

## THE IRRESPONSIBLE LAWYER: WHY WE HAVE AN AMORAL PROFESSION

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## I. INTRODUCTION

Two of the most pressing issues in the legal profession *qua* profession are the public discontent and cynicism *with* lawyers and the private emptiness and dissatisfaction *among* lawyers. This article contends that both problems stem from the moral irresponsibility of lawyers. It is also the thesis of this article that current legal education, legal ethics, firm practice, and the modern attorney-client relationship all contribute to this lack of responsibility.

It should be stated at the outset that this article is not interested in the conduct of lawyers, *per se*. Rather, it is interested in the underlying moral reflection and moral accountability to which individual lawyers hold themselves. While such moral responsibility may (and probably will) translate into favorable conduct, this article is primarily interested in the first link in the chain—the individual moral accountability or responsibility of lawyers. For instance, the *morally* responsible lawyer views his professional conduct in moral terms. In other words, he understands the moral values expressed in his professional conduct. In contrast, the *morally irresponsible* lawyer views his conduct in amoral or morally neutral terms. That is, he divorces himself from moral reflection regarding the means or ends to which his technical proficiency is put. Therefore, it is not the conduct, *per se*, that defines the irresponsible lawyer; rather, it is the way he views and understands his conduct.

It is this kind of irresponsibility that has produced the problems mentioned above. First, it causes the attorney to forsake or ignore the moral norms of his community, causing understandable feelings of outrage and disgust. Likewise, this abandonment of personal responsibility drives a wedge between the lawyer and his own sense of right and wrong. In pursuit of professional goals and values dictated by others and often at odds with his own, the lawyer suffers internal doubt and skepticism about the very profession of which he is a member.

In contrast, placing the focus on personal responsibility will invigorate the lawyer's soul and restore the public's confidence. Rather than practicing in an amoral profession, divorced from

one's own values, the responsible lawyer will be empowered to practice law as a full moral agent capable of ethical decisionmaking. This responsibility will call the attorney to account when his actions are not consistent with the moral standards of the community and will limit the means employed and ends pursued in his own practice. Responsibility has a price, but it is one the public and the profession seem willing to pay.

## II. THE PROFESSION & ITS DISCONTENTS

### A. *The Public: "First, kill all the lawyers"*

The legal profession is under assault from all sides. The law plays a larger role than ever in the lives of individuals and American society.<sup>1</sup> As a result, the conduct of lawyers is under increasing scrutiny. A series of highly publicized trials brought legal terms like "perjury," "deposition," and "reasonable doubt" into the public lexicon and spawned the phenomena of law-as-entertainment.<sup>2</sup> Rather than increase public trust in legal institutions and rituals, this scrutiny has only furthered public cynicism and distrust of lawyers.<sup>3</sup> Shakespeare's famous quote would likely garner more public support in modern America than ever before: "The first thing we do, let's kill all the lawyers."<sup>4</sup>

The everyday conduct of lawyers is one aspect of the public criticism. Another is the sense that the profession rarely serves

1. One academic has titled her book *A Nation Under Lawyers*, reflecting the growing importance of law in American life. MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

2. The O.J. Simpson trial, legal maneuvering surrounding President William J. Clinton, Anna Nicole Smith's litigation, and the legal defense of Saddam Hussein have consumed the nation's attention for months at a time. The public's fascination with trials is evidenced by the creation of *Court TV*, a cable channel dedicated to broadcasting trials of interest.

3. The percentage of the public that view law as an occupation of "very great prestige" dropped from 36% in 1977 to 17% in 2004. See *Firefighters, Doctors and Nurses Top List as "Most Prestigious Occupations," According to Latest Harris Poll*, HARRIS INTERACTIVE, July 26, 2006, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=685](http://www.harrisinteractive.com/harris_poll/index.asp?PID=685). Another survey reported that only 18% of the public finds lawyers to have high or very high standards of "honesty and ethics." Gallup Organization, *Honesty / Ethics in Professions*, Nov. 2005, available at <http://www.galluppoll.com/content/?ci=1654&pg=1>.

4. WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE FOURTH* act 4, sc. 2, lines 76-77. But see *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) (pointing out that, taken in context, this statement is actually pro-lawyer).

any interest but its own.<sup>5</sup> As courts have undertaken the task of making public policy, they have often done so against the will of the people.<sup>6</sup> This furthers the distrust of the legal system. The attention that a number of huge verdicts has gained has also highlighted the seeming absurdity of the law.<sup>7</sup> “Will lawyers represent anyone?” “Is there no claim they will not assert?”

### B. *The Profession: Dissatisfaction & Despair*

The attacks on lawyers have not only been made by those outside the profession. In recent years, the legal profession itself has undergone a crisis of confidence. The Watergate scandal sparked some of this self-examination,<sup>8</sup> including the institution of the Model Code of Professional Responsibility. The ABA House of Delegates was prompted to require the teaching of professional responsibility in all accredited law schools.<sup>9</sup>

5. See Steve Korris, *Dead Plaintiff Should Answer Questions, Class Counsel Argues*, THE MADISON RECORD, July 20, 2006, available at <http://www.madisonrecord.com/news/newsview.asp?c=181949> (law firm pursues class action case for two years after death of plaintiff); Carlos Sanchez, *Attorney Expenses Detailed: Costs Claimed by Lawyers in the Texas Tobacco Case Include More than \$300 for Coffee Service and \$952 for Lunch*, FORT WORTH STAR-TELEGRAM, Feb. 21, 1998, at 1 (noting some expenses included in record \$3 billion attorney fee award).

6. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (Court invalidated results of popular referendum); *Guinn v. Legislature of State*, 71 P.3d 1269 (Nev. 2003) (Court ordered state legislature to ignore constitutional procedural rules in order to approve new taxes); Cheryl Wetzstein, *'Marriage' Issue Works Its Way Through Courts*, WASH. TIMES, Nov. 29, 2004, available at <http://www.washtimes.com/national/20041129-120457-1640r.htm> (Louisiana referendum on same-sex marriage overturned by court).

7. See, e.g., *Jury: Eller Media Should Pay \$65.1M*, S. FLA. BUS. J., June 27, 2005 (verdict for death that may have been caused by lightning); Henry Gottlieb, *Jury Duns Stadium Beer Vendor \$105M for Injuries Caused by Drunken Fan*, N.J. L.J., Jan. 21, 2005; Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17 (recording \$5 billion award to Alaskans in Exxon spill, \$6.9 million award against law firm for not preventing sexual harassment, \$125 million award against pharmaceutical company because doctor administered drug wrong, and \$80 million award for wrongful termination).

8. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 1975:5 HUM. RIGHTS 1, 3 (1975) (John Dean testified in the Watergate hearings that he had wondered whether there was a connection between the fact that many of the participants in the cover-up were attorneys and their willingness to participate in it.). One participant in the affair had this assessment:

Whether we are willing to reexamine our own functions and are able to articulate with some particularity a better sense of our own public responsibilities will therefore go far to determine whether the years of Watergate will mark a brief spasm or the beginning of a renaissance in the quality of public life.

Archibald Cox, *The Lawyer's Public Responsibilities*, 1974:4 HUM. RIGHTS 1, 1 (1974).

9. APPROVAL OF LAW SCHOOLS: STANDARDS AND RULES OF PROCEDURE § 302(a)(iii) (1977).

While this sparked the modern legal ethics movement,<sup>10</sup> it did not quell the growing discontent among the members of the profession itself. Growing numbers of lawyers report dissatisfaction with their choice of profession<sup>11</sup> and are hesitant to pass it along to their children.<sup>12</sup> One prominent figure in the Watergate scandal itself made the following statement: “I really thank God for Watergate. If it weren’t for that, I might be back practicing law.”<sup>13</sup>

### III. THE IRRESPONSIBLE LAWYER . . .

This external criticism and internal dissatisfaction signals a deeper problem. Anthony Kronman has even suggested that the profession is “in danger of losing its soul.”<sup>14</sup> This section examines how legal education and various aspects of legal practice foster an irresponsible profession without the moral direction and authority its members once felt and the public once appreciated.

#### A. . . . Goes to School

Legal education is one element that has contributed to the decline in the responsibility of lawyers. While all professions require rigorous and specialized education, few seem as intent on changing the very *way* its initiates think as does the legal profession. While the maxim “think like a lawyer”<sup>15</sup> has much to do with the amorality of the legal profession, it is also true that legal education teaches professional responsibility in a manner that exacerbates the problem.

#### 1. The Socratic Method

10. See Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 722 (1998) (describing the ascendancy of legal ethics training and scholarship).

11. Seventy percent of California attorneys indicate that they would choose another career if they could. See GLENDON, *supra* note 1, at 85.

12. Seventy-five percent of California attorneys would not want their children to become lawyers. See *id.*

13. Andrea Sachs, *From Prisoner to Preacher: Watergate “Hatchet Man” Colson Wins Religion Award*, 79 A.B.A. J. 38, 38 (May 1993) (quoting Charles Colson).

14. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION I* (1993).

15. Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992) (“[N]early everyone agrees—in an ‘indefinable chant whose repetition suggests sacred meaning’—that the purpose of law school is to teach every student to ‘think like a lawyer.’”).

Probably no aspect of law school is better known and feared by incoming students than the Socratic Method. Whatever psychological harm may come from being called upon and grilled in front of your peers, that is not the focus of this critique.<sup>16</sup> Rather, it is the Socratic Method's reliance upon teaching law through the case method that results in the first steps away from an ethic of responsibility.

The case method has two features that result in the phenomena this article is addressing. First, the case method is the study of law through the study of actual appellate court opinions.<sup>17</sup> Rather than study law through a direct examination of its principles and doctrines, the case method attempts to teach the doctrines and principles by distilling them from cases. In order to maximize class time, little time is spent on core problems or easy cases. Instead, the focus of class time is the boundary problems.<sup>18</sup> Almost by definition, it is such boundary problems that "necessarily involve a clash of principles in which as much . . . may be said on one side as on the other."<sup>19</sup> This concentration on the fringes of legal theory leaves the law student with the sense that there is no *right* answer to legal questions.<sup>20</sup> Rather, the law is seen as "arbitrary"<sup>21</sup> or merely the imposition of one judge's biases resulting from his position of political privilege.<sup>22</sup> When the law is taught using this method throughout the three years of law school, "the concept of 'right'

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16. See Bridget A. Maloney, *Distress Among The Legal Profession: What Law Schools Can Do About It*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 324 (2001). For a very interesting analysis of such effects on the moral development of lawyers, see John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429, 440-42. For an autobiographical sketch of the first year of law school, and one commonly read by prospective law students, see SCOTT TUROW, *ONE L* (1977).

17. KRONMAN, *supra* note 14, at 110.

18. *Id.* at 111.

19. *Id.*

20. Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 379 (1989).

21. KRONMAN, *supra* note 14, at 112.

22. Kronman traces much of the current view of the law to the scientific realism presented by Karl Llewellyn. See KRONMAN, *supra* note 14, at 195-96. Llewellyn posited that judicial decisionmaking cannot be based solely upon the rules of law but must always rely upon "an exercise of the will." *Id.* at 196. Kronman points out that this view interprets judicial decisions as descriptive of what the law "is" but never dispositive of what it "ought" to be. See *id.* at 197 ("What the law is, and what it ought to be, become questions that must now be answered separately."). The critical legal studies movement takes this view only to the point of the law's descriptive qualities. It denies that there is a normative view of law that "ought" to be followed. Seen through the eyes of any number of disenfranchised groups, the law is always and simply seen as the exercise of one person or group's will on another's.

gradually loses currency and eventually withers from disuse.”<sup>23</sup> Of course, students do leave with a measure of certainty about the “core” doctrines and ideas, but the emphasis on “hard cases” and “boundary problems” distorts the measure of law that is firmly rooted in the common values of society.<sup>24</sup> Law is seen as a means to an end, rather than an end in itself. Thus the lawyer may use the law to serve his or her client’s purposes with no allegiance to any fundamental values or principles expressed in the law.

The second aspect of the case method that contributes to the irresponsibility of lawyers is the Socratic questioning of the court opinions. The student must exhibit an

unwillingness to take the soundness of any judicial opinion for granted, no matter how elevated the tribunal or how popular the result, and a commitment to place the conflicting positions that each lawsuit presents in their most attractive light, regardless of how well they have been treated in the opinion itself.<sup>25</sup>

“The hallmark of intellectual quality . . . is the ability to argue one side of a question convincingly in the morning, and then forcefully carry the other side in the afternoon.”<sup>26</sup> While this practice is quite effective at teaching logical reasoning, it undermines “moral commitment.”<sup>27</sup> Kronman, and others, argue that such analytical practice will aid lawyers in moral inquiry.<sup>28</sup> However, in defending the Method, Kronman also states that this results in “the dulling or displacement of earlier convictions

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23. Kleinberger, *supra* note 20, at 379.

24. Orrin K. Ames III, *Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed*, 28 AM. J. TRIAL ADVOC. 531, 543 (2005) (“[B]efore they began their immersion into the Socratic Method, students had some concept of what is right and what is wrong. All too soon, however, in a law school classroom, students find that a given set of facts can produce two advocates’ arguments each with, arguably, equal intellectual merit.”); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 617 (1985) (“Conventional law school courses not only demythologize doctrine, they also reinforce a skepticism about its underlying moral foundations.”).

25. KRONMAN, *supra* note 14, at 110.

26. Kleinberger, *supra* note 20, at 379.

It is common for a student to respond to the question, ‘How do you come out on this case?’ with the revealing reply, ‘It depends on what side I’m on.’ If the lawyer is going to live with himself, the system seems to say, he can’t worry too much about right and wrong.

Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 259–60 (1978).

27. Kleinberger, *supra* note 20, at 379.

28. KRONMAN, *supra* note 14, at 113–15; Kleinberger, *supra* note 20, at 379.

and a growing appreciation of the incommensurability of values”<sup>29</sup> as well as a “critical detachment from one’s earlier commitments.”<sup>30</sup> Kronman sees these as benefits of legal education generally, and the Socratic Method particularly.

Kronman is not alone in his assessment that such detachment from moral commitment is necessary. Karl Llewellyn stated the following: “The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges.”<sup>31</sup> While some educators apparently view this deconstruction of the moral self as an unqualified good, others worry that such methods “may actually be creating amoral lawyers, whose skills of rationalization . . . and insensitivity to ethical issues will become increasingly dangerous in the highly complex, specialized, and competitive world of law practice.”<sup>32</sup> “The relativism necessary to the practice of law shifts easily into cynicism; tolerance for other views becomes quite naturally the belief that all views are equally wrong, and that ‘truth’ and ‘justice,’ the supposed aims of the legal process, are empty words.”<sup>33</sup>

Legal education in America today first destroys its students’ moral commitments and ethical foundation. It then instills an amoral view of law in which there are no right answers, merely exercises of will. Against what is the responsible lawyer to judge his own professional activity? Are there no moral consequences that flow from the decisions attorneys and judges make?

## 2. Black-Letter Ethics

The law student may leave school deconstructed and disabused but he *will* have taken at least one course in “Professional Responsibility.”<sup>34</sup> This ABA-mandated course purports to teach students the rules of the profession as stated in the Model Rules of Professional Conduct. These Rules claim to be the “framework” for deciding “difficult issues of professional

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29. KRONMAN, *supra* note 14, at 115.

30. *Id.* at 114.

31. KARL LLEWELLYN, *THE BRAMBLE BUSH* 101 (1951).

32. Flynn, *supra* note 16, at 441.

33. *Id.* at 434.

34. See *supra* note 9 and accompanying text.

discretion”<sup>35</sup> and purports to “define [the] relationship” between the lawyer and the legal system.<sup>36</sup> The Rules claim not to “exhaust the moral and ethical considerations that should inform a lawyer,”<sup>37</sup> but do “prescribe” the lawyer’s professional responsibilities.<sup>38</sup> While difficult issues are left unresolved by the Rules, “[s]uch issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”<sup>39</sup> These rules thus become the guide by which law students are trained to make ethical professional decisions.

One critique of modern legal ethics training is that these rules and principles are not being taught seriously.<sup>40</sup> “Professional Responsibility” courses are normally only two or three credits.<sup>41</sup> Furthermore, students’ perception of these classes as the dog of the law school<sup>42</sup> indicate that law schools are not putting the necessary emphasis on legal ethics training.<sup>43</sup>

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35. MODEL RULES OF PROF’L CONDUCT pmbl., para. 9.

36. *Id.* pmbl. para. 13.

37. *Id.* scope para. 16.

38. *Id.* pmbl. para. 9.

39. *Id.*

40. In a survey of Indiana University School of Law alumni, only one person said the course in professional responsibility was “valuable to career,” and only three found the course intellectually stimulating. Kenneth G. Dau-Schmidt, Jeffrey E. Stake, Kaushik Mukhopadhyaya & Timothy A. Haley, “*The Pride Of Indiana: An Empirical Study of the Law School Experience and Careers of Indiana University School of Law—Bloomington Alumni*,” 81 IND. L.J. 1427, 1430 (2006); *see also* Pearce, *supra* note 10, at 720.

41. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONALISM, REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS 54 (2006), [http://www.abanet.org/cpr/reports/LawSchool\\_ProfSurvey.pdf](http://www.abanet.org/cpr/reports/LawSchool_ProfSurvey.pdf) (last visited Nov. 29, 2006). This may signal a slight improvement from a decade ago. *See* Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147 (1996) (“In most law schools today legal ethics occupies a minor academic role as a one- or two-credit required course in the upper class years, often taught by adjuncts or by a rotating group of faculty conscripts.”); *see also* Stuart C. Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, in *TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE* 21, 22–23, 36 (P. Keenan ed. 1979) (reporting that one-third of law schools only required a one-credit course and only 10% required a three- or four-credit course).

42. Dau-Schmit et. al, *supra* note 40, at 1430; Dale C. Moss, *Out of Balance: Why Can’t Law Schools Teach Ethics?*, *STUDENT LAW.*, Oct. 1991, at 18–19; *see also* Cramton & Koniak, *supra* note 41, at 145 (“Law students, law teachers, and practitioners often assume that legal ethics is mushy pap that the organized profession requires law students to study for public relations purposes.”).

43. Cramton & Koniak, *supra* note 41, at 146–47 (“Many law school faculties remain convinced that [legal ethics] is unteachable or believe that it is not worth teaching.”); *see* Susan Daicoff, *Asking Leopards To Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 593–94 (1998); *see also* Goldberg, *supra* note 41, at

This criticism of ethics training certainly has merit, but a deeper issue involves not the *technique* but the *content* of such classes. As more emphasis has been placed on the Rules as the arbiter of professional decisionmaking, the result has been the “de-moralization” of legal ethics.<sup>44</sup> “Reading or teaching the Model Rules, it is easy to embrace the illusion that rules constitute the whole of the moral life.”<sup>45</sup> In such a system, professional ethics is no longer viewed as a “subspecies of moral philosophy . . . but as a course in substantive law akin to torts or corporations.”<sup>46</sup> Such a “rule-oriented approach implies that ethics need not be viewed broadly, that is, as an aspect of morality.”<sup>47</sup> Even the principal draftsman of the Rules admits that they are merely a “code of conduct” rather than of ethics.<sup>48</sup>

Such a system can hardly prepare a student, and future lawyer, for the “complexities of professional practice.”<sup>49</sup> Joseph Allegretti notes that such a system

ignore[s] many of the interesting and important issues in legal practice. Rules cannot tell a lawyer whom her clients should be. Rules cannot empower a lawyer to be caring or courageous. They cannot teach a lawyer how to balance a client’s lawful interests against the harm that will be done to opponents and third parties. They cannot tell a lawyer whether a tactic or strategy that can be employed should be employed.

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22–23, 36 (reporting that one-third of law schools only required a one-credit course and only 10% required a three- or four-credit course).

44. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 45 (1995); see also THOMAS SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES 7 (1991) (“[T]he moral aspiration . . . has gradually been excised from American lawyers’ professional consensus.”).

45. Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101, 1106 (1998).

46. *Id.* at 1106; see also Rhode, *supra* note 24, at 649 (“Legal ethics should be taught as ethics, not as etiquette or statutory exegesis.”); Kleinberger, *supra* note 20, at 370 (“[T]he rules are seen primarily as a set of *malum prohibitum* commands to be parsed, analyzed, interpreted, and distinguished—just like any set of regulations applicable to any other trade or business.”).

47. Cramton & Koniak, *supra* note 41, at 176. Deborah Rhode examined the following:

Law school courses and bar examinations that demand rote memorization of official standards merely trivialize the subject matter. For some years, the prevailing wisdom has been that one can pass most states’ multiple choice ethics tests by resolving all doubts in favor of the second most ethical course of conduct.

Rhode, *supra* note 24, at 649.

48. Rhode, *supra* note 24, at 647 (citing Geoffrey Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 572–73 (1971)).

49. *Id.* at 647.

Moreover, rules provide no guidance for the lawyer who is grappling with the questions that the rules themselves ignore—questions such as the ends of lawyering or the lawyer’s moral accountability for her actions. . . . If we are to deal with these profound and fundamental questions, we need a more-encompassing approach to legal ethics and legal practice.<sup>50</sup>

While such a system does educate the young lawyer about the “agreed-upon minimums”<sup>51</sup> that the lawyer will be required to perform, it cannot provide him with the “techniques of ethical decisionmaking and to issues regarding lawyers’ societal role.”<sup>52</sup>

This “ethics-as-rules” conception is flawed in its reliance upon the Rules, but the Rules themselves also perpetuate a minimalist ethic of professional responsibility rather than an aspirationally high expression of professionalism. This minimalism incorporated in the Rules has been justified as necessary to avoid having a system that was routinely violated, thereby undermining the legitimacy of the Rules.<sup>53</sup> Deborah Rhode disputes this justification<sup>54</sup> but also points out that “[w]here a threat of formal sanctions is remote . . . the most significant function of official codes will be symbolic and pedagogic.”<sup>55</sup> Calling and inspiring members to a higher standard of conduct can be the most powerful role of such a set of rules. A minimalist list of responsibilities as the guiding light results in a “socialization to the lowest common denominator . . . .”<sup>56</sup> Students leaving with such an emphasis upon a “bottom-line”<sup>57</sup> ethics are ill-prepared to embark upon a profession marked by moral responsibility.

John Flynn has remarked that regarding the Rules “as the

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50. Allegretti, *supra* note 45, at 1107.

51. *Id.*

52. Rhode, *supra* note 24, at 650.

53. See James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 AM. B. FOUND. RES. J. 926, 937–38 (1980).

54. See Rhode, *supra* note 24, at 647–48.

55. *Id.* at 647.

56. *Id.* Another scholar noted:

By focusing on such a “bottom line,” one is likely to encourage an ethics based on what lawyers in general are willing to call ethical . . . . Concentration on the minimum requirements imposed on all lawyers obscures the choice of a standard of behavior for the individual lawyer, a choice that affects personal integrity, self-image, and human aspiration . . . .

James R. Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11, 20 (1982).

57. Elkins, *supra* note 56, at 20.

definition of a lawyer's ethical duties risk retarding a student's ethical development."<sup>58</sup> Flynn examined Lawrence Kohlberg's stages of moral development and concluded that legal education generally, but its reliance upon teaching the Professional Rules in particular, would actually stunt a lawyer's moral development.<sup>59</sup> Rather than encouraging students to form a professional ethic of "continuous self-reflection in terms of one's own personal values," study of the Rules as the catalog of roles and duties emphasizes the group's norms and expectations.<sup>60</sup> "The attitude is not only one of conformity to personal expectations and social order, but of loyalty to it, of actively maintaining, supporting and justifying the order, and of identifying with the persons or groups involved in it."<sup>61</sup> This rejection of any self-determined values in favor of a minimalist group-ethic only deepens the divide the young lawyer already feels between his fundamental values and those he will be living by in his profession.<sup>62</sup>

A responsible lawyer must have his own fundamental values reinforced, or even sharpened, by the profession rather than undermined and dulled. Ethics courses that "sensitiz[e] professionals to the full normative dimensions of their choices"<sup>63</sup> rather than minimize their moral responsibility are needed to produce a profession worthy of self-esteem and public trust. Also, a code of conduct that raised the ethical bar would eliminate "one source of rationalization for dubious conduct."<sup>64</sup> In fact, Rhode points out that such a code may even provide external justification for lawyers wishing to avoid impropriety.<sup>65</sup> Whether it is removing a rationalization for bad conduct or

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58. Flynn, *supra* note 16, at 442.

59. *Id.* at 440-42.

60. *Id.* at 441.

61. *Id.* at 442 (quoting Lawrence Kohlberg, *From Is to Ought, in* COGNITIVE DEVELOPMENT AND EPISTEMOLOGY, 164-65 (T. Mischel ed. 1971)); *see also* Allegretti, *supra* note 45, at 1109 (stating that such an ethic "tends to perpetuate the status quo").

62. "In a world of expediency, maintaining an ethical character requires, at a minimum, a commitment to doing right for right's sake. That commitment, in turn, requires a focus on oneself as a moral actor and a sense that what one does as an individual is morally important." Kleinberger, *supra* note 20, at 370.

63. Rhode, *supra* note 24, at 648.

64. *Id.*

65. *Id.* at 648-49 (citing Steven N. Brenner & Earl A. Molander, *Is the Ethics of Business Changing?*, HARV. BUS. REV., Jan.-Feb. 1977, at 57, 68 (finding the primary function of professional codes of conduct would be to provide individuals with a way to "refuse an unethical request impersonally.")).

providing a justification for good conduct, it is clear that a more demanding ethical code would enhance the responsibility of the profession.

### B. . . . Gets a Job

The attack upon the personal responsibility of the lawyer does not end when he graduates from law school. Many factors in the modern American legal profession continue to deny the moral autonomy of the lawyer and undermine his moral authority to make judgments based upon his personal beliefs. The sociology of modern firm practice, aspects of attorney-client relationships, and the adversary system itself help to identify the ways these elements of the modern profession create the irresponsible lawyer.

#### 1. Large Firm Practice

The practice of law has transformed from one dominated by small partnerships to one characterized by large firms. Kronman has even called this transformation a “revolution.”<sup>66</sup> Before 1960, only thirty-eight firms had more than fifty lawyers and less than twelve had more than 100 lawyers.<sup>67</sup> Forty-five years later, more than seventy firms had over 500 lawyers, and more than 250 had more than 150 lawyers.<sup>68</sup> The largest firm in 1968 had 169 lawyers.<sup>69</sup> In 1988, the largest firm had 962.<sup>70</sup> In 2002, the largest firm had over 3,000.<sup>71</sup> This growth of the large law firm has consequences for the ethical practice of its members and the profession generally.

One of these consequences is legal specialization. “There is some evidence for a transformation of the work process in the large firm . . . [away from] general practice and client responsibility and the increasing frequency of subspecialization and big cases.”<sup>72</sup> This movement away from long-term

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66. KRONMAN, *supra* note 14, at 274.

67. Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

68. *The NLJ 250*, NAT'L L.J. (Nov. 14, 2005).

69. Galanter & Palay, *supra* note 67, at 749.

70. *Id.*

71. *The AM Law 100*, AM. LAW., July 3, 2003; available at [http://www.law.com/special/professionals/amlaw/2003/amlaw100/amlaw\\_100main.html](http://www.law.com/special/professionals/amlaw/2003/amlaw100/amlaw_100main.html).

relationships with clients toward more “task-specific ad hoc engagements”<sup>73</sup> not only effects the *kind* of work that lawyers do, but the *way* they do it. Kronman points out that this break in the holistic and lasting bond between the lawyer and client eliminates the context needed for the “cultivation of deliberative wisdom.”<sup>74</sup> The lawyer no longer has access to information about the breadth of client interests in order to make wise judgments. “[I]t becomes more difficult to advise a client in any but instrumental terms, and in particular to answer the questions of ultimate ends.”<sup>75</sup> In fact, lawyers in one recent study reported that the “decreasingly loyal clientele . . . will no longer . . . indulge ethical back-talk.”<sup>76</sup>

A second consequence of this trend toward large firm practice is a bureaucratization of legal practice. In the past, firm size and character created a more homogeneous firm culture.<sup>77</sup> While some of this was due to prejudiced views of racial and religious difference, the relatively smaller size of the firm attracted and cultivated individuals with similar interests external to the firm.<sup>78</sup> “In short, most of the lawyers working in large firms thirty years ago not only saw their work as a way of making a good living, but agreed, as well, in their conception of what living well implied.”<sup>79</sup> As these external interests and values became pluralized, the large firm responded by placing a “greater reliance on formal versus informal control, and on material versus cultural control.”<sup>80</sup> In the past, when lawyers entered firm practice, their individual moral values would be reinforced by the culture of the firm. Today the firm cannot, by virtue of its size, represent or cultivate the values of all its members. As a result, the modern firm can only rely upon and reinforce a minimalist ethic to

72. ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE FIRM 171 (1988); see Timothy Hia, *Que Sera, Sera? The Future of Specialization in Large Law Firms*, 2002 COLUM. BUS. L. REV. 541, 542 (2002).

73. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 50 (1991); see Hia, *supra* note 72, at 541.

74. KRONMAN, *supra* note 14, at 285.

75. *Id.* at 286.

76. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 864 (1998); see also GLENDON, *supra* note 1, at 34 (“What companies now want most from outside lawyers . . . in highly charged, one-shot situations [is] zealous representation, rather than co-deliberation.”).

77. KRONMAN, *supra* note 14, at 291–95.

78. *Id.* at 292.

79. *Id.*

80. Suchman, *supra* note 76, at 864.

which all of its members subscribe.<sup>81</sup>

A third consequence of the revolution in large firm practice is an increasing “ethical pragmatism” among its lawyers.<sup>82</sup> As the bonds between the firms and its clients have become increasingly commercialized, lawyers have reduced legal ethics to “pragmatic strategies.”<sup>83</sup> Non-pragmatic ethical considerations are removed from the decisionmaking process, and judgment calls are made on the basis of their pragmatic or utilitarian consequence. One form of this pragmatism is a reliance upon the adversary system as the protector of more fundamental values.<sup>84</sup> A second form of this pragmatism is a trust in the “invisible hand” of reputation.<sup>85</sup> One lawyer expressed it this way: “You’re expected to do the right thing, the favored thing, the ethical thing. It makes sense for a lot of reasons. I think sharp practices never work in the end. They always get you in trouble or get your client in trouble, causing malpractice suits and things like that.”<sup>86</sup> In both cases, the justification for ethical behavior is entirely practical rather than moral.<sup>87</sup> This kind of ethic provides large-firm lawyers with an amoral justification for complying with the “pragmatic demands of their result-oriented clients.”<sup>88</sup>

Little may be done to change this trend towards the large firm and the specialization, bureaucratization, and commercialization that results. However, contemporary large law firm practice does reinforce the need to internalize and strengthen the moral responsibility of individual lawyers. The lawyer must now go out of his way to identify and analyze the breadth of interests the client may have in a particular isolated matter. Also, the individual lawyer may no longer rely upon the social culture of the firm to build and develop his own sense of

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81. See *supra* note 56 and accompanying text.

82. Suchman, *supra* note 76, at 842–46.

83. *Id.* at 845.

84. *Id.* at 843 (quoting one large-firm litigator: “Most of the issues that we’re talking about here aren’t issues of ultimate justice or even specific justice. They are questions of following the rules so that cases will come out, and the right information will be presented, and ultimately, justice will be served.”).

85. Pearce, *supra* note 10, at 726.

86. Suchman, *supra* note 76, at 844 (quoting one large-firm participant in the study).

87. Mark Suchman concluded that the participants in his study “seemed distinctly ill at ease with the prospect of justifying litigation decisions in purely moral terms, without reference to these aligning mechanisms.” *Id.*

88. *Id.* at 846.

moral responsibility. Instead the task must be done alone or with a smaller community of like-minded professionals. Finally, the modern large-firm lawyer must fight against the prevailing pragmatism to assert and justify his moral bases for professional decisionmaking.

The Model Rules do little to encourage this kind of personal responsibility. Rather than requiring each lawyer to account for his own conduct, the Rules send exactly the opposite message to young lawyers. In particular, Rule 5.2(b) explicitly allows a “subordinate lawyer” to defer in “arguable question[s] of professional duty” to the opinion of a “supervisory lawyer.”<sup>89</sup> Opponents of this rule have characterized it as a “Nuremberg” or “superior orders” defense,<sup>90</sup> and even advocates of it have a difficult time making any principled distinction.<sup>91</sup> Regardless of the interpretation of the rule, it is clear that the rule “facilitates law firm management by encouraging law firm associates to follow the directions of the senior lawyer without fear of the consequences.”<sup>92</sup> In the context of the large law firm, this effect is exaggerated:

I’ve worked with two firms, and in the less hierarchical—the much smaller—firm, there was a much more open flow of information. You feel more free and capable of speaking your mind, and you’re less intimidated about speaking to someone who is the head of your department or the head of your firm. In a larger firm, which is more hierarchical by nature, there are more barriers.<sup>93</sup>

As lawyers come under increasing pressure by clients to pursue narrow interests and the firm no longer provides the culture within which moral justifications are accepted, this rule provides an easy way for the young attorney to defer all moral judgment to his senior colleagues.

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89. MODEL RULES OF PROF’L CONDUCT R. 5.2(b).

90. See Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 889 (1997).

91. See Irwin D. Miller, *Preventing Misconduct by Promoting Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 297 (1994) (stating that the rule “unequivocally disposes of any ‘Nuremberg’ defense in which a subordinate lawyer attempts to deny responsibility because he or she was merely acting in accordance with the orders of a superior,” but the rule “does provide subordinate lawyers with a limited ‘following orders’ defense”).

92. Rice, *supra* note 90, at 904.

93. Suchman, *supra* note 76, at 864–65 (quoting an associate).

A final word should be said about the many, in fact majority,<sup>94</sup> of lawyers who do not practice in large firms. While the sociology within the small firm may be different than in their larger counterparts, the influence and power of these large firms upon the culture of the bar and the state of legal education will make it difficult for these small firms not to fall in line.<sup>95</sup> In fact, smaller firms may even be more susceptible to the pressures of specialization and commercialization in order to compete with the larger firms. One partner in a large firm stated that “[t]hose who can afford ethics do it.”<sup>96</sup> Thus, the larger firms may have the financial capacity to turn away work or clients that demand behavior that does not comport with the lawyer or firm’s values.<sup>97</sup> Small firms are not immune from many of these pressures, and they draw attorneys from the same system of legal education as the large firms. Hence, the irresponsible graduate of law school will often succumb to the commercial pressures of practice regardless of the size of the firm.

## 2. Attorney-Client Relationship

The pressures of large-firm practice are not the only aspect of the modern profession that contribute to the irresponsibility of attorneys. One aspect of lawyer-client relations not addressed here is the complexity of defining lawyers and clients. The growth of firm practice and corporate clients calls into question the traditional concept of one lawyer representing one client.<sup>98</sup> Nevertheless, examining characteristics of the attorney-client relationship will help reveal how the goals of zealotry and role-differentiation undermine the responsible lawyer.

### a. *Zealous Advocacy*

The Model Rules express the desire for the lawyer to be a

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94. ABA MARKET RESEARCH DEPARTMENT, *LAWYER DEMOGRAPHICS 1* (2006), [http://www.abanet.org/marketresearch/lawyer\\_demographics\\_2006.pdf](http://www.abanet.org/marketresearch/lawyer_demographics_2006.pdf) (last visited Nov. 29, 2006).

95. KRONMAN, *supra* note 14, at 272–73.

96. Suchman, *supra* note 76, at 865.

97. “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” GLENDON, *supra* note 1, at 37 (quoting Elihu Root). It would be difficult to see how firms, large or small, could survive in the modern commercialized practice of law if they turned away half their clients.

98. For an interesting examination of this problem and some solutions, see John Leubsdorf, *Phuralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1992).

zealous advocate for his client.<sup>99</sup> This conception of the lawyer-client relationship has several unique effects upon the responsibility of lawyers. First, the ideal of the zealous advocate contains no inherent limiting principle against which client selection should be measured.<sup>100</sup> “From this perspective, the lawyer’s function is simply to defend, not judge, the client. Accordingly, counsel assumes no moral responsibility for the ends to which his or her services are put.”<sup>101</sup> The Model Rules reinforce this non-judgmental view of advocacy: “representing a client does not constitute approval of the client’s views or activities.”<sup>102</sup> The model of zealous advocacy, with no limiting principle, encourages lawyers to act irresponsibly in their selection of clients.

While the first problem relates to the kind of clients one should represent, the second problem resides in the kind of claims one should make on the client’s behalf. Zealous advocacy denotes a win-at-all-costs mentality that abdicates responsibility for the kind of arguments one ought to make in the pursuit of furthering the client’s interests. The Rules place only the outer limits of frivolousness<sup>103</sup> and delay<sup>104</sup> on the kinds of arguments that a lawyer may assert but even backs off of these standards: “Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.”<sup>105</sup> In fact, one lawyer remarked about the satisfaction that came from making an argument he knew to be wrong: “[I]t is sometimes more fun to have a bad case than a good one for it tests your powers of persuasion more severely. Certainly I have seldom felt better pleased than when I persuaded [the court] to come to a decision which I was convinced was wrong . . . .”<sup>106</sup> Is this the calling that a responsible lawyer expects to follow in his profession? Surely not.

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99. MODEL RULES OF PROF’L CONDUCT pmb. paras. 2, 8.

100. The law may impose some limits, but those will be exposed as slight at best.

101. Rhode, *supra* note 24, at 618.

102. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 5.

103. *Id.* R. 3.1.

104. *Id.* R. 3.2, R. 3.2 cmt.

105. *Id.* R. 3.1 cmt. 2.

106. Rhode, *supra* note 24, at 604 (quoting Warren Lehman, *The Pursuit of a Client’s Interest*, 77 MICH. L. REV. 1078, 1078 (1979) (quoting Hon. Lord Cross of Chelsea)).

A final problem associated with the requirement of zealous advocacy is the single-minded loyalty to the client that it imparts. Lord Brougham's quote sums this up:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.<sup>107</sup>

This unswerving loyalty and commitment to the client even calls into question the right of the lawyer to consider the reputational consequences of his behavior on behalf of his client. If this is so, even the "invisible hand" of professional oversight<sup>108</sup> cannot be brought to bear on the attorney's conduct.

It is important to note one recurring myth and one limited reality in relation to the choice of clients and claims. This is the myth of the "last lawyer" or "one-lawyer town." In this story, an unpopular client walks into the office seeking enforcement of his constitutional right to engage in some disfavored or repugnant behavior (e.g., the Ku Klux Klan's right to march down a public street). The potential client states either that all other lawyers have refused to represent him or that you are the only attorney in town. Must you accept his business? Whatever moral or legal obligations the lawyer may have,<sup>109</sup> it is clear that this is such an obscure likelihood—especially in the pluralistic and heterogeneous society we currently live in—to be the sound basis for a rule requiring representation. The one aspect of this myth that does represent a limited reality, and in which the claims of zealous advocacy retain unique force, is the criminal defense context. Deborah Rhode defends and dismisses the criminal defense paradigm:

When individuals' lives, liberties, or reputations are so immediately at risk, our constitutional tradition has sought to guarantee that they have advocates without competing loyalties to the state . . . . Given the small number of attorneys actively

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107. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976) (quoting Lord Brougham).

108. See *supra* note 85 and accompanying text.

109. See Rhode, *supra* note 24, at 621.

engaged in criminal defense work, the critical question is whether professional norms appropriate in that context should serve as the paradigm for all legal practice.<sup>110</sup>

Apart from the limited criminal defense paradigm, these consequences of zealous advocacy reveal its weakness as a governing ideal. It strips lawyers of their moral responsibility in choosing their clients, releases them of moral accountability in the way they pursue their client's interests, and rejects their own moral values and interests on behalf of their clients. This leaves the lawyer "an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established."<sup>111</sup>

#### b. *Role-Differentiation*

A second characteristic of the attorney-client relationship that contributes to the irresponsible lawyer is the role-differentiation<sup>112</sup> promulgated by the Rules and modern practice. The last section examined one way in which role-differentiation is encouraged in the lawyer-client relationship—the preference given the interests of the client over individuals generally.<sup>113</sup> However, there are other ways that role-differentiation in the lawyer-client relationship impacts the responsible lawyer.

First, role-differentiation dissects the moral relationship between the client's ends and the means the lawyer must use on

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110. *Id.* at 605–06. Another critic has stated:

[I]t is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits . . . . Once we leave the peculiar situation of the criminal defense lawyer, I think it quite likely that the role-differentiated amorality of the lawyer is almost certainly excessive and at times inappropriate.

Wasserstrom, *supra* note 8, at 12; *see also* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 170 (1997) (encouraging multiple paradigms of lawyer responsibilities in contrast to the unitary approach of the rules).

111. Wasserstrom, *supra* note 8, at 6; *see also* Kleinberger, *supra* note 20, at 369 (“Lawyers are legal technicians, and their morality consists of being good at what they do.”).

112. Richard Wasserstrom gives one definition of role-differentiated behavior: “[I]t is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive.” Wasserstrom, *supra* note 8, at 3.

113. *See id.* at 5 (“What is characteristic of this role of a lawyer is the lawyer’s required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance.”).

behalf of those ends. Rule 1.2 states that the lawyer “shall abide by a client’s decisions concerning the *objectives* of representation” while he need only “consult with the client as to the *means* by which they are pursued.”<sup>114</sup> This distinction between ends and means and assignment of responsibility between the lawyer and client attempts to separate the inseparable questions of ends and means that will necessarily have moral implications on each other. Anthony Kronman agrees: “[I]n addition to finding means for ends their clients have already set, lawyers regularly help to clarify these ends themselves and even on occasion act as midwives without whom the ends might never come to light.”<sup>115</sup> By separating the roles of determining the ends and means, the Rules also separate the necessary moral reflection and discourse that must take place in order to make responsible decisions about both.

A second consequence of role-differentiation is the subsuming of the lawyer’s personal morality to that of his client. Sanford Levinson perceives the lawyer’s professional duties to include the “bleaching out’ of merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our ‘conscience.’”<sup>116</sup> Much of this theory is based upon a conception of client autonomy.<sup>117</sup> However, this version of the role of the lawyer ignores the moral autonomy of the lawyer. “This disconnection from ourselves skews moral or ethical analysis because it cuts us off from the primary source of ethical judgment, our individual development of the capacities to reason and justify contemplated action.”<sup>118</sup> A lawyer thus “cut off” is likely to experience “cognitive dissonance” from having to “act against one’s own nature.”<sup>119</sup> In order to restore responsibility to the life of the lawyer, he must be reunited with his moral foundations and be allowed to exercise them as an equal moral partner in the lawyer-client relationship.

The lawyer’s moral interests are subsumed by those of the

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114. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (emphasis added).

115. Anthony Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 866 (1987).

116. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993).

117. See Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 40 (1996–1997) (identifying the trend in modern scholarship to isolate autonomy in the realm of the client).

118. *Id.* at 41.

119. *Id.*

client, but they are also rejected as irrelevant to the lawyer-client relationship characterized by role-differentiation. The rules provide that “representing a client does not constitute approval of the client’s views or activities.”<sup>120</sup> This “moral nonaccountability” is deemed crucial to the lawyer’s ability to represent his client effectively: “[A] lawyer who is morally responsible for the views of a client would not be able to represent his client zealously, thus denying the client access to the only system that protects his individual rights.”<sup>121</sup>

The means-end distinction, overarching client autonomy, and moral nonaccountability all tell the young lawyer that moral issues are best left to the discretion of the client. Even more than this, they tell the lawyer that it would be inappropriate for him to make moral judgments in his role as a lawyer. “Role-differentiated behavior is enticing and reassuring precisely because it does constrain and delimit an otherwise often intractable and confusing moral world.”<sup>122</sup>

#### IV. CONCLUSION

The state of the legal profession is dire. Both legal education and the practice of law create forces that, at best, divide the lawyer against his own values, and at worst, ‘bleach’ them from his professional life. The minimalist legal ethic instilled in classrooms and practiced in large firms leaves no room for the nuance and discourse required in responsible decisionmaking. When a holistic view of moral responsibility and the legal profession are reduced to a minimalist ethic, only the stark ideal of zealous advocacy and the strict role-differentiation between lawyer and client remain. Such an ethic cannot account for the multiplicity of values individual lawyers will bring to the profession, and cannot provide the values to keep them fulfilled in it.

It is no surprise that the public is dissatisfied and the profession disheartened. Louis Brandeis summed up the critical need for responsibility in this way:

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120. MODEL RULES OF PROF’L CONDUCT R. 1.2(b), R. 1.2 cmt. 3.

121. Janine Sisak, *Confidentiality, Counseling, and Care: When Others Need to Know What Clients Need to Disclose*, 65 *FORDHAM L. REV.* 2747, 2758 (1997).

122. Wasserstrom, *supra* note 8, at 9.

They can not be worthy of the respect and admiration of the people unless they add to the virtue of obedience some other virtues—the virtues of manliness, of truth, of courage, of willingness to risk positions, of the willingness to risk criticisms, of the willingness to risk the misunderstandings that so often come when people do the heroic thing.<sup>123</sup>

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123. ALPHEUS THOMAS MASON, *BRANDEIS A FREE MAN'S LIFE*, 281 (1910) (citing 9 JOINT COMM. TO INVESTIGATE THE INTERIOR DEPT. AND FORESTRY SERV., 61ST CONG., S. Doc. No. 719, 3807, 4922-23 (3d Sess.1910)).