in the area of values, despite increasing appreciation of the importance of workplace experiences in shaping professional behavior. Our teaching should self-consciously address that reality.

C. Discretion and Experience Combine to Make Workplace Experiences More Vivid and Lasting than Passive Instruction

One reason workplace experiences importantly affect behavior is that within the framework of professional rules and mores, lawyers have substantial discretion in determining how to act.⁴⁸ There are those who argue that embedded in the professional rules is a standard conception of professional identity that channels and limits the role

THE MACCRATE REPORT, *supra* note 3, at 317. In my view, the focus of *The MacCrate Report* on a relatively mechanical enumeration of skills and values undermined its avowed purpose of creating an integrated approach. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report-Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 594, 607-15 (1994) (finding that *The MacCrate Report* embodied "taxo-nomic, scientific, classificatory, and schematic thinking about lawyering" and enshrined limited conceptualization of skills).

46. See Michael Norwood, *Scenes from the Continuum: Sustaining the MacCrate Report's Vision of Law School Education into the Twenty-First Century*, 30 WAKE FOREST L. REV. 293, 297 (1995) (acknowledging law school as lawyers' most intensely focused educational experience).

47. See THE MACCRATE REPORT, *supra* note 3, at 111-14 (documenting history of law school unifying experience); STANLEY REPORT, *supra* note 3, at 16 (emphasizing that "[w]e begin our recommendations with law schools, not because they represent the profession's greatest problems but because they constitute our greatest opportunities").

There are Continuing Legal Education (CLE) providers that offer CLE to practicing lawyers in ethics and professionalism. According to *The MacCrate Report*, those courses are in heavy demand only in jurisdictions with mandatory CLE requirements. THE MACCRATE REPORT, *supra* note 3, at 313. Many lawyers in mandatory CLE jurisdictions do not approach those courses enthusiastically. See, e.g., William S. Stevens, *Ethics and CLE*, PHILA. LAW., Winter 1993, at 25 (summarizing lawyers' responses to survey on Pennsylvania's new CLE requirements in ethics as, "Lawyers don't like it."). One lawyer stated his objection as follows: "As for ethics, requiring a knave to listen to five hours of lectures on ethics per year will give you a bored knave, not an honest attorney." *Id.*

48. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 52 (1988) (noting lawyer's discretion within ethics rules); Hall, *supra* note 45, at 532-34 (stating Model Code of Professional Responsibility creates zone in which lawyers are free to employ their own moral perspectives and dispositions); Johnstone & Treuthart, *supra* note 36, at 78 (finding that legal procedures and codes of conduct leave room for considerable ethical discretion); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085 (1988) [hereinafter Simon, *Ethical Discretion*] (believing that under libertarian approach to ethical decisionmaking, legal ethics impose on lawyers only duty of loyalty to client).

of discretion.⁴⁹ Under this conception, the rules enshrine partisanship (single-minded, uncritical devotion to the client's cause);⁵⁰ neutrality (indifference to clients' ends);⁵¹ and role-differentiated behavior (conduct that one may be reluctant to engage in on one's own behalf, but which is justified because it is performed on behalf of the client).⁵² Even those who argue most strenuously that the standard conception is accurate,⁵³ suggest that it is possible to construct, within the rules, an alternative model that includes deliberation with clients about the appropriateness or wisdom of the client's goals⁵⁴ and the introduction of moral concerns into client counseling.⁵⁵ The culture of the practice situations in which lawyers work and the nature of their work are important influences on the manner in which they exercise that discretion.⁵⁶

49. See LUBAN, *supra* note 48, at 104-74 (criticizing standard conception of lawyer's role).

50. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249-52 (1991) (noting that Model Rules of Professional Conduct continue tradition of envisioning lawyers as partisan advocates of client's claims).

51. Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 372 (1988) (stating that Model Code of Professional Responsibility is "passive or neutral" toward client's morally objectionable ends).

52. See LUBAN, *supra* note 48, at xix-xxi (outlining standard conception of lawyers' role). Some critics argue that there is no standard conception of a lawyer's role or that the conception fails to conform empirically to reality. See, e.g., Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1532-37 (arguing that role-differentiated behavior is attributable to psychological and economic pressures of law practice or to moral values shared by lawyers and nonlawyers alike, rather than to distinctive professional ethic); Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 12-27 (1991) (responding to critics of "hired gun" ethic and defending his definition of that ethic).

53. See LUBAN, *supra* note 48, at xx ("These three elements [of the standard conception] form a highly coherent picture that resonates with so much of our familiar experience and contains so many points of plain truth that it is hard to argue with.").

54. See LUBAN, *supra* note 48, at 394-95 (highlighting ethics rules that stress lawyers' ability to counsel clients on moral issues); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 81-83 (1980) (suggesting new code of professional responsibility that requires lawyers to consider social and moral costs of their actions).

55. See, e.g., LUBAN, *supra* note 48, at 169-74 (noting that "nothing permits a lawyer to discard her discretion or relieves her of the necessity of asking whether a client's project is worthy of a decent person's service"); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 1 (1994) (finding moral considerations in all legal representation); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 553-60, 578-83 (1994) (criticizing moral independence theory of lawyer-client relationship and suggesting instead interdependence theory). See generally Simon, *Ethical Discretion*, *supra* note 48, at 1083 (suggesting that lawyers have discretion to decide which clients to represent and how to represent them and that these judgments by lawyers ought to further justice).

56. MICHAEL KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 13 (1994) (discussing how rationalizations and compromises developed in actual practice settings transform standard concepts of professionalism within the legal community); KRONMAN, *supra* note 7, at 298 (stating that "changes in the practice of a firm may sometimes limit the extent to which its lawyers are called upon to give deliberative advice, and in the culture of today's large firm, with its heavy emphasis on money, such limitations will not be given significant weight").

Experience exerts a powerful influence over the exercise of discretion. Experiential learning is critically important to moral development.⁵⁷ Aristotle stated that one had to practice virtuous behavior, modeling oneself on the good, and then reflect on it for such behavior to become a part of one's character.⁵⁸ As Justice Holmes said: "We learn how to behave as lawyers, soldiers, mer-

As I argue throughout this Article, we law teachers convey, explicitly or implicitly, a relatively impoverished view of the variety and complexity of practice. In particular, we do not do a very good job introducing students to the idea or extent of their discretion in practice. Either they believe that there is little room for the exercise of discretion, or they believe that their discretion will be constrained by their clients or supervisors.

In the absence of attempts to confront practical constraints, many students tacitly assume that they will have virtually no autonomy in practice, that the partners must do as clients say, and that they as associates must do as their partners say, without any slack for cavil or maneuver, at peril of losing their jobs. In other words, students assume that practical considerations will almost always trump ethical ones in the 'real world,' that the constraints of practice will leave the lawyer so little discretion that ambitious reflection would be pointless.

Robert W. Gordon & William H. Simon, *The Redemption of Professionalism, in* LAWYERS' IDEALS, *supra* note 5, at 238.

Elsewhere, Professor William Simon suggests that the focus on examining and teaching the formal disciplinary codes undercuts "complex, creative judgment and . . . subvert[s] the vital aspirations of professionalism." Simon, *Trouble with Legal Ethics*, *supra* note 2, at 67.

The transactional approach to teaching is an effective teaching method to assist students to develop an appreciation for the role of discretion in practice. See *infra* notes 65-66 and accompanying text; see also Hellman, *supra* note 3, at 539-41 (commenting that lawyers' work atmosphere plays significant role in determining professional behavior).

57. See Richard W. Miller, *Ways of Moral Learning*, 94 PHILOSOPHICAL REV. 507, 529-30 (1985) (describing contemporary moral theorists who see moral learning occurring through "empathic role-taking on the basis of equality"); Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1282-83 n.171 (1988) (describing developmental theories of William Perry, Lawrence Kohlberg, and Norma Hoan, all standing for proposition that "actual experience best promotes movement toward the highest levels of [moral] development"); see also Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 522-27 (1995) (containing results of empirical study confirming connection between moral thought and experiential classroom teaching); June Louin Trapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 31-36 (1974) (discussing values education as requiring active participation in resolving conflicts concerning one's personal values, role-taking opportunities, and exposure to diverse legal cultures).

58. See Robert Condlin, *The Moral Failure of Clinical Education*, in THE GOOD LAWYER 317, 323 (David Luban ed., 1984) (discussing how Aristotle's foundational philosophical claim holds that one must act in certain way before understanding principle embodied by that way of acting). "Principles are arrived at by reflection upon activities that have been experienced prereflexively and internalized as dispositions. A person learns virtues by imitating good people and good actions." *Id.*; see also M.F. Burnyeat, *Aristotle on Learning to Be Good*, in ESSAYS ON ARISTOTLE'S ETHICS 69, 73 (Amelie Oksenberg Rorty ed., 1980) (explaining that "Aristotle is not simply giving us a bland reminder that virtue takes practice. Rather, practice has cognitive powers, in that it is the way we learn what is noble or just."); Steven L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1606-07 (1995) (suggesting that, under neo-Aristotelian understanding of ethics, lawyers' characters largely determines their choices, moral perception, and decisionmaking).

chants, or what not by being them. Life, not the parson, teaches conduct."⁵⁹

Proponents of clinical legal education have long understood the importance of concrete experience to moral learning.⁶⁰

"[E]xperience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases The way in which ideas are understood after they have been used feels different in a sense that is not fully explained by the fact that they are more easily remembered." This is particularly true of ideas about values, much of whose content is lost when understood in a purely intellectual way.⁶¹

In other words, it is not until students actually experience the reality of practice that they begin to internalize and make their own moral and ethical judgments that are at the core of practice. Because the opportunities in law school for experiential learning are relatively limited,⁶² the first extended and systematic exposure to practicing law usually does not occur until after graduation.

The cultures of the workplaces in which our students first find themselves may well influence their ethical and moral behavior far more than does our teaching in law school. Much data suggests that workplace influences may undercut our students' desires to practice in conformity with their own visions of professionalism.⁶³ How can

59. Letter from Oliver Wendell Holmes to Fredrick Pollock (Apr. 2, 1926), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDRICK POLLOCK, 1874-1932, at 178 (Mark D. Howe ed., 1941).

60. See Mark Neal Aaronson, *Dark Night of the Soul: A Review of Anthony T. Kronman's The Lost Lawyer: Failing Ideals of the Legal Profession*, 45 HASTINGS L.J. 1379, 1397 (1994) (stating that clinical courses are richest source "for nurturing judgment and testing character"); Hartwell, *supra* note 57, at 506 n.4 (listing clinicians who have written about their success promoting moral development in clinical setting); Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 92-95 (1991) (suggesting that although professional responsibility may not necessarily be "better taught" in clinical setting, it may be "better learned" there).

61. Condlin, *supra* note 58, at 321 (quoting from Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 391 (Council on Legal Educ. for Prof. Responsibility ed., 1973)).

62. See THE MACCRATE REPORT, *supra* note 3, at 245, 259-60; see also Martin & Garth, *Clinical Education*, *supra* note 33, at 453 (arguing that only small number of new lawyers identify clinical courses as important educational tool because clinical training is not widely available to law students). Of course, clinical education is not the only opportunity for experiential learning in law school. See Hartwell, *supra* note 57, at 531-35 (advocating use of experiential student-centered ethics classes in law schools); Steven Lubet, *Ethics and Theory Choice in Advocacy Education*, 44 J. LEGAL EDUC. 81, 87-88 (1994) (arguing that trial advocacy courses are well suited to introduction of ethics questions; and that raising them this way requires students to resolve them in concrete and realistic setting and to live with their choices).

63. See Geoffrey C. Hazard, Jr., *Law Schools Must Teach Legal Ethics*, 14 NAT'L L.J. 17, 17 (1991) (suggesting that despite law school ethics courses, many young lawyers learn by example

we be realistic about current professional practice while simultaneously assisting our students to aspire to an improved profession?⁶⁴

I suggest that the organized bar's emphasis on promoting the idea of a unitary professional experience undermines the effort to instill a spirit of aspiration in our students. Such a notion conveys an implicit message that there is a standard or objective conception of what constitutes a good lawyer. It reinforces our students' tendencies to see ethics as a code of obedience rather than a system requiring discretion and judgment, and, as a result, it undermines personal responsibility. Rather, my goal is to convey to our students that the legal profession is diverse, not unitary. This diversity derives primarily from the nature of professional work, from the variety of people who make up the practice, and from the importance of context to the resolution of professional questions. Being a good lawyer does not mean behaving in a single way, in particular it does not require conformity to a conception of lawyering that denies the validity of our students' preexisting moral intuitions and sense. Students should not think that they have to suppress their best instincts to be good lawyers.⁶⁵ Within our diverse profession, we should encourage our students to seek a practice that utilizes their strengths and suits their personalities. In that search they should be guided by the notion that questions of professional behavior are profound and difficult. They should not be reticent about raising them even if they think that such questions are common or recurrent, and they should not be afraid to call on mentors in practice to assist in resolving them. I believe that these themes ought to inform our teaching throughout the curricu-

to ignore ethical obligations); see also Dart, *supra* note 19, at 83 (discussing change in attitude during early years of practice); Ramos, *supra* note 19, at 1700 (doubting whether professional responsibility classes can alter law students' later behavior in practice).

64. See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699-1704 (1990) (discussing problem of "double bind" which arises when one tries to achieve justice in nonideal world, which may paradoxically lead to perpetuating conditions of injustice).

65. Students struggle with the conflicts between devotion to client interests and preventing harm to third persons, such as the dilemma presented by *Spaulding v. Zimmerman*, a settlement negotiation in which the lawyer for a settling defendant in an automobile accident failed to disclose to plaintiff's counsel that plaintiff was suffering from a potentially fatal aneurysm that might have been due to the accident. 116 N.W.2d 704, 707 (Minn. 1962). An important point to make in the discussion of this dilemma is that the rules do not *require* that the defense lawyer behave in that manner. The lawyer can seek consent from the client to disclose, can argue persuasively that the long-term interests of the client are best served by disclosure, and can withdraw if the client refuses to disclose. We law teachers can also point out to our students that many practicing lawyers simply would not cooperate with a client in keeping the information from the potentially injured party. One highly regarded personal injury attorney to whom I posed a similar hypothetical stated that he would just call up his client and say that he had to tell the plaintiff or he might die. There was no question that, for him, no client was worth sacrificing his fundamental decency.

lum.⁶⁶

II. ADDRESSING THE REALITY

A. *We Are Not a Unitary Profession*

As I began to write this Article, a student came to see me after working for two weeks at her part-time summer job. She was writing complaints and answering interrogatories at a law firm from which an associate had recently left. There was a lot of nastiness surrounding the associate's departure (such as refusing to tell phone callers where he could be reached), which was counterproductive in her view, and the work that she was doing was boring and repetitive. She told me that she was not cut out to be a lawyer and that she was considering going into teaching.⁶⁷ She assumed, as do many students, that what she was experiencing was "the" practice of law, rather than one aspect of a diverse, multifaceted profession.⁶⁸ She did not imagine that there were other practice settings that would feel different, where lawyers would behave more collegially, where the nature of the work would be different, and where lawyers might utilize different talents.⁶⁹

66. I recognize that there might be an inconsistency between my position that experiential learning in the arena of values education is likely to overwhelm classroom experiences, and my recommendations that follow for incorporating messages in teaching, implying that such incorporation occurs through explication rather than experience. See *supra* text accompanying notes 31 and 34. In fact, I believe that the ideal way to impart the messages discussed in this Article is through a program of experiential learning, such as the one we have developed at Temple Law School—"Integrated Transactional Practice." See *infra* note 163 (advocating benefits of integrated course that centers on simulated clients' matters while simultaneously raising professional responsibility questions). For example, if students are exposed via live clients or simulations to lawyering tasks that utilize non-adversarial skills, and if they have the opportunity to take account of third-party interests in counseling clients, they will understand the diversity of the profession in a more profound way than by simply being exposed to a lecture on those topics. In this Article, I primarily suggest themes that we can all use, irrespective of the particular methods by which we choose to teach. In addition, I hope that the messages here might also inform conversations with students outside of class.

67. I will not address the notion that discouraged and disaffected practitioners comprise the ranks of academic faculty, although I believe that the presence of faculty who disdain practice should be taken into account in any full discussion of teaching about the profession. See generally J. Canyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1958-60 (1993) (discussing anti-practice bias among law professors); Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7 (1991) (suggesting that most law professors communicate disdain for "real world activity and practice").

68. See Nelson & Trubek, *Arenas of Professionalism*, *supra* note 43, at 177-79 (discussing misconception that only one official professional ideology exists within legal community).

69. Survey results about declining civility in the legal profession document that the problem is "significantly greater and more common in large urban areas where the practice of law has become depersonalized" and where lawyers less commonly encounter one another on a repeated basis. Aspen, *supra* note 23, at 523.

It is easy to see how she received this message. Both the culture of law school⁷⁰ and the bar's professional rhetoric promote the idea that the profession is unitary,⁷¹ with a single or dominant conception of what it means to be a good lawyer.⁷² Law schools teach that legal problems can be solved through intellectual and abstract reasoning;⁷³ personal concerns and individual moral preferences are beyond the law's competence;⁷⁴ reason is privileged over emotion in solving legal problems;⁷⁵ and legal representation ought to be characterized by an attitude of impartiality and neutrality toward client ends.⁷⁶ Professional rhetoric likewise supports the conception of a unitary profession.⁷⁷ The centerpiece of *The MacCrate Report* was a Statement of Fundamental Skills and Values, which represented the ABA Task Force's attempt to initiate a process for developing a shared conception of skills and values that were central to the role and functioning of lawyers.⁷⁸ The Task Force viewed its undertaking as

70. See Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1159 (1990) (suggesting that students' perceptions of law school are formed primarily by their first-year experiences and that those experiences are roughly uniform).

71. See THE MACCRATE REPORT, *supra* note 3, at 29.

72. JACK & JACK, *supra* note 12, at 163 (stating that currently lawyers in different practice areas are "all taught the same rules of client relations and are all trained to play the same professional role").

73. See Roger Cramton, *The Ordinary Religion of the Classroom*, 29 J. LEGAL EDUC. 247, 262-63 (1978) (stating that law school professors encourage non-emotional, purely intellectual responses in classroom); Lesnick, *supra* note 70, at 1162 (commenting that law school gives impression that lawyers all do same job by "bringing our intellectual powers to bear on reasoning a problem through to solution").

74. See Kleinberger, *supra* note 7, at 381 n.74 (asserting that law schools teach lawyers "to be skeptical of everything except the conventional amorality of the legal profession"); Lesnick, *supra* note 70, at 1180 (stating that legal reasoning is generally taught as realm of thought insulated from other realms of learning and experience).

75. See Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1775 (1993) (stating that dominant law school teaching ideology treats development of logical thinking as central focus of legal training and seeks to suppress emotional expression in classrooms); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987) (noting that "[t]he normal discourse of law disallows the language of emotion and experience").

76. See GRANFIELD, *supra* note 12, at 89-92 (observing that law school encourages students to become pragmatic and to discard their orientation toward social justice); Lesnick, *supra* note 70, at 1178-79 (arguing that law schools focus students on arguing instrumentally to achieve client ends without encouraging reflection on nature and quality of those ends). See generally Menkel-Meadow, *supra* note 67, at 7 (finding that traditional classrooms foster adversariness, argumentativeness, zealotry, single-minded devotion to client ends, and disregard for non-client concerns).

77. Nelson & Trubek, *New Problems*, *supra* note 5, at 13 ("The bar . . . has continued to portray itself as a unitary profession in the service of a unitary legal system."); see also Loh, *supra* note 28, at 511 (finding that "notion of a unitary legal profession" is rationale for professional self-regulation and privileges that it entails).

78. THE MACCRATE REPORT, *supra* note 3, at 124-26.

consistent with the traditional vision of law as a unitary profession.⁷⁹ "The legal profession has . . . successfully preserved, to this time, the vision of a single profession with a common notion of what it means to be a lawyer."⁸⁰

In fact, the profession is not unitary in any meaningful sense.⁸¹ Lawyers do different kinds of work, ranging from high stakes business litigation to counseling individuals. Lawyers work in different organizational settings, ranging from private law firms of varying sizes to in-house legal departments to government and public interest practices. Lawyers work in different geographic settings, ranging from urban to rural.⁸² Lawyers represent different kinds of clients, ranging from wealthy corporations to poor individuals. Authors of a 1982 study of the Chicago Bar, documenting these differences, characterized the notion of a single unified profession as one that "no longer fit[s] the facts."⁸³

79. THE MACCRATE REPORT, *supra* note 3, at 124.

80. THE MACCRATE REPORT, *supra* note 3, at 11.

81. See KELLY, *supra* note 56, at 1 (noting that legal profession is increasingly more specialized and heterogeneous); Donald P. Judges, *Voyages on the H.M.S. Beagle*, 49 SMU L. REV. 611, 623 (1995) ("It may seem self-evident that no single concept can define what it means to be a member of a professional group that is the size of, say, Baltimore or Indianapolis."); Loh, *supra* note 28, at 511 (asserting that legal profession is stratified and specialized in its functions, and that "not all lawyers are cut from the same mold"); Jonathan Rose, *The MacCrater Report's Restatement of Legal Education: The Need for Reflection and Horse Sense*, 44 J. LEGAL EDUC. 548, 558 (1994) (noting that it is unclear whether "unitary concept" exists today, given varied practices and highly differentiated work).

82. See KRONMAN, *supra* note 7, at 378-79 (discussing differences between smaller rural firms and their larger urban counterparts). Professor Anthony Kronman in his book *The Lost Lawyer*, championed the ideal of the lawyer statesman, whose work he characterized by the traits of practical wisdom and devotion to the public interest. *Id.* at 12. He was pessimistic that lawyers could find such work in large law firms in urban centers. *Id.* at 378-79. He suggested, however, that practice in rural areas might offer an opportunity to fulfill his conception of the professional ideal. *Id.*

These firms typically serve a local market that is to varying degrees detached from the larger ones in which the biggest firms and their spin-offs operate. They commonly exhibit a lower degree of specialization. They are less influenced by the culture of growth that now dominates most large law firms in the country's major cities. And they are often intertwined in complex ways with the communities in which they exist.

Id. at 379; see also Garth & Martin, *Construction of Competence*, *supra* note 3, at 476 (suggesting that there are differences in perception of importance of certain skills and competencies between urban and rural practitioners and between large and small firms). For example, small firm and rural practitioners rated sensitivity to professional ethical concerns more highly than did their large urban firm counterparts. *Id.*

83. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 3 (1982). This 1982 analysis of the Chicago Bar documented the growth of what it termed two professions, one characterized by the representation of large entity clients with economic concerns and the other concerned with individual clients with "personal plight" claims. *Id.* at 321. The type of client represented resulted in differing lawyering tasks, distinct ethics of practice, and generally different socialization patterns for the lawyers associated with that type of representation. *Id.* at 319-32 (asserting that lawyers who serve large organizations differ systematically from those who work for individuals and small businesses, regardless of

We are told that the tumultuous process that led to the ABA's adoption of the Model Rules of Professional Conduct included arguments from all sectors of the profession over the proper definition of professional conduct.⁸⁴ Controversy regarding issues such as confidentiality and entity representation highlighted how lawyers in different practices expressed their professional concerns in different ways.

Taking trial lawyers, corporate counsel, legal services lawyers, code enforcers, judges, private practitioners in large and small firms, law professors, and others properly into account . . . one is struck by the heterogeneity of ethical views in today's profession. . . . Legal services lawyers want rules that guarantee their zealous commitment to clients and special attention to the problem of advancing litigation expenses for the indigent and the problem of maintaining professional independence from lay employers. Securities lawyers want ethics rules that buffer them from an aggressive SEC. Small-town lawyers do not want to formalize their ongoing client relationships by putting fee agreements in writing. Bar counsel want the easiest rules to enforce. Trial lawyers want to minimize the perception that they might have to betray their clients' trust, even at the risk of having to blink at perjury. And so on.⁸⁵

Professional diversity stems from at least three important sources: the nature of the professional work itself, the diversity of the people engaged in practice, and the contextualized nature of ethical decisionmaking. This means that each ethical question is, in important ways, distinct from every other one because of its unique context. In this Article, I focus primarily on the diversity and variety of professional work and the contextualized nature of ethical decisionmaking. Of course, the legal profession is increasingly diverse demographically. *The MacCrate Report* describes striking changes in size, age, gender, and race in the makeup of the profession since World War II.⁸⁶

social origins, prestige of law schools they attended, their career histories and mobility, their social or political values, or their networks of friends and professional associates).

The MacCrate Report stated: "The great variety in practice settings and the highly differentiated work in which lawyers are engaged present today the greatest challenge to law schools and the profession in maintaining the unitary concept of being a lawyer." THE MACCRATE REPORT, *supra* note 3, at 29.

84. See Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in LAWYERS' IDEALS, *supra* note 5, at 95 (discussing background of ABA's production of Model Rules of Professional Conduct).

85. *Id.* at 140-41.

86. THE MACCRATE REPORT, *supra* note 3, at 13-27. Missing from that description, however, is an account of disabled or gay and lesbian lawyers. Beverly Babos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLINICAL L. REV. 349, 361 (1994).

Individual perspectives and personalities of the lawyers with whom our students work will be very important to the kind of practice they experience.⁸⁷ In my judgment, students appreciate that the personalities of the people with whom they will work will be significant to the degree of satisfaction they experience in their work. They do not appreciate as readily that the nature of legal work they do, and the context in which they make professional decisions, will also be profoundly important. I have therefore chosen in this Article to focus on the work aspect of diversity and the contextualized nature of ethical decisionmaking, both of which receive insufficient attention in our teaching.⁸⁸

The diversity of practice and the discretion afforded by the professional mores to construct alternative conceptions of lawyering to accommodate those differences have led scholars to a more comprehensive theory of professionalism. They reject the notion of a unitary vision and substitute the idea that different workplaces and practice situations produce differing professional visions; that there are multiple "arenas of professionalism."⁸⁹ "[L]awyers possess widely varying conceptions of professional ideals that correspond to the historical and practical circumstances of their work."⁹⁰

Indeed within those arenas, lawyers have constructed multiple, even conflicting, ideas of what constitutes professional lawyering.⁹¹ The struggles over, and debates about those competing visions are themselves as important as arenas in which notions of professionalism are forged.⁹²

Conflicting articulations of professional values of loyalty and confidentiality in different practice settings provide good examples of the various professional visions that result from the diversity of professional work.

87. See, e.g., KELLY, *supra* note 56, at 53-83 (describing specific law firm as cooperative, egalitarian, friendly, and good to people because it is managed by senior partner to whom those values matter and because it consciously hires lawyers who share its values).

88. Nelson & Trubek, *New Problems*, *supra* note 5, at 11-13 (discussing how lawyers have diversified their practices in response to changing market demands causing erosion of distinctive professional tradition).

89. Nelson & Trubek, *Arenas of Professionalism*, *supra* note 43, at 177.

90. Nelson & Trubek, *Arenas of Professionalism*, *supra* note 43, at 211. "One could posit a great many legal professions, perhaps dozens, and to some degree there are perceptible distinctions among all of these types of lawyers." HEINZ & LAUMANN, *supra* note 83, at 5; see KELLY, *supra* note 56, at 1-2 (describing growing diversification of legal profession).

91. See Nelson & Trubek, *Arenas of Professionalism*, *supra* note 43, at 187 (articulating lack of "unitary vision" among arenas of practice).

92. See Nelson & Trubek, *Arenas of Professionalism*, *supra* note 43, at 187-88 (noting that in each arena of professional behavior there are ongoing struggles to define appropriate professional visions).

The conflict of interest provisions of the Model Rules of Professional Conduct provide that, absent consent, a lawyer should not represent a client whose interests are directly adverse to another client, or in circumstances where the lawyer's representation may be materially limited by the lawyer's responsibilities to another client or to a third person.⁹³ The comments to that Rule advise that a lawyer should not seek consent "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances."⁹⁴

The conflict of interest rule is often invoked in a litigation or adversarial context to preclude a lawyer from simultaneously representing clients whose interests actually or potentially diverge.⁹⁵ Lawyers who represent clients in non-adversarial settings, however, face distinct issues in multiple client representation.⁹⁶ For example, lawyers who do estate planning for married couples face a situation in which clients share many goals, but also may have potential conflicts with one another regarding such matters as distributive schemes or the disposition of separate assets. The ethical dilemmas of estate lawyers were so distinct from those arising in the litigation context that the ABA Section of Real Property, Probate, and Trust Law (Section) wrote a separate set of recommendations and commentaries setting forth its "prescriptive guide" on those ethical questions.⁹⁷ In those recommendations, the Section characterized the ABA's Model Rules "as a code of conduct for lawyers, written primarily to govern the conduct of advocates,"⁹⁸ describing the

93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) (setting forth general rules pertaining to conflict of interest).

94. *Id.* at Rule 1.7 cmt.

95. See *Shearing v. Allergan*, No. CV-S-93-866-DWH (LRL), 1994 WL 382450, at *2 (D. Nev. Apr. 5, 1994) (granting defendant's motion to disqualify law firm); Pennegar, *supra* note 51, at 309-10, 326-36 (expressing Model Code's dominant concerns to be individualistic conception of who client is and deep loyalty to that client's interests).

96. See Report of the Special Study Committee on Professional Responsibility, *Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP., PROB. & TR. J. 765, 767 (1994) (outlining responsibilities of estate planning lawyers with respect to intra-familial representation). The comments to the *Model Rules* recognize differences in multiple-client representation, but provide relatively little guidance in assessing them. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt (1983). The tentative drafts of *The Restatement of Law Governing Lawyers* by the American Law Institute set forth different conflict of interest rules for different practice settings including civil litigation, criminal litigation, non-litigated matters, and organizational representation. RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 209-212 (Tentative Draft No. 3, 1990).

97. Reports of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association, *Editor's Introduction*, 28 REAL PROP., PROB. & TR. J. 763, 763 (1994) [hereinafter SPECIAL STUDY COMMITTEE REPORT].

98. *Id.* at 767.

limitations of the Rules as they apply to lawyers representing married couples as follows:

From an ethical standpoint, the risk is that, in counseling the couple as a unit for tax and planning purposes, neither individual will receive the representation a single individual might receive under the same circumstances. Yet family needs, tax incentives and the very nature of marriage often make separate counseling unnecessary, and indeed, inappropriate. Lawyers may look to the Model Rules to guide them in the representation, but will find only a set of rules that assumes the existence of well-defined conflicts between well-defined clients.⁹⁹

The Section's recommendations as to modes of representation under the Model Rules,¹⁰⁰ guidelines for observing confidentiality,¹⁰¹ and standards for obtaining consent,¹⁰² all departed from the litigator's conception of a lawyer single-mindedly representing an individual client.

The Real Property, Probate and Trust Section's report attempted to harmonize the reality of a distinct kind of practice with the adversarial ethic that the Section perceived to dominate the ABA Model Rules. It is an uneasy alliance.¹⁰³ It highlights a distinct notion of professionalism that animates that arena of practice.¹⁰⁴

The American Academy of Matrimonial Lawyers provides another example of a distinct ethic developed to meet the special attributes of a particular field of practice. In its Preliminary Statement to Bounds

99. *Id.* at 770-71.

100. *See id.* at 771-72 (explaining joint representation and separate representation are two modes of representation of husband and wife consistent with Model Rules).

101. *Id.* at 783-87.

102. *Id.* at 779.

103. *Compare* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 211 (Tentative Draft No. 4, Apr. 10, 1994) (suggesting that attorney obtain formal consent when simultaneously giving both husband and wife estate planning advice and drafting wills) *with* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 211 (Preliminary Draft No. 11, May 18, 1995) (including in later version illustrations that appear to give estates lawyers representing husbands and wives more leeway in representing family unit without necessity of obtaining formal consent); *compare* ABA Committee on Ethics and Professional Responsibility, Formal Op. 94-380 (1994) (indicating that when representing fiduciary, lawyer owes duty of confidentiality to fiduciary and cannot ordinarily disclose information adverse to fiduciary to beneficiaries, even if such disclosures are necessary to protect interests of beneficiaries) *with* Report of the Special Study Committee on Professional Responsibility, *Counseling the Fiduciary*, 28 REAL PROP., PROB. & TR. J. 825, 848 (1994) (asserting that fiduciary is special type of client who has special duties to beneficiaries, and lawyer should not be required to withhold confidential information from beneficiaries).

104. *See* SPECIAL STUDY COMMITTEE REPORT, *supra* note 98, at 766 (asserting that representation of husband and wife has little in common with adversarial aspect of litigation law and is yet more difficult in that conflicting interests may be harder to identify). "[T]he marriage of two people does not create a *per se* conflict between them." *Id.* at 767. It is hard to imagine another situation in which such a disclaimer would be necessary except to draw a contrast with an unrelentingly adversarial vision.

of Advocacy, a guide to ethical conduct for family lawyers, the Academy stated: "Existing codes do not provide adequate guidance to the matrimonial lawyer. . . . [T]heir emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters Many [family law practitioners] have encountered instances where the [Rules of Professional Conduct] provided insufficient, or even undesirable, guidance."¹⁰⁵ The Matrimonial Lawyers' guide set forth standards of conduct that departed from the traditional conception of lawyering responsibilities, particularly with respect to children. Those recommendations included considering the welfare of the children in any marital dispute,¹⁰⁶ prohibiting the use of child custody demands for financial leverage or vindictiveness,¹⁰⁷ and requiring disclosure of a substantial risk of child abuse, even if the information was otherwise confidential under the ethics rules or the attorney-client privilege.¹⁰⁸ The special regard for children in the Matrimonial Lawyers' guide is a departure from the traditional conception of a lawyer single-mindedly pursuing client goals with minimal regard for the interests of third parties.¹⁰⁹

It is important for law teachers to convey to students the diversity of practice and the accompanying modes of professionalism.¹¹⁰ Our students should begin to appreciate that different practices entail different skills and cultures.¹¹¹ Not only do they differ by the nature of the legal tasks performed (e.g., counseling husbands and wives for the future as opposed to litigating over events in the past), but within modes of practice there are different cultures as well. The much-criticized "scorched earth" and "Rambo" litigation tactics characterize

105. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, STANDARDS OF CONDUCT 3-4 (1991).

106. *Id.* at 27 (Rule 2.23).

107. *Id.* at 28 (Rule 2.25) (advising attorney to withdraw rather than promote "vindictiveness").

108. *Id.* (Rule 2.26) (setting forth situation of "substantial risk of physical or sexual abuse of a child by the attorney's client" upon which attorney is justified in breaching attorney-client confidentiality).

109. See Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 18 (1987) (asserting that according to traditional concepts, lawyer has minimal obligations to third parties). Traditionally, to protect their interests, third parties have had a cause of action under criminal law and for fraud, but not much more. *Id.*

110. See *infra* notes 115-23 and accompanying text (suggesting methods of advising students on diversity of practice). Other professional organizations have promulgated codes of conduct that similarly reflect the distinct ethic and needs of their practices. See generally THE AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe Pound-American Trial Lawyers Foundation, Revised Draft 1982); AMERICAN BAR ASSOCIATION, TASK FORCE ON MEDIATION SECTION OF FAMILY LAW, DIVORCE AND FAMILY MEDIATION: STANDARDS OF PRACTICE (1986).

111. See generally KELLY, *supra* note 56, at 19-20 (examining five different legal practices and different cultures that characterize each of them).

only one type of big business litigation.¹¹² Those tactics do not ordinarily accompany litigation undertaken on behalf of individuals in other kinds of cases.¹¹³

There are several ways we might convey the diversity of the profession to our students. One method is to highlight the nature of the work of lawyers who practice the law we are teaching.¹¹⁴ In a Corporations course, we can contrast the roles of in-house and outside counsel, particularly in the area of corporate compliance¹¹⁵ and examine the role of lawyer as planner;¹¹⁶ in Trusts and Estates, we can highlight the non-adversarial nature of transactional practice;¹¹⁷ in Family Law, we can expose the degree to which non-client interests (e.g., children) are taken into account by lawyers representing parents.¹¹⁸

112. See SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION* 82 (1994) (expressing disappointment in declining reputation of practice of law characterized in part by contemporary litigation tactics arising from litigation by corporations); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 938-44 (1993) (recounting "scorched earth" litigation tactics of 1970s and 1980s).

113. Garth, *supra* note 112, at 945.

114. Textbook authors are beginning to provide materials from which such lessons may be drawn. See, e.g., HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* v-vi (4th ed. 1993).

The materials in the book also reflect the variousness of lawyers' situations in practice. Some of the cases and rules involve big firm corporate practice. Others involve small firm lawyers and sole practitioners and such transactions as drafting a will, handling a divorce or defending a criminal accused. Situation in practice makes a difference in the kind of matters a lawyer handles and therefore the kind of ethical problems she encounters . . . [i]n these respects, lawyers are very different from each other.

Id.

In this book we deal with people, the quick as well as the dead. There is nothing like the death of a moneyed member of the family to show persons as they are, virtuous or conniving, generous or grasping. Many a family has been torn apart by a botched-up will. Each case is a drama in human relationships—and the lawyer, as counselor, draftsman, or advocate, is an important figure in the *dramatis personae*. This is one reason the estates practitioner enjoys his work, and why we enjoy ours.

JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS TRUSTS AND ESTATES* xxxiv (5th ed. 1995).

115. A particularly congenial context for this discussion is provided by *Graham v. Allis Chalmers Mfg. Co.*, 188 A.2d 125, 131 (Del. 1963) (holding that director of corporation had no knowledge of any facts regarding antitrust activities of corporation employees and is therefore not liable for failure to take further action).

116. WILLIAM A. KLEIN & J. MARLA RAMSEYER, *BUSINESS ASSOCIATIONS* iii-iv (2d ed. 1994). "[B]ecause lawyers plan at least as often as they litigate, we bring a planner's perspective . . . [W]e explore how the parties to a case could have avoided the disputes at stake . . . we use corporate debt to ask . . . how business executives can structure relationships among their many investors . . ." *Id.* at iii.

117. See DUKEMINIER & JOHANSON, *supra* note 114, at xxxiv (highlighting joys of estate planning). The now well-known example of *The Case of the Unwanted Will* provides a good opportunity to explore the dilemmas that arise in this kind of non-adversarial practice. See Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 982-83 (1987) (recounting *Case of the Unwanted Will*, an estate planning matter exploring ramifications of decision by attorney to represent entire family, not merely husband and wife as individuals).

118. See *supra* notes 105-08 and accompanying text (urging attorney to accord protection to children's interest while representing parent).

A second method for conveying the diversity of professional work to our students is to bring satisfied practitioners into each of our substantive classes to discuss the nature and culture of their practices.¹¹⁹ If students were exposed to practitioners across the curriculum, they would have a richer picture of the possibilities for creating or choosing an identity that is congruent with their character and their skills. They would also have models of lawyers who had found satisfaction in their work while maintaining their personal integrity.¹²⁰

A third method to make this diversity more vivid is to build on the student's own legal experiences. Nearly all of our students do legal work while in law school, either in clinics, externships, or part-time or summer employment.¹²¹ In addition, many of them have been clients. We should encourage them to bring their experiences into the classroom. We should help them appreciate that they have already begun to face the issues that will define them as practitioners.¹²²

119. See James R. Rest, *An Interdisciplinary Approach to Moral Education*, in MORAL EDUCATION: THEORY AND APPLICATION 9-25 (Berkowitz & Oser eds., 1985) [hereinafter MORAL EDUCATION] (describing interdisciplinary approach to moral education for professional graduate students that included exposure to respected professionals who are "technically competent" and "successful" in their careers). "The basic idea is that the students will respect these professionals, aspire to be like them, and will develop an ideal image of their professional selves not only as technically competent but also as active moral agents in a wider social world." *Id.* at 22.

120. The stories of practitioners are often more vivid to the students than their experiences in class. For several years, I had the privilege of offering my students an opportunity to hear from a particularly wise and gifted practitioner. He advised them to forsake the ethics rule book for something he termed "the stomach tightening test." He told them not to do anything as lawyers that made their stomachs tighten up. Semester after semester, "the stomach tightening test" appeared in many exam answers as the final arbiter of the students' proposed solution.

There are other teaching materials to use to show praiseworthy, satisfied lawyers. See Vincent Robert Johnson, *Law-givers, Story-tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 GEO. J. LEGAL ETHICS 341, 346 (1989) (reviewing *Legal Heroes* by Lawrence Dubin, a 28-minute videotape aired on University of Michigan Public Television, WFUM-TV in 1988, which focuses on three attorneys who pursued "altruistic" careers).

121. Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 4-7 (1995) (citing studies indicating that vast majority of law students engage in some form of work experience while in law school, either by way of law school clinics and externships, or though part-time employment during school year or summer).

122. See Menkel-Meadow, *supra* note 67, at 4 (asserting that many students have already developed images of legal system prior to law school). Implicit in our teaching and in law school culture are important messages about professional behavior. There are some thoughtful attempts to utilize the law school experience itself as a basis for exploring the diversity of professional behavior. My colleague, Professor Rick Greenstein, teaches the introductory six weeks of his first year Criminal Law class by dividing his class into small groups to reach consensus on and draft a disciplinary code for law students. Some of the questions are whether the code should address the following situations: a student's unwanted following around and watching of another that has not resulted in provable harm; cutting out an important case from a reporter; removing a key volume from the library late in the evening; or deliberately misshelving a required text for a legal writing assignment. See Frank J. Macchiarola, *Teaching in*

The goal of these efforts is to give our students an appreciation of the profession's diversity so they seek out opportunities to develop as professionals in ways that comport with their self-conceptions, by finding a practice that conforms with their own character and style.¹²³ Imparting a richer sense of the range of practice may also contribute to students' ability to construct alternative visions of lawyering so that if they find themselves in a practice that is inhospitable to the values that they hold, they will have the confidence to challenge it. Cultivating an understanding that there is no single conception of professional lawyering may assist our students both to seek and to create alternative visions of practice.

B. Moral Questions Are Difficult

A student recently approached me with what he termed a "dumb" question. He was working on a moot court brief and had found, through a Westlaw search, briefs submitted in a case on which he was relying to make his argument. He wanted to use some of the arguments from those briefs, but was worried that such use would violate the Moot Court rules requiring "original" work.

His question was not dumb. Resolution of the question required a close reading of the Moot Court rules and a clear understanding of what "originality" means in connection with brief writing (which is after all an attempt to apply precedent, i.e., preexisting arguments, to new facts). It was a wonderful example of professional behavior for him to have recognized the issue and to have had the courage to raise it. I told him so.

It is my experience that students often think that raising ethical or moral questions is dumb. They think that because such questions arise frequently, they must have clear and ready answers.¹²⁴ More-

Law School: What We are Doing and What More Has to be Done?, 71 U. DET. MERCY L. REV. 531, 538 (1994) (suggesting that law school ethics education should focus on what information to include on student resumes, how to deal with clinic clients who may not wish to tell truth, how to count hours for law review service, and when collaboration becomes cheating); Timothy P. Terrell, *A Tour of Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students*, 34 WASHBURN L.J. 1, 16-18 (1994) (proposing that law schools should self-consciously promote, in classrooms, professional values of excellence, integrity, respect for rule of law, respect for other lawyers and their work, accountability, and responsibility-for adequate distribution of legal services).

123. See KRONMAN, *supra* note 7, at 366-67 (asserting that to find satisfaction, lawyers must find work that requires powers and capacities that are important to lawyer's self conception, which bear upon who he is and what he does, and that such qualities must be character traits).

124. Students also feel frustrated when these apparently simple questions do not have clear answers. We must assist them to explore why the answers are not easy and why those answers might be different depending on context. I often tell students that although there might be a wrong answer, there is probably more than one right answer. See *infra* notes 143-44 and

over, the problem of thinking that questions of professional behavior are easy is not limited to students. Faculty who are taken by surprise by an ethical question or who encounter student questions about an aspect of their course that never occurred to them approach me apologetically to ask a "stupid" question. They often assume that they should already know the answer or that the answer should be obvious.¹²⁵

There is something about the ordinariness and recurrence of many questions of professional behavior that belies their complexity. We should encourage students to understand that such questions deserve attention and respect. Often resolutions are not easy, but require careful thought and deliberation.

Questions of appropriate professional behavior are not answered simply, nor are they susceptible of answers *a priori*. Such questions require assessments of context, competing values, and one's own responsibilities. That someone has faced and resolved a similar question before does not mean that the same answer is appropriate in a different context, with a different client or for a different lawyer. Often such questions raise profound issues at the core of our profession. Two examples will illustrate this point.

Lawyers in practice make mistakes. A relatively common example is the misdelivery of a privileged document to an opposing party. The professional responsibility questions are: (i) what the receiving lawyer should do upon discovering the mistake, i.e., read the document, return it unread, or turn it over to a judge (if the matter is in litigation); and (ii) whether the lawyer may make that decision without consulting the client. These relatively straightforward and recurring questions have generated ethics opinions,¹²⁶ contradictory court decisions,¹²⁷ and scholarly commentary.¹²⁸ To resolve the

accompanying text (emphasizing that moral decisionmaking requires complex contextualized judgments made in light of real life situational pressures).

125. I suspect that some faculty actually dismiss ethical questions as trivial to mask their own confusion or surprise, to spare themselves from feeling that they are "unethical" or "immoral" for not having recognized the moral dimensions of the problem on their own, or to excuse the fact that they do not have the answer.

126. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (advising attorney, who inadvertently receives confidential material, to return it without examination); *id.* Formal Op. 382 (1994) (discussing ease with which technology allows mistakes to occur); D.C. Bar Legal Ethics Comm., Op. 256 (1995); New Jersey Supreme Court Advisory Comm. on Professional Ethics, Op. 680 (1995), *reprinted in* 11 ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT 67 (1995) (ruling that attorney must disclose to opposing counsel that client gained access to papers in briefcase of opposing counsel).

127. Compare *Berg Elecs. Inc. v. Molex Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995) (holding that inadvertent disclosure of documents did not waive attorney-client privilege) with *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 450 (D. Mass. 1988)

questions, the ABA and the courts have balanced the confidentiality concerns of the client¹²⁹ against the duty of diligent representation.¹³⁰ The opinions are conflicting, sometimes resulting in the return of the document and other times not. The ultimate resolution of the question implicates our deepest notions of what it means to behave professionally. Are we bound to capitalize on our opponent's mistakes? Must we defer to our client's wishes on this point? Does merely raising the question contradict fundamental notions of trust and shared humanity which ought to characterize our dealings with others?¹³¹

As another example, a lawyer counsels a client about whether or not to accept a proffered settlement of a case.¹³² The client, strapped for funds and nervous about testifying, is inclined to accept.¹³³ The lawyer thinks the offer is inadequate and that the client's chances of obtaining substantially more money at trial are excellent.¹³⁴ The professional responsibility question is how much pressure the lawyer should exert to influence the client to follow the lawyer's recommendation. This relatively straightforward question

(stating that inadvertent production of documents constitutes waiver of attorney-client privilege).

128. See, e.g., Coquillette, *supra* note 5, at 1276 (recounting instance where attorney erroneously received and opened opposition's client report). See generally THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY, ETHICAL OBLIGATIONS ARISING OUT OF AN ATTORNEY'S RECEIPT OF INADVERTENTLY DISCLOSED INFORMATION, *reprinted in* 50 RECORD 660 (1995).

129. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (proscribing revelation of client information without consent, except under certain circumstances); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980) (addressing preservation of client confidences and secrets); see also *supra* note 127 (citing cases involving inadvertent disclosure of confidential documents).

130. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) (requiring reasonable diligence and promptness in client representation); see also *supra* note 127 (citing cases involving inadvertent disclosure of confidential documents).

131. I have often raised this question of the misdelivered document when showing my students the videotape "*Representing the Corporate Client: The Saga of Albinex*," written by me, produced by the University of Pennsylvania's Center on Professionalism and published by Commerce Clearing House (CCH). On one occasion, following a lively discussion in which the class was evenly split about whether or not to return the document, a student rushed up to me obviously agitated and upset. He told me that he had a job as a psychological tester of incarcerated prisoners in which he assessed their pro-social skills (these, he explained, are the opposite of anti-social skills). A standard question on those tests is what to do if you see a package lying next to a mailbox. The student went on to explain that even the "lowest functioning sociopath" faced with that dilemma would not open the package but would put it in the mailbox. He was appalled at the view expressed by many of his classmates that dedication to client goals compelled the lawyer to read the misdelivered paper. "We are training sociopaths," was his conclusion. Although his analogy was inexact, he appreciated the implications of the question raised by the hypothetical.

132. See Sarena Stier, *Reframing Legal Skills: Relational Lawyering*, 42 J. LEGAL EDUC. 303, 314 (1992) (discussing scenario taken from "*Who's In Charge: The Lawyer as Counselor*," videotape produced by Center on Professionalism, University of Pennsylvania Law School).

133. *Id.*

134. *Id.*

raises profound issues about the allocation of power in the lawyer-client relationship. It is a subject that has attracted legal scholarship,¹³⁵ moral philosophy,¹³⁶ and writing about practical skills.¹³⁷ Although practitioners face this question every day, it is complex and deserves sustained attention.

The message that professional responsibility questions are profound and difficult, and that it is professional to raise such questions is one that every teacher in law school can impart, even if that teacher does not "know the answer." It is important for our students to be encouraged to raise and ponder these issues, and to "rehearse"¹³⁸ their conversations about them.

Moreover, it is especially important that all faculty, not just "professional responsibility" faculty, accord those questions attention and respect. Through our teaching, we impart messages to our students about what counts in law. Legal discourse consists primarily of categorizing ideas.¹³⁹ We help our students construct legal frameworks and place facts and ideas within them. These frameworks are the lenses through which they view lawyering. If we avoid using words such as ethical, professional, right, wrong, and truth, we send a message that those concepts are irrelevant to the enterprise.¹⁴⁰

135. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 140-43 (explaining that there is often great danger, particularly where clients have little hope of finding another attorney, that lawyers will force clients to compromise substantive goals in order to achieve access and participation in judicial process); cf. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 4.3 (1986) (presenting three different models for viewing lawyer-client relationship: lawyer as "hired gun" for dominant client, lawyer as "master of the ship," and lawyer-client cooperation).

136. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15-16 (1975) (examining accusations that lawyer-client relationship is morally defective one, in which client is treated with neither dignity nor respect).

137. See SHAFFER & COCHRAN, *supra* note 55, at 1-2 (discussing methods of lawyer-client deliberation that may enable both to notice and resolve moral issues).

138. Hartwell, *supra* note 57, at 535 (finding that students are likely to respond more effectively to ethical and moral dilemmas by "rehearsing" how they are going to talk about these dilemmas).

139. See Henderson, *supra* note 75, at 1591 (contending that "legal categories," created by doctrine, statute, or constitution, will define legal discourse and therefore determine what is relevant).

140. This point is made by those who advocate transforming jurisprudence through storytelling. See Jane Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 264 (1994).

All legal doctrine functions to limit the factual information that will be brought to bear on a problem. Just as the law recognizes only limited kinds of stories, law also recognizes only limited ways of telling stories. Powerful conventions govern how stories must be told in legal settings; they govern form and language.

Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459, 2483 (1989) ("If language is intimately bound up with the way we think about experience, then talking about experience in a different language necessarily entails knowing that experience in a somewhat different way."). Paradoxically, the point is also made by those who are skeptical about narrative jurisprudence. Daniel A. Farber & Suzanna Sherry, *Telling Stories*

If we take our students' moral questions seriously and show them that there is a place in legal discourse and lawyering for those concerns,¹⁴¹ we help them find the courage to raise such concerns in practice, where the environment for such conversations may be less congenial.¹⁴²

C. *Find a Mentor*

We know our students will encounter troubling ethical questions. The best advice we can give them is to find a mentor, someone who experiences the world as they do and with whom they can raise their concerns. Moral questions cannot be resolved without considering the context in which they arise.¹⁴³ Moreover, the development of moral judgment requires experiential, complex decisionmaking in the real world. Any answers that we give students to their hypothetical dilemmas in law school necessarily lack the rich context and variables that such dilemmas present in real life. Accordingly, the best advice we can offer beginning lawyers is to find someone with whom to talk when those dilemmas do arise, so that the culture, politics, and other important factors can be addressed in context.¹⁴⁴

Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807, 809 (1993).

141. I do not mean to overlook the importance of faculty raising moral questions on their own without the input of students. See *supra* notes 139-40 and accompanying text. My point, however, is that when our students raise such issues, particularly when we are not expecting those questions or when the moral dimensions of the problem had not occurred to us, that we take them seriously and treat such questions with respect even if we do not have a ready answer for them.

142. This point is documented in Professor Lawrence Hellman's study on the formation of professional values. The study found that the students in clinical placements who had an opportunity to raise and discuss their professional responsibility concerns with supervising faculty had two important experiences. Hellman, *supra* note 3, at 608. First, they were confronted with their own individual responsibility for their actions; and second, they became emboldened to speak up to supervisors in their work settings if they felt a matter was being inappropriately handled. *Id.* at 608-10.

143. See Hartwell, *supra* note 57, at 530 (suggesting that people have inherent capacity to develop moral reasoning when provided with appropriate environment); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1603 (1990) (asserting that moral decisions cannot be reached by simply figuring out which moral rule applies to situation at hand, because process of formulating and stating such rules erases critical contextual details).

144. Critics of the current state of professional life often point to the disappearance of mentoring as one cause of declining values. See, e.g., Aspen, *supra* note 23, at 518 (observing that notion of apprenticeship in which etiquette and other "traditions of civility" are passed down from one generation of lawyers to next, is virtually nonexistent today); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1447 (1995) (explaining that as large law firms increasingly place premium on efficiency, "one-on-one instruction" by partners and senior associates has declined greatly because such time is neither billable nor directed at expanding clientele); Linowitz & Mayer, *supra* note 13, at 97 (describing nostalgically "children's hour," an open bar in library of major Washington, D.C. law firm at 6:00 p.m., where partners felt that it was part of their professional duty to talk regularly with new associates about their work); see also John F. Dolan & Russell A. McNair, Jr., *Teaching Commercial*

Engaging in moral dialogue is an essential ingredient of moral growth. Studies and theorists suggest that moral development requires participation in an appropriate environment, characterized by engaging and active moral discourse.¹⁴⁵ The process of locating a mentor and engaging such a person in dialogue about moral issues is itself a professionally responsible act. Encouraging our students to find and rely on a mentor is one of the best techniques we can offer them for navigating the workplace.¹⁴⁶

Several people with whom I have discussed this point have asked me to suggest how our students should go about finding mentors, particularly because this Article assumes that many workplaces will be characterized by pressures that hinder reflective, professional behavior. In such environments, say my colleagues, it may be difficult to find an appropriate mentor.¹⁴⁷ I have thought about why this does not seem to be a problem to me. In part, I suppose it is because I personally know so many thoughtful and decent people who have chosen to be lawyers and who would be honored to be asked about questions concerning professional practice. In my experience, the morale problem¹⁴⁸ that is affecting our profession is of great concern to most practicing lawyers who would welcome the opportunity to do something about it, by helping a new colleague.

Law in the Third Year: A Short Report on a Business Organization and Commercial Law Clinic, 45 J. LEGAL EDUC. 283, 284 (1995) (describing reports of practitioners that opportunities for mentoring are less than in other times).

145. James R. Elkins, *Difficulties in Talking Ethics*, 17 VT. L. REV. 353, 373 (1993); see Hartwell, *supra* note 57, at 530 (stating that appropriate environment for moral growth requires students to reveal their moral positions to themselves and others). See generally Wolfgang Edelstein, *Moral Intervention: A Skeptical Note*, in MORAL EDUCATION, *supra* note 119, at 387, 392-96 (stating that model of ordinary teaching is at odds with requirements of moral discourse, which entails equality among parties, unconstrained dialogue and dissent, and freely consensual participation by everyone, which implies right to withdraw from further dialogue at any time); Wangerin, *supra* note 57, at 1284 (describing theory of Norma Haan that moral development occurs through "a process of engaging in dialogues with other affected individuals").

146. As a start, we should see ourselves as mentors of our students in law school. An important component of this mentoring process is to take their moral questions seriously. See *supra* notes 141-42 and accompanying text.

147. My colleagues may be right. Professor Hellman's study of students' clinical work experiences in law school found that a "significant portion of the students' law office mentors display disinterest or discomfort in discussing the concerns that are felt by the students when they observe or are even directly impacted by a practitioner's or judge's inappropriate conduct." Hellman, *supra* note 3, at 543. This is a distressing conclusion. Perhaps the student supervisors in Professor Hellman's study did not perceive input into the students' professional development to be part of their role. Indeed, Professor Hellman suggests that many aspects of supervision and instruction were inadequate. Hellman, *supra* note 3, at 543; see also Aaronson, *supra* note 60, at 1400 (stating that opportunity to work with "rare individual who may embody the qualities of the lawyer-statesman" is highly unlikely today, given bar's dramatic increase in size and proliferation of specialties).

148. See KRONMAN, *supra* note 7, at 2 (perceiving that legal profession faces "spiritual crisis" and proposing revival of lawyer-statesman ideal).

I think there is a more subtle reason for my optimism as well. From my experience teaching and talking about professionalism and ethics to practicing lawyers around the country,¹⁴⁹ I believe that most lawyers maintain a core of idealism. They are not happy about the commercial pressures that they see transforming the profession. Even those who submit to the pressures in their practices are not comfortable about it. When these lawyers confront issues of professionalism in a less pressured environment, where there is an opportunity for reflection, they commonly argue for a less self-serving or more idealistic position. Moreover, in that environment, they are open to considering the moral dimensions of their work. Accordingly, I believe that the process of being asked to reflect on someone else's dilemma, and of being required to articulate and explain reasons for behavior, will influence many practitioners to respond thoughtfully.

In a recent article, Bryant Garth, Director of the American Bar Foundation, made a similar observation in his discussion of litigation reform.¹⁵⁰ In that article, he described the explosion since the 1970s of "scorched earth" business litigation, that is, litigation undertaken to gain tactical competitive advantage.¹⁵¹ Lawyers conducting such litigation have tended to engage in aggressive, adversarial tactics, in particular, abusive and burdensome discovery.¹⁵² He suggested that one place to look for reform efforts directed toward such litigation is to the organized activity of those same lawyers in professional associations.¹⁵³ Lawyers, he said, have internalized the value of engaging in such law reform activities, and many believe that such service enhances their stature as professionals.¹⁵⁴ "[T]he organized profession has acted as a restraint on its own membership . . . because lawyers have become eminent through professional service."¹⁵⁵ I believe that the same drive that animates lawyers to seek publicly to reform practices in which they engage privately also motivates lawyers who are asked for advice on ethical or other professional matters. I think many lawyers, when asked to reflect on practices that may not conform to their internalized sense

149. For three years, I created materials and taught Continuing Legal Education in Ethics and Professionalism as an associate of the University of Pennsylvania's Center on Professionalism. During that time I taught classes for several thousand practicing lawyers.

150. Garth, *supra* note 112, at 955-56 (finding that membership in professional associations requires lawyers to advance "universal principles" upon which legal profession is based).

151. Garth, *supra* note 112, at 940-45.

152. Garth, *supra* note 112, at 942.

153. Garth, *supra* note 112, at 945-49.

154. Garth, *supra* note 112, at 955-56.

155. Garth, *supra* note 112, at 959.

of decency or to justify unprofessional practice that may have become commonplace, will be reluctant to encourage those practices in others. If our students have the moral courage to speak up and search for mentors, they will find them, and together the students and mentors may engage in a dialogue that promotes moral growth of both groups.¹⁵⁶

D. *It Is Important for Students to Be Who They Are*

There is empirical and anecdotal evidence that law school encourages students to suspend their personal notions of morality. Some suggest that law school transforms students from ordinarily moral people, who experience moral feelings and make moral judgments for themselves, into people who become resistant to taking personal moral responsibility for their own actions.¹⁵⁷ Another characterization is that we induce our students to shed a non-legal identity, one that encompasses emotional and moral thinking, and to assume an objective mechanical stance.¹⁵⁸ Adding to that disassociation, some of us assume that our students' personal morality will often conflict with their responsibilities as lawyers. Consequently, we suggest that to be effective they will be required to abandon or compromise their ordinary morality.¹⁵⁹

We should self-consciously try to give our students "permission" to be who they are and to convey to them that they will be better lawyers as a result.¹⁶⁰ We should not further contribute to the disassociation

156. See THE MACCRATE REPORT, *supra* note 3, at 205 (suggesting that part of skill of "recognizing and resolving ethical dilemmas" includes critically evaluating ethical propriety of practices confronting lawyers and consulting other lawyers in process of that critical evaluation).

157. See GRANFIELD, *supra* note 12, at 200 (noting that at both Harvard and Northeastern law schools, students grew to perceive world with "detached cynicism," abandoning their original principles of justice); JACK & JACK, *supra* note 12, at 95-129 (finding that one way lawyers cope with strain between personal morality and professional obligation is to suppress that very tension); Cramton, *supra* note 73, at 262 (arguing that most law school curricula teach values which conflict with beliefs and attitudes central to most peoples' lives); Timothy L. Hall, *Moral Character, The Practice of Law, and Legal Education*, 60 MISS. L.J. 511, 535-41 (1990) (noting that law students have often been viewed as "moral skeletons," stripped of moral faculties and dispositions that give life substance); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 76-81 (1980) (observing that lawyers, who may need to distance themselves psychologically from arguments they make on behalf of their clients, incorporate that detachment into their self-concept leading to deep moral skepticism).

158. See David R. Culp, *Law School: A Mortuary For Poets and Moral Reason*, 16 CAMPBELL L. REV. 61, 79-87 (1994) (asserting that law school experience teaches students to divorce emotion from rational thought).

159. See Postema, *supra* note 157, at 76 n.35 (explaining traditional conception that there is sharp distinction between lawyer's private and professional life).

160. Professor Jack Sammons terms this process "professing lawyering" and describes it in rich detail. Jack L. Sammons, Jr., *Professing: Some Thoughts on Professionalism and Classroom Teaching*, 3 GEO. J. LEGAL ETHICS 609, 615-22 (1990) (terming process of self-consciously

our students experience between who they were before and after they went to law school. Instead, we should attempt to reveal the moral tension that underlies disputes, encouraging students to apply their natural moral sense to their resolution.¹⁶¹

A particularly congenial way to highlight the underlying moral dimension of legal disputes is to utilize a transactional perspective.¹⁶² By this I mean to shift the perspective from the impartial decisionmaker to the parties, and to focus on events as the matter unfolds rather than after it is complete. This shift to a transactional perspective brings the roles of the lawyers and parties more sharply into focus and highlights the choices and decisions made by each.

Teaching in this manner may entangle us in arguments about moral relativism.¹⁶³ It need not do so, however, because solutions

permitting students to be themselves as "professing lawyering" and further describing this process). This manner of teaching is movingly portrayed in SHAFFER & COCHRAN, *supra* note 55, at 113-34; see also Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1598-1609 (1995) (describing examples of such dialogue with clients).

161. See Sammons, *supra* note 160, at 617-20 (describing "good teacher" as one who shows students that both sides of legal dispute have valid claims to students' moral allegiance).

162. See Wangerin, *supra* note 57, at 1282-83 n.171 (suggesting that best method for exposing students to moral issues is to restructure law school classes to focus on future and away from past and toward litigation and negotiation and compromise). A description of "Integrated Transactional Practice," an integrated course in Trusts and Estates, Professional Responsibility, and Interviewing, Negotiation and Counseling, which I co-teach with Professor Nancy Knauer at Temple University Law School, will be the subject of a forthcoming article. The course, which centers around simulated Trusts and Estates client matters raising professional responsibility questions, provides a realistic, concrete, and effective context for exploring the moral dimensions of lawyering. See Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 119-43 (1993) (discussing moral dilemmas involved with estate planning in context of transactional practice).

163. It is beyond the scope of this Article to discuss the competing claims of relativism, skepticism, and universalism. See Wangerin, *supra* note 57, at 1240-41 (describing differing approaches to understanding nature of truth). I am squarely in the camp of those who believe that contextualized inquiry and open discussion of problems from multiple perspectives need not undermine the foundations for the exercise of judgment nor incapacitate us from reaching a decision. See Minow & Spelman, *supra* note 143, at 1620-21 (concluding that viewing issues in context does not necessarily result in loss of ability to make reasoned judgments); Sammons, *supra* note 160, at 617 (finding that "good teaching" need not be value neutral). I take this position largely for pragmatic reasons. Respecting our students' notions of morality and working within them is the only effective way I have found to teach. In my experience, students view as patronizing most pronouncements from professors concerning how they should behave. See Hall, *supra* note 157, at 545-46 (asserting that law professors are probably not very effective at indoctrination, and, in any event, ought to be teaching approach to legal ethics not particular model of virtuous lawyer); Kleinberger, *supra* note 7, at 380 (noting that exhortation from professors is not way to foster moral understanding because law school is "purposefully hostile to faith, intuition and feeling" and because it is practically impossible to "orate people" into sense of morality). The method I use to ground these discussions is to suggest that we begin with an examination of values embodied in the *Model Rules* such as loyalty to clients, keeping confidences, respect for client autonomy, and candor to the court. The difficult questions arise when those values conflict with each other or with our internal values. The Preamble to the *Model Rules of Professional Conduct* states:

to dilemmas may emerge from a shared moral consensus.¹⁶⁴ Where there is no consensus, we can still acknowledge that some answers are better than others. I tell my students that while I may be able to identify some answers that I believe are wrong, there is often more than one right answer.¹⁶⁵

Giving our students "permission" to be themselves in law school allows them to see that the enterprise of lawyering is not disconnected from ordinary life.¹⁶⁶ Providing the opportunity to bring their personal notions of morality to bear on resolving professional problems is an important method to make that connection vivid. It

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

MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1995). Examination of the manner in which each of us resolves those values conflicts exposes our individual preferences and norms and brings us face to face with the necessity of making judgments. This process exposes both the moral dimension of lawyering and the framework within which we make decisions.

164. See Sammons, *supra* note 160, at 617 (finding that teaching by searching for shared morality does not have to foster "vulgar moral relativism"); Hall, *supra* note 157, at 543 (arguing that law professors should seek moral consensus with students by "extrapolating from [moral] intuitions on which they agree").

165. To assist our students in their moral deliberations, I do not think it is productive to suggest ambiguity where there is significant clarity, either by law or by shared professional consensus. Destroying relevant documents after an investigation has commenced, backdating or otherwise altering subpoenaed documents, and lying to regulators are all actions that are plainly wrong by the standards of our criminal law and the profession. See 18 PA. CONS. STAT. ANN. § 4910 (1983) (criminalizing destruction of any record or document to impair its availability in pending investigation and prohibiting alteration of record or document to impair its veracity); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983) (stating that lawyer should not unlawfully alter, destroy, or conceal document or other material having potential evidentiary value); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 375 (1993) (setting forth lawyer's obligation to disclose information adverse to client in context of bank examination); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983) (stating that lawyer is required to be truthful when making material statement of fact or law to third person). Sometimes our students do not appreciate that certain issues are more settled than others. If we do not elucidate the boundaries for them, however, they have no standard by which to measure the less clear questions.

My students laugh when I tell them that they may not kill off a witness in the name of zealous representation even if that witness is going to testify in a way that will severely hurt their client. Nevertheless, this example is useful for when they confront the question of the propriety of a misleading discovery response. Is such a response more akin to killing a harmful witness or to framing testimony in the most favorable light for the client, the latter being an ethically appropriate activity? I sometimes begin classes by asking students what behavior would clearly violate the Rules. We can usually come to a class consensus in several areas, which then serve as points of reference for the rest of the hour.

166. See Paul Bergman et al., *Learning from Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 539-43 (1987) (finding that use of non-legal role playing in law school classes can fill "experience gap" left by traditional classes and clinical programs).

imparts a message that there is a place for them in the profession that utilizes their personal moral preferences and styles.

All of the foregoing themes emerge from an acknowledgement that the practice of law is diverse—diverse in the nature of work, diverse in the people who practice, and diverse in the variety of circumstances that bear on the resolution of important professional questions. The approach to values education in law school that I suggest here is designed to prepare our students for the workplace pressures and forces that they will encounter. It seems to me to be the proper focus for our educational efforts.

CONCLUSION

As we realize the importance of workplace experiences in influencing ethical behavior, we must take account of that reality in our teaching. Our goal should be to assist our students in developing tools and skills, such as moral courage, to navigate the pressures of the workplace. This courage includes not simply the fortitude to withstand pressures to behave unprofessionally once they are in practice,¹⁶⁷ but also the desire to bring their best moral selves into their working lives. Understanding that the practice of law is not unitary and that there is a place within our diverse profession for them to be themselves, taking moral and ethical questions seriously, finding someone to talk to, and respecting their own moral and emotional judgments seem to me to be important messages that we can all begin to share with our students in the service of a more honorable, fulfilling, and humane professional life.

167. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1611 (1986) ("It is one thing to understand what ought to be done, quite another thing to do it. Doing entails an act of will and may require courage and perseverance. In the case of an individual's actions, we think such qualities are functions of motivation, character, and psychology.").