THE LIMITS OF INTEGRITY OR WHY CABINETS HAVE LOCKS

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INTRODUCTION

Any call for personal integrity among lawyers raises the interesting question of how integrity relates to other supposed bedrock requirements of the lawyer ideal: ethicalness,\(^1\) competence,\(^2\) diligence,\(^3\) and professionalism.\(^4\) Is being possessed of integrity, in

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1. I am using the term “ethical” here in the narrow sense of an obligation related to the legal and moral responsibilities of a lawyer that arise with respect to the courts, the legal profession, and the public and which are often comprehensively summarized in lawyer oaths such as those in early Pennsylvania. Such oaths appear to have been inspired by the Act of Assembly for regulating and establishing fees passed August 22, 1752. The law directed that, upon admission to the bar, a lawyer take an oath “to behave himself in the office of attorney according to the best of his learning and ability, and with all good fidelity, as well to the court as to the client; that he will use no falsehood, nor delay any man’s cause for lucre or malice.” George Sharswood, An Essay on Professional Ethics 56-57 (facsimile reprint 1993) (5th ed. 1896).


3. See id. at R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).


One cannot discuss the regulation of law without recognizing that it is a “profession.” It certainly is a proud and noble profession. In the Middle Ages, it was said that there were historically four professions: the military, who professed peace; the medical doctors, who professed health, the clergy, who professed God, and lawyers, who professed justice.

Id. (discussing Roscoe Pound, The Lawyer From Antiquity to Modern Times: With Particular Reference to the Development of Bar Associations in the United States 5 (1953)). Still, I wish to draw a distinction between being a professional and professionalism. Certainly the two are related. When a lawyer lives up to the obligations of her oath, she is likely also to be acting in a manner that is other regarding, the essence of professionalism. See generally Burnele V. Powell, Lawyer Professionalism as Ordinary Morality, 35 S. Tex. L. Rev. 275 (1994). But obligations are, by definition, only a subset of what professionalism addresses. If not the core, at least the most interesting part of professionalism is what we expect of lawyers, even
other words, just one aspect of the lawyer who is ethical, competent, diligent, and professional (the, "ECDP" lawyer, as it were)? Or is integrity a trait that stands apart from other expectations, such that even if a lawyer is ethical, competent, diligent, and professional, we might, nevertheless, say that he or she lacks integrity?

I conclude that integrity is not simply the sum of the core qualities of the ideal lawyer but rather is best understood as an element of one of those core qualities—a characteristic that is, perhaps, the most important element of the professional attribute: Professionalism. The surprise in this, however, is not simply that while viewing integrity as highly important, I view it as something distinct from the obligations imposed on lawyers as a matter of law. What might also be unanticipated is that I assert that at some level it is, indeed, possible to be an attorney—perhaps even an ostensibly successful one—while lacking integrity.

Thus, I acknowledge that integrity is popularly viewed as a primary lawyer requirement or, at minimum, a subset of the requirement of ethicalness. I suggest, however, that such a classification is not only conceptually wrong but that the insistence on that view may actually hinder our ability in the context of regulating lawyers to improve lawyer conduct. Accordingly, I argue that anyone interested in achieving a legal profession that is more professional—more ECDP-engaged—must first understand that achievement of a higher standard of lawyer behavior will not come through exhortations for lawyers to obey the rules. Regrettably, too, such higher standards will not be achieved as a consequence of pleas that lawyers act in accordance with idealized creeds of voluntary behavior. Nor will higher standards of conduct result from the traditional bromides: better educating lawyers about their expected norms, ballooning the staffs of lawyer disciplinary agencies, or increasing the severity of sanctions for violations of professional standards.

though no professional rule supports the expectation: kindness, interest, civility, decorum, empathy, fairness, and the like.

5. Powell, supra note 4, at 277-88.

6. I say ostensibly successful because it is possible to accomplish all of the mechanics of practice—counseling, analyzing, filing pleadings, communicating—and still lack the sense of situational control that integrity implies. For integrity is not simply about performance; it is about structuring the context of one's performance. But see Sharswood, supra note 1, at 168 (emphasizing internal, psychological factors: "[N]o man can ever be a truly great lawyer, who is not in every sense of the word, a good man. A lawyer, without the most sterling integrity, may shine for a while with meteoric splendor; but his light will soon go out in blackness of darkness.").

7. See infra notes 60-68, 69-80 and accompanying text.

8. See Brian E. Mitchell, Note, An Attorney's Constitutional Right to Have an Offensive Personality? United States v. Wunsch and Section 6068(f) of the California Business and Professions Code, 31 U.S.F. L. Rev. 703, 703-04 (1997) ("attorney discipline ha[s] turned to ethical and civility codes to prevent... a negative impact on the proper administration of justice").
Rather, we will see the standards of lawyer conduct rise, and the consequent gains in public and professional stature, only to the degree that we are willing to re-conceptualize the problem and the solution. The profession must come to understand the limits of what a regime of lawyer ethical training can accomplish,\(^9\) and then proceed to shape a professional working environment that takes into account those limits.\(^10\) Such a reshaping will not be easy as it requires both ideational and structural changes. The legal profession will need to overcome the popular tendency to over-promise even with so basic a claim as the definition of what constitutes an ethical lawyer.\(^11\) Because, for example, the legal profession can prove only the most limited kinds of claims about lawyers' presumed knowledge bases, it will have to limit its representations accordingly. So limited, it may well be that the legal profession can say nothing more than what any course in instruction could allow us to assume: An ethical lawyer is, by definition, simply a lawyer who knows the standards of the legal profession and has affirmatively pledged to conform to them.\(^12\)

The view of the ethical lawyer in this narrowly defined sense must be simultaneously starker for contrast and narrower for focus. We must be able to recognize the lawyer conduct that we value with sufficient certainty that we can measure it empirically, compare conduct in light of the absence or presence of its identified variables, and validate our observations through a process of replicating prior studies to test predicted outcomes.\(^13\) In brief, the study of lawyer professional ethics, and especially lawyer regulation, must become less subjective, less self-serving, and more empirical. No longer can we afford to indulge ourselves with thoughts that we are redefining the moral centers of our students or our colleagues.\(^14\) We will have to be satisfied with the less ambitious, but ultimately more salutary,

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9. See infra note 103.
10. See infra notes 100-07 and accompanying text (discussing the need to focus on the context in which "ethical" decisions are made).
12. By objectifying our definition, we would not only be able to increase our precision by providing a measurable basis for including and excluding lawyers within the defined group, but, as explained infra in notes 88-98, we will be encouraged to shift our remedial efforts to a focus that is not dependent on what is occurring, as it were, inside a lawyer's head.
13. Currently the most insidious problem confounding the study of professional ethics is that there are no unethical lawyers, doctors, clergy, etc. to study. All professionals profess to be ethical—indeed, to do otherwise might itself qualify as unethical behavior. As a result, it is only with respect to those who have been subsequently charged and convicted that we have an objective basis for declaring that they are unethical. But when did they become unethical? When they acted? When they thought about acting? When they came under suspicion? When they were adjudicated?
14. See infra notes 40-44.
prospect that we are changing behavior, not essences—what lawyers do, not why they do it.\textsuperscript{15}

It is, then, with respect to this less ambitious view of lawyer regulation that I suggest that what is required is a new paradigm—one based on a more limited view of what we expect of lawyers and the lawyer regulation process. Heuristically the new paradigm will have two wings, one grounded on \textit{Legal Obligations} (e.g., ethicalness, competence, diligence, and professional standards) and the other based on \textit{Professional Expectations} (e.g., professionalism, civility, kindness, and service concerns). Thus, on the Legal Obligations side, the paradigm deals with \textit{what one knows}. The Professional Expectation side focuses on \textit{what one does}. Similarly, Legal Obligations are generic to the profession, while Professional Expectations are the personal commitments of individual lawyers. Indeed, it is because of the personal nature of integrity that I have ascribed it to the Professional Expectation side of the paradigm. Integrity is about conduct, what one does. It is about a lawyer's actions in light of the lawyer's known obligations to the legal profession.\textsuperscript{16}

Taken together, then, the new paradigm argues that the ideal lawyer is at least two-dimensional. Such lawyers are ethical, competent, diligent, professional, etc., to the extent that \textit{they know and are committed to} the standards of conduct of the legal profession. Conversely, they are lacking in such qualities to the extent that it can be demonstrated that they are without a sufficient knowledge base to be held accountable. Furthermore, such lawyers either act or fail to act in accord with Professional Expectations. Hence, we can say that lawyers manifest professionalism, or not, to the extent that we can see integrity, civility, kindness, and the like, because in our descriptions we are focused empirically on what lawyers do, rather than what they know, say, or think.

My claim, however, is more than that the conventional wisdom represents an error of classification. Indeed, I concede that as a practical matter little is at stake when a lawyer is described as unethical. What is actually being described is a lawyer who has failed to act in accord with that lawyer's professional code. To the contrary, it might be argued that whatever the benefit from reserving the term \textit{unethical} for situations when it is the scope of a lawyer's \textit{learning} that is in issue, the recommendation to change our nomenclature simply comes too late. Likewise, I must concede that no matter the merits of describing a failure to live up to lawyer standards as reflecting a lack of \textit{integrity} (rather than reflecting that a lawyer is unethical), the

\textsuperscript{15} See infra text accompanying note 18.

\textsuperscript{16} Similarly, professional integrity is about the actions of the clergy, see infra notes 60-68, journalists, see infra notes 69-75, and doctors, see infra notes 76-80.
psychological hurdle of past practice may be too longstanding to overcome. Furthermore, many will want to continue the view that professionalism, the category under which I newly urge that integrity is properly placed, ought not to encompass substantive responsibilities. In this view, integrity is simply too central to the self-identity of the profession to be subordinated in any conceptual scheme.\(^{17}\)

Two preliminary responses meet these objections whether or not the taxonomy that I urge is adopted. As I will show in the next part of this discussion, the change in terminology—viewing the lawyer's ethical obligation as descriptive of what lawyers know (and have promised to adhere to)—has advantages beyond simply offering a more accurate description. First, from an analytical standpoint, the legal profession will be better able to answer a question that has long perplexed it: Given all the resources that are devoted to educating lawyers about rules of professional conduct, why aren’t lawyers (and specifically law teachers) able to improve lawyer conduct?\(^{18}\) Second, upon committing to treat integrity as a professionalism concern, we will be better able to address two problems of conceptualization for which the legal profession has thus far been unable to formulate a compelling response. We will be able to explain in a robust way why lawyer professionalism, despite its lack of substantive rules, continues to deserve heightened attention. Furthermore, we will be able to identify a concrete, empirically testable agenda for the study of professionalism.

Accordingly, I turn to assess the consequences of the popular error—the conventional view—of defining an ethical lawyer as something more than simply a lawyer who is knowledgeable about the rules of legal ethics.

THE LIMITS OF ETHICAL LEARNING

Recently I moderated a panel of lawyers and judges for the Missouri Bar called Lawyer Independence: Post-Enron, Insurance Defense and Other Challenges.\(^{19}\) After I had laid down a particularly contentious string of questions to the panel, one of the panelists, who for the purposes of this discussion I will identify simply as Attorney Q,

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17. I do confess that I subordinate it not once but twice. First, I treat it as something other than a legal obligation by limiting that category to inquiries about knowledge. Then, I characterize it as a subset of professionalism—not even a counterpart to professionalism—which is a category that has long sought a definitive role.

18. See infra text accompanying notes 24-25.

reversed roles and put a question to me. I had asked whether it wasn’t time to abandon business as usual when it appears that, in the wake of the bankruptcy of the seventh largest company in America, criminal conduct and self-dealing had occurred? I added even more of an edge to that question by noting that it had occurred right under the noses of a lot of lawyers at one of the nation’s Big Five accounting firms (Arthur Andersen) and at one of the nation’s largest corporations (Enron). Then, just to drive home to the panel that I was not prepared to make it easy for them, I reminded them that one of the most prominent law firms in the nation (Vinson & Elkins) had also been involved. How could it be, I asked, that with over a thousand lawyers at Arthur Andersen, over 300 lawyers at Enron and, minimally, another dozen or so lawyers at Vinson & Elkins, the only person willing to blow the whistle was a senior vice president with a business degree? I noted, too, that this tally excluded all those who we can reasonably guess were working at Arthur Andersen and Enron who were licensed lawyers but who were not part of the general counsel’s staff.

Yes, it seemed to me that this was a good set of questions. And with no ready answer coming from the panel, it was understandable why Attorney Q interjected his own, equally provocative one, notwithstanding that it had a sort of “you’re another one” quality. “Well, Dean,” Attorney Q said, “I’d like to know what the law schools are doing about making sure that the ethical values of the legal profession are being upheld!” I have since thought continually about Attorney Q’s question, but ultimately I want to suggest that rather than the narrow question Attorney Q posited, the fuller articulation of that question is the one that keeps coming back to me: What is it that any of us—law school, bench, bar, or gown—can do about incompetent, exploitative, dishonest, corrupt, and criminal lawyers?

This is a question worth asking under any circumstance, but it takes on added interest if, as I suspect is true, Attorney Q shares the profession’s general view about the answer to his question. In summary terms, this view holds that law schools are the gatekeepers of the legal profession and, as such, have a major role (if not the major  

20. Concerned about how Enron Corporation, a virtual icon among America’s largest corporations, could collapse, Senator Fitzgerald (R-IL), Ranking Member of the Senate Commerce Subcommittee on Consumer Affairs, and Subcommittee Chairman Byron Dorgan (D-ND) have proposed legislation to reform areas of the financial system that may have contributed to Enron’s fall. Peter Fitzgerald, Enron Investigation, at http://fitzgerald.senate.gov/legislation/enron/enronmain.htm (last visited Sept. 8, 2003).


22. Of course, I resisted asking what would only have been viewed as piling-on: Does this mean that lawyers ought to stop acting like “professionals” and begin serving the public by acting more like people in business?

23. I have come to call this simply “Attorney Q’s Question.”
role) in assuring that students are trained so that they practice law ethically.

But this question is also interesting because it invites saying something that is long overdue: Unless we can begin to reject the conventional view in all of its articulations, we will not move beyond its limited, often self-defeating, anti-empirical, public-relations outlook towards lawyer professional ethics. There is no chance, in other words, of meaningfully addressing Attorney Q's question until we come to a new understanding.24 What law schools are doing to make law students ethical, in other words, can only be appreciated in light of an understanding of what law schools practically can do. They can, in other words, rely on their teaching skills to teach students ethics, but they must rely on the individual initiative of each student and, more importantly, the law practice environment to achieve the kind of self-control and avoidance of wrongdoing that Attorney Q desires.

But let me pause here to sketch in more detail what it is that I am describing as the conventional view: The view that the lawyer who is truly taught ethics—really knows it—will be an ethical lawyer.25 I turn, first, to explaining why the conventional view does not work. Then I consider a different model from the conventional one—what I will now call, for reasons that will become clear, the Integrity Testing Model.26 Finally, I will close by broadly sketching a different

24. See infra text accompanying notes 91-93.
25. I might as easily have called the conventional view the historical view. In the national culture, it is easily traceable at least as far back as the invocations of Cotton Mather, the great New England preacher of the 1700s. From your early American literature course, you will recall that it was Mather who invoked the conventional view of moral advancement as traceable, at least, to King David. In his famous sermon, What Must I Do To Be Saved? The Greatest Concern in the World, Mather admonished his flock:

Knowledge, Knowledge; To get good Knowledge, let that be the First Care of them that would be Saved. Knowledge, 'Tis a Principal thing; My Child, Get Knowledge; with all thy might, Get understanding. Oh! That this Resolution might immediately be made in the minds of all our people; I will get as much Knowledge as ever I can!

The Word of God must be Read and Heard with Diligence that so you may arrive to the Knowledge that is needful for you.

26. In the Howard Lichtenstein Legal Ethics Lecture, supra note *, I described the Integrity Testing Model, in contrast to the conventional (or historical) model, as focusing on lawyers and the context in which they practice. The Integrity Testing Model asks, for example, what a lawyer is doing to structure his or her environment to ensure conformity with ethical obligations and professional considerations. My suggested response to the Integrity Testing Model's question is that lawyers move towards a new view of ethics—what I am preliminarily calling Transvalued Ethics. This view of lawyer ethics acknowledges the primary role of the practice contexts by accentuating such empirically examinable factors as transparency, redundancy, accountability, notice, and the systemization of practice procedures. See generally
regulatory and research agenda for what I now want to call Transvalued Ethics.

The Integrity Testing Model

What I am here describing as the conventional model—what I am contrasting to the Integrity Testing Model—has deep historical roots. It is essentially the notion, traceable at least to Cotton Mather among early American moralists, that the possession—or, if necessary, inculcation—of knowledge is the starting point of moral behavior. It is this conventional view of moral advancement, in fact, that Mather relied on in his famous sermon, What Must I Do To Be Saved? The Greatest Concern in the World. Following the idea that moral learning and moral conduct are equivalent back, at least, to King David, Mather admonished his flock: “Knowledge, Knowledge; To get good Knowledge, let that be the First Care of them that would be Saved. Knowledge . . . .”

Note, though, that my point is not to indorse Mather’s antiquated syntax, his religious fervor, or his particular religious perspective. Rather, what I want to emphasize about Cotton Mather’s evangelical intoning is his special notion of what it means to have moral grounding: It is knowledge.

Take note, in particular, of the connection Mather urges between the knowledge of what proper conduct requires and the existence of proper conduct. This input/output connection, if you will, is a long established connection in American life and one that has been honorably urged by proponents as different as William Bennett and Ralph Nader, and even lawyer practitioners and law professors,

infra notes 80-105 and accompanying text.
27. See supra note 25 and accompanying text.
29. Id.
30. That view is, in fact, odious and utterly unacceptable in its full articulation, as he elsewhere contends:
‘Tis an Erroneous and Pernicious Principle, That a Man may be Saved in any Religion, if he do but Live according to it. The unerring and infallible Gospel has expressly taught us otherwise [in] 2 Cor. 4:3 “If our gospel be hid, it is hid unto them that be lost.”

Id.
31. See id.
32. William Bennett, on whom the mass media has bestowed the mantel of America’s National School Marm because he was formerly Secretary of Education under Presidents Ronald Reagan and George Herbert Walker Bush, is author of The Death of Outrage: Bill Clinton and the Assault on American Ideals (1998) and the best-selling The Book of Virtues (1993), which seeks to improve moral virtue by inculcating readers with platitudinous stories about what it takes to be a virtuous person.
33. One commentator has called Nader on his messianic moralizing, noting:
Most Americans, it seems safe to wager, are not in favor of abolishing the death penalty, doubling the minimum wage, taxing every stock transaction,
such as Moliterno, Noonan and Painter, and Kaufman and Wilkins.

... beefing up the Internal Revenue Service, reorienting the World Bank and the International Monetary Fund (IMF) to “fight global infectious diseases,” charging broadcast companies “billions” in spectrum “rent,” rewriting the Constitution to create European-style proportional representation, and erecting a Museum of Tort Law in Winsted, Connecticut. Yet Nader seems to believe that if we just remove the corporate blinders from our eyes, Americans will naturally embrace this political program and the Greens will become a “majoritarian” party.


34. A strong belief in the view that teaching equates with more ethical behavior undoubtedly is what motivates a significant number of practitioners to work to influence law school curriculums. Neil Hamilton argues that such efforts are a reasonable extension of the profession’s role in “fostering and maintaining the foundation of moral capital” on which our economic system is based, lamenting: “Think about the role as ethics adviser in particular. Our survey of American law schools indicates that just a handful have a course on business ethics or corporate counseling. This is extremely unfortunate given the increasing proportion of the bar that is representing corporate clients.” Neil Hamilton, *Counseling on Business Ethics After Enron and Worldcom*, Minn. Law., Aug. 12, 2002, available at www.minnlawyer.com.

35. I start at a different point, resisting the notion that *to do is to be* (or that *to know is to do*). Still, I too have heard similar stories and share the view that there is more to learn about being a lawyer than simply knowing right from wrong. Moliterno tells a good story, however:

Occasionally someone will say that all you must do to be an ethical lawyer is to practice what your parents taught you or to remember what you learned in kindergarten about golden rules, playing nicely, respect for others, and sharing belongings. No one should forget any of those good lessons, and cheating or stealing will produce predictably bad results when engaged in by lawyers. But there is a great deal more to the law governing lawyers than the difference between right and wrong.


36. In some instances it is not only the lawyer professional standards that form the input but the entire culture of lawyer practice. As John T. Noonan, Jr. and Richard W. Painter have described it:

Our objective is to teach students to think about ethics proactively rather than reactively. After reading the cases, students should ask “what would I have done in this situation?” or “how could this problem have been avoided?” not merely “should the lawyer in this case be sanctioned?” and “what is the rule here?” This approach reflects our belief that professional responsibility should be taught as an approach to practicing law rather than as a distinct body of law, and that legal educators should be at least as concerned with promoting ethical conduct as with drafting rules and analyzing case law concerning unethical conduct. A professional responsibility course should focus more than other courses in the curriculum on developing standards of behavior and training students to anticipate ethical problems and less on interpreting judicial opinions, statutes and rules. Our pedagogical objective in the classroom is discerning not what the lawyer in each situation can get away with but what he or she should do.


37. An explicit statement of the *not enough knowledge* (not enough input) premise was offered by Professors Kaufman and Wilkins:
Let me make that point another way (and in a way that I hope will not sound nearly so shocking). Since the early days of the Republic, commentators on issues of morals, ethics, religious learning, and individual responsibility have found it convenient to work from an unstated—and, seemingly, unexamined—premise. The premise, as endorsed by Reverend Leonard Barnes, is essentially that moral training is successful when legalisms are thoroughly internalized.38

This conventional view of the moral/ethical socialization of the individual (and by extension the family, the profession, the community, the nation), therefore, is circular. It consists of a feedback loop that starts with the mastering of canons and codes of conduct, which have been transmitted by a teacher, and assumes that, upon internalization of such canons, the moral individual moves on to a phase in which he or she is acting on the basis of such internalized learning and transmitting those canons to other students. And the measure of a successful internalization, we are told, is when the canons and the codes “appear to the trainee to spring from the promptings of his private self, and are no longer felt as social requirements laid down by external authority.”39

It is, then, this conventional view of ethics—and in particular its implications for the question “What are law schools, etc. doing to make law students ethical?”—to which I am emphatically opposed. Let me be quick to explain, though, that my strong rejection is not because I would not like to see moral training, such as legal ethics,40

Our view is that whatever the magnitude of ‘unethical’ conduct in the profession, and it is very difficult to measure,... there is widespread insensitivity to issues of professional responsibility. A great deal of the insensitivity derives, we believe, from the fact that the typical lawyer has not devoted enough thought to those issues before they arise in practice. The problems are then often ignored because they are not recognized as such. Or, if they are recognized, they are dealt with inadequately because the lawyer has not developed a philosophy of, or at least a general attitude toward, practice and a sense of the kind of lawyer he or she wants to be.


39. Id.

40. In relating moral training and ethics here, I use the terms advisedly. For the purposes of this discussion, however, I am willing to accept the definitions implicit in one introductory discussion of the relationship between the law and the ethics of lawyering:

Each of these terms has depth, complexity and multiple shades of meaning. Law and ethics, which are related yet distinct concepts, are part of a general subject that includes all aspects of the concept of obligation. As used here, ethics refers to imperatives regarding the welfare of others that are recognized as binding upon a person’s conduct in some more immediate and binding sense than law and in some more general and impersonal sense than morals.

work as described, but rather because I am unaware of having seen it work at any time or place as so described.\(^{41}\)

Instead, what I have seen in the area of morals and ethics is best characterized as the phenomenon that is increasingly studied in the psycho-socio disciplines as the Fundamental Attribution Error.\(^{42}\) Accordingly, I now turn to a description of this phenomenon and its implication for Transvalued Legal Ethics.

### A Difference Between Morals and Ethics

Before going further, I want to pause briefly to clarify a definitional point that may already have been noted. I have thus far used the terms moral and ethical as though they are interchangeable. I do not want to leave that impression. The fact is that when I use the term “morals,” I do not intend it to include all sources of guiding principles, as if to say that morals (or by extension morality) encompass everything “concerned with the judgment of the goodness or badness of human action and character.”\(^{43}\) In my more limited view of the term “morals,” I mean a category that is limited to primary beliefs that are grounded on a priori considerations.\(^{44}\)

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41. I recognize that, as a former law school dean, I open myself to the criticism that I am here admitting what critics may long have suspected: Law schools don't work. Such a critique, however, would miss the point. Law schools do not fail in their mission to educate because some of their graduates go on to act unethically. The failure does not rest with the law school for having failed to provide a moral or ethical prophylactic. The failure lies in misunderstanding the relationship between what one *knows* and what one *does*. Law schools perform the necessary but ultimately insufficient task of assuring that their graduates demonstrate that they *know*. Despite the popular desire to treat the demonstrated mastery of knowledge as shorthand with which to predict future behavior of graduates beyond the law school, the desire is wishful thinking. All that can truly be said at this stage of our knowledge is that law schools work, but they were not designed to do some of the work critics desire. Law schools work, but they cannot account for the multivariate conditions in which their graduates must work. Rather than accept this reality, though, it is easier for some to assume that failings demonstrated by law graduates are more a function of what they have internalized (morally, ethically, psychologically) than of the environments in which they operate.

42. Fundamental Attribution Error:
A feature of attribution theory, so frequently seen that it has its own name. This refers to the fact that whenever people are making attributions about an action, they tend to over-emphasize dispositional factors about the actor, and under-emphasize situational factors. An example is attributing a friend's recent car accident to the fact that the friend is a poor driver rather than to the fact that another car just happened to pull out in front of her.
The former would be a dispositional attribution; the latter a situational attribution.


44. This is not to say that a belief might not be grounded on morality and thereafter enforced on the basis of ethical considerations. When the Boy Scouts of
By contrast, therefore, when I use the term "ethics" I am reserving it for that category of primary beliefs that is grounded on social contract—products of human interaction without any claim of authoritiveness beyond the fact that they have been articulated by a commonly agreed procedure. In the sense that I use the term, then, ethics are a "set of principles of right conduct," that humans agree should apply—nothing more, nothing less. We need to pause, however, and remind ourselves about the limited scope of any discussion that concerns legal ethics. The opportunity for confusion, which is great in most instances, must be of particular concern as it relates to law professors. To be explicit, we must resist the notion that legal ethics professors shoulder some larger responsibility for their students' mastery of the subject matter of legal ethics than do, for example, professors of tax, criminal law, or family law.

Regrettably, the notion that law professors are inescapably part of a larger moral discourse has too often diverted them from addressing the question that ought to be the central focus of the classroom: What does the legal profession require of me? Too often that discussion is diverted into inquiry about whether the rules of the legal profession are moral (or serve a higher spiritual purpose). I reject, then, the notion advanced by a dear and
respected former colleague who described the term "legal ethics" as misleading "because the primary definition of ethics is morality. The secondary definition is the rules of conduct governing a profession."\textsuperscript{49} However, the issue is not which word has the greater usage but whether anything useful is gained (or lost) as a result of collapsing all discussions of lawyer professional responsibility into a debate about the supremacy of competing a priori assertions of the moral. As importantly, the "ethics is morality" approach precludes the opportunity for lawyers to grow as a result of understanding the oft-arising tension between their professional ethical responsibilities and their moral responsibilities.\textsuperscript{50}

Returning to my original point, perhaps you can now see why I am displeased with the quality of the profession's general discussion of ethics. In many cases, almost from the beginning, we have thoroughly obfuscated the distinction between the moral and ethical realms. We then proceeded to compound the error by treating the teaching of legal ethics as though it carries with it an obligation to transform our students. Worse still, we lay responsibility for such transformations on the shoulders of legal educators generally and legal ethics professors in particular.

Let me hasten to make an additional point: In complaining that, in a way different from most others, legal ethics professors have been saddled with responsibility for Attorney $Q$'s question,\textsuperscript{51} I concede that much of that damage has been self-inflicted. Especially in the early days of legal ethics,\textsuperscript{52} one of the key justifications for mandating the course was to reassure the courts and the public that the profession was addressing weaknesses exposed by Watergate, especially as they might be related to the capacity of law schools to train the next generation of lawyers.\textsuperscript{53} The willingness of ethics professors to accept responsibility for morally centering the next generation of lawyers certainly answered the question of why ethics belonged in the law school curriculum, but the strategy was at best shortsighted. Inevitably, the next O.J. Simpson trial,\textsuperscript{54} Monica Lewinski Affair,\textsuperscript{55} or

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\item Profession, 28 Pac. L.J. 257, 272 (1996). Of course, if that is the message that one's faith provides as one's mandate, how could one possibly argue differently?
\item Paul G. Haskell, Why Lawyers Behave as They Do 1 (1998).
\item See supra note 23 and accompanying text.
\item I mark the early days as the pre-Watergate era. After twenty-nine attorneys were disbarred for unethical conduct, the American Bar Association led the push to style the teaching of legal ethics as a ministerial mission. In an effort to prevent another Watergate scandal, the ABA pushed aggressively to require the teaching of a formal course in legal ethics in all ABA-approved law schools.
\item See ABA Standards for Approval of Law Schools, Standard 302(b) (1999).
\item See The Office of the Independent Counsel, Referral to the United States
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Enron fiasco\textsuperscript{56} would arise and Attorney \(Q\)'s question would be back before us. At that time, too, it would become increasingly apparent that legal ethics professors were taking responsibility for the personal and private lives of their students far more so than, for example, the tax, contracts, or criminal law professors.

Still, it is not enough simply to ask ourselves whether the assumption of ethical (not to mention moral) transformation was justified. We must also ask: How could we so confuse ourselves\textsuperscript{57} and what can we do about it? Answers to both questions are suggested by three stories concerning other professions: the priesthood, journalism, and the medical profession.

\textit{The Good Samaritan Story}

The first story is recounted in Malcolm Gladwell's book, \textit{The Tipping Point: How Little Things Can Make a Big Difference}. Gladwell describes a psychological study conducted by two Princeton psychologists, John Darley and Daniel Batson, which was inspired by the biblical story of the Good Samaritan.\textsuperscript{58} You no doubt know the story. It's about travelers on the road from Jerusalem who encounter the victim of a robbery lying beaten half-to-death by the side of the road. As the story goes, a priest and a Levite, both worthy, pious men, come upon the man but do not stop, choosing instead to pass by on the other side. The only man who helps is a Samaritan. This is significant because, unlike the priest and the Levite, the Samaritan is a social outcast, a member of a despised minority. Yet, it is the Samaritan who stops to tend the stranger's wounds and take him to a nearby inn so that he can receive further care.\textsuperscript{59}

Gladwell recounts the story in the course of explaining that Darley and Batson sought to replicate the situation in their test of a group of Princeton Theological Seminary students whom they invited to deliver an address to a select audience. The framing of the study is important. Darley and Batson met with each member of the group individually

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\textsuperscript{56} See generally Powell, supra note 21.

\textsuperscript{57} As has been observed:
The mistake we make in thinking of character as something unified and all-encompassing is very similar to a kind of blind spot in the way we process information. Psychologists call this tendency the Fundamental Attribution Error (FAE), which is a fancy way of saying that when it comes to interpreting other people's behavior, human beings invariably make the mistake of overestimating the importance of fundamental character traits and underestimating the importance of the situation and context.

\textsuperscript{58} Luke 10:25-10:37. What is usually forgotten is that Jesus was speaking to a lawyer.

\textsuperscript{59} Gladwell, supra note 57, at 164.
“and asked each to prepare a short, extemporaneous talk on a given biblical theme, then walk over to a nearby building to present it.”\textsuperscript{60} Key to the experiment, though, were three variables that Darley and Batson introduced. First, before the experiment even started, they gave the students a questionnaire about why they had chosen to study theology. Specifically, the questionnaire was designed to determine their motivation for entering the priesthood. “Did they see religion as a means for personal and spiritual fulfillment? Or were they looking for a practical tool for finding meaning in everyday life?”\textsuperscript{61} Second, the experimenters varied the subject matter of the theme the students were to talk about, giving some of them topics like the relevancy of a professional clergy and others the parable of the Good Samaritan.\textsuperscript{62} Finally, they varied the send-off instructions given to each student.\textsuperscript{63} In some cases, “the experimenter would look at his watch and say, ‘Oh, you’re late. They were expecting you a few minutes ago. We’d better get moving.’”\textsuperscript{64} In other cases, he said, “It will be a few minutes before they’re ready for you, but you might as well head over now.”\textsuperscript{65}

For our purposes, though, the key to this experiment was that along the way to deliver their talks, “each student ran into a man slumped in an alley, head down, eyes closed, coughing and groaning.”\textsuperscript{66} I say that for our purposes this was the key to the experiment because at this point Darley and Batson were ready to ask Attorney Q’s question. Gladwell tells us that the conventional view of moral teaching was presumed to apply here too. “If you ask people to predict which seminarians played the Good Samaritan (and subsequent studies have done just this) their answers are highly consistent,” notes Gladwell.\textsuperscript{67} Overwhelmingly, they think that the students who entered the ministry to help and those just reminded of the importance of compassion by the parable of the Good Samaritan will be the ones most likely to stop.\textsuperscript{68}

Before turning to Darley and Batson’s conclusion regarding the factors that determined which seminarians stopped to give aid, though, I want to introduce the second and third stories, about a journalist and a doctor. Together the three stories have important implications for the teaching of legal ethics and the focus of lawyer regulation.

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 164-65.
\textsuperscript{64} Id. at 165.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 164.
\textsuperscript{67} Id. at 165.
\textsuperscript{68} Id.
The Second Story: A Journalist

Before you become too comfortable with the idea that there is a close relationship between knowledge of what proper conduct requires and the existence of proper conduct, let me provide a second story. This one begins with a headline in the New York Times, reading: "Wire Service Says Reporter It Fired Invented His Sources." As if the details matter, the story went on to relate that the Associated Press (the "A.P.") had reported a day earlier that "it could not verify the existence of more than 45 people and a dozen organizations cited in news articles written by a reporter [Christopher Newton] who was fired by The A.P. last month."

My question, though, is not simply a rhetorical one. Is there anybody who would seriously contend that the reason Christopher Newton perpetrated a fraud on the A.P. and his readership and disgraced his colleagues and profession was that he did not know that fabricating names and sources was wrong?

If you are tempted by that analysis, consider the next couple of paragraphs of the article:

The reporter, Christopher Newton, was dismissed... eight days after the publication of an article on criminal justice statistics that quoted two people—who could not be found. A.P. editors found no trace of the [referenced] institute either.

The news agency cited 40 articles with the dubious references, including the Sept. 8 article that led to its inquiry. The articles by Mr. Newton, who was covering the Justice Department at the time of his dismissal, covered subjects including education, civil liberties and stem cells.

To put Mr. Newton, a graduate of Texas Christian University, in the best light, I should add that he denied that his material was fabricated. In an interview, he said that "all the disputed quotations reflected individual conversations he had had with sources." He also added, oddly, that he "could not promise that every name was a real name and was spelled correctly or that the organizations cited still existed." With all due respect to Mr. Newton, it has long been my (perhaps misguided) view that the essence of being a reporter was getting the story right. That means, at the very least, that the quotes

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69. See supra notes 14-17 and accompanying text.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
can be verified—that they are supported by facts that allow anybody who might wish to replicate the inquiry to do so.

But if you are bothered by the image of a reporter who is a graduate of Texas Christian University, whose beat is the Justice Department, who is writing about federal crime statistics, and who defends against charges that he has fabricated sources by suggesting that he should not be held responsible for the correct names of the people or the existence of the organizations that he is reporting about, here's another image.

**Third Story: Doctors**

How about the picture of an anesthesiologist strung out on the drugs she administers? Prescription drug abuse continues to be a problem for the medical profession despite its efforts to end such abuse. In fact, the October 2002 issue of *Anesthesia and Analgesia* reported that a survey of 123 academic medical centers suggests that 1% of anesthesiology faculty members and 1.6% of their residents had drug problems. "If anything, I'm sure are [sic] numbers underestimated the true problem," said Dr. John V. Booth, the lead author of the study. The survey did not include private practitioners and only counted those who were caught.

Once again, I am tempted to ask Attorney Q's question in another context: What are the medical schools doing to make sure that the ethical values of the medical profession are being upheld? I resist this temptation, however, because the article went on to tell me what intuitively I already knew:

The survey found that at many medical centers, officials had tightened the availability of drugs like fentanyl, the opiumlike [sic] drug that is most frequently abused, and increased the amount of substance-abuse education for doctors. But the efforts appear to have accomplished little, the study said.

In other words, the study revealed that, in this instance, the medical profession had already tried (and found wanting) the conventional view. It had, as an historical matter, taught the rules and hoped that such knowledge would lead to the expected proper conduct, but it had found no empirical confirmation of this expected outcome.

However, this study demonstrates that the conventional view of the feedback loop and the moral and ethical socialization of the individual is wrong. The feedback loop does not involve individuals

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77. *Id.*
78. *Id.*
79. *Id.*
80. See supra text accompanying note 39.
simply taking their cues from internalized standards that have been
drummed into them by a teacher.\textsuperscript{81} Rather, the feedback loop for
individuals, including, of course, lawyers and all other professionals,
consists of learned standards and another important element: Context.

As researchers have begun to study how ethical decisions are made,
they have come to see that it is the circumstance, the factual context,
in which an ethical decision is made that is most determinative of an
actor’s compliance.

Recall the seminary students who had been instructed to prepare
speeches on a biblical theme.\textsuperscript{82} The determinative factor in whether
they stopped to assist the moaning beggar at the side of the road was not:

- Whether they had entered the clergy for high-minded reasons;
- Whether they had just previously read the parable of the Good
  Samaritan;
- What the seminarians were assigned as the subject for their
  short talk;

and it certainly was not whether the seminarians were well-schooled
in the morals and ethics of their church.\textsuperscript{83}

Rather, the key factor was a change in the one variable that had the
capacity to radically alter the context in which the seminarians were
asked to apply their moral code: Whether the seminarians were told
that they were late or whether they were told that they had plenty of
time.\textsuperscript{84} Of the seminarians in a rush, 10% stopped to help; of those
who were not, 63% stopped to help.\textsuperscript{85} As Gladwell summarized it:
“What this study is suggesting, in other words, is that the conviction of
your heart and the actual contents of your thoughts are less important,
in the end, in guiding your actions than the immediate context of your
behavior.”\textsuperscript{86}

\textit{Inside Your Head Matters}

Please take note, however, that I am not arguing that what you have
in your head doesn’t matter.\textsuperscript{87} It does. All that indoctrination and
inculcation has to mean something. What it means, though, is that
you have \textit{knowledge}.\textsuperscript{88} You have, to some extent or another, mastered

\begin{footnotes}
\footnotetext{81}{See supra text accompanying note 39.}
\footnotetext{82}{See supra text accompanying notes 60-66.}
\footnotetext{83}{See supra notes 60-61 and accompanying text.}
\footnotetext{84}{Gladwell, supra note 57, at 165.}
\footnotetext{85}{Id.}
\footnotetext{86}{Id.}
\footnotetext{87}{See supra notes 14-17 and accompanying text.}
\footnotetext{88}{While knowledge is necessary for the mastery of an ethical situation, it is
simply not sufficient. See supra note 31 and accompanying text and infra note 106 and
accompanying text.}
\end{footnotes}
the literature of your schooling. It does not follow, however, that knowledge of the literature of a field such as legal ethics will make one a more ethical person.

Again, Gladwell helps us to understand why we so often make this error of the conventional view\(^9\), and why psychologists have named the tendency the Fundamental Attribution Error.\(^{10}\)

\[W\]hen it comes to interpreting other people’s behavior, human beings invariably make the mistake of overestimating the importance of fundamental character traits and underestimating the importance of the situation and context. We will always reach for a “dispositional” explanation for events, as opposed to a contextual explanation.\(^{11}\)

**The Fundamental Attribution Error and Our Three Stories**

Given this new understanding of the conventional view as an effect of the Fundamental Attribution Error, you should now be able to appreciate why both our journalist\(^2\) and our doctor\(^3\) failed despite their learning.

The journalist had training: instruction from an avowedly Christian university and experience on a beat at the Justice Department studying crime statistics.\(^{4}\) What was lacking, though, was a structured environment in which the process of fact checking actually served as a legitimate deterrent to wrongdoing. Instead, a spokeswoman for the A.P. tells us that “the earlier questionable sources, named in articles dating back to January 2000, went undiscovered because the quotations involved were ‘innocuous’ and tangential.”\(^{5}\)

The case of the pill-popping doctors makes the point even more emphatically.\(^{6}\) Again we know that the source of their problem was not likely a failure to know what legal and ethical standards applied. What is needed in such cases is a change in the context.\(^{7}\) If you want to change behavior, change the situation in which the behavior is likely to happen. Dr. William P. Arnold III, Chairman of the Substance Abuse Task Force of the American Society of Anesthesiologists, put his finger on the solution when he sought to

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89. See supra notes 25-26, 36-41.
90. See supra note 42 and accompanying text.
91. Gladwell, supra note 57, at 160. Gladwell gives a further example of a study in which a group of people was asked to evaluate the skills of two sets of similarly skilled basketball players. One group played in a well-lit gym; the other in a poorly lit one. Yet the evaluators consistently discounted the lighting and rated those in the well-lit gym the superior players. Id.
92. See supra notes 71-75 and accompanying text.
93. See supra notes 76-79 and accompanying text.
94. See supra notes 73-74 and accompanying text.
95. Barringer, supra note 70, at A21.
96. See supra notes 76-79 and accompanying text.
97. See supra notes 9-12 and accompanying text.
describe why drug abuse poses a particular threat to anesthesiologists. He noted the highly addictive nature of some of their medications but concluded that the most important circumstance might simply be unguarded access. Anesthesiologists keep the drugs on hand because their role often involves dispensing them.

WHY CABINETS NEED LOCKS

Now you see the inspiration for this article: The Limits of Integrity or Why Cabinets Have Locks. Cabinets have locks because locks are a means of focusing on the context in which, for example, drug abuse occurs. Cabinets have locks because it is not enough to rely on indoctrination, moral homilies, schooling in the literature, law professors as role models, teaching by the pervasive method, or,

98. See Doctors, supra note 76, at D6.
99. Id.
100. Locks, or, more specifically, contextual safeguards, reinforce the desire to do what we know is the right thing to do. Thus, the fewer locks you need in your environment, the more integrity you have. But don’t make the mistake of assuming that having fewer locks in your environment means you have more integrity. Having and needing are different. A prudent environment for a lawyer to practice in will have as many locks (discretely placed, of course) as it might need, even while the architects of the environment hope that they have overestimated the need.
101. See supra notes 87-88 and accompanying text.
102. See supra notes 87-88 and accompanying text.
103. “Basic awareness is developed through education,” assert Daniel J. DiLucchio & Marci M. Kruftka in The Impact of Recent Corporate Scandals on Corporate Counsel: Four Questions Every General Counsel Must Answer, Metropolitan Corporate Counsel, Sept. 2002, at 37. I agree, but we must be sufficiently conscientious to guard against the Fundamental Attribution Error on which their view rests. See supra note 42 and accompanying text. “Regardless of staff education programs or reporting systems, if a lawyer or staff member does not have the appropriate values, then he or she will probably do nothing when faced with an ethical dilemma.” DiLucchio & Kruftka, supra, at 76. We cannot suppose, as DiLucchio and Kruftka do, that a lawyer and her staff’s awareness of ethical obligations, appropriate empowerment to act, or possession of appropriate values will be enough. The Fundamental Attribution Error warns us that, as a fifth concern, we must also structure an environment in which lawyers (and their staffs) are encouraged to pursue their obligations regardless of what they think about them, and in which their views are subordinated to structures and processes that encourage them to do what is right.
104. The argument here is not that role models are unimportant. However, they are more effective when combined with efforts to address the context in which decisions must be made. In a discussion about racial diversity, for example, the very existence of diverse role models improves the context in which discussions about racial diversity take place. See Anita Allen, The Role Model Argument and Faculty Diversity, Online Ethics Center for Engineering and Science (“All teachers fall into the category of ethical templates. They can set the [sic] either high or low standards.”), at http://onlineethics.org/div/abstracts/fac-diverse.html (last visited Sept. 11, 2003).
105. We must come to understand that initiatives such as those to teach legal ethics pervasively throughout the curriculum represent noble efforts but fall short of adequately structuring the legal environment in which the law is practiced. It is no wonder, then, that even enthusiastic advocates of the pervasive strategy usually couch
quite frankly, any of the curriculum-based solutions that become fashionable from time to time. What we must remember is that we put locks on cabinets in order to organize the context in which decisions have to be made.

If taken to heart, this observation can have profound implications for the entire legal profession. For example, the decision to structure the environment in which lawyers work, rather than focusing on improving their substantive knowledge of legal ethics, might lead to increased efforts to assure that all lawyers (active or inactive) become part of a lawyer practice group, perhaps with its own senior attorney, ethicist, and reporting obligations. Similarly, it might mean that law firm discipline,\textsuperscript{106} already adopted as a regulatory feature in New York,\textsuperscript{107} might become the norm for all jurisdictions. And, if it is the

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their claims in highly probabilistic terms: "Thus, with pervasive professional training throughout the law school curriculum plus cross-discipline postgraduate courses—such as psychology, business, medicine, or sociology—and clinical experience, \textit{it is more likely} lawyers will carefully consider their choices when facing moral dilemmas." Katy Brandis, Trained to Think Like a Lawyer, Not How to Act Like One: Learning Moral Professionalism During the Formative Years, Gonzaga University School of Law Legal Education Seminar, Apr. 25, 2001 (emphasis added), at http://law.gonzaga.edu/ilst/CarnegieSeminar/brandis.pdf; \textit{see also} Judith Lichtenberg, \textit{What's a Code of Ethics For?}, in Legal Ethics 119, 120-21 (Deborah L. Rhode & David Luban eds., 2d ed. 1995) ("\[C\]ode[s] of ethics can \textit{increase the probability} that one will think about [what one is doing]... by describing explicitly behavior that is undesirable or unacceptable." (emphasis added)).

106. That I consider "law firm discipline" is not an indication that I endorse it at this stage. Bill Smith pointed out one problem correctly:

So New York adopts a rule. That was in 1996. And here we are 2002 and we've heard that there has been no public discipline imposed against a law firm in New York. Well I don't understand. If western democracy was being threatened by all these bad acts of big firms, surely, surely at least one of them would have committed a bad act, and we would have a public case on the record as a result of this law firm discipline rule. But we don't. Ah, but it makes a statement. It makes a statement .... This is not the place to make statements.


107. \textit{See} Elizabeth Chambliss & David B. Wilkins, \textit{Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting}, 30 Hofstra L. Rev. 691, 693-94 (2002) (discussing and quoting the obligation under ABA Model Rule 5.1(a), now replaced by ABA Model Rules of Professional Conduct, for law firm partners and supervisors to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct"). Encouraging a shift of emphasis in professional regulation that is compatible with the emphasis on context urged in this article, the professors note that, "[r]ecently, two states, New York and New Jersey, amended their state versions of this rule to apply to law firms as entities, in addition to individual partners." \textit{Id.} at n.15 (citing N.Y. Code of Prof'l Responsibility DR1-102A (1999); N.J. CT. R. Ann. R. 1:20-15(j) (1999)).
structure of lawyers' working environments that is our focus, we may well wish to adopt professional rules that provide that all members of a bar assume joint liability for any loss of client funds due to theft of funds by their attorney. We might also explore whether regular sabbatical reviews of law firms, pursuant to which law firms are periodically required to submit to a process of self-assessment and outside review, are effective. More radical still, we might also require that lawyers periodically participate in a reality-based continuing legal education program. One such program might include instructors acting in the roles of clients visiting their lawyers unannounced and confronting them with an ethical dilemma scenario; the lawyer's response would later be critiqued.

This list, like this article, is not intended to be exhaustive; it is a challenge with illustrative examples. It is intended to provoke thought in a new direction. It is my way of saying to Attorney Q that what law schools are doing (and need to do more of) is to engage in the art of thinking. We should be the laboratories for the profession, not the gatekeepers.

We can teach the literature and we can frame our own ethical environments so that ethical conduct in the context of the law school is increased and celebrated. What we cannot do—what only the practicing profession (including the courts) can no longer do—is to continue to pretend that we do not understand why cabinets have locks.