The De-evolution of American Legal Ethics

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The Perception of the American Legal Profession

Q. How can you tell when a lawyer is lying? A. His lips are moving.
Q. What do you call one thousand lawyers anchored to the bottom of the ocean? A. A good start.

These jokes are just two among many in the popular lawyer-genre. A good question to ask is why are there so many disparaging jokes about lawyers? How did the profession of lawyering, once noble and universally respected in the United States, sink to this point? And if this humor does in fact mirror public opinion, why has the legal profession been so ineffective in responding? What, if anything, have American lawyers or law schools done to reverse this perception?

Professor Geoffrey Hazard, of the University of Pennsylvania Law School, asserts that humor denigrating lawyers is intrinsically linked to certain definitive characteristics of the American legal profession.

The contemporary problems of the American legal profession seem to run deeper than in the past. There are more lawyers today, both proportionately and absolutely, than at any other time in recent history. There is much greater public consciousness of lawyers’ work, which is now the subject of regular coverage in the newspapers, magazines, and television serials. Yet the public, and perhaps the profession itself, seem increasingly convinced that the lawyers are simply a plague on society.

The idea that lawyers are a plague on society as a result of their professional conduct is hardly new. Legal scholar Henry Drinker explained in 1954, that, “[f]or five hundred years it

1 I would like to extend a special thank you to Professor David Luban of the Georgetown Law Center and Professor David Wilkins of Harvard Law School - who advised me during the initial writing of this article when it began as an undergraduate thesis at Middlebury College - and to Professor Mary Clark of the Washington College of Law - who helped me most recently turn my years of hard work into a finished article.

has been the fashion for uninformed people to carp at lawyers. There have, of course, always been crooked lawyers who have pursued their crooked course without - to our shame - being taken to task by their complaisant colleagues at the bench or bar...The prominent positions which lawyers have always occupied in the community have made such lapses from rectitude the more noticeable. Like, Hazard, Drinker attributes the American lawyer’s ironic fall from grace as an unavoidable side-effect of the position lawyers have historically held in society, as actual or pseudo-public servants. Charles Wolfram, author of the renowned legal discourse, “Modern Legal Ethics,” agrees with Drinker’s explanation. “Lawyers, more than the members of any other profession, enjoy power, prestige, income and the genuine affection of both clients and non-clients...but, also probably more than any other profession, lawyers are the target of some of the most cutting, wide-sweeping, and relentless criticism.”

However, Drinker and Wolfram tell only half of the story. If the criticism aimed at American lawyers were solely due to the authoritative positions they have held, then why and how has the respect given to American lawyers altered so drastically over the past two centuries? At the turn of the Nineteenth century, American lawyers, much like British barristers today, were highly regarded in both the professional and non-professional sectors of society. Almost half of the signers of the Declaration of Independence were lawyers. Over one half of the members of the Constitutional Convention were lawyers. These men were respected for more than their drafting and oratorical skills; they were respected because of the role they played in the creation

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of a new, more just society. Today, many of the highest government positions continue to be held by lawyers, and most American lawyers thrive economically. Nevertheless, the respect that lawyers once had has all but disappeared. Is this just a natural regression of opinion as the American legal profession and society in general have evolved, or is there a specific impetus from within the profession that had generated or at least aided the decline?

The main premise of this article is that the current low public perception of American lawyers is, ironically, rooted in the burgeoning subject of legal ethics. While some aspects of the legal profession have changed as a result of increased attention to legal ethics, most of the changes have been reluctant. The profession as a whole has consistently resisted ethical reforms and it can fairly be said that many have actually undermined the goal that the subject of legal ethics is meant to achieve - to regulate and “uphold the dignity” of the profession.

Over the past one hundred and fifty years, the subject of legal ethics has gradually evolved, gaining academic respect; it has become characterized by an increasing complexity in the breadth of the subject and in its theoretical base. However, the irony of this evolution is the relative lack of impact it has made, both in American law schools and within the legal profession generally. By tracing the historical developments of legal ethics over time, one can hope to explain how a subject meant to raise the ethical standards of lawyers and lawyering in this country has instead seemed to aid in the decline of this once noble profession.

Historians and Legal Ethics

Lawrence Friedman, an eminent legal historian, wrote twenty years ago that “American legal history, for a variety of reasons, has been a rather neglected field. It may come as a surprise to hear that this book...is the first attempt to do anything remotely like a general history, a survey of the development of American law, including some treatment of substance, procedure, and
While Friedman is correct in noting the paucity of historical interest and scholarly writing about American legal history, his book fails to address one of the most important issues of the American legal tradition which should be of interest to historians: legal ethics. Although the subject of legal ethics has played an important role in recent American history -- throughout the twentieth century and especially during the past three decades -- Friedman failed even to mention this subject once. Even in his more recent book, “American Law in the Twentieth Century,” Friedman mentions legal ethics only in the context of a three-page discussion of the American Bar Association (ABA) attorney conduct codes.

Friedman is not alone among historians in his neglect of the topic of legal ethics. Historian of legal education, Robert Stevens, in his book, Law School: Legal Education in America from the 1850's to the 1980's does not acknowledge legal ethics as an important subject taught in law school. Why has this subject been omitted from historical inquiry? Ask lawyers, law professors, or legal scholars, and most will not be able to explain this omission. Ask philosophers or religious scholars who have written in the past half century, and they too can only point out the error committed by historians; they cannot explain it.

An historian has the advantage of distance from the legal profession - which a lawyer or law professor obviously does not - and therefore can offer an unbiased analysis concerning a subject intertwined with the legal profession’s historically noble reputation. Historians are trained to glean implications from historical trends, from such implications explain current phenomena, and then make informed predictions for the future. Thus, an historical inquiry into

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6 Id. at 11.

7 Lawrence Friedman, American Law in the Twentieth Century (Yale University Press) (2002).

the evolution of the subject of legal ethics creates an opportunity to contribute new observations to a subject that sorely needs new direction, to enable it to finally make a significant impact on the legal profession.

A Brief Outline of the Article’s Concerns

This article examines pertinent historical developments in the subject of legal ethics, the theories underlying the subject, attempts to integrate the subject into the law school curriculum, and the results of those efforts to incorporate a set and sense of legal ethics into legal education and practice. Part One describes the difficulty of defining the term “legal ethics,” what attempts have been made to do so, and the result of the continuing disagreements on the content for the study of this subject. Part Two presents an empirical investigation of the published sources on legal ethics, beginning in the mid Nineteenth century and ending with the ABA’s 1974 adoption of an ethics law school-accreditation requirement. This section also focuses on the most important scholarly texts of the period and the two ABA ethics codes which were published before 1974.

Part Three describes one of the major changes in the legal profession during the 1970's and 1980's, which in turn changed the focus of the subject of legal ethics: the series of Supreme Court decisions concerning attorney advertising and solicitation, which were a major impetus for the publication of a new ABA code of ethics. Also in this time period, legal ethics scholars published a tidal wave of articles and texts espousing new theories and philosophies of legal ethics which challenged the traditional concepts of the subject. Part Four studies the history of the teaching of the subject of legal ethics in American law schools beginning in 1974, focusing in particular on the late 1980's to the present, an historical backdrop that juxtaposes continued scholarly development on the subject of legal ethics with certain realities of the legal profession.
Part Five considers the present state of legal ethics and the present perception of American lawyers. The author considers the low public perception of lawyers contemporaneous to the legal community’s alleged endorsement of the subject of legal ethics. This analysis rests in large part on the author’s empirical research including a sampling of opinions from practicing lawyers concerning the effect which the subject of legal ethics has had on their legal practice.

**Part One: Defining Legal Ethics**

Early efforts to define the term “legal ethics” yielded only vague generalizations. In 1854, Judge George Sharswood published a collection of his lectures and essays, entitled “Professional Ethics,” with the hope that they would serve as a set of guidelines for the professional conduct of American lawyers. In 1887, the Alabama State Bar Association published America’s first *Code of Ethics*, which later served as the model for the American Bar Association’s first work on the subject of legal ethics - *Canons of Professional Ethics*. The ABA defined legal ethics as “the professional standards that serve as models of the regulatory law governing the legal profession.” Even though the ABA revised its ethics codes several times since 1908, it never altered this definition.

Definitions and explanations of the subject of legal ethics offered by those outside the legal establishment were somewhat broader. In 1954, lawyer and legal historian Henry Sandwich Drinker presented two partial definitions in his book, “Legal Ethics.” The first states that “legal ethics is that branch of moral science which treats of the duties which a member of the


10 See Alabama State Bar Association, Code of Ethics (1887) quoted in Drinker, supra at 352-63.


12 Drinker, supra.
legal profession owes to the public, the court, to his professional brethren, and to his client.” The second is more expansive and is borrowed from legal scholar, Felix Cohen: “Ethics is the study of the meaning and application of judgments as good, bad, right, wrong, etcetera, and every valuation of law involves an ethical judgment.” Drinker himself posited that “an exact definition [of legal ethics] is . . . impossible.”  

In recent years, legal scholars and law professors have continued to struggle to define the concept because of an apparent - and widely debated - overlap between legal ethics and moral ethics (or moral philosophy). When professors of legal ethics from around the United States were asked by the author in a survey circulated in late 2002 how to define the subject of legal ethics, they responded with an array of answers which generally fit into two categories. One group offered a narrow definition of legal ethics similar to that presented by the ABA. The second group felt that defining this term was a more difficult and delicate task, and tended to lean more toward the views of Drinker and Cohen.

Two examples of the narrower definition come from Professor Geoffrey Miller of New York University Law School and Professor Andrew Perlman at Suffolk Law School. Professor Miller defines legal ethics as “principally the regulation of the contract between attorney and client. Law is a regulated industry and ‘ethics’ is the name given to the rules governing that

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13 Id., at xi.

14 The survey was conducted by questionnaire, which was emailed to professors at 187 U.S. law schools during October-November 2002. The questionnaire appears at the end of the article, and is discussed at greater length in Parts Three and Four (hereinafter “Professors’ Questionnaire.”).
industry.” Professor Perlman states that, “Legal ethics defines acceptable behavior for people acting as professionals (lawyers.)”

More professors, however, believe that legal ethics are not simply the codes of conduct articulated by the ABA, even if these codes represent much of the substantive written work on the subject. This second group of professors believes that legal ethics cannot and should not be completely divorced from the moral ethics ideally shared by all human beings. Professor David Wilkins of Harvard Law School, a highly respected legal ethics scholar commented:

Legal ethics is neither the same as ‘ordinary ethics’ nor completely detached from it. The lawyer’s role does create a distinct professional morality but that morality must always be tested against, and ultimately justified by, the standards of common morality. Moreover, what is ‘ethical’ for one lawyer in one context (say, a criminal defense lawyer in a trial setting) may not be ethical for another lawyer in a different context (say, a lawyer advising Enron on how to structure offshore transactions.) Legal ethics is inherently contextual. But the fact that the lawyer is acting as a lawyer is a part of the context that cannot be ignored.

Similarly, John Sutton, a practicing lawyer and lecturer at Boalt Hall, believes that “legal ethics is a subset of professional ethics, which is a subset of applied ethics, which is a branch of moral philosophy.”

Other professors offer an explanation of legal ethics which encompass both ethical concepts. For example, Roger Cramton, a professor at Cornell Law School, explains his definition of legal ethics and the relationship between legal and moral ethics this way:

Lawyer’s ethics have very little relationship to the abstractions of theoretical moral philosophers who think that universals do or ought to govern human behavior. The law and ethics of lawyering are like the everyday morality of

16 Id., Andrew Perlman.
17 Id., David Wilkins.
18 Id., John Sutton.
ordinary people: they accept various rubrics such as “tell the truth” but recognize that there are lots of situations when they can and do tell lies or misleading half-truths (e.g., to protect a loved one). It is a messy world in which there are legal rules that often have a moral foundation but are expressed in other terms, in which the profession’s ‘ethics codes’ consist of some rules that are strongly stated and regularly enforced (e.g. don’t steal a client’s money) and others are largely or totally unenforced (e.g. harassing an opposing party in a transaction or litigation, bringing a frivolous litigation); and individual morality is usually displaced partially or wholly by the legal culture or organizational morality of the organization in and for which the lawyer works.¹⁹

David Luban, formerly a professor of undergraduate philosophy and currently a professor of legal ethics at Georgetown Law School, focuses on the controversy and confusion over what legal ethics are, and where they overlap with moral ethics, if indeed they do:

I think of [legal ethics] roughly as the special obligations that fall on lawyers by virtue of their social role and by virtue of the specialized body of regulatory law that applies to them. The question of if legal ethics are different from what a philosopher might call moral ethics, is itself a controversial philosophical question: when a lawyer’s ‘role morality’ conflicts with ‘common morality’ which prevails?²⁰

Clearly, Drinker was correct; it is no simple task to define the subject of legal ethics.

From the time the first treatise on the subject was published in the United States to the present, a simple, universally accepted definition of legal ethics has not surfaced. Indeed, this discrepancy and the myriad of disagreements about how to define the subject of legal ethics, and in turn, how the subject should be taught and investigated, have resulted in a torpid and often schizophrenic evolution of the subject of legal ethics. Further, while the legal profession generally agrees that legal ethics is intended to regulate lawyers’ conduct, there is not one consistent view about the proper place of legal ethics within the law school curriculum. It seems unlikely that the subject

¹⁹ Id., Roger Cramton.
²⁰ Id., David Luban.
will have the impact on the legal profession that it is intended to make until a consensus develops about what the subject and purpose of legal ethics is.

**Part Two: The Early History of Legal Ethics**

While legal ethics has only relatively recently begun to be accepted as one of the most important courses that a prospective lawyer must study in law school, the subject itself is not new. Sir Matthew Hale, a respected English barrister, published a set of legal ethics rules in 1660. Interest in the subject did not arise in the United States until the early nineteenth century. The earliest American treatment of legal ethics was in 1836, when the respected legal scholar David Hoffman wrote his *Fifty Resolutions in regard to Professional Deportment*, a publication that was widely distributed. In the century and a half that followed, several important essays by respected legal scholars and practitioners concerning legal ethics were published, the American Bar Association released its Codes of Ethics for American lawyers, and many respected scholars published commentaries in and explanations of these codes. By the early twentieth century, legal ethics was at least superficially recognized as an important subject to be addressed by the legal profession. On the other hand, the early works on legal ethics were very general and often poorly and randomly organized. Those characteristics weakened the impact of the message. The subject remained in the form of sporadic, non-mandatory lectures and readings at American law schools until 1974, when the ABA made legal ethics a mandatory course for law school accreditation.

To understand the status of legal ethics at the time of the accreditation requirement, it is first necessary to examine the early formulations of the subject. The works written in the nineteenth and early twentieth centuries are considered seminal works, and many are still studied

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by present day law students. In addition, to fully appreciate the importance of legal ethics as it is taught in American law schools today, it is important to understand how the subject changed when it entered the arena of scholarly discourse -- to know not only what was being said, but also how it was being said, and to what audience.

Before examining the material presented in the early American legal ethics sources, it is also necessary to explain the relationship between American interest in and concern about this subject, and the British rules of etiquette and ethics for barristers, because the earliest American works borrowed heavily from the British rules. It is well-known that English common law is the basis and source of much of American common law. What is less well-known is that in colonial times, the majority of Americans who wanted to be trained as lawyers went to the British “Inns of Court” where they trained as English barristers. This orientation gave rise to some problems when they returned to the United States because the American legal system is different from the English in a number of ways.

Perhaps the most noteworthy difference between English barristers and American “lawyers”, and certainly the one which had the greatest impact on the early American works on legal ethics, is that English barristers, especially in the nineteenth century and earlier, were most often the sons of wealthy men. As a result, English barristers typically did not depend on their profession for their livelihood. In British society, barristers occupy a place near the top of the social order, and thus follow codes of conduct similar to those of the nobility. In contrast, their American counterparts practiced in a competitive and increasingly commercial profession.

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22 Drinker, supra.
English barristers were freer to concern themselves with an intangible like moral excellence and not primarily with achieving successful results.\(^{23}\)

An important result of the differences between the societal roles of the British barrister and American lawyer is that the professional norms American lawyers established were different from those followed in Great Britain. Though the earliest American writings on legal ethics tend to echo British perspectives on lawyering and adopt moral and ethical standards similar to those followed by British barristers, American writings on the subject of legal ethics slowly adopted a more American style - more pragmatic and less genteel.

Hoffman’s *Fifty Resolutions*, presented initially to the Baltimore Bar Association in 1836, are a broad and general overview of what Hoffman felt should be the etiquette and ethics of American lawyering.\(^{24}\) The tone and advice Hoffman proffered seems a combination of the Ten Commandments, warnings against the Seven Deadly Sins, and a handbook for professional comportment. Although Hoffman certainly intended to make a serious impact on the way in which American lawyers practiced, the force of his advice was tempered, both as a result of the format he selected and of the content of his message. Indeed, the lofty goals he set forth for his audience often sound more like social guidelines, not rules of professional conduct. For example, Hoffman states that above all other obligations, the American lawyer must remain morally untainted, always punctual and always respectful.\(^{25}\) Hoffman’s focus on British-like rules of etiquette as opposed to ethical guidelines for actual conduct specific to American society and the American legal system may, in part be, attributed to the continuing British-loyalist

\(^{23}\) Id.

\(^{24}\) David Hoffman, Hoffman’s Fifty Resolutions (1836), quoted in Drinker, supra.

\(^{25}\) Id. at p. 351.
sentiment by the still young and relatively undeveloped American legal system. Alternatively, the Resolutions can be seen as part of a reaction against the rough-and-ready Jacksonian democracy’s attempt to wrench the United States away from British traditions and practices.

Despite the undercurrent of British sentimentality in Hoffman’s Resolutions, the enduring importance of Hoffman’s work is the topics he identified, which continue to be considered central to legal ethics in the United States. The fidelity and obligations of the lawyer to the court, to his professional brethren, and to his client, discussed extensively in the Resolutions, formed the cornerstone of American legal ethics in the nineteenth century and remain its focus today.  

The second important American source on legal ethics, which in combination with Hoffman’s Resolutions comprises the main foundation for the ABA’s first official Code of Ethics, is Judge George Sharswood’s essay, “Professional Ethics,” first delivered as a set of lectures at the University of Pennsylvania Law School in 1854. In this compilation essay, Sharswood discusses “those duties which the lawyer owes to the public or commonwealth,” and “those which are due from him to the court, his professional brethren, and his client.” Delivered at a time in American history when the United States was embroiled in political upheaval due to social and economic divisions, Sharswood’s essay appears to have been an attempt to keep the American legal system from falling prey to the chaos. While the issues discussed by Sharswood would be incorporated in almost every work on legal ethics published thereafter, Judge Sharswood, like Hoffman, presented his ideas in a very disorganized fashion. Again, this lack of focus tempered the immediate impact of his words.

26 Id.

In the first section of his essay, Sharswood attempts to describe the duties of the lawyer to the public, by explaining the importance of legislation and jurisprudence to American society, and the role that the lawyer plays in both, a subject virtually untouched by Hoffman. Sharswood reminds his audience that the American lawyer “is as frequently called upon to inquire what the law ought to be as what it is. While a broad and marked line separates and always ought to separate the departments of legislation and jurisprudence, it is a benefit to both that the same class of men should be engaged in both.”28 The main point in this section of Sharswood’s essay is that the American lawyer plays a prominent role within the governmental bodies that enact and interpret laws, and thus, American lawyers occupy key roles in American society. Though the text makes it clear that this section was delivered as a separate lecture, the reason why Sharswood nevertheless chose to include it in a treatise ostensibly devoted to lawyers’ professional ethics is unstated and ambiguous. Perhaps it was his attempt to provide an historical foundation and justification for the necessity of paying attention to legal ethics.

The relevance of the second portion of his essay to the subject of legal ethics is, however, easy to see, and is in fact the main focus both for Sharswood, and all those who later looked to his work as a foundation of American legal ethics. He begins by explaining that the main objective of the essay is:

To arrive at some accurate and intelligible rules by which to guide and govern the conduct of professional life. It would not be a difficult task to declaim in general propositions - to erect a perfect standard and have the practitioner to make his own application to particular cases. It is a difficult task, however, as it always is in practice, to determine the precise extent of a principle, so as to know when it is encountered and overcome by another - to weigh the respective force of duties which appear to come in conflict.29

28 Id. at 26.

29 Id. at 56.
He recites the language of the oath which each American lawyer took before beginning practice – promising “fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor”\(^\text{30}\) – and turns to the second part of his treatise.

Sharswood asserts that the lawyer must always show “outward respect in words and action”\(^\text{31}\) to the court, and that it is the duty of counsel to “present everything in the cause of the court openly in the course of the public discharge of its duties.”\(^\text{32}\) In offering more specific guidance, Sharswood cautions that:

A practitioner ought to be particularly cautious in all his dealings with the court, to use no deceit, imposition, or evasion - to make no statements of facts which he does not know or believe to be sure - to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions - to present no paper-books intentionally garbled.\(^\text{33}\)

Sharswood instructs American lawyers not to stray from the path of open honesty in dealings with the court, and to be similarly honest when dealing with witnesses, the judge, and the jury.

Sharswood briefly notes the importance of maintaining a good professional reputation. “Let him shun most carefully the reputation of a sharp practitioner,” while also remembering that “nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public.”\(^\text{34}\)

The most important duty, according to Sharswood, is the duty of the lawyer to his client. “The

\(^{30}\) Id. at 58.

\(^{31}\) Id. at 61.

\(^{32}\) Id. at 66.

\(^{33}\) Id. at 72.

\(^{34}\) Id. at 74-75. This is an issue to which he returned in his conclusion, when he admonished his readers that, “No man can ever be truly great lawyer, who is not in every sense of the word, a good man...From the very commencement of a lawyer’s career, let him cultivate, above all things, truth, simplicity, and candor: they are the cardinal virtues of a lawyer.” Id. at 169.
topic of fidelity to the client involves the most difficult questions in the consideration of the duty of a lawyer.”\textsuperscript{35} The “cardinal rule” of a lawyer’s obligation to his client is that the lawyer must offer his “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability.”\textsuperscript{36} Sharswood sets forth a lofty goal to which all lawyers are expected to adhere:

There belong to him, moreover, moral ends which regard his profession; namely, to make it an institution fitted to promote morality. To raise and purify the character of the profession, so that it may answer the ends of justice without requiring insincerity in the advocate, is a proper aim for a good man who is a lawyer; a purpose on which he may well and worthily employ his efforts to influence.\textsuperscript{37}

Judge Sharswood explains that the proper role of the lawyer as advocate or adversary comprises duties very distinct from those of a judge or jury. By this, Sharswood means that it is not the role of the lawyer to judge the justness or rightness of his client’s cause, that is for the judge and jury. It is sufficient for the lawyer to argue for the cause of the client with zeal and within the bounds of the law. “The lawyer who refuses his professional assistance because in his own judgement the case is unjust and indefensible, usurps the functions of both judge and jury.” However, Sharswood conceded that a lawyer can refuse a retainer under certain circumstances. “[A lawyer] ought to examine and be well satisfied before he refuses to a suitor the benefit of his professional skill and learning, yet it would be on his part an immoral act to afford that assistance when his conscience told him that the client was aiming to perpetrate a wrong through the means

\textsuperscript{35} Id. at 76.

\textsuperscript{36} Id. at 80.

\textsuperscript{37} Id. at 102. Sharswood did not go any farther in discussing the inherent conflict between the serving the needs of the client and serving the character of the profession. This conflict is the topic of extended discussion by Twentieth Century legal scholars.
of some advantage the law may have afforded him.” As Chief Justice Gibson cautioned a few years earlier, “the high and honorable office of the counsel would be degraded to that of a mercenary, were he compelled to do the bidding of his clients against the dictates of his conscience.” Thus, Sharswood adopts as a guideline that once a lawyer accepts a case, he is expected to represent his client to the best of his ability, but he is not obligated to take on all clients who or which request his assistance.

In his conclusion, Sharswood posits several other ethical guidelines for lawyers. The fact that he does not present them in any particular order is emblematic of the questionable dedication by any scholar to this subject in the nineteenth century. One of the issues he touches on is that of compensation. The American habit of relying on English guidelines is especially apparent in this topic, as Judge Sharswood leaves American lawyers without any definitive guide for determining the amount of “ethically” acceptable lawyer’s fees. His failure to address the American lawyer’s more commercial needs reveals both a practical and ethical problem with the wholesale adoption of British rules of barrister etiquette.

Following Sharswood’s essay, the subject of legal ethics remained largely dormant until the Alabama State Bar Association published its Code of Ethics in 1887, largely based on Hoffman’s and Sharswood’s works, the first code of ethics published by a group of American lawyers. The American Bar Association’s first code of ethics published twenty years later (and viewed generally as a set of guidelines for all lawyers) is based almost entirely on Alabama’s Code. It seems somewhat peculiar that in 1877, when radical Reconstructionists suddenly

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38 Id. at 84.

39 Id. At 96.

40 Id at 97.
backed down and left the South to be run once again by white aristocrats, that a reformist code of any kind would come out of a Southern state’s bar association. This disconnect from the overarching trends of America’s social and political history appears to be the result of state bar associations throughout the country regulating the legal profession more closely, as a way to combat membership to the bar opening up to almost any candidate, regardless of education or family background.41

The Alabama Code begins by quoting Judge Sharswood on the necessity for members of the American legal profession to retain high moral principles and an upright character:

There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to serve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career needs often the prudence and self-denial, as well as the moral courage, which belongs commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst a darkness and obstruction.42

Following the Preamble and Sharswood’s quote, the Alabama Code is divided into two sections: The first describing the “duty of attorneys to Courts and Judicial Officers,” and the second describing the “duty of attorneys to each other, to clients, and to the public.”43 It is easy to glean Hoffman and Sharswood’s philosophies and approach from the Code’s text. For example, the provisions concerning the lawyer’s duties to the court and its officers (the obligation to show respect, not to criticize judicial conduct during trial, not to attempt to bribe or otherwise unduly influence the judge or jury, and that “candor and fairness should [always]


42 Alabama State Bar Association, Code of Ethics (1887), quoted in Drinker, supra at 352.

43 Id., at 354.
characterize the dealings of attorneys with the courts and with each other⁴⁴) are traceable almost directly from Hoffman. The Code’s exhortation that lawyers must uphold the honor of the profession is also reminiscent of both seminal works:

An attorney should strive, at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one, advances the other; and the attention thus discharges, not merely an obligation to his brothers, but a high duty to the state and his fellow man.⁴⁵

In discussing the duties of the attorney to limit his actions to that which is allowed by law, the Code quotes Sharswood, as he quoted directly from Hoffman:

[The attorney] owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability...Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it.⁰ The attorney’s office does not destroy the man’s accountability to the Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery for the client’s sake.⁴⁷

In the section devoted to a lawyer’s duties to his colleagues, to his clients, and to the public, the Alabama Code presents an extended list of guidelines that does not seem to be organized in a logical way. This section very briefly mentions the issues of defending and prosecuting those accused of crimes; the strict rules against almost any advertising and soliciting; broad guidelines concerning confidentiality and conflicts of interest; advice to always curry favor

⁴⁴ Id.
⁴⁵ Id. at 355.
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⁴⁷ Id.
with one’s professional brethren; rules of conduct for dealing with witnesses; and a short directive not to steal the client’s money, nor to “blend” one’s own with that of one’s client.  

The publication of the Alabama State Bar’s Code of Ethics certainly represents a positive step toward creating a strong foundation of ethical conduct by lawyers in the United States. However, the disorganized way in which most of the topics are presented, and the paucity of any probing or detailed discussion of the guidelines diminished any lasting impact this Code might have had. The Alabama Code’s major contribution is that it served as the model for the ABA’s 1908 code.

In the two decades between the publication of the Alabama Code of Ethics and the ABA’s first Canons of Legal Ethics, two other important documents concerning the legal profession were published. The first are the papers from the ABA’s 1894 and 1895 meetings, at which legal scholars discussed publicly for the first time the need for legal ethics to be a requirement of American legal education. Edmund Wetmore’s 1894 paper, “Requirements of Legal Education,” states the proposition plainly:

Every law course would be improved that should include a brief series of lectures from those whose own lives and character entitle them to speak with authority, the object of which should be to impress upon the young men entering the profession that the highest requirement of a legal education is to make a practitioner whose word is as sacred as an oath, and who would no more seek to impose upon a court, to bring a questionable suit, or to seek success by resort to other influences than evidence and argument, than he would enter the courtroom to ply the trade of a pickpocket.  

At the 1895 session, Dr. Austin Aldset, chair of the ABA Committee on Legal Education, delved further:

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48 Id.

49 Drinker, supra at 218.
The committee would recommend...that a course upon Legal Ethics be introduced in the law school curriculum...it is unnecessary to argue the need of a knowledge of legal ethics by the bar, or the propriety of instruction on this subject in our law schools in order that their graduates may enter the profession with correct ideas of the duties and responsibilities of practitioners to one another, to their clients, to the courts, and to the public.\textsuperscript{50}

Dr. Aldset then briefly discusses the benefits to offering a specific course in legal ethics rather than restricting the subject to references in the teaching of other subjects:

It could not be but useful near the close of their career as students to bring together the disconnected threads, and in a brief course of lectures to warn them of the pitfalls which will beset their way, and with genuine solicitude and sympathy, make plain to them the oath of duty, of honor, and of safety...Such a course would give to the student a more clear and definite conception of the function of the lawyer, as being in its highest aspect the pursuit of truth whether in questions of fact or of law. It would show him the noble scope for a just partisanship for his client within the honorable limits of his duty to the court, to the public, and to the state. It would enhance the wholesome influence upon him of a sense of responsibilities as an officer of the court, and would enlarge his appreciation of the public influence which honorable service at the bar always brings.\textsuperscript{51}

The second important addition to the body of legal ethics works, was a set of essays published in 1902 by George Warvelle, a well-respected legal scholar and practicing lawyer, who stressed the need for the study of legal ethics in legal education, and described what he saw as the necessary material for such a course:

For many years the importance of this subject...has been urged by learned and influential lawyers and legal educators, and, as the study of Moral Philosophy obtains a place in the curriculum of every literary college, so, it is contended, the study of Legal Ethics should be given a distinct position in the courses of the law school.\textsuperscript{52}

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 219.

\textsuperscript{52} George Warvelle, Essays in Legal Ethics, 2 (Callaghan & Company) (1902).
One especially noteworthy aspect of Warvelle’s work is his attempt to offer a definition of what is actually meant by the phrase “legal ethics.” While Warvelle readily admits that there is no easy answer (or perhaps any answer at all) to this quandary, he is one of the first scholars to address the issue head-on. He was also one of the first to emphasize it, by raising the question at the beginning of his exploration into the subject of why legal ethics should be taught in American law schools. Unlike his predecessors, Warvelle seems willing to grapple with all of the facets of the issue. What he actually presented as his definition of “Legal Ethics” is disappointingly vague by current day standards, but was nevertheless remarkable for his time:

A craft, or profession, from its experience and observation, establishes certain canons of ethical import and makes rules for the guidance and governance of its members. The rules may be express or implied, and it is immaterial whether they be written or unwritten. It is sufficient that they have received a general assent by substantial observance only.  

In the body of his essay, Warvelle focuses on the same sorts of issues as those on which his intellectual predecessors focused, but he improves the discussion by presenting his exploration of legal ethics in an organized - and thus more forceful - fashion. The first part of Warvelle’s inquiry looks at the lawyer as advocate, and the demands made upon the lawyer by the adversary system. Here, he focuses on the increasing criticism of lawyers arising from the traditional and perhaps naive understanding of the role of the lawyer in that system:

With the growth and development of the practice of advocacy there has also grown and developed a class of detractors who not only attack the lawyers but assail the principle of advocacy itself, which they are wont to characterize as repugnant to good morals and sound ethical precept.  

The modern criticism voiced most often about the American legal system is its requirement that there should be two clearly delineated sides, one right and the other wrong; one good, the other

53 Id. at 19.

54 Id. at 25.
bad. It is a popular misconception that the system of advocacy necessitates that one lawyer is on the side of truth, fighting zealously for a just cause, and the other is representing a falsehood, purporting lies and throwing away his professional character. Warvelle pointed out, more accurately, that, “in the great majority of litigated cases, even after careful hearing of both sides, it is extremely difficult to say on which side the legal right lies,” and that it is the function of all adversaries to provide “materials” from which decisions can then be made by judge and jury.

Perhaps the most interesting concession offered by Warvelle is his candid admission that lawyers as advocates may and do stray from the path of what is “right” and “legal,” and when this occurs, the lawyers should be punished harshly:

The lawyer is not alone a gentleman; he is a sworn minister of justice. His office imposes high moral duties and grave responsibilities, and he is held to a strict fulfillment of all that these matters imply. Interests of vast magnitude are intrusted to him; confidence is reposed in him; life, liberty and property are committed to his care. He must be equal to the responsibilities which they create, and if he betrays his trust, neglects his duties, practices deceit, or panders to vice, then the most severe penalty should be inflicted and his name stricken from the roll.

Warvelle also discusses further the acceptable codes of conduct for a lawyer in specific situations. Regarding advertising and solicitation, his advice does not differ sharply from that proffered by his predecessors. He frowns upon the idea of lawyering becoming commercialized, despite the likely well-known fact that most American lawyers rely on their practice for their livelihood. Warvelle states that “all solicitation must be done in a modest and decorous manner,” and that the only acceptable advertising is business cards and law lists. He does, however, take one step farther away from the somewhat antiquated ideas of advertising and solicitation adhered to in England. Warvelle seems to understand that lawyers in the United

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55 Id. at 27.

56 Id. at 43.
States do derive their living on their law practice, and as such, “when a solicitation can be made without a loss of professional dignity or a lowering of professional standing, then it is proper.” This brief statement represents a major advance in professional ethics.\textsuperscript{57}

After addressing solicitation and advertising, Warvelle moves his discourse in a new direction, discussing the role of morality in lawyering. Warvelle proposes that a moral qualification should be imposed for the admission of new lawyers to the bar as far too many incompetents, and those of dishonorable character, had been allowed to practice the noble profession of law in the United States, with the result that they failed to uphold the dignity of the profession:

This general character of a moral agent, it is contended, cannot be put off by merely putting on professional character, for every man, when he advocates a case in which morality is concerned, has an influence upon those around him which arises from the belief that he shares the moral sentiments of mankind.\textsuperscript{58}

After this discussion, Warvelle, like all those who wrote on legal ethics before him, turned to specific ethical rules of conduct, and he does not bring anything new to these subjects.

The path for the ABA to follow in creating a code of ethics which would bind all American lawyers - after the publication of Warvelle’s essay - was well-laid. The direct impetus for the ABA’s Code, according to Deborah Rhode and David Luban in their legal ethics casebook, is the 1906 speech given by President Theodore Roosevelt rebuking corporate lawyers for helping powerful clients to evade regulating legislation. As a result, the President of the ABA authorized a Committee on Ethics to consider “whether the ethics of our profession rise to

\textsuperscript{57} Id. at 55-6.

\textsuperscript{58} Id. at 100.
the high standards which its position of influence in the country demands.” The Committee reported that:

It...becomes our plain and simple duty...to use our influence in every legitimate way to help make the American Bar what it ought to be. A code of ethics, adopted after due deliberation and promulgation by the ABA, is one method in furthering this end...A further reason why we report the advisability of canons of ethics being authoritatively promulgated arises from the fact that many men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of ethical requirements of the situation. Habits acquired when professional character is forming are lasting in their effects.

The result of the Committee’s efforts was the 1908 code that the ABA called the Canons of Professional Ethics, a clear product of earlier writings and theory.

While the ABA’s code was very similar to the Alabama Code, the ABA’s original thirty-two canons expanded upon explanations and requirements in a few areas, such as advertising and lawyers’ fees. However, the Canons are very disorganized and often lack even the main headings that are included in the Alabama Code. The most obvious similarity in the two codes is the Canon’s exact quotation from the Alabama Code, many of which were borrowed from


60 Id. at 67.

Hoffman and Sharswood. A major difference between the Canons and Alabama’s Code is the inclusion of a Preamble in the former, part of which remains mostly unchanged today:

In America, where the stability of the Courts and all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.62

By 1920, all but thirteen states had adopted the ABA Canons of Ethics. There were, however, persistent and substantial problems in the enforcement of these rules “in part because of the [Canons’] brevity, generality, and attempt to combine moral exhortation with disciplinary mandates.”63 Indeed, the situation worsened as the number of Canons grew to forty-seven by 1937, and as formal and informal ABA Ethics Committees published opinions, designed to interpret and clarify the Canons. By 1920 - barely twelve years after the Canons were first announced - fourteen hundred opinions had been published. Despite the proliferation of general texts and essays on legal ethics, and two Codes of Ethics, one sponsored by the American Bar Association, “many significant ethical problems remained unacknowledged and unaddressed.”64

Over thirty years passed before the next significant text was published on the subject of legal ethics: Henry Sandwich Drinker’s treatise, Legal Ethics, released in 1953. In the Preface of this work, Drinker offers as his reason for writing the fact that all other works on the subject were now “out of date.” Hoffman’s Resolutions and Sharswood’s essays were, by the mid-twentieth century, about one hundred years old, and the legal profession had been changing

62 American Bar Association, Canons of Ethics (1908) quoted in Drinker, supra at 309.
63 Luban, and Rhode, supra at 66.
64 Id. at 67.
along with the rest of American society in his interval. According to Drinker, Warvelle’s book was also out of date, and there was general agreement within the American bar that the *Canons*, even as revised in 1937, were insufficient and flawed. Drinker offers the following specific justification for his writing:

> To many lawyers it has...seemed essential that our lawyers and law students should have a modern book on the subject which would apply the eternal principles to present conditions, embody those dealing with the new developments, such as advertising, matrimonial litigation, fee splitting, etc., and also make available a summary of the principles established by the many written decisions which have been rendered during the past thirty years by Ethics Committees of the different bar associations construing the Canons.65

It is not surprising that Drinker’s commentary on American legal ethics would emerge at this time, a period of American history where social reform and civil rights were manifesting an increasingly important presence in society. In addition, Drinker cites the “continual and increasing stream of inquiries from lawyers all over the country stating delicate and difficult problems of conduct with which they and their associates and competitors at the bar are confronted, and asking whether the bar association can offer guidance as to what they do.”66

Like Warvelle, Drinker briefly explores possible definitions of the term legal ethics. However, unlike any who came before him, Drinker adds a section between his Preface and his first chapter called “Noblesse Oblige,” referring to the obligations which the lawyer owes because his is a “noble” profession.67 While much of the supposed nobility of the legal profession, according to Drinker, comes from the regard for the legal profession in English society, the historical roots do not make Drinker’s commentary on why the lawyer is expected to

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65 Drinker, supra, at ix.

66 Id. at p. 7.

67 Id. at 5-9.
uphold the dignity of the profession any less valid and helpful. Indeed, this hoary concept was an ABA Canon. Where Drinker’s book departs from those of all of his predecessors’ is that he presents a critique of the 1908 ABA Canons, attempting to assess the good in the them, and then suggests what needs to be changed.

He begins with a history of the Canons, and a general assessment of their impact on the legal profession. Drinker points out the Canons’ connections with the ideas expressed by Hoffman and Sharswood and the Alabama Code. He then offers an explanation of the circumstances that necessitated the Canons:

Unquestionably the primary reason for the great activity in the bar associations in forming and adopting Codes of Ethics, beginning with the Alabama Code in 1887, was the same as that which prompted the organization of bar associations - the realization by thoughtful leaders of the bar of the growing commercialism all over the country...The consequent weakening of an effective professional public opinion clearly called for a more definite statement by the bar of the accepted rules of professional conduct. These must be made accessible, in simple form, as a guide both to law students and also to practicing lawyers.68

Drinker also acknowledges the problem with the Canons’ not being mandatory. Even when adopted by the respective state bar associations, no lawyer was forced to follow the Canons, and could easily ignore the Canons’ ethical considerations, as distinct from the Disciplinary Rules.

In 1952, federal district court Judge McGuire commented on this unfortunate truth:

Codes of Ethics adopted by bar associations have no statutory force. They are indicative, however, of and reflect the attitude of the profession as a whole upon those courses of actions which they frown upon and interdict, and they are commonly regarded by bench and bar alike as wholesome standards of professional ethics.69

68 Id. at 25.

69 Id. at 27.
As noble as the ABA’s goal was for its code, Drinker saw the absence of strict and mandatory enforcement as a serious problem, especially if the Canons were one of the only guides to which lawyers could look to frame their conduct.

In the next section of his book, Drinker examined the Canons thematically. His organization, deceptively simple, was a major breakthrough, because it made the disorganized Canons easier to comprehend. He did not substantively add to the supposed duties of a lawyer, but as he discussed each ethical obligation, Drinker wove in commentaries by the ABA Ethics Committees, judges, and state bar associations.

Drinker also expanded upon the Canons in his section on advertising and solicitation. He notes that historically, these regulations were derived from the standards set for British barristers who, “did not have to worry about earning their keep, and who traditionally looked down on all forms of trade and the competitive spirit characteristic thereof.”70 Although Drinker acknowledges that the social and professional position of American lawyers is somewhat different from those of British barristers, he does not believe that the American rules and regulations concerning solicitation and advertising ought to differ sharply. His justification is that in the United States lawyering is still considered a profession, “not a fancied conceit, but a cherished tradition,” the preservation of which is essential to the lawyer’s reverence for his calling as well as to his regard and esteem for his fellows at the bar. Drinker cites a 1933 opinion of the New York Ethics Committee that the functions of the legal profession “relate to the administration of justice, and to the performance of an office erected and permitted to exist for the public good, and not primarily for the private advance of the officer.”71

70 Id. at 210.

71 Id. at 212.
Although it is understandable, from an historical perspective, that such beliefs would persist in the American legal system in 1953, pressure for the profession to acknowledge America’s more obviously commercialized society and to reject such strictly minimal advertising was beginning to build.

Drinker’s book attempts to modernize the subject of legal ethics by proffering advice and explanations that are useful for instructing law students, and for explicating the rather poorly written and far too brief ABA Canons. However, Drinker’s work remains rooted in the past as it retains elements of antiquated British ideals no longer pertinent to American lawyers practicing in a distinctly different legal system, or in need of updating to take into account American realities. Further, in light of the fact that the ABA’s Canons received so much criticism, it seems surprising that a scholar like Drinker would devote a treatise to rehashing and commenting on the existing Canons rather than to proposing a new code.

One year after Drinker’s book was published, legal scholar and practitioner George Costigan published the first modern legal ethics casebook. In his Preface, Costigan offers his reasons for compiling a legal ethics casebook:

Two reasons have been given for the failure of law schools to devote a proper amount of time to the subject of Legal Ethics. One has been the fact that the curriculum is already overcrowded, the other has been the lack of a source-book on the subject; it is believed that the first reason is not nearly as strong as it is supposed to be, and once a casebook, with sufficient variety and quantity of materials to meet the needs of most persons interested in the subject is supplied, the curriculum will be expanded to permit adequate instruction in this important subject.  

Costigan’s casebook marks the real beginning of interest and acknowledgment in the twentieth century that the subject of legal ethics is a necessary part of legal education. He

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comprehends that teaching the *Canons of Ethics* and essays on the subject written over one hundred years previously no longer suffices as proper training for young American lawyers. The specific aim of the casebook differs from earlier treatises on legal ethics, in that it seeks to aid lawyers in avoiding disbarment and disciplinary proceedings resulting from ignorance of the ethical requirements of particular situations. Instead of engaging in a discourse on what should be the ethical aspirations of lawyers, Costigan focuses on the minimum level of conduct to follow to make sure one is not disciplined.

Costigan divides his casebook into five sections. Each section Costigan begins with a description of the subject and citation of the applicable *Canons* and pertinent rules from state codes and opinions by different bar ethics committees. The majority of each chapter, however, is focused on excerpts from actual cases where ethical questions come into play, thus leaving the lawyer or law student to learn by example about what may and may not be done in actual practice. While the subject matter is not necessarily new, his empirical method of offering factual examples set a precedent for the format of legal ethics casebooks continue to follow today.

Costigan’s book added fuel to the growing criticism about the insufficiency of the ABA’s *Canons of Ethics*, and in 1964, the ABA created a special Committee on the Evaluation of Professional Ethics to examine the 1908 Canons and to make recommendations for changes. This Committee, with the special aid of legal scholar and academic John Sutton, worked until 1969 to formulate a new Code:

After substantial study and a number of meetings we concluded that the present Canons needed revision in four principle particulars: One, there are important areas involving the conduct of lawyers that are either only partially covered in or

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73 The Admission and Discipline of Lawyers; The Ethical Duties of Lawyers to Courts; Solicitation of Legal Business; The Ethical Duties of Lawyers in Criminal Cases; The Ethical Duties of Lawyers in Civil Cases.
totally omitted from the Canons; Two, many Canons which are sound in substance have been awkwardly or deficiently stated; Three, Most of the Canons do not lend themselves to practical sanctions for violations; and four, changed and changing conditions in our legal system and urbanized society require new statements of professional principles.\textsuperscript{74}

The idea of revising the Canons was not new. In 1928, 1933, and 1937 special committees investigated the Canons and recommended revisions, but none were adopted. In 1954, another ABA Committee recommended more revisions to the Codes, but these suggestions stagnated for over ten years. In an effort to garner support for the new code, Chief Justice Harlan Fiske Stone added his voice to those recommending the 1969 revision:

Before the Bar can function at all as a guardian of the public interests commanded to its care, there must be appraisal and comprehension of the new conditions and the changed relationship of the lawyer to his clients, to his professional brethren, and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our Canons of Ethics for the most part are generalizations designed for an earlier era.\textsuperscript{75}

The 1969 ABA code, dubbed the \textit{Professional Code of Conduct}, relied heavily on Drinker’s discourse on legal ethics, as well as several changes suggested by recent U.S. Supreme court cases. The ABA \textit{Code’s} new structure, inspired by Yale Law School professor Lon Fuller’s 1964 book, “The Morality of Law,” which called for “a distinction between moralities of duty and moralities of aspiration,” was divided into eight Canons, complete with subject headings, ethical considerations, and disciplinary rules.\textsuperscript{76} The Canons themselves were


\textsuperscript{75} Id. at vi.

\textsuperscript{76} Canon One, pertaining to “the Integrity and Competence of the Legal Profession.” describes the obligation of the lawyer to keep out those not properly qualified, and alert the bar to disciplinary rule offenders. Canon Two, largely concerned with advertising and solicitation, reflected the ABA’s position that any commercialization of the legal profession must be closely regulated controlled in order to “guard the integrity of the profession.” It decreed that the only acceptable advertising was identifying lawyers by name, location, and
considered to be “axiomatic statements of the obligations of lawyers to the public, to the legal system, and to the legal profession.”\textsuperscript{77} The Ethical Considerations were supposed to be, “aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely in many specific situations.” The Disciplinary Rules were to be considered “mandatory in character, and stated the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”\textsuperscript{78}

specialization, and briefly discusses the ethical considerations and disciplinary rules concerning lawyers’ fees. Canon Three (“Preventing the Unauthorized Practice of Law”), Canon Four (“Act[ing] Competently and Us[ing] Proper Care in Representing Clients”), and Canon Five (“Preserv[ing] the Confidences and Secrets of Clients”) mean exactly what their titles say and do not expound on specific situations or exceptions. Canon Six (“Exercis[ing] Independent Professional Judgement”) is meant to regulate conflicts of interest. “The professional judgement of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client, and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.” (ABA Professional Code at 60). Canon Seven (“Lawyer’s Duty to Represent [] Client with Zeal Limited Only by his Duty to Act Within the Bounds of the Law”) borrows heavily from the 1908 Canons and acknowledges that identifying what law should limit or inform the lawyer’s zealous position is often difficult because it depends on whether the lawyer is acting as advocate or advisor, public prosecutor, or defender. However, the overall message of this Canon remains loyal to George Sharswood’s philosophy that devotion to the client - within the law - is paramount (The Disciplinary Rules of this Canon attempt to describe examples of acceptable zeal, and what exactly should be understood as “within the bounds of law.”) Canon Eight partially mirrors Canon One, advocating that lawyers should “propose[] and support[] legislation and programs to improve the system” (ibid at 107), and touches briefly on the issue of lawyer’s ethics supporting justice, and not just regulating legal conduct.

\textsuperscript{77} ABA Professional Code, at 1.

\textsuperscript{78} Id.
Though a considerable improvement over the 1908 Canons, especially in organization, the content and structure of the 1969 Code came under heavy criticism not long after its adoption. Three main criticisms surfaced:

[One], the disparity between what the Ethical Considerations exhorted and what the Disciplinary Rules required was fostering cynicism about the bar’s aspirational norms and creating confusion in enforcement efforts. [Two], the failure to distinguish among various functions that lawyers performed (e.g. advocate, counselor, intermediary) and its inconsistent approach towards the Ethical Considerations; [and Three], In addition, a series of Supreme Court decisions in the 1970's on advertising, solicitation, fees, and group legal services forced reconsideration of rules governing professional comportment.  

Within a single decade following the Code’s adoption, “a special ABA Commission was already recommending an alternative set of standards” that would meet the changing needs and requirements of the legal profession.

**Part Three: Changes in Legal Ethics**

In 1974, the already present force to change and expand legal ethics intersected with Watergate and the resignation of President Richard Nixon. The U.S. legal profession bore the brunt of especially heavy criticism in the Watergate fallout because so many lawyers had prominently been involved in the scandal. Not only had Presidential advisers gone to jail, but the Attorney General of the United States was imprisoned for his complicity and participation in the illegal actions. The members of the American Bar Association took upon themselves the task of designing steps that would demonstrate the dedication of the legal profession to moving beyond the scandal and to improving their professional ethics, which had obviously been sorely lacking in the lawyers involved in Watergate. Also in 1974, the ABA mandated that in order for a law school to retain its accreditation, each law student had to take at least one course in legal ethics.

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79 Luban and Rhode, supra at 68-69.

80 Id. at 69.
The requirement of a mandated legal ethics course helped to illuminate a subject which had just started to gain real momentum in its academic development. The hope was that if every graduating law student was now required to study legal ethics in the course of his or her legal education, and the subject was properly expanded and explicated, then newly trained American lawyers would have a better sense of their professional ethics and the expectations of acceptable conduct than the lawyers who had come before them.

In the first fifteen years following Watergate and the implementation of the accreditation requirement, the subject of legal ethics underwent abundant change. These changes occurred both within the law school curriculum and outside of it, as part of larger changes affecting the American legal profession. These changes were interdependent, each begetting the next. Many factors contributing to these changes came close in time, in a flurry of progressive thought which has since been slowly integrated into the subject of legal ethics. The subject of legal ethics, which underwent a very gradual evolution from the time of its birth in the United States in the early nineteenth century until the early 1970's, thus changed dramatically in the two plus decades which followed the Watergate scandal.

**Attorney Advertising and Solicitation**

The first big change in professional ethics for lawyers was engendered by a series of Supreme Court cases about lawyer advertising and solicitation. Prior to the 1970's and 1980's, the advertising and soliciting of clients by lawyers was mainly prohibited. The traditional view concerning advertising and solicitation was that, “a distinctive aspect of professionalism was a rejection of the commercial spirit, a posture that reinforced notions of the lawyer as serving larger interests than those of self. Moreover...that advertising of legal services would inevitably be
misleading to lay persons, resulting in deception, overreaching and incitement of litigation.”81 However, beginning in the late 1960's, forces “within and without the [legal] profession began to challenge the total prohibition of advertising.”82 The Supreme Court cases all focused on the protective powers of the First Amendment (applied to the states via the Fourteenth Amendment), and extended the private right of “free speech” to legal, “commercial” speech.

The Supreme Court’s decision in Bates et al. v. The State Bar of Arizona,83 in June of 1977, was the seminal case, establishing not only that a lawyer’s “commercial” speech should be protected by the First Amendment, but also that lawyers should be able to “constitutionally advertise the prices at which certain routine legal services will be performed.” While the lawyers in Bates, by advertising their legal services, were directly violating Disciplinary Rule 2-101(B) of the 1969 Model Code of Professional Responsibility, the Supreme Court rejected the time-honored justifications for this rule which forbade virtually all attorney advertising, and ushered in a new professional role for lawyers. Specifically, the justices unanimously agreed that:

The postulated connection between advertising and the erosion of true professionalism [is] severely strained...If the commercial basis of the relationship [between lawyer and client] is to be promptly disclosed...once the client is in the [lawyer’s] office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at the office.84

The Court declared that, “the belief that lawyers are somehow above “trade” is an anachronism, and for a lawyer to advertise his fees will not undermine true professionalism.”85

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82 Id. at 1016.


84 Id. at 368.

85 Id. at ___.
an apparent attempt to assuage concerns about the potential ramifications of the profound changes in the practice of law that its decision presaged, stated, “We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system.”86 However, the majority cautioned that:

[W]e, of course, do not hold that advertising by attorneys may not be regulated in any way...We recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.87

86 Id. at ___.

87 Id. at ___.

Over the next eleven years, the Court decided five more cases concerning attorney advertising and solicitation, which demarcated a gradual evolution of the constitutional limits on attorney advertising. The changes were not however entirely wrought by the Court. The ABA incorporated the Court’s earliest pronouncements in the code of ethics published in 1983.

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88 See, In Re Primus and Ohralik v. The Ohio State Bar Association, 436 U.S. 412 (1978) (companion cases holding that specific forms of mailed solicitation would no longer be prohibited, but continued to prohibit in-person solicitation if it posed significant harm for the prospective client, and that it remained the State’s responsibility to protect “the public from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct”; In Re R.M.J., 455 U.S. 191 (1982) (expanding the acceptable content of newspaper advertisements, restricting the power of a state bar to prohibiting only wording and context in advertisements deemed to be misleading or deceptive, and allowing certain “targeted” solicitations by mail); Zauderer v. The Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (widening the spectrum of acceptable forms of attorney advertising and solicitation and reprimanding the state bars for overly prohibitive limits on types and formats of attorney advertising); and Shapero v. The Kentucky Bar Association, 486 U.S. 466 (1988) (holding as long as the solicitation was not factually misleading or deceptive, the State had no constitutional right to prohibit lawyers from soliciting business for pecuniary gain).
A New Code of Ethics

The ABA decided to publish a new ethics code not only in response to the Supreme Court cases on attorney advertising and solicitation which had rendered the Code out of date, but also because the 1969 *Model Code of Professional Responsibility* had been heavily criticized - especially for its structure - almost immediately upon being published. Thus, “in 1977, the ABA created a Commission on Evaluation of Professional Standards to undertake a comprehensive rethinking of the ethical premises and problems of the profession of law.” The Commission was empowered to revamp the *Model Code* because the ABA determined that “amendment of the Code would not achieve a comprehensive statement of the law governing the legal profession.” The resulting six-year process “produced the *Model Rules of Professional Conduct*, adopted on August 2, 1983.”

One of the biggest changes in the *Model Rules* is structural. Whereas the 1969 *Model Code* which was divided into eight Canons, Ethical Considerations, and Disciplinary Rules, the 1983 *Model Rules* were divided into fifty-two more precise rules, grouped under general subject headings. In addition, each rule was accompanied by a commentary meant to explain and illustrate the “meaning and purpose of the rule.”

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90 Id. at 9.
Moreover, in order to leave this set of ethical rules open to further changes by Supreme Court decisions, alterations in the general practice of law, and a general acknowledgment that the future might effect further changes in what was considered ethical practice, the preamble of the Code states that “the rules do not...exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.”  

One of the most unique aspects of the *Model Rules*, and most helpful to historical inquiry, is that after the comment section in each rule, an additional note is added describing the differences and similarities between the 1969 *Model Code* and the 1983 *Model Rules*. In fact, to define the changes even more clearly, at the end of the *Model Rules*, there are two sets of comparative tables, which list and correlate the disciplinary rules and ethical considerations (or commentaries). Generally, the *Model Rules* follow the original canons in the *Model Code*, but the *Model Rules* go into much more depth on nearly every subject.  

Not surprisingly, the *Rules* incorporated the Supreme Court’s rulings on various topics into new regulations and commentaries. Indeed, perhaps the most notable difference in the *Rules* are the new, more progressive and less restrictive rules retaining to lawyer advertising and solicitation, heralded by the Court’s decisions in *Bates, Primus, and Ohralik*, which forced the ABA to recognize a broader scope of acceptable information in newspaper advertisements, and acceptable forms of “targeted” solicitation by mail. (The ABA amended the *Rules* as each new decision was handed down). Another striking improvement in the *Rules* over the *Code* is the separation of the

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91 Id. at 7.

92 The *Model Rules*, like the *Model Code*, are divided into eight main sections of professional regulation: the client-lawyer relationship, lawyer as counselor, lawyer as advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services (advertising and solicitation), and maintaining the integrity of the profession. However, the Rules, unlike the Code, are then divided further into various specific rules, each related to the others through the theme of the main sub-section.
different roles that a lawyer can play in the American legal profession, and the recognition that there should be different rules regulating professional conduct depending on which role the lawyer is playing.\(^9^3\)

Charles Wolfram, a well-respected legal academician, produced a comprehensive examination of the meanings of the 1983 Model Rules in his 1986 book, *Modern Legal Ethics*, viewed as a landmark by many in the legal profession.\(^9^4\) In his exhaustive work, Wolfram places the code of ethics contained in the Model Rules within the wider context of the realities of the American legal profession. Although he attempts to focus on every topic included in the Model Rules, his real contributions to the field of legal ethics and its evolution, are his forthright explications of the actual role the Model Rules play in the legal profession, and his opinions on what he believes should be the relationship between American lawyers and their code of professional ethics. This contribution is best exemplified in Wolfram’s explications of the ethics rules he identifies as most important: The role and necessity of the adversary system and his belief that the concept of morality is different for lawyers than for non-lawyers.\(^9^5\)

According to Wolfram, three rules are the most pervasive to the practice of law, and are therefore the most important for lawyers to follow. The first rule mandates lawyer competence.\(^9^6\)

\(^9^3\) The Rules contain a section on lawyer as counselor, with sub-sections on lawyer as advisor, and lawyer as intermediary, as well as a section on lawyer as advocate.


\(^9^5\) Wolfram, supra.

\(^9^6\) He breaks this concept down further into four elements: knowledge, legal skills (advising, negotiating, litigating, mediating, etc), office management, and character (namely, the lawyer must be motivated to serve the client effectively and loyally.) Id at 187.
Though the *Model Rules* do not identify competence in a specific governing rule, Wolfram posits that the idea of lawyer competence reaches into almost every guideline of the *Rules*.

The second ideal is confidentiality. “In order for lawyers to obtain client disclosure, it is essential that lawyers be able to assure clients that their private conversations will always remain confidential.”97 The 1969 *Code* explained confidentiality as protecting the “secrets” of the client and case. The 1983 *Rules* give that ideal an even broader scope by commanding that every communication must be held in confidence: “a lawyer shall not reveal information relating to representation of a client.”98

The third rule concerns conflicts of interest, which Wolfram explains is pervasive because “in a sense, every representation begins with a lawyer-client conflict.”99 This issue incorporates the idea of lawyer loyalty, that “where choices have to be made between the interest of a client and any other person - whether the lawyer personally or another client, the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than that of the client.”100 Wolfram also notes that “once the client has made a decision to pursue a particular objective...the lawyer’s emotional commitment to that objective should not be impaired by conflicting interests.”101 Neither of the ABA codes address this issue very clearly, and are perhaps purposely vague, only demarcating extreme instances in which this rule is the absolute governing device. “Sometimes a conflict of interest can

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97 Id at 243.
98 Id at 297-98.
99 Id. at 313.
100 Id. at 317.
101 Id.
be so strong that the professional rules forbid the lawyer from keeping the client.”{102} In making the case for the pervasive power of this concept, Wolfram points to its relevance in his discussion of almost every other aspect of the Model Rules.

Wolfram perhaps most advances the evolution of legal ethics in discussing the adversary system and describing the debate over the inherent contradictions in the lawyer’s role as zealous advocate. Wolfram notes that, “it is often objected that adversarial trials cannot be an effective search for truth because one or perhaps both advocates come to the proceedings prepared to obfuscate, conceal, and distort the truth - to the considerable extent permissible under the rules of perjury, false evidence, and contempt of court.”{103} However, he argues it is also important that in an adversary system, “lawyers are not necessarily attempting to persuade the fact-finder to find the truth; they attempt to persuade the fact-finder to find facts favoring their clients.”{104} Wolfram acknowledges the problem of determining the “proper role for lawyers functioning within the adversary system,” observing the difficulty in striking an ethical balance between the role of advocate, in which the lawyer supposedly acts only and completely for the best interests of his client, and society’s search for truth.{105}

Wolfram focuses on the two main components of adversarial representation: the “principle of professional detachment of non-accountability” (meant to guide the lawyer in separating his personal morals from his professional ones),{106} and the “Principle of Zealous Partisanship,” which

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102 Id. at 314.
103 Id. at 566.
104 Id at 567.
105 Id at 563.
106 Id. at 569. The Model Rules state that “An advocate does not vouch for the justness of a client’s cause but only for its legal merit.” This principle is probably the aspect of the lawyer’s role most contested by both lawyers
commands the lawyer “to devote energy, intelligence, skill, and personal commitment to the single
goal of furthering the client’s interests as those are ultimately defined by the client,”107 and links
the relationship between the lawyer and client, lawyer competence, confidentiality, conflicts of
interest, advocacy, and counseling. Wolfram observes that the 1983 Model Rules mandate strict
adherence to the concept of zealous advocacy,108 and explains the rationale. “For a lawyer to
permit personal doubts to intrude about the truthfulness of client-favoring witnesses and the
untruthfulness of those opposed, the lawyer’s function would be hobbled by self-doubt and the
client’s rights wrongly impaired.”109 Though Wolfram briefly presents both sides of the adversary
system debate, it is apparent that he does not seriously questions that it plays a necessary role in
the American legal profession and system of justice.

Wolfram also contributes some of the earliest writing on the issue of a lawyer’s role
separation and role morality as a possible conflict, a topic which even today is widely-debated.
Indeed, this debate is part of the larger misconception that the general public has about the
meaning of the term “legal ethics.” While the general public conceives that this term means the
role of morality in lawyering, lawyers understand that legal ethics also comprises the set of rules
and guidelines which they must follow to stay within the acceptable bounds of their professional
conduct. Wolfram posits that a lawyer is a professional, and a professional is not an average
citizen. Whereas an “average citizen” must live by his own code of moral ethics, a lawyer is

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107 Id. at 578.
108 Id. at 579.
109 Id. at 581.
supposedly only meant to live by a set of legal, or lawyer’s ethics. Indeed, Wolfram notes that this separation of individual and professional morality is part of a lawyer’s training:

Through training and early practice, the truly professional lawyer supposedly acquires an ability to put emotional distance between himself or herself and a client, the client’s problem, and others who may be affected by the representation. The lawyer can then function intellectually or skillfully without the hindrance of normal affects or feelings of guilt.\(^\text{110}\)

However, Wolfram questions whether the *Model Rules* dictate that distinction, and even if they do, should a published code be the only authority on the matter? Wolfram sees an inherent conflict -- “whether it is possible for a lawyer, or a member of any other group that functions with a set of moral values very different from those of the containing society, to function effectively either individually or within and as a member of the containing society.”\(^\text{111}\)

There last area of importance in Wolfram’s work is his criticism of certain blatant omissions in the *Rules*. Wolfram concedes that the *Model Rules* acknowledge the basic tensions in litigation - between the lawyer’s duty to his client and the restraints put on him by interests of the public, the courts, third parties, and society in general,\(^\text{112}\) - but he observes that the problems which most often arise in the process of litigation are not discussed either at length, or at all, in the ABA *Rules*. He identifies pretrial discovery abuses,\(^\text{113}\) unnecessary delays by attorneys, and issues

\(^\text{110}\) Id at 584.

\(^\text{111}\) Id.

\(^\text{112}\) Id at 593.

\(^\text{113}\) The pretrial discovery abuses Wolfram highlights are the groundless objections and incomplete responses to an adversary’s requests, and what is referred to as the “file dump,” where a lawyer unloads onto his adversary an overwhelming amount of frivolous paperwork, often “hiding” requested documents under a mountain of extraneous information. The only admonition in the Code against such abusive tactics is to command lawyers not to “make frivolous requests or fail to make reasonable efforts to comply with discovery.” Id at 597.
concerning contact between the lawyer and the evidence, witnesses, and judges\textsuperscript{114}, as not only the most common abuses introduced into the American legal system, but also the areas where ethical dilemmas most often conflate. Wolfram advocates that ethical choices should and could be made on these issues, and notes that most often the action taken has reflected an amoral, or at best, orthodox adversarial point of view.

Wolfram’s contribution to the subject of legal ethics is multifaceted. By expounding upon the code of ethics put forth in the \textit{Model Rules of Professional Conduct}, he helps to inculcate these ideas into the minds and professional lives of his most likely readers - lawyers, legal scholars, and law students. By criticizing and questioning the sense and applicability of certain rules and aspects of the role of the American lawyer, he helps to shape the subject of legal ethics by forcing the regulations to accurately fit the aspirational goals of lawyering. Finally, he created an arena for the ongoing debates over the content and meaning of the subject of legal ethics.

\textbf{The Development of Legal Ethics Theories}

Professor David Wilkins of Harvard Law School explains that beginning in the 1970's and with increasing momentum in the 1980's, two schools of thought critiquing various aspects of the subject of how legal ethics was being taught emerged, and that these theories were part of a larger movement in American law schools where professors attempted to contextualize their courses by connecting them to subjects once deemed to be the sole domain of undergraduate institutions - e.g., economics - in order to better consider the “proper” role of lawyers in society. The first theory to take root, “critical legal theory”, focused mainly on critically studying the adversary system, and questioning the supposedly necessary principle that lawyers must practice within that system. The

\textsuperscript{114} In terms of advocates and what level of contact with the other actors in the legal process is proper, the \textit{Rules} merely point out obvious objections and instances where contact is not allowed - i.e., \textit{ex parte} communications. Concerning witnesses, the \textit{Rules} recommend that they not be badgered or harassed by the lawyer, nor should the lawyer discourage, coach, or falsify testimony. However, Wolfram notes that the \textit{Rules} do not contain any mandatory regulations or disciplinary consequences of conduct which does not conform.
second theory, which emerged slightly later, is the “moral theory” of legal ethics, and it is espoused mainly by philosophers, many of whom had started to teach legal ethics in law schools. These theories mark the first time in the history of the subject of legal ethics that substantial numbers of lawyers and scholars came together to consider and to question the content of the subject, and of its relationship to their profession, instead of just accepting what the scholars of the past had asserted as truths. These men and women believed that merely because it was tradition and habit to accept certain rules, regulations, and ideas concerning legal ethics, did not negate the conclusion that these concepts were antiquated and faulty.  

**Critical Legal Theory**

In 1966, Monroe Freedman, a law professor and lawyer, published an article in the *Michigan Law Review* called, “Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions.” The main issue Freedman discussed article is that “in almost any area of legal counseling and advocacy, the lawyer may be faced with the dilemma of either betraying the confidential communications of his client, or participating to some extent in the purposeful deception of the court.” Freedman views the “Three Hardest Questions” which a criminal defense lawyer must consider as,

[One], Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Two], Is it proper to put a witness on the stand when you know he will commit perjury? [Three], Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

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115 David Wilkins, interview by author, December 24, 2002.


117 Id.
Freedman asserts that these questions had never been properly addressed by the legal community, and especially not by the American Bar Association. Thus, both the subject of legal ethics as it was comprised in 1966, and the *Canons of Legal Ethics* were “inadequate and self-contradictory.”  

Freedman answers the questions posed at the beginning of his article, each in the affirmative without any apology. He defends his affirmative answer to the first question by pointing out that “the same policy that supports the obligation of confidentiality precludes the attorney from prejudicing his client’s interest in any other way because of knowledge gained in his professional capacity.” He argues that in most cases, even if a lawyer knows an opposing witness to be telling the truth, this knowledge has most likely come from some statement made by his own client, in confidence, and thus, the client’s information cannot be considered or used.

His answer to the second question depends on the same premise as the answer to the first question. According to Freedman, under most circumstances, an attorney will only know that his client is about to commit perjury if the client has first told him so. Since no one else is privy to this information, the attorney cannot reveal it to the court. However, though he can never divulge the secrets of his client, the attorney is obligated to try and convince his client not to perjure himself.

Freedman’s answer to the third question is slightly less straightforward. He recognizes that if the attorney’s advice could be used by his client to perjure himself, then it will create the appearance that the attorney condones and encourages perjury. However, Freedman ultimately

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118 Id.

119 Id. at __ .

120 Id. at __ .
supports the acceptability of offering advice even if it may be used later for perjury because, he 
argues, there are countless situations in adversary system in which a lawyer’s traditional conduct, 
could be construed as advising his client to lie. For example, in plea-bargaining the lawyer advises
the client to plead guilty to a lesser charge if there is a likelihood of his being found guilty of a
more serious charge even if the client is innocent; this advice could be considered to be advising
the client to lie about his guilt or innocence. But because this practice is both necessary and
ingrained in the adversary system, it must be deemed acceptable.121

David Luban, a Professor of legal ethics at Georgetown Law School, has observed that
Freedman opened the floodgates of criticism concerning legal ethics and American lawyering in
general.
Freedman’s conclusions embarrassed leaders of the bar and scholars who had
tended to cloak the subject of Legal Ethics in euphemisms and happy-talk, as
though role-morality, the adversary system excuse, and the standard conception of
the lawyer’s role harmonize effortlessly with everyday moral views.

Though Freedman’s views themselves did not create critical legal theory, they did create a
foundation upon which opposition to his theories were built, and these opposing views gave birth
to critical legal theory.

The first strong criticism of the adversary system came in 1978, in William Simon’s article,
“The Ideology of Advocacy: Procedural Justice and Professional Ethics.” Simon, then a professor
at Yale Law School, describes the inspiration for his writing as the legal community’s insufficient
reaction to Watergate, and especially the factions of that community responsible for decrying the
ethical responsibilities of the legal profession.

Watergate has in fact been an occasion for retrenchment and reindoctrination, rather
than reexamination [of legal ethics]. The profession has viewed Watergate as
revealing problems regarding the enforcement of professional norms, but has
refused to see it as raising questions about the validity of those norms. In the
profession’s current view, what is needed is not criticism of legal ethics, but rather

121 Id. at 1482.
more zealous propagation of those ethics through greater emphasis on the professional catechism in Law School curricula and bar examinations.\textsuperscript{122}

Although Simon recognizes that “there is a growing body of writing addressed to the profession which is critical of the conduct of lawyers and professional organizations...most of these discussions take place within the framework of the “ideology of advocacy” and do not involve criticism of its premises.” In his article, Simon takes issue with the “current view” of the legal profession concerning legal ethics and professional responsibility, and focuses on “the way in which lawyers rationalize their departures from personal and social norms.”\textsuperscript{123}

To lay the groundwork for his refutation of the inherent necessity of certain components of the adversary system, Simon first describes what he labels as the four principles of the “ideology of advocacy.” The first is neutrality, which allows the lawyer to “detach” himself from the views of his client. The second principle is partisanship, which requires the lawyer to work “zealously” to achieve the client’s ends, and therefore often causes the lawyer to act in ways that would not be considered acceptable for the “average” citizen. The third principle is procedural justice, which Simon argues makes it possible for lawyers to justify certain actions without acknowledging possible consequences, or put more crudely, achieving “procedural justice” prizes the means over the ends. The fourth principle is professionalism. Simon explains that because the law is a specialized discipline, special rules - the rules of professional responsibility - preserve the necessary discipline.\textsuperscript{124}

Simon then attempts to refute each of these principles. He posits that advocacy actually leads “to the subversion of the values which [it] purports to safeguard; values such as individual


\textsuperscript{123} Id. at 36.

\textsuperscript{124} Id. at ___
Further, he suggests that this ideology alienates “the individual from his own ends and actions, [and] the fatal discontinuity is inherent in the notions of procedural justice and professionalism, and is implemented in practice by the principles of neutrality and partisanship.” Thus, instead of the adversary system’s comprising a necessary component both of the lawyer’s role and the legal profession, defining how a lawyer should best conduct himself, Simon argues that it actually demoralizes the lawyer.

Simon also offered an alternative to the traditional adversarial role of the lawyer - one which does not leave the lawyer morally thread-bear. His model is the “non-professional advocate,” which he explains means that the “problems of advocacy [should] be treated as matters of personal ethics, [so that] no specialized group has a monopoly which disqualifies outsiders from criticizing the behavior of its members, [and] it requires that individuals take responsibility for the consequences of their decisions. They cannot defer to institutions with autonomous ethical momentum.”

As Simon solves each of the problems he found in the traditional adversarial role with his alternative model, trust becomes one of the most important components of the lawyer-client relationship. Not just the type of trust dictated in the confidentiality Canons, but the sort of trust between two human beings making morally sound decisions together. Simon contends that in that way, the lawyer and client will have shared ends. The lawyer will not simply act on his own for his personal pecuniary gain relegating the client’s full desires to secondary importance. “The non-professional advocate can give his client advice which will enhance, rather than subvert, the

\[\text{125 Id. at 114.}\]

\[\text{126 Id.}\]

\[\text{127 Id. at 131.}\]
client’s autonomy.” Further, in dealing with a non-professional advocate, the client will keep his dignity also, instead of being played off as a pawn of the legal system. “The non-professional advocate discourages the client’s passive reliance on the lawyer, and encourages the client to take an active role in the conduct of his case.”

Unfortunately, even with the lofty ideas and goals put forth, Simon recognizes that proposing an alternative lawyer role is not enough to change the entire adversary system. Although non-professional advocacy could greatly alleviate the problems of adversary advocacy...the prevailing patterns of the regulation of law practice, the practices of the courts, and the style and substance of legal rules and doctrine all promote specialization. All contribute to the alienation of the citizen from the law and to the weakening of his capacity for autonomous participation in the legal system and in society.

Simon, therefore, advocates for a change in the overall structure of the legal system, in order to improve the moral conduct of the principal actors in that system.

Joining the ranks of critical legal theorists, also in 1978, law professor Murray Schwartz from the University of California Los Angeles, published an article entitled, “The Professionalism and Accountability of Lawyers.” Like Simon, Schwartz does not believe that the adversary system is the optimal type of legal system. He does not, however, address that topic, but instead focuses on the differences between the roles of the lawyer as advocate, and the others that he plays,

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128 Id. at 139
129 Id. at 140.
130 Id. at 142.
such as counselor, advisor, negotiator, and intermediary. From these differences, Schwartz asserts, comes the need for different rules regulating lawyer conduct, because the conduct is itself so different. Schwartz’s argument is one of the first to acknowledge the multifaceted roles played by American lawyers, and the problems which stem from this fact when trying to define one set of rules governing all types of professional behavior.

Schwartz started with the status quo - the general view that the acceptable role for the lawyer is that of the zealous advocate - and then describes all of the ways in which the non-adversary lawyer could and should act in moral ways which the legal system currently prevents the adversarial lawyer from doing. He then proposes a rule “that would restrain the non-adversarial lawyer from using ‘unconscionable’ means or working from ‘unconscionable’ ends...[because] non-adversarial lawyers cannot claim the immunity from moral accountability for their actions that is accorded to advocates operating within the Adversary system.”

Schwartz’s carefully formulated rule takes into account all functions that the non-adversarial lawyer might perform, and most importantly, tries to harmonize the need for the non-adversarial lawyer to be morally accountable for his actions, with the need to not so disrupt the lawyer-client relationship that clients will feel they cannot fully disclose information to their lawyers. It is instructive to review what Schwartz proposes:

A. When acting in a professional capacity other than that of adversary, a lawyer shall not render assistance to a client when the law knows or its if obvious that such assistance is intended or will be used:

   1. to facilitate the client in entering into an agreement with another person if the other person is unaware:

      a. of facts known to the lawyer such that under the law the agreement would be unenforceable or could be avoided by the other person; or

132 Id. at 669.
b. that the agreement is unenforceable or could be avoided under the policy of the law governing such agreements; or

2. to aid the client in committing a tort upon another person provided that this rule applies in business or community transactions only to torts as to which it is probable that the other person will in the circumstances be unable to obtain the remedy provided by the law; or

3. to allow the client to obtain an unconscionable advantage over another person.

B. For the purpose of this rule, “assistance” does not include advice to a client that a particular course of action is not unlawful.\(^{133}\)

While Schwartz’s rule has yet to be included in the official ABA ethics codes, his words have played an important role in the growing body of work concerning critical legal theory, which now has sufficient force to change the content of the subject of legal ethics as it exists to govern and guide the American legal system. Many other legal scholars and professors since 1978 have concerned themselves with this issue, and it is at the forefront of debates on legal ethics today.

The works described above form the foundation of critical legal theory. They do not, however, represent all areas of the legal system and the role of the lawyer which proponents of critical legal theory have challenged. Legal scholars and lawyers in this area have also focused on the problem of the stringent rules surrounding confidentiality between lawyer and client (Freedman’s centerpiece), and have offered many different alternatives to and re-workings of the role of the lawyer in the American legal system. Attacks on the adversary system are perhaps the most abundant, suggesting not only that the need to make changes in the subject of and codes about legal ethics, but also, as Simon pleaded, the need for real changes to the structure of the American legal system itself.

**Moral Theory**

\(^{133}\) Id. at 685-86.
Even as the new critical theories gained wide-spread acceptance, what is meant by the subject of legal ethics continued to evolve. In the late 1970's, philosophers slowly began to leave undergraduate institutions in search of law school posts, and began to teach the required courses in legal ethics. "Philosophical interest in Legal Ethics appeared in the aftermath of the Watergate scandal in 1974, which coincided fortuitously with the ABA accreditation requirement that law schools offer a course in the subject."\(^\text{134}\)

Probably the most renowned and well-respected undergraduate philosophy professor turned legal ethics scholar is David Luban, currently a professor of legal ethics at Georgetown Law school. The contribution to the evolution of legal ethics made by Luban (and many others with similar academic histories) is significant. At a time when many lawyers and legal scholars - as well as many non-lawyers - were challenging the amorality of lawyers and the adversary system, philosophers like Luban began their own investigation and offered advice based on their area of expertise - morality and ethics - about how the role of the lawyer and the American legal profession could be improved, and finally, as the codes of ethics proclaimed, "uphold the dignity of the profession."

In 1983, Luban published *The Good Lawyer*, a compilation of essays (including one written by Luban himself) concerning the moral issues for the legal profession. In the introduction to this work, Luban describes the questions which form the foundation of moral legal theory.

The essays in this book ask whether the professional ideal is itself morally worthy; more profoundly, they ask whether it can be and, if it cannot, whether we must stand by it nonetheless. The authors - practicing lawyers, law teachers, and philosophers - address the fundamental problems of legal ethics: does the professional role of lawyers impose duties that are different from or even in conflict with, common morality? Can such a "role morality" exist? Does the adversary system necessitate behavior on the part of lawyers that would be immoral if

performed by non-lawyers? Must a lawyer’s moral character be affected by the profession’s role morality? Does legal education corrupt moral character?\textsuperscript{135}

Luban uses articles written by lawyers, legal scholars, and philosophers together in an attempt to bridge the gap between critical legal theory as espoused by legal technicians, and moral theory as espoused by philosophers. Luban included articles on the now familiar topics of the lawyer’s role and the role of the adversary system, and articles on the less well-known topics of the moral psychology of lawyering, and clinical education.

Richard Wasserstrom’s (the first philosopher to publish an article about legal ethics) 1978 article, “Roles and Morality,” is the first article in Luban’s book. Wasserstrom critiques the role into which the American lawyer has been forced, claiming that if a lawyer is to follow the codes of ethics, and regulations of the adversary system, then he will have no choice but to act amorally, and sometimes immorally. Wasserstrom describes the main problem this way:

> When trying to decide what constitutes the right way to behave, or when trying to determine after the fact whether one behaved rightly, a very common and familiar way of reasoning is employed...This reasoning places weight upon the roles that the person occupies and locates concerns about how one ought to behave within a context of what is required, expected, or otherwise appropriate of persons occupying that role...Such reasoning is often used to deflect or defuse potential moral criticism by explaining that the role constitutes a sufficient reason for doing or not doing something that would otherwise be objectionable, criticizable, or morally wrong to do or not to do.\textsuperscript{136}

To illustrate the universality of the problem of having a distinct role morality from which one reasons, Wasserstrom uses the examples of a parent and child, a lawyer and client, and a general with his soldiers. He does not argue for or against the concept of role morality. Rather, he uses each example to point out the negative and positive aspects of the reasoning used.

\textsuperscript{135} Id. at p. 1.

\textsuperscript{136} Id. at 27.
The negative aspect of role-reasoning that Wasserstrom identifies is similar in all three examples. In claiming that one plays a particular role within a distinct institution, one is thereby claiming that his morality must be loyal only to the rules of that institution, and not to the universal morals of society in general. On the other hand, Wasserstrom notes that a positive aspect of role-reasoning is the argument that, “a better moral outcome overall will result if persons restrict their reasoning in the way mandated by the role than would be attained if persons were regularly to focus directly upon the question of what, all things morally considered, one ought to do.”137 He comments on the de facto “expectations that come to be held by those who are typically benefitted or preferred by the role-defined behavior,”138 such as the privileged status of being someone’s child, or a client.

137 Id. at 30.
138 Id. at 31.
Wasserstrom rejects the argument that distinct role moralities should continue to exist merely because that is the status quo, and concludes by describing the ways in which he remains dissatisfied with the current status of the lawyer’s role in the American legal system. He asks first, if distinct roles for lawyers (or for anyone) should even exist, and second, if it is a given that a certain role does exist, “should the occupant of that role do what the role...requires?” 139 In general, Wasserstrom presents his ideas not as solutions to the problem of role moralities, but instead as a springboard for discussion and criticism.

Gerald Postema, a professor of philosophy at the University of North Carolina who also wrote on the problem of a separate professional morality for lawyers, in his article “Moral Responsibility in Professional Ethics,” 140 begins where Wasserstrom left off. Where Wasserstrom identified the problem, Postema attempts to explain why the problem is serious and suggests improving the status quo. Postema expresses doubt that it is possible to act as a lawyer without taking into account one’s personal morals, and he posits that under the ABA codes of ethics, it is not possible to be wholly moral. “The present conception of the lawyer’s role...must be abandoned, to be replaced by a conception that better allows the lawyer to bring his full moral sensibilities to play in his professional role.” 141 Though not offering nearly as precise a solution as does Schwartz,

139 Id. at 35.

140 Gerald Postema, Moral Responsibility in Professional Ethics, 55 New York University L.R. 64 (April 1980). Although Postema’s article is not included in Luban’s book, it is an apt follow-up on the problems identified by Wasserstrom.

141 Id. at ___. 

Postema makes very clear the need for a lawyer to blend his professional and personal morals, and that continuing not to do so merely produces amoral lawyers.

Arguing along similar lines, Luban, in his own article, “The Adversary System Excuse,” blames the amorality of lawyers on the adversary system, and discusses the invalid way in which many lawyers attempt to excuse their immoral actions by claiming that they were merely acting within their role as advocate. Luban highlights this “excuse” with a quote by attorney Ray Cohn in an 1980 interview with the National Law Journal,

> It is not the lawyer’s responsibility to believe or not to believe - the lawyer is a technician...Law is an adversarial profession. The other side is out to get your client. Your job is to protect your client and the nonsense they hand out in these ethics courses today - if the young people listen to this kind of nonsense, there isn’t going to be such a thing as an intelligent defense in a civil, or criminal case.142

Like Wasserstrom and Postema, Luban argues that lawyers should not have a separate role morality within which they act in their professional capacity, but the main focus of Luban’s argument is discrediting the adversary system. Luban discusses the “principle of non-accountability” - that because a lawyer must act as a “zealous advocate” he should not have to account for his actions - and states that this principle entirely depends on the existence of the adversary system. Luban rejects the notion that lawyers are not morally responsible for their adversarial actions, and argues that the principle is simply not justified.143

Luban also examines the claims made by defenders of the adversary system to justify its existence - that is the best system for ferreting out truth, and is the best way to

142 Luban, The Good Lawyer, p. 84.

143 Id. at 87-91.
defend individual rights.\textsuperscript{144} One traditional view is that in the adversary system, when two zealous lawyers fight against one another, they will cancel out their respective weaknesses or inaccuracies leaving behind only the truth. Luban asks what if what is left is simply more confusion piled with deceit and zealous representation? Another view is that the adversary system assures all clients that they will obtain what they are legally entitled to if they are on the side of truth. However, Luban argues that it is more often the case that the adversary system is used to get clients all that the law can be made to give, even if the client is not actually entitled to it. He notes that a skillful lawyer has the ability to contort the law for his own ends, rather than search for justice. By showing that the lawyer’s role in the adversary system is not actually what it has been argued to be, Luban discredits the main justification for the adversary system.\textsuperscript{145}

Six years after publishing \textit{The Good Lawyer}, Luban published another book, \textit{Lawyers and Justice: An Ethical Study}.\textsuperscript{146} In the book, Luban describes the evolution of the subject of legal ethics as it began to change in the late 1970's, up through 1989, and his main focus is the general complaint that a lawyer’s primary concern has become his client instead of “justice.” Similar to Wolfram’s exhaustive overview of the opinions concerning legal ethics based on the 1983 \textit{Model Rules}, Luban touches on in \textit{Lawyers and Justice} every theory which has addressed the subject of legal ethics, both legal and moral, in order to advance the debate on the subject.

\textsuperscript{144} Id. at 93. In criticizing the adversary system, Luban recognizes, as have others, the need to discredit Freedman’s article. Luban acknowledges that Freedman’s article may point identify conduct necessary for criminal trials, but Luban reminds us that the majority of litigated cases are civil cases, and thus Freedman’s article has little if any relevance to most of the actions taken by the majority of lawyers. Id at 91-93.

\textsuperscript{145} Id. at 117-118.

In addition to compiling probably the most extensive collection of theories on legal ethics, Luban also takes this opportunity to plead for further change. He exhorts the legal profession, and most specifically law schools, to create better lawyers, moral lawyers who have professional zeal, but who use this zeal in conscionable ways. Luban reminds his readers of a speech given in 1905 by Louis Brandeis, viewed by many as one of the most ethical lawyers ever to practice law in the United States and later a Supreme Court Justice, in which Brandeis discussed the “opportunity in the law” for change and improvement. Luban sees in this idea the possibility of a morally activist legal profession, “a vision of law practice in which the lawyer who disagrees with the morality or justice of a client’s ends does not simply terminate the relationship, but tries to influence the client for the better.”

Whereas the main purpose of *The Good Lawyer* was to describe the professional qualities which all American lawyers should strive to achieve for themselves, *Lawyers and Justice* is meant to remind lawyers of their greater, cardinal loyalties to society as a whole, and the system of justice upon which the United States was founded.

**Part Four: Teaching Legal Ethics**

The history of the teaching of legal ethics in American law schools is pertinent to the final stages of the evolution of the subject in the 20th Century for reasons beyond those of mere chronological happenstance. By the time American law schools really put a concerted effort into teaching the subject of legal ethics, the foundational rules and regulations governing the legal profession’s approach to the topic had already been revamped several times, and were essentially firmly established. The critical theories

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147 Id. at 160.
expounded in the 1970's and 1980's had garnered widespread support, and fewer radical ideas challenging the direction of the evolution of legal ethics were surfacing, thus insuring that the subject would continue to hew to the same path it had already begun to travel. By the last fifteen years of the twentieth century, law professors were unquestionably well-equipped to combine the rules and theories into a subject which taught law students that legal ethics means more than rote rule memorization and tactics for avoiding professional discipline. Indeed, as of the mid-1980's, many law professors had concluded that a properly designed course in legal ethics could inculcate new attitudes and could thus (hopefully) improve the ethical conduct by the lawyers that law schools were producing, and not merely provide students with the skills necessary to pass a portion of the bar exam.

The history of the teaching legal ethics reveals that the subject came to be regarded as an important topic for law students to study in the waning years of the 20th Century because it is the only law school subject which deals specifically with the practical, ethical dilemmas all students face after graduation, regardless of what field of law they choose to enter. During this same time period, the legal community was accosted again by the public improprieties committed by its members (the series of corporate scandals and the wave of huge malpractice suits against law firms that started in the late 1980's), a circumstance that imposed outside pressures on lawyers to take ethical considerations and their professional roles more seriously. A number of law schools reacted to these external and internal pressures by offering courses on legal ethics designed to more directly translate into the production of ethically minded lawyers.

Changes in the Teaching of Legal Ethics
When the subject of legal ethics formally entered the curriculum at American law schools in 1974, it floundered and struggled to be taken seriously both by faculty and students. Traditional methods of presenting the subject, as sets of rules, were viewed as boring and tedious. The new theories about the subject, which attempted to inculcate imbue concepts of morality into legal ethics courses, were typically either rejected by professors as faulty and unnecessary, or seen by students as beyond the scope of what their professors were qualified to teach. It was not until 1990, when a dedicated group of legal ethics professors made a concerted effort to improve the content of what was being taught that real progress toward unqualified respect for the subject acceptance began to develop.

In December of 1990, the W. M. Keck Foundation, best known for its support of the sciences, initiated its “Law and Legal Administration Grant Program,” with the primary focus “on improving methods for teaching ethics in law schools.” Between January of 1991 and November of 1995, twenty-three grants, totaling approximately $5 million, were awarded to professors of legal ethics, who used the funds in various ways to try and implement what had been the theoretical improvements in the subject of legal ethics into concrete courses.

By committing its resources to the study of legal ethics, the W.M. Keck Foundation has encouraged law schools to pay attention to a subject all too often ignored...The money has made things happen. Schools have held conferences devoted to legal ethics that otherwise would not have been held; schools have experimented with teaching programs in legal ethics that otherwise might not have occurred.148

At the beginning of November in 1995, over sixty law school deans and other legal scholars from schools whose professors had received Keck grants met to share what they had learned. At this symposium, each professor presented his or her findings, revealing through shared knowledge “the litany of problems associated with the course,” and their dedication to making the “required course a vibrant offering within their schools and institutions.”¹⁴⁹ These speeches were later released in a more expanded format published in Duke’s legal journal, *Law and Contemporary Problems*.

Law professors who received Keck grants went about trying to improve the course of legal ethics in four main ways. The first group focused primarily on the two or three credit course traditionally offered in the second or third year of law school, and tried to find ways to increase the positive impact of this survey course.¹⁵⁰ The second group of professors created specialized and advanced courses which attempted to contextualize the subject. The third group built on some of the ideas implemented by the first two groups, but assumed a broader view, that in order for legal ethics to be properly ingrained in law students the subject had to be taught both in a specific course, and pervasively throughout the entire law school curriculum. The fourth group rejected all of the traditional methods for teaching of legal ethics and adopted instead a method designed to bring the subject alive; this group used clinical teaching. Regardless of their approaches, all of the professors who received Keck grants agreed that the three biggest problems with traditional legal ethics course were:

¹⁴⁹ Ibid, p. 2.

¹⁵⁰ Law school courses are generally offered at anywhere from one to six credits, where the credit hours informally denote the importance of the course to the student’s legal education. It has been generally accepted by the leading legal ethics scholars, that two credits is not sufficient. A three credit legal ethics course is average.
[I]t pretends or purports to teach legal ethics when all that it is really teaching are legal rules, also known as the “law of lawerying;” it does not necessarily engage students to debate morality in the practice of law, which is necessary if legal education is to produce competent, caring, and thoughtful professionals; and . . . students who are required to take the class probably treat it at best as a review course for the MPRE (Multi-state Professional Responsibility Exam), engaging in little, if any, critical evaluation of the Rules and the Code.  

The symposium and the expanded publication provided not only a forum for professors to describe their experimental teaching methods, but also with the opportunity to review with their peers the positive and negative aspects of those methods, so that each law school might be able to create an effective course on the subject.  

**Improving the Basic Course**

The professors who used their Keck grants to improve the legal ethics courses already in existence focused on similar characteristics of the subject and elements of the course. These professors experimented with the timing of the course - which year it would be offered - the materials used, the teaching method, and the length of the course (e.g., one semester or a mini-course offered in one month). As a result, courses in legal ethics, which had experienced very gradual change over the previous 150 years, were suddenly overhauled, seemingly overnight.

Stephen Bundy, a legal ethics professor at Boalt Hall, experimented with the basic legal ethics course by teaching it as a two credit course during the first year. Traditionally, students take legal ethics in their second or third year, but Bundy felt that there might be specific advantages to teaching this subject earlier.

We hoped that placing the required course in the first year would improve its reception with students, making it easier to teach and hence, easier to

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151 Metzloff and Wilkins, supra at 288.
staff. First year students...are generally more open, and less jaded, than their second and third year counterparts.\textsuperscript{152}

In addition, by 1990, a trend had developed for large law firms to hire law students as summer clerks after their first year, instead of the traditional pattern of waiting to hire only after the second year. Bundy believed that having the sort of practical knowledge which can be gleaned from a legal ethics course would be advantageous to the clerking students.

Bundy also recognized the risks inherent in changing the course. In general, professors who had been teaching legal ethics did not think that two credit hours was sufficient time to teach this course, and Bundy shared that point of view. He could not, however, convince professors of other subjects to give up more than two hours from the established first year curriculum. There was also real concern that first year law students would have “little, if any, experience of law practice to draw upon in interpreting the material” of a legal ethics course.\textsuperscript{153} Because so much stress has been put on the need to contextualize the topic of legal ethics, if the students were not able to really understand the practice settings about which they were studying, then Bundy’s course would not be an improvement.

The outcome of the Boalt Hall experiment was disappointing. It fell prey to the anticipated problems and did not seem to achieve any of the experiment’s lofty goals. The students felt that the course was too short and squeezed into an already full semester, and they did not, in fact, seem to be any more open to considering ethical issues than their second and third year counterparts. The two credit nature of the course was deemed

\textsuperscript{152} Id. at 22.

\textsuperscript{153} Id. at 24.
especially problematic, because all other required first year courses were either three, four, or five credits. The indelible message to the students was that legal ethics was somehow less important. Teaching a more than two credit course in legal ethics dictated its inclusion in the second or third year curriculum choices at Boalt, and so in that way alone, Bundy’s experiment failed. However, Bundy continues to believe that the fact that the course needs to be taught in at least three credit hours does not rule out the possibility that students would benefit more if it were also taught in the first year. He feels that the subject of legal ethics must be an integral part of the foundation of a prospective lawyer’s education.

A lawyer cannot accurately grasp the contours, significance, or potential for reform of U.S. law without understanding the core material of legal ethics. The material includes, at a minimum, the role of lawyers in making, shaping compliance with, and enforcing the law, this country’s increasingly controversial attachment to the adversary system, and the circumstances under which actors have access to the legal counsel or advocacy.154

Robert Burns of Northwestern Law School, another Keck recipient, attempted a different approach to improving general perception of legal ethics, and focused on improving teaching methods. His legal ethics course, offered as a ten credit program, integrated traditional materials and instruction in trial advocacy skills and evidence, and was centered around a set of simulated exercises involving client interviewing and negotiation. Burns felt that the underlying “real” characteristics of simulation exercises would engage the students more thoroughly, and would thus provide them with a more accessible understanding of what it would actually feel like to encounter specific ethical dilemmas. The negotiation exercises in particular “involve[d] the challenging issues of

154 Id. at 32.
disclosure and confidentiality, paternalism and respect for client autonomy, deference to client objectives and avoidance of fraud, the relationship of civil litigation to possible criminal litigation, and the inevitable conflicts between law and client financial interests.\textsuperscript{155}

Perhaps one of the most ingenuous aspects of Burns’ experiment was his recognition of the need to convince his peers (on the faculty) about the importance of legal ethics even before attempting to reach the students. Instead of the standard survey lecture syllabus, “the teacher’s manual [for Burns’ course] is quite extensive. Our goal was to make this style of teaching as user friendly as possible for teachers who had not previously employed simulation.”\textsuperscript{156}

Stephen Gillers, of NYU Law School, used methods similar to those employed by Burns. Instead of in-class simulations, however, Gillers produced two videotapes of “ethical vignettes” from which he taught most of his course. After showing each vignette, Gillers instructed his students to try to react “in” the video, instead of “to” the video, in order to make the story a more poignant and personal experience. The concept of “getting personal” is central to Gillers’ goals of improving the traditional methods of teaching this legal ethics course.\textsuperscript{157}

Carol Bensinger Liebman of Columbia Law School and Heidi Li Feldman from the University of Michigan are two other Keck recipients who relied upon simulation and role-playing. The feature which distinguishes their courses from others is that each

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\textsuperscript{155} Id at 47.
\textsuperscript{156} Id at 48.
\textsuperscript{157} Id at 68-70.
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taught legal ethics as part of an intensive “mini-course,” either during or directly following the first year. They chose this structure as a means of imparting the idea that legal ethics had an importance equal to all other law school courses. Professor Liebman offered a one week “mini-course” in the first week of the second year, and required that each student study and learn certain material during the preceding summer. During the course, students met from for eight hours daily, and scrutinized filmed simulations by using a “freeze-frame” technique designed to enable them to pick apart each element of the dramatized real-life lawyering situations and the ethical dilemmas arising from them.\textsuperscript{158} Professor Feldman also offered a one-week “mini-course,” however, her aim was broader than Liebman’s. Feldman not only wanted her students to comprehend the significance of legal ethics to all other aspects of law and legal practice, but she also hoped that her students would be able to grasp the philosophical, sociological and historical complexity of the subject. Like Burns, Feldman realized the need to have a dedicated and inspired faculty teaching legal ethics, and she produced her course in a way that she hoped would help to foster faculty scholarship on the subject. By inviting professors of other legal subjects and practicing attorneys to lecture to her class, Feldman believed she could inspire increased student and faculty interest in the subject.\textsuperscript{159} Both Bensigner and Feldman found that while a one-week intensive course succeeded in sending a message to students about the importance of legal ethics, the short course still was not able to do the very complex subject justice. Both concluded that their courses

\textsuperscript{158} Id at 73-86.

\textsuperscript{159} Id at 51-55. It is also worth noting that Feldman team-taught her first “mini-course” with an established and well-regarded authority on legal ethics, Professor David Luban.
had to be followed-up with an upper level legal ethics course at some point in the second or third year.

In general, the professors who used their Keck grants to improve traditional legal ethics course found that they were able to make significant changes. They sincerely believed that their more expansive and nuanced methods yielded increased respect for the subject, and would aid students’ ability to both recognize and solve ethical dilemmas. Despite those benefits, however, each professor received from students one persistent complaint, regardless of the format used: the focus of the course was on ethics per se instead of on law.\(^{160}\) Classically, legal education is an orthodox focus on substantive legal subjects, free of any undergraduate humanities influences. Entwining concepts of morality with the traditional rules of legal ethics has not generally been well accepted. Although the trend in scholarly articles and books published in the 1990's was on more philosophical aspects of the subject, this was still a new concept, and students were uncomfortable with the change.\(^{161}\)

**Advanced and Specialized Courses**

Some of the Keck grant recipients opted to teach upper level seminars in legal ethics, which could be offered as three or four credit courses, and could focus more intensively either on a certain aspect of legal ethics, or on specific contexts for examining questions involving legal ethics. The three courses that took this route present different models.

\(^{160}\) Id at 84.

\(^{161}\) Id at 85-86.
Walter Bennet Jr., a professor of legal ethics at the University of North Carolina, used his Keck grant to fund a course centered around the oral histories of esteemed lawyers and judges. In his seminar, each student had to interview a judge or lawyer and solicit their “life-story.” These “stories” were then discussed in detail during the three credit hour class. In addition, each student was expected to work one hour a week with a local attorney acting as their mentor. The use of “oral histories” was intended to “expose students to criticism of the profession from some of its most prominent members...In describing some of their own tactics, lawyers often seem disturbed or unclear about how the decision to use those tactics comports with their own morals or their attitudes about professional values.”162 Such an experience, Bennet thought, would express to law students the reality of the tough choices they would have to face in their every day practices. In addition, the real life interview process succeeded in satisfying Gillers’ goal of “getting personal.” After teaching this course for one semester, Bennet felt confident that the use of “oral histories” was a benefit to the teaching of legal ethics:

Law students rarely hear moral affirmations of the profession or the honesty of lawyers in law school, and they tend to discount them when they do. They hear it even more rarely from persons outside the profession. But they hear it when they talk to lawyers who live those affirmations and who truly believe in the decency of their fellow members of the bar. While this does not eradicate the deep ethical problems among lawyers and in lawyers’ work, it does tell students that they can live a morally worthy life in the law, that they have some control over the moral choices in their future, and that there are people in the profession who are living by principle and thriving.163

While perhaps not as creative as Bennet, three professors from Fordham Law School - Mary Daly, Bruce Green, and Russel Pearce - presented their advanced legal

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162 Id at 183.

163 Id at 185 (emphasis in original).
ethics seminar in the form of contextualized courses. Each professor taught the subject of legal ethics as it related to a specific practice area (i.e. corporate, public interest, and criminal law) and in different employment settings.\textsuperscript{164} These professors believed that such a course would best engage students, because it would relate to a broad spectrum of possible future career interests. The professors observed an increased student interest in legal ethics, evidenced by the fact that “the students are enthusiastic and work harder.”\textsuperscript{165} The goal of the course was to put legal ethics in a particular substantive context, thereby illuminating different aspects of the subject of legal ethics. Since what a second year law student believes will be his or her future practice path may very well change, the professors made sure to include cross-references to other practice settings throughout their lectures and classroom meetings.

David Wilkins (Harvard Law School) offered a specialized course on legal ethics. In order to express to his students the serious nature of lawyering, Wilkins presented a multi-course program he called “Ethics and the Professions.” The program aimed at responding to the “justifications offered by professionals for their ethical standards and [to] ask whether these norms actually serve their stated purposes or instead are better understood as a convenient cover for actions that do little more than promote professional self-interest.”\textsuperscript{166} In 1995, Wilkins team-taught one course in his program with Dr. Linda Emanuel, a Harvard Medical School professor, called “Ethical Dilemmas in Clinical

\begin{footnotesize}
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\item\textsuperscript{164} Id at 193.
\item\textsuperscript{165} Id at 200.
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Practice: Physicians and Lawyers in Dialogue.” Students from both the Medical School and the Law School were invited to enroll. Presented during the month of January - the only time the calendars of the two professional schools overlapped - this four week intensive course included daily class sessions where medical students mixed with law students to role-play ethically-laden scenarios, and each student was required to make site visits to practice locales - e.g., hospitals and courtrooms - not familiar to his or her own field of study. During this month, Wilkins and Emanuel sought to explore the connections between the norms and practices of medicine and law, keeping in mind Luban’s words that, “professional norms must always be justified in terms of some more general set of moral criteria.” While students of both schools who evaluated this course gave it the highest marks, Wilkins has since concluded that monetary and calendar logistical issues may unfortunately prevent him from repeating it. Even if he is unable to repeat this course, he intends to continue his efforts to contextualize legal ethics in the law school curriculum.

The Pervasive Method

Many professors believe that legal ethics must be taught pervasively, meaning that the course must reflect the breadth of the subject and touch every element of lawyering in the United States. The proponents of this method explained to their peers at the Keck Symposium that for legal ethics to be taken seriously by the students, it must first be taken seriously by the professors of all subjects. In their presentation, Susan

167 Id at 241.

168 Id at 249.

169 Id at 257-258.
Koniak and Goeffrey Hazard (Boston University and the University of Pennsylvania, respectively) stressed the need for conscious and dedicated pervasive teaching of legal ethics in law. They asserted that professors of legal ethics must “pay attention to the signs” - the things which signal to law students that a class or subject is important to their legal education - and use these “signs” to highlight the importance of the study of legal ethics.\(^{170}\)

In their article on this subject, Koniak and Hazard discuss both the positive signals which denote the importance of legal ethics, and the negative ways in which many professors unconsciously communicate “their disdain for the subject,” either by leaving out discussion of ethics entirely from their classes, or by actually announcing that they are being forced by the dean to include such discussion in their course presentations.\(^{171}\) Koniak and Hazard gleaned positive signs from those characteristics of core courses that seemed to trigger a law student’s taking those courses seriously: using real cases in study and discussion, employing the Socratic method in class, requiring essay exams, and inducing rigorous analytic thought.\(^{172}\) They believe that by making the discussion of legal ethics appear more like traditional law school courses, the importance of the topic of legal ethics to students will be bolstered psychologically. Further, by including discussions on legal ethics as part of the teaching of these other, well-established courses, they argue it should become more natural for students and teachers to consider the subjects as one.

\(^{170}\) Id at 118.

\(^{171}\) Id at 120.

\(^{172}\) Id at 121.
Deborah Rhode of Stanford Law School, probably the most vocal proponent of the “pervasive method,” believes in the need for not only the pervasive teaching of legal ethics, but also a specialized course on the subject. She agrees thematically with Koniak and Hazard that the importance of legal ethics to the entire legal profession must be made clearer. However, she focuses much of her writing on the failure of law professors to present this subject in the appropriate light to their students. “Faculty who decline, explicitly, or implicitly, to address ethical issues encourage future practitioners to do the same.”  

In other words, not only must professors take it upon themselves to incorporate legal ethics concepts into their courses, but they must make sure that they believe what they are saying.

The most common concern about teaching legal ethics through use of the “pervasive method” was verbalized by Bundy, when describing his experiment. He observed that “by giving the pieces of legal ethics a home everywhere, it effectively deprives its core concepts of a home anywhere. . . It does not provide the kind of centered comprehensive understanding of the lawyer’s role that is the foundation of reflective practice.”  

Koniak, Hazard, and Rhode disagree, and view the “pervasive method” as creating precisely the opposite results. They believe that only by giving legal ethics a “home everywhere” can the real importance of this subject be imparted to future lawyers. In practice, they argue, ethical dilemmas do not just pop up in a vacuum. Rather, they arise out of actual situations involving advocacy, confidentiality, and conflicts of interest.

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173 Id at 140.

174 Id at 33.
- in short, from all aspects of the American legal system. All three agree, however, that teaching legal ethics is only effective if it mirrors practical experience.

**Clinical Teaching**

One of the oldest, yet at the same time most innovative methods of teaching legal ethics is through legal clinics, where students actually represent clients in court under the supervision of a practicing attorney. Several of the Keck professors experimented with different kinds of clinical teaching.

Christine Venter from Notre Dame Law School, teaches one of the most respected clinical legal ethics classes in the country, aims, through the seven clinical seminars she supervises, to put “ethical issues [of lawyering] into a practical context.” Venter’s general goal is to “educate men and women to become lawyers of extraordinary professional competence who possess a partisanship for justice, an ability to respond to human need, and compassion for their clients and colleagues...therefore...the program emphasizes not only skill but service, not only professional ethics but also social and moral ethics.” Venter uses team-teaching - by a professor and a supervising practicing attorney - in her courses, where students assume the role of lawyer in real life clinical situations, and in their class meetings, they discuss the problems that they encounter in their “practice.” This format, she believes, will ingrain in students the practice of actively questioning the decisions they make as practicing lawyers.

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175 Id at 288.

176 Id at 292.

177 Id at 291.
In her article describing her clinical experiments, Venter discusses several shortcomings and difficulties of teaching legal ethics in a clinical setting. First, she concedes that clinical practice does not exactly duplicate the environment of a law firm, where most students eventually practice. In the clinics she used as teaching tools, the clients are poor and do not pay for the legal services being provided for them. As a result, there is a danger the lawyer-client relationship experienced is not realistic - because the decisions made by the student lawyer may not be challenged in the same way or to the same extent as those made by a lawyer dealing with a powerful, wealthy client are likely to be. In addition, the classroom and clinical environment tend to be more supportive of the students’ ethical and moral development than a law firm, since real law firms are not as likely to create a “safe” environment in which its lawyers feel free to impose their personal morals upon their professional work whenever they deem it necessary.\textsuperscript{178} Second, her legal clinics do not provide the full range of legal services (\textit{i.e.} no criminal or corporate law), and students tend to experience only one kind of practice setting. Third, teaching through legal clinics is very expensive, as such classes are best suited to small numbers of students. The Keck grant was only meant to last for a few years; after that, obtaining a higher permanent level of funding proved difficult.\textsuperscript{179}

Although they were not funded with a Keck grant, Michael Millemann (a practicing attorney) and David Luban taught a “hybrid” course at the University of Maryland Law School, which they wrote about in 1995, around the same time the Keck Symposium was held. Like Venter, they believed that, “the best way to teach legal

\textsuperscript{178} Id at 295.

\textsuperscript{179} Id at 294-295.
ethics...is clinically...[the best way to do this] is by combining, as seamlessly as possible, theoretical classroom instruction and reflection with clinical casework.”180 Their course was composed of “a full classroom legal ethics course of two or three credit hours with a multi-credit clinical course in which students, under faculty supervision, and faculty, with student critique, represent clients. In addition to the classroom hours, students meet weekly in clinical rounds,...in which they and the teachers discuss ethical issues arising in their clinical work.”181 At first glance, their course does not sound very different from Venter’s marriage of theory and actual experience. What made the course unique is their deliberate effort to provide students with opportunities to speak freely about the problems they ran into. While Millemann and Luban sometimes lectured together, in general, Luban led the classroom discussions about what the students encountered in their clinical experience; he did not watch the students perform in court. Similarly, Millemann acted mostly as advisor and counselor to the students while they explore the lawyer-client process, and he was not present in the weekly discussions. They hoped that students felt less inhibited, without fear of being graded or criticized, they would engage in thoughtful evaluation of the ethical issues they face.

The Keck grants were instrumental for several reasons. The grants provided the financial resources necessary to implement new teaching methods, and as a result, more creative teaching methods and courses with complex content were developed. The grants also helped to stimulate academic interest in the subject of legal ethics because the


181 Id at 55.
recipients were able to inform (and hopefully inspire) their peers to elevate the subject from its “step-child” status.

**Historical Pressures**

During the same time period the Keck fellows were implementing new and creative ways of teaching legal ethics, the legal profession - and American society as a whole - was publicly assaulted again by ethical lapses by lawyers. In the late 1980's, and 1990's, a number of high profile legal malpractice cases (seeking huge damage awards) were filed against nationally-known law firms, which denigrated the professional status of American lawyers in ways similar to Watergate. The lawsuits against Rogers & Wells (filed in 1986), Venable, Baetjer & Howard (1987), and Milberg Weiss (1999) were all based on claimed violations of existing disclosure regulations, and raised the question whether lawyers were required to “rat out” their corporate clients in situations where previously lawyers had been permitted to turn blind eyes to obvious or at least potential wrongdoing by their clients’ businesses. The cases, all settled with multi-million dollar payments ($40, $27, $50 million respectively), easily caught the public’s attention. More significant perhaps than the notoriety was that fact that these cases highlighted the extent to which law was becoming more regulated by forces outside of the profession, whereas traditionally, the American legal profession had been left to self-regulation, through codes of ethics and disciplinary proceedings. After the Milberg Weiss settlement, the storm of public attention abated for a few years, but as the new century dawned, lawyers questionable conduct once again made headlines. In the Arthur Anderson, Enron, and Worldcom scandals, lawyers were actual participants, not mere advisors.¹⁸²

¹⁸²Nor were the scandals confined to the national stage. In late 2002, a scandal involving Fletcher Allen Health Care (FAHC) came into public view in Vermont, when FAHC’s Board hid close to
The criticism generated by these scandals was not lost on the legal academic community, and indeed helped foster a resurgence of interest in legal ethics begun by the Keck grants. Scholars increasingly sought to answer the question, could improved legal ethics courses ameliorate the decline in ethics in the legal profession?

Renewal of Scholarly Interest and Reaction

The period from the early 1990's through today has been marked by a veritable explosion of scholarly writing about legal ethics. Some scholars have written on topics similar to those of the Keck fellows, describing their own experiments with teaching, or critiquing the courses then offered at law schools. Others focused on specific aspects of the components of legal ethics - confidentiality, conflicts of interest, and - taking cues from the critical theorists of the 1970's and 1980's - explored these topics in light of the necessity (or lack thereof) for an adversary system. While a detailed discussion of the many articles and books concerning legal ethics which were published during this time period is beyond the scope of this article, a thematic overview will certainly be instructive. Before beginning that analysis, it is worth noting that the majority of the critical works written during this period were produced by scholars and professors who had either already exhibited their dedication to the subject, or who had previously taught or were currently teaching legal ethics in law school. Certainly, some new faces entered the relatively small field, but they were a distinct minority. Accordingly, it is fair to ask

$140 million from state regulators in order to obtain permits for massive hospital expansions. Their lawyers did not alert either the hospital or health care center trustees or the regulators, signaling both to the public and to the Vermont Bar that perhaps protecting client confidentiality has gone too far. The Bar president, Cadence Mertz, felt the need to publicly remind lawyers that they must sometimes “balance client obligations with ethical obligations.” (Cadence Mertz, “Bar president: Lawyers should learn from FAHC fiasco,” reported in Burlington Free Press, November 30, 2002.).
whether the near mountain of legal ethics treatises produced during this time period is truly representative of the level of interest by the legal profession in this subject.

The works (mostly law review articles) on legal ethics published from the 1990’s to the beginning of the 21st Century can be divided into two broad categories: those that continue to critique and comment on the teaching of the subject of legal ethics, and those that discuss the subject in the broader terms of its place within the legal profession. The writing came primarily from the academic community, as legal ethics courses served as incubators for ideas about additional changes in the way the subject of legal ethics and the regulation of the lawyer’s role were analyzed.

In 1991, William Simon re-emerged on the legal ethics scene with his article, “The Trouble with Legal Ethics.”183 He observed that legal ethics courses focused only at the ends of the legal ethics spectrum -- viewing the subject merely as a set of disciplinary rules, or, conversely, focusing on the personal moralities of lawyers. He argued that both types of study were inadequate, and that a middle-ground had to be developed. In 1999, he published a book which has become one of the most respected works on legal ethics, The Practice of Justice.184 In the book, Simon explores the implications for and effects of legal ethics on the legal profession, in light of the supposed pursuit of justice which lies at the core of lawyering. He addresses the topic of the growing public disillusionment with the legal profession as the result of “the dominant conception of the lawyer’s professional responsibilities [weakening] the


connection between the practical tasks of lawyering and the values of justice that lawyers believe provide the moral foundations of their role.\textsuperscript{185}  He focuses on historical examples of occasions when lawyers could have furthered justice, but did not because of adversarial restrictions on their role, to expose the duality of legal ethics regulatory codes. He posits that the codes enhance the ethical standards of lawyers while at the same time they severely restrict personal ethically sound behavior lawyers might otherwise exhibit, were they not acting as advocates. He used the Savings and Loan scandal as a prime example, where corporate lawyers chose not to disclose illegal activities in which their clients were engaged, supposedly because of the client confidentiality rules integral to the adversary system. Simon expresses the view that a lawyer’s choice to place adversarial dedication over the honest pursuit of justice demonstrates the failure of practical legal ethics to influence the practice of law.\textsuperscript{186}

Simon’s discussion of most of the traditional theories justifying continued reliance of an adversary system of justice and a distinct lawyer’s role-morality highlights the logical flaws of each, and he proposes a theory for the moral practice of law which harkens back to his 1978 suggestion that the legal profession needs “non-professional advocates” who will treat the “problems of advocacy . . . as matters of personal ethics.”\textsuperscript{187}

Deborah Rhode also authored a large number of articles and books in this time period, all devoted to critiquing curriculum choices that failed to adopt the pervasive method of teaching legal ethics. She broadens the arguments she presented at the Keck

\textsuperscript{185}  Id. at 2.

\textsuperscript{186}  Id. at 6-7.

Symposium, and posits that the subject of legal ethics is of paramount importance in the law school curriculum. For example, in her 1999 article, “Professionalism in Professional Schools,” Rhode focuses on the need to “educate educators”\textsuperscript{188} in law schools, as the means to spark real faculty dedication to and interest in the subject of legal ethics. She comments that, “most faculty could, with minimal effort, effectively present ethics issues related to their specialty. The real problem is that most prefer not to.”\textsuperscript{189}

In a December 2000 symposium held at Fordham Law School, the teaching methods used in courses on legal ethics were revisited, and a plethora of articles on subjects similar to those written about by the Keck fellows soon followed. For example, Elizabeth Chambliss, research director for the Program on the Legal Profession at Harvard Law School, in an article reminiscent of Wilkins’ article on his advanced professionalism course, wrote about the need to focus of professionalism in order to understand the ethical pressures on lawyers. “By focusing on the professions generally, and treating the legal profession as an extended case study, students end up better equipped to recognize and address the ethical and regulatory challenges confronting individual lawyers, law firms, and the profession as a whole.”\textsuperscript{190} Carrie Menkel-Meadow, a professor at the Georgetown Law Center, renowned for teaching her legal ethics course entirely through the use of video simulations, published an article

\begin{footnotes}

\item[189] Id.

\end{footnotes}
discussing her teaching methods and presented a strong case of the efficiency and importance of using simulation to teach the subject.\textsuperscript{191} While the articles from this symposium generally do not shed much new light on the subject of legal ethics, they do demonstrate the enduring interest in the subject.

Around and just after the turn of the century, legal scholars also begin to approach the subject of legal ethics from an historical perspective, and most of these works have focused on the ways in which law schools have dealt with legal ethics since the 1974 ABA accreditation requirement was imposed. In 2000, Ronald Rotunda, co-author of one of the most respected case-books on legal ethics and a professor at the University of Illinois College of Law, wrote an article called, “Teaching Legal Ethics a Quarter Century After Watergate,” in which he attempts to answer the questions, “does teaching ethics matter? Have the last twenty-five years made any difference?”\textsuperscript{192} Given the amount of space he devotes to describing the major legal malpractice suits of the 1990's, it is not entirely clear that he in fact thinks that since 1974 the teaching of legal ethics has made any difference on the legal profession. He does, however, remain a strong proponent of the teaching of this subject, and reminds all lawyers and future lawyers that, “what we call lawyer’s ethics is law, not a suggestion.”\textsuperscript{193}

James Moliterno, a professor of law and Director of the Legal Skills Program at the College of William & Mary School of Law, published similar retrospective article in


\textsuperscript{193} Id. at 666.
2001, “Experience and Legal Ethics Teaching,” and stressed the importance of teaching legal ethics,

Legal Ethics was once thought to be among the least important things about which American legal educators could teach. Today, Legal Ethics is regarded as a quite important thing about which to teach. Someday soon, I expect, Legal Ethics will be regarded as the most important thing about which American law schools teach.\textsuperscript{194}

He also tried to persuade his readers that it is not nearly as difficult to teach this subject as some professors may have made it seem. “Engaging students in the law’s application to them, its attachment to their calling, makes the Legal Ethics course among the easiest in which to generate interest and engagement.”\textsuperscript{195}

\textbf{2002 Questionnaire on Legal Ethics}

In an attempt to uncover the most contemporary views held by legal academics on the subject of legal ethics and, in part, to test whether the amount of published legal scholarship reflects broad-based interest, the author created a questionnaire for the professors of legal ethics and sent it by email to all 187 ABA accredited law schools where she was certain the course was offered (\textit{see Appendix A}). The questions were designed to elicit information that had not previously been published. More than fifty professors responded within the first week, a level of response that reflects not only the importance of the subject of legal ethics in law school, but also the fact that an established forum does not exist for such a discussion. As a follow-on to the questionnaire, the author developed contacts with professors who had been teaching a

\textsuperscript{194} James Moliterno, \textit{Experience and Legal Ethics Teaching}, 12 Legal Education Review 7 (2001).

\textsuperscript{195} Id.
legal ethics course for a long time who offered to guide her in mapping the trends this subject has followed in law school since the 1974 accreditation requirement.

Several of the questions posed were meant to explore the actual effect the 1974 accreditation requirement has had on legal ethics courses. The majority of professors posited that while the ABA requirement did force the issue in law schools, there were a varied combination of factors which together aided in the gradual evolution and expansion of the subject in law school curricula. For example, Roger Cramton, Dean and legal ethics professor at Cornell Law School, describes in depth what he believes are the main factors contributing to the changes in the subject of legal ethics from 1974 to the present:

The subject has increased enormously in practical and theoretical interest because of two developments: One, Practicing lawyers have become much more interested and engaged in the subject because of increased regulatory and liability exposure (e.g. sanctions for misconduct in civil litigation; disqualification because of a conflict of interest, an especially vexing problem for large law forms that have many clients; expansion of the risks of a malpractice action brought by a client - or new management of a corporate client - and third-party liability, such as a negligent misrepresentation of fraud action by a non-client, such as a person the client has contracted with or a shareholder or investor in the client’s stock.) Practitioner recognition of the importance of the subject translates into much greater student interest than formerly. And Two, the tremendous improvement in the volume and quality of good writing in the field. Better teaching books; development of lines of scholarship tying the subject to moral philosophy, economics, public choice theory, legal history, as well as traditional doctrinal and law reform scholarship have increased a greater general interest in the subject.196

The professors also discuss the gradual increase in respect which the subject of legal ethics has garnered over the last twenty-five years, from law school deans and

196 Roger Cramton, Professors’ Questionnaire.
professors, who have started to treat this subject as an integral part of a legal education.

Andrew Perlman, a professor at Suffolk Law School comments on this change.

Schools have begun to take the subject much more seriously. While the course used to be taught by adjuncts, it is increasingly taught by people (like me) who are full-time faculty members who dedicate their scholarship to the subject of professional responsibility.”

Susan Smith Bakhshian, a professor at Loyola Law School agrees with Perlman about the increased importance of the subject in general. “Ethics has fully developed to become its own area of law. Professors specialize in the area. Conferences are devoted exclusively to ethics. Legal scholarship is taken seriously on ethics topics. It is no longer a fringe subject.”

Responses such as these - and there were many - show that increased interest in the subject of legal ethics did not atrophy after the 1995 Keck Symposium, and indeed at least at law schools’ interest in this subject seems to have increased.

Several questions in the questionnaire were aimed at understanding why professors teach legal ethics, in order to discover (hopefully) what they see is so special and important about this subject. The responses to this question universally validated what has been reported in the literature. The professors who responded all suggested there is currently an increased dedication to the subject of legal ethics and that it is beginning to occupy a prominent role in legal education. The most common response on this topic was positive, and almost always included a statement that the subject was both fun to teach and the most pertinent law school course to a student’s future practice. For example, Eric Goldman, a professor of legal ethics at Marquette Law School, offers a

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197 Id., Andrew Perlman.

198 Id., Susan Smith Bakhshian.
somewhat sobering, yet nevertheless optimistic set of reasons why he has chosen to teach this subject:

I volunteered to teach this course, a somewhat unusual request given how much professors hate to teach this course, and how much students hate to take it. I chose to teach it because I wanted to help students with their transition from law school to being a junior attorney. Primarily, I wanted to help empower students to speak up when they saw fact patterns that were violations of the rules and yet ‘everyone is doing it.’ Many junior attorneys doubt their own legal acumen, and thus stay silent, in the process becoming socialized to the sloppy practices of those around them. I was hoping to break that cycle through helping students to realize that, if their instincts told them something was a violation, to follow up on that instinct and not to assume the other attorneys knew what they were doing. I also wanted to use the course to help students understand the complicated interplay between their duties as a professional and their personal time, and help students realize early the stresses their job will create in their personal life and how that creates a platform for unethical behavior. 199

Goldman’s response suggests that while he does not ignore the difficulties this subject has faced in the past and may continue to face in the future, he still believes that it is a necessary subject to teach to law students, and one which may affect their future law practices more than any other subject they study in law school.

David Wilkins, of Harvard Law School, summarizes his reasons for teaching legal ethics succinctly:

It is the best and more interesting subject in the curriculum - and the only one that faces outward onto the world instead of inward to the academy. Because I believe that it is more than just about ethics, however, I call my course, “The legal profession,” to highlight that it is really about how my students can try to build successful, rewarding, and ethical lives in the law. 200

In general, the information elicited from the questionnaires suggests that although in the last two decades the legal profession has been battered by scandals, and American

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199 Id., Eric Goldman.

200 Id., David Wilkins.
law schools have struggled and continue to struggle with a faculty only marginally interested in the subject of legal ethics, the subject has survived and even flourished as a growing number of professors come to recognize its important role in legal education, and to the legal profession.

**Part Five: The Legal Ethics Paradox**

What does studying the evolution of the subject of legal ethics, from the early 19th Century to the present, reveal about the impact that this subject has had on the legal profession? In theory, it is a subject meant to contain the keys to upholding the dignity of the profession. The ABA codes of ethics are meant to be rules that if followed will not only keep lawyers from being disciplined, but that will also supposedly assist a lawyer to act ethically. Has this subject actually provided the guidance and regulation that it has long promised? And if it has, why is the public’s perception of the profession of lawyering in the United States so dismal?

Logically, the evolution of legal ethics should coincide with both an increase in the propriety and ethics of American lawyers, and an improvement in the general public’s perception of lawyers. The subject has gone from sets of rules largely borrowed from British barrister etiquette, to its current status as a subject supported by the ABA’s codes of ethics, endorsed by critical legal and moral theorists, and highlighted by a growing increase of interest within American law schools. New teaching methods ranging from pervasive to clinical have emerged and the pedagogical underpinnings have become more complex. Despite these developments, however, it can still be fairly debated whether anything has changed in the legal profession. Ironically, this connection is the supposed reason the study of legal ethics exists.
Although the subject of legal ethics has yet to find a completely stable and entirely welcoming home in either law schools or the legal profession, it is unquestionably a long way from where it began almost two centuries ago. Professors of this subject contend that it is the hardest subject that they teach, precisely because it is the one subject which is ingrained in every aspect of lawyering and the legal profession.

Indeed, the subject of legal ethics seems to have become a sort of an umbrella over the entire law school curriculum. However, the subject is in a precarious position today, because the polarization between moral legal ethics and the law of lawyering begs a decision between the two. The better path, the author submits, is an effective combination.

**An Inverse Reaction to Legal Ethics**

The academic focus on legal ethics inevitably leads to questioning whether, as a result of this focus, American lawyers have become more ethical? Do members of the American legal profession now follow the rules regulating their behavior more closely and seek ways of comporting themselves professionally in a manner more in tune with their personal morals? The generally negative public perception of lawyers suggests that intense academic scrutiny has not yielded the hoped for results. Indeed, scholars posit that the evolution of the subject of legal ethics has ironically helped the legal profession along a path of “demoralization,” where lawyers have actually become less ethical and less prone to inculcate their personal morals into their professional conduct.

While the ABA codes of ethics are a force ostensibly for good, Luban and Milleman point out that the evolution of these codes actually seems to trace a trend of
demoralization. To explain this theory, they focus on the changes in labels the ABA employed over the past near century. In 1908, the code was called the Canons of Professional Ethics. Canons is a biblical term which suggests a serious moral obligation and connotation. Using the word “ethics” in the title indicates that at this point in time the ABA considered the regulation of lawyers to be morally grounded, and not a mere set of rules governing minimum standards for good behavior. In 1969, the ABA changed the name of this code to the Model Code of Professional Responsibility. No longer canons, the code suddenly loses some of its moral authority as it becomes secularized. However, within the code, each rule continues to be called a “canon,” thus signaling that the ABA still considers that this code is meant to be regarded with special importance. The label “ethics” was changed to Professional Responsibility, a phrase still indicating that lawyers are a distinct societal sect in need of regulation and guidance, but at the same time suggesting that they may no longer need moral guidance. In 1983, the ABA took a giant step away from presenting an ethical code for lawyers. The title Model Rules of Professional Conduct nowhere suggest any sort of moral obligation for lawyers; these are merely a set of completely secular and straightforward rules designed to govern the ways in which lawyers are to conduct themselves professionally. The content of the codes also follow this de-moralizing trend, becoming more and more rule-based, rather than ethically inspirational.

A second way in which the evolution of the subject of legal ethics has effected a de-moralization of the legal profession is that the rules of legal ethics have changed to

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201 Luban and Millemann, “Good Judgment” at ____.

202 Id. at ____. 
accommodate the increasingly commercial nature of the profession. Roscoe Pound, an ethical giant and a former dean of Harvard Law School, insisted that the legal profession is “a group of men pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood.” 203

The Supreme Court cases which extended First Amendment protections to attorney advertising and solicitation effectively altered that view and virtually blessed the legal profession as a trade or a commercial business. As the Court noted in *Bates v. Arizona*, “The belief that lawyers are somehow above “trade” is an anachronism, and for a lawyer to advertise his fees will not undermine true professionalism. 204 The irony is that the changes wrought by the Supreme Court decisions have undermined the view that lawyering is a profession. Before the Supreme Court handed down its decisions on attorney advertising and solicitation, eschewing commercial practices was the norm in legal practice. While it would be foolish to argue that lawyers should not be allowed to earn a livelihood from their legal practice alone, and it would be anachronistic to argue that lawyers should not be allowed to advertise in certain forms, the fact is that lawyer advertising is now almost wholly unregulated, and has indisputably led to lawyering becoming recognized as a business, rather than a profession - a label which implies very different ethical obligations. Though businessmen, one would hope, are not entirely devoid of ethics and morals, they do not practice in an environment supposedly typified by “noblesse oblige.” 205

203 Drinker, supra at 5.


205 Drinker, supra at 1.
A third way in which developments in legal ethics have detracted from the positive impact this subject was hoped to make on the legal profession is that the adversary system seems more entrenched than ever. While many critical theories decried the reliance on the adversary system and a role differentiated morality for lawyers, rarely have proponents of these theories actually suggested that the adversary system could or should be replaced entirely. William Simon, one of the most vocal opponents of the adversary system, has always advocated that though the characteristics of the lawyer’s role in the adversary system need to be changed, the adversary system itself need not be replaced. David Luban, like Simon, criticizes the “adversarial excuse” as an unacceptable justification for role-differentiated behavior, but while he concludes that the adversarial system is not the best system for the administration of justice, he does not proffer any other suggestion. The arguments against the adversarial system seem strong, and indeed much more powerful than the defenses of this system – like the one offered by Monroe Freedman. Unfortunately, it does not matter how many times the system is criticized, if no one successfully builds a new system in its place. While it is certainly preferable to offer criticism and suggestions in place of doing nothing, preliminary actions are simply not enough to make positive ethical changes in the legal profession, and ambivalence about the adversary system may be the root of the public’s negative view of lawyers.

A fourth way in which the evolution of legal ethics has negatively affected the legal profession lies in the mixed experiences by members of the academy. Consider the courses that failed, and those that were never tried. *(i.e. Stephen Bundy’s first-year, two-credit course; a repeat of David Wilkin’s nuanced course on professionalism)* Why did
they suffer this fate? Responses by current legal ethics professors seem to suggest that
the two largest obstacles to successfully teaching legal ethics are a lack of student and
teacher respect and interest. David Luban noted the problem of student disrespect in mild
terms when he responded that:

Students have never held the course in high esteem, and they still don’t. Most
teachers report that on their numerical teaching-evaluations they do 20-25% worse on their ethics course than their other courses.206

Andrew Perlman from Suffolk Law School was more pointed: “Students typically don’t
give a damn about [legal ethics], put it off until their last semester, in hopes, I think, that
it will go away.”207 Deborah Rhode has written extensively on the paucity of teachers
actually willing to dedicate themselves to legal ethics, or to teach with conviction because
they believe in what they teach. Perlman also voices this opinion, simply stating that,
“most professors don’t want to teach legal ethics.”208

Equally if not more damaging to any positive impact from the study of legal
ethics on the legal profession is the new type of course which has been recently begun to
be adopted. Professor John Sutton from the University of Texas Law School and the
Reporter for the 1969 ABA Code of Professional Responsibility, explains this new type
of course, hinting at its negative attributes:

Why has Legal Ethics become a more popular course to teach? I think formerly (say, until the mid-1970's) we tended to teach it really as an
ethics course, which is not an easy subject to teach at law school because almost all other courses involve “law” with little attention to “ethics.” But
the course has now become, in most places, another course on law - this
time, the law of discipline. I now teach the course largely from case-law,

206 Professors’ Questionnaire, David Luban.

207 Id., Andrew Perlman.

208 Id.
or court decisions. It is easier to teach law than to teach ethics, and the present disciplinary standards are so detailed and sweeping that the lawyer has less room than formerly to rely on his own view of ethical conduct...I wish there were more opportunities in the course to deal with real ethical questions, rather than with questions as to what does the disciplinary law command? 209

Professor Wilkins has also noted the trend of teaching the “law of lawyering” instead of teaching legal ethics, and Professor Tom Metzloff, from Duke Law School, observed that the subject of legal ethics “has become much more rule-based...for good or ill.” 210 This trend may perhaps be the single largest reason why law students and young lawyers now seem to focus more on avoiding discipline than on aspiring to ethical greatness - or at least ethically acceptable conduct. If students are being taught to think of legal ethics as mere rules, aren’t they are being told that avoiding discipline is good enough?

Hope for the Future?

“The practice of law is losing its moral integrity and social stature.” 211 This statement, made in 1995, is no less true today. In fact, following a decade riddled with multi-million dollar malpractice cases against once respected law firms, it is quite possible that the legal profession is now viewed in an even more negative light by the general public than previously. Can anything be done to reverse this damning verdict?

This article has mapped both the mis-steps and the improvements that characterized the evolution of the subject of legal ethics. It has attempted to contextualize this evolution within the recent history of the legal profession. Finally, it has argued that the subject of legal ethics may perhaps only be worth teaching and worth

209 Id., John Sutton.
210 Id., Thomas B. Metzloff.
211 Metzloff and Wilkins, supra at 358.
learning if it is truly a course on the ethics of lawyering - which includes both rule and guiding aspiration - as opposed to merely the law of lawyering. We are left to answer whether learning from the history of legal ethics will produce a solution to the current crisis?

Professor Timothy P. Terrel, from Emory University Law School, suggests that it is necessary to consider what exactly teaching courses and writing books on legal ethics is meant to establish, before considering the effects of this subject on the greater legal profession:

What are we trying to produce with this strong emphasis on inculcating ethical values (or at least an appreciation of ethical values) into law students? Better lawyers? How so? Nicer lawyers? How so and why? Happier Lawyers? Happier Clients? Or is the point a better, nicer legal system? Or a better, nicer society?212

What is the answer to these questions? Some professors and scholars believe that the purpose of teaching legal ethics is simply to help lawyers be more ethical people in their practice of law. On the other hand, a larger contingent has found that the only successful way to teach this subject is to teach it as merely another law subject, and that the most a professor can aspire to do is to churn out future lawyers who know how to avoid disciplinary proceedings. Some scholars argue for the death of the adversary system and role-differentiated morals for lawyers, while other cling to these beliefs as the very foundations of the American legal system. If even lawyers, law professors and legal scholars cannot agree on a definitive meaning for the term legal ethics - as is evident from a review of the literature and questionnaire responses - then how can one determine what the purposeful impact of this subject on the profession is meant to be? How can one

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212 Professors’ Questionnaire, Timothy P. Terrel.
determine what kind of impact this subject may have on the future of American lawyering? And if none of these variables can be determined, then where does that leave legal ethics as a supposedly important subject both to the law student and to the practicing lawyer?

The current and future status of legal ethics cannot be properly assessed without juxtaposing the advancements in this subject with the public’s decreasing regard for American lawyers. Are these two trends related, or does one merely offset the other? Is the public perception of lawyering so low because the subject of legal ethics has failed to effect real change, or are the commercializing forces of the legal profession overpowering and displacing the good that can come from the inculcation of this subject? Former dean of Yale Law School, Anthony T. Kronman, commented on this issue in his December of 2002 alumni greeting:

The integrity of the law is not self-executing. It depends upon the integrity of the men and women who administer it. In the past year, we have been reminded of the extent to which public trust rests on the integrity of professionals, including lawyers, who are called upon to validate the soundness of arrangements too complex for most people to grasp, yet vital to their way of life. We have been reminded of what happens when public trust is shaken.\(^{213}\)

If, as Kronman and others urge, lawyers’ ethics are intrinsically linked with the public perception of the legal profession, then it is worthwhile to spend some time discussing what today’s practicing lawyers think of legal ethics, and if this subject has actually had any sort of impact on the profession as is supposedly its ultimate purpose.

**The Effect of Legal Ethics on the Practice of Law**

The primary goal of this article is delineate the evolution of the subject of legal ethics, in order to discern the impact it has had on the practice of law. While procuring a definitive answer to this query is virtually impossible - especially because the author has had neither the time nor the financial resources to conduct wide-ranging empirical research - this investigation would not be complete without at least a small sampling of the opinions of today’s practicing lawyers concerning lawyers’ ethics. Therefore, the author solicited responses from twenty-five practicing attorneys, varying in age from their mid-twenties to late sixties, men and women, who practice in different parts of the country, and graduated from a diverse set of law schools (See Appendix B).

The three main questions posed to lawyers in the survey investigated whether the attorney took a course on legal ethics in law school and if so, were the course topics relevant to the actual practice of law; do the attorneys believe that anything learned from their course on legal ethics affected the way in which they conduct themselves professionally; and do they believe that younger lawyers (i.e. lawyers who graduated since 1974 when the study of ethics in law school became mandatory) are more ethical than older lawyers? The responses received to these questions were enlightening, yet also somewhat disturbing for one who plans to make a career in law.

The majority of the responses to the first question presented lists of the topics covered in the responder’s legal ethics course (i.e. conflicts of interest, confidentiality, negotiation). A few lawyers, however, also commented that their classes studied a broader sense of legal ethics, beyond just rules. In light of the intense academic debate on this topic, it was discouraging that practicing lawyers tended to believe that it is unnecessary to include any consideration of broader moral issues within the study of
legal ethics. Charles Dyke, a 1972 graduate from the Georgetown Law Center, stated that in his class, the broader issues of legal ethics were considered ("civility, morality, and sharp practices"), but that these studies were not relevant to his current practice because, "I don’t think a law school can graduate honest, moral, civil people who weren’t already that way when they first arrive at law school. People who think a semester of legal ethics is going to fundamentally change a person’s character are naive." Travis Smith, a 2000 graduate from Boston University Law School, agrees with Dyke, commenting that, “the greatest predictor of whether a lawyer will act ethically is whether he or she has a personal commitment to do so. If this is the case, the class on legal ethics is likely not necessary (so much of ethics is simple common sense and not acting in selfish ways).” In general, most lawyers responded that their legal ethics course was relevant to their practice, but typically only in strict and objective rule-based ways.

The responses to the second question also followed a general trend. In fact, almost every attorney responded in nearly the same words:

The course raised my sensitivity to ethical pitfalls. (Kris Olson, Yale, 1972)

As a result of [my legal ethics course], I will sometimes spot potential issues arising in everyday practice that I otherwise might not. (Charles Dyke, Georgetown, 1972)

The study of ethics heightened my awareness of the ethical dimensions of the practice of law. (Leslie Kay, Willamette and Harvard, 1982)

Taking the course...raised my consciousness to be on the alert for such issues. (Lynne E. Mallya, Loyola Los Angeles, 1993)

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215 Lawyers’ Questionnaire, Travis Smith.
The emphasis on ethics did help me to become more accustomed to looking for ethical issues when analyzing legal problems. (Travis Smith, BU 2000)

Legal ethics has enabled me to be aware of any ethical violation that I may encounter in my practice. (Nadine Peters, Boston University 2002)\textsuperscript{216}

Before considering the responses to the third question - perhaps the most disturbing as an indicator of the result that comes from studying the subject of legal ethics - it is critical to analyze what the answers to the first two questions contribute to assessing the impact of legal ethics on the practice of law. Relying on these responses as an accurate (though small) sampling of practicing American attorneys, it seems as if the study of legal ethics has had only a very limited impact on the practice of law, and this impact is largely centered on the awareness of today’s lawyers of what rules regulate their conduct. The lawyers questioned here did not believe that the study of legal ethics has or can effectively inculcate a set of professional ethics - which include personal morals - into today’s lawyers-to-be. While today’s practicing attorneys may be able to avoid the technical blunders described in the codes of ethics, the responses to this survey in no way suggest that lawyers consciously attempt to act more ethically in their everyday practice.

The responses to the third question also speak to the larger question, whether lawyers who studied legal ethics in law school are now more ethical in their practice than those who did not? In other words, has the subject of legal ethics changed the profession for the better since it became a mandatory course? The nearly unanimous response to this question was, no. Younger lawyers, trained in legal ethics, are not more ethical, and many believe that they and the legal profession have become less ethical.

\textsuperscript{216} Id.
The responses to the third question can be broken down into three categories. The first group of lawyers answered that they believed that younger lawyers are in fact less ethical (the adjective “sharp” is common), although some qualified these responses by attributing this decrease in ethical conduct to the commercial and monetary pressures on today’s legal profession. Charles Dyke commented,

Generally, the elbows are a lot sharper in the practice of law today than they were twenty or thirty years ago. The practice seems to be filled with people of all ages who are deeply (and generally wrongly) convinced that they can gain more by being nasty and uncivil. However, not everyone is that way, and usually it’s the very smart, older men and women (i.e. mid-50’s and up) who are the exceptions.\(^{217}\)

Along the same lines, Hilary Schultz, a 1974 Yale Law School graduate, states that she has in fact, “seen a number of ‘young’ lawyers who act unethically. They are certainly in the minority, but I am always jarred when I encounter a young lawyer engaging in what I consider shady conduct. Such conduct is hardly the preserve of older lawyers.”\(^{218}\)

Attributing this decrease in the caliber of ethical conduct to the increased interests in monetary gain, Scott J. Tepper, a 1971 graduate of Harvard Law School, explained, “sadly, the pressures of the times have made younger lawyers less likely to be gentlepersons than we were. Law is no longer viewed as a profession or a calling, but simply as another way to make money.”\(^{219}\) Kris Olson (Yale Law School, 1972) agrees that, “the monetary, billable hours pressures, and business practices of law firms since 1974 have increased ethical problems.”\(^{220}\)

\(^{217}\) Id., Charles Dyke.

\(^{218}\) Id., Hilary Schultz.

\(^{219}\) Id., Scott J. Tepper.

\(^{220}\) Id., Kris Olson.
A second group of lawyers acknowledge that younger lawyers are at least better informed about the rules of legal ethics than are the older practicing attorneys, who did not study legal ethics in law school. Julia Hesse, a 2001 graduate of the University of Pennsylvania Law School, stated that younger lawyers are “certainly better informed about legal ethics.” Lynne E. Mallya (Loyola Los Angeles Law School, 1993), agreed that younger lawyers “have more awareness of the types of issues to be on the lookout for,” but she does not necessarily believe that these lawyers are “more ethical.” Similarly, Leslie Kay (Wilamette and Harvard Law School, 1982), commented that she is “not sure if younger lawyers are more ethical, but [she] is sure that they have more awareness of the ethical boundaries that they are crossing when they choose to do so.”

The third group of lawyers seemed to share the view that in general, age is less of a factor in determining ethical conduct than is the current status of the legal profession, which affects lawyers of all ages. These attorneys responded that if lawyers act less ethically today, it is as a result of the legal profession’s fostering and encouraging immoral behavior. Stephen Schultz, a 1973 Yale Law School graduate, describes this phenomenon:

I know some very ethical older lawyers, some barely ethical older lawyers, some very ethical younger lawyers, and some barely ethical younger lawyers. If I had to make generalizations, I would state that non-litigators tend to be more ethical that litigators. While there are certainly many lawyers working for large firms who are extremely ethical, large firms have an inordinately high number of persons who have adopted a ‘large firm mentality,’ which is ethically grey. For example, too many large firm lawyers believe that it is acceptable practice to try to win a case by making

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221 Id., Julia Hesse

222 Id., Lynne E. Mallya.

223 Id., Leslie Kay.
it so expensive to try that the other side will fold. Even if not consciously trying to intimidate the other side by the cost of the case, they will frequently act in a way that causes inordinate expense to both sides. For example, they will object to every request for discovery and not voluntarily produce documents until compelled to do so or until a motion to compel has been drafted and they know that it is inevitable that they will be compelled to produce the material. 224

In his response to this question, Les Swanson, a 1966 graduate from the University of Oregon Law School, offers this general view of what makes a lawyer and a person ethical:

Ethics in life translates into ethics in law. There are many legal ethics rules, but a person with a good set of ethics in life is unlikely to violate a legal ethics rule if the person always places the client’s and the public’s interests first, and never gives the lawyer’s own financial interest priority. Young lawyers can be hyper-sensitive to legal ethics rules and not rely on the basic principles underlying them. Older lawyers can get careless about the rules because they think they have mastered the underlying principles. It takes both rules, principles, and character to have an ethical lawyer. 225

Perhaps the most disconcerting concept which can be gleaned from the responses offered by these practicing lawyers is that no matter what kind of impact the subject of legal ethics as taught in law school has had on their own professional conduct, the changes within the legal profession in the last quarter of the 20th Century are overpowering, and thus dissipate the impact of studying the subject. Peter Carson, a 1985 graduate of Berkeley’s Boalt Hall laments,

I am concerned that professional ethics, as an elemental part of the practice of law, are receding to the background. Not that lawyers are less ethical; just that the practice of law has become the business of law, and the emphasis on professional ethics as guiding principles simply are displaced by higher priorities. 226

224 Id., Stephen Schultz

225 Id., Les Swanson.

226 Lawyers’ Questionnaire, Peter Carson.
The responses offered by some of today’s practicing attorneys concerning the effect - or rather, lack thereof - legal ethics has had on the legal profession reveal that the future status of the study of legal ethics may sit at an unavoidable impasse. The subject continues to make positive strides forward in the enhanced respect given to by academics and in the broadening of the theoretical spectrum within which legal ethics are embedded, even against the persistent oncoming tide of criticism and doubt. Nevertheless, if in fact legal ethics is only a minor factor in the way law is actually practiced, how can the mandatory study of legal ethics in law school continue to be justified? Has this investigation of the history of legal ethics demonstrated that ethics - personal morals, as opposed to just rules of conduct - can be successfully taught? I will close with one last anecdote.

I am currently a 1L taking a legal ethics course. My professor is one of the seeming minority who genuinely cares about the subject. One week ago during the break mid-way through class a friend leaned over and asked me, “Is this at all interesting to you, because you actually care about this subject? Because it is NOT interesting to any of us.” My unfortunate, and surprising answer, is that no, it was not all that interesting to me. Studying legal ethics as a two-credit course where the students read forty pages out of a casebook every week and then regurgitate what they read in class, perhaps delving slightly into a more in depth consideration of a particular subject is neither very interesting nor, I think, a successful way to actually teach future lawyers to act with professional ethics. But when a professor, who cares about the subject, is only given two credit hours, how much more can she do? Based on my investigation of the history of the subject, and after speaking with many present legal ethics professors, I believe the only
truly successful way to teach legal ethics is by using real-life scenarios, role-plays or clinical situations. I do not believe that legal ethics is, or can be, properly taught as a regular classroom course.