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# ARTICLES

## THE ROLE OF THE LAW SCHOOL IN THE TEACHING OF LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

WARREN E. BURGER\*

**M**Y THESIS IS SIMPLE AND STRAIGHTFORWARD. Every law school has a profound duty—and a unique opportunity—to inculcate principles of professional ethics and standards in its students. This duty should permeate the entire educational experience beginning with the first hour of the first day in law school.

The failure to do this is, perhaps, even more serious than the failure to relate legal theory to practice. I recognize the interest and creativity which has gone into the development of some law school courses directly devoted to professional responsibility and ethics in the past decade. There has been, for example, progress in developing more adequate teaching materials. There is a special value in confronting ethical issues within the practical setting of clinical-type courses. But professional standards and ethics can neither effectively be left to one or two courses, nor should this crucial area be so relegated and denigrated as it has been for so long.

While concern with ethical issues ought to permeate the entire educational process in law school, it is not solely the law schools' responsibility to instill members of the bar with the feeling of the responsibility for what it is to be a member of the bar. To see that higher standards of responsibility permeate the profession, all three branches—law schools, bar and bench—must cooperate and build upon the foundations laid in recent years.

### I. THE ROLE OF THE LAWYER

To become a lawyer is to be more than being available as a "hired gun" or a "legal mechanic." To be sure, one of our great tasks is to be effective advocates. The history of our profession is rich with accounts of lawyers who risked careers by asserting their independence in oppo-

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\*Chief Justice of the United States.

I acknowledge the painstaking work of Dr. Jeffrey Morris, who took on the initial task of sifting through what I have written over more than two decades on these problems. I also thank Dr. Mark Cannon, my Administrative Assistant, for comments and suggestions from a non-lawyer point of view.

sition to the government or to popular attitudes.<sup>1</sup> Andrew Hamilton did that in defending John Peter Zenger; John Adams did that when he defended the soldiers accused of what history calls the "Boston Massacre;" that is what Luther Martin and others did when they defended Aaron Burr in his trial for treason.<sup>2</sup> Defending their clients, these men advanced the liberties of all. An independent judiciary alone is not enough; it must be supported by a strong, independent, courageous and competent bar. This is an imperative for a free people.

But lawyers are not "licensed" to promote conflict; they must be more than skilled legal technicians. We should be that, but in a larger sense, we must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers—not the promoters—of conflict. Lawyers must reconcile and stabilize, for a democracy often functions best by compromise. For hundreds of years England and the United States have been able largely to avoid internecine conflict, vigilantism, and collective violence because lawyers have served as the indispensable "brokers" of social progress,<sup>3</sup> providing the lubricant for acceptable resolution of controversies and for gradual change and evolution of the law.<sup>4</sup> It bears repeating that we must see ourselves more clearly in the function of *healers* rather than as promoters of litigation.<sup>5</sup>

Our profession carries public and ethical burdens with its privileges. Daniel Webster spoke of justice as "the greatest interest of man on earth."<sup>6</sup> As a profession with a monopoly over the performance of cer-

<sup>1</sup> W.N. SEYMOUR, *THE OBLIGATION OF THE LAWYER TO HIS PROFESSION* 18 (1968).

<sup>2</sup> See *In re Griffiths*, 413 U.S. 717, 732-33 (1973) (Burger, C.J., dissenting).

<sup>3</sup> Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121 (1968).

<sup>4</sup> This is not the occasion to treat at length the unhappy saga of betrayal of public trust by lawyer-public officials in recent years. My predecessor, Charles Evans Hughes, once said to a group of students at Yale:

Work in your chosen field to the best of your ability, enter into political activities without thought or demand of reward, do your duty as a citizen because it is your duty and not because you expect office, keep yourself free from embarrassing obligations, be ready to take office if it comes your way and you can take it; but never let the thought of your selection stay your efforts in aiding the community to better things.

C.E. HUGHES, *CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT* 54-55 (1910).

<sup>5</sup> George Sharswood, the seminal figure in American legal ethics, wrote: "A very important part of the advocate's duty is to moderate the passions of the party, and where the case is of a character to justify it, to encourage an amicable compromise of the controversy." G. Sharswood, *An Essay on Professional Ethics* in 32 ABA REP. 109 (5th ed. 1907).

<sup>6</sup> Wilkie, *The Role of the Supreme Court in Regulating the Ethics of Lawyers and Judges*, 49 WIS. B. BULL. 23, 24 (Feb. 1976).

tain services, we have special obligations to the consumers of justice to be energetic and imaginative in producing the best quality of justice at the lowest possible costs for those who use it, and with a minimum of delay. It was in these respects that my late colleague, Charles Fahy, hoped that we would think of a lawyer and the law as forces for moral good, "as a civilization of its own, enhancing the whole of our civilization."<sup>7</sup>

## II. THE PUBLIC AND THE BAR

Unfortunately, few members of the general public see us this way. In one poll lawyers ranked in ninth place among professions on a public credibility rating, just above law enforcement officers, television news reporters and plumbers.<sup>8</sup> In 1974, a poll sponsored by the American Bar Association showed: sixty-eight percent (68%) of the public believed that lawyers charged more for their services than they were worth; sixty percent (60%) believed that lawyers work harder for wealthy, influential clients than for others; eight-two percent (82%) believed that many matters could be handled as well and cheaper by accountants, bank officers, and insurance agents; and forty-two percent (42%) believed that "lawyers are not concerned about doing anything about the bad apples in the legal profession."<sup>9</sup> A 1977 Gallup poll on the honesty and ethical standards of lawyers found that only twenty-six percent (26%) of the sample rated honesty and ethical standards of lawyers as being high or very high, while twenty-seven percent (27%) rated lawyers' honesty and ethical standards low or very low. These results were substantially lower than those for members of the clergy, medical doctors, engineers, college teachers, bankers, police, journalists, undertakers, business executives, building contractors and others. Lawyers did rank higher than members of Congress, realtors, labor union leaders, state office holders, advertising practitioners and car salesmen.<sup>10</sup>

One can reasonably question the validity of such surveys, but the findings of these polls—accurate or not—suggest that the public's perception of lawyers is that they needlessly complicate the problems of life; that average citizens do not seek legal advice as often as they could or should; that lawyers are not prompt in getting things done; and that

<sup>7</sup> Cohn, *Charles Fahy*, 68 GEO. L.J. iii, v (Oct. 1979) (quoting Charles Fahy).

<sup>8</sup> See McKay, *Legal Education: Law, Lawyers, and Ethics*, 23 DE PAUL L. REV. 641, 644 (1974).

<sup>9</sup> B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 231-34 (1977).

<sup>10</sup> G. GALLUP, *Honesty and Ethical Standards* in *THE GALLUP POLL: PUBLIC OPINION 1972-1977*, 1196-97 (1978). See Gallup, *Honesty and Ethical Standards of Lawyers*, 1978 *THE GALLUP OPINION INDEX* 17 (Jan. 1978) (Report No. 150). See also S. ROPER, *THE ROPER REPORTS*, 1977, 123-25 (1977); S. ROPER, *THE ROPER REPORTS*, 1978, 63-65 (1978).

lawyers do not care whether their clients fully understand what needs to be done and why. For my part, I would seriously question that these public perceptions are accurate—or fair—but as “straws in the wind,” they afford little basis for complacency. These results, to some degree, are due to age-old, popular suspicions of the jargon and technicality in the profession, and to a failure to understand that lawyers are specialists who become identified with the interests they represent in conflicts. It is inevitable that lawyers, to some extent, become scapegoats. Over the centuries artists like Daumier, Shakespeare, Samuel Johnson, Dickens and Shaw, have had harsh things to say about the law's delays, lawyers' avarice, and the role of lawyers in fomenting conflicts.<sup>11</sup>

But, as Harlan Fiske Stone wrote almost a half-century ago:

We cannot brush aside this lay dissatisfaction with lawyers with the comforting assurance that it is nothing more than the chronic distrust of the lawyer class which the literature of every age has portrayed. It is, I fear, the expression of a belief too general and too firmly held for us the shut our eyes to it.<sup>12</sup>

Nor can we take comfort in the diagnosis that lawyers are not alone among American institutions and professions—public and private—to suffer declining respect. A significant part of our profession has been, and continues to be, guilty of grave ethical lapses over which public awareness and resentment have grown. More serious is the complacency of the organized bar with even the most grave lapses of professional propriety.

### III. COMMON ETHICAL PROBLEMS

Doubtless it is a small minority of American lawyers who are guilty of unprofessional conduct, but they are far too many in number and they still largely escape censure. The greatest number of client complaints are about incompetence, neglect and procrastination. Whitney North Seymour, Jr. has reported that eighty percent (80%) of the client complaints to the Association of the Bar of the City of New York deal with the lawyer's failure to perform his or her professional responsibilities promptly, or at all.<sup>13</sup> A 1978 survey of members of the Virginia bar found that Virginia lawyers believed that one out of every five lawyers frequently failed to perform satisfactory work for his or her clients.<sup>14</sup> In a

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<sup>11</sup> See, e.g., Shakespeare, *Henry VI*, Part II, Act IV, Scene ii, line 86: “The first thing we do, let's kill all the lawyers.”

<sup>12</sup> Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 3 (1934)

<sup>13</sup> W.N. SEYMOUR, JR., WHY JUSTICE FAILS 17 (1973).

<sup>14</sup> Washington Star, August 28, 1978. For a similar finding in the years 1928-1948, see A. BLAUSTEIN & C. PORTER, *THE AMERICAN LAWYER* 258 (1954) (statistics for Illinois).

recent year, client neglect was the most common complaint to the Board of Professional Responsibility of the District of Columbia.<sup>15</sup>

At various times, I have expressed profound concern about the inadequate courtroom performance of far too many American lawyers. It is the disadvantaged members of society whose interests are most likely to be prejudiced by such lack of competence.<sup>16</sup> Although some observers may have initially questioned the seriousness of the problem of the competency of trial advocates, a series of studies have revealed an unmistakable picture of a growing recognition by all parts of the profession that there is indeed "a serious problem."<sup>17</sup> As with the consumers of medical services, it is the lawyer's clients who suffer the most serious consequences. The quality of advocacy directly affects the rights of litigants, the costs of litigation, the proper functioning of the justice system, and ultimately, the quality of justice. In this area at least, we are beginning to show some progress, although only the "tip of the iceberg" has been addressed.<sup>18</sup>

I have also expressed concern over the failure of many lawyers to observe elementary standards of civility in professional manners, behavior, and decorum. Certain rules of behavior, etiquette and manners are the indispensable lubricant of our inherently contentious system of adversary justice. They keep the focus of the courtroom contest on issues and facts and away from distracting personal clashes and irrelevancies. Civility in a trial distinguishes a courtroom contest from a barroom brawl.<sup>19</sup> There is nothing incompatible between zealous and courageous advocacy and conformity to standards of ethics and professional behavior.

Another chronic concern is the cost of legal services. In 1978, it was estimated that sixty percent (60%) or more of the population did not

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<sup>15</sup> Washington Post, Nov. 13, 1958. To be sure, data based upon complaints must be scrutinized with care. Many complaints are crank complaints. Others come from clients who have lost their case or who have not gotten along with their lawyers.

<sup>16</sup> Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

<sup>17</sup> See, e.g., A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1978); Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978); Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 A.B.F. RESEARCH J. 105 (1978); Law Poll, *Burger Not All That Wrong?*, 64 A.B.A.J. 832 (1978).

<sup>18</sup> See Burger, *Some Further Reflections on the Problem of Delinquency of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980).

<sup>19</sup> Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971) (remarks to the American Law Institute, Washington, D.C., May 8, 1971). See Ehrlich, *Charles H. Miller Lecture—Lawyers and Their Public Responsibilities*, 46 TENN. L. REV. 713, 718 (1979).

have meaningful access to legal services.<sup>20</sup> In spite of this, there are a host of relatively simple transactions where ordinary folk must employ lawyers because our profession has a monopoly. In all too many cases—the purchase of a home being a good example—clients are “ripped off” by fees that are greatly out of proportion to the complexity of the transaction or the time spent by the lawyer. Perhaps nowhere else are there more instances of the imposition of excessive fees, of charging buyer and seller (or lender and borrower) for the same services or of “jacking up” closing costs to an unreasonable and unwarranted level, than in the sale of real property. This still occurs even though recent Court decisions have held that the minimum fee schedules of bar associations for title searches constitute price-fixing in violation of the anti-trust laws,<sup>21</sup> and—wisely or not—have upheld lawyer advertising.<sup>22</sup> Any intelligent person can be trained to close real estate transactions at a reasonable cost. That is precisely the kind of service a paralegal can perform.

Lawyers have become too costly for the middle class.<sup>23</sup> A corporate attorney's statement suggests the dimension of the problem: “If you earn \$75,000 a year you couldn't afford my fees. Things have gotten so bad I can't afford my own fees.”<sup>24</sup>

To some extent, this is a problem that goes beyond the ethics of high fees. It is time that the profession explored computerization for maintenance of land title records and the process of examining land titles to reduce costs to a fraction of the present figures. Ways must be found to simplify and reduce the cost of transferring property at death. It is time to explore new ways to deal with such family problems as divorce, child custody and adoptions.<sup>25</sup> I have also suggested that “fully trained litigation lawyers” may not be “needed to resolve some kinds of

<sup>20</sup> Hellman, *Considering the Future of Legal Education: Law Schools and Social Justice*, 29 J. LEGAL EDUC. 170, 184 n.64 (1978). See B. CHRISTENSON, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970); B. CURRAN & F. SPALDING, *THE LEGAL NEEDS OF THE PUBLIC* (1970); Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339 (1975).

<sup>21</sup> Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

<sup>22</sup> Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

<sup>23</sup> See McKay, *Legal Education: Law, Lawyers, and Ethics*, 23 DE PAUL L. REV. 641 (1974). See also Cheatham, *A Lawyer When Needed: Legal Services for the Middle Class*, 63 COLUM. L. REV. 973 (1963).

<sup>24</sup> J. LIEBERMAN, *CRISIS AT THE BAR* 55 (1978). See *The Organized Bar: Self-Serving or Serving the Public?*, in *HEARINGS BEFORE THE SUBCOMM. ON REPRESENTATION OF CITIZEN INTERESTS OF THE SENATE COMM. ON THE JUDICIARY*, 93rd Cong., 2d Sess. (1974).

<sup>25</sup> Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 33-34 (A. Levin & R. Wheeler 1979).

conflicts, and, except for part of the decision-making process, they may be a handicap."<sup>26</sup>

[C]onsumer[s] with \$300 in controversy for car repairs, or a dispute on a defective roofing job, or a malfunctioning home appliance, [prefer] a reasonably satisfactory resolution to the protracted legal proceedings that are characteristic of courts. I suggest that most people will prefer an effective, common sense tribunal of non-lawyers, or a mix of two non-lawyers and one lawyer, rather than the traditional court system to resolve [their] modest but irritating claim[s].<sup>27</sup>

Some progress to these ends has been made in the past five years.<sup>28</sup>

There are other problems which can be limited or ended only by greater ethical sensitivity, i.e., lawyers who practice with conflicts of interest, who breach fiduciary obligations, or who commit fraud.<sup>29</sup> Last year a reporter, posing as an accident victim, went to thirteen personal injury lawyers in New York City with a case in which their willingness to aid and abet her in perjuring herself would have produced a large contingency fee. In her hypothetical situation, an undetectable lie would have turned a hopeless claim into a winner with a potential for a big recovery. Several of the thirteen lawyers offered to set up the fraud.<sup>30</sup>

We know that the public is conscious of dishonesty in many areas of modern life, including the professions.<sup>31</sup> We know too, that public tolerance for these abuses increased during the 1970's when we began to produce more law school graduates than ever before, more litigation than ever before, and when legal fees increased more rapidly than the rate of inflation. During the 1970's there were increased misuse and abuse of pre-trial discovery and growing concern that the class action had, in too many instances, evolved in an action more for the benefit of the lawyers than for the benefit of the class.

#### IV. PROGRESS BY THE ORGANIZED BAR IN DEALING WITH PROFESSIONAL RESPONSIBILITY

The organized bar—especially the American Bar Association—has been aware of the shortcomings and the extent of popular dissatisfac-

<sup>26</sup> Remarks by Warren E. Burger, Minor Disputes Resolution Conference, in New York City (May 27, 1977) at 6.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> See Warren E. Burger, End-of-the-Year Statement, 1980, at 6-8 (released Dec. 29, 1980).

<sup>29</sup> See, e.g., A. BLAUSTEIN & C. PORTER, *supra* note 14, at 258.

<sup>30</sup> Berentson, *Integrity Test* in AMERICAN LAWYER 15-18 (May 1980).

<sup>31</sup> Thomason, *What the Public Thinks of Lawyers*, 46 N.Y. ST. B.J. 151-57 (April 1974).



tion with the administration of justice, but only each local bar can implement remedies. In little more than a decade there have been two major efforts to define ethical standards for the profession, as well as revision of the Canons of Judicial Ethics, creation of Uniform Standards for bar discipline which have been widely adopted in the states, proposed Uniform Federal Disciplinary Rules, creation of standards for criminal justice and creation of a National Disciplinary Data Bank.

In 1964, the American Bar Association created the Special Committee on Evaluation of Ethical Standards to examine the Canons of Professional Ethics and to make recommendations for changes. In 1967, widespread concern over the state of disciplinary procedures and their enforcement led to creation of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement. Retired Justice Tom C. Clark was named chairman. The ABA Committee, concerned that attorneys disbarred in one jurisdiction were practicing in others and that there were no procedures for the exchange of information about discipline between jurisdictions, recommended the creation of a National Discipline Data Bank in an interim report. After favorable replies from disciplinary agencies, the House of Delegates authorized the establishment of the Discipline Data Bank, which was approved by the Board of Governors on May 21, 1968.<sup>32</sup>

By 1970, the Canons were described as "little more than a collection of pious homilies,"<sup>33</sup> although they clearly established the duty of lawyers to be ethical in their professional work. As early as 1934, Harlan Fiske Stone had written that "[o]ur Canons of ethics for the most part are generalizations designed for an earlier era."<sup>34</sup> Deciding that piecemeal amendment of the 1908 Canons would no longer suffice, the Special Committee on Evaluation of Ethical Standards submitted a new code, the Model Code of Professional Responsibility. It was adopted by the ABA on Aug. 12, 1969. The Model Code had nine Canons, which were general concepts or standards; 138 Ethical Considerations, which were aspirational; and 41 Disciplinary Rules, which were mandatory standards. Fifty states and the District of Columbia adopted at least the Disciplinary Rules within a few years.

The Report of the Clark Committee may have had even greater impact on upgrading ethical procedures than the newly restated ethical standards. The Committee minced no words in its description of the state of disciplinary machinery. On the very first page of the report was this conclusion:

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<sup>32</sup> ABA SPEC. COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 156 (June 1970) [hereinafter cited as CLARK REPORT].

<sup>33</sup> Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639, 639 (1977).

<sup>34</sup> Stone, *supra* note 12, at 10.

[T]his committee must report the existence of a *scandalous situation* that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges *from apathy to outright hostility*. *Disciplinary action is practically nonexistent* in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.<sup>35</sup>

The Committee dealt with thirty-six problems through recommendations regarding disciplinary structures and jurisdiction, the financing, staffing and record-keeping of such agencies, their acceptance within the profession, and the exchange of information between jurisdictions.<sup>36</sup> The Committee recommended the establishment of procedures by bar associations for the arbitration of fee disputes, procedures for handling claims against attorneys, and for client security funds.<sup>37</sup> The Committee also stressed the need to centralize bar discipline procedures and to make them more professional.

The existence of the ABA Committee, the questionnaires it had sent out to every disciplinary agency and its regional hearings stimulated some jurisdictions to embark upon renewed efforts to achieve more effective disciplinary enforcement, even before the final report of the Committee was submitted.<sup>38</sup>

Along with the Model Code of Professional Responsibility and the ABA Committee Report, there was a good deal of other activity in the field of professional responsibility during the 1970's. The ABA adopted a set of standards for prosecution and defense lawyers as part of its monumental Criminal Justice Standards Project. An ABA Committee was appointed 1969 to redraft the 1924 Canons of Judicial Ethics. The new Code, adopted by the ABA in 1972, helped to clarify standards for judges and to maintain public trust in the judicial process. The Code was promptly adopted by most state courts. The federal courts also adopted it, adding several stringent provisions.

The ABA established the Center for Professional Responsibility (later called the National Center for Professional Responsibility) in 1973. It is the central clearinghouse for information on case law, rules, memoranda, and statistics in the field of professional responsibility.<sup>39</sup> The Stan-

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<sup>35</sup> CLARK REPORT, *supra* note 32, at 1 (emphasis added).

<sup>36</sup> In 1956 the ABA Special Committee on Disciplinary Processes had submitted a report in the form of a uniform model code of rules of court for disciplinary proceedings.

<sup>37</sup> CLARK REPORT, *supra* note 32, at 186.

<sup>38</sup> CLARK REPORT, *supra* note 32, at 192-93.

<sup>39</sup> See M. B. SHOAF, STATE DISCIPLINARY ENFORCEMENT SYSTEMS STRUCTURAL SURVEY (1980) (compiled for National Center for Professional Responsibility). See also Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821, 822 (1974).

ding Committee on Professional Responsibility, together with the center for Professional Responsibility, developed the "Suggested Guidelines for Rules of Disciplinary Enforcement"<sup>40</sup> to help states revise their disciplinary enforcement systems.

Most states adopted disciplinary procedures similar to those suggested in the Clark Committee recommendations: Centralization of disciplinary enforcement; rotation of membership on disciplinary boards; initiation of investigation without complaints; centrally located records; suspension for incapacity or on conviction of serious crime, and conviction as conclusive evidence of guilt for purposes of a disciplinary proceeding.<sup>41</sup> Between 1970 and 1975, many fee-arbitration systems were established. In 1970, Michigan became the first state to add non-lawyer members to disciplinary boards. Recently, Maryland became the twenty-third state to do so.<sup>42</sup>

At the request of the Appellate Judges' Conference and the ABA Standing Committee on Professional Discipline, the Joint Committee on Professional Discipline was appointed to develop standards for courts to use in establishing a structure for judicial and lawyer disciplinary proceedings. The Standards for Lawyer Discipline and Disability Proceedings were approved by the House of Delegates in February, 1979.<sup>43</sup>

The ABA and the Judicial Conference of the United States have endorsed the Model Federal Rules of Disciplinary Enforcement, which is the result of cooperation between the Subcommittee on Judicial Improvements of the Judicial Conference Committee on Court Administration and the Standing Committee on Professional Discipline. I have strongly supported these rules.<sup>44</sup> All but seven federal districts now participate in the National Discipline Data Bank.

The last major effort of the 1970's in the area of discipline, the Model Rules of Professional Conduct—the work of the ABA Commission on Evaluation of Professional Standards—have yet to be approved by the House of Delegates and the states.<sup>45</sup> Whatever is done to modify or reframe standards of professional responsibility, the most vital concern

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<sup>40</sup> ABA COMM. ON PROFESSIONAL RESPONSIBILITY, SUGGESTED GUIDELINES FOR RULES OF DISCIPLINARY ENFORCEMENT (1974).

<sup>41</sup> Letter from John C. McNulty to Bryant Edwards, Table 3 (Nov. 15, 1976) (on file in the Office of the Administrative Assistant to the Chief Justice, Supreme Court of the United States).

<sup>42</sup> Bar Notes, *More States Adding Public to Discipline Boards*, NAT'L L.J. June 25, 1979, at 7. See generally M. BAYS SHOAF, *supra* note 39.

<sup>43</sup> See generally ABA NAT'L CENTER FOR PROFESSIONAL RESPONSIBILITY FOR THE JT. COMM. ON PROFESSIONAL DISCIPLINE, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES (1979).

<sup>44</sup> See Letter from Warren E. Burger to John C. McNulty (Nov. 23, 1977). See also Burger, *The State of the Judiciary 1979*, 65 A.B.A.J. 358, 359 (1979) (1979).

<sup>45</sup> See, e.g., Kutak, *Coming: The New Model Rules of Professional Conduct*, 66 A.B.A.J. 47 (1980); Patterson, *supra* note 33.

is to make them understood and to enforce them to show we intend them as a means to protect the public.

The work of the organized bar for nearly two decades offers the hope of restoring and maintaining an honorable and effective legal profession. The record of the bar toward self-enforcement has surely improved, but more must be done. We have learned that we can no longer tolerate faltering enforcement programs which diverge widely among the fifty states with the unhappy spectacle of the bar looking to the bench and the bench to the bar for action. While making state procedures modern and professional has led to an increase in discipline as well as voluntary resignations, too often even criminal prosecutions against lawyers do not result in significant disciplinary action.<sup>46</sup>

We still have a long way to go, and we could well take a leaf from the British. In England, the education of lawyers, the framing of standards of conduct, and the power to enforce such standards is in the hands of the bar. At the core of their training is inculcation of strict standards of civility and decorum, and high standards of ethical conduct. Those aspects of training begin on the very first day of the educational process and permeate the entire educational experience. Occasions for discipline are relatively rare, for misconduct is dealt with swiftly and—by our standards—harshly. There are relatively few disbarments in England, “not because our chaps are more moral,” as one London Bar leader put it, “but because they know the consequences of a lapse.” In any multiple-judge American courthouse, numerous offenses occur daily which would bring severe censure if committed by a British barrister. They go largely unremarked over here. Yet, although rigidly regulated and disciplined by their peers, British barristers remain vigorous, zealous, courageous and independent.<sup>47</sup>

Less money is still being spent nationally on professional discipline than may accrue to lawyers in one big case.<sup>48</sup> There must be adequate staffing and financial resources. If we are to maintain public confidence in our profession, it is imperative that courts and local and state bar associations take positive action to deal with every manifestation of professional misconduct. This must be done fearlessly and with fairness to the public, the profession, and the individuals involved. Every segment of the organized bar must share the responsibility of seeing that the public interest comes first. The ABA Committee chaired by Justice Clark warned: “[U]nless public dissatisfaction with existing disciplinary procedures is heeded and concrete action taken to remedy the defects, the public soon will insist on taking matters into its own hands.”<sup>49</sup>

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<sup>46</sup> W.N. SEYMOUR, JR., *supra* note 13, at 18.

<sup>47</sup> It is, of course, fair to note that England has far fewer lawyers than we do—and none of the complexities of our federal system.

<sup>48</sup> See *More Discipline Money Needed, Expert Claims*, 63 A.B.A.J. 312 (1977).

<sup>49</sup> CLARK REPORT, *supra* note 32, at 2.

## V. LAW SCHOOLS AND THE TEACHING OF LEGAL ETHICS

Almost a half-century ago, Harlan Fiske Stone observed that the character of the law schools determines the character of the legal profession.<sup>50</sup> Surely the failures of the law school in teaching legal ethics and professional responsibility are responsible in some measure for the ethical problems in our profession. We now have generations of lawyers whose superior technical training has not been leavened by adequate training in ethics and professional responsibility. Of course, there are exceptions, but, on the whole, what the law schools have done is to take young men and women and train them in the skills of a professional monopoly, leaving the learning of moral and ethical precepts—which ought to guide the exercise of such an important monopoly—to a vague, undetermined, unregulated, and undefined future. Paradoxically, the guild, which emphasized rigorous thought and analytical discipline, somehow assumes that ethical standards will be absorbed during practice by osmosis.<sup>51</sup>

Some observers argue that character and moral sense are largely molded by the time students get to law school.<sup>52</sup> There is some truth to this. The law school cannot replace the family, the church or synagogue, or the strong role model provided by the classroom teacher during the years of elementary and secondary school.<sup>53</sup> But we know full well that the law school is an immensely powerful force in defining, structuring, and internalizing professional norms, values and attitudes.<sup>54</sup> Studies have established that over the course of law school study, student interest and involvement in classwork drops off radically.<sup>55</sup> Unfortunately, there are also studies suggesting a progressive decline on the part of students in sensitivity and concern about the ethical ideas of professionalism, from their pre-law days through law school and into

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<sup>50</sup> Stone, *supra* note 12, at 14.

<sup>51</sup> See Warren E. Burger, *The Role of the Lawyer in Modern Society*, Remarks at Convocation of the J. Reuben Clark College of Law, Brigham Young University, Provo, Utah (Sept. 5, 1975).

<sup>52</sup> See generally Hellman, *supra* note 20, at 171 n.11.

<sup>53</sup> Generally, ethics are inadequately taught in much of higher education, although medical schools have made progress in recent years. Note the words of John C. Sawhill:

As long as educators cater only to the transient interests of society and the job market, we run the risk of reaching the moon without knowing why, of curing illness in the lab when there is still suffering in the field. . . . In charting our course to a successful future, we must have the data of the science of ethics.

Sawhill, *A Question of Ethics*, NEWSWEEK, Oct. 29, 1979, at 27.

<sup>54</sup> Hellman, *supra* note 20, at 171.

<sup>55</sup> See Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 652-59 (1973). See also Boyer and Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 276, 277 n.197 (1974).

practice.<sup>56</sup> Many law students come to law school because they view lawyers as dedicated to ideas of service, high ethical standards and problem-solving.<sup>57</sup> If their sensitivity to ethical problems as well as their idealism declines, the law schools are doing a markedly poor job of what former Dean Robert B. McKay calls "the one thing which we should be charged with above all others, the inculcation of a sense of discipline and morality into the practice of the law."<sup>58</sup>

Many acute observers have remarked on this failing of legal education. For example, in 1963, a survey of 134 law schools produced the results that forty percent of the 123 deans surveyed (or their delegates) did not consider their law school's approach to teaching legal ethics and professional responsibility satisfactory.<sup>59</sup> Tom Clark wrote in 1968: "[T]here is a strong consensus among the disciplinary agencies . . . that law schools have failed thus far to institute courses which effectively promote pride in the profession and elevate ethical standards."<sup>60</sup>

And again in 1975: "We have been meeting and talking about [professional responsibility] for over fifty years, but the truth is that we have done little to correct the ethical emptiness in our law schools."<sup>61</sup>

Chesterfield Smith, as President of the ABA, wrote in 1974: "I go to all kinds of law schools . . . and very few of them are proud of their course in legal ethics. Most of them are kind of ashamed of it."<sup>62</sup>

Whitney North Seymour, Jr. has concurred in these evaluations, stating: "[L]aw schools training on such subjects as ethics and professional responsibility is also woefully inadequate."<sup>63</sup>

I have not argued that law schools can necessarily make up for the shortcomings in an individual's previous ethical training,<sup>64</sup> nor do I argue that law schools should or could do so much that no further expo-

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<sup>56</sup> Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 14-15 (1963).

<sup>57</sup> Stevens, *supra* note 55, at 612-14.

<sup>58</sup> McKay, *supra* note 8, at 645.

<sup>59</sup> L. LANBORN, *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY: A SURVEY OF CURRENT METHODS OF INSTRUCTION IN AMERICAN LAW SCHOOLS* 15 (1963).

<sup>60</sup> Clark, *More Effective Disciplinary Enforcement—A Beginning*, 40 N.Y. ST. B.J. 407, 409 (1968).

<sup>61</sup> Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 260 (1975).

<sup>62</sup> *The Bar and Watergate: A Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31 (1974).

<sup>63</sup> W.N. SEYMOUR, JR., *supra* note 13, at 11. See also Boyer and Cramton, *supra* note 55, at 286.

<sup>64</sup> Dr. Charles Malik, former President of the United Nations General Assembly, speaking to a Conference on education, stated: "I search in vain for any reference to the fact that character, personal integrity, spiritual depth, the highest moral standards, the wonderful living values of the great tradition, have anything to do with the business of the university or the world of learning." See Burger, *Annual Report to the American Bar Association*, 67 A.B.A.J. 290, 291 (1981).

sure to ethical issues is necessary.<sup>65</sup> But I do submit that a very large responsibility rests with the law school to teach real life problems in real life terms. The law school is uniquely situated to shape and form the habits of students during the period in which their professional ideals and standards of ethics, decorum and conduct are being formed. At this stage, law students are more malleable and receptive than they will be after years of professional observation of bad habits of legal thinking, legal application, or dubious ethics.

Some law teachers do not believe that their function and the function of their schools is to teach these fundamentals of professional responsibility any more than to train trial advocates. Too many remark, "[w]e are teaching students to *think*—we are not running a trade school." But lawyers who know how to think in legal terms, but have not learned how to behave, are a menace to society and a liability, not an asset, to the administration of justice.<sup>66</sup> Justice Harlan Fiske Stone wrote in 1934:

From the beginning the law schools have steadily raised their intellectual standards. It is not too much to say that they have worshipped the proficiency which they have sought and attained to a remarkable degree. But there is grave danger to the public if this proficiency is directed wholly to private ends without thought of the social consequences, and we may well pause to consider whether the professional school has done well to *neglect so completely the inculcation of some knowledge of the social responsibility which rests upon a public profession. . . .* [T]hat conception is a distorted one if it envisages only the cultivation of skill without thought of how and to what end it is to be used, and the question of what the law schools have done and can do to make that conception truer is one to be pondered. . . .<sup>67</sup>

## VI. HOW LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY MIGHT BE TAUGHT

The increased attention during the past few years by some law teachers and some law schools to the teaching of legal ethics and professional responsibility is encouraging. There have been national con-

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<sup>65</sup> See COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY (CLEPR), THIRD BIENNIAL REPORT, 1973-74 (1974). I agree with the conclusions of the 1977 National Conference on the Teaching of Professional Responsibility that those working in the area of continuing legal education ought to include in their specialty courses materials to maintain the sensitivity of the bar to issues of professional ethics. See TEACHING PROFESSIONAL RESPONSIBILITY, MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE xv. (A. Keenan ed. 1979) [hereinafter cited as 1977 NATIONAL CONFERENCE]. See also Wilkie, *supra* note 6, at 24.

<sup>66</sup> See Burger, *supra* note 19, at 215.

<sup>67</sup> Stone, *supra* note 12, at 13-14 (emphasis added).

ferences on the subject,<sup>68</sup> seminars at the Association of American Law Schools' annual meeting, articles about the proper methods for teaching legal ethics and attempts at creative and innovative programs in several law schools.

The American Bar Association amended its standards for accreditation in 1974 to mandate that the law schools shall: ". . . provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession."<sup>69</sup> The ABA standard requires that the "history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered."<sup>70</sup> While not limiting instruction to a specific pedagogical method, the standard encourages the law school to "involve members of the bench and bar in such instruction."<sup>71</sup> Practitioners know these problems first hand.

The most popular approach to the teaching of legal ethics, according to a 1977 survey by the Association of American Law Schools, is a required course, sometimes entitled "legal ethics," or sometimes "professional responsibility." According to that survey, one-third of American law schools make this course worth but one credit. This does not begin to allow enough time to cover the subject matter. Moreover, it carries with it the connotation that the law school places little value on professional responsibility. The subject ought to rate with Constitutional Law—at a minimum. In one-sixth of these courses, grading is pass/fail (while other courses are graded traditionally), possibly another sign of institutional disinterest—if not an abdication of responsibility. This course is most often available towards the end of law school, when students are the least motivated and the most cynical. According to the 1977 survey, the instructors for this course were not practitioners, but legal educators, often full professors, who averaged two years experience in teaching the course<sup>72</sup>—a dull chore to be shed as soon as pos-

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<sup>68</sup> See, e.g., 1977 NATIONAL CONFERENCE, *supra* note 65; The Society of American Law Teachers National Conference on the Future of Legal Education, at NYU Law School (Dec. 1976), *proceedings discussed in* 53 N.Y.U. L. REV. 293-675 (1978). There were also National Conferences at Boulder in 1956 and 1968. See J. STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY: A REPORT AND ANALYSIS OF THE CONFERENCE ON THE EDUCATION OF LAWYERS FOR THEIR PUBLIC RESPONSIBILITIES, 1956 (1959); Weckstein, EDUCATION IN PROFESSIONAL RESPONSIBILITIES OF THE LAWYER (D. Weckstein ed. 1970) (proceedings of the National Conference on Education in the Professional Responsibilities of the Lawyer, University of Colorado, Boulder, Colorado, June 10-13, 1968).

<sup>69</sup> ABA, APPROVAL OF LAW SCHOOLS—ABA STANDARDS AND RULES OF PROCEDURE § 302(a) (iii) (1979).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> While this subject matter ought ideally to be addressed by an instructor with extensive experience in practice, this is at least an improvement over the past where faculty members avoided this course like the plague. See Frankel, *Can a Good Lawyer Be a Good Person?* NAT'L L.J. Nov. 27, 1978, at 19.



sible! The most encouraging aspect of the survey is that most law schools have not moved away from the sterile method of lecturing at their students about professional responsibility. Today, more and more law schools use the "problem" or casebook methods and new casebooks and other materials have proliferated.<sup>73</sup>

Some law schools, like the Spessard Holland Law Center of the University of Florida,<sup>74</sup> have approached their single course in professional responsibility with great imagination. But too many of the courses offered are examples of tokenism. As then Professor Donald Weckstein said in 1968: "We cannot expect too much from ethics classes held, like church services, a couple of hours a week."<sup>75</sup> Too many courses are given in too few hours and taught by too many faculty members who lack both dedication and practical experience. A token course on ethics might be worse than none, creating an illusion pregnant with mischief.

Advocates of clinical education argue that it is the best vehicle for teaching professional responsibility<sup>76</sup> because students need firsthand observation of the ways in which ethical problems arise and of the actual mores of the bar. This was clearly one of the principal aims in the efforts of the Council on Legal Education for Professional Responsibility which claimed that:

Only in the clinic, where the teacher, and the student are personally involved, where they have to take action and face the consequences; where they undergo tensions which upset their emotions and take away their peace of mind, is there opportunity to develop the moral fiber and the proper instincts for dealing with ethical problems in a professionally responsible way. Thus the principal reliance for teaching ethics and professional responsibility must be on the law school clinic and on clinical legal education.<sup>77</sup>

Learning about ethics comes easier, no doubt, when professor and student are jointly facing moral dilemmas than when they are standing outside a problem and commenting on it.<sup>78</sup>

But the clinic is not yet ready to become the primary method for

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<sup>73</sup> Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, in 1977 NATIONAL CONFERENCE, *supra* note 65, at 21-57.

<sup>74</sup> See Maloney, *Panel on Methods of Teaching Professional Responsibility*, in 1977 NATIONAL CONFERENCE, *supra* note 65, at 67-68. See also Levinson, *Teaching Professional Responsibility at Vanderbilt University School of Law*, in 1977 NATIONAL CONFERENCE, *supra* note 65, at 117-24.

<sup>75</sup> Weckstein, *Boulder II: Why and How*, 41 U. COLO. L. REV. 304, 308 (1969).

<sup>76</sup> Weinstein, *Educating Ethical Lawyers*, 47 N.Y. ST. B.J. 260 (1975).

<sup>77</sup> COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, THIRD BIENNIAL REPORT, *supra* note 65, at 9.

<sup>78</sup> *Id.*

teaching ethics. The law schools have not yet provided enough clinical courses for those students interested in taking them. There is no form of quality control at present to insure that instructors in the clinics will be especially sensitive to issues of professional ethics, or whether they too may fall prey to overzealous advocacy for clients.<sup>79</sup> Furthermore, it is an error to segregate ethics to any one course or any one part of the curriculum.

A variety of other methods are used in law schools to expose students to ethical issues. The first-year introductory course in legal methods may devote a percentage of its time to ethical issues. Occasionally, discussions are held even before the standard first-year courses begin. Some law schools encourage extracurricular dinner meetings led by judges and lawyers paralleling those at the four Inns of Court in London. Sometimes the student bar association of a law school will conduct discussions or show films. Some law schools send out reading lists to entering first-year students upon admission or even upon application to the law school.<sup>80</sup>

I repeat that from the first hour of the first day in law school there must be emphasis on the ethical principles and standards of conduct governing the profession. Ethics cannot be taught in a single course or clinic. I suspect that in most cases, legal ethics will not be taught effectively if the lead instructor has not had extensive experience in practice. Legal ethics should not be taught as a catechism by rote memorization or by lecturing at students. Students will learn through clinics and through discussion with faculty members, members of the bar and judges. Students will learn professional responsibility if sensitized to the ethical issues as they arise in various courses in substantive and procedural law.<sup>81</sup>

<sup>79</sup> See *LAWYERS, CLIENTS AND ETHICS* (M. T. Bloom ed. 1974) (interesting commentaries upon the ethical problems coming to the attention of the clinical professor).

<sup>80</sup> Harris Wofford has suggested that law school faculties should add ethicists, moral philosophers and social scientists. See Hellman, *supra* note 20, at 181.

<sup>81</sup> Although I use the word "pervade," I distinguish my approach from the so-called "pervasive" method of teaching professional responsibility which typically involves several members of the faculty taking special care to point out and discuss in their regular courses various latent issues in professional responsibility. To judge by the 1977 National Conference on Teaching Responsibility, the pervasive method is out of favor because of lack of time, specific knowledge of ethical problems, and possibly also due to the attitudes of professors. Still another, more encouraging-reason is the growth in the number of professors who are scholars in this field "defending their turf." See generally the Discussions at the 1968 Boulder Conference where this method was highly recommended. See Covington, *The Pervasive Approach on Teaching Professional Responsibility: Experiences in an Insurance Course*, 41 U. COLO. L. REV. 365 (1969). See also Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, in 1977 NATIONAL CONFERENCE, *supra* note 65, at 23-24; Weckstein, *Panel on Methods of Teaching Professional Responsibility*, in 1977 NATIONAL CONFERENCE, *supra* note 65, at 63-66.

The accreditation requirement of a course in professional responsibility is an imperative. To put it bluntly, a law school that sweeps this problem under the rug should not be accredited. The growth of scholarship and teaching materials in this field is a welcome development and the subject should not be cast to one side of the curriculum. As Paul Von Blum wrote: "Ethics courses and the like are valuable beginnings; at every level of legal education, however, personal morality should be stressed as much as technical precision."<sup>82</sup>

There is not a single area of law where one can practice as a true professional without knowledge of ethical precepts. If some professors are more interested in and more sensitive to ethical considerations than others, then all the more reason for each professor to feel responsible for detecting and raising ethical issues peculiar to his or her subject matter with students. The argument that there is no time to consider ethical questions in a course, due to the need to teach substantive law, is a confession of misplaced priorities.

Indeed, what I am proposing is that faculties, as corporate entities, give a far higher priority to the teaching of ethics, for at present neither faculties nor bar examiners, nor the profession as a whole, make sensitivity to ethical considerations a high priority. What are students to think when they see professional responsibility as a one-credit, pass/fail course largely irrelevant to the bar examination and the job market? What are they to think when professors cannot find time in courses in contracts or torts for ethical questions? We cannot expect a dramatic recasting of bar examinations and employment criteria (although some thought might be given to both areas), but we can at least expect law school faculties to resolve to make professional responsibility a higher learning priority.<sup>83</sup> Finally, even as the teaching of ethics in law schools comes to pervade the curriculum, it is important that students are exposed, while they are in school, to experienced practitioners who are facing ethical dilemmas.<sup>84</sup>

## VII. CONCLUSION

Possibly, some law professors will say, "What business is this of yours?" Professor (now Judge) Jerre S. Williams, in his Presidential Address to the Association of American Law Schools, recognized that

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<sup>82</sup> Von Blum, *A New Course of Professional Responsibility: "The Legal Profession in the Humanities,"* 30 J. LEGAL EDUC. 366, 369 (1979).

<sup>83</sup> When ethical considerations, in the broadest sense, are regarded as significant as such staples as contracts, torts, and property, there will be a reasonable chance for qualitative change. See Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 A.B.F. RESEARCH J. 247, 255 (1979).

<sup>84</sup> See Joiner, *Professional Responsibility: A View from the Bench*, in 1977 NATIONAL CONFERENCE, *supra* note 65, at 3, 7, 18.

law schools are not an end unto themselves, but a tool: "Faculties must recognize that law schools are created to serve the legal profession and ultimately the society in which we live."<sup>85</sup> Soon after the ABA fixed its modest requirements for teaching professional responsibility in its standards of accreditation, Dean McKay wrote: "A few years ago I am not sure we would have welcomed that requirement. We might have thought it inappropriate or too difficult, preferring not to be told what to do. Now I believe we welcome the requirement because we recognize how badly we have done."<sup>86</sup>

The operation of a law school is a high trust, not a private enterprise for the benefit of its faculty. And, as with every fiduciary function, it must be treated as a stewardship for which there is an accountability—accountability to the public, to the concept of the rule of law, and to the principles of justice.<sup>87</sup> To meet this high trust, law schools must have the support of local and state bar associations and from the Judiciary.

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<sup>85</sup> Jerre S. Williams, *Legal Education in the Age of Accountability*, Presidential Address to the Association of American Law Schools (Jan. 3, 1980).

<sup>86</sup> McKay, *supra* note 8, at 644.

<sup>87</sup> See Burger, *The Role of the Lawyer in Modern Society*, *supra* note 51, at 8.

