ORIENTATION - PROFESSIONALISM AND ETHICS

Professor David M. Tanovich

GENERAL INSTRUCTIONS FOR STUDENTS

These problems focus on the issue of the ethical and professional obligations of law students. Spend approximately 30-35 minutes eating your lunch and thinking about each hypothetical. Identify the professional/ethical issue(s), any relevant provision of the Law School Disciplinary Policy and all of the relevant factors that you would consider in answering the questions. The student leaders will then facilitate a discussion for the remainder of the session.

PROBLEMS

1. Sam and Laura are first year students. They are working with George on an Access to Justice (A2J) assignment. Sam e-mails George about a meeting where they can discuss the assignment. George does not respond. Two days later, Laura sees George in the hallway and he tells her that his part of the assignment will be done by the end of the week. The week passes and he does not contact either Sam or Laura. As he is passing her desk, a member of the administrative staff reminds him that the assignment is due in a week. George tells her to "mind her own business." George finally responds to Laura that his work is done and that they can meet to discuss it. He also rudely indicates that he did not "f'n" appreciate being hassled by her and Sam.

   During their meeting, George tries to explain why he was late with his work. He told Sam and Laura about "Dave", a Community Legal Aid (CLA) client, who was a real "loser" having been caught twice driving without insurance. "Maybe if he didn't go to the race track every-day, he would be able to pay for his insurance. I can't believe that he is financially eligible for legal aid when he spends all of his money on the horses and drugs. He admitted to me that he didn't have insurance and he still wanted me to contest the charges, can you believe it?" George also could not believe that the client was not grateful when he secured a favourable result on fine payment. "You know, I am doing this for free, you would think that my client would appreciate that and at least thank-me." What professional and ethical issues are raised by George's conduct?

2. Last year, Sarah was selected as one of the finalists for the Lerner Cup moot. The case was a decision from the Supreme Court of Canada (SCC) during its 2006 term. The moot involved both written and oral argument. The written argument is known as a factum. Sarah's mother is a Crown in Toronto. When she learned about her daughter's case, she obtained copies of the written arguments (i.e. facta) filed in the case from a colleague. The facta were of assistance to Sarah as she prepared for the case. At that time, SCC facta were not available (as they now are) on the SCC website. Sarah did not share the facta with her other opponents.

   As she prepared for her written argument, Sarah was struck by the words of a dissenting judge in a lower court decision. Sarah decided to use those words verbatim in her factum. She did not reference the source figuring that it was a judicial decision and not an academic reference.

   Bob was another student in the final. When he read Sarah's factum, he recognized the quote and realized that it had been taken from a lower court decision. He was friends with Sarah and decided not to say anything. What ethical/professional issues are raised in this fact pattern?

3. Jamie is a second year student. He has a Facebook page. Jamie identifies himself on the page as a Windsor Law student and links the law school website. On that page, which he created as an undergrad, he has a blog, pictures and a "hot list" site. The blog posts editorials from a number of ultra conservative commentators who oppose same-sex marriage and abortion and who promote racial profiling of Black and Muslim men to fight the war on gangs and terrorists. The pictures are of naked women assuming various positions with men. On his "hot list", there is a list of the initials of the "law school women" everyone wants to sleep with. When one of his colleagues confronts Jamie, he tells her that what he does on his own time and computer is his business. Is he right? What should the law school do about Jamie's conduct? Finally, during class time, Jamie often visits his page during the lecture which those around him find distracting. How should the professor respond? As a general rule, is it professional to be surfing the web during class?

LEARNING TO ACT LIKE A LAWYER: A MODEL CODE OF PROFESSIONAL RESPONSIBILITY FOR LAW STUDENTS

David M. Tanovich*

(2009) 27 Windsor Y.B. Access Just.

Law students are the future of the legal profession. How well prepared are they when they leave law school to assume the professional and ethical obligations that they owe themselves, the profession and the public? This question has led to a growing interest in Canada in the teaching of legal ethics. It is also led to a greater emphasis on the development of clinical and experiential learning as exemplified in the scholarship and teaching of Professor Rose Voyvodic. Less attention, however, has been placed on identifying the general ethical responsibilities of law students when not working in a clinic or other legal context. This can be seen in the presence of very few Canadian articles exploring the issue, and more significantly, in the paucity of law school discipline policies or codes of conduct that set out the professional obligations owed by law students. This article develops an idea that Professor Voyvodic and I talked about on a number of occasions. It argues that all law schools should have a code of conduct which is separate and distinct from their general University code and which resembles, with appropriate modifications, the relevant set of rules of professional responsibility law students will be bound by when called to the Bar. A student code of conduct which educates law students about their professional obligations is an important step in deterring such conduct while in law school and preparing students for ethical practice. The idea of a law school code of professional responsibility raises a number of questions. Why is it necessary for law schools to have their own student code of conduct? The article provides a threefold response. First, law students are members of the legal profession and a code of conduct should reflect this. Second, it must be relevant and comprehensive in order to ensure that it can inspire students to be ethical lawyers. And, third, as a practical matter, the last few years have witnessed a number of incidents at law schools that raise serious issues about the professionalism of law students. They include, for example, the U of T marks scandal, the Windsor first year blog and the proliferation of blogs like www.lawstudents.ca and www.lawbuzz.ca with

* Faculty of Law, University of Windsor. This article is dedicated to my late friend and mentor Rose Voyvodic. It was made possible by a Law Foundation of Ontario research grant. I wish to thank Kevin Wong (09) for his outstanding research assistance. I also wish to thank those that took the time to read this piece and offer their very constructive comments. Earlier versions of this article were presented at "Re-Imagining Access to Justice: A Symposium in Honour of Professor Rose Voyvodic" (19 September 2008); "Professionalism and Serving Communities" (11th Colloquium on the Legal Profession) (24 October 2008); and, at a Faculty Seminar, Robson Hall, University of Manitoba (1 November 2008).

gratuitous, defamatory and offensive entries. It is not clear that all of this conduct would be caught by University codes of conduct which often limit their reach to on campus behaviour or University sanctioned events. What should a law school code of professional responsibility look like and what ethical responsibilities should it identify? For example, should there be a mandatory pro bono obligation on students or a duty to report misconduct. The last part of the article addresses this question by setting out a model code of professional responsibility for law students.

Les étudiants et étudiantes en droit constituent l'avenir de la profession juridique. Comment bien préparés sont-ils lorsqu'ils quittent la faculté de droit pour assumer leurs obligations professionnelles et éthiques envers eux-mêmes, envers la profession et envers le public? Cette question a mené à un intérêt grandissant au Canada à l'enseignement de l'éthique juridique. Elle a aussi mené à plus d'emphase sur le développement de formation Clinique et expérientielle tel que l'exemplifie le savoir et l'enseignement de la professeure Rose Voyvodic. Toutefois, moins d'attention a été consacrée à identifier les responsabilités éthiques générales d'étudiants et étudiantes en droit lorsqu'ils n'oeuvrent pas dans une clinique ou dans un autre contexte légal. Cela se voit dans les faits qu'il y a très peu d'articles canadiens qui portent sur la question, et, de plus grande importance, qu'il y a pénurie, au sein de facultés de droit, de politiques disciplinaires ou de codes déontologiques qui présentent les obligations professionnelles d'étudiants et étudiantes en droit. Cet article développe une idée que j'ai discuté avec la professeure Voyvodic à un nombre d'occasions. Il soutient que toutes les facultés de droit devraient avoir un code déontologique séparé et distinct du code général de leur université et qui ressemble, avec les modifications appropriées, à l'ensemble pertinent de règlements de responsabilité professionnelle que devront respecter les étudiants et étudiantes en droit lorsqu'ils seront reçus au barreau. Un code déontologique étudiant qui renseigne les étudiants et étudiantes au sujet de leurs obligations professionnelles est une étape importante pour dissuader une telle conduite pendant qu'ils sont à la faculté et pour les préparer en vue d'une pratique fondée sur l'éthique. Le concept d'un code de responsabilité professionnelle pour une faculté de droit soulève un nombre de questions. Pourquoi est-ce nécessaire que les facultés de droit aient leur propre code déontologique? L'article répond en trois temps. D'abord, les étudiants et étudiantes endroit font partie de la profession juridique et un code déontologique devrait refléter cela. Deuxièmement, il doit être pertinent et compréhensif afin d'assurer qu'il puisse inspirer les étudiants et étudiantes à être des avocats qui suivent les normes d'éthique. Et troisièmement, d'ordre pratique, au cours des quelques dernières années, on a été témoins d'un nombre d'incidents à des

tés de droit qui soulèvent des questions importantes en rapport avec le professionnalisme d'étudiants et d'étudiantes en droit. Ils incluent, par exemple, le scandale au sujet de notes à l'université de Toronto, les blogues de la première année à Windsor et la prolifération de blogues tels que www.lawstudents.ca et www.lawbuzz.ca contenant des commentaires injustifiés, diffamatoires et offensifs. Il n'est pas clair si tous ces comportements seraient captés par des codes déontologiques universitaires dont la portée se limite souvent au comportement sur campus ou aux événements sanctionnés par l'université. Quel aspect devrait présenter un code de responsabilité professionnelle pour une faculté de droit et quelles responsabilités éthiques devrait-il identifier? Par exemple, devrait-il y avoir une obligation pro bono impérative pour les étudiants et étudiantes ou le devoir de rapporter une mauvaise conduite. La dernière partie de l'article porte sur cette question en présentant un modèle de code de responsabilité professionnelle pour les étudiants et étudiantes en droit.

"[Law][s]tudents need to be treated as professionals so that they will learn to behave as professionals."[1]

I. INTRODUCTION

Law students are the future of the legal profession. How well prepared are they when they leave law school to assume the professional and ethical obligations that they owe themselves, the profession, and the public? This question has led to a growing interest in Canada in the teaching of legal ethics.[2] It has also led to a greater emphasis on the development of clinical and experiential learning as exemplified in the scholarship and teaching of Professor Rose Voyvodic.[3] Less attention, however, has been placed on

[1]Leonard Biernat, "Why Not Model Rules of Conduct for Law Students?" (1985) 12 Fla. St. U.L. Rev. 781 at 802.

[2]See Alice Woolley & Sara Bagg, "Ethics Teaching in Law School" (2007) Canadian Legal Education Annual Review 85; Lorne Sossin, "Can Ethics be Taught" *The Lawyers Weekly* 26 (6 April 2007) 5; Richard Devlin, Jocelyn Downie & Stephanie Lane, "Taking Responsibility: Mandatory Legal Ethics in Canadian Law Schools" (2007) 65 Advocate 671; Stephen G. A. Pitel, "The Teaching of Legal Ethics: Recent Developments in Ontario" (2005) 55 J. Legal Educ. 592; and, Jocelyn Downie, "A Case for Compulsory Legal Ethics Education" (1997) 20 Dal. L.J. 224. See further, the general discussion in "Reinvigorating Legal Education" in Adam M. Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall L.J. 1 at 32-36. The Law Society of Upper Canada has also begun to take a more active look at the teaching of professional responsibility in law school. See Law Society of Upper Canada, Licensing and Accreditation Task Force, Report to Convocation (20 September 2007) at paras. 8-9, online: The Law Society of Upper Canada <http://www.lsuc.on.ca/news/b/conv/?i=12590>.

[3]At the time of her death in April 2007, Professor Voyvodic was Academic Director of Windsor's two student clinics: Legal Assistance of Windsor and Community Legal Aid. As for her scholarship, see Rose Voyvodic,

identifying the general ethical responsibilities of law students. This can be seen in the presence of very few Canadian articles exploring the issue;[4] and more significantly, in the paucity of law school discipline policies or codes of conduct that set out the professional obligations owed by law students.[5] Part II of the article provides a scan of the codes of conduct or discipline policies of fifteen common law schools in Canada. It also examines the extent to which these law schools have publicly declared professionalism and ethics as a core mission of the school.

This article develops an idea that Professor Voyvodic and I talked about on a number of occasions. It argues that all law schools should have a code of conduct separate and distinct from their general university code and which resembles, with appropriate modifications, the relevant set of rules of professional responsibility law students will be bound by when called to the legal bar. A student code of conduct which educates law students about their professional obligations is an important step in deterring unprofessional conduct while i n law school and preparing students for ethical practice. In 1986, the American Bar Association issued a similar recommendation:

> Law schools should have – as many do – a code of ethics, including procedures for dealing with disciplinary infractions. Ideally, we believe honor codes should

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"Lawyers Meet the Social Context: Understanding Cultural Competence" (2006) 84 Can. Bar Rev. 563; Rose Voyvodic, "'Change is Pain:' Ethical Legal Discourse and Cultural Competence" (2005) 8 Legal Ethics 55; Rose Voyvodic & Mary Medcalf, "Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor" (2004) 14 Wash U.J.L. & Pol'y 101; and, Rose Voyvodic, "'Considerable Promise and Troublesome Aspect:' Theory and Methodology of Clinical Legal Education" (2001) 20 Windsor Y.B. Access Just. 111 at 119-121.

[4]My research only revealed one Canadian article on point. See Bruce P. Elman, "Creating a Culture of Professional Responsibility and Ethics: A Leadership Role for Law Schools" (Paper presented to the Eighth Colloquium on the Legal Profession: The Challenges of Leadership, University of Western Ontario, 25 May 2007) online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/eighth_colloquium_professional_responsibility_ethics.pdf>. In the United States, the issue has generated more academic attention. The seminal article in this area is Leonard Biernat, *supra* note 1. See also, Steve K. Berenson, "Education Law: What Should Law School Codes Do?" (2005) 38 Akron L. Rev. 803; Brigette L. Willauer, "The Law School Honor Code and Collaborative Learning: Can They Coexist?" (2004) 73 University of Missouri-Kansas City Law Review 514; Elizabeth G. McCulley, "School of Sharks? Bar Fitness Requirements of Good Moral Character and the Role of Law Schools" (2001) 14 Geo. J. Legal Ethics 839; Sarah Ann Bassler, "Public Access to Law School Honor Code Proceedings" (2001) 15 Notre Dame J.L. Ethics & Pub. Pol'y 207; and, Kimberly C. Carlos, "The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes" (1997) 65 University of Missouri-Kansas City Law Review 937.

[5]For examples of such codes i n the United States, see "Professional Conduct Code," Emory Law, online: Emory Law <http://www.law.emory.edu/current-students/registrar/professionalconduct-code.html>; "Law School Code of Conduct" online: The John Marshall Law School <www.jmls.edu/students/pdf/**Code**of**Conduct**.pdf>.

> be adapted, insofar as practical, from the *Model Rules of Professional Conduct* and the *ABA Standards for Lawyer Discipline and Disability Proceedings….* Law schools should thereby introduce students from the outset of their careers to what it means to be subject to professional standards and processes.[6]

The idea of a law school code of professional responsibility raises a number of questions. *Why is it necessary to have a separate and distinct code of conduct?* Part III of the article provides a threefold response. First, law students are an integral part of the legal profession and a code governing their conduct should reflect this. Second, a code of conduct must be relevant to law students in order to ensure that it can inspire them to be ethical members of the profession. And third, as a practical matter, the last few years have witnessed a number of incidents at law schools that raise serious issues about the professionalism of law students. They include, for example, the University of Toronto marks scandal, the University of Windsor first year blog and the proliferation of blogs such as www.lawstudents.ca and www.lawbuzz.ca with gratuitous, defamatory and offensive entries. These and other similar incidents are chronicled in Part III. It is not clear that all of this conduct would be caught by university codes of conduct which often limit their reach to on campus behaviour or university sanctioned events. *What should a law school code of professional responsibility look like and what ethical responsibilities should it identify?* For example, should there be a *pro bono* obligation on students or a duty to report misconduct? These questions are addressed at the end of the article where a model code of professional responsibility for law schools is provided.

II. THE LAY OF THE LAND

Over the summer of 2008, a scan of fifteen common law schools in Canada was conducted.[7] The information was obtained from the law school website and from e-mail correspondence with law school officials.[8] The purpose of the scan was twofold. First, to get a sense of how law schools convey their commitment to ethics and professionalism in their official documents. Second, to determine whether any Canadian law school employs a code of conduct incorporating or modelled after the 'professional rules' that govern lawyers in that jurisdiction.

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[6]ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, *reprinted in* 112 F.R.D. 243 (1986) at 269 [ABA].

[7]These schools included: University of Victoria ("Victoria"), University of British Columbia ("UBC"), University of Calgary ("Calgary"), University of Alberta ("Alberta"), University of Saskatchewan ("Saskatchewan"), University of Manitoba ("Manitoba"), University of Windsor ("Windsor"), University of Western Ontario ("Western"), Osgoode Hall Law School of York University ("Osgoode"), University of Toronto ("UofT"), Queen's University ("Queens"), University of Ottawa ("Ottawa"), McGill University ("McGill"), University of New Brunswick ("UNB"), and Dalhousie University ("Dalhousie").

[8]A copy of the completed scan was also e-mailed to all Deans and Associate Deans to ensure that all relevant material was examined.

A. Official Document(s) Identifying Commitment to Professionalism and Ethical Development

As Bruce Elman, Dean of Windsor Law, has observed "[a] mission statement which states clearly the commitment to ethical lawyering would, I believe, have an impact on prospective students."[9] The same holds true for current students. Since many law schools do not have an explicit mission statement, other documents were examined such as a school's five year strategic plan, student handbook or statement of objectives or values. Many of the law schools scanned (e.g. Victoria,[10] UBC,[11] Alberta,[12] Calgary,[13] Saskatchewan,[14] Manitoba,[15]

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[9]Elman, *supra* note 4 at 2.

[10]The *UVic Faculty of Law Policy on Academic Integrity* begins with, "Students at the Faculty of Law are expected to observe high ethical standards not only as students but also as potential members of the legal profession. The Faculty trusts its students to act with propriety and integrity in their relationships with each other and with the Faculty, in both academic and non-academic endeavours," online: University of Victoria Law <http://www.law.uvic.ca/Current_Students/Academic_Regs/Academic-Regs.php#academic>.

[11]See *infra* at note 23.

[12]The *Law Faculty Council Mission Statement* states that "[t]he mission of the Faculty of Law is to provide service to the community, to educate prospective lawyers and others seeking a thorough understanding of the law and the legal system, and to promote the acquisition of legal knowledge and the advancement of legal scholarship, in an environment based on equality, support, respect and recognition for the unique and diverse contributions of all its members." See Law Faculty Council Policy Manual (2007) at 1, online: University of Alberta Law <http://www.law.ualberta.ca/Faculty--Research/Administration/Law-Faculty-Policy-Manual.php>.

[13]Two of the Calgary objectives are "[t]o familiarize the students with the ethical and professional responsibility dimensions of law and its practice;" and, "[t]o instil in students a sense of obligation to be full contributing members of their communities." See *Program Objectives*, online: University of Calgary Faculty of Law <http://www.law.ucalgary.ca/programs/llb/objectives>. In addition, in discussing academic misconduct, Calgary observes that "[e]ntry into the legal profession requires the highest ethical conduct possible…." See Faculty Regulations, online: University of Calgary Faculty of Law <http://www.law.ucalgary.ca/current/regulation>.

[14]The *Mission Statement* states that "The College of Law at the University of Saskatchewan is committed to providing critical and reflective education so students have the best academic preparation for assuming professional responsibilities in the humane operation of the legal system and for all vocations in which an understanding of law is necessary or helpful," online: University of Saskatchewan College of Law <http://www.usask.ca/law/about_us/index.php>.

[15]The *Manitoba Law School Frequently Asked Questions* page states that "As well, the program offers a sense of professionalism and emphasizes the professional responsibilities of lawyers in terms of ethics and service to clients and the public." online: University of Manitoba Faculty of Law
<http://www.umanitoba.ca/law/newsite/faq.php>.

Windsor,[16] Western,[17] Osgoode,[18] UofT,[19] Queens,[20] and Ottawa[21]) have a document that identifies the importance of ethics and professionalism or, at a minimum, placing it, or some aspect of professionalism, as an integral learning outcome or law school value.

However, there is a significant degree of variance in the details contained in these statements. Queens, for example, simply places "Professionalism" as a value in their *Law Strategic Framework (2005-2010)* without any definition or discussion.[22] Similarly, UBC's *Dean's Message* states that "UBC has become one of the best law schools in the world by … providing practical skills training in advocacy, alternative dispute resolution, legal research and writing, problem solving and ethics …"[23], while UofT refers to its "dedication to the public good" and to exposing its students "to the inherent value of public service" in its *Degree Level Expectations*.[24] Slightly more detail is provided by Western's *Strategic Plan*

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[16]See the discussion below.

[17]The *Western Law: A Strategic Plan* (2006), online: Western Law <http://www.law.uwo.ca/infogeneral/StrategicPlan06.pdf> identifies the Western Law School Values as:
• Leadership - in teaching, in research and law reform
• Diversity – in our curriculum, in our scholarly interests and in our student community
• Collegiality and Partnership – in our mission
• Responsibility – to one another, and to our law school, for the accomplishment of our goals
• Integrity – in our dealings with students, with one another, and with the community.

[18]Discussed *infra* at note 27.

[19]Discussed *infra* at note 24.

[20]Discussed *infra* at note 22.

[21]The *LLB Objectives*, online: University of Ottawa Faculty of Law

<http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=blogcategory&id=141&Itemid=136&pid=136&lang=en> page states:

… As a professional program, the [Common Law] Section prepares students for entrance to the practice of law …. These professional and intellectual objectives are achieved in a manner which is mindful of the privilege and power often accorded to lawyers in our society. Our students are future leaders. Our programs concentrate on more than just the letter of the law. We address the spirit of the law and the ideal of justice. In our view, it is the duty of the program to respect and promote the full range of diversity reflecting the multi-lingual, multi-cultural and multi-racial characteristics of the women and men in our programs and in Canadian society.

[22]*Queen's Law Strategic Framework 2005-2010* at 3, online: Queens University <http://law.queensu.ca/strategicPlanning.html>.

[23]Online: UBC Faculty of Law <http://www.law.ubc.ca/welcome/index.html>.

[24]On file with the author. In its prospectus for future students, UofT notes that "[a]t UofT …public service is a critical component of the faculty's mission and of every law school student's legal education. From the first day of law school, students are expected and encouraged to demonstrate social responsibility through their

(2006) that identifies some of the elements of professionalism including "collegiality," "responsibility," and "integrity" as core values of the law school.[25] A strong statement of commitment to ethics i s provided by Victoria[26] and Osgoode. For example, in its *Plan for the Law School 2006-2010*, Osgoode states that:

> It is critical that our student body learn about and appreciate the role of law and lawyers in society, the role of our legal institutions, and how lawyers can assist their clients with an extremely high degree of ethics….
>
> At the heart of Osgoode's values is the concept of a profound ethical concern, one that seeks to increase students' awareness of the relationship between law and society and their professional and scholarly responsibility not only to individual clients but also to the community at large …."
>
> … Legal ethics is a critically important aspect of a legal education. It is a fundamental tenet of a professional legal education.[27]
>
> Windsor provides the most comprehensive approach with a number of official documents committing the school and its students to professionalism and ethical development. The *Statement of Objectives* states that the central goals of the school include:
>
> 5. To create a sensitive, caring and supportive environment for the study of law, enhancement of professionalism…
>
> 6. To create an academic and social environment conducive to learning and to the personal development of students, particularly women and those who are socially and economically disadvantaged, differently abled, late vocational, and from Aboriginal and various ethnic backgrounds, and in particular:
>
> a. To provide opportunities for the development of social consciousness and self-awareness by students, and to examine and develop ethical and social

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involvement in the many public interest opportunities …." See J.D. Program (2008-2009) at 17, online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/prosp_stdn_content.asp?itemPath=3/6/0/0/0&contentId=1036&cType=webpages>.

[25] *Supra* note 17.

[26] *Supra* note 10.

[27] *Plan for the Law School 2006-2010* at 6, 11, 13. On file with the author. See also, "Raising Ethical Lawyers" (2008) Continuum (Osgoode Alumni Magazine) at 8, online: Osgoode Alumni <www.osgoodealumni.ca/documents/Continuum2008.pdf>.

values in relation to personal and professional responsibility, and in particular, to instil in the students a sense of social responsibility in the practice of law and the need for the examination of social structures with a view to contributing to such changes as may ensure social justice …

e. To foster in students an attitude of fairness and openness in dealing with others, free of bias.[28]

In 2006, Windsor created *LEXpectations* based on Duke University Law School's *Blue Notes*.[29] The document is given to every student and is posted outside the General Office:

Engage Intellectually

[Text omitted]

Embody Integrity

• Be truthful, candid, fair, even if your actions go unnoticed; know that acting honourably often requires effort

• Articulate your personal code of ethics in the context of the rules governing the Law School and the legal profession

• Use ambiguous situations as an occasion to cultivate sound judgment, and avoid even the appearance of impropriety

• Transform controversy and conflict at the Law School into opportunities to work constructively with others for the benefit of the community

Lead Effectively

[Text omitted]

Build Relationships

[Text omitted]

Serve The Community

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[28]University of Windsor, Faculty of Law, CALENDER 2006-2008 at 5. Online University of Windsor Law <http://www.uwindsor.ca/units/law/lawTop.nsf/831fc2c71873e46285256d6e006c367a27536300d0e48b4185256dca005a6f1b/$FILE/LawCalendarWEB.pdf>. The statement should be read to include racialized students and students from sexual minorities.

[29]Elman, *supra* note 4 at 6.

• Volunteer for a service activity designed to benefit the community

• Engage in pro bono activities before you graduate

• Identify public issues that are important for you, form connections with others involved in these issues, and work to make a difference

Practice Professionalism

• Treat everyone with respect, even in the midst of disagreement

• Collaborate with others to achieve common goals; be mindful of the appropriate time and place for competition

• Take pride in your work and responsibility for your actions

Live With Purpose[30]

[Text omitted]

Finally, Windsor has identified the following learning outcome:

> **5. Responsible behaviour to self, others and society**
>
> The responsible behaviour of a law student/lawyer requires a familiarity with the rules of professional conduct and the principle of civility as well as an understanding of the ethical obligations owed to clients, the legal system, the profession and the general public. Law students must be able to articulate these ethical obligations and be able to relate them to the behaviour expected of them throughout law school.[31]

B. The Current Content of Law School Discipline Policies

In addition to mission/objective statements, there are other ways in which a law school can demonstrate and inculcate a commitment to the ethical development of its law

[30] *LEXpectations – Lawyer Education and Development,* online: University of Windsor Law online: University of Windsor Law <http://www.uwindsor.ca/units/law/lawTop.nsf/SubCategoryFlyOut/C2C5531E08D8024E852572A400483B95>.

[31] *Faculty of Law Learning Outcomes.* On file with the author. See also, Raising the Bar: A Plan of Action for Windsor Law School 2006-2012 at 7, online: University of Windsor Law <http://www.uwindsor.ca/units/law/LawTop.nsf/inToc/B4AF84C655BCE4E38525714B004D6A75?OpenDocument>.

students. These include the creation of a professionalism centre;[32] a mandatory ethics/professional responsibility course;[33] pervasive ethics teaching; a focus on clinical and experiential learning; internships; and, a code of professional responsibility for law students. The focus of this article is on the latter. Codes of conduct are an important part of the professionalization process in law school because their purposes include: to educate, to exhort and reinforce the values and goals of the profession, to inspire, and to regulate and deter misconduct.[34] In the context of a law school code, one commentator has noted that the purposes include "(1) to educate the students about appropriate ethical conduct; (2) to reinforce ethical principles already considered important; and (3) to serve as an incentive for students to act in ethical ways."[35]

A scan of the common law schools reveals that the norm is for law schools in Canada to have a policy setting out only academic misconduct offences (e.g. Victoria,[36] Alberta,[37] Calgary,[38] Western,[39] Queens,[40] Ottawa,[41] and Dalhousie[42]) and then to rely on the general

[32]The UofT Faculty of Law has recently established the "Centre for Legal Professionalism" whose goal is "to broaden and deepen our understanding of professionalism, ethics and public service, and the relationship between them." Online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/12/0/0/0&contentId=1602>.

[33]Currently, eleven (11) law schools in Canada have either a mandatory ethics/professional responsibility course or a significant part of their first year curriculum devoted to legal ethics. These schools include UBC, Alberta, Calgary, Manitoba, Windsor, Western, Osgoode, Toronto, Ottawa, UNB and Dalhousie. See Dodek, *supra* note 2 at 34; and, Devlin, Downie and Lane supra note 2 at note 3. The importance of mandatory courses to ethical development has now been made in a number of Canadian articles and will not be addressed here. This academic literature is cited at supra, note 2.

[34]See Berenson, *supra* note 4 at 810-811, 825-831; and, Bassler, supra note 2, 207 at 209-213.

[35]Bassler, *supra* note 2 at 210.

[36]*Policy on Academic Integrity*, online: University of Victoria Law <http://www.law.uvic.ca/Current_Students/Academic_Regs/Academic-Regs.php#academic>.

[37]Alberta only has an exam cheating provision as part of their *Law Faculty Council Policy Manual* at 64 (section 30.18), online: University of Alberta Law <http://www.law.ualberta.ca/Faculty-Research/Administration/Law-Faculty-Policy-Manual.php>. Reliance is placed on its University Code for other academic offences.

[38]Calgary only has exam cheating provision as part of their *Law Faculty Council Policy Manual* at 11, online: University of Calgary Faculty of Law <http://wcm2.ucalgary.ca/law/files/law/regulations.pdf>. Reliance is placed on its University Code for other academic offences.

[39]*Professional Responsibility Policy*, online: Western Law <http://www.law.uwo.ca/Current/ProfessionalResponsibility.html>.

[40] *Faculty of Law Plagiarism and Academic Dishonesty Regulations*, online: Queens University <http://www.queensu.ca/calendars/law/pg77.html>.

university policy or code of conduct and nondiscrimination/harassment policy to govern non-academic misconduct.[43] With the exception of Victoria,[44] none of these policies begin with a discussion of the special obligations owed by law students.[45] Other law schools rely on their general University code for both academic and non-academic misconduct (e.g. UBC, Saskatchewan, Manitoba, Osgoode,[46] UofT,[47] McGill,[48] and, UNB[49]).

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[41] *Faculty of Law Academic Fraud Policy*, online: University of Ottawa Faculty of Law <http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=blogcategory&id=35&Itemid=46&pid=46&lang=en>.

[42] *Faculty Policy on Avoiding Plagiarism in Legal Writing*, online: Dalhousie Law School <http://law.dal.ca/Current_Students/Course_Selection_Materials/Regulations_Handbook/Plagiarism_Policy/index.php>. See also, "H. Examination Regulations" Faculty of Law Calendar 2008-2009, online: Dalhousie University <http://dlm.cal.dal.ca/_LAWS.htm#1>.

[43] The University of Ottawa is in the process of approving a Student Code of Non-Academic Conduct. It is one of the only universities in the country without such a code. See "The University of Ottawa consults its community on the student code of conduct," online: University of Ottawa <http://www.media.uottawa.ca/mediaroom/news-details_1458.html>.

[44] *Supra* note 10.

[45] Victoria also has policy governing clinic students. See *Student Conduct and Competence in Clinical Programs*, online: University of Victoria Law <http://www.law.uvic.ca/Current_Students/Academic_Regs/Academic-Regs.php#student>.

[46] *Osgoode Student Handbook (2007)* at I.4-I.7 (non-academic misconduct); II.30-II.37 (academic misconduct) (on file with the author). Osgoode does, however, have an anti-discrimination standard of conduct in its Student Handbook at I.2-I.4. It includes the following:

A. Osgoode Hall Law School Equality Resolution

…2. Affirmation

Osgoode Hall Law School, its staff, students and faculty, subscribe to the public policy enunciated in the preamble to the *Ontario Human Rights Code*, and state expressly that they seek to do everything possible to enhance that policy within the Law School community. To this end the Law School affirms that every member of the community has a right to equal treatment without discrimination, and in particular, without regard to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, political orientation, sex, age, marital status, sexual orientation, family status, or handicap.

…3. Teaching and Learning

The faculty and students, in order to continue and expand efforts to promote freedom from discrimination both within the Law School and in society at large, undertake to consider the following measures in relation to teaching and learning:

…b. use of language in the classroom…that is free from discriminatory stereotypes and references...

…d. a heightening awareness of the existence of systemic discrimination.

B. Osgoode Hall Law School Equality Procedures

1.1 Standards of Conduct – General Principles

b. Members of the Osgoode Community have a right to be free from discrimination or harassment directed at their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, political orientation, sex, age, marital status, sexual orientation, family status or handicap.

Alberta is interesting because it has incorporated the Alberta Code of Professional Responsibility into its university code of conduct. Section 30.3.3(2) places an obligation on all law students to obtain and be familiar with the Alberta Code, while section 30.3.3(1) states that "[a] Student enrolled in a Professional Program is bound by and shall comply with the Professional Code of Ethics governing that profession and the practice of its discipline." The problem is that violation of the Law Society of Alberta Code only becomes a disciplinary offence where the student is involved in a Practicum Placement.[50] Moreover, incorporation is not sufficient. If a law school code is to achieve its purpose of education and aspiration, it must, as discussed later, specifically identify the professional obligations owed by law

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> c. Any intellectual community thrives on the free and full expression of opposing ideas and values. However, only in an environment free of discrimination or harassment can the Law School fulfil its commitment to fostering an environment that promotes free and open inquiry by all members of the community. Students, staff and faculty have a responsibility to exercise their freedom of expression in a manner that promotes equality and justice.

[47]*Faculty of Law Syllabus and Academic Handbook 2008-2009* at 6, online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/students_content.asp?itemPath=2/2/12/0/0&contentId=442>.

[48]*Faculty of Law Calendar 2007-2008* at 9.2 Student Rights and Responsibilities and 9.5 Academic Integrity, online: McGill University <http://coursecalendar.mcgill.ca/law200708/wwhelp/wwhimpl/js/html/wwhelp.htm>.

[49]Online: University of New Brunswick <http://law.unb.ca/unbpolicies.html>. UNB does have its own language policy which states:

> **a. Language Policy**
> It is the policy of the Law Faculty Council that:
> 1. In all professional and law school related communication, members of the Faculty of Law community avoid language and conduct that can be understood reasonably to be sexist, racist, homophobic or for similar reason objectionable; and
> 2. Members of the Faculty of Law community use, as far as possible, gender neutral or gender inclusive language, except where gender exclusive language might usefully sensitize the listener or reader to stereotypical thinking.

Faculty of Law Regulations at C.18, online: University of New Brunswick Law School <http://law.unb.ca/pdf/regulations.pdf>.

[50]Section 30.3.3(3) states:

> A Student enrolled in a Professional Program who contravenes the Professional Code of Ethics governing the profession and the practice of its discipline commits an offence under this Code when, at the time of the alleged offence, the Student is involved in a Practicum Placement related to a course of study in a Professional Program.

Section 30.3.3(4) identifies specific conduct that constitutes unprofessional conduct when working in a Practicum Placement. See *Code of Student Behaviour*, online: University of Alberta <http://www.uofaweb.ualberta.ca/gfcpolicymanual/content.cfm?ID_page=37633#38365>.

students. For example, a student's duty of competence and civility will be different from that owed by lawyers.

Windsor is the only law school that has its own autonomous discipline policy. It specifically incorporates some of the professional obligations owed by law students.[51] The policy begins with a discussion of law as an honourable profession, the duties owed by lawyers to their clients, the courts, the public and their fellow members, and the obligation of law students to act with both educational and professional integrity. With respect to the latter, the policy states:

> The term "integrity" and its expression herein is drawn from the Canadian Bar Association Code of Professional Conduct, ch. 1, which has been adopted by the Law Society of Upper Canada. The spirit and intent of the Code which requires civility, candor, honesty, and adherence to sound moral principle shall be observed by all law students in their **personal and academic behaviour** to the end that credit shall be reflected upon the Law School and the legal profession.
>
> … [I]t is fundamental to the study of law and to the maintenance and betterment of the community of scholarship which is the Law School that the faculty and students adhere to and foster the highest standards of integrity including trustworthiness, truthfulness, fair dealing, uprightness, honesty and sincerity.
>
> Any student at the Faculty of Law whose conduct is improper in that it exhibits a lack of integrity touching the educational and professional objectives of the University, the Law School, **or the profession** must be appropriately disciplined in the interests of safeguarding and upholding these standards.[52]

The Windsor policy also extends the Law Society of Upper Canada's Rules of Professional Responsibility to clinic students and, as well, to "law students engaged in activities analogous to the practice of law such as mock trials and mooting." Perhaps, even more significant, is that "this provision has been interpreted very broadly over time to include almost any student activity to which the *Code of Professional Conduct* could be applied."[53]

While a good start, the Windsor policy has a number of shortcomings. With the exception of malicious harassment and improper conduct in the provision of legal services, all of the specific instances of misconduct relate to academic misconduct or misuse of

[51]Enacted as University of Windsor, Faculty of Law, *Policy Statement on Student Discipline,* online: University of Windsor Faculty of Law <http://www.uwindsor.ca/units/law/lawTop.nsf/inToc/3DCC59996A526AD585256D87005686A5> [Windsor Discipline Policy].

[52]*Ibid* (emphasis added).

[53]Elman, *supra* note 4 at 8.

campus facilities. More significantly though, with the exception of integrity, honesty and civility, the policy does not identify or discuss the other professional values that law students should aspire to. For example, there is no discussion of service, competence, confidentiality (with the exception of disciplinary proceedings) or the duty to not discriminate. It also does not address whether or not there is a duty on students to report misconduct. Of course, as Dean Elman has observed, these obligations may nevertheless exist through incorporation of the *Rules of Professional Responsibility*.

III. WHY A LAW SCHOOL CODE OF PROFESSIONAL RESPONSIBILITY IS NECESSARY?

A. Law Students as an Integral Part of the Legal Profession

In 1986, the American Bar Association took the view that "law students should be viewed as members of the legal profession from the time they enter law school."[54] In addition, as noted earlier, they recommended that law students should be subject to a code of conduct that reflected this status. This is a very reasonable position to take. While law school is an academic institution, it is primarily, or at least has evolved in North America, to become a professional school.[55] Indeed, I suspect that well over ninety-five (95) percent of students come to North American law schools intending to get called to the Bar.[56] And, even those who decide to teach, enter politics or work for a non-governmental organization, will likely remain members of their relevant professional body and, therefore, subject to its ethical rules.

But perhaps, more significantly, admission to law school is the key to becoming a legal professional because there is no other meaningful vetting process besides the articling requirement. This point i s made by Adam Dodek in his address to his first-year students:

> Your entry into the legal profession begins on Day 1 of law school because (1) few students fail law school; and (2) few - if any – fail bar admission courses.

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[54]ABA, *supra* note 6 at 266. See also Richard Devlin, "Normative, and Somewhere to Go? Reflections on Professional Responsibility" (1995) 33 Alta. L. Rev. 924 at 929 where he observes that "[s]tudents … are active members of the legal community and also have much to contribute to the questions of professional responsibility."

[55]William M. Sullivan *et al., Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Wiley & Sons Inc., 2007) at 91-95. See also, American Bar Association, Legal Education and Professional Development – An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (the "MacCrate Report") (Chicago: American Bar Association, 1992).

[56]The likelihood that students will choose law school as part of a liberal education as opposed to a professional school has and will likely continue to decrease with the rise in tuition.

> You may "exit" either option by choice, but very few of you will have that choice made for you.[57]

Thus, the privileges of law school extend beyond education, to the right to engage in student lawyering (defined broadly to include clinic work, *pro bono* work, mooting, internships, and clerking), to be a summer associate and ultimately the right to be a legal practitioner. The number of students involved in student lawyering in law school should not be underestimated. In addition to clinic work, more and more law students are serving our communities through *pro bono* placements. Indeed, *Pro Bono* Students Canada reports that it engages approximately 2,000 law students per year. Students working in these positions need to be aware of their professional obligations and ensure that their words and conduct do not further marginalize the very communities they are serving.[58] Public trust and confidence demands nothing less.

With these privileges come special obligations including the obligation to develop a professional conscience, to learn how to be professionally responsible,[59] a duty of confidentiality, a duty to be culturally competent and a duty to protect the reputation of the law school and profession. Consequently, a law school's mission must include teaching all students about professionalism and demanding that they act like professionals.[60] This is recognized, for example, by Osgoode in its *Plan for the Law School 2006-2010*:

> In providing a professional education, we believe it important to provide not just a sound training in legal reasoning and in the technical aspects of law, but

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[57]E-mail from Adam Dodek (21 August 2008) (on file with the author).

[58]See Pro Bono Students Canada, online: Pro Bono Students Canada <http://www. probonostudents.ca/en/>.

[59]Or how to rely on "WWRVD." At Windsor, students who had the privilege of having Professor Voyvodic as a teacher and mentor coined this expression in her honour. It means "what would Rose Voyvodic do" when confronted with a difficult situation. In an acceptance speech she wrote for the Charles Clark award a few days before her death, Rose provided the following insight into her ethical yardstick:

> My own compasses of heart and mind have done me well in prioritizing the need to find social justice where we can, and, perhaps more importantly, in learning how to self-reflect so that I learn from my mistakes …. [T]he best way I have of telling myself I have made a mistake (ethical, legal, moral or just bad behaviour) or am about to make one is still whether or not my head feels right on my pillow at the end of the day, corny as that sounds.

See "Law community celebrates Rose Voyvodic's Life" *The Windsor Star* (30 September 2007); and, "Rose Voyvodic's Remarks as Recipient of the Charles Clark Award, 2007," (2007) 3 CAVEAT at 2, online: Essex Law Association <www.essexlaw.ca/caveat/Caveat2007-05.pdf>.

[60]Downie relies on this argument in support of mandatory legal ethics education i n law school. See Downie, *supra* note 2 at 226-227.

> also a deeper understanding of the social and ethical roles and responsibilities of members of the legal profession.[61]

In its *Consultation Paper* on the Canadian common law degree, the Federation of Law Societies' Task Force on the Canadian Common Law Degree similarly observed:

> Both the profession and the legal academy have a responsibility to develop and nurture a sense of professionalism in students and lawyers.[62]

The authors of the Carnegie Foundation's *Educating Lawyers: Preparation for the Profession of Law* note that "[p]rofessional education aims to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals."[63]

General university codes of student conduct are not up to the task.[64] They are usually more focussed on discipline rather than on creating a culture of professionalism. Nor are they adequate to teach law students about legal professionalism. They do not, generally speaking, address issues of public service, competence, confidentiality, or a duty to report misconduct. In addition, having a separate law school code of conduct focussed on the professional obligations of law students is an important part of experiential learning. Over the last decade, law schools have come to recognize that one of the most effective ways in which to get students to "think like a lawyer" is experiential learning, including clinical work, internships, and mooting. The same is true for the development of professionalism. As has been observed:

> This cannot be learned through lecture or by reading – it can only be learned through the experience of knowing and understanding one's professional obligations and faithfully carrying out those duties. At the same time, legal educators cannot teach professional responsibility solely by lecturing and giving reading assignments. Professional responsibility can be inculcated only by giving students responsibilities and by cultivating their professional and ethical growth. The development and use of an ethical code of conduct for law

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[61]At 3. On file with the author.

[62]Online: Federation of Law Societies of Canada <http://www.flsc.ca/en/pdf/2008Consultation_paper.pdf> (September 2008) at 21. One of the recommendations of the Task Force is a mandatory legal ethics course in law school.

[63]Sullivan *et al*, supra note 55 at 22.

[64]Recall here that I am only examining the role of codes of conduct in inculcating professionalism. Earlier, I identified other important steps a law school can take including mission statements, ethics courses, clinical and other experiential learning.

> students may be an appropriate vehicle through which law students may gain additional responsibility.[65]

This learning process could be enhanced by giving law students an opportunity to participate in the structure and content of a code, as well in the disciplinary hearings. A code and any subsequent opinions could also be used in class as a starting point for discussions of ethics and professionalism.

Finally, while one would expect all university students to act responsibly, one of the hallmarks of being a member of a profession is the expectation, as noted above, that its members have "special responsibilities by virtue of the privileges" associated with that profession.[66] As noted earlier, law school students enjoy privileges their other student counterparts do not. So, for example, general university codes do not usually impose a service obligation on its students or a duty to report misconduct. Nor do they always extend their jurisdiction into the private lives of students as far as may be necessary to ensure that law students do not bring disrepute to the law school and profession.

And so, as Dean Elman has observed, "[t]he purpose of having a separate policy is clear – it is designed to give effect to the professional elements of the law program and emphasize to the student that they are going to be held to standards similar to that of members of the legal profession, even while they are preparing educationally for a career in law."[67]

B. A Professionalism Crisis

1. In Practice

The last decade has witnessed a number of high profile incidents of unprofessional conduct ranging from the suppressing of evidence in a high profile murder case;[68] intemperate and uncivil conduct in the courtroom;[69] to the Treasurer of the Law Society of

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[65]Biernat, *supra* note 1 at 804.

[66]Rule 1.03(1)(a), Rules of Professional Responsibility (Law Society of Upper Canada, 2008), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/regulation/a/profconduct/>.

[67]Elman, *supra* note 4 at 7.

[68]See *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.).

[69]See *R. v. Felderof* (2003), 68 O.R. (3d) 481 (C.A.); and Marchand v. Public General Hospital Society of Chatham (2000), 51 O.R. (3d) 97 (C.A.).

Upper Canada being suspended because of a sexual relationship with a client.[70] With these incidents has come a renewed emphasis on professionalism in the legal profession. We have seen the creation of an Advisory Committee on Professionalism in Ontario headed by the Chief Justice of Ontario (September 2000);[71] the promulgation of a working definition of professionalism;[72] the creation of a rotating Colloquium on the Legal Profession at Ontario's six law schools; and, a code of civility enacted by the Advocate's Society (Ontario) and adopted by the Canadian Bar Association.[73] While these initiatives are largely focussed on the practicing bar, a code of conduct for law students would begin the professionalization process much earlier. As Jordan Furlong so aptly puts it in "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure:"

> By the time students finish law school, they will have spent three years learning about the purpose of the law, but not about the purpose of lawyers. It is unacceptable that a lawyer may progress three years into her career without receiving lengthy and illuminating instruction in legal professionalism.... If lawyers do not understand the nature and importance of professionalism from the start, they will not believe it is important, and they will not practise it.[74]

2. In Law School

(a). High Profile Incidents at UofT and Osgoode

Law schools have not been immune to the professionalism crisis. There have been a number of high-profile incidents of unprofessionalism at Canadian law schools. The most notable

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[70]See *Law Society of Upper Canada v. Hunter*, [2007] L.S.D.D. No. 8. These incidents and others are chronicled in Dodek, supra note 2 at 9-13.

[71]See Law Society of Upper Canada, Chief Justice of Ontario's Advisory Committee on Professionalism, online: <http://www.lsuc.on.ca/latest-news/a/hottopics/committeeonprofessionalism/>.

[72]See Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, "Elements of Professionalism" (October 2001, rev. December 2001, June 2002), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/latestnews/a/hottopics/committee-on-professionalism/>. The identified ten "building blocks" of professionalism include: scholarship, integrity, honour, leadership, independence, pride, spirit, collegiality, service and balanced commercialism.

[73] *Principles of Civility for Advocates*, online: The Advocates' Society <http://www.advocates.ca/pdf/100_Civility.pdf>. See also, the discussion in Alice Woolley, "Does Civility Matter?" (2008) 48 Osgoode Hall L.J. 175 at 177.

[74]Paper presented to the Tenth Colloquium on the Legal Profession: Professionalism: Ideals, Challenges, Myths and Realities, University of Ottawa, 8 March 2008, online: Law Society of Upper Canada <http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia/> at 11.

being three incidents in 2001: the UofT marks scandal involving two dozen students;[75] overtly racist acts at Osgoode Hall Law School targeting Black students during Black history month;[76] and, an Islamaphobic article written by an Osgoode student in *Obiter Dicta*, a student newspaper.[77]

A more recent incident involved a former Osgoode student, who was found to have engaged in conduct unbecoming a student licensee for selling papers he had written, to a student in the MBA program at York University. The agreed statement of facts read in at the Law Society hearing revealed that the student and another Osgoode student wrote papers for the same student while all three were in law school.[78]

(b). Windsor Law Incidents

It is difficult, however, to get a real sense of how many other incidents there are in law schools since most incidents go unreported or are not publicized outside of the particular law school community.[79] As I teach at Windsor Law, I have firsthand information about a number of incidents that reveal the scope of unprofessionalism in our midst. Some of these include:[80]

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[75]In 2001, more than two dozen students were alleged to have misrepresented their first year grades to potential summer employers. Twenty-four students received some form of sanction. See James Cowan, "Atonement: When 24 students at UofT's Faculty of Law lied about their grades to land summer jobs, they tarnished the school's reputation and risked their own futures" (June 2001) 36:9 *Toronto Life*. See also, Shanks v. Daniels (2002), 57 O.R. (3d) 539 (Sup. Ct. J.).

[76]The acts included letters sent to two Black female law students. The letters contained newspaper clippings about crimes involving racialized suspects and the words "It disgusts me to see you at Osgoode." In another incident, the eye of a Black woman whose picture was posted on the bulletin board of the Black Law Students Association was poked with a pin. See Nicholas Keung, "Racism Targets York Law School: Black Students Look for Justice After Hate Letters" *Toronto Star* (22 February 2001). See also, "Notice to the Osgoode Community" (21 February 2001) (on file with the author).

[77]For example, the article condemned Islam as "oppressive, backwards and brutal." See, Adrian Humphreys, "Osgoode Hall Apologizes for Anti-Islam Article" *National Post* (1 May 2001).

[78]See Robert Todd, "Toronto Lawyer Fined in Cheating Scandal" *Law Times* (26 January 2008).

[79]For a dated but still very relevant article describing incidents of violence against women at law schools, see Teresa Scassa, "Violence Against Women in Law Schools"(1992) 30 Alta. L. Rev. 809. See also, Sheila McIntyre, "Gender Bias within the Law School: 'The Memo' and Its Impact" (1987) 2 C.J.W.L. 362.

[80]The Administration has responded to these and other incidents in a number of ways. First, the Dean issued two stern letters to the student body reminding them of the duty to act like professionals, including the duty not to discriminate, and to respect the dignity of their colleagues. Second, professionalism now features prominently in our first year orientation. Third, two consultants have been retained to provide training to faculty about addressing discriminatory incidents and comments. There are similar plans to provide cultural competence training to the student body. Fourth, there is now a requirement that all professors attach the

1. ***The Blawg for Beginners (The Unofficial Windsor Law Blog) (2006)***

A number of first-year students decided to start a blog to "tell us about anything … what's goin' on in the city what's goin' on in your life, what your beef is with school, you name it... you write it, we'll post it. That's right. The colour of justice of our blog is not necessarily white." The URL of the blog was http://windsorlawblog.blogspot.com/. The links on the first page included the UWindsor Faculty of Law Page; Turtle Rape and Tub-Girl. The blog reached well over one hundred and fifty (150) pages of entries before it was eventually removed from the web i n early 2007 following my complaint to the Associate Dean.[81]

The blog contained numerous offensive and demeaning entries targeting racialized and female professors as well as female students. The following entry reveals the tone of many of the blog's entries:

A Manly Man's Guide to "Friends with Benefits" (by Harry Ballsonya)

> *Disclaimer: before all you feminist lesbians get your boxer-briefs in a bunch, remember that this is JUST A JOKE. I'm not condoning insensitivity, sex with strangers, or sex with any of you. So relax! or better yet, if your easily offended by sexist humour, don't read this.
>
> ** Disclaimer to the Disclaimer: I know not all lesbians are feminists and not all feminists are lesbians. But I stand by the boxer-briefs.

[The author goes on to describe his intent to create a "warning" list for a number of different kinds of women that male law students might interact with and a "how funny it'd be to fuck her" scale]

. . .

2. *Girls you don't really know but is in law guy* – sure you've creeped her in A2J big group, but what do you know about her. She could potentially ruin our law career, because her feminist man-hating vagina powers are unknown. She could also be a lesbian. I'd stick to casual flirting on Tuesday's.

Complexity-rating: 3/5

University's Human Rights Policy to their syllabi. And, finally, there is a commitment to overhaul our discipline policy.

[81] A copy of the blog is on file with the author.

...But How funny it'd be to fuck her: 2/5 – two points cuz she could be freak
[After seven entries, this part of the blog ended with the following]

Stick to the guidelines boys and everything will be fine … actually don't even bother – A Kill is A Kill – happy hunting!

2. The Failure to Report Homophobic Graffiti in the Men's Washroom

For at least a period of over one year (September 2006 to November 2007), male students at Windsor Law who used the washroom in the commons area witnessed homophobic graffiti including "SAMIR IS GAY"; "ARAB IS GAY" and "40s A FAG" etched into the stalls.[82] Not a single student reported this homophobic and racist graffiti to the administration during this time. This incident is not in isolation. A number of students have reported incidents in which their colleagues openly expressed disgust at homosexuality. In November, 2007, the Dean and Associate Dean sent the following letter to all law students:

> It has come to our attention that there have been a number of incidents during the Fall term which involved the use of abusive and hateful language which targeted our gay students in the Faculty of Law. Such behaviour is intolerable in any academic environment, and even more so in a Law School committed to Access to Justice and to the basic principles of equality. The Law School is committed to ensuring a safe and inclusive environment, and will not tolerate homophobic words and conduct.[83]

3. Cyber-Bullying

In July of 2008, someone claiming to be a prospective Windsor student posted a message on www.lawstudents.ca. He or she appeared concerned about a number of incidents that were taking place at the law school including "allegations of homophobia" and wanted to know more about the school's environment. In one of the responses, a Windsor law student named and attacked an openly gay first-year student:

> … What you have here is someone who was in first year named [name deleted] that gets all hot and bothered about absolutely everything! Trust me, if you attend Windsor you will know who [name deleted] is

[82]I am aware of the 06 date because a gay student confided in me that he saw the graffiti as one of his first experiences in law school. The graffiti was reported to the Administration in 2007 as one of a number of homophobic incidents at the law school. The stalls have now been painted.

[83](27 November 2007). On file with the author.

> within weeks! … [H]e hit the roof over someone that used the word gay – yet another example of the gay community taking a word that they themselves changed the meaning of (i.e. gay used to mean happy) and is upset when anyone else tries to use it in their own way – as though one community can somehow "own" a word. It was blown out of proportion, there was absolutely, positive, no anti-gay intent behind it, which by definition would make it NOT a homophobic problem but rather just the wrong use of a word.[84]

(c). Law Blog Entries

One can also get a sense of the mind-set of many law students by examining some of the entries that have been posted on blogs like www.lawstudents.ca and www.lawbuzz.ca. Consider the following recent entry:

> *"gay on Bay" [Law Buzz (16 July 2008)]*[85]
>
> This entry begins with someone asking "how gay friendly are toronto firms?"[86] Some of the responses include:
>
> "I can't stand queens…"
>
> "To all the people calling homosexuals and their deviant pastimes "gay", I implore you to use the correct terminology. There's nothing happy or cheery about sodomy between two guys. Be honest and call them homosexuals, don't fall victim to the propaganda machine."[87]

I recognize that there are limitations in using these blogs as an unprofessionalism yardstick. For example, it is possible that non-law students participate on these blogs. However, I suspect that this is a relatively infrequent occurrence and cannot explain topics where there are a significant number of participants.

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[84]Online: Law Students <http://www.lawstudents.ca/forums/viewtopic.php?t=15509&sid=9c760c19c1ffdfcca864fc3af8d89363>.

[85]Online: Law Buzz <http://www.lawbuzz.ca/index.php?showtopic=15545>.

[86]It is unclear whether this was a legitimate search for information or an attempt to evoke homophobic responses.

[87] For other offensive entries see, *"Pregnant in Law School"*, online: Law Buzz http://www.lawbuzz.ca/index.php?showtopic=15415&st=20; "Law School and Girls", online: Law Buzz http://www.lawbuzz.ca/index.php?showtopic=6443&st=0; and, "Law School and Boys", online: Law Buzz http://www.lawbuzz.ca/index.php?showtopic=15459&hl=Law+School,and,Boys!.

(d). Why Is This Occurring?

Some of the incidents described above are expressions of hate, others likely the result of students struggling with having to confront issues of discrimination and difference in law school. There are other, more common and less offensive, incidents of unprofessional conduct that occur in law school every day. For example, there is much behaviour in law school that would be seen, by other students, as expressions of a sense of humour, however misguided rather than as discriminatory, demeaning, or uncivil. This is often not the product of hate or bias but rather immaturity. It is also the product of cultural incompetence and the failure of students to recognize the ways in which words and conduct perpetuate stereotyping and marginalization.

Other reasons for a professionalism crisis in law school include the absence of a professional culture and technology. A lack of professional culture includes students failing to appreciate their professional obligations, professors failing to teach legal ethics pervasively, the lack of meaningful mission statements and the failure of law professors, including sessional faculty, to sometimes serve as appropriate role models. Technology contributes to the problem because of its apparent anonymity and a 'write now, think later' mentality.

Finally, a core cause of unprofessionalism is the consumer culture that pervades law schools. It would seem that most students view themselves as students or consumers rather than as law students and as part of a community of professionals. Indeed, as one researcher found in his survey of law students in the United States "… at least a third or more --- took the position that, despite being in a professional school, the concept of professionalism did not apply to them. Whatever professionalism might be… [it] would attach at graduation or after passing the bar examination. … In the meantime, they considered themselves to be … merely consumers of an educational product provided by the law school."[88] A law school code of professional responsibility is one small step that can be taken, to ensure that students understand from day one, that they are an integral part of the profession and are obligated to act in a manner consistent with that role.

IV. CONCLUSION

In his thoughtful article on the state of legal ethics in the Canadian academy, Adam Dodek observes that "[l]egal ethics has grown as an academic discipline in terms of both scholarship and course offerings… However, with these developments, we can also recognize that the ethical terrain yet to be explored is vast."[89] One part of that unexplored terrain is

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[88]Timothy P. Terrell, "A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students" (1994) 34 Washburn L.J. 1 at 19-20.

[89]Dodek, *supra* note 2 at 48-49.

the role and content of law school codes of conduct. This article has argued that all law students should be subject to a law school code of professional responsibility both to deter unprofessional conduct in law school but perhaps more importantly to prepare students for ethical practice by educating and inspiring them about the obligations owed by legal professionals.

How well will a law school code of conduct modelled on the rules governing lawyers fulfil these goals?[90] This is the same question that so many ethics scholars have asked in relation to the Rules of Professional Conduct for lawyers. The general sentiment based on both experience and now some empirical research is that rules have little impact on ethical conduct either because lawyers ignore the rules; the rules are too general to address the myriad of ethical issues that arise on a day-to-day basis; or, because of the lack of vigorous and systemic enforcement.[91]

However, much of this discussion is less relevant in the law school context where the focus of a code should be on education and inspiration rather than regulation. Indeed, the central purpose of a law school code is to begin the professionalization of students. Moreover, even from a regulatory perspective, the range of activities that raise professionalism issues in law school are relatively small compared to actual practice and thus a code of conduct can be more comprehensive than codes that govern the conduct of lawyers. I am optimistic that a law school code, properly drafted and accessible, can inspire and educate. My experience is that law students are highly motivated and anxious to learn about their professional responsibilities. A law school code provides students with a starting point and structure to engage in a dialogue about professionalism and a yardstick with which to measure their conduct.

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[90]This question is explored in detail in Steven K. Bereson, "Education Law: What Should Law School Student Conduct Codes Do?" (2005) 38 Akron L. Rev. 803 at 825-834, 849-851.

[91]See M.A. Wilkinson, C. Walker & P. Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views On the Practice of Law" (2005) 18 Can. J.L. & Jur. 165; Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40 Osgoode Hall L.J. 49; M.A. Wilkinson, C. Walker & P. Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill L.J. 645; Joan Brockman, "The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Profession" (1997) 35 Osgoode Hall L.J. 209; and, Gavin MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" (1994-1995) 33 Alta. L. Rev. 859.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY FOR LAW STUDENTS[92]

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1.0 PREAMBLE

Law students are an integral part of the legal profession. As a result, they have a duty to embrace their legal education with spirit and enthusiasm and discharge all responsibilities honourably and with integrity. In their law school activities, a student should be competent, courageous, diligent, civil and ensure that their conduct is consistent with human rights and the interests of justice. In addition, in their personal lives, students must ensure that they do not act in a manner that will bring disrepute to the law school and legal profession.

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[92]Much of the format, identification of relevant principles and commentary is based on the Law Society of Ontario's *Rules of Professional Conduct* (2008), online: < http://www.lsuc.on.ca/regulation/a/profconduct/> [Rules of Professional Conduct (Ontario)] which are similar to the Rules across the country. Reliance on the rules governing lawyers is an important part of the professionalization process at law school since it is these rules that students will be bound by when called to the Bar.

In light of the privileges afforded law students, they have duties and obligations that extend beyond those imposed on other students. For example, law students have a "duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations, and institutions."[93] One of these institutions is the law school. These special duties include service and promoting access to justice. Above all, the conduct of law students must reflect that they are part of a community of professionals.

Commentary

Professionalism has been defined by the Chief Justice of Ontario's Advisory Committee on Professionalism as "a personal characteristic [that] is revealed in an attitude and approach to an occupation that is commonly characterized by intelligence, integrity, maturity, and thoughtfulness."[94] There are a number of "building blocks of professionalism." They include: scholarship, integrity, honour, leadership, independence, pride, spirit, collegiality, service and balanced commercialism.[95]

2.0 APPLICATION

This Code of Professional Responsibility "cannot address every situation" and a law student "should observe the rules in the spirit as well as in the letter."[96] In interpreting and applying this Code, students and administration should be guided by its primary purpose, which is to educate and inspire students about their professional obligations. Regulation and discipline are secondary purposes.

3.0 PLEDGE

Each year, a copy of this Code will be provided to first-year students upon registration and they shall sign the following pledge:

> **I, [name of student] as a student entering [name of law school] understand that I am joining an academic community and embarking on a professional career. The law school community and the legal profession share important values that are expressed in the [name of law school]**

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[93]See Rule 1.03(1)(c), *Ibid*.

[94]See Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, "Elements of Professionalism" (October 2001, rev. December 2001, June 2002), online: Law Society of Upper Canada <http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism/> at 1.

[95]*Ibid.*

[96]See Rule 1.03(1)(f), *Rules of Professional Conduct (Ontario)*, supra note 92.

Code of Professional Responsibility. I have read the Code, I accept its terms as a condition of registration and I will conduct my academic, professional and personal life to honour those shared values.[97]

4.0 OFFENCES

4.01 Professional Misconduct

It is professional misconduct for a law student to violate (or to assist or induce another student to violate) the minimum standards of professional conduct set out in this Code when interacting with their colleagues, professors, law school administrators and other law school staff or when acting as student lawyers. Irrespective of the locus of such conduct, this section is triggered where the conduct reasonably relates to activities or matters connected with the law school.

4.02 Conduct Unbecoming a Law Student

A law student's duty to act with integrity, honesty, in good faith and in a manner consistent with the pursuit of justice does not end when he or she is no longer engaged in the life of the law school. Consequently, unjustified conduct in a law student's personal life which reflects negatively on the profession and law school may be subject to discipline. In interpreting this section, the following commentary must be taken into account.

Commentary

It is recognized that law schools need to be careful about unduly interfering with the personal lives of its students. This section should be interpreted narrowly. Due consideration must be given to competing interests including the privacy and dignity of the student. Its reach should be limited to serious instances of misconduct which raise a question about the fitness of the student to be a member of a learning and professional community. It is important to point out that this section is not intended to act as a bad faith tool for other students to report minor infractions in another student's private life i n the guise of reporting conduct unbecoming a law student.

Non-exhaustive examples of conduct unbecoming a law student could include:

(a) A conviction for a criminal offence committed during a student's law school tenure involving dishonesty, sexual violence, criminal harassment or the administration of justice (e.g. perjury or bribery). Not all convictions, however, will necessarily require sanction. For example, some acts committed as a form of civil

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[97]This pledge is taken directly from the pledge in the Emory School of Law's *Professional Code of Conduct*, online: Emory Law <http://www.law.emory.edu/current-students/registrar/professional-conduct-code.html>.

disobedience that do not cause physical harm or serious property damage may be exempt from the jurisdiction of the Code;
(b) Conduct that is motivated by hate or bias towards an equality-seeking group;
(c) Participation in activities that are in some way related to the student's status as a law student which perpetuate the marginalization of equality-seeking groups whether or not that is the purpose of the participation. For example, such a link would exist where a group of law students decide to create an "unofficial" law school blog and post entries that demean women or sexual minorities;
(d) Maliciously sending false or confidential information about a law student to potential employers, the Law Society or other members of the legal community (including graduate programmes);
(e) Falsely representing oneself as a lawyer, whether knowingly, negligently or recklessly;
(f) Sexual harassment as defined in 5.06; and,
(g) Conduct which is inconsistent with the relevant provincial human rights policy.

5.0 MINIMUM STANDARDS OF PROFESSIONAL CONDUCT

5.01 Academic Integrity – Plagiarism

A law student shall not knowingly engage in plagiarism on any written assignment or examination. The essence of plagiarism is the holding out of one's work or any part of it as original. Law students should consult the plagiarism policy of the law school or University and ensure strict compliance with it.

Commentary

Examples of plagiarism include, but are not limited to:
(a) failing to acknowledge the source of non-original ideas;
(b) submitting work as one's own when, in fact, it was written or prepared, in whole or in part, by another person;
(c) failing to properly cite the source of a direct or indirect quote.

When in doubt, law students should consult with their professor about proper attribution.

5.02 Academic Integrity – Examinations

A law student shall not engage in improper conduct in relation to examinations. Law students are obligated to become familiar with the examination regulations and policies of the law school or University and ensure strict compliance with them.

Commentary[98]

Examples of improper conduct include, but are not limited to:

(a) "marking an exam in such a manner to identify themselves to the professor, unless otherwise authorized;

(b) consulting or copying from the examination of another student during an examination;

(c) taking unauthorized material, or material in excess of that authorized, into an examination room; consulting or copying from unauthorized material during the course of the examination;

(d) communicating with anyone concerning the subject matter of the examination in examination is being written at different times, communicating with another student concerning the subject matter of the examination where the result of such communication may be to give any student an unfair advantage in the examination;

(e) falsely representing that all or part of a course requirement or examination has been fulfilled or submitted;

(f) failing to submit an examination immediately upon the expiration of the time authorized for its completion;

(g) intentionally providing the means or the opportunity for another student to engage an improper conduct relating to examinations."

5.03 Academic Integrity – Other Misconduct

A law student shall not knowingly:

(a) "Make a false statement of material fact or law in a class discussion, oral argument, written research assignment, or in any other academic exercise" for the purpose of misleading the audience;

(b) "Forge or use any law school document in an unauthorized manner;"

(c) "Steal any of the property or services of the law school or of others;"

(d) "Obstruct another student's access to legal knowledge by removing, altering, destroying, or concealing any library material;"

(e) "Engage in any other conduct intended to interfere with another student's right to learn;"[99]

(f) Submit work from one course as original work in another course without the consent of the professor;

(g) Misrepresent one's grades;

(h) Damage law school property including library books; or,

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[98]These examples are taken directly from the University of Windsor's *Discipline Policy*, online: University of Windsor Faculty of Law <http://www.uwindsor.ca/units/law/lawTop.nsf/inToc/3DCC59996A526AD585256D87005686A5>.

[99](a)-(e) are taken directly from Biernat's model code. Biernat, *supra* note 1 at 812.

(i) Violate an undertaking given to a faculty member or administration official with respect to an assignment or examination.

5.04 Competence

Law students are expected to use reasonable diligence in completing their reading and all other assignments. They should apply "intellectual capacity, judgment and deliberation to all functions."[100] Law students should also strive to become culturally competent.

Commentary

Law students should recognize that their future clients will share different lived experiences whether it be, because of difference in class, sexual orientation, race, ethnicity, disability, mental disorder, age or religion and that, therefore, they must strive to develop cultural competence while in law school.

What is cultural competence? Professor Voyvodic offers the following approach. "In order to practise law in a culturally competent manner, I believe that we must "(1) value an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledge the harmful effects of discriminatory thinking and behaviour upon human interaction; and (3) acquire and perform the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice."[101] Law schools provide students with a number of opportunities to develop cultural competence including clinic placements,[102] critical seminar courses,[103] job shadowing placements, and *Pro Bono* activities.

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[100]See Rule 2.01(1)(f) of the *Rules of Professional Conduct (Ontario)*, supra note 92.

[101]Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2006) 84 Can. Bar Rev. 563 at 564, 581-582 [Lawyers Meet the Social Context]. See also, Rosemary C. Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27; and, Michelle S. Jacobs, "People for the Footnotes: The Missing Element in Client-Centered Counselling" (1997) 27 Golden Gate U.L. Rev. 345.

[102]See "Lawyers Meet the Social Context," *supra* note 101 at 582-587.

[103]For a discussion of the role of "outsider" seminar courses in legal education, see Natasha Bakht *et al.*, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45 Osgoode Hall L.J. 667. See also, Gerald P. Lopez, "Training Future Lawyers to work with the Politically and Socially Subordinated: Anti-Generic Legal Education" (1988-89) 91 W. Va. L. Rev. 305.

5.05 Civility and Good Faith

All law students are expected to be "courteous, civil, and act in good faith" with all members of the law school community.[104] **In particular, it is unprofessional for a law student to use "misplaced hyperbole" or to "intimidate, sully or defame" in their communications with or about colleagues, law school administration, staff or professors.**[105]

Law students should ensure, particularly when addressing issues relating to race, ethnicity, religion, gender, disability or sexual orientation that their class discussions and/or presentations are respectful and do not demean the dignity of their fellow students.

All law students shall respond with reasonable diligence to all communications from professors and law school administration and staff.

Commentary

Nothing in this rule is meant to deter the healthy exchange of ideas that is a critical part of legal education. Rather, it is designed to remind students to be self-reflective and ensure that comments are well-reasoned and not grounded in stereotypes.

5.06 Sexual Harassment

A law student shall not sexually harass a colleague or any other member of the law school community including faculty and support staff. Sexual harassment is defined as:

"(a) any unwanted sexual attention or behaviour by a person who knows or ought reasonably to know that such conduct is unwanted; or
(b) any implied or expressed promise or reward for complying with a sexually oriented request; or
(c) any implied or expressed threat of reprisal, in the form either of actual reprisal or the denial of opportunity for the refusal to comply with a sexually oriented request; or
(d) any inappropriate verbal or physical conduct that has a focus on sexuality or sexual identity in what reasonably may be perceived as a hostile, intimidating or offensive manner; or

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[104]See Rule 6.03(1), *Rules of Professional Conduct (Ontario)*, supra note 92.

[105]See *Law Society of Upper Canada v. Kay*, [2006] L.S.D.D. 112 at para. 19.

(e) the communication or display of material with a focus on sexuality or sexual identity which has the effect or purpose of creating a hostile or intimidating working or educational environment."[106]

Commentary

Examples of sexual harassment include:

"● verbal abuse including but not limited to graphic commentaries on the victim's body and sexual remarks which demean a person and are known or ought to have been known to be unwanted;
● using sexually degrading words to describe a person;
● insulting and offensive gestures, innuendoes, language, joking and or taunting about another person's body which causes awkwardness and or embarrassment;
● leering (suggestive staring) or other gestures;
● asking inappropriate questions about the person's sexuality or any sexual relationships past, present or future;
● unnecessary physical contact such as brushing up against a person's body, touching, patting, pinching and invasion of personal space for the purpose of sexually harassing a person;
● demanding sexual favours accompanied by implied or overt threats concerning a person(s)' employment (economic livelihood) grades (academic failure hence loss of future livelihood), reputation and/or letters of recommendation;
● sexual solicitation or advance made with implied reprisals if rejected;
● backlash or the threat of backlash, or retaliation or the threat of retaliation, for the lodging of a complaint or participation in an investigation;
● behaviour including but not limited to attention and/or conduct that is known or ought to be known to be unwanted after the end of a consensual relationship; and
● inappropriate display of sexually offensive material and /or pornography such as pin up posters (of any size), magazines etc."[107]

5.07 Harassment

A law student shall not harass a colleague or any other member of the law school community including faculty and support staff. Harassment is defined as "vexatious comment or conduct in relation to a person or group of persons which has the effect or purpose of creating a hostile or intimidating working or educational environment." [108]

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[106] University of Windsor, *Human Rights Policy*, Approved June 1997, online: University of Windsor <http://www.uwindsor.ca/humanrightspolicy> [Windsor Human Rights Policy].

[107] These are taken directly from the Windsor *Human Rights Policy*, ibid.

[108] *Ibid*.

Commentary
Examples of harassment include but are not limited to:

- *Verbal Behaviour*
Using stereotypes to describe a particular group; name calling; insults; threats; slurs; degrading or unwelcoming remarks; jokes or innuendos about a person/persons in relation to the prohibited grounds in the Ontario Human Rights Code.
- *Written Materials*
Displaying or distributing racist/sexist derogatory or otherwise offensive materials or graffiti; displaying or distributing derogatory pictures or cartoons.
- *Physical Behaviour*
Making threatening or rude gestures; using physical intimidation or assault; leering; unwanted touching, kissing, patting, pinching; insulting actions or practical jokes based on the prohibited grounds i n the Ontario Human Rights Code.
- *Non-Verbal Behaviour*
Avoidance, exclusion and inaction: refusing to talk or work with another member of the University community because of personal, physical, racial or ethnic characteristics; condescension, paternalism or patronising behaviour; failure to provide accommodation for persons with disabilities or for persons engaged in religious observation unless the accommodation causes undue hardship."[109]

5.8 Discrimination

A law student "has a special responsibility to respect the requirements of human rights laws ... and, specifically, to honour the obligation not to discriminate on the grounds" of "race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, sex, sexual orientation, age, ... marital status, family status, or disability"[110] with respect to any law school activities. As the Law Society of Upper Canada recognizes in the Commentary to Rule 5.04 of its Rules of Professional Responsibility:

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law. ...

[109]These examples are taken directly from the Windsor Human Rights Policy, *ibid*.

[110]See Rule 5.04, Rules of Professional Responsibility (Ontario), *supra* note 92.

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including:

(a) Differentiation on prohibited grounds.…

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory.…

Human rights law … includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. …[111]

Commentary

The law school is committed to providing a safe working and learning environment, one that is committed to equality, ethical and professional development and social justice. As students prepare for practice, they should become familiar with the discrimination and harassment definitions and prohibitions set out in their relevant Code of Conduct.[112]

5.09 Confidentiality

Students who are obligated to hold in strict confidence information acquired or discussed during Faculty Council meetings, committee work, other law school activities, including *pro bono* work or judicial clerkships shall not divulge any such information unless expressly or impliedly authorized by a law school or other official.

5.10 Clinics

In addition, to the principles set out in this Code, all students working in a clinic or legal organization while in law school are bound by the relevant Rules of Professional Responsibility including the rules relating to confidentiality, competence, advocacy, criminal defence work, interviewing witnesses, withdrawal, alternative dispute resolution and conflicts of interest. Students are also required to abide by any policies or regulations established by the clinic.

[111]*Ibid*.

[112]See, for example, Rule 5.03 (Sexual Harassment) and Rule 5.04 (Discrimination) of the *Rules of Professional Conduct (Ontario)*, supra note 92.

5.11 Law Society Student Regulations

Law students are required to familiarize themselves with and are bound by the Law Society protocols governing summer positions and articling.

6.0 MAKING LEGAL SERVICES AVAILABLE

Law students have, where practicable, an obligation to make "legal services available to the public in an efficient and convenient way that commands respect and confidence and is compatible with the integrity and independence of the profession."[113] In furtherance of that obligation, law students should strive to perform a minimum of forty (40) hours of *pro bono publico* ("for the public good") legal services during their three years of law school.[114]

Commentary

Access to justice is a serious problem in Canada. As the Canadian Judicial Council noted in their 2006-2007 Annual Report "… many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system.[115] There is a professional obligation on lawyers to address the problem.[116] In the United States, for example, Model Rule 6.1 of the American Bar Association's Code of Professional Conduct states that "a lawyer should aspire to render at least fifty (50) hours of *pro bono publico* legal services per year."[117] In Canada, the Canadian Bar Association established a Pro Bono Committee which called "for each member of the legal profession to strive to contribute 50

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[113]See Rule 3.01 (Making Legal Services Available), Rules of Professional Conduct (Ontario), *supra* note 92.

[114]This number is based on the Osgoode model. In 2006, Osgoode imposed a public service obligation on all law students as a condition of their graduation. See "The Osgoode Public Interest Requirement," online: Osgoode Hall Law School <http://osgoode.yorku.ca/Quickplace/ opir/Main.nsf/h_Toc/4df38292d748069d0525670800167212/!OpenDocument>.

[115]"Access to Justice: Meeting the Challenge" (2006-2007 Annual Report) online: Canadian Judicial Council <www.cjc-ccm.gc.ca/cmslib/general/news_pub_annualreport_2006-2007_en.pdf>. For example, it has been reported that "[i]n some courts, more than 44 percent of cases involve a self-represented litigant." See Rook, "Access to Justice is Critical for Canadians: Chief Justice" *National Post* (9 March 2007).

[116]See the discussion in Raj Anand, "Fostering Pro Bono Service in the Legal Profession: Challenges Facing the Pro Bono Ethic" (Paper presented at the Ninth Colloquium on the Legal Profession: Legal Ethics in Action, Osgoode Hall Law School, 19 October 2007), online: Law Society of Upper Canada http://www.lsuc.on.ca/latest-news/a/hottopics/committee-onprofessionalism/papers-from-past-colloquia/ at 6-11. See also, The Honourable John Major, "Lawyers' Obligation to Provide Legal Services" (1995) 33 Alta. L. Rev. 719.

[117]ABA MODEL RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE, online: American Bar Association <http://www.abanet.org/legalservices/probono/rule61.html>.

hours or 3% of billings per year on a pro bono basis."[118] The CBA and PBLO (Pro Bono Law Ontario) have assisted lawyers and law firms meet this professional obligation.[119]

A similar obligation should be imposed on students. As Professor Rhode has observed "[b]y enlisting students early in their legal careers, these initiatives attempt to inspire an enduring commitment to public service. The hope is that, over time, a greater sense of moral obligation will 'trickle up' to practitioners."[120] Law students in Canada have the resources to fulfill this obligation through Pro Bono Students Canada, the only national pro bono student organization in the world. According to PBSC, it engages approximately 2,000 law students every year.[121]

7.0 REPORTING MISCONDUCT

Law students should report serious incidents of professional misconduct or conduct unbecoming a law student to the Associate Dean where the student possesses information that would lead a reasonable person to believe that an offence has occurred. The failure to report may, depending on the circumstances, constitute professional misconduct. It is professional misconduct for a student to falsely accuse another student of conduct in violation of this Code.[122]

Commentary

Students are understandably reluctant to report suspected misconduct of their colleagues for fear of being labelled a "snitch" or more significantly the jeopardizing of a friendship. However, the legal profession is a self-regulating one. Indeed, this is one of the hallmark characteristics of a profession.[123] As such, there is a duty on everyone to ensure that misconduct is addressed. This serves an important deterrent function and gives effect

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[118] *Pro Bono Working Group Report*, online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/2003res/03-04-M.aspx>.

[119] See "Pro Bono" online: Canadian Bar Association <http://www.cba.org/CBA/groups/probono/>; and, "PBLO" online: Pro Bono Law Ontario <http://www.pblo.org/>.

[120] See Deborah L. Rhode, "Cultures of Commitment: Pro Bono for Lawyers and Law Students" (1999) 67 Fordham L. Rev. 2415 at 2416. See also the discussion in Elman, *supra* note 4 at 9-14.

[121] See online: Pro Bono Students Canada <http://www.probonostudents.ca/en/>.

[122] For examples of findings of professional misconduct for the making of unfounded allegations of incompetence or unethical conduct of other lawyers, see *Law Society of British Columbia v. Goldberg*, [2007] L.S.D.D. 61; Law Society of Upper Canada v. Kay, [2006] L.S.D.D. No. 112; Law Society of Upper Canada v. Carter, [2005] L.S.D.D. No. 57; and, Nova Scotia Barristers' Society v. Murrant, [1995] L.S.D.D. 257.

[123] See Rule 6.01(3) of the Rules of Professional Responsibility (Ontario), *supra* note 92 which places a mandatory obligation on all lawyers to report instances involving breaches of the Rules.

to the practical reality that misconduct will only come to the attention of the administration if it is reported by a fellow student.[124] There is a good faith obligation on students to ensure that their reporting is not based on unreliable information such as hearsay.

8.0 PROSECUTION

Prosecution of offences under this Code shall be conducted in accordance with the law school's discipline procedure.

[124]For competing views on whether law school codes should contain a mandatory reporting clause, see Berenson, *supra* note 4. For a more general discussion of reporting obligations, see Arthur F. Greenbaum, "The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform" (2003) 16 Geo. J. Legal Ethics 259.

LAW'S AMBITION AND THE RECONSTRUCTION OF ROLE MORALITY IN CANADA

David M. Tanovich*

There is *a growing disconnect and alienation between lawyers and the legal profession in Canada. One cause, which* is *the focus of the article,* is *philosophical in nature. There appears to be* a *disconnect between the role lawyers want to pursue (i.e.,* a *facilitator of justice) and the role that they perceive the profession demands they play (i.e.,* a *hired gun). The article argues that this perception* is a *mistaken one. Over the last fifteen years, we have been engaged in* a *process of role morality reconstruction. Under this reconstructed institutional role, an ethic of client-centred zealous advocacy has slowly begun to be replaced with* a *justice-seeking ethic that seeks to give effect to law's ambition. Part I of the article provides the basic foundations of this reconstruction thesis. In the first section, role morality* is *defined and defended* as a *beacon of ethical reflection. The next section attempts to trace the evolution of our understanding of the public interest. The final section of Part I provides the evidence of this reconstructed role morality by exploring statements from leading members of the profession, recent ethics jurisprudence and by examining equality and harm prevention principles in our codes of conduct. Like any large bureaucratic institution. the profession will inevitably be slow to respond to its new identity and the changing set of norms and values that go with that identity The required institutional changes are beyond the scope of this article. However, Part II does address how lawyers can on an individual level give effect to this evolving role morality by adopting* a *pervasive justice-seeking ethic and by engaging in identity lawyering that is consistent with the interests of justice.*

Au Canada, on constate que la dichotomie et I'alienation entre les avocats et la profession juridique sont en croissance. Cet article avance que i'une des causes de cette dichotomie et de cette alienation est d'ordre philosophique. II semble exister une dichotomie entre Ie rôle que les avocats veulent jouer (intervenants qui favorisent I'application de la justice) et Ie rôle qu'ils croient que la profession leur impose (mercenaires au service de leurs clients). L'auteur de cet

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article allegue que cette perception est sans fondement. Depuis plus de quinze ans, nous avons ete actits dans un processus de reconstruction de la moralité. Dans ce rô1e institutionnel reconstitue, une ethique de representation partiale et sectaire axee sur Ie client a *lentement cede la place* a *une ethique de recherche de justice qui vise* a *realiser I'ambition du droit. La premiere partie de (article etablit les bases de cette these de reconstruction. Dans la premiere section de cette partie, Ie rôle de mora lite est defini et defendu en tant que modete d'ethique. Dans la section suivante, I'auteur tente de tracer I'evolution de notre perspective de i'interet public. Dans la derniere section de la partie II, il donne la preuve de cette mora lite reconstituee en examinant les temoignages de membres eminents de la profession, la jurisprudence recente sur i'ethique et les principes d'egalite et deprevention de prejudices dans nos codes de conduite. A l'instar de toute grande institution bureaucratique, la profession mettra inevitablement beaucoup de temps a reagir* a *cette nouvelle identite et aux normes et aux valeurs changeantes qui I'accompagnent. Les changements institutionnels requis vont au-dela de la portee de cet article. Toutefois, dans la partie II, I'auteur traite des far;ons dont les avocats peuvent, individuellement, donner suite a cette moralite en evolution en adoptant une ethique profonde de recherche de la justice et en pratiquant leur profession de maniere conforme aux interets de la justice.*

Introduction

I. *Role morality, public interest and a justice-seeking ethic*
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Conclusion

Introduction

There is a growing disconnect and alienation between lawyers and the legal profession in this country. A 2004 survey, for example, discovered that "lawyers were more dissatisfied than other professionals" and that they perceived their work as generally "not particularly relevant to society as a whole."[125] Indeed, many recent graduates and more seasoned lawyers would likely agree with the following diagnosis provided by William Simon at the commencement of his ethics treatise *The Practice of Justice* - "[n]o social role encourages such ambitious moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations it encourages."[126] Why is this happening? What is it about the law school and lawyering experiences that is creating such despair and discontent?

The etiology of this discontent is complex. Some of the problems are structural in nature. They include, for example, the presence of systemic biases in entry and mobility for groups traditionally excluded from the profession.[127] Other structural problems include: barriers to justice[128]; the commodification and corporatization of legal practice[129]; the lack of

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[125]See Chief Justice Roy McMurtry. "The Legal Profession and Public Service" presented at the Third Colloquium (Ottawa) (Law Society of Upper Canada, 2004) online: Law Society of Upper Canada <http://www.lsuc.on.calnews/pdf/third_colloquiulll_mcmurtry.pdf> (date accessed: 10 February 2005). See also the discussion in Fiona M. Kay, Cristi Masuch & Paula Curry, *Diversity and Change: The Contemporary Legal Profession In Ontario* (Toronto: Law Society of Upper Canada, 2004) at 120 *[Diversity and Change).*

[126]See William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass.: Harvard University Press, 1998) at 1 *[The Practice of Justice]. I* owe a great debt to Professor Simon for providing me with the theory and tools to understand and embark upon this exploration of role morality in Canada.

[127]See generally the discussion in *Diversify and Change, supra* note 1 at 1-11, 119-120; Fiona M. Kay, Cristi Masuch & Paula Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession* (Toronto: Law Society of Upper Canada, 2004) 1-17, 106-111; Charles C. Smith, "Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession" presented at the Fourth Colloquium (Windsor) (Law Society of Upper Canada, 2005), online: Law Society of Upper Canada <http://www.lsuc.on.calnews/updates/define_prof.jsp>; Merrill Cooper, Joan Brockman & Irene Hoffart, *Final Report On Equity and Diversify in Alberta's Legal Profession* (Calgary: Law Society of Alberta, Jan. 2004) at i-iii (Executive Summary); Gerry Ferguson & Kuan *Foo, Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers* (Vancouver: Law Society of British Columbia, April 2000); Chris Tennant, "Discrimination in the Legal Profession. Codes of Professional Conduct and the Duty of Non-Discrimination" (1992) 15 Dal. L.J. 464 *[Duty of Non-Discrimination].*

[128]See generally Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dal. L.J. 335 at 351 *[Breach of Contract].*

[129]See generally Gavin MacKenzie, "The Valentine's Card In The Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" (1994-1995) 33 Alta. L. Rev. 859 at 859-865 *[The Valentine's Card In The Operating Room].*

consistent and meaningful enforcement of ethical and regulatory prohibitions[130]; and finally, the failure of many law schools to provide an environment in which students can develop the necessary skills, judgment, and cultural competence to engage in an ethical and meaningful practice o flaw. [131]

Beyond structure, the profession suffers from chronic disrespect and a lack of public confidence in it.[132] As Justice Abella of the Supreme Court of Canada has observed "the intensity of the public's disaffection is now so palpable that it has started to affect the profession's own perception of its professionalism.''[133] This lack of public respect has only been heightened with a number of highly publicized cases involving over-zealous conduct including the now infamous Ken Murray case.[134] As Kent Roach notes "[the case] has been something of a mini-Enron for the legal profession."[135] The same can be said with the growing systemic problem of prosecutorial zeal in criminal cases.[136]

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[130]See generally Harry W. Arthurs, "Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs" (1994-1995) 33 Alta. L. Rev. 800 *[Dead Parrot].*

[131]For example, only Alberta, Manitoba, Western, New Brunswick and Dalhousie have mandatory ethics courses in Canada. See the discussion of mandatory ethics courses in Jocelyn Downie, "A Case For Compulsory Legal Ethics Education In Canadian Law Schools" (1997) 20 Dal. L.J. 244. See also the discussion of law school pedagogy and cultural competence in Rose Voyvodic, "Advancing The Justice Ethic Through Cultural Competence" presented at the Fourth Colloquium (Windsor: Law Society of Upper Canada, 2005), online: Law Society of Upper Canada <http://www.lsuc.on.ca/news/pdf/fourth_colloquium_voyvodic.pdf> (date accessed: 18 April 2005) *[Advancing The Justice Ethic].*

[132]See *e.g.,* Michael Wilhelmson, "Public's Perception of B.C. Lawyers Found To Be Slipping" The Lawyers Weekly (26 March 2004).

[133] "Professionalism Revisited" (14 October 1999), online: Ontario Courts <http://www.ontariocourts.on.calcourt_of_appeal/speeches/professionalism.htm> (date accessed: 1 February 2005) *[Professionalism Revisited].*

[134]Murray kept in his possession videotapes depicting his client's (Paul Bernardo) involvement in the rape and torture of his victims. While he did eventually disclose the tapes, the damage had already been done. As a result of Murray's conduct, Bernardo's accomplice, Karla Homolka, was able to secure a plea bargain that sent her to jail for only twelve years. Murray was charged with obstruction of justice and acquitted. See *R.* v. *Murray* (2000), 144 C.C.C. (3d) 322 (Ont. S.C.). Disciplinary charges against Murray were also eventually withdrawn. See the discussion of the Murray case in a forum at (2001) 50 U.N.B.L.J. 171-277 and (2003), 47 Crim. L. Q. 141-223.

[135]"Ethics and Criminal Justice" (2003) 47 Crim. L. Q. 121 at 121. See also the discussion in Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 1-2 *[Ethics and Canadian Criminal Law].*

[136]See, for example, the recent case involving Amold Piragoff, one of Alberta's top Crown Attorneys. Piragoff was found liable for malicious prosecution and reprimanded by the Law Society of Alberta for his role in the Jason Dix prosecution. Dix was charged with two counts of first degree murder and spent 22 months in custody before his charges were eventually dismissed. Piragoff misled the court at Dix's bail hearing. As evidence that Dix posed a danger, Piragoff presented a letter, purportedly written by a police informant Dix had met in jail,

The final cause, which is the focus of this article, is philosophical in nature. It concerns the role morality or raison d'être of the profession. In my opinion, there is a disconnect between the role lawyers want to pursue *(i.e.,* a facilitator of justice) and the role that they *perceive* the profession demands they play *(i.e.,* a zealous advocate). This disconnect is evident in a 1994 empirical study of lawyers in Ontario.[137] Forty-nine of the 154 lawyers whose interviews were analyzed by the researchers raised the issue of the lawyering role when discussing problems they had experienced in practice. Interestingly, all forty-nine lawyers started out in the role of a counselor applying an ethic of care.[138] In twenty-nine cases, that role at some point conflicted with the instructions of the client. Four lawyers resolved that conflict by substituting their own judgment for that of the client while another seven lawyers withdrew from the case. The remaining eighteen lawyers ultimately adopted a hired gun role even though ten of them continued to experience stress and internal conflict. In their conclusions, the authors of the study observed that

> [a]lthough most lawyers, in the end. relinquished their decision-making to their clients', this transition from counselor to hired gun, *mandated by their professional obligations,* was one fraught with challenge for many lawyers. Lawyers resolved their problems in these areas, not by resort to official sources such as their code of conduct, but by resort to internal, informal sources of information such as mentors . . .
>
> Finally, this research amply demonstrates that . . . lawyers are preoccupied with the constant tensions of specific solicitor-client relationships and the lawyer's overall obligations to society. [139]

But is this hired gun role now "mandated by [our] professional obligations"?

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which offered to kill Dix's girlfriend, a potential Crown witness. Piragoff was aware, however, that the letter had, in fact, been written by two RCMP officers, in conjunction with the informant, as a ploy to get Dix to confess. Indeed, during a break, an RCMP officer reminded him of this fact. Piragoff did nothing to correct the mistake and Dix was denied bail. See *Dix v. Canada (A. G.),* [2002] A.J. No. 784 (Q.B.). See also Paula Simons, "No Justice In Wrist Slap By Law Society: Prosecutor Deserved Sterner Sanctions" Edmonton Journal (21 May 2005) B1; Charles Rusnell "Dix Prosecutor Fined For Misleading Court: Actions A - Shade Short Of Deliberate" *Edmonton Journal* (19 May 2005) A 1.

[137]See Margaret Ann Wilkinson, Christa Walker & Peter Mercer, "Testing Theory and Debunking Stereotypes: Lawyers' Views On The Practice Of Law" (2005) 18 Can. J.L. & Jur. 165 *[Testing Theory].* See also, Peter Mercer, Margaret Ann Wilkinson, and Terra Strong, 'The Practice of Ethical Precepts Dissecting Decision-Making By Lawyers" (1996) 9 Can. J.L. & Jur. 141 at 153.

[138]As the authors note, in this role "the lawyer must weigh competing and concurrent third party interests, as well as those of the client, in order to decide how to advise the client. The lawyer must consequently thoroughly weigh all available options and encourage the client to be thoughtful in making the ultimate decision" See *Testing Theory, supra* note 13 at 172 and 178.

[139]*Supra* note 13 at 190 [emphasis added).

There is no question that historically, the philosophy of lawyering in Canada has largely been driven by principles of partisanship, zealous advocacy, and morally unaccountable representation within the bounds of the law.[140] It is an ethic that many trace back to Lord Brougham's speech in Queen Caroline's case[141]:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[142]

The lawyer's role was conceptually and morally simple -- facilitate understanding of the available legal options and fearlessly protect the client's interests even at the expense of harm to innocent third parties. By using the law as the outer boundary of permissible conduct, the profession could simultaneously claim that lawyers acted honourably and as officers of the court.

It should be pointed out that some have suggested that this hired gun ideology of lawyering is of more recent vintage having only emerged in the 1960s and 1970s in the United States and perhaps much later in Canada.[143] Indeed, we can find expressions of role morality throughout the first half of the twentieth century in Canada, that appear to give

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[140]See John R. Cartwright, "An Address To Convocation By The Chief Justice of Canada" (1968) *2 Gazette* 6 at 6-7; George Finlayson, "The Lawyer As A Professional" (1980) 14 *Gazette* 229 at *230,235 [Lawyer As A Professional]; Chrysler Credit Canada Ltd. v.* 734925 *Ontario Ltd. (1991),* 5 O.R. (3d) 65 at 69 (Ont. Ct. Gen. Div.); Marvin Joel Huberman, "Advocacy, War, and the Art of Strategy" (1992) 26 Gazette 122; Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2001) at 1-9 - 1-10 *[Lawyers and Ethics]; R. v. Felderof* (2003),180 c.c.c. (3d) 498 at 536 (Ont. C.A.); David Layton, "The Criminal Defence Lawyer's Role" (2004) 27 Dal. L.J. 379 at 381-382 *[The Criminal Defence Lawyer's Role].*

[141]In 1820, King George IV of England wanted to remove his wife Caroline as Queen and to dissolve their marriage. In order to accomplish this task, a bill was entered in the House of Lords. The charge was that Caroline had committed adultery. The inquiry became, in effect, "The Trial of Queen Caroline." Henry Brougham, later Lord Chancellor, was chosen as her legal counsel. During the trial, he gave notice that he intended to prove that the King had previously married in secret. Many thought that proof of this might bring down the monarchy. In doing so, Brougham gave what is now one of the most famous speeches on role morality. The Bill was eventually withdrawn by the King. Caroline died shortly after King George's coronation. See online: <http://www.loyno.edu/history/journal/Mouledoux.html> (date accessed: 20 February 2005); William H. Simon, '''Thinking Like A Lawyer' About Ethical Questions" (1998) 27 Hofstra L. Rev. 1 at 4 *[Thinking Like a Lawyer (1998)].*

[142]As quoted in *R. v. Neil.* [2002] 3 S.C.R. 631 at para. 12.

[143]See *e.g.,* the discussion in *Ethics and Canadian Criminal Law, supra* note 11 at 3-5.

more prominence to personal conscience than in the post-1960 era.[144] However, this so-called "golden age" of the profession may have simply engaged in a different kind of unaccountable and zealous representation. Given the profession's history of exclusion both in terms of entry and access to justice,[145] one is left to question whether these calls for reliance on personal morality were simply a means to further exclusion and maintain the dominance of the privileged. As Wesley Pue has noted:

> We do not know exactly how or why a code of professional ethics was first developed in Canada but we do know that it emerged from a professional culture which was xenophobic, elitist and generally aligned with capital interests against ordinary citizens.[146]

Leaving aside the exact moment in time when fearless allegiance to the client's interests took root in our role morality, let me return to the question posed earlier: does Brougham's speech still accurately capture our role morality *today?* Given public discontent, academic criticisms of the concept of role morality (discussed *infra),* and indeed the conduct of the lawyers in the study referred to earlier, it would appear that most perceive a lawyer in hired gun terms. This article argues that this perception is mistaken and that, over the last fifteen years, we have been engaged in an ongoing process of role morality reconstruction. Under this reconstructed institutional role, an ethic of client-centred zealous advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law's ambition.

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[144]See *e.g.,* W.B. Ferris, "The Call" (1949) 7 *Advocate* 137 at 140: "[n]o lawyer should allow his retainer by a client to interfere with that he considers his public duties and to do that which his conscience tells him he should do." See also the discussion in W. Wesley Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20 Man. LJ. 227 at 239 *[Becoming Ethical].*

[145]See generally, Constance Backhouse, "Gender and Race In The Construction of 'Legal Professionalism': Historical Perspectives" (2003) online: Law Society of Upper Canada <http://www.lsuc.on.ca/news/updates/define_prof-isp#colloquium> (date accessed: 28 February 2005) *[Gender and Race].*

[146]W. Wesley Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alta. L. Rev. 730 at 762-763 *[In Pursuit of Better Myth).* Consequently, it may have been commonplace for lawyers in the first part of the twentieth century, for example, to refuse to vigorously represent (or represent at all), an individual perceived to be (or constructed a,) a threat to the existing social, economic and political order and to rely on conscience or their own personal morality to justify that decision. On the other hand, these very same lawyers likely had no difficulty applying Brougham's exhortation for the wealthy client who wished, for example, to build a factory that would cause harmful emissions for a neighbouring low-income housing community. For example, Pue writes about a prominent lawyer in 1919 who, in a speech to members of the Canadian Bar Association about the dangers of so-called "scheming for business", made it "abundantly clear that the real problem with commercialized legal practice was that it permitted injured workers, the poor, maimed and injured, to recover damages from business enterprises!" See *Becoming Ethical, supra* note 20 at 231-232, 245-246.

Part I of this article provides the basic foundations of this reconstruction thesis. The first section of Part I defines role morality and defends keeping it as the beacon of ethical reflection rather than jettisoning it in favour of an approach that relies on personal responsibility or morality as has been argued by many academics including Allan Hutchinson, Alvin Esau, and Donald Buckingham in Canada and David Luban in the United States.[147] The next section attempts to trace the evolution of our understanding of the public interest. As the legal profession has always attempted to ground itself in the public interest, how the profession conceives of the public interest will largely determine how it, and its members, should conduct themselves. The final section of Part I attempts to provide the evidence of this reconstructed role morality by exploring statements from leading members of the profession, recent ethics jurisprudence, and finally, by examining equality and harm prevention principles in our codes of conduct.[148]

Like any large and bureaucratic institution, the profession will inevitably be slow to respond to its new identity and the changing set of norms and values that go with that identity. Indeed, many parts of our codes of conduct remain inconsistent with a justice-seeking ethic. To fully give effect to legal practice as a means of securing justice rather than maximizing clients' goals, there will need to be structural change, strong leadership from the law societies and Canadian Bar Association, and a reorientation in law schools. These issues are beyond the scope of the paper. Part II does address, however, how lawyers can, *on an individual level,* give effect to this evolving role morality by adopting a pervasive justice-seeking ethic and engaging in identity lawyering that is consistent with the interests of justice.

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[147]See Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, *1999) [Legal Ethics and Professional Responsibility];* Alvin AJ. Esau, "What Should We Teach? Three Approaches to Professional Responsibility" in Donald E. Buckingham *et al., e*ds., *Legal Ethics in Canada: Theory and Practice* (Toronto: Harcourt Brace, 1996) 178-191; Donald E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders For An Approach That Encourages Moral Development" (1996) 9 Can. J.L. & Jur. 111; Alice Woolley "Integrity in Zealousness: Comparing the Standard Conception of the Canadian and American Lawyer" (1996) 9 Can. J.L. & Jur. 61 *[Integrity in Zealousness];* David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) *[Lawyers and Justice].*

[148]The focus will be on Ontario, see *Rules of Professional Conduct,* online: Law Society of Upper Canada <http://www.lsuc.on.ca/services/rulesprofcondpage_en.jsp> (date accessed: 22 February 2005) *[Ontario]* and the Canadian Bar Association, *Code of Conduct,* online: Canadian Bar Association *<http://www.cba.org/CBA/activities/code/>* (date accessed: 25 February 2005) *[CBA]* as they have been very active in amending their codes.

I. *Role morality, public interest and a justice-seeking ethic*

1. *What is role morality?*

Role morality is the set of norms, standards, and values that govern the conduct of individuals when acting as lawyers. It is the profession's "professional conscience."[149] The foundations for role morality are not religious, spiritual or even utilitarian principles of good and evil or right and wrong. Instead, the foundations are largely normative involving role differentiated and specific requirements. These norms and values come from expectations *(i.e.,* what role should lawyers play in our society) and from codes of conduct, jurisprudence, custom, and convention. The rationale for recognizing a distinct way of thinking and acting for individuals occupying the role of legal professional is perhaps best explained by many of the codes of conduct which contain the following exhortation: "a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice . . . ."[150]

Using role morality as an ethical guide for lawyers has been given short shrift. For many, it is inappropriate because it gives effect to, and further entrenches, the excesses of the adversarial process, namely, zealous advocacy, partisanship and a "sporting theory of justice." It is thus perceived to be a shield by which to protect lawyers from accountability and, therefore, as "amoral" lawyering.[151] As an alternative to role morality, we have seen the new ethics scholars like Luban and Hutchinson urge lawyers to take personal responsibility

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[149]See *Rush v. Cavenaugh,* 2 Pa. 187; 1845 Pa. LEXIS 306 (1845) *[Rush].* In *Rush,* the respondent, a lawyer, was hired by the appellant to prosecute a third party for forgery. At that time, individuals could retain lawyers to prosecute criminal cases. During the course of the prosecution, the lawyer became convinced of the accused's innocence and dismissed the action against the wishes of his client. After he collected his fee, the client called him a "thief, robber, and cheat." The lawyer launched an action for slander. As his justification, the client argued that the lawyer was obligated to follow his instructions. In rejecting this argument, Justice Gibson of the Pennsylvania Supreme Court held (at 189):

> It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to anyone except his client; and that the latter is the keeper of his *professional conscience.* He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he *violates it when he consciously presses for an unjust judgment;* much more so when he presses for the conviction of an innocent man [emphasis added].

Rush has been largely ignored in professional responsibility and ethics discussions in the United States. See Fred C. Zacharias & Bruce A. Green, "Reconceptualizing Advocacy Ethics" (2005) 74, Geo. Wash. L. Rev. 1.

[150]See Rule 1.03(I)(b), *Ontario, supra* note 24.

[151]See *e.g.,* the discussion in Randal N. Graham, "Moral Contexts" (2001) 50 U.N.B.LJ. 77 at 83-87.

for the decisions they make and to rely on personal morality as their compass.[152] For example, in what he calls his "ethical call to arms," Hutchinson exhorts:

> a fully ethical practice requires an independent sense of moral virtue that involves the lifelong development of personal moral character . . . . [I]t is about the development of a moral way of living and lawyering . . . .
>
> My most central recommendation is to urge lawyers to take personal responsibility for what they say and do in their professional capacities . . . . It is for each person to arrive at an informed and conscientious decision in accordance with his or her political and moral lights.[153]

Finally, many are critical of using role morality to foster ethical judgment because it is assumed that "there is little space for reflection or engagement [as] reference to the professional codes is intended to provide definitive and authoritative answers."[154]

My response to these criticisms is fourfold. First, the criticisms are largely grounded in the traditional image of lawyer as the hired gun or the "honest" hired gun and do not necessarily hold true if one accepts the argument that we are in the midst of reconstructing role morality as the pursuit of justice.[155] As Hutchinson himself recognizes "[t]he argument that there is a strongly differentiated role morality that lawyers are to interpose between their personal and professional lives can only be justified by reference to the overall and deeper moral worth of the profession's work generally."[156] Second, while role morality may be amoral in the sense that it relies on role differentiation and legal values rather than common morality as its guide, the foundations of our legal system are largely built upon values such as truth and justice. Indeed, controversial moral issues such as abortion, same-sex marriage, or the exclusion of unconstitutionally obtained evidence have escaped the will

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[152]Luban, for example, offers the following circumstances which would be prohibited under his moral activism approach: (1) the "inflict[ion] [of] morally unjustifiable damage on other people, especially innocent people"; (2) "deceit"; (3) "manipulations of morally defensible law to achieve outcomes that negate its generality or violate its spirit"'; and (4) "the pursuit of substantively unjust results." See *Lawyers and Justice, supra* note 23 at 157.

[153]*Legal Ethics and Professional Responsibility. supra* note 23 at 47-49, 195.

[154]*Supra* at note 23 at 39-40. Hutchinson is not alone in his criticism of using rules to promote ethical reflection. See *e.g., The Valentines Card In The Operating Room, supra* note 6 at 865-873; Margaret A. Wilkinson. Christa Walker & Peter Mercer, "Do Codes of Conduct Actually Shape Legal Practice?" (2000) 45 McGill L.J. 645; *Testing Theory, supra* note 13 at 190. See also the discussion of this issue in the context of the discrimination and sexual harassment rules in Joan Brockman, "The Use of Self-Regulation To Curb Discrimination and Sexual Harassment In the Legal Profession" (1997) 35 Osgoode Hall L.J. 209 *[The Use of Self-Regulation].*

[155]This is defined *infra.*

[156]*Legal Ethics and Professional Responsibility, supra* note 24 at 10.

of the moral (and likely political) majority because of the triumph of legal values such as dignity, equality, and procedural fairness. And so while we can all debate whether the statues outside the Supreme Court of Canada bearing the words "veritas" and "justitia" are more about law's ambition than its practice, the ambition is nevertheless a moral one and role morality demands that lawyers give effect to that ambition in their conduct.

Third, asking lawyers to rely on their own morality is often too subjectivist and relativist to ensure that justice is served on a consistent basis. The attraction of a role differentiated guide to behaviour is that lawyers are taught to "think like lawyers" which, in theory, empowers them to determine what justice demands in any given situation.[157] As William Simon puts it:

> [i]f the problem involves the reconciliation of competing legal values, lawyers know how to address it. The range of solutions and authorities and the modes of analysis and argument that lawyers habitually employ in their everyday work are available and appropriate for the central issues of legal ethics . . . .
>
> On the other hand, if the problem arises from claims of nonlegal values, then lawyers are likely to be uncertain how to deal with these claims collectively and individually. They have no common analytical and rhetorical tools for addressing them. The tools offered in popular culture for considering moral problems seem too formless and subjective; those offered by academic philosophy seem too abstract and multifarious.[158]

This link between ethical reflection and thinking like a lawyer has also been made by Christine Boyle and Marilyn MacCrimmon:

> We say that to engage in legal reasoning is to be attentive to human rights, in the broadest sense-that legally-trained people, that is those who understand and are committed to the concept of the rule of law, reflect the investment society makes in insurance against tyranny and injustice. This can be expressed in terms, familiar to lawyers, of professional responsibility. For example, the Law Society of British Columbia, in its Canons of Legal Ethics, says that 'it is a lawyer's duty . . . to serve the cause of justice.' We take the view that the discipline of law requires attention to the very values, in particular such values as human dignity and equality, which form the basis of the criticism that individual laws or legal practices fail to live up to those values. In that the very essence of lawyering requires attention to such values it can be said that people

[157]See generally William H. Simon, "Thinking Like a Lawyer -- About Ethics" (1999-2000) 38 Duq. L. Rev. 1015 *[Thinking Like A Lawyer (1999-2000)].*

[158]*The Practice Of Justice, supra* note 2 at 18.

> who are not so attentive are doing something that is perhaps legalistic but not law.[159]

Moreover, asking lawyers to rely on justice to guide their conduct should also more easily enable them to defend behaviour that may be inconsistent with prevailing professional or legal norms. Lawyers will be more comfortable, given their training, to articulate a justice-based justification should they have to account for their conduct. Discipline tribunals and malpractice triers will be more receptive to justice-based as opposed to conscience-based defences. In addition, clients are more likely to listen and act when the dialogue concerns what justice demands in the situation as opposed to what the lawyer's moral compass will permit.

Finally, role morality is not solely about adhering to a rigid set of positivist rules or legal commands as has been suggested. Rather, it is about professional identity and a state of mind. It is not about asking each lawyer the question "what kind of a lawyer do I want to be" but rather, "what kind of a lawyer does the legal profession demand I be." In order to answer this question, each lawyer must ask herself what the substantive norms inherent in law demand in the particular situation, taking into account the purpose behind the legal command and the context in which it is operating. A reconstructed role morality requires considerable reflection and contextual thinking. It is about developing and actualizing a "sense" of justice.[160]

And so, while I agree with Hutchinson's call for lawyers to take responsibility for their actions, I part company in terms of what exactly lawyers are to take responsibility for. Under a reconstructed role morality, lawyers are required to take *professional* responsibility to ensure that their conduct promotes the cause of justice. Again, as we frequently see stated in codes of conduct, "[a] lawyer's responsibilities are greater than those of a private citizen."[161] That said, it is clear that we agree on what we see as the goal of legal ethics. As

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[159]Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Y.B. Access Just. 55 at 59.

[160]The concept of a "sense" of justice can be found throughout moral and political theory. For a summary. see Markus Dirk Dubber, "Making Sense of the Sense of Justice" (2005) 53 Buff. L. Rev. 815.

[161]See *e.g.,* the Commentary to Rule 4.06(1) *Ontario, supra* note 24. Moreover, as David Wilkins has observed:

> Lawyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests of their clients and the public purposes of the legal framework. As a result, the kind of deliberation that may be appropriate in the realm of personal moral decision making will not always produce the social goods that society legitimately expects from a regime of professional ethics.

See "In Defense of Law and Morality: Why Lawyers Should Have A Prima Facie Duty To Obey The Law" (1996-1997) 38 Wm. & Mary L. Rev. 269 at 274 *[In Defense of Law and Morality].*

Hutchinson puts it "it is incumbent on the profession to ensure that the interests of justice are placed squarely and regularly at the forefront of professional concerns."[162] This is the very essence of law's ambition.

2. The professional obligation of lawyers to act "in the public interest"

As it has been argued that role morality is largely normative and its content is derived from thinking about the role lawyers should play in our society, it is now necessary to address the parameters of that role. It is beyond dispute that serving the interests of the public is the prevailing ideology and guiding principle of the profession.[163] The idea that Canadian lawyers are obligated to act in the "public interest" finds its most emphatic expression in the jurisprudential recognition of the utility of the self-regulating nature of the legal profession and in legislation that establishes the right of law societies to regulate.[164] So, for example, in *Pearlman* v. *Manitoba Law Society Judicial Committee,* the Supreme Court held that "the self-governing status of the professions, and of the legal profession in particular, was created in the public interest."[165] Similarly, the preface to the Canadian Bar Association Code of Conduct states that:

> The Code of Professional Conduct that follows is to be understood and applied in the light of its primary concern for the protection of the public interest. This principle is implicit in the legislative grants of self-government. . . . Inevitably, the practical application of the Code to the diverse situations that confront an active profession in a changing society will reveal gaps, ambiguities and apparent inconsistencies. In such cases, the principles of protection of the public interest will serve to guide the practitioner to the applicable principles of ethical conduct and the true intent of the Code.[166]

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[162]*Legal Ethics and Professional Responsibility, supra* note 23 at 10.

[163]See Frederick DeCoste. "Towards A Comprehensive Theory of Professional Responsibility" (2001) 50 U.N.B.L.J. 109 at 117.

[164]See *e.g., The Legal Profession Act (British Columbia),* S.B.C. 1998, c. 9, s. 3(a).

[165][1991]2 S.C.R. 869 at 887 (as per Iacobucci J.).

[166]*CBA, supra* note 24. With some modifications, the CBA Code of Conduct is used by law societies in Saskatchewan, Manitoba, Newfoundland, P.E.I., Northwest Territories, Yukon and Nunavut.

3. Our evolving understanding of what is *"in the public interest"*

As noted earlier, the ideology of lawyering in this country has historically been, generally speaking, one of client-centred zealousness. Its expression can be seen in Justice George Finlayson's address to the 1980 call to the bar ceremony in Ontario:

> We must have the ability to sit back and view a client's problems dispassionately and be able to advise as to what would be in his or her best interests . . . . [The lawyer] is representing a person, and that person is entitled to be told what his circumstance is, not what he or you, his lawyer, would like it to be.
>
> [o]ur duty is not to motivate the clients or to involve them in our concerns, but to deal with the problem of a particular client and to obtain the best possible result in representing the client, keeping in mind the client and nobody else.
>
> [s]o long as you choose to practice law in the traditional sense -- the representation of a client in any sphere -- *you must never forget that your duty is to that client alone . . . .*
>
> *If you confuse your social or political conscience with your duty to that client, you betray his trust; you betray us all.*[167]

It is curious how this ideology grew out of a profession that has defined itself in the public interest. Why were we (and why are we still in many respects) so willing to say to the client, "I am prepared to do your bidding whatever it may be and regardless of the harm that may accrue provided you can stay within the narrow bounds of the law"? It is far too simplistic to think that this ideology can be explained in terms of pure self-interest. Surely we have had to weave a far more complex myth to convince generations of well-meaning individuals to buy into this traditional role morality.

What is this myth? It would appear that the public interest justifications for this ideology of lawyering include the long-term promotion of access to justice, competent representation, and client autonomy.[168] The link to access is explained as follows. If lawyers are seen to be moral advisors to their client, then a lawyer who represents an unpopular or repugnant client will be viewed as endorsing the client's position. Role morality, therefore, protects the lawyer from being vilified in public. We recently saw an example of this when Stockwell Day suggested that a lawyer who defended an individual charged with possession

[167] *Lawyer As A Professional, supra* note 16 at 230, 235 [emphasis added].

[168] See generally Monroe H. Freedman, "How Lawyers Act In The Interests Of Justice" (2002) 70 Fordham L. Rev. 1717; Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986), 1986 Am. B. Found. Res. J. 613.

of child pornography was personally in favour of child pornography.[169] As for competence, client loyalty manifested in strict confidentiality rules ensures, in theory, that there will not be a chilling effect on communication and a free flow of information which is necessary for competent representation.[170] This chilling effect is seen to impact not only the quality of representation but also access. Individuals with problems may fear seeking legal help if they think that their lawyer will disclose their confidences. Moreover, some have argued that strict rules of confidentiality may, in fact, serve to protect the public from future harm. If clients feel that they can alert their lawyer as to their intentions, the lawyer may be in a position to dissuade them from so acting. In addition to these justifications, there has been the steadfast belief that the negative effects of zealousness will be checked by the adversarial nature of the adjudicative process. In theory, each side of a dispute is represented by competent counsel and a neutral umpire ensures that truth and justice are served.[171]

The problem with these justifications, however, is that they are largely illusory and without foundation. For example, the idea that criminal and civil disputes are resolved by means of an adversarial trial is largely a myth.[172] Most cases are settled well before trial

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[169]See "The Letter That Launched The Lorne Goddard Lawsuit" *The Edmonton Journal* (18 January 2001) A2.

[170]As Justice Sopinka, for the majority, observed in *Macdonald Estate v. Martin,* [1990] 3 S.C.R. 1235 at 1244 *[Macdonald Estate]:*

> The legal profession has distinguished itself from other professions by the sanctity with which . . . communications [between a lawyer and client] are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.

Similarly, in *Smith v. Jones* (1999), 132 C.C.C. (3d) 225 at 240 (S.C.C.) *[Smith v. Jones].* Justice Cory, for the majority, held:

> Family secrets, company secrets. personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish al1 the relevant information that must be provided to lawyers if they are to properly advise their clients.

See also the discussion in *City of Montreal v. Foster Wheeler Power Co.,* [2004J 1 S.C.R. 456 at 475-476.

[171]As was observed in *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 at 57 (Ont. C.A.) *[Joanisse],* "[w]e place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by 'partisan advocacy on both sides of the case' . . . . "

[172]See the discussion of this myth in Gavin MacKenzie, "Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism" (1995) 29 Gazette 122 at 132-140.

either by way of settlement, mediation, or a guilty plea. For example, in criminal cases, where adversarialism is purportedly most vibrant, it is estimated that over ninety per cent of cases are resolved before trial.[173] And, even when criminal cases go to trial, many individuals are unrepresented. A 2002 Department of Justice funded study discovered shockingly high levels of unrepresentation in nine provincial court sites across Canada.[174] Other accused are under-represented either because of inadequate legal aid funding, over-reliance on over-worked duty counsel,[175] or incompetent representation.[176] For example, in one troubling Ontario case, a defence lawyer in Toronto candidly revealed that he did not "do jails" in response to a claim on appeal that he was ineffective because he did not interview his client, a young offender in custody, before the trial date.[177]

Returning to the justifications for zealousness, while autonomy is an important goal that the law seeks to enhance, no one has the right to harm another under the guise of self-realization.[178] Indeed, one of the central purposes of a legal system is to constrain autonomous action in the name of collective peace and security. And finally, there is no evidence that zealousness manifested in the strict maintenance of confidences has served to

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[173]This includes guilty pleas and withdrawal of charges by the Crown. See Milica P. Piccinato, "Plea Bargaining" The International Corporation Group, online: Department of Justice <http://canada.justice.gc.ca/en/ps/inter/plea2.html> documenting a 1998 study in Ontario. See also the discussion in Joseph DiLuca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50 Crim. L.Q. 14 at 15. As DiLuca observes, "[w]e now operate in a system of guilty plea justice."

[174]See Robert G. Hann, Joan Nuffield, Colin Meredith & Mira Svoboda, "Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts Part 1: Overview Report" (September 2002), online: Department of Justice <http://canada.justice.gc.ca/en/ps/rs/rep/rr03-LARS-2.pdf>. For example, the authors provide the following general summary of their findings:

- [i]n some situations, depending on the jurisdiction and the stage at which plea was entered, well in excess of 50 percent of accused are convicted without the benefit of legal representation.

- [i]n some situations, depending on the jurisdiction and the type of offence, up to 30 percent of those convicted receive custodial sentences, again without benefit of legal representation.

[175]*Ibid.*

[176]See David M. Tanovich, "Charting The Constitutional Right of Effective Assistance of Counsel in Canada" (1994) 36 Crim. L.Q. 404; "Further Developments On Claims of Ineffectiveness of Counsel" (1995) 34 C.R. 32.

[177]He also failed to interview a defence witness until the day of the trial. See *R.* v. *B.(L.C.)* (1996), 104 C.C.C. (3d) 353 (Ont. C.A.). The Court of Appeal ultimately concluded that this conduct did not constitute ineffective assistance of counsel.

[178]See generally, David Luban, "Partisanship, Betrayal And Autonomy In The Lawyer-Client Relationship: A Reply To Stephen Ellmann" (1990) 90 Colum. L. Rev. 1004 at 1035-1043 *[Partisanship, Betrayal and Autonomy].*

create greater access, promote competence or a just system. As Simon has pointed out, there is simply no evidence that the confidentiality rule has served to promote trust and a free exchange of information between the client and lawyer.[179] Nor is there any evidence that transactional lawyering requires the same level of confidentiality as litigation and yet the rule has applied with equal vigour in both contexts.[180] It is troubling that our system has been built on assumptions about confidentiality that have never been empirically tested. The recognition of the illusory nature of these justifications along with the realization of the harm and injustice caused by zealousness has played an important role in our rethinking of what lawyering "in the public interest" means.

There are a number of other factors that have emerged over the last fifteen years as well. The first and perhaps most important factor was the introduction of the *Charter* in 1982 and, in particular, section 15(1) and its guarantee of substantive equality. This equality guarantee has provided us with a powerful measuring stick that can be (and has been) used as a guiding principle by which to assess the impact of our behaviour as lawyers on clients, our colleagues, and other members of the public.[181] In conjunction with section 15(1), we have seen greater participation in the profession by traditionally excluded groups, particularly women, and this has had an impact on how we think about ethics and professionalism. As Rosemary Cairns Way notes:

> The Honourable Bertha Wilson, in her capacity as chair of the Canadian Bar Association (C.B.A.) Task Force on Gender Inequality in the Legal Profession suggested that the influx of women had triggered a rethinking of the meaning of professionalism. For her, professionalism encompassed more than service to the client, it required a commitment to justice, and specifically to equality.[182]

Moreover, the last decade has seen a more diverse and representative group of individuals who are ultimately responsible for governance and the development of the codes of conduct.[183] We are also slowly beginning to recognize and give effect to a distinct legal

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[179]*The Practice of Justice, supra* note 2 at 54-62. See also Fred Zacharias, "Rethinking Confidentiality" (1989) 74 Iowa L. Rev. 35 J at 377-96.

[180]For a compelling argument on why the confidentiality rule should not apply with the same vigour in corporate law, see "Corporate Counsel and Confidentiality" (Chapter 10) in *Lawyers and Justice, supra* note 24.

[181]See generally Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27 ["Reconceptualizing Professional Responsibility"].

[182]*Ibid.* at 32.

[183]In Ontario, for example, some of these benchers are (and have included) Professor Constance Backhouse. Professor Joanne St. Louis who is African-Canadian, Mary Eberts, Tracey O'Donnell and Todd Ducharme, both of whom are Aboriginal, Avvy Yao-Yao Go who is Asian, Beth Symes, Carol Curtis, Eleanore Cronk, and Vern Krishna who is South Asian.

culture in Canada which includes an Aboriginal legal tradition.[184] And finally, the recent recognition of the importance of pro bono work and the willingness of the Supreme Court to impose limits on the ability of lawyers to do harm has heightened our understanding of the importance of the relationship between lawyers and the public.[185]

What then is our current understanding of the obligation of lawyers to act "in the public interest"? I suggest that we have been moving towards a conception of public interest that requires lawyers to act in the pursuit of justice. Justice can be defined, for the purposes of the lawyering process, as the *correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner.*[186] This approach to justice has both procedural and substantive elements. The procedural component is the right to a fair and non-discriminatory process that is capable of producing the result demanded by the law. The substantive component involves assessing the merit of the legal claim as seen through the lens of the law properly interpreted. A proper interpretation is one that gives effect to the purpose behind the legal provision and which ensures that the provision is consistent with other substantive legal norms such as equality, fairness, and harm reduction. It is also one that pays special attention to our history of injustice.[187] Having defined justice in this fashion, the pursuit of justice requires the following minimum ethical obligations of lawyers:

- Do what you reasonably can to promote accessibility to legal representation[188];

- Ensure that your competence extends beyond legal skills and knowledge to cultural sensitivity and understanding *(i.e.,* cultural competence)[189];

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[184]We can see this influence, for example, in our thinking about restorative justice. In the context of sentencing, see *R.* v. *Gladue,* [1999] 1 S.C.R. 688. See also Larry Chartrand, "The Appropriateness Of The Lawyer As Advocate In Contemporary Aboriginal Justice Initiatives" (1994-1995) 33 Alta. L. Rev. 874.

[185]See in particular. *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 (S.C.C.) (prohibiting the putting off also suggestions to a witness on cross-examination) *[Lyttle]; Smith v. Jones, supra* note 46 (recognizing an exception to confidentiality/privilege to prevent future harm),

[186]This is consistent with Simon's approach to both ethical reflection and the meaning of justice. As he writes, "[l]awyers should take those actions that, considering the relative circumstances of the particular case, seem likely to promote justice." Simon defines justice as the "'legal merits' of the matter at hand." See *The Practice of Justice, supra* note 2 at 10, 138.

[187]See Alan Dershowitz, *Rights From Wrongs: A Secular Theory of the Origins of Rights* (New York: Basic Books, 2004) at 8-9.

[188]See *Breach of Contract, supra* note 4 at 351 on the issue of mandatory pro bono obligations for lawyers. As for imposing a similar obligation on law professors and students, see Deborah L. Rhode, "The Professional Responsibilities of Professors" (2001) 51 J. Legal Educ. 158 at 162-164; Deborah L. Rhode, "The Professional Responsibilities of Professional Schools" (1999) 49 J. Legal Educ. 24 at 30-36; Deborab L. Rhode. "Cultures of Commitment: Pro Bono for Lawyers and Law Students" (1999) 67 Fordham L. Rev. 2415 at 2416-2417.

- Protect your client's right to a fair process and a result which is consistent with the legal merit of the claim;

- Generally avoid deceitful, obstructionist, or other conduct that will frustrate the ability of the process to produce the legally correct result;

- Do not engage in conduct that will have a discriminatory impact on third parties[190];

- Protect your client's right to be free from discriminatory practices or conduct; and,

- Be responsible. Avoid and disclose conduct that will unjustifiably harm an innocent third party.[191]

Some may view this concept of a justice-seeking ethic as one of client betrayal as it will sometimes require the lawyer to refuse to follow the client's instructions, disclose confidential information to prevent harm, or assist an unrepresented litigant. However, as Simon notes, "[a] lawyer who limits the distance she will go for a client on the basis of norms of legal merit or justice does not deprive the client of anything he is entitled to; on the contrary, she simply insists on respecting the entitlements of others."[192] In many respects, this is no different than the limit on the zealous advocate to act within the bounds of the law. A justice-seeking ethic simply demands that lawyers engage in a reorientation of what the law demands in individual cases.

Nevertheless, one of the biggest challenges in actualizing this ethic will be for lawyers to learn how to deal with situations where their client will feel that they are being betrayed. There is no question that many lawyers will feel uncomfortable with having justice-based

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[189]See *Advancing The Justice Ethic. supra* note 7. See also, Susan Bryant, "The Five Habits: Building Cross·Cultural Competence in Lawyers" (2001) 8 Clinical L. Rev. 33; Michelle S. Jacobs, "People From The Footnotes: The Missing Element In Client·Centered Counseling" (1997) 27 Golden Gate U. L. Rev. 345; Carwina Weng, "Multicultural Lawyering: Teaching Psychology to Develop Cultural Self·Awareness" (2005) 11 Clinical L. Rev. 401; and, Carolyn C. Hartley & Carrie J. Petrucci, "Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration between Social Work and Law" (2004) 14 Wash. U.J.L. & Pol'y 133.

[190]In many respects, this conception of a justice-seeking ethic mirrors Rosemary Cairns Way's equality-seeking ethic. See *Reconceptualizing Professional Responsibility, supra* note 57 at 46. See also the discussion in Esmeralda M.A, Thornhill, "Ethics in the Legal Profession: The Issue of Access" (1995) 33 Alta, L. Rev, 810,

[191]The exhortation to act responsibly and do no harm are integral to Richard Devlin's reconstruction of legal ethics. See "Normative and Somewhere To Go? Reflections On Professional Responsibility" (1994-1995) 33 Alta, L. Rev. 924 at 933 *[Normative and Somewhere To Go].*

[192]*The Practice of Justice, supra* note 2 at 50.

dialogues with those who are paying their fees. How would you explain to the client, for example, that their conduct is not prohibited under the law as currently interpreted by the courts, but that it is contrary to the law properly interpreted by you? This is not to say that a justice-seeking ethic will necessarily lead to a "race to the bottom" where the client will end the retainer and find their "hired gun" at another firm. As has been suggested:

> Clients might value high ethical standards in lawyers because they themselves have such standards and prefer to associate with people who share their views. They may value such high standards because they believe such standards are associated with an especially sophisticated type of legal judgment that is less likely to sacrifice the client's long-term interests to short-term gain. They may value them because association with lawyers with a reputation for high standards lends the client valuable status or credibility with third parties with whom the client has to deal.[193]

Even more challenging may be explaining your conduct to your firm. In other words, institutional forces will pose challenges for those committed to this style of discretionary lawyering.[194] It will, therefore, be important for the Canadian Bar Association and provincial law societies to play an active role in supporting lawyers committed to pursuing a justice-seeking ethic. This support can come in providing advice, setting standards and in intervening when a lawyer fears negative consequences from their firm.[195] It will also be important for law schools to instill an ethic of justice in future lawyers. There is great strength in numbers. Richard Devlin reminds us of one powerful American example of the ability of transformative lawyering to occur despite the so-called bottom line. In the 1980s, an elite Washington law firm (Covington & Burley) severed its retainer with an airline owned by the South African government after a student-led boycott.[196]

Having set out what I suggest is our evolving understanding of acting "in the public interest" *(i.e.,* in the interests of justice) and offering an explanation for why it is occurring, I end this section by marshalling the support for my thesis. I suggest that this reconstruction

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[193]See Robert Gordon & William H. Simon, "The Redemption of Professionalism" in Robert Nelson *et. al.,* eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1992) 230 at 245.

[194]See a discussion of these issues in *Dead Parrot, supra* note 6 and Tanina Rostain, "Waking Up From Uneasy Dreams: Professional Context, Discretionary Judgment and *The Practice of Justice"* (1999) 51 Stan. L. Rev. 955.

[195]Devlin offers some important insights into these issues in *Normative and Somewhere To Go, supra* note 67 at 940-941. See also Simon's response to a number of these issues in "The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on *The Practice of Justice"* (1999) 51 Stan. L. Rev. 991.

[196]*Normative and Somewhere To Go, supra* note 67 at 938. See also the discussion in William H. Simon, "Ethical Discretion In Lawyering" (1988) 101 Harv. L. Rev. 1083 at 1130.

of our "role morality" can be seen in professional statements, jurisprudence, and in equality and harm reduction principles in our codes of conduct.

4. *The evidence of reconstruction*

a. *Professional and jurisprudential developments*

In Ontario, the most important professional statement of this reconstructed role morality is the 1994 role statement of the Law Society of Upper Canada (LSUC). For the first time, we see an explicit link between the public interest and the pursuit of justice:

> The Law Society of Upper Canada exists to govern the legal profession in the public interest by
>
> - ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, and
>
> - upholding the independence, integrity and honour of the legal profession,
>
> *for the purpose of advancing the cause of justice* and the rule of law.[197]

This statement was endorsed by Justice Abella in her 1999 address to the Law Society Benchers. As she put it:

> [t]here are three basic values which merge in a good lawyer: a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the other two values . . . .
>
> To me, the Law Society got it right when it said in its 1994 Role Statement that the legal profession exists in the public interest to advance the cause of justice and the rule of law.[198]

In a later paper, Justice Abella stated that the essence of professionalism was "whether justice is seen as being done."[199] Chief Justice McMurtry of the Ontario Court of Appeal has also recently observed:

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[197]Adopted by Convocation, October 27, 1994 [emphasis added], see online: Law Society of Upper Canada <http://www.lsuc.on.ca/conv/may2000/StrategicPlan.PDF> at 6. There was apparently some resistence to this role statement because of its focus on protecting the public interest as opposed to the interest of lawyers. See Carole Curtis, "Alternative Visions Of The Legal Profession In Society: A Perspective On Ontario" (1994-1995) 33 Alta. L. Rev. 787 at 789.

[198]*Professionalism Revisited, supra* note 9. See also Rosalie S. Abella, "Law, Literature, and Identity: Seeking Equality" (2000) 63 Sask. L. Rev. 1.

> I believe that in a changing world, the one thing that cannot change is our common pursuit of justice. That is and must remain the principal reason for the existence of the courts and the profession alike. They are bound together by that pursuit.[200]

Similar sentiments have been echoed in Supreme Court of Canada jurisprudence. In *Smith v. Jones*, the Court recognized that in some cases the public interest will trump solicitor-client privilege and adopted a broad future harm exception that the Court recognized would apply to "all classifications of privileges and duties of confidentiality."[201] In establishing the contours of the exception, the Court did not limit the trigger of the harm to criminal activity as was the traditional approach to future harm. Rather it extended the exception to any act that poses a risk of death or serious bodily harm including psychological harm that substantially interferes with the health or well-being of the innocent third party.[202]

Five years later, in *Lyttle,* the Supreme Court added its voice to a longstanding legal and ethical debate about whether a lawyer can cross-examine a truthful witness in order to create a misleading impression that the witness is either lying or mistaken.[203] The issue has been a classic example of the struggle in legal ethics between duty to the client, particularly in criminal cases, the prohibition on misleading the court, and protecting the public from harm. In this context, harm includes embarrassment and possibly trauma for the witness. Justices Major and Fish, for the Court, held:

> we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, *provided that counsel has a good faith basis for putting the question.*
> . . .

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[199]"Professionalism in the Justice System: The Divine Comedy of Roscoe Pound" (2002) 51 U.N.B.L.J. 3 at 5.

[200]Online: Ontario Courts <http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_ speeches/coareport1999.htm>.

[201]*Smith v. Jones, supra* note 46 at 239 (para. 44). This is discussed infra in relation to the Ontario future harm exception.

[202]*Smith v. Jones, supra* note 46 at 247-251.

[203]See the discussion in *The Criminal Defence Lawyer's Role, supra* note 16 at 389-391; *Legal Ethics and Professional Responsibility, supra* note 23 at 154, 156; "Cross-Examining The Truthful Witness" in *Ethics and Canadian Criminal Law, supra* note 11 at 59-65 where the authors suggest that such conduct is not necessarily ethical improper. See also *Lawyers and Ethics, supra* note 16 at 7.4.

> In this context, a "good faith basis" is a function of the information available to the cross-examiner, and his or her belief in its likely accuracy. . . .
>
> *In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false* . . . .
>
> The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; *to assert or to imply in a manner that is calculated to mislead* is in *our view improper and prohibited.* [204]

Lyttle stands as one of the first cases where the Court infused a legal rule with ethical principles.

b. Codes of conduct

Codes of conduct are "intended to express to the profession and to the public the high ethical ideals of the legal profession"[205] and thus are a good place to find the minimum standards of conduct and aspirations of the profession.[206] However, even in relation to minimum standards, the codes of conduct across this country are not consistent. This is hard to understand. Questions, for example, of harm prevention, discrimination, sexual harassment, the duty to report or the duty to rectify harm are not economic in nature and thus bear no relationship to geography or demographics. One can readily understand how the rules

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[204]*Lyttle, supra* note 61 at paras. 43, 44, 47, 48 [emphasis added]. Some are likely to argue that Lyttle is not a complete answer to the ethical dilemma of cross-examining a truthful witness because the issue in the case involved the putting of false suggestions to a witness. See, for example, the discussion in *The Criminal Defence Lawyer's Role, supra* note 16 at 391-392. In some cases, truthful witnesses will be challenged with suggestions grounded in truthful facts such as a prior criminal record, prior inconsistent statement or evidence capable of constituting *animus* or some other motive to lie. However, the language in *Lyttle* does appear broad enough to support an assertion that counsel are prohibited from using cross-examination, even on truthful facts, in order to create a misleading impression. I will return to this issue again in the discussion of the cross-examination of sexual assault complainants and police officers in racial profiling cases.

[205]Rule 1.03(d), *Ontario, supra* note 24.

[206]As Justice Sopinka noted in *Macdonald Estate, supra* note 46 at 1244:

> [a]n important statement of public policy with respect to the conduct of barrister and solicitor is contained in the professional ethics codes of the governing bodies of the profession . . . . these rules must be taken as expressing the collective views of the profession as to the appropriate standards to which the profession should adhere . . . .
>
> A code of professional conduct is designed to serve as a guide to lawyers . . . .

governing advertising or conflict of interest may be different in P.E.I. as compared to Ontario. But what can logically explain, for example, a more explicit expansive duty to prevent future harm in Ontario than say in British Columbia?[207] There is simply no principled justification. Consequently, I would argue that a lawyer should be entitled to rely on any rule of professional conduct in Canada including the CBA Code when deciding whether a justice-seeking course of conduct is or is not permitted. I take this position notwithstanding the fact that some codes, like in New Brunswick, specifically address the situation and state that "[s]ave as may be provided by law, in the event of a conflict of standards in matters involving the conduct of the lawyer the standards declared by this Code shall govern."[208] While breaching the rules is prima facie a disciplinary infraction, there is a further requirement that the lawyer's conduct "bring discredit upon the legal profession . . . ."[209] It is hard to imagine that this latter standard would be met where a lawyer relied on a rule from another province, for example, that served to protect an innocent third party from serious bodily harm.

Other times, however, relying on the standards of another jurisdiction will not involve an explicit breach of the rules in the lawyer's jurisdiction. Since the rules are minimum standards, they will often be silent on the issue confronting the lawyer. For example, there is very little guidance on what a lawyer should do after discovering that a client has committed perjury.[210] In Alberta, a lawyer must make some attempt at rectification unless it would involve revealing a confidence. The rules suggest, for example, that the lawyer could advise the trier of fact not to rely on that part of the testimony the lawyer knows to be false.[211] Presumably, Alberta is satisfied that this option does not, in theory, constitute a disclosure of confidential information. Based on this reasoning and precedent, there would be nothing to stop lawyers in provinces that are silent on the issue to

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[207]In British Columbia, future harm is restricted to criminal acts involving death or serious bodily harm. See Professional Conduct Handbook, "Confidential Information," Chapter 5 (Rule 13), online: Law Society of British Columbia <http://www.lawsociety.bc.ca/publications_forms/handbook/body_handbook_toc.html> *[British Columbia].* In Ontario, future harm is linked to death, serious bodily harm and psychological harm regardless of the cause of the harm. See Rule 2.03(3), *Ontario, supra* note 24. This rule is discussed in more detail infra as well as my position that the scope of the future harm rule recognized in *Smith* v. *Jones* and codified in *Ontario* would now qualify under the "otherwise provided by law" exception to confidentiality.

[208]See "Application and Interpretation" at 7, online: Law Society of New Brunswick <http://www.lawsociety-barreau.nb.ca/emain.asp?165> *[New Brunswick].*

[209]See "Professional Misconduct", Rule 1.02, *Ontario, supra* note 24.

[210]See *Ethics and Canadian Criminal La, supra* note 11, Chapter 7 for a detailed discussion of the perjury dilemma.

[211] See "The Lawyer as Advocate", Chapter 10 (Rule 15), online: Law Society of Alberta <http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm> *[Alberta].*

adopt this course of action, and to use it in their attempts to dissuade the client from committing perjury.

In our codes of conduct, we can find powerful statements regarding equality and harm reduction that reveal the reconstruction I have been discussing. My point here is not to suggest that the codes have fully embraced this reconstructed role morality. One can still find exhortations consistent with the zealous advocate conception[212] and, as noted above, the codes are not consistent across the country. Instead, this discussion is meant to demonstrate that our role morality is under construction and moving towards a justice-seeking set of norms and, perhaps more importantly, to empower lawyers by providing them with the sources they can rely on to justify their conduct to themselves, their clients, their colleagues and ultimately the law society should the need arise.

Promoting equality

All lawyers in Canada are now subject to code-based ethical obligations not to discriminate. In Nova Scotia, for example, Rule 24 of the Legal Ethics and Professional Conduct Handbook includes a note that states that lawyers have an ethical obligation to "become familiar with and understand section 15 of the *Canadian Charter of Rights and Freedoms"* and that a "lawyer should cultivate a knowledge and understanding of Canadian jurisprudence on the meaning of equality and discrimination and on adverse impact analysis . . . ."[213] In Ontario, the interpretation rule (rule 1.03(1)(b)) specifically requires that the rules (and ultimately all conduct of lawyers) be interpreted in a manner that "recognize[s] . . . the diversity of the Ontario community . . . and [that] respect[s] human rights laws in force in Ontario." In addition to this anti-discrimination interpretative aid, rule 5.04(1) demands that lawyers not engage in conduct that discriminates against *anyone* the lawyer interacts with in their professional capacity.[214] Rules 5.04(2) and (3) extend the rule to the provision of services

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[212]88. See *e.g.,* the Commentary 2(h) to Chapter 1, "Integrity" (CBA) which asks lawyers to be absolutely frank in their dealings with the tribunal, fellow lawyers and other parties "subject always to not betraying the client's cause . . . ." See online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/04-01-A.pdf>. Another example is the duty of advocates to fearlessly . . . ask every question, however distasteful, which they think will help their client's case. See *e.g.,* Rule 4.01(1), *Ontario, supra* note 24 and Chapter IX, *CBA, supra* note 24. Interestingly, New Brunswick has removed "distasteful" from the rule and have added a reasonableness requirement. The rule reads" . . . the lawyer shall ask every question, raise every issue and advance every argument that the lawyer thinks reasonably will assist the cause of the client. . . . " See Rule (b), Chapter 8, *New Brunswick, supra* note 84.

[213]Online: Nova Scotia Barristers' Society <http://www.nsbs.org/legalethics/chapter24.htm>.

[214]*Ontario, supra* note 24, Rule 5.04 came into force 1 November 2000. 5.04(1) reads:

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Ontario Human Rights Code),* marital status, family status, or disability with respect to professional

and employment practices.[215] The commentaries to rules 5.04(1) and (3) clearly define discrimination so as to make it clear that the rule is directed not only at intentional discrimination but also systemic or adverse effects discrimination *(i.e.,* substantive equality):

> An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly 'neutral' rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate.
> . . .
> An employer should consider the effect of seemingly 'neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees . . .
> . . .
> The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the

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> employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person.

Rule 5.04 was preceded by Rule 28 which came into effect in September 1994. It tracked the wording of Rule 5.04(1) although the commentary to Rule 5.04(1) is far more extensive and places obligations on the lawyer that did not exist under Rule 28. This is discussed *infra,* Rule 28 was preceded by Rule 13, Commentary 5 which came into effect in January, 1990. Commentary 5 read:

> The lawyer shall not discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, creed, sex, sexual orientation, age, marital status, family status, or handicap in the employment of other lawyers or articled students, or in dealings with other members of the profession or any other persons.

From 1974-1990, there was an even more limited discrimination rule that read:

> The lawyer shall not discriminate on the grounds of [enumerated grounds which expanded over the years] in the employment of other lawyers or articled students, or in dealings with other members of the profession.

As can be seen, this latter conception did not cover discrimination of third parties including potential and existing clients. See generally, Darryl Robinson, "Ethical Evolution: The Development of the Professional Handbook of the Law Society of Upper Canada" (1995) 29 Gazette 162 at 190-191 and *Duty of Non-Discrimination, supra* note 3 at 517. I wish to thank Jim Varro for helping me clarify the history of Ontario's anti-discrimination rule.

[215]*Ontario, supra* note 24. The Commentary to Rule 5.04(1) also provides that "[t]he right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."

> accommodation of differences that arise from the personal circumstances cited in rule 5.04. [216]

The Commentary to rule 5.04(1) further observes that it would not constitute discrimination should the differential treatment be designed to "relieve disadvantage."[217] Another important provision of the anti-discrimination rule is the obligation in both Ontario and CBA Code for lawyers *to take reasonable steps to prevent discrimination.*[218] For example, Chapter XX of the CBA Code (Commentary 2) obliges lawyers "to take reasonable steps to prevent or stop discrimination by the lawyer's partner, co-worker, or by any employee or agent" and that the failure to take such steps "also violates the duty of non-discrimination."[219]

The impact of an anti-discrimination ethical rule can be seen, for example, in the context of criminal defence work where the zealous advocate paradigm is seen by many as appropriate given that the client is pitted against the powerful state. In this context, many defence lawyers have traditionally believed that they are not accountable for their behaviour even if it was discriminatory or otherwise harmful. Consider the following two examples involving jury selection and cross-examination.[220]

Jury Selection. On December 3, 1991, Constable Douglas Lines shot Royan Bagnaut, a young Black male, as he was being pursued in downtown Toronto for having allegedly stolen a purse with a knife. Lines repeatedly fired at Bagnaut striking him in the arm and chest. Lines would claim that he thought Bagnaut had a gun. No gun was ever found. A hunting knife was later discovered in the lining of Bagnaut's jacket.[221] Lines was ultimately charged with criminal negligence causing bodily harm and related offences. In a pre-trial motion, the Crown attempted to prevent Lines' lawyers from striking prospective jurors from the jury simply because of the colour of their skin. The Crown argued that this would violate the equality guarantee of section 15(1) of the *Charter.* In a criminal trial, the Crown and defence can remove a juror who would otherwise be on the jury by exercising one of their allotted

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[216]*Ontario, supra* note 24. Prior to 1994, there was no explicit recognition that the anti-discrimination rule embraced substantive rather than formal equality.

[217]*Ontario. supra* note 24.

[218]This obligation did not previously exist.

[219] See Chapter XX B Non-Discrimination, online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/04-01-A.pdf>. The amended Chapter XX was approved in August, 2004.

[220]The absence of a discussion of the ethics and equality in these two contexts is discussed in some detail in *The Duty of Non-Discrimination, supra* note 3 at 481-482, 484-487.

[221]See Wendy Darroch "Police Shooting Victim Stole Purse, Court Told" *Toronto Star* (8 May 1993) A19.

peremptory challenges.[222] No reason has to be given by the challenging party. The trial judge dismissed the Crown's motion. Justice Bruce Hawkins held that section 15(1) does not apply to the defence because it is not a state actor and that the adversarial process demands that the defence be entitled to use whatever weapons it has available. As the trial judge put it, "it is fanciful to suggest that in the selection of a jury [the accused] doffs his adversarial role and joins with the Crown in some sort of joint and concerted effort to empanel an independent and impartial tribunal."[223] According to a media report, at trial, the defence exercised seven of its allotted twelve challenges. Four of the seven challenges were used to exclude racialized jurors including at least one Black juror from the jury box. The jury that ultimately tried the case consisted of 11 White jurors and one Asian juror.[224] Lines was acquitted.[225]

And so, while section 15(1) may or may not prohibit the discriminatory exercise of peremptory challenges by the defence,[226] I would argue that anti-discrimination ethical rules clearly place a prohibition on the use of peremptory challenges in this fashion.[227] This context provides a good example of where the boundary that has often served to demarcate the ethical limits on behaviour *(i.e.,* the law) will not have caught up to the substantive norms inherent in law's ambition and how our reconstructed role morality can serve as a safety mechanism to preserve the system's integrity.

Cross-Examining A Truthful Sexual Assault Complainant.[228] On February 3, 1997, a 22-year-old university student was awakened in the middle of the night and sexually assaulted

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[222]See the *Criminal Code,* R.S.C. 1985, c. C-46, s. 634(1) of. The number of challenges given to the parties depends on the seriousness of the offence. In this case, the Crown and defence would have been entitled to 12 challenges.

[223]See *R. v. Lines,* [1993] O.J. No. 3284 (Gen. Div.).

[224]See Tracey Tyler "Should Juries Reflect Society's Racial Mix" *Toronto Star* (22 May 1993) D4.

[225]See Wendy Darroch "Officer Cleared In Shooting Of Teen Suspect" *Toronto Star* (18 May 1993) A2; Tracey Tyler "Crown Appeal Dropped In Officer's Acquittal" *Toronto Star* (15 November 1994) A19.

[226]In *R.* v. *Brown,* [1999] O.J. No. 4867 (Gen. Div.), the trial judge concluded that he had jurisdiction to control the discriminatory exercise of peremptory challenges by the defence. But see *R. v. Gayle* (2001), 154 C.C.C (3d) 221 at 247-254 (Ont. C.A.) which did not address whether the limits it was placing on the ability of the Crown to use their peremptory challenges in a discriminatory fashion applied to the defence.

[227]See also Laura I. Appleman, "Reports of Batson's Death Have Been Greatly Exaggerated: How The *Batson* Doctrine Enforces A Normative Framework Of Legal Ethics" (2005) 78 Temp. L. Rev, 607 for a further discussion of the transformative impact of an anti-discrimination ethical norm in jury selection. Under *Batson v. Kentucky,* 476 U.S. 79 (1986) and its progeny, the prosecutor and defence counsel are prohibited from exercising their peremptory challenges in a gender or racially biased manner.

[228]All of the facts of this case and quotes from interviews come directly from Christie Blatchford "The Still, Sad Music Of Humanity" *Globe and Mail* (6 November 2004).

by a stranger. A set of footprints in the snow immediately below her unlocked kitchen window revealed how the perpetrator had broken into the apartment. The search for the rapist went cold until 2002 when the police were able to link a semen stain on the complainant's pajamas to one Philip Barlow. Over the course of a month long pre-trial hearing, Barlow challenged the admissibility of the DNA evidence. His motion failed. At trial, his defence suddenly became consent. Over a three day period, his lawyer vigorously cross-examined the complainant. According to a newspaper report, he suggested that she had consented, that she and Barlow had met at a bar and that she had brought him home. He even suggested that she concocted a break and enter story to "cover up a one-night stand of casual sex." Barlow did not testify. He was convicted and sentenced to six years imprisonment. While it is unknown what Barlow said to his lawyer about his guilt or innocence, his lawyer had, at a minimum, constructive knowledge of his client's guilt given how ludicrous the defence was in the circumstances.[229] It was no more plausible than had it been suggested to the complainant that the rapist was Barlow's identical twin. In addition, Barlow's lawyer was aware that his client had been convicted in 1991 of breaking and entering and that in 1997, the year that this complainant was raped, he had pleaded guilty to trespass in exchange for the withdrawal of a more serious charge of prowling at night.[230] The complainant and defence lawyer were interviewed by *Globe and Mail* columnist, Christie Blatchford. Blatchford summarized the complainant's reaction to her brutal cross-examination as follows:

> She was shocked by the minute parsing of what she'd told police right after the attack -- she used 'straddling' and 'lying on me' interchangeably, for instance, and [the defence lawyer] suggested that the latter implied she was having consensual sex.

Meanwhile, Barlow's lawyer told Blatchford that:

> he contested the DNA evidence on solid legal grounds, and a subsequent consent defence was not incompatible with that. What's more, he said, the prosecutor has a positive duty to prove the absence of consent, and the defence is entitled to make suggestions . . . .

These comments suggest that he was working under the constraints of a client who had admitted his guilt as they are the classic ways in which many defence lawyers perceive their role in defending the guilty.

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[229]For an interesting discussion of when a lawyer knows her client is guilty including circumstances other than when the client discloses his guilt, see *Ethics and Canadian Criminal Law, supra* note 11 at 37-51. The authors argue for an "irresistible knowledge of guilt" standard.

[230]See *R. v. Barlow,* [2002] O.J. No. 5652 (S.C.J.).

Surprisingly, Blatchford did not question the ethics of the lawyer's cross-examination and simply observed that "[t]he way . . . [the defence was] conducted . . . was perfectly proper and played by all Canada's legal rules." Leaving aside the issue of the legality of the cross-examination under the "good faith" requirements from *Lyttle,* I would argue that, in the circumstances of this case where there was no "air of reality" to a consent defence, that the non-discrimination rule ethically barred defence counsel from conducting it. This was a three-day cross-examination that served to further the historical discrimination and disadvantage faced by women. It was humiliating, traumatizing and based on stereotypical assumptions.[231] The trauma of the cross-examination was particularly accute for the complainant in this case. As recounted by Blatchford, "because Mr. Barlow had said, 'I know you guys' before he left on the night in question, she'd always harboured the nagging suspicion that maybe they *had* crossed paths before." And, so when Barlow's lawyer suggested to her that they had met that night at a bar, "she believed he was actually giving her hard information, not questioning her." The complainant responded "I did?" and then "burst into tears."

Do no harm

One of the most common themes expressed throughout professional codes of conduct in Canada is "do no harm" whether it be harm to your client, to the tribunal and its fact-finding mission, the profession, opposing counsel, or the public at large. This is very significant given that this is a fundamental element of a justice-seeking ethic. There are a number of "do no harm" exhortations that I want to highlight. The first is the interpretation rule in Ontario (rule 1.03(1)(b)) which states that:

> A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to . . . protect the dignity of individuals.[232]

The exhortation could not be any more explicit. Lawyers have an ethical obligation to ensure that their conduct does not harm the *dignity of individuals.*

The second is the adoption of the Supreme Court of Canada's approach to "future harm" in *Smith v. Jones* in Ontario[233] and, more recently by the Canadian Bar Association.[234]

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[231]This position is advanced by David Luban. See *Lawyers and Justice. supra* note 23 at 150-152. Luban originally favoured a general rule barring cross-examination of all sexual assault complainants. He later slightly softened his position to cases where on any reasonable view of the facts there was no consent or where the client privately concedes that there was no consent. See *Partisanship, Betrayal and Autonomy, supra* note 54 at 1026-1035. See also Stephen Ellmann, "Lawyering For Justice in a flawed Society" (1990) 90 Colum. L. Rev. 116 at 155-157; and the discussion in *The Criminal Defence* Lawyer's *Role, supra* note 16 at 394-396.

[232]*Ontario, supra* note 24.

[233]See Rule 2.03(3), *Ontario. supra* note 24 which came into force 1 November 2000.

Historically, lawyers in Canada were prohibited from disclosing confidential information to prevent harm unless it involved future criminal conduct. This meant, for example, that a lawyer for the defendant in a torts case could not disclose the discovery that the plaintiff had a life-threatening injury or disease that had gone undiagnosed by the plaintiff's doctors.[235] Under the new Ontario and CBA rules, lawyers can now disclose confidential information where they have information that "there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being . . . ." In addition, since *Smith v. Jones* recognized that the public safety exception applies to all "duties of confidentiality," lawyers in other provinces should now be able to disclose under similar circumstances under the "otherwise authorized by law" exception to confidentiality.[236]

In Ontario, there is a discretion to disclose future harm. It is mandatory under the CBA regime.[237] It is hard to imagine when it would be just not to exercise the discretion to disclose, but giving lawyers that discretion is consistent with the contextual approach to ethics set out *infra.* The danger with categorical rules even those created in the interests of justice is that circumstances will arise that were perhaps not contemplated by the drafters and which require some flexibility. The case of Marcel Tremblay provides us with one such case. Tremblay suffered from a fatal lung disease. He planned to take his own life to ensure that he could die with dignity and to spark a national debate on the issue of assisted-suicide.[238] As there is no criminal prohibition on suicide, there was no legal command that could deny him this right. He was concerned, however, with the possibility that his family members might be charged under the assisted-suicide provisions of the Criminal Code, if they were present during his suicide.[239] Tremblay went to see Lawrence Greenspon, a well-

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[234] See Chapter IV - Confidential Information (Rule 2), online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/04-01-A-Annex1.pdf>. The amendment was approved in August, 2004.

[235]This is the classic dilemma from *Spaulding v. Zimmerman,* 116 N.W. 2d 704 (Minn. 1962) *[Spaulding].* See the discussion of *Spaulding* and the different ethical issues raised by the case in Roger C. Crampton and Lori P. Knowles, "Professional Secrecy and Its Exceptions: *Spaulding v. Zimmerman* Revisited" (1998-1999) 83 Minn, L. Rev. 63,

[236]Proulx and Layton come to a similar conclusion that *Smith v. Jones* established a "a public safety exception to the common law duty of confidentiality. However, they go on to observe that "[c]ounsel outside of Ontario who relies on this reading of *Smith v. Jones* to justify disclosure has nonetheless probably breached the ethical dictates of his or her governing body." See *Ethics and Canadian Criminal Law, supra* note 11 at 233-239,

[237]It is unclear whether there is a discretion under *Smith v. Jones.* See *Ethics and Canadian Criminal Law. supra* note 11 at 244-245,

[238]See Joanne Laucius "Ottawa Man Kills Himself To Draw Attention To Cause" *The Gazelle* (29 January 2005) A12,

[239]See the *Criminal Code. supra* note 98, s. 241, which reads:

known criminal lawyer in Ottawa for legal advice. Although Greenspon admitted that he had both moral and ethical difficulties with Tremblay's decision, he recognized that "[his] role [was] . . . to advise Mr. Tremblay and his family about the possible implications of the law. It is certainly not for me to make any judgment about what he has chosen to do."[240] Suppose, however, that Tremblay had not wanted to publicize his plans in order to die in private without the intrusion of the state and further suppose that Greenspon was satisfied that Tremblay was mentally fit to make this decision.[241] Under a mandatory disclosure regime, Greenspon would have had to, in theory, ignore his client's request and notify the police.[242]

Returning to the *Smith* v. *Jones* conception of future harm which was explicitly adopted in Ontario, David Layton has argued that it is more narrow than the previous approach taken in Ontario. Under the previous exception, a lawyer could disclose confidential information "necessary to prevent a crime . . . if the lawyer has reasonable grounds for believing that a crime is likely to be committed."[243] He takes this position primarily because a lawyer can now no longer disclose confidential information to prevent *any* crime (his emphasis). I disagree. By taking away the crime element of the exception, only non-violent crimes such as drug or property offences are not, in theory, covered by the exception although in many cases these crimes involve violence and so would trigger the exception. But more fundamentally, it is precisely by taking away the crime requirement and adding psychological harm to the mix, that the exception is much broader than its predecessor. While Layton would ultimately like to see a future harm exception not saddled with a crime or bodily harm limitation, I would argue that the *Smith v. Jones* approach is sufficiently broad enough to capture the kinds of harm that Layton and others are concerned about.[244] Consider, for example, the following chart of possible harmful conduct:

> Everyone who (a) counsels a person to commit suicide. or (b) aids or abets a person to commit suicide. whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[240]Aron Heller and Vito Pilieci "Ailing Kanata Man Plans To Die Tonight: Right-To-Die Advocate Announces His Suicide" *The Ottawa Citizen* (28 January 2005). See also Pauline Tam "Tremblay Case Raises Host Of Ethical Questions" *National Post* (29 January 2005) A8.

[241]While Tremblay had already been seen by two psychiatrists before the police heard of his plan, they nevertheless insisted that he undergo a further psychiatric evaluation. See Jennifer Pritchett. Andrew Duffy & Joanne Laucius "Ailing Man 'Had Enough'" *The Ottawa Citizen* (29 January 2005) A1. It is this kind of coercive state activity that someone may wish to avoid.

[242]Unless, of course, he was prepared to engage in nullification. Nullification is discussed further *infra.*

[243]See "The Public Safety Exception: Confusing Confidentiality, Privilege and Ethics" (2001) 6 Can. Crim. L. Rev. 217 at 223, 233-238 *[The Public Safety Exception].*

[244]See the discussion in *Ethics and Canadian Criminal Law, supra* note 11 at 236-241.

Type of Harm	*Is Disclosure Permitted Under Current Ontario and CBA Future Harm Exception?*	*Is Disclosure Permitted Under Old Ontario and CBA Exceptions?*
Acts or Threats Of Violence	Yes	Yes
Existence Of An Undiagnosed Harmful Medical Condition	Yes	No
Client's Intention To Commit Suicide	Yes	No
Emotional and Psychological Abuse Of Child	Yes[245]	No

[245]I recognize that in its final report (28 April 2000) to Convocation, the Ontario Task Force did, in fact, recommend that the disclosure exception be broadened to include " . . . limited disclosure where a lawyer has reasonable grounds for believing that there is an imminent risk of substantial harm to the welfare or security of a child or other vulnerable person (Rule 2.03 (4)) and where a lawyer has reasonable grounds for believing that there is an imminent risk that a fraud that may cause substantial financial injury to another is likely to be committed (Rule 2.03 (5))." See online: Law Society of Upper Canada <http://www.lsuc.on.ca/conv/apr2000/RulesTaskForce.PDF>. Convocation ultimately voted against adding sections (4) and (5). See online: Law Society of Upper Canada <http://www.lsuc.on.ca/conv/jun2000/special_convocation.pdf>. Nevertheless, the emotional and psychological abuse of a child or indeed other conduct that could be said to create substantial harm to the welfare or security of a child would clearly trigger the psychological harm of the rule that was passed by Convocation.

Defective Medical, Drug Or Vehicle Product[246]	Yes	No
Dangerous Environmental Hazard	Yes[247]	No
Wrongful Conviction	Yes, particularly if the individual were incarcerated	No
Economic Loss	Arguably where the victims are vulnerable (eg., the elderly) and the scope of the loss is significant	Yes

Another "do no harm" theme can be seen in the Ontario response to the Enron crisis and the *Sarbanes Oxley Act of 2002.* In Ontario, rules 2.02(5.1) and (5.2) require a lawyer to withdraw when she discovers intended or ongoing dishonest, fraudulent, criminal or illegal conduct occurring in the organization that retains her and when her attempts of dissuasion up the ladder of authority within the organization have failed.[248] There are similar requirements in Nova Scotia[249] and the CBA Code[250] although there is no mandatory

[246]For example, in the United States, secret settlements in cases involved defective tires (Firestone) and birth control device (Dalkon Shield) caused widespread devastation. In the case of Firestone, 150 individuals were ultimately killed with another 500 injured. In the case of Dalkon Shield, "the device was linked to 11 deaths, 209 miscarriages and countless cases of sterilization or birth defects." See Editorial - "When Secrets Can Be Deadly" *San Francisco Chronicle* (10 May 2005). To address the harm caused by non-disclosure clauses in civil settlements, there is legislation pending in California that would prohibit such clauses where there is a known public danger. See AB 1700, online: <http://www.aroundthecapital.com/bills/AB_1700>.

[247]Layton himself appears to recognize this kind of harm might fall under the Ontario exception. *The Public Safety Exception, supra* note 119 at page 236. As he observes:

> But query the case of dangerous environmental hazards or faulty products manufactured by a client. Also query the situation where a huge fraud would devastate the financial security of thousands of individuals. Serious bodily harm might be implicated in the former case, and perhaps in the latter example under the rubric of "serious psychological harm that substantially interferes with health or well-being."

[248]The new rule was approved by Convocation 24 March 2005. See online: Law Society of Upper Canada <http://www.lsuc.on.ca/services/contents/archive/rpc_archive_en.jsp> and <http://www.lsuc.on.ca/news/pdf/convmar04_prc_report.pdf>.

[249]See "Honesty and Candour When Advising Clients" (Commentary 4.21 and 4.22) of the Nova Scotia Legal Ethics and Professional Conduct Handbook Chapter 4, online: Nova Scotia Barristers' Society <http://www.nsbs.org/legalethics/toc.htm>.

withdrawal requirement in the latter.[251] A mandatory withdrawal obligation should serve as an important deterrent as it means that unless the company ceases and desists their illegal conduct, the company will be unable to secure legal advice. Indeed, it could be argued that withdrawal also requires notification to any new lawyer of the failure of the organization to cease and desist its unlawful conduct. If the purpose of the rule is to ensure that organizations are deprived of legal advice when acting illegally, then any new lawyer must be apprised of the situation to ensure that they are not duped into representing the organization.

Before leaving this discussion of "do no harm," it is worth pointing out that in 1993, the Law Society of Prince Edward Island added the following Commentary to Chapter IX - The Lawyer As Advocate of their Code of Professional conduct:

> 7A. In order to minimize the risk of domestic violence inherent in many family law matters, the lawyer as advocate in such proceedings, whether civil or criminal in nature, must avoid all unnecessary delays in the advancement or defence of an action from commencement through conclusion. [252]

Giving merit a chance

All of the codes of conduct in Canada prohibit lawyers from engaging in conduct that would mislead the court and jeopardize the chances of a decision that reflects the legal merit of the dispute or claim. And so we see requirements that advocates not, for example: knowingly offer or rely on false evidence; misstate evidence, argument or the law; or deliberately refrain from informing the court of binding authority that the other party as not presented.[253] There are a number of other exhortations that are designed to prevent the frustration of the merit of the claim and are thus integral to a justice-seeking ethic. These include:

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[250] See "Confidential Information" (Commentary 12) Chapter IV, online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/04-01-A-Annex1.pdf>.

[251] In other provinces, lawyers could go further and disclose the conduct, if it were criminal, under a future harm exception. For example, "Confidentiality" (Commentary 9), Chapter 5 of the New Brunswick Rules permits disclosure for crimes not involving violence. See *New Brunswick, supra* note 84.

[252] Online: Law Society of Prince Edward Island <http://www.lspei.pe.ca/pdf/Chapter_IX_Commentary_7A.pdf>.

[253] See e.g., *Ontario, supra* note 24 Rule 4.01 (2) and Chapter lX -- Lawyer As Advocate (Commentary 2) *CBA, supra* note 24.

- avoiding sharp practice and not taking advantage of or act without fair warning upon slips or mistakes not going to the merits or involving the sacrifice of a client's rights.[254] In Alberta, the rule states that "[a] lawyer must not take advantage of a client a benefit to which the client has no *bonafide* claim or entitlement"[255];

- advising the court to not rely on testimony given in court (including the client's testimony) that you know is false[256]; and,

- disclosing to the court that material testimony given by a witness, including that of the client, is false.[257]

II. *Actualization, empowerment, and motivation*

1. Adopting a pervasive justice-seeking ethic

Having identified a reconstructed role morality that takes the pursuit of justice as its guiding principle, all lawyers need to take the next step and adopt a pervasive justice-seeking ethic in all facets of their professional role. How is such an ethic actualized? The answer is, as Simon recognizes, the engagement of *contextual judgment.* It is a style of judgment that is concerned with substance over procedure and purpose over form.[258] As opposed to rule-based categorical thinking, contextual judgment involves discretionary decision-making. It requires an assessment of all of the relevant factors that impact on the justice of the relevant claim and/or proposed course(s) of action including interests other than those that relate to the client. Relevant factors include:

- the legal merit of the claim or conduct, defined in substantive terms. This includes assessing whether the anti-discrimination norm is engaged and/or whether history has taught us that enforcement of the positivist law will contribute to injustice;

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[254]See *Ontario, supra* note 24 Rule 6.03(3). Sec also Chapter lX -- Lawyer As Advocate (Commentary 7) *CBA, supra* note 24.

[255]See Chapter 4 -- Relationship Of The Lawyer To Other Lawyers (Rule 3), *Alberta, supra* note 87.

[256]See Chapter 10 -- Lawyer As Advocate (Rule 15), *Alberta, supra* note 87. Only Alberta and New Brunswick have such provisions although New Brunswick's rule is only triggered vis-a-vis material evidence.

[257]See Chapter 9-Lawyer As Advocate (Rule 12), *New Brunswick, supra* note 84. The rule is discretionary as the lawyer can choose to withdraw or ask the court not to rely on the testimony.

[258]*The Practice of Justice, supra* note 2 at 139-149.

- whether the anti-discrimination norm is engaged by the procedure or process involved;

- the nature of the work (*e.g.,* transactional or litigation; civil or criminal);

- the nature of the client *(e.g.,* individual or corporate entity; privileged or disadvantaged and marginalized);

- whether there is a power imbalance between the parties including whether all of the parties are represented by competent lawyers;

- whether there are any other factors that will impact on the ability of the process or procedure to produce the legally correct result; and,

- the nature and extent of the harm that has been or will be caused by the client.[259]

Contextual judgment is in no way foreign to lawyers in this country. Our common law is now largely governed by contextual principles such as reasonableness in criminal and tort law, the "best interests of the child" in family law, or the repute of the administration of justice in *Charter* litigation. In the law of evidence, for example, the Supreme Court has now rejected categorical reasoning in favour of a more flexible principled approach to adtnissibility.[260] Our statutes also require contextual decision-making. Consider, for example, section 276(3) of the *Criminal Code* which identifies the factors to be taken into

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[259] *Thinking Like a Lawyer* (1998), *supra* note 17. To illustrate the importance of context, it is instructive to return to the trial of Queen Caroline. While many have used Lord Brougham's speech as the justification for zealous protection of the client's interests, Simon has correctly pointed out that properly placed in context, it is really more a vigorous defence of a client's rights and ultimately of justice than interest:

> Brougham's threat [to disclose the King's will and potentially bring down the monarchy] was based on a far more complex set of judgments than simply the Queen's interests would be served by producing King George's will. In the first place, Brougham believed that his client was factually innocent of the acts with which she was charged. In the second place, the secret marriage was centrally relevant to an important substantive defense: if George had been married previously, then his later marriage to Caroline was invalid, and she was legally incapable of adultery. In the third place, Brougham shared the popular view that, even if the charges had been true, this extraordinary prosecution would have been inappropriate given the King's outrageous mistreatment of his wife from the beginning of their marriage.

See *Thinking Like a Lawyer* (1998), *supra* note 17 at 6-7.

[260] See *e.g., R. v. Starr* (2000), 147 *C.C.C.* (3d) 449 (S.C.C.); *R.* v. *Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.).

account when determining the admissibility of a complainant's prior sexual history under section 276(2):

> 276(3) In determining whether evidence is admissible under subsection (2), the judge . . . shall take into account;
>
> (a) the interests of justice, including the right of the accused to make full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law . . . . [261]

We also see a recognition that lawyers regularly engage in complex judgments in the law on negligence and ineffective assistance of counsel.[262]

In some cases, contextual judgment will call for conduct that is inconsistent with the prevailing code of conduct or the positivist law. This could occur, for example, where the codes have not caught up to the demands of a justice-seeking ethic, the positivist law is unjust, or where there is no other way to ensure a just result. In order to empower lawyers to deal with this situation, Simon suggests that lawyers engage in what he calls *ad hoc* nullification. As he points out, there is already institutionalized nullification in the criminal justice system. The police do not enforce all laws and even when they discover a violation, they do not always lay a charge. Prosecutors sometimes dismiss charges because of the unconstitutional behaviour of the police. Judges sometimes refuse to strictly apply precedent in order to achieve a substantively just result and, in some cases, juries will refuse to convict a guilty person because of their dislike of the law or manner in which the evidence was obtained.

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[261] R.S.C. 1985, c. C-46.

[262] See generally *Folland v. Reardon,* (2005) O.J. No. 216 at para. 44 (C.A.). See also *Joanisse, supra* note 47 at 61.

According to Simon, nullification should not be viewed as a recipe for lawlessness but rather a re-orientation of prevailing norms to ensure the actualization of the goals of the profession and to assist the pursuit of justice when procedures break down. As he puts it "the lawyer should defy the rule, not as an act of lawlessness, but as an act of principled commitment to legal values more fundamental than those that support the rule."[263] Nullification is a powerful means of individual empowerment and should provide some comfort to the radical lawyer who thinks that role morality, even as reconstructed in the interests of justice, may be too conservative for meaningful and transformative lawyering. There are different forms of nullification including refusing to represent certain kinds of cases *(e.g.,* sexual assault cases or cases involving police officers charged with shooting racialized individuals) even if you were the last lawyer in town, engaging in zealous advocacy that would otherwise not be permitted under a justice-seeking ethic, relying on ethical norms from other jurisdictions, wilful blindness *(e.g.,* not asking your client for admissions that would trigger a lawyer's obligation not to mislead the court), breaching the codes of conduct, or even breaking the law.

Although nullification occurs in the criminal justice system and zealous advocacy is itself often a recipe for nullification of the substantive norms inherent in law, it is a practice that is not generally accepted in the profession, particularly where the conduct involves violating the rule of law.[264] It will, therefore, require considerable courage and motivation. It is here where personal responsibility comes into play. A lawyer must take responsibility for the circumstances under which he or she would be prepared to engage in nullification. A lawyer must also be prepared to acknowledge their use of nullification and bar organizations must be prepared to openly address this issue, provide advice, and ultimately institutionalize it.[265]

My own view of criminal law advocacy is largely based on principles of nullification. It is well documented that the criminal justice system is inherently biased towards racialized groups.[266] And so, with respect to Black and Aboriginal accused, for example, racial profiling,

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[263]*The Practice of Justice, supra* note 2 at 164.

[264]The concept of nullification is also problematic given that it could also be used by those seeking to subvert justice. In the United States, we have seen this in southern cases involving Black accused. See *In Defense of Law and Morality, supra* note 37 at 279-280. In Canada, we have also seen juries likely use unconscious nullification in cases involving White police officers charged with shooting young Black men. See Gabriella Pedicelli, *When Police Kill: Police Use of Force in Montreal and Toronto* (Montreal: Vehicule Press, 1998) at Chapter 4.

[265]See *e.g.,* the discussion in Robert M. Palumbos, "Within Each Lawyer's Conscience A Touchstone: Law, Morality And Attorney Civil Disobedience" (2005) 153 U. Pa. 1. Rev. 1057 at 1092-1096.

[266]The number of Royal Commissions and inquiries documenting this are too numerous to be cited. They include: *Report Of The Commission Of inquiry Into Matters Relating To The Death of Neil Stonechild* (October 2004), online: The Stonechild Inquiry <http://www.stonechildinquiry. ca/finalreport/default.shtml>; *Legacy*

biased decision-making in bail, verdicts and sentencing have led to an adversarial process that can no longer guarantee a result obtained in a non-discriminatory fashion. As a result, I believe that criminal defence lawyers have a substantial licence to engage in zealous advocacy when representing accused from racialized or other marginalized communities. The difficult question remains how far you are prepared to push the nullification envelope in the interests of justice. I provide one situation for reflection and debate.

Misleading Cross-Examination. Let us assume that you have an Aboriginal client who is charged with possession of a small pocket knife. On the night of your client's arrest, the police had been patrolling a so called high crime area in Halifax and decided to stop and search your client. Your client admits that he was in possession of the knife but feels that he was targeted because he is Aboriginal. You agree and file a *Charter* application. It is dismissed. The case proceeds to trial. The arresting officer is the first witness. You suggest to the officer in cross-examination, that the only reason he stopped your client was because he was a young Aboriginal male. The officer denies the suggestion. You then suggest that the officer realized that his conduct might be later scrutinized and, so he concocted a story about finding a knife on your client. The suggestion is denied. Since the lawyer would not have a "good faith" basis to believe that the suggestion is true, the question would violate the legal and ethical rule set out in *Lyttle.* However, is it an appropriate case for nullification given the relevant social context?[267] What about if the client wanted to testify that he was not in possession of a knife that night? Would this form of nullification be ethical?

2. Identity lawyering in the interests of justice

I want to end this article with a discussion of a potential source of motivation for a justice-seeking ethic. In "Beyond Bleached-Out Professionalism", David Wilkins examines the "relationship between a lawyer's group-based identity and her professional role."[268] As he

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Of Hope: An Agenda For Change, Final Report From The Commission On First Nations and Metis Peoples And Justice Reform (June 2004), online: Justice Reform Commission <http://www.justicereformcomm.sk.ca>; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, December 1995); *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); *Royal Commission* Oil *the Donald Marshall Jr. Prosecution* (Halifax: Queen's Printer, 1989). See also, Clayton James Mosher, *Discrimination and Denial: Systemic Racism In Ontario* s *Legal and Criminal Justice Systems, 1892*-1961 (Toronto: University of Toronto Press, 1998); Frances Henry, Carol Tator, Winston Mattis & Tim Rees, *The Colour of Democracy: Racism In Canadian Society* (Toronto: Nelson, 1998) at Chapters 5 & 6; *R. v. Gladue* (1999). 133 C.C.C. (3d) 385 (S.C.C.); *R.* v. *Borde* (2002), 172 C.C.C. (3d) 225 at 236 (Ont. C.A.); and *R. v. Park,* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.).

[267]A very similar scenario is provided by David Layton in *The Criminal Defence Lawyer's Role, supra* note 16 at 400,

[268]"Beyond 'Bleached Out' Professionalism: Defining Professional Responsibility for Real Professionals" in D,L. Rhode, *ed. "Ethics In Practice: Lawyers' Roles, Responsibilities, and Regulations* (New York: Oxford University Press, 2000) at 209 *[Beyond Bleached Out Professionalism],* The term "bleached-out professionalism" comes

points out, the traditional approach to professionalism "requires lawyers to check their identities at the door when performing their professional roles . . . . [B]ecoming a lawyer means adopting a 'professional self' that supercedes all other aspects of the lawyer's identity."[269] Justice is colour, gender, or religion blind so the rhetoric goes and therefore, this part of the self is seen as irrelevant. As Wilkins observes:

> It is not surprising that bleached out professionalism has become a core professional ideal. Norms such as neutrality, objectivity, and predictability are central to American legal culture. Lawyers are the gatekeepers through which citizens gain access to these important legal goods. If the law is to treat individuals equally, the argument goes, then lawyers must not allow their nonprofessional commitments to interfere with their professional obligation to give their clients unfettered access to all that the law has to offer. A professional ideology that treats a lawyer's nonprofessional identity as relevant to her professional conduct appears to threaten this important role. [270]

This formalized bleaching out occurred in Canada from 1876 to 1951 when Aboriginal lawyers had to give up their status of "Indian."[271] Today, it occurs more informally. Indeed, many traditionally excluded lawyers likely feel that they need to go great lengths to prove that their loyalty is to the profession.

Wilkins is rightly critical of this traditional conception of professionalism. As he argues, the problem is that by encouraging lawyers to not engage in identity lawyering *(i.e.* letting their non-professional self or group affiliations impact on their thinking process), we are perpetuating the systemic biases that exist in society and in the legal profession. This is

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from S, Levinson, "Identifying The Jewish Lawyer: Reflections On The Construction of Professional Identity" (1992-1993) 14 Cardozo L. Rev, 1577,

[269]*Beyond Bleached Gut Professionalism, supra* note 144 at 209. Wilkins further notes that:

> In addition to the benefits that bleached out professionalism offers to the consumers of legal services, it also appears to safeguard the interests of the women and men who become lawyers . . . . This 'professional' status is particularly important for the profession's new entrants-Jews, women, blacks, and other racial and religious minorities-who. in their nonprofessional lives, have been subject to discrimination on the basis of certain aspects of their identities. These traditional outsiders have a powerful stake in being viewed as lawyers *simpliciter;* freed by their professional status from the pervasive weight of negative identity-specific stereotypes.

Finally, bleached out professionalism appears to uphold the legal system's core commitment to the fundamental equality of persons.

[270]*Beyond Bleached Out Professionalism, supra* note 144 at 211.

[271]See *Indian Act, 1876,* S.C. 1876, c. 18, s. 86(1) as discussed in *Gender and Race, supra* note 21.

certainly the case in Canada where there is now overwhelming evidence that justice is neither gender nor colour blind. "Bleached out professionalism" has and continues to be a powerful means of socialization that has ensured that the White middle class male heterosexual privilege that has historically guided the direction of the profession is not threatened by a more diverse group of lawyers.

By bleaching out identity, we are losing an important voice that can identify inequality and other systemic problems in the legal profession which is a critical component of contextual thinking under a justice seeking ethic. As Wilkins persuasively argues, contrary to popular belief, group consciousness doesn't make lawyers less neutral or objective - just the opposite in fact. Indeed, as he points out, feminist legal scholars have played an important role in advancing an alternative dispute resolution model.[272] In addition, since identity gives individuals special reasons for "caring about others who share their identity and to work together to advance the interests of their group" -- we are losing a vital source of passion and commitment for the pursuit of social justice and a justice-seeking ethic.[273] Of course, as Wilkins notes, there is still a legitimate question -- where do you draw the line? What aspects of one's non-professional self should be expressed in lawyering? I would argue that the focus should be on attributes that are relevant to group advancement, social justice, and fundamental fairness.[274]

Conclusion

This article has attempted to demonstrate that the role morality of the legal profession in Canada has been evolving over the last fifteen years. With this reconstruction, the emphasis of lawyering is slowly shifting away from zealous pursuit of the client's cause within the bounds of the law to the pursuit of the cause of justice. That pursuit demands that lawyers engage in behaviour that will enhance a fair, other-regarding, and nondiscriminatory process of problem-solving and that will protect the right of the client to obtain the remedy he or she is entitled to under the law properly interpreted.

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[272]*Beyond Bleached Out Professionalism, supra* note 144 at 218.

[273] *Beyond Bleached Out Professionalism, supra* note 144 at 219-220, 223.

[274]*Beyond Bleached Out Professionalism, supra* note 144 at 222-234. In the United States, the issue of identity lawyering has been particularly acute in the context of client selection. For example, the question has been raised as to whether a racialized lawyer should use identity consciousness to refuse to prosecute certain criminal offences because of systemic racism in the justice system. It is now commonly referred to as "the Darden dilemma" following the selection of Chris Darden, an African American, to prosecute O.J. Simpson and his subsequent attempts to exclude the audiotapes that exposed his main witness, Mark Furhman, as a racist. See K.B. Nunn, "'The Darden Dilemma': Should African Americans Prosecute Crimes?" (2000) 68 Fordham L. Rev. 1473. In the context of gender, see the discussion of the Nathanson case in the forum discussion at (1998) 20 W. New Eng. L. Rev. 23-142. Judith Nathanson, a well known Massachusetts divorce lawyer, was successfully sued by a male client for discrimination. Nathanson refused to represent men in divorce cases in her effort to bring out about systemic changes in family law.

There are likely to be many sceptics. Some will argue that I have failed to present sufficient evidence of a reconstruction. To them, I urge patience as this is a work in progress. Others, without denying the importance of the anti-discrimination and do no harm norms now incorporated in our codes, will view the reforms as nothing more than political window dressing designed to convince the public that self-regulation works and that the profession is motivated by the public interest. These sceptics will point to the impossibility of trying to institutionalize justice in a profession and economy that is so driven by the bottom line and where institutional culture, particularly elite law firm culture, too often defeats the best of intentions.[275]

These are valid concerns. Much of the reorientation and resistance will require structural changes including the re-thinking of self-regulation and law school pedagogy. It will require a commitment to interpreting and applying all of the rules in a manner consistent with a justice-seeking ethic. And finally, as I have said repeatedly throughout this piece, we will need stronger leadership from the Canadian Bar Association and law societies. However, before we move on to institutional reform, we need to have a set of meaningful and workable standards. Unfortunately, we have only had few attempts in Canada to set out systemically a coherent theory of ethical lawyering.[276] This article attempts to fill in the gap.

A final group of sceptics will argue that a justice-seeking ethic simply places too much emphasis on legal values and law's ambition. While there is no question that the law has often been corrupted in favour of the dominant groups by those interpreting and applying it, in my view, the law can be a powerful means of securing justice. The recognition of same sex

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[275]For example, in her 1993-1994 study of lawyers in British Columbia, Joan Brockman found that 73% of women and 45% of men indicated that they thought that the anti-discrimination rule in British Columbia's code of conduct would not be effective or were not optimistic about its effectiveness. See *Use of Self-Regulation, supra* note 30 at 217. See also, Richard L. Abel & Philip S.C. Lewis, eds., *Lawyers & Society: The Common Law World* (Berkeley & Los Angeles: University of California Press, 1988). As Jerome Bickenbach notes:

> Abel has argued that there is no empirical evidence that legal practitioners are, because of their professional status, able to rise above the profit motive in order to serve the public interest. Not only is the moral mandate of law blatant PR, none of the standard features of professionalism are actually manifested in practice.

See "The Redemption of the Moral Mandate of the Profession of Law" (1996) 9 Can. 1. L. & Jur. 51 at 56.

[276]These include the works of Allan C. Hutchinson (see *Legal Ethics and Professional Responsibility, supra* note 23; "Calgary and Everything After: A Postmodern Re-Vision Of Lawyering" (1994-1995) 33 Alta. L. Rev. 768); Rosemary Cairn Ways (see *Reconceptualizing Professional Responsibility. supra* note 57); Richard Devlin (see *Normative and Somewhere To Go, supra* note 67) and Randal N.M. Graham, *Legal Ethics: Theories. Cases and Professional Responsibility* (Toronto: Emond Montgomery, 2004).

marriages, for example, would likely never have occurred without *Halpern* and other similar cases. Moreover, as I have tried to argue, a justice-seeking ethic does not rest solely on positivist law but rather asks lawyers to properly interpret the law by examining its consistency with substantive legal norms including fairness, equality, and harm reduction and with special attention to our history of injustice.

This article has also had more modest ambitions. For those seeking a meaningful practice of law, I have tried to chart a course that will identify some basic obligations owed by lawyers in the pursuit of justice and how a justice-seeking ethic can be actualized. Perhaps more importantly, I have attempted to identify a course of redemption by pointing largely to code based developments that can provide support, courage and ultimately justification for justice-seeking lawyers. There is no longer any excuse.

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Appendix 4

SKILLS AND PROFESSIONAL RESPONSIBILITY COMPETENCY COMPARISONS LAW SCHOOLS AND LAW SOCIETY OF UPPER CANADA

COMPETENCY DESCRIPTIONS*

ETHICS AND PROFESSIONALISM

- Identifying professional ethical dilemmas as and when they arise in practice and dealing with these appropriately, in particular
    - Identifying and responding appropriately to potential and actual conflicts of interest
    - Understanding and respecting the extent and limits of the confidentiality obligation
    - Carrying out fiduciary duties to clients and others
- Articulating her or her own ethical framework for making choices that respond to ethical
- Demonstrating a commitment to providing effective and competent legal services to advance the client's interests while upholding the law
- Demonstrating a commitment to the promotion of justice

CLIENT RELATIONS AND PRACTICE MANAGEMENT

- Interviewing to understand the problem, issues, context and goals or objectives of the client and to gather relevant information
- Advising the client about decisions that must be made and options that are available
- Communicating effectively with clients
- Managing client expectations
- Managing time and setting priorities
- Using a tickler system
- Maintaining an orderly and up-to-date files, including documenting actions taken on a file

** Although many of the law school courses listed in the chart cover a variety of professional responsibility and ethics competencies, courses are listed according to the primary competencies covered.*

LRD: Jan 11/08

SKILLS AND PROFESSIONAL RESPONSIBILITY
COMPETENCY COMPARISONS
LAW SCHOOLS AND LAW SOCIETY OF UPPER CANADA

COMPETENCY DESCRIPTIONS CONT'D

MANAGING A CLIENT FILE (TRANSACTIONS/APPLICATIONS AND DISPUTE RESOLUTION)

- Understanding client goals
- Developing a theory of the file
- Developing a dispute resolution strategy (including making choices and decisions for file direction)
- Preparing for the different forms of dispute resolution available at the various stages of the case
    - Negotiation
    - Mediation
    - Trial/hearing
    - Appeal
- Implementing a dispute resolution strategy and using the skills of advocacy appropriate to the chosen forum

LEGAL RESEARCH AND WRITING

- Conducting electronic research using relevant legal and non-legal databases
- Conducting library/paper-based research
- Analyzing results, including sorting cases, legislation and secondary legal materials according to relevance; identifying leading cases and trends in the law; and citing all sources appropriately
- Drafting a legal memorandum that analyzes and presents the results of the research in an effective manner
- Providing practical and clear written advice based on research
- Drafting clear and cogently written advocacy