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Professional Ethics for Lawyers and Law Schools: Interdisciplinary Education and the Law School's Ethical Obligation to Study and Teach about the Profession

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I. INTRODUCTION

What does it mean to be a "professional?" The question lies at the heart of any attempt to teach professional ethics. Yet, despite its undeniable centrality, there is remarkably little consensus among the current generation of legal ethics teachers about what this term actually means beyond its obvious historical and descriptive connotations. Few would deny, of course, that lawyers have traditionally been considered "professionals" or that, in the minds of many, this designation carries with it certain normative implications about the relationship between lawyers and society that links the "legal profession" to the small number of other occupational groups (for example, doctors) that are also considered professionals. What has become quite controversial, however, is whether these normative claims are either true or, if true, socially desirable. Moreover, even among those who believe that the concept has some independent normative value worth preserving, the claim that "professionalism" can be taught remains deeply controversial.[1]

In this essay, I argue that the lack of consensus over the meaning and normative value of professionalism is symptomatic of a profound ethical failing in American legal education, one that I suspect is common in law school in other parts of the world as well: the law school's persistent failure to make the norms, structures,

and conditions of legal practice the subject of serious teaching or scholarship. This failure, I suggest, is deeper than the usual criticism that there is an increasing separation – or "disjunction" in the words of one influential account[2] – between the legal academy and the profession that it is supposed to serve.[3] Instead, it is nothing less than an ethical failure by the legal academy to meet the legitimate needs of its three principal constituencies: students, the bar, and society. This is a time of tremendous upheaval and change for lawyers in the United States and around the world. If individual lawyers, the bar, and the public we serve are to emerge from this time of change with a legal profession capable of meeting the enormous challenges it now faces, than the legal academy must become an active participant in developing and transmitting the empirical and theoretical knowledge about legal practice that will allow us to construct a vision of legal professionalism fit for the twenty-first century instead of for the nineteenth.

The remainder of this essay chronicles one effort by Harvard Law School's Programme on the Legal Profession (hereinafter the Programme) to transcend the standard limitations of traditional law school ethics courses and to lay the foundation for the development of a theoretically coherent, practically realisable, and normatively attractive understanding of lawyer professionalism. The organising premise of this effort is that traditional teaching and scholarship about professions and professional ethics, both within professional schools and in other parts of the academy, either takes the normative value of professionalism for granted or divorces the study of this concept from the actual social and institutional contexts of professional work. In order to counteract these tendencies, the Programme sponsored an interdisciplinary course on professionalism entitled "Ethical Dilemmas in Clinical Practice: Physicians and Lawyers in Dialogue." The course, which was co-taught by Dr Linda Emanuel, Assistant Director of the Harvard Division of Medical Ethics and myself, brought students from Harvard's law and medical schools together with practitioners and academics from a wide range of disciplines to discuss, debate – and most of all to experience – how professional ideals and ideology are constructed in law and medicine.

This course stands as both a testament to the value of an empirically grounded, interdisciplinary approach to professional ethics and the difficulty of implementing such an approach in an

environment where law schools continue to shirk their ethical obligation to make professional practice a serious subject of study. For the reasons stated below, courses such as the one I taught at Harvard can play an important role in moving beyond the limitations that characterise traditional teaching and scholarship about professional ethics. But the fact that this course has only been taught once underscores how difficult it is to develop such initiatives in an environment where empirical research and interdisciplinary teaching continue to be undervalued.

The following four parts flesh out these basic points. Part II briefly sets out the theoretical underpinnings of traditional approaches to teaching about professionalism and indicates how the shortcomings of these standard methods are exacerbated in legal education by the academy's persistent failure to study the profession. Part III describes the course and examines some of its principal accomplishments. Finally, Part IV draws some tentative conclusions from our experience for future teaching and scholarship about professional ethics.

II. THEORETICAL BACKGROUND AND THE STATE OF THE FIELD

The term "professional ethics" can be given at least three distinct, although admittedly interconnected, meanings.[4] The most general understanding of the term refers to the ethics of "that entire family of vocations that we call 'the professions.'"[5] Those who subscribe to this meaning assume that it is possible to identify a stable set of criteria for classifying which occupations are entitled to be called professions and that all those who properly fall under this designation will share important normative commitments.[6]

The second meaning focuses on a particular profession, such as law, and attempts to identify those normative characteristics that are uniquely "professional." Unlike those who subscribe to the more general usage, persons interested in "legal ethics" need not claim that they can justify lawyers' professional status by some set of objective criteria or that the "professional" norms they identify will necessarily be shared by other professionals. Instead, these theorists tend to take professional status as a given and ask which ethical values lawyers ought to uphold in light of the legal profession's unique position in society.[7]

Finally, the last usage takes a descriptive and instrumental view of professional ethics. Rather than asking what norms professionals (either in general or in a particular profession) ought to share, those using the term in this third sense ask what ethics professionals actually display. This investigation into the meaning of professional ethics can be conducted at the level of both group ideology and individual behavior. At the collective level, scholars examine the official justifications offered by professionals for their ethical standards and ask whether these norms actually serve their stated purposes or instead are better understood as a convenient cover for actions that do little more than promote professional self-interest.[8] With respect to individuals, the question asked is whether practitioners actually conform their conduct to the profession's articulated norms, values, and standards.[9]

Notwithstanding the fact that most scholars interested in professional ethics acknowledge the importance of all three understandings, one or the other of these approaches has tended to dominate each of the arenas in which professional ethics is generally taught. This segmentation has, in turn, nurtured and reinforced a growing cynicism among academics, practitioners, and the general public about whether the concept of professionalism has any independent normative content worth preserving.

Undergraduate and graduate level liberal arts courses that discuss professional ethics tend to embrace the first meaning. The question most frequently posed in these settings is whether there is something sufficiently distinctive about being a professional that justifies holding those occupying these social roles to normative standards that are different from the rules of common morality.[10] For the most part, the academics who teach these courses tend to be skeptical about such claims. This skepticism comes from two quarters. First, many sociologists contend that it is impossible to identify a stable and objective set of criteria for separating existing professions from other occupations that, although desiring the social and economic benefits that flow from professional status, have had less success than doctors and lawyers in achieving their objectives.[11] Second, philosophers are frequently critical of arguments that are premised on the existence of a "role differentiated morality," particularly where the argument asserts that people who occupy a given position in society are exempt from moral obligations that would govern the conduct of ordinary

citizens.[12]

Collectively, these skepticisms cast doubt on the claim that professionalism per se has any independent moral content. Thus, to the extent that sociologists can convincingly demonstrate that lawyers and doctors achieved their current status as a result of concerted political struggle, the traditional structural/functionalist account that links professional status — and, therefore, professional ethics — to the unique functions that professionals perform for society is undermined. As a result, sociologists tend to view these normative claims as simply another tool that professionals use to pursue their objective of freeing themselves from state control and the constraints of the market. Consequently, although they begin by asking the question posed by the first understanding of professional ethics — what are the ethical claims that unite all professions? — the answers that these scholars give tend to devolve into the third approach that identifies self-interest as the common thread that unites all efforts to articulate a distinctive normative understanding of professional ethics. Similarly, once philosophers reject the idea that any group should be exempt from the demands of ordinary morality simply because they occupy a particular social role, there is no longer any reason to treat "professional ethics" as a separate and distinct area of moral inquiry. Once again, the overall effect is to shift the focus away from the norms and practices of particular professionals in favor of a more general examination of moral duties.

Not surprisingly, professional schools have tended to take a different tack. Required ethics courses in law schools are generally premised on the second model of professional ethics. Traditionally, these courses have started with the assumption that lawyers are "professionals" with their own unique ideals and practices.[13] The task these courses set for themselves, therefore, is to identify which of these norms and practices are legitimate in light of the positions that lawyers occupy in society. In recent years, however, this standard orientation has increasingly come under attack. Taking as their inspiration many of the criticisms of the first model of professionalism outlined above, a growing number of legal ethics courses now include substantial criticism of both the self-interested nature of many traditional professional ideals and of the standard claim that lawyers are not governed by the rules of ordinary morality.

Both of these approaches to formal ethics instruction in law schools undermine the claim that professionalism per se has independent moral content. The insularity of the standard orientation strongly implies that lawyers have nothing to learn from social scientists, or indeed from other professionals, about the normative content of the lawyer's role. Although the critical approach adopted by many contemporary ethics teachers substantially reduces this insularity, it also paradoxically reinforces the view that professionalism is either irrelevant or pernicious. In these courses, professionalism is largely identified with the standard version of legal ethics as articulated in the Code of Professional Responsibility,[14] the Model Rules of Professional Conduct,[15] and other official sources. The question, therefore, is whether lawyers should follow these professional rules or the dictates of their personal conscience when deciding difficult ethical problems. However one resolves this question in any particular case, this way of framing ethical issues deflects attention from investigating whether lawyers *as professionals* ought to reject both the traditional model of legal ethics and the assertion that they should simply follow the dictates of their personal morality.[16] By omitting this third choice, legal ethics courses have left themselves vulnerable to the criticism that they either reify the narrow and often self-interested view of lawyer professionalism articulated in the current ethics rules or that they attempt to teach a personal moral code that bears little or no relationship to the competence or the mission of legal education. Collectively, these criticisms reinforce a skeptical attitude about the meaning of professionalism.

The implicit and sometimes explicit messages about lawyers' professionalism conveyed by the rest of the law school curriculum only serve to deepen this skeptical attitude. While formal ethics courses tend to portray the legal profession's traditional ideals as both legitimate and important (even when they are being critical), when "ethics" is mentioned in the rest of the curriculum the focus is on the third model's descriptive claim that ethical rules are either ignored in practice or simply a cover for lawyer self-interest. In cases, hypothetical examples, and off-hand remarks, lawyers are frequently portrayed as ruthless economic actors unconcerned with the "niceties" of the profession's traditional ethics.[17] This skeptical attitude is reinforced by powerful intellectual movements in legal education that focus attention on the indeterminacy of rules

(including ethical rules),[18] the need for functional as opposed to normative justifications for public policies, and the numerous ways in which law and lawyers entrench existing inequalities of wealth and power.[19] At the same time, students who raise general ethical objections in traditional law school courses are often told that these concerns are irrelevant to the "legal" issues being discussed. When one puts all of these developments together, the clear message to law students is that lawyer professionalism, and indeed ethics in general, is either irrelevant to their lives or something to be deployed instrumentally to further their (or their clients') self-interest.

Indeed, the fact that philosophers, legal ethics teachers, and the rest of the law school faculty have largely failed to generate a meaningful account of the normative value of professionalism has had important consequences beyond the academy. As I have argued, many commentators have complained of a growing separation between law schools and the legal profession itself.[20] Each of the three approaches to professional ethics outlined above exacerbate this separation. By isolating the concept of "professionalism" from the actual practices of any group of professionals, the first definition leads many lawyers to believe that philosophers and other social scientists do not know (and probably do not care) enough about the realities of legal practice to render judgments that practitioners ought to heed.[21]

The second account embraced by most traditional legal ethics courses tends to have the same effect. Although these courses purport to speak directly to practicing lawyers, they often present a stylised account of lawyering that bears little relationship to the realities of contemporary legal practice.[22] As a result, practicing lawyers often complain that law students are not being given the skills they need to cope with the massive changes that have transformed many areas of legal practice from the "gentlemanly" world of individual decision- making, apprenticeship, and noblesse oblige portrayed in most traditional ethics courses.[23]

Not surprisingly, the practicing bar resents the third account as well. To many practitioners, most legal academics know almost as little about the bar's actual ethical practices as the philosopher proponents of the first model. They therefore tend to dismiss these critics, as they have tended to dismiss most of what is taught in law school, as being irrelevant to the contemporary realities of legal

practice.

Ironically, when the bar formally attempted to define professionalism, it paid no more attention to the contemporary realities of legal practice than most traditional ethics courses.[24] This failure further exacerbates the split between the bar and the academy by reinforcing the critical dimension of many contemporary legal ethics courses that portray the bar's understanding of professionalism as simply a cover for self-interest. At the same time, this critical attitude, as well as the even more openly cynical view of lawyers articulated in the mainstream legal curriculum, discourages practitioners from either acknowledging or confronting the difficult ethical problems caused by the growing bureaucratisation and competitiveness of the market for legal services. This, in turn, simply fuels the claims by academics in both law schools and other parts of the university that the profession consistently fails to come to terms with academic criticism of its practices and its ideals.[25]

The net result of this dynamic, as with the segmentation of the three models of professionalism in general, has been to reinforce the cynicism by both academics and practitioners about the normative value of professionalism. But matters are even worse than this bleak portrait suggests. The legal academy's failure to study the profession has created a knowledge vacuum of enormous proportions concerning the changes in law practice sweeping across the legal landscape. As with any vacuum, the academy's silence has attracted a host of other purveyors of information and ideas about legal practice who are all too willing to fill the void. Thus, the "New Information Order" about law and legal practice is primarily the result of the increasingly cacophonous voices of legal recruiters, public relations specialists, trade associations, and legal journalists.[26] Many of these sources, however, are more interested in furthering their own agenda than in providing disinterested information. Those who are not self-dealing often know little more about legal practice than those whom they purport to educate. By leaving students, practitioners, and citizens to fend for themselves among these self-interested and inaccurate information merchants, law schools have doubly failed each of these core constituents.

Let me briefly illustrate this unhealthy dynamic with respect to each of the three groups that the law school is designed to serve.

The Student Experience: The Fox and the Chicken Coop

Students are hungry for information about their future careers. The regular curriculum, however, offers them almost nothing to satisfy this hunger. As a result, students typically learn about potential careers from three sources: legal recruiters, the legal press, and each other. It should go without saying that each of these sources of information is seriously flawed.

Consider, for example, the tragic case of Lawrence Mungin, a black lawyer who unsuccessfully sued the law firm where he was employed for race discrimination.[27] When Mungin graduated from Harvard Law School in 1985, he believed that his elite education would protect him against race playing a negative role in his career. Everything about Mungin's Harvard Law School experience reinforced this point, promising that those lucky enough to be admitted to Harvard are destined to succeed simply by virtue of having gone to school there.[28] In order to reap these rewards, however, law schools like Harvard imply that students must adopt a "bleached out" vision of themselves as lawyers.[29] To be a "good" professional, according to this standard view, one must suppress all other aspects of one's identity – race, gender, sexual orientation – and assume a "professional self" that governs all actions taken in one's professional capacity.

Like most law students, Mungin internalised this view. He therefore sought to remove race as an obstacle in his career by acting as though race were irrelevant and hoping that others would do the same. This strategy, however, blinded Mungin to the many ways in which race inevitably affected his career. This effect did not take the form of racial epitaphs or outright exclusion. Instead, Mungin fell prey to the kind of subtle stereotypes, assumptions, and perceptions that often make it more difficult for black lawyers to succeed in elite law firms. These problems are not different in kind than the issues that white lawyers confront when they run afoul of the rules of the modern tournament of lawyers. But for black lawyers, these problems are magnified because everything that they do is examined through the lens of racial attitudes and preconceptions that brand blacks as inferior. In Mungin's case, these complex racialised attitudes took the form of partners who thought that they were engaged in some form of affirmative action,

but who could not see that their preconceived assumptions about Mungin were an important part of the reason that Mungin was having difficulty succeeding at the firm.

For all of its excellence, therefore, Harvard Law School failed to give Lawrence Mungin the knowledge and skills that he needed to construct an understanding of professionalism that allowed him to see how race might affect his dream of becoming a partner in a large law firm.[30] In so doing, it broke its ethical covenant with Mungin and his fellow students that, in return for their hard work and substantial tuition payments, they would be given the knowledge, skills, and dispositions that they need to become successful practitioners.

The Bar's Experience: The Blind Leading the Blind

Law schools have done no better in fulfilling their ethical duty to the profession. Indeed, a good argument can be made that they have done worse. Given that they depend upon tuition dollars for their survival, law schools must at least pay lip service to the goal of preparing their graduates to build successful and ethical careers. With few exceptions, however, the academy has not even given this much attention to the large-scale economic, social, and cultural forces that are reshaping the profession that their students are about to enter.

Consider, for example, the role of the public defender.[31] Both academic scholarship and popular mythology tend to portray public defenders as the very personification of the autonomous lawyer zealously fighting to protect the rights of poor clients against the awesome power of the state. But these lawyers also work for a large and increasingly bureaucratic institution that must consider its own institutional role; a role that extends beyond, and sometimes conflicts with, the interests of individual clients. Thus, the Chief Public Defender has an ethical responsibility to ensure that the office's limited resources are used effectively for the benefit of both current and future clients. The positions lawyers take in one case will necessarily affect the interests of other clients and of the community as a whole. These constituencies, however, have very little political capital to protect their interests and therefore depend upon the Public Defender Service to act as their advocates. At the same time, the policies that the office adopts will inevitably shape

the ability of individual lawyers to protect the interests of particular clients.

Given these realities, Chief Public Defenders are faced with a host of difficult ethical problems. Should the office require individual defenders to take consistent positions on specific legal questions or police practices in order to increase the office's overall chances of "winning" on these issues even though the contrary view might benefit some individual clients? Should the office seek better relations with prosecutors and judges in the hope that such alliances might improve the office's chances of receiving additional funding from the legislature even though the price of heightened cooperation might be less zealous representation by individual defenders, particularly in high profile cases? Should the office lobby against law enforcement initiatives – for example, those aimed at curbing domestic violence – on the ground that such policies will disadvantage potential future clients even though these same measures may help some battered women avoid becoming clients of the office by removing the need for them to take the law into their own hands to protect themselves from their batterers?

These and other similar questions are the daily reality of the women and men who administer America's public defender organisations. Yet, with a few notable exceptions, the academy has produced almost no scholarship that can help these beleaguered individuals make these wrenching choices. Indeed, one can make a strong case that the academy has actually made things worse. Law schools continue to turn out potential public defenders committed to an individualistic, even anti-authoritarian, vision of their role. As a result, the academy has actually made it less likely that the Chief Public Defenders of tomorrow will recognise the full extent of the conflict between their individual and institutional roles, and once recognised, be able to convince their fellow defenders that the institutional role is legitimate and important.

The Public's Experience: Whose Law is it Anyway?

Finally, the law school's failure to study and teach about the profession is an affront to the academy's ethical obligation to the public. The main ethical responsibility of law schools, of course, is neither to students nor to the profession. It is to the citizens who depend upon law, and therefore derivatively upon lawyers, to

provide a fair, coherent, and efficient framework within which to live their lives. The recent changes in legal institutions and practices have their most important impact not on lawyers, but on the public as a whole. By failing to study these changes in any systematic way, we have deprived policy makers of the information that they need to determine how these developments might affect specific public values, and how those that are important might be regulated or controlled.

Consider all of the talk about globalisation. It is impossible to have a substantive discussion in almost any field without addressing the world's growing interdependence. The legal academy has certainly not been immune to this preoccupation. Quite the contrary. Legal academics have been in the forefront of the movement to promote the exportation of American law, legal institutions, and even the American model of legal practice. These projects, like those that came out of the "law and development movement" of the 1970s, are typically justified on the ground that they will "modernise" the legal infrastructure of developing countries, thereby allowing them to participate in the international economy. Increasingly, proponents supplement this standard claim with the nationalistic argument that exporting US law and legal institutions is good for American business, professionals, and, hopefully, consumers. What is rarely discussed, however, is whether this new legal entrepreneurship will have any adverse affects on US legal norms or democratic values. Once we unpack what it might mean to "export" US law in a particular area, however, the claim that this process might have important implications for our own polity seems far from frivolous.

For example, in order to maximise the degree to which the law of a particular foreign jurisdiction "harmonises" with American law, some commentators suggest that developing countries should adopt a particular US legal regime "wholesale" as an evolving system.[32] Under this approach, a country would not only adopt verbatim, for example, various US statutes and regulations in the field of securities law. It would also commit *ex ante* to follow authoritative interpretations of these statutes and regulations by the Securities and Exchange Commission or the Delaware Supreme Court.

What is less clear are the implications of giving the governments that adopt these US legal norms a direct stake in the development of American securities law doctrine. The analogy to

our recent experience with the Chinese government's efforts to influence the 1996 presidential election, however, suggest that globalising the reach of US law posses important risks to our democratic framework. If the allegations are true, the Chinese government funneled substantial amounts of money to Democratic fundraisers in order to ensure the election of a president sympathetic to continuing China's status as a "most favoured" American trading partner. Imagine, therefore, the effect of giving a large number of foreign governments a direct stake in how the Delaware Supreme Court or the SEC decides American securities law issues. Could these governments petition courts or regulators to intervene in cases that might affect their national interests? If they are denied the right to participate directly, are they likely to resort to the kind of "indirect" participation that the Chinese allegedly employed to protect their interests in American policy? Seen in this light, exporting US law "wholesale" to developing nations could have profound ethical effects on our policies and practices. And yet this aspect of the problem – the problem that has to do with our public responsibilities – remains unstudied.

Each of these examples, I suggest, underscores the degree to which students, practitioners, and the public are worse off because of the legal academy's failure to study and teach about the profession. If the concept of professionalism is to have a coherent meaning to today's practitioners, it can neither be divorced from nor subsumed by the realities of contemporary practice. Critics of the attempt to give some transcendental meaning to professional ethics are correct insofar as they point out that it is impossible either to generate a set of a historical criteria for determining which occupations qualify as "professions" or to provide a meaningful account of the attitudes, dispositions, or normative commitments that any given professional ought to hold on the basis of the abstract relationship between professionals and those they serve. Whatever may be said of ethics in general, professional ethics must be designed to serve specific societal needs.[33] As such, it cannot be separated from the social, economic, and political contexts in which these needs arise and through which they must be met.

This does not mean, however, that we ought to confine our understanding of professional ethics to those norms and practices that have traditionally been the province of a single profession such as law. As David Luban and others persuasively argue, professional

norms must always be justified in terms of some more general set of moral criteria.[34] One important element of this inquiry is how the normative claims of the legal profession compare with those of other actors in society who are confronted with similar problems. Those who occupy social roles that have traditionally been thought of as professions provide one obvious source (though by no means the only source) for such comparisons. Moreover, given the complexity of modern social interactions and the breakdown of many traditional barriers to inter-professional cooperation and competition, members of different professions are increasingly likely to interact with each other in a variety of contexts. It is therefore critically important that these actors learn to understand one another and not to make demands that subvert one another's legitimate ethical practices.

This comparative approach, however, must not conflate professional ethics with personal ethics. Although common morality stands as the ultimate check on any assertion of professional ethics (and on the value of any cross-professional comparisons), it does not define the normative stance of professionals. 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. These unique responsibilities must be taken into account in defining a lawyer's professional obligations, even as we recognise that these obligations must account for the fact that lawyers are also individuals who are morally responsible for their own actions.

Finally, no attempt to provide a meaningful account of professional ethics can ignore the actual conduct of professionals. Without some attention to practice, professional ideals can easily degenerate into legitimation.[35] Nor is it always appropriate to label the misdeeds of particular lawyers as individual deviance rather than as failings of the general ideals or practices. Certain officially sanctioned ideals or institutional arrangements make it more likely that individuals will transgress stated norms. More importantly, the substantive content that an individual practitioner gives to any ethical norm will inevitably be shaped by the institutional context in which the norm is developed and applied.[36] Failure to pay attention to how these institutional structures shape lawyer conduct can both produce undesirable ethical norms as well as frustrate

attempts to increase compliance with desirable ones.[37]

These observations have both theoretical and pedagogical significance for any attempt to create a new understanding of professional ethics. At the theoretical level, the new model must embrace the prevalent, but nevertheless often neglected, truth that law is a practice that takes place in varying discrete institutional contexts. As a result, the goal of professional ethics instruction is to help students develop the skills, dispositions, and commitments that will allow them to navigate these complex arrangements in a manner that best promotes society's interest in the social goods produced by lawyers. While formal codes of conduct can sometimes be a useful guide, developing those traits of character that are particularly suited to the lawyer's role is at the core of what we ought to mean by professional ethics.[38]

Given these theoretical commitments, the pedagogy of a course designed to explore the contemporary meaning of professionalism must offer students both a window on actual professional practice and a vantage point to discuss and evaluate these practices from a critical distance. As David Luban and Michael Millemann argue, the kind of ethical judgment lawyers most need to cultivate is best taught through "trial and error and by imitation."[39] Observing others, although not a perfect substitute for individual effort, can provide valuable insight and encourage the development of both empathy and critical judgment.

Cross-professional exchanges further these goals. When students observe professionals in other fields coping with issues that are present in the students' own discipline, they often see these problems in a new light. Not only must they consider, for example, the doctor's justification for her approach to informed consent or patient confidentiality, but they must also ask whether these justifications are persuasive in their own disciplines. Even this level of comparison, however, may fall short of fully addressing the problem of professional insularity. The very features that make the two groups similar may obscure the degree to which each subscribes to norms that unduly protect their respective professional prerogatives. Therefore, a course in professionalism must ultimately infuse the study of particular professional practices with normative perspectives from disciplines such as philosophy, sociology, psychology, and political science that stand outside the traditional discourse of professionalism.

III. THE COURSE

In 1995, Dr Emanuel and I attempted to design and teach a course that was true to the theoretical and pedagogical commitments outlined above. Three principles guided our decisions about the content and methodology of Ethical Dilemmas in Clinical Practice: Physicians and Lawyers in Dialogue. First, we wanted to create a course that would speak directly to the meaning of professionalism. We therefore avoided many of the usual topics covered in courses that combine elements of law and medicine such as medical malpractice, hospital law, or the admissibility of medical testimony.[40] Instead, we focused on issues that presented concerns central to the self-conception of each profession.

Second, we wanted the course to be interdisciplinary in the fullest sense of the term. Since the course was open to students from both the law and medical schools, it had to be taught during the law school's intensive January term because this was the only time that the schedules of the two schools overlapped.[41] We also taught half of the classes in each school and included an equal number of academics and practitioners from both fields as guest lecturers. The course also featured lecturers trained in philosophy, political theory, sociology, and economics.

Third, we were committed to exploring the connection between norms and practices. We therefore limited enrollment to students who had some clinical experience (third- and fourth-year medical students and second- and third-year law students with either summer or extra-curricular clinical experience). In addition, every student was required to make a series of site visits outside of their own field: The law students spent time in a hospital emergency room, a neonatal or cardiopulmonary intensive care unit, and an internist's office; the medical students went to criminal court, a legal aid office, and landlord-tenant court.[42] Finally, each student participated in three role-playing exercises: drafting a model statute on the definition of death; a moot court trial of a medical malpractice action; and a simulated meeting of a hospital ethics committee.

We divided the course into four sections, each running for approximately one week. The first week consisted of a four-part examination of the core elements of professionalism. In the first session, Dr Emanuel and I each presented brief overviews of the

two professions, including organisational structures, demographics, and codes of ethics. The second session, conducted by Dr Stockle, an internist at Massachusetts General Hospital, and Professor Robert Gordon of Yale Law School, examined the two relationships at the heart of professional practice: the doctor/patient-lawyer/ client relationship and collegial relations among doctors and lawyers. The next session featured Dr Arnold Relman, former editor-in-chief of the New England Journal of Medicine, and Professor Dennis Thompson, Director of the University Programme in Ethics and the Professions, discussing institutional ethics with a particular emphasis on conflicts of interest. In the fourth session, Dr Cyrus Hopkins of Harvard Medical School and I examined methods of reasoning, including ethical reasoning, in law and medicine. The majority of site visits were also scheduled for this first week.[43]

In the second week, we turned our attention to specific issues surrounding the allocation of decision-making authority between the two groups of professionals and those they purport to serve. The centerpiece of this week was a drafting exercise of a model statute on the definition of death. In the first session, Dr Alan Weisbard of the University of Wisconsin Law and Medical Schools gave students an overview of the issues surrounding the definition of death, including medical and legal problems with the concept of "brain death" and other traditional formulations. He also discussed the effect of any potential standard on issues such as organ donation, religious freedom, and personal autonomy. After this introduction, the students were divided into two teams for the purpose of drafting a model statute. The goal of this exercise was to encourage students to reflect on the ethical issues confronting doctors in this area and to examine how lawyers (in their capacities as drafters and interpreters of legislation) ought to take the medical profession's concerns into account. While the students were drafting, Dr Emanuel discussed patient self-determination in the context of advance directives concerning life-prolonging care. Dr Emanuel was joined in this session by Professor Susan Koniak of Boston University Law School. Professor Koniak examined client self-determination in the legal context. The next session, conducted by Professors Robert Truog, a neonatologist at Children's Hospital in Boston, and Elizabeth Bartholet of Harvard Law School addressed the unique problems that arise when the patient or client

is a minor. Finally, Dr. Paul Appelbaum and Harvard Law Professor Lucy White discussed the practical and ethical dilemmas involved in obtaining informed consent in law and medicine. At the conclusion of the week, the student teams presented and defended their model statutes.

The third week was devoted to examining risk and research in professional practice. In the first session on professional risks, Dr Lynn Peterson, Director of the Harvard Medical School Division of Medical Ethics and a practising surgeon, discussed the ethics of treating patients with HIV and other contagious diseases. Harvey Silverglade, a long-time criminal defense and civil rights lawyer in Boston, discussed the risks associated with representing an unpopular defendant against the government. The second session was devoted to the ethical problems associated with research both by and about professionals. Doctors Kenneth Ryan and Allan Brandt of Harvard Medical School and History of Science Department, respectively, examined the ethical implications of "research integrity" in human subject experimentation. Professor Robert Nelson of the American Bar Foundation and Northwestern University Sociology Department discussed the difficulty of obtaining reliable empirical data on lawyers and the implications of this lack of know- ledge for debates about professional practice. We then turned our attention to the academy, where Dean Federman of the Harvard Medical School and Michael Meltsner, the former dean of Northeastern Law School, discussed the differing approaches to professional education in the two fields. Dr Susan Pauker of Harvard Medical School and Professor Dorothy Roberts of Rutgers University School of Law completed the week by examining how technologies like genetic screening will present both doctors and lawyers with new and difficult ethical problems.

During this week, the students also prepared and participated in a moot court exercise. The case, which was supplied by the National Institute for Trial Advocacy, involved a lawsuit by a patient against her former doctor for damages allegedly stemming from unsuccessful breast reconstruction surgery.[44] In keeping with our general orientation, the purpose of the exercise was not to teach the students about the law of medical malpractice. Instead, our goal was to open a lens on each profession's views about resolving disputes over the delivery of professional services through adversarial adjudication. Thus, we wanted the law students to

experience the anger and frustration that doctors feel when their professional practices are evaluated by lay juries. Similarly, we hoped that medical students would reflect on why lawyers believe the adversarial nature of trials justifies legal tactics (for example, discrediting witnesses) that appear to obscure the truth. To that end, medical students were assigned to play all of the major legal roles, while law students filled the medical positions. At the conclusion of the trial, students were debriefed about the ethical issues they perceived both in their roles and in the process as a whole.

In the final week, we covered two general issues that have become increasingly important to professionals in both medicine and law: causation and government regulation. With respect to the first issue, Dr Leon Eisenberg of Harvard Medical School and Professor David Rosenberg of Harvard Law School examined how expanding notions of causation create difficult problems in both medicine and law. With respect to the second issue, Dr Ezekial Emanuel of Harvard Medical School and Professor David Charny of Harvard Law School examined how government in its role as both provider of professional services (either through insurance schemes such as Medicaid and Medicare or through government-funded health clinics and legal aid offices) and as regulator of professional conduct is redefining the norms and practices of both doctors and lawyers.

The bulk of this last week, however, was devoted to preparing for and conducting a simulated meeting of a hospital ethics committee. The scenario for the exercise involved a doctor who reported false information to a patient's insurance company in order to get the insurer to pay for genetic screening that the doctor believes is in the patient's best interest but to which the patient is admittedly not entitled under the existing guidelines agreed upon between the hospital and the insurance company. The students were assigned roles both on the committee (including a hospital administrator, the general counsel, the chief of surgery, and an outside ethics expert) and as witnesses on behalf of the doctor, the hospital, and the insurance company. Wherever possible, students were assigned to roles outside of their professional sphere. The rest, however, was up to the students, who designed both the committee's procedural and decisional rules as well as the substance of the views they would espouse in their various roles. Once again, our goal was to teach students about the realities of

professional decision-making as opposed to either the medical or legal implications of genetic screening. As with the moot court experience, students were given an opportunity to discuss their reactions to the exercise, as well as to the class as a whole, at the conclusion of the hearing.

By any measure, the course was extremely successful. Students from both schools gave the course the highest rating on their evaluations, with many stating it was the best course they had taken in professional school. These ratings are especially significant in light of the initial skepticism, particularly on the part of medical students, about the value of a course of this kind.[45] Moreover, although students received only two credits, the workload was as onerous and intense as any of the most demanding classes in either school.

More importantly, the combination of observation, role-playing, and reflection appears to have given students important, concrete insight into what it means to be a professional in both law and medicine. The site visits and the role-playing exercises alerted students to the difficulties faced by professionals in both disciplines. From the simple fact of having to be in the hospital by 6:00 am to the realisation that an internist may have less than ten minutes to listen to a patient's complaints and reach a preliminary diagnosis, the law students came away with a new understanding of the difficulty of getting informed consent or encouraging patient self-determination in the pressure-filled world of contemporary medicine. For their part, the medical students stated that their courtroom visits and the experience of "actually" representing a client in the various role-playing exercises allowed them to see clearly the moral tension inherent in the lawyer's role and how easy it is to be swept up in the grip of adversarial zeal. Indeed, in the statutory drafting exercise, all of the students became so engaged in their roles that in the interest of getting the students to continue to work together, Dr Emanuel and I gently reminded them that the process was not real.

Similarly, there were many instances in which the comparative focus caused both students and faculty (including Dr Emanuel and me) to reevaluate our own professional ideals and practices. For example, with respect to conflicts of interest, Dr Relman conceded that the medical profession could learn a great deal from the way lawyers identify and address such conflicts. On the other hand,

lawyers are only beginning to think about the ethical implications of the kind of institutional structures, government regulation, and third- party payment schemes that have confronted physicians for more than a decade.

Most fundamentally, the course produced some tantalising insights about the general meaning of professionalism. Not surprisingly, these insights relate to character and judgment. Whether the discussion was about how lawyers and doctors "diagnose" problems and design potential solutions, or about the reasons why some professionals are prepared to risk their physical safety, defy authority, or genuinely listen to their clients' or patients' needs while others are not, lecturers from both professions argued that rules, procedures, and sanctions could never fully define, let alone produce, proper ethical conduct. Judgment and character, according to the nearly unanimous view of all participants, hold the key to understanding the proper meaning of "professional" in professional ethics.

The course also offered some tentative clues about how professional character and judgment are shaped and constrained by institutional forces both within the academy and in the world of practice. From the feel of the classrooms to the lecturing styles of faculty members, professional education shapes lawyers and doctors in subtly different ways. Notwithstanding the apparent formality of the law school classroom, lawyers are taught to argue and challenge authority from the moment they arrive. Moreover, most law school teachers know relatively little, either from their own experience or from sustained study, about legal ethics. Nor does legal education offer any formal avenue for law students to form mentoring relationships with lawyers who have this kind of experience or knowledge.

Medical students, on the other hand, spend the first two years of their education passively absorbing large quantities of data and immediately enter into complex hierarchical relationships in which they start at the bottom with the expectation that they will eventually work their way to the top. At the same time, these relationships offer medical students an opportunity for mentoring and a real immersion in the medical profession's ideals unmediated (or at least only partly mediated) by the profit motivations that attend mentoring relationships in law to the extent that they exist at all.

Each of these respective educational tracks creates unique problems for developing professional character and judgment. Given the relative absence of professional role models and the constant emphasis on being able to argue the opposite side of every proposition, it is not surprising that law students often develop a kind of cynicism about professional norms captured by the third model of professional ethics. The medical students, on the other hand, were far less cynical about their profession's ethical traditions. In their case, the problem was getting them to examine these traditions critically. As the course progressed, however, these two positions began to converge as each group of students was placed in the position of both justifying and critiquing its own and the other group's professional practices.

Once these new professionals enter the working world, the institutional structures in which they practice are also likely to produce their own effects. Dr Truog's and Professor Bartholet's discussion of the unique ethical problems that arise when the patient or client is a minor nicely illustrates this point. Dr Truog described a case involving a clinical trial of a potentially life-saving therapy for critically ill infants.[46] According to Dr Truog, the physicians involved in the trial probably would have refused to participate if the terms of the experiment had required them to treat one of their own patients with a therapy they believed less effective than an available alternative. These same doctors, however, readily consented to a procedure for obtaining randomised consent that consigned some of these same critically ill babies to the less effective therapy without informing their guar- dians of the potentially more effective alternative. As Truog argues, the institutional structure of the trial, including the fact that the babies who were not offered the potentially more effective therapy were sent to a different floor of the hospital where they were treated by a different group of doctors (from different specialties), helped obscure the ethical problems attending the consent procedures.

Similarly, Professor Bartholet in her discussion about how the legal system fails to protect the rights of children in child custody and adoption cases argued that the institutional framework in which these cases are decided often blinds lawyers and judges to the ethical issues at stake. Thus, given their role as "zealous advocates," lawyers who represent custodial parents are frequently either unable or unwilling to recognise when their client may be

unfit to care for a child. At the same time, the judge who has the responsibility for deciding what is in the "best interest of the child" must make this determination based on information supplied by a social welfare system that often has institutional interests that cloud the judgment of participants about what is best for the child.

These and other insights that emerged throughout the course began to open a window on the complex process by which professional norms are developed and learned. The task for the future is to develop curricular innovations that will allow us to continue investigating this crucial process.

IV. CONCLUSION: FACING UP TO THE OBSTACLES

The Programme on the Legal Profession remains committed to refining and expanding our interdisciplinary approach to teaching professional ethics. The road, however, has not been easy. Despite the success of "Ethical Dilemmas in Clinical Practice," the course has never been repeated. I close by examining briefly some of the obstacles to developing theoretically rich and empirically grounded courses on professionalism.

The first and most obvious is money. Assembling this talented array of academics and practitioners and providing students with access to all of the opportunities for site visits and simulated instruction was expensive. In 1995, these expenses were defrayed by a generous grant from the WM Keck Foundation. Unfortunately, that grant was not renewed when the Keck Foundation decided to stop funding projects in legal ethics.

Even if courses of this kind are adequately funded, the logistical problems are almost enough to discourage anyone from going forward. Chief among these is the calendar. As I indicated above, January is the only month where the law and medical schools' calendars overlap. For a variety of reasons, this time is less than ideal for all concerned. Although we are investigating alternatives, the difficulty of finding a time for an interdisciplinary course that is even minimally convenient to all interested parties is daunting in the extreme.

Finally, and most importantly, there is the problem of knowledge. Specifically, we know far too little about the institutions and practices of all professionals, including lawyers. Courses such as this one depend for their success on painting an

accurate portrait of the real ethical problems that confront practitioners in their day-to-day lives. We simply do not know enough about the subtle, but crucial differences among institutions and practice settings to understand how these forces influence the development of professional judgment and other valuable traits of character. What is needed, as I have argued above, is an interdisciplinary research programme that would complement the new approach to teaching about professionalism exemplified by this course.[47]

A full proposal for an interdisciplinary research agenda on the profession would take me far beyond the confines of this essay. Moreover, the more fulsome the plan, the more schools are likely to claim that they don't have the resources to implement such an ambitious agenda. I therefore offer three very simple proposals, each of which could be adopted by any school committed to making progress on the issues I have addressed. Adopting these proposals, I suggest, would go a long way toward bridging the ethical gap outlined in Part II.

Hire the Right Team

The first step is to hire faculty members who have a serious interest in, and experience with, legal practice. The point sounds obvious because it is. Law schools are faculty driven institutions. If a school does not have faculty members with a strong interest in writing and teaching about legal practice, no amount of exhortation by deans or alumni will produce the work. Conversely, if a school has faculty members who are committed to these issues – particularly tenured faculty – then these individuals will create pressure on the institution and its alumni to provide the needed support.

Not so long ago, hiring faculty members with substantial practice experience was fairly common. In my experience, this is no longer the case at most schools. There is an important reason for this change. Law schools now value the production of academic scholarship much more highly than they did in the past. I support this development. What I do not support is the unstated assumption that lawyers who have spent more than a few years in practice cannot become productive and influential scholars. This assumption is particularly perverse once we recognise that the

absence of faculty with a serious interest in, and understanding of, legal practice is one of the primary reasons why the academy has failed in its ethical obligation to study and teach about the profession. Successful scholars in this area must be able to step back from the normative commitments, practices, and habits of mind that practitioner often take for granted. Unless scholars *understand* these frames of references, however, they are unlikely to produce work that speaks to the real problems that the profession and those it serves confront. While it is not true that only those who have spent significant time in the trenches of actual practice will have this kind of understanding, the common, if largely unarticulated, claim that those who have earned their understanding through practice will be incapable of using it effectively is equally false.

Nor should schools confine their hiring in this area to experienced practitioners. Some of the best empirical work on the profession has been done by scholars without substantial practice experience, some of whom are not lawyers at all. Sociologists, anthropologists, organisational behaviourists, and institutional economists all have made important contributions to understanding particular legal organisations and practices.[48] The external perspective that these scholars bring to bear on familiar legal questions ranging from the organisational structure of large law firms to conflicts of interest provide an important balance to the internal perspective articulated by former practitioners. Law schools interested in expanding their capacity to do sophisticated quantitative and qualitative work on the profession should look for candidates who can bring some of these additional methodologies and perspectives to their work.

Start Small

Nationwide empirical projects on professional norms and practices are both daunting and expensive. There is no reason, however, why a school cannot start closing the knowledge gap by setting its sights on understanding a discrete organisation or practice. Both business and public policy schools routinely create in-depth case studies of companies, agencies, and individuals. Producing these studies serves a dual purpose for these institutions. First, the studies themselves provide an excellent vehicle for teaching students about the many factors that influence whether a given business or policy

decision is likely to be successful. Second, the act of creating the studies keeps faculty members in these schools connected to the world of practice in the areas in which they teach. This knowledge, in turn, enhances both their teaching and their scholarship.

With only a few notable exceptions,[49] law faculty have eschewed this approach. Instead, law professors typically confine their use of the "case method" to teaching judicial opinions, primarily from appellate courts. These opinions, however, present only an abbreviated, abstract, and highly stylised account of the disputes they resolve. Even when cases focus directly on lawyers or legal practice (which they rarely do), the opinion typically provides little of the background information and institutional context that gave rise to the dispute and that ultimately will affect how similarly situated individuals resolve future disputes. In-depth case studies like those taught in business and public policy schools would go a long way toward helping law students learn to identify and resolve the ethical, strategic, career, and policy issues that they will face as practitioners. At the same time, conducting the interviews and on-sight investigations necessary to prepare these studies would help law faculty acquire the knowledge and skills that they will need to become effective scholars and teachers about the profession.

Charity Begins at Home

Finally, every law school can begin to study its own graduates. Law schools collect an enormous amount of information on their students and alumni. Yet, virtually none of this data is systematically stored, analysed, and made available to students, faculty, and alumni. Consequently, students know almost nothing about what their careers are likely to look like five, ten, or fifteen years after graduation. Nor do alumni have more than a general idea about whether the factors that they use for hiring or promotion correlate strongly with future success as a lawyer. And administrators and professors can only guess about whether they are providing their graduates with the knowledge, skills, and dispositions that they will need to become competent and ethical practitioners. A systematic longitudinal study of alumni careers would go a long way toward answering all of these questions.

In addition, schools can multiply the benefits that they receive from studying their own graduates by linking their efforts to

regional and national projects. For example, a school wishing to determine whether its programme for teaching legal ethics is more or less effective than alternative approaches might jointly sponsor a comparative study with a school that utilises a different approach.50 Similarly, the National Association of Law Placement has recently received a grant from the Open Society Foundation to conduct a nation wide ten-year longitudinal study of law graduates. Schools wishing to understand how their graduates compare with those of other schools can coordinate their own research efforts with the NALP project.

By hiring faculty members committed to studying the profession, creating in-depth case studies of legal organisations and practices, and beginning to study our own graduates, law schools could go a long way toward answering some of the fundamental questions about legal practice that currently bedevil students, practitioners, and citizens alike. This knowledge would then lay the foundation for future courses of the kind described above. Such courses, I suggest, are a necessary step in building a normative understanding of professionalism for lawyers in the twenty-first century. The goal is not to replace traditional ethics courses, although some of the methodologies and examples we developed could and should be incorporated into these courses. Nor are these courses a substitute for the kind of direct engagement with ethical problems that students gain in their clinical courses. Nevertheless, if we expect our students to value "professional ethics," we must begin to provide them with an account of lawyer professionalism that neither reifies existing practices nor devolves into their own personal moral commitments. Teaching professional ethics through an inter-disciplinary approach provides our best opportunity to forge this new understanding.

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 (2001) 12 *Legal Educ Rev* 47.

1 See Amy Gutmann, Can Virtue be Taught to Lawyers? (1993) 45 *Stanford Law Rev* 1759 (cataloguing, but ultimately rejecting, the major criticisms to teaching lawyers professional virtue).

2 See Harry T Edwards, The Growing Disjunction Between Legal Education and the Legal Profession (1992) 91 *Michigan Law Rev* 34.

[3] This critique typically comes in two forms. The first, exemplified by the American Bar Association's McCrate Report, argues that law schools are not teaching students the skills they need to be competent and ethical practitioners. See American Bar Association, Committee on Legal Education, *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, Section of Legal Education and Admissions to the Bar, 1992). The second, most often associated with Judge Harry Edwards and Dean Anthony Kronman, complains that legal scholarship is too theoretical and pays insufficient attention to the doctrinal questions faced by real lawyers and judges. See Edwards, *supra* note 2; Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Belknap Press of Harvard University Press, 1993). See also Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession Transformed American Society* (New York: Farrar, Straus & Giroux, 1994).

[4] See Paul Camenisch, *Grounding Professional Ethics In A Pluralistic Society* (New York: Haven, 1983) (discussing these three meanings). For other discussions about the multiple and often contradictory meanings given to professionalism, see David Trubek & Robert Nelson *Arenas of Professionalism*, in Robert L Nelson, David M Trubek & Rayman L Solomon (eds), *Ideals/Lawyers Practices: Transformations in The American Legal Profession* (Ithaca: Cornell University Press, 1992) ("*Lawyers Ideals"*).

[5] Camenisch, *supra* note 4, at 7.

[6] Talcott Parsons is probably the most influential exponent of this view. See, eg Talcott Parsons *Professions*, in David L Sills (ed) International Encyclopedia of The Social Sciences, vol 12, 536 (1968). The most prolific contemporary advocate is Eliot Freidson. See Eliot Freidson, *Professionalism as Model and Ideology*, in *Lawyers Ideals*, *supra* note 4, at 215-29; see also Camenisch, *supra* note 4.

[7] See, eg Kronman, *supra* note 3; Monroe Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions (1966) 64 *Michigan Law Rev* 1469; Stephen Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities (1986) *Am B Found Res J* 613.

[8] See, eg Ralph Nader & Mark Green, *Verdicts on Lawyers* (New York: Crowell, 1976); Richard Abel, Why Does the American Bar Association Promulgate Ethical Rules? (1981) 59 *Texas Law Rev* 639.

[9] See, example Deborah L. Rhode, Ethical Perspectives on Legal Practice (1985) 37 *Stanford Law Rev* 589.

[10] See, eg Alan Goldman, *The Moral Foundations of Professional Ethics* (Totowa: Rowman and Littlefield, 1980);

[11] See Magali Sarfatti Larson, *The Rise Of Professionalism: A Sociogocial Analysis* (Berkeley: University of California Press, 1977).

[12] See David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988).

[13] See Deborah L Rhode, Ethics by the Pervasive Method (1992) 42 *J of Leg Educ* 31 (explaining and critiquing this standard orientation).

[14] Model Code of Professional Responsibility (1981).

[15] Model Rules of Professional Conduct (1992).

[16] See William Simon, Ethical Discretion in Lawyering (1988) 101 *Harvard Law Rev* 1083, 1113-19 (1988) (criticising the fact that ethical issues are frequently framed as a contest between "law" and "morality").

[17] See, example Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (New York: Routledge, 1992); Roger C Grampton, The Ordinary Religion of the Law School Curriculum (1978) 29 *J of Leg* Educ 247.

[18] See David B Wilkins, Legal Realism for Lawyers (1991) 104 *Harvard Law Rev* 468 (1991).

[19] See Kronman, *supra* note 3 (arguing that "law and economics" and "critical legal studies" reinforce a skeptical attitude that undermines the legal profession's traditional values).

[20] See sources cited in note 3, *supra*.

[21] See, eg MBE Smith, Should Lawyers Listen to Philosophers About Legal Ethics (1990) 9 *Law & Philosophy* 67 (arguing that the answer is clearly no). Ironically, Smith himself is a philosopher who became a practicing lawyer later in life.

[22] I explore this problem at some length elsewhere. See David B Wilkins, Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics, in A Sarat (ed) *Everyday Practice and Trouble Cases* (Evanston: Northwestern University Press, American Bar Foundation, 1998).

[23] See, eg the MacCrate Report, *supra* note 3 (criticising law schools for failing to prepare students for the demands of legal practice).

[24] See ABA Committee on Professionalism, "In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism (Chicago: American Bar Association Commission on Professionalism, 1986). For a critique of this report on the ground that it failed to discuss the contemporary realities of legal practice, see Trubek & Nelson, *supra* note 4, at 192-96.

[25] See, eg Rhode, *supra* note 13.

[26] See Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* 68-76 (Chicago: University of Chicago Press, 1991) (discussing the New Information Order).

[27] Mungin's story is chronicled in Paul M Barrett, *The Good Black: A True Story of Race in America* (New York: Dutton, 1998). For my own take on Mungin's case, see David B Wilkins, On Being Good *and* Black (1999) 112 *Harvard Law Rev* 1924.

[28] See Granfield, *supra* note 17 (describing Harvard Law School as indoctrinating a feeling of "collective eminence" among its students).

[29] See Sanford Levinson, Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity (1993) 14 *Cardozo Law Rev* 1577, 1578-79 (defining "bleached out professionalism" as creating "purely fungible lawyers" in which "such apparent aspects of one's identity as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer"). For a discussion of the importance of bleached out professionalism in the prevailing ideology of legal practice, see David B Wilkins, Identities and Roles: Race, Recognition, and Professional Responsibility (1998) 57 *Md Law Rev* 1502, 1511-1517.

[30] See David B Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers (1993) 45 *Stanford Law Rev* 1981.

[31] Much of my thinking about this question has been informed by reading two excellent articles by Kim Taylor-Thompson on the institutional role of public defenders. See Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender* (unpublished manuscript on file with the author); Kim Taylor-Thompson, Individual Actor v. Institutional Player: Alternating Visions of the Public Defender (1996) 84 *Geo Law J* 2419. It is not surprising that Taylor-Thompson is one of the few scholars to discuss the institutional ramifications of public defense practice. Before going into teaching, Taylor-Thompson was the Chief Public Defender for the nation's premier public defender service. As I argue below, the fact that she is writing about these issues underscores the need for hiring faculty with both an interest in, and an understanding of, the institutional dimensions of legal practice.

[32] For an excellent discussion of this approach, see Howell H Jackson, Selective Incorporation of Foreign Legal Systems to Promote Nepal as an International Financial Center, in Christopher McCrudden (ed), *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Oxford:

Clarendon Press/Oxford; New York: Oxford University Press, 1999).

[33] See Deborah L. Rhode, Why the ABA Bothers? A Functional Perspective on Professional Codes (1981) 59 *Texas Law Rev* 689, 690 (1981) ("from a societal perspective, ... professional codes are desirable only insofar as they serve common goals to a greater extent than [available alternatives]"). I explore this issue as well as the general relationship between personal and professional ethics in David B Wilkins, Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics (1994) 108 *Harvard Law Rev* 458, 468-72.

[34] See Luban, *supra* note 12.

[35] I make this point in relationship to Anthony Kronman's attempt to define an ideal for lawyers independent of actual practice. See Wilkins, *supra* note 33, at 463-68; see also Trubek & Nelson, *supra* note 4, at 181-82.

[36] See Trubek & Nelson, supra note 2, at 185-88 (discussing arenas of social construction). Trubek and Nelson's account builds on Jerome Carlin's pioneering study in which he determined that a lawyer's propensity to violate certain ethical norms varied according to the "ethical climate" in the firm, which was itself a function of the type of practice setting. See Jerome Carlin, *Lawyer's Ethics* (New York: Russell Sage Foundation, 1966).

[37] I have argued for this proposition extensively. See David B. Wilkins, Making Context Count: Regulating Lawyers after Kaye Scholer (1993) 66 *S Cal Law Rev* 1145; David B Wilkins, Who Should Regulate Lawyers? (1992) 105 *Harvard Law Rev* 799.

[38] This understanding of "character" is distinct from the artificial "professional self" that traditional theorists posit as an antidote for unethical conduct in that it assumes that a lawyer's character, and hence his or her sense of what is both ethical and possible, is largely a function of the lawyer's concrete experiences in the practice of law. See Trubek & Nelson, *supra* note 4, at 182-85 (describing and critiquing the idea of a separate "professional self"). For a thoughtful discussion of the relationship between professional codes and character, see Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators? (1996) 69 *S Cal Law Rev* 885.

[39] David Luban & Michael Millemann, Can Judgment Be Taught? Ethics Teaching in Dark Times (1995) 9 *Geo J Legal Ethics* 31.

[40] As I explain below, we did use a medical malpractice case for our moot court exercise.

[41] During the month of January, Harvard law students take one course that meets every weekday for two or three hours (the equivalent of a two- or three-credit course meeting once a week for 15 weeks). At all other times, law school courses run for either a semester or a year. After their first two years, medical students take all of their courses and clinical placements in one-month intervals.

[42] A planned visit to a large corporate law firm was canceled due to scheduling problems.

[43] Our intention was to have all the site visits completed by the end of the first week. This proved to be logistically impossible.

[44] Michelle G Herman, *King* v *Rogers*: Case File (1st ed. 1986)(unreported case available from the National Institute for Trial Advocacy).

[45] The fact that it was easier to convince law students than medical student to take the course is undoubtedly due in large measure to the students' differing opportunity costs. In order to take the class, third-year medical students must either delay or give up one of their medical rotations while fourth-year students generally do not have to take classes at all by January. Law students, on the other hand, need only decide whether to take this course or some other intensive class during the month of January in both their second and third years.

[46] For a full description of this problem, see Robert D. Truog, Randomised Controlled Trials: Lessons from ECMO (1992) 40 *Clinical Rev* 519.

[47] See also Paul Brest, The Responsibility of Law Schools: Educating Lawyers as

Counselors and Problem Solvers (1995) 58 *Law and Contemporary Problems* 5 (Summer/Autumn); Susan P Koniak & Geoffrey C Hazard, Jr, Paying Attention to the Signs (1995) 58 *Law & Contemporary Problems* 117 (Summer/Autumn).

[48] See, eg Elizabeth Chambliss, Organizational Determinants of Large Firm Integration (1997) 46 *Am U Law Rev* 670 (sociology and law); Renee M. Landers, James B Rebitzer & Lowell J Taylor, Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms (1989) *86 Am Econ Rev* 329 (law and institutional economics); Austin Sarat & William LF Felstiner, Law and Legal Consciousness: Law Talk in the Divorce Lawyer's Office (1989) 98 *Yale Law J* 1663 (political science and law); Galanter & Palay, supra note 26 (law, sociology, and economics); Robert Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (Berkeley: University of California Press, 1988) (sociology and law); John Heinz & Edward Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation; 1982) (law and sociology); Sally Engle Merry & Neal A Milner, *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (Ann Arbor: University of Michigan Press, 1993) (law and anthropology).

[49] The best examples of which I am aware are Philip B Heymann & Lance Liebman, *The Social Responsibilities of Lawyers: Case Studies* (Westbury: Foundation Press, 1988) and Michael Kelley, *Lives of Lawyers* (Ann Arbor: University of Michigan Press, 1993).

[50] For an excellent example of a comparative study, see James E Moliterno, Professional Preparedness: A Comparative Study of Law Graduates' Perceived Readiness for Professional Responsibility Issues (1995) 58 *Law & Contemporary Problems* 259.