The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons

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The legal profession has seen multiple efforts on the part of lawyer regulators to confront what is seen as a "crisis" of professionalism among lawyers. This Article argues that despite the sincerity of these efforts, they have failed largely because the profession has divided what was once the single unifying goal for bar associations and lawyer regulators—providing moral, ethical, and practical guidance on how to practice law—into two quite distinct, and in some ways contradictory goals, thus undercutting the entire project. The original, unified goal, best embodied by the ABA Canons of Professional Ethics, provided both general moral and ethical advice and specific practical advice to lawyers. This unified statement was split first by the adoption of the ABA Code of Professional Responsibility, which separated the general considerations from the mandatory minimums, and then by the adoption of the Rules of Professional Conduct, which eliminated the broadly moral altogether. Now there are two distinct goals. The drafters have largely eliminated the broad, philosophical standards from the Canons of Professional Ethics and Code of Professional Responsibility, have sharpened the minimums into a quasi-criminal set of rules, and have increasingly focused on the minimum standards of lawyer conduct. These efforts are referred to as the "minimalist" project. At the same time, bar associations and attorney regulators have felt a backlash from the legalization of
what was once accurately termed "legal ethics," and have attempted
to raise the ethical consciousness of the profession as a whole
through hortatory, non-binding efforts. These efforts are known as
the "broadly ethical" project.

This Article argues that the goals of the "minimalist" project and
the "broadly ethical" project conflict and undercut each other in
several important ways. Further, this Article provides a simple but
heretical solution: redraft the Canons with a single goal in mind—
giving moral, ethical, and practical guidelines for the practice of
law. This will reunite the broad and narrow goals of legal ethics,
will give some needed meaning and attention to the "broadly
ethical" project, will fundamentally change the way lawyers
approach their minimalist duties, and will make the minimums
more explicitly ethical, moral, and naturally followed.

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INTRODUCTION

Any hardened observer of modern lawyer regulation cannot avoid the overwhelming sensation of churning. For years now the legal profession,¹ the judiciary,² the academy,³ and bar associations⁴ have decried a "crisis" in the profession and have proposed various solutions.


3. Scholarly references to the "professionalism crisis" have become so common that Professor W. Bradley Wendel has described "a burgeoning genre—the 'profession in crisis' jeremiad." See W. Bradley Wendel, Public Values and Professional Responsibility, 75 Notre Dame L. Rev. 1, 3 (1999). For a comprehensive overview of the most common complaints, see Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society 17-108 (1994); Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 1-48 (2000) [hereinafter Rhode, Interests].

4. The American Bar Association ("ABA") has led the bar association charge, see, e.g., American Bar Association Commission on Professionalism, In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism 3, 12-54 (1986), reprinted in 112 F.R.D. 243, 253-54, 263-304 (1986) [hereinafter Blueprint] (identifying a decline in lawyer professionalism and suggesting various solutions to help remedy the problem), but other bar associations have been heavily involved. Consider, for example, the New Jersey Commission on Professionalism, "a unique cooperative venture of the NJSCA, the state and federal judiciary, and New Jersey's three law schools," see New Jersey Commission on Professionalism, Background, at http://www.njscba.com/commission_on_prof/ (last visited Sept. 15, 2004), or the professionalism creed of the Dallas Bar Association, which has been reprinted in Dondi Prop. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 292-95 (N.D. Tex. 1988) (describing Dallas Bar Association's Guidelines for Professional Courtesy and professionalism creed, and adopting them as standing orders for Northern District of Texas).
solutions, ranging from hortatory to regulatory. For the last twenty years these reform efforts have proceeded along two tracks: increasing "professionalism" and revising and recalibrating the regulations governing the minimum standards of attorney conduct.

Despite the prevalence of the terms "crisis" and "professionalism" in these reform efforts, neither term is particularly well defined. There are actually at least four related but distinct crises listed in these various accounts of the Job-like woes of the legal profession. First, many lament the public's low opinion of the legal profession. Second, others concern themselves with the unhappy and unhealthy nature of the legal profession itself. Third, many bemoan the loss of "professionalism" amongst lawyers. Last, some fret over


9. As noted below, there is no set definition for "professionalism," either. Some of these complaints center on perceived lawyer incivility. See, e.g., Allen K. Harris, The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices Solution, 53 S.C. L. REV. 549, 556-58 (2002) (describing need for increased civility as a portion of the professionalism crisis); Robert C. Josefsberg, The Topic is Civility—You Got a Problem with That?, FLA. B.J., Jan. 1997, at 6 (stating that the lack of civility in the legal profession is a serious issue). Others take the view that lawyers have increasingly rejected any consideration of the broader interests of society or the justice system, focusing on narrow client interests instead. See, e.g., WILLIAM H. SIMON, THE
the legal profession’s alleged transformation from profession to business.\textsuperscript{10}

Moreover, the term “professionalism” itself has proven abstruse. Most agree that professionalism implies something above and beyond the minimum behavior required under state rules of professional conduct (often referred to as rules of “ethics”).\textsuperscript{11} It has proven notoriously difficult to define what professionalism offers beyond the minimums of legal ethics, and most scholars and bar officials have abandoned efforts at a specific definition.\textsuperscript{12}

Thus, reformers of the legal profession have attempted to address a shifting set of problems, crises, with a series of reforms


\textsuperscript{12} Professor Deborah Rhode has long noted a “professionalism problem … a lack of consensus about what exactly the problem is, let alone how best to address it.” Deborah L. Rhode, \textit{Opening Remarks: Professionalism}, 52 S.C. L. REV. 458, 459 (2001); see also Rob Atkinson, \textit{A Dissenter’s Commentary on the Professionalism Crusade}, 74 TEX. L. REV. 259, 271–80 (1995) (delineating the “elusive meaning of ‘professionalism’ ” and arguing that there is no meaningful definition); Austin Sarat, \textit{The Profession Versus the Public Interest: Reflections on Two Reifications}, 54 STAN. L. REV. 1491, 1494 (2002) (reviewing \textit{RHODE, INTERESTS}, supra note 3) (arguing that professionalism means different things to each lawyer depending on context). Even the ABA’s Professionalism Blueprint acknowledged that professionalism is an “elastic concept the meaning and application of which are hard to pin down,” and chose to define the legal “profession” instead. See BLUEPRINT, supra note 4, at 261.
based upon an indeterminate concept, professionalism. Not surprisingly, there is a sense within the profession and academia that much of the professionalism crusade has fallen short of the mark. Public opinion of lawyers remains low, lawyer satisfaction has not risen, the law continues its drift from profession to business, and most damningly, there is little evidence of any increase in lawyer professionalism, however defined.

The churning sensation arises because of the cyclical nature of the professionalism crisis and response process: the perceived crisis leads to regulatory responses, the responses fail to address the crisis, and the cycle begins again with a renewed sense of frustration and concern. This frustration and concern will likely continue unabated because the latest reforms look an awful lot like what already has been tried to little effect. These responses include more attention to professionalism in law schools, more voluntary and mandatory

13. The most recent survey data confirms lawyers' relatively low public standing. See Dianne E. Lewis, Ethics, MIAMI HERALD, Jan. 5, 2004, at 23 (describing a survey rating the honesty of lawyers at the bottom of the professions with car salesmen, HMO managers, insurance salesmen, and advertising executives).

14. For example, bar journal stories warning lawyers about their increased likelihood of substance abuse or depression are still quite prevalent. See, e.g., Thomas Adcock, Despite '93 Report, Substance Abuse Persists at Law Schools, N.Y. J.L., June 27, 2003, at 16 (describing continuing problem of substance abuse in law schools); Arthur D. Burger, Dealing with a Colleague's Addiction, TEX. LAW., Feb. 16, 2004, at 31 (“Lawyers are prime candidates for impairment, whether caused by alcoholism, drug abuse, depression or some other mental disability.”).


16. One sign that things have not improved is the continued focus on these issues by lawyer regulators, bar associations, and legal academics. Ten states have commissions on professionalism. See ABA STANDING COMMITTEE ON PROFESSIONALISM, A GUIDE TO PROFESSIONALISM COMMISSIONS ix, 4-6 (2001) (listing Florida, Georgia, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, and Texas as states with professionalism commissions), available at http://www.abanet.org/cpr/scop_commission_guide.html (on file with the North Carolina Law Review). More such commissions are planned. See Roy T. Stuckey, Introduction, 52 S.C. L. REV. 443, 443 (2001). At least eleven law schools have legal ethics centers. See id. Professor Rhode has collected some evidence of improved professionalism, and makes a persuasive case that while things do not appear any better since the launch of professionalism efforts, there is no evidence that they are any worse. See RHODE, INTERESTS, supra note 3, at 12-13.

17. Suggestions include requiring a “pervasive approach” to teaching professional responsibility to law students, i.e., requiring some consideration of ethical issues throughout the law school curriculum. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD xxix (2d ed. 1998) (providing “coverage of all the basic professional responsibility issues that would be part of a specialized course in the subject, as well as materials for integrating such issues into the core curriculum.”) [hereinafter RHODE, PERVERSIVE METHOD]; Peter A. Joy & Kevin C.
professionalism continuing legal education ("CLE") courses,\(^{18}\) more stringent character and fitness reviews for bar admissions,\(^{19}\) more civility and professionalism creeds/standards,\(^{20}\) and more public

McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961, 961–63 (2003) (making a general case for the importance of a pervasive approach to teaching ethics). Other suggestions include moving the required professional responsibility class to the first year curriculum, adding hours to the class, and requiring an additional upper-level ethics class. See Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 735 & n.104 (1998) ("At a minimum, legal ethics education must include a required first year, first semester course of at least three credits, a required advanced course of at least three credits, and pervasive teaching throughout the curriculum."). Given that the two-credit required professional responsibility class is already among the most neglected and disliked law school classes by faculty and students alike, see infra notes 207–212 and accompanying text, the efficacy of more required professional responsibility training is open to question.

18. These CLE classes fall into several categories. At least forty states require every lawyer to regularly attend some type of professionalism CLE. See Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 230–31 (2003) (noting that "the Louisiana Supreme Court in 1997 amended its Rules for Continuing Legal Education to require that every Louisiana lawyer attend at least one hour of professionalism CLE each year" (footnote omitted)); ABA CENTER FOR CONTINUING LEGAL EDUCATION, *Summary of MCLE State Requirements*, at http://www.abanet.org/cle/mcleview.html (last visited Sept. 16, 2004) (listing states) (on file with the North Carolina Law Review). Interestingly, many of these states allow classes in substance abuse in lieu of the ethics requirement. See id. Other states, including New York, Louisiana, Kentucky, Idaho, Florida, Maryland, and Delaware require new lawyers to attend a basic skills/professionalism orientation to "bridge the gap" between law school and practice. See id.; Pamela J. White, *Holistic Approach to Professionalism*, Md. B.J., Sept.–Oct. 2003, at 19, 20 (describing the mandatory "Professionalism Course" taken by all new Maryland attorneys). Anyone who has attended or taught an ethics CLE class will agree that they are more likely to cause an increase in cases of narcolepsy than any increase in ethical lawyer behavior. For a historical view on these courses, see generally THE AMERICAN LAW INSTITUTE–AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, *A Model for Continuing Legal Education: Structure, Methods, and Curriculum*, (Discussion Draft 1980) (proposing local or regional CLE organizations designed to serve lawyers within their jurisdiction with certain methods and curricula); ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY* (1959) (examining the state of continuing legal education and recommending an increased emphasis on professional responsibility).

19. See JUSTICES ACTION PLAN, supra note 2, at 32–34 (arguing for a beefed up character and fitness evaluation for bar admission, and for greatly enhanced involvement of law schools). Given the long-standing criticisms of these evaluations as ineffective, unfairly applied, and overly burdensome, see, e.g., Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 507–46 (1985) (evaluating the structural and substantive problems of character assessment in bar certification procedures), a renewed emphasis is of questionable value.

20. For a listing of these creeds/codes, see CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 5. Most of the codes are hortatory in nature. See, e.g., MSBA, *Maryland State Bar Association Code of Civility*, at http://www.msba.org/departments/commpubl/publications/code.htm (May 1997) ("MSBA encourages all Maryland lawyers and judges to honor and voluntarily adhere to the standards set forth in
relations work.\textsuperscript{21} The mandatory rules side of the project includes similar rehashes: more tinkering with the Rules,\textsuperscript{22} more "ethics hotlines" to make compliance easier for lawyers,\textsuperscript{23} and more Lawyer Assistance Programs to deal with lawyer addiction problems.\textsuperscript{24}

\textsuperscript{21}See BLUEPRINT, supra note 4, at 302-03; JUSTICES ACTION PLAN, supra note 2, at 39-44; Tom Godbold, Professionalism: A Goal that is Hard to Reach, but Must be Preached, HOUSTON LAWYER, Sept.–Oct. 2002, at 8, 8 (suggesting "[w]e ... stand together as a profession and strive to better educate the public on what it is we do, how we do it and why we do it"). This approach is my personal favorite. A high school anecdote well describes the weakness of this reform. A somewhat unpopular friend of mine launched a "get to know me" campaign in an effort to raise his popular standing. Another friend recommended an immediate cessation of all such activities: "The problem, pal, is that everyone knows you all too well, not the other way around."


\textsuperscript{23}See JUSTICES ACTION PLAN, supra note 2, at 27–28 (suggesting increased assistance to lawyers for ethical questions, including establishing an ethics hotline); Veasey, supra note 11, at 899 (recommending "[a]ssistance with ethics questions, like an ethics hotline").

\textsuperscript{24}See ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 34 & n.109 (1996) [hereinafter LEARNING PROFESSIONALISM] (arguing for additional Lawyer Assistance Programs). See generally ABA COMM’N ON IMPAIRED ATTORNEYS, AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES (1991) (listing programs available to lawyers with a range of mental illness, addiction, and other problems). Bar disciplinary authorities also have been notably lenient on lawyer infractions when substance abuse or depression is involved. See Fred C. Zacharias, The Purposes of Lawyer Discipline, 45 WM. & MARY L. REV. 675, 699–706 (2003) (describing mixed treatment of alcoholism in bar disciplinary proceedings); Todd Goren & Bethany Smith, Note, Depression as a Mitigating Factor in Lawyer Discipline, 14 GEO. J. LEGAL ETHICS 1081, 1087 (2001) (describing how lawyers with mental disabilities in the District of Columbia are given more lenient treatment in disciplinary procedures).
There are a number of explanations for the struggles of the professionalism movement. One possibility that I, among others, have endorsed is that because the legal profession is basically self-regulating, most regulations governing lawyers are self-serving and aimed at increasing lawyer profits and protecting the monopolistic nature of the legal profession. Under this hypothesis efforts at professionalism are best seen as either sops to fend off greater attention from the public or the judiciary, or crass economic protectionism. Others have argued that there is actually no "crisis" at all, the legal profession has been publicly disliked and internally pressurized since lawyers have existed. The lack of any actual crisis would thus render any curative efforts moot.


27. I have previously argued that continuous efforts to raise the barriers to entry to the profession (i.e., the bar examination, the MPRE, stricter character and fitness) are actually most likely consciously or unconsciously motivated by the desire of existing practitioners to limit competition from new entrants. See Barton, supra note 26, at 445-48.


29. One of my reviewers suggested that a lack of a crisis makes this Article moot; if there is no crisis, why should we worry about any schism within legal ethics? I have two responses. First, given that bar regulators are reacting to a perceived crisis, the reality of a crisis is meaningless. All that matters for purposes of this Article is that regulating
Despite the persuasive force of these explanations, they do not jibe with the substantial efforts that innumerable lawyers, judges, and academics have poured into these concerns or with the very real sense of malaise within the profession. This Article argues that despite the sincerity of these efforts, they have failed largely because the profession has divided what was once the single unifying goal for bar associations and lawyer regulators—providing moral, ethical, and practical guidance on how to practice law—into two quite distinct, and in some ways contradictory goals, thus undercutting the entire strategies are being created to address the crisis. Second, as a matter of human psychology I take general agreement that a crisis or a problem exists as sufficiently serious to justify use of the word “crisis”.

30. See generally GLENDON, supra note 3 (identifying a number of problems faced by lawyers, judges, and law schools and examining their possible consequences); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (describing a lack of morale in the legal profession and concluding that legal institutions are not capable of reviving the ideal of the lawyer-statesman); SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994) (asserting that the legal profession has lost its way and calling on lawyers, judges, and the bar to make reforms); RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED (1999) (urging increased attention to ethics and improved public relations throughout the legal profession). My previous scholarship in this area has looked at the multitudinous problems of lawyer regulation from an outsider’s point of view and used economic analysis to elucidate some of the more glaring weaknesses. In this Article I take an insider’s point of view and look at our current worries as a lawyer and law professor. In that regard, I take the bar at its word when it says it has a serious problem and it is earnestly endeavoring to solve it. The question this Article seeks to answer is, why are these efforts so unsuccessful, and how could they be improved?

31. I use the term “lawyer regulators” with some regularity in this Article. Since the legal profession is largely self-regulated, “lawyer regulators” refers to those in charge of creating and enforcing the regulations that govern the legal profession. Nominally state supreme courts are in charge in all fifty states. See Barton, supra note 25, at 1249. As a practical matter the ABA and state bar associations hold the greatest sway, and since the early twentieth century the ABA has drafted the baseline Rules/Codes/Canons that govern lawyer conduct. See id. at 1188–200.

32. In reading this Article some reviewers have asked for a definition of these three terms, or more pointedly, challenged me to differentiate between them. I use these three terms, “moral, ethical, and practical,” in this order purposefully, to express the breadth of guidance the Canons offered to lawyers from the broadest and most personal (moral) to the narrowest and most generally applicable (practical). By “moral” I mean the dictionary definition: “Of or pertaining to human character or behaviour considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings.” 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1827 (Lesley Brown ed., 1993). “Ethical” is explicitly related to the moral, but it refers to a more systematic, or scientific approach to morality, i.e., it is less personal and has a structure beyond any single individual’s moral leanings. See id. at 856. “Practical” specifically refers to the nuts and bolts of lawyering, and is the least personal of the three terms. Id.
project. The original, unified goal is best embodied by the ABA Canons of Professional Ethics, which provided both general moral and ethical advice and specific practical advice to lawyers. This unified statement was first split by the adoption of the ABA Code of Professional Responsibility, which separated the general (entitled “canons” and “ethical considerations”) from the mandatory minimums (“disciplinary rules”), and then the Rules of Professional Conduct, which eliminated the broadly moral altogether.

Now there are two distinct goals. On the one hand, the efforts of attorney regulators to draft, redraft, and continuously narrow the minimum rules of lawyer behavior are the *sine qua non* of the last thirty years of the professionalism movement. The goal of these efforts is, most charitably put, to maximize the number of lawyers who know and follow the minimum rules of the profession. Less charitably, the goal is to make it easier to follow the minimum standards. The drafters have largely eliminated the broad, philosophical (and thus harder to apply) standards contained in the predecessor Canons of Professional Ethics and Code of Professional Responsibility and have sharpened the minimums into a quasi-criminal set of rules. They have also set up multiple avenues, through ethics hotlines and ethics committees, for pre-determining

33. While it is clear from an analysis of the regulatory activities that there are two distinct goals, lawyer regulators frequently treat these goals as if they are identical, or conflate them.

34. See *infra* notes 67–88 and accompanying text (discussing the structure and adoption of the ABA CANONS OF PROFESSIONAL ETHICS).

35. See *infra* notes 89–95 and accompanying text (discussing the structure and adoption of the MODEL CODE OF PROF’L RESPONSIBILITY).

36. See *infra* notes 96–107 and accompanying text (discussing the structure and adoption of the MODEL RULES OF PROF’L CONDUCT).


38. The ABA MODEL RULES OF PROFESSIONAL CONDUCT have largely replaced the Code and are framed almost solely in terms of the minimum standards of lawyer behavior. *See infra* note 102 and accompanying text. For a specific and much discussed example, consider the delicate balance struck by the Canons between zealous advocacy and the warning that it is not “the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause.” *See* ABA CANONS OF PROFESSIONAL ETHICS, CANON 15 (1908). Compare the nuance of Canon 15, and its requirement that a lawyer “must obey his own conscience and not that of his client” with the Rules and the Code, which basically require any and all efforts with the bounds of the law in support of zealous advocacy. *See* CODE DR 7-101, DR 7-102; RULE 3.1–3.3. For a seminal discussion of the systematic shortcomings of a zealous advocacy requirement, see DAVID LUBAN, LAWYERS & JUSTICE: AN ETHICAL STUDY 11–30 (1988).
the propriety of any questionable actions. Thus, while bar associations and lawyer regulators once sought to offer lawyers moral and ethical guidance for the practice of law, regulators have increasingly focused on minimum standards of lawyer conduct. For purposes of clarity I will refer to this set of goals as the "minimalist" project.

On the other hand, bar associations and attorney regulators have felt a backlash from the legalization of what was once accurately termed "legal ethics," and have attempted to raise the ethical consciousness of the profession as a whole through hortatory, non-binding efforts. In this context "ethics" means the dictionary definition—"a set of moral principles"—not the narrower, minimum rules of conduct meaning regularly ascribed to "legal ethics." In this regard lawyer regulators are actually trying to accomplish a much headier mission: they are trying to make lawyers more moral and ethical. I will refer to this goal as the "broadly ethical" project.

These two goals conflict and undercut each other in several important ways. The broadly ethical project's focus upon a moral world outside of the minimum legal rules actually draws attention to the relatively picayune nature of the minimalist project, and breeds cynicism among members of the profession and law students interested in considering more than just minimum allowable boundaries.

The continuing effort to eliminate the philosophical or broadly

39. See OXFORD, supra note 32, at 856.

40. See, e.g., Julius W. Gernes, Professionalism Aspirations: Encouraging Professionalism, 58 BENCH & B. MINN. 32, 32 (2001) ("Legal Ethics can be defined as the mandated minimum level of conduct required by the Minnesota Rules of Professional Conduct."); Thomas E. Richard, Professionalism: What Rules Do We Play By?, 30 S.U.L. REV. 15, 18 (2002) ("From these definitions it is apparent that legal ethics provide minimum standards that lawyers must follow, while professionalism establishes lofty standards that lawyers should follow.").

41. Note that the term "professionalism" as used by bar regulators and academics actually straddles and conflates both of these distinct goals. See infra notes 109–121 and accompanying text. Frequently the minimalist project itself is hailed as the cornerstone of "professionalism," at other times "professionalism" is defined as being something more than the required minimums. See supra notes 5–12 and accompanying text. In this later definition the term "professionalism" most closely resembles my "broadly ethical" project, and unless specifically noted, when this Article refers to regulator attempts to encourage "professionalism" it refers to the "broadly ethical" project.

Nevertheless, this may actually be paying the "professionalism" movement too much respect. There is a persuasive argument that professionalism is nothing more than the minimalist project plus a non-binding emphasis on civility. Cf. Thomas D. Morgan, Creating a Life as a Lawyer, 38 VAL. U. L. REV. 37, 45 (2003) (noting that some have attempted to define "professionalism" as "civility").
ethical from the Rules themselves further exacerbates this problem. Criminal law theorists have long argued that the criminal law is most effective when its proscriptions track the norms and morals of society.\textsuperscript{42} This is because legal proscriptions that fit commonly held morality are generally obeyed regardless of enforcement or the odds of being caught. The efficacy of more "administrative" criminal laws not easily recognizable as common morality relies much more on actual and perceived government enforcement. If these rules are enforced, they are followed; if not, people generally feel little moral compunction about violating them. This is why many people would not shoplift while a cashier turns her back, although the odds of being caught are not high, but many people violate the speed limit or jaywalk when they sense no police presence. By divorcing the Rules governing lawyers from the broadly moral in favor of a series of technical regulations, the drafters have decreased the odds that lawyers who do not fear reprisals will follow the rules.

The minimalist project, likewise, has choked off much of the broadly ethical effort. Professor Heidi Li Feldman, among others, has persuasively criticized the mode of "ethical deliberation" inspired by the current regulatory structure.\textsuperscript{43} The ABA's new, narrower Rules of Professional Conduct encourage, or even require, reductionist and simplistic thinking about complicated issues. When confronted by a thorny moral or ethical issue, lawyers are encouraged to consult the black letter Rules to determine what is allowed, what is mandated, and what is banned. The thought process begins and ends with consultation and application of the Rules. Broader questions of context, personal morality, or a greater duty to society at large can be (and are thus frequently) ignored.\textsuperscript{44}

Black letter rules trigger a particular mode of thinking—or heuristic—in lawyers: we are trained to read carefully and to analyze

\textsuperscript{42} See infra notes 137-42 and accompanying text.

\textsuperscript{43} See Heidi Li Feldman, \textit{Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?}, 69 S. CAL. L. REV. 885, 885–89 (1996) (stating that the current Rules inspire, and may require, a "technocratic" approach to ethical dilemmas); see also SIMON, supra note 9, at 9–25 (noting that current approaches to professional responsibility require a severely restricted and "categorical" approach to ethical judgment); Richard Delgado, \textit{Norms and Social Science: Towards a Critique of Normativity in Legal Thought}, 139 U. PA. L. REV. 933, 953 (1991) (arguing that professional responsibility rules "often function affirmatively to encourage a sort of minimal-ethicality, according to which actors are rewarded for being 'minimally ethical' as possible").

\textsuperscript{44} See Feldman, supra note 43, at 889–908 (using the example of the Lake Pleasant bodies case to demonstrate the shortcomings of a legalistic approach to a complex ethical issue); SIMON, supra note 9, at 138–69 (comparing the legalistic "dominant view" of legal ethics with "contextual judgment").
rules to find (as precisely as possible) the boundary between legal and illegal behavior.\textsuperscript{45} When lawyers apply this same boundary-seeking process to issues of ethics or professional responsibility, the search for the border between permitted and proscribed behavior frequently displaces any consideration of the more general ethical question: "is this the right thing to do?"\textsuperscript{46}

The question of enforcement also becomes critical in this boundary-seeking calculus. Lawyers are trained not only to determine the boundaries of the law but also to consider the worst-case scenario of violating any given law, \textit{i.e.} the odds of being caught and the likely punishment. Here the drafters' choice to emphasize the boundary-seeking heuristic is particularly devastating because the minimum Rules governing lawyers are, in fact, notoriously under-enforced.\textsuperscript{47}

Therefore, the decision of lawyer regulators to divide the single goal of providing ethical, moral, and practical advice to lawyers into the twin goals of the minimalist and broadly ethical projects has proven internally inconsistent and ultimately self-destructive.\textsuperscript{48} I offer

\textsuperscript{45} For a good working definition of the psychological concept of heuristics, consider the following: "The human brain is extremely efficient, but it is not a computer. The brain has a limited ability to process information but must manage a complex array of stimuli. In response to its natural constraints the brain uses shortcuts that allow it to perform well under most circumstances." Jeffrey J. Rachlinski, \textit{Heuristics or Biases in the Courts: Ignorance or Adaptation?}, 79 OR. L. REV. 61, 61–62 (2000); see also ANTHONY G. AMSTERDAM \& JEROME BRUNER, MINDING THE LAW 19–109 (2000) (discussing special legal heuristics of categorization).

\textsuperscript{46} This is not to say that all lawyers have or will abandon personal morality. Nevertheless, the current regulating scheme is at best neutral and at worst adverse to careful consideration of broader morality.

\textsuperscript{47} See Leslie C. Levin, \textit{The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions}, 48 AM. U. L. REV. 1, 8–17 (1998) (providing further disciplinary examples); Deborah L. Rhode, \textit{The Profession and the Public Interest}, 54 STAN. L. REV. 1501, 1512 (2002) (citing examples of lax lawyer discipline); Fred C. Zacharias, \textit{What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules}, 87 IOWA L. REV. 971 (2002) (describing underenforcement and its results in the area of lawyer advertising); ABA CENTER FOR PROF'L RESPONSIBILITY, STANDING COMM. ON PROF'L DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1998–99 1–8 (2001) (listing Chart I showing that out of a national total of 116,424 complaints received by lawyer disciplinary agencies in 1998 only 3,602 lawyers were formally charged, and Chart II showing that the great bulk of the sanctions imposed were either private or public sanctions, the lowest levels of discipline).

\textsuperscript{48} Admittedly, the history of twentieth century lawyer regulation establishes that these two goals have been in tension since courts first began to enforce the Canons. Lawyers complained about being held to broad standards, and the minimalist project, and the never-ending quest for more "guidance" (read more black letter rules), began. See infra notes 89–107 and accompanying text. Although the tension between the hortatory and the mandatory existed under the Canons, I argue that this tension has currently
a simple, but heretical solution: redraft the Canons with a single goal in mind—giving moral, ethical, and practical guidelines for the practice of law. This will reunite the broad and the narrow goals of legal ethics, will give some needed meaning and attention to the "broadly ethical" project, will fundamentally change the way lawyers approach their minimalist duties (because, like the reading of the Canons, the narrow will be read in light of the broad), and will make the minimums more explicitly ethical, moral, and naturally followed.

The Article proceeds in four parts. Part I presents a brief history of American legal ethics, and argues that legal ethics once had the single goal of providing ethical, moral, and practical advice to lawyers. It will also assert that since the Rules were instituted, that goal has been bisected into separate minimalist and broadly ethical goals. Part II asserts that this division actually undercuts both goals on multiple fronts. Part III examines a specific recent regulatory effort, the MPRE, and demonstrates how the twin goals undercut the efficacy of the exam. Part IV proposes both a narrow solution (explicitly recognize the two competing goals) and a broad solution (redrafting the Canons).

I. THE HISTORICAL DIVISION OF A SINGLE GOAL INTO TWO

The history of American legal ethics begins with the broad moralizations of two nineteenth-century law professors, and ends with the black letter Rules of Professional Conduct that govern the profession today. The origins of legal ethics are explicitly moral. First and foremost discussions of legal ethics were meant to offer non-binding moral, ethical, and practical guidance. As bar associations grew in power, and ethical codes were widely accepted, courts began to use the codes as the basis for attorney discipline. What was once solely hortatory began to have binding, legal effect. Over time, this brought increased attention to the ethics codes, and in reaction to growing enforceability, bar associations shifted from broad to narrow
degenerated into open conflict. The decision to focus upon enforceability and to jettison the broader ethical framework has resulted in the need for a free standing "professionalism" movement and a new and more deleterious clash within lawyer regulation.

and from ethical and moral to quasi-criminal. When lawyer regulators removed the moral underpinnings from their minimum rules it led inexorably to a bisection of the original goals into the separate minimalist and broadly ethical projects of today.

A. Stage One: The Rebirth of Bar Associations, the Origins of Legal Ethics, and the First Hortatory Codes

In the earliest days of American lawyers there was little consideration of "legal ethics" as a distinct entity. The ethical and moral obligations of lawyers derived largely from religious principles, and lawyer conduct was regulated through the natural peer pressure of a small, homogenous group or through the common law "summary jurisdiction" each court retained over the lawyers who practiced before them.

The early focus on legal ethics began in legal academia and was promulgated by bar associations. In the last third of the nineteenth century, organized bar associations rose to prominence as city bar associations and later as state and national associations. The bar


51. See HENRY WYNANS JESSUP, A STUDY OF LEGAL ETHICS xxiv (1925) (noting that prior to organized statements of ethics the traditions of the profession were perpetuated and the fundamental principles observed as a result of the "habit of the tribe"); Fannie Memory Farmer, Legal Practice and Ethics in North Carolina 1820-1860, in THE LEGAL PROFESSION, MAJOR HISTORICAL INTERPRETATIONS 274, 294-99 (Kermitt L. Hall ed., 1987) (describing the lack of any formal code of ethics for North Carolina attorneys between 1820-60, and the informal pressures to conform to certain values of the legal profession); Bruce Frohnen, The Bases of Professional Responsibility: Pluralism and Community in Early America, 63 GEO. WASH. L. REV. 931, 931-38 (1995) (arguing that early American lawyers learned professional responsibility from other lawyers, as well as the society at large); William R. Johnson, Education and Professional Life Styles: Law and Medicine in the Nineteenth Century, 14 HIST. OF EDUC. Q. 185, 187-92 (noting that in Wisconsin in the nineteenth century "[g]roup standards were defined and enforced in an immediate and personal manner").


associations had a reform-minded agenda, focusing specifically on the punishment of the "activities of a notorious fringe of unlicensed practitioners," as well as requiring higher qualifications for admission to practice.

As an aspect of the effort to "professionalize" the legal profession, nascent bar associations turned their attention to "codes of ethics," beginning with Alabama in 1887. The Alabama Code was based primarily on the written work of two law professors: David Hoffman and George Sharswood. Both Hoffman's and

55. See Pound, supra note 53, at 259-69; Friedman, supra note 53, at 563.

56. Among the national bar associations was the ABA, founded in 1878 by seventy-five gentlemen from twenty-one jurisdictions, out of approximately 60,000 lawyers then practicing in the United States. Alfred Zantzinger Reed, Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada 208 (1921); see also John A. Matzko, "The Best Men of the Bar": The Founding of the American Bar Association, in The New High Priests: Lawyers in Post-Civil War America 75-90 (Gerald W. Gawalt ed., 1984) [hereinafter High Priests] (providing an overarching history of the founding of the ABA). In general the members of these new bar associations were drawn by invitation from the "elite" of practice. See Friedman, supra note 53, at 563; Pound, supra note 53, at 255-70.

57. Friedman, supra note 53, at 562-63; see also Marvelle C. Webber, Origin and Uses of Bar Associations, 7 A.B.A. J. 297, 298 (1921).

58. See W. Hamilton Bryson & E. Lee Shepard, The Virginia Bar, 1870-1900, in High Priests, supra note 56, at 171.


60. See Code of Ethics, Alabama State Bar Association (1887), reprinted in Drinker, supra note 53, at 352-63 [hereinafter Alabama Code]. See generally Marston, supra note 59 (providing a general overview of the history and content of the 1887 code of ethics of the Alabama State Bar Association). Between 1887 and 1906 the Alabama Code was adopted, with minor changes, by bar associations in Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky, and Missouri. See 31 A.B.A. Rep. 685-713 (1907) (compiling the codes of ethics adopted by the bar associations in Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, Wisconsin, and West Virginia).

61. David Hoffman was a professor of law at University of Maryland for over twenty years until 1836. See Maxwell Bloomfield, David Hoffman and the Shaping of a Republican Legal Culture, 38 Md. L. Rev. 673, 678-83 (1979); Stephen E. Kalish, David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate, 61 Neb. L. Rev. 54, 59 (1982). In 1836 Hoffman published the second edition of his Course on Legal Study, which contained a treatment of a subject that Hoffman termed "almost wholly new," the study of a lawyer's professional deportment. See 2 David Hoffman, A Course of Legal Study 723 (Morton J. Horwitz et. al., eds., Arno Press 1972) (2d ed. 1836). As an aspect of this new study, Hoffman included his fifty "Resolutions in Regard to Professional Deportment," id. at 752-75, which has been widely recognized as the first American attempt to boil the issues of professional deportment or ethics down into a single statement. See Thomas L. Shaffer, American Legal Ethics: Text,
Sharswood's writings on legal ethics were explicitly based upon religious faith, but branched out to include both general and specific advice on the ethical, moral, and practical meaning of practicing law.

62. George Sharswood was elected Professor of Law at the University of Pennsylvania in 1850, and served as Professor and Dean until 1868. See GEORGE SHARSWOOD, LECTURES INTRODUCTORY TO THE STUDY OF LAW v (T & J.W. Johnson & Co. 1870). In addition Sharswood served on the Supreme Court of Pennsylvania as both a Justice and the Chief Justice. See Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241, 249 (1992). In 1854, Sharswood delivered a series of lectures to his law class at Pennsylvania concerning legal ethics; these lectures were later published as an essay on legal ethics. See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 7-8 (5th ed., T & J.W. Johnson & Co. 1884) [hereinafter SHARSWOOD, PROFESSIONAL ETHICS]. Sharswood's essay proved quite influential, and laid the basis for further codification of legal ethics. See LUBAN, supra note 38, at xxviii (naming Sharswood the key predecessor to modern legal ethics); Walter P. Armstrong, Jr., A Century of Legal Ethics, 64 A.B.A. J. 1063, 1063-64 (1978) (same); Pearce, supra, at 243-47 (stating that Sharswood's essay formed the basis for the Alabama Code of legal ethics, and eventually, the ABA's Canons). This is, of course, a dubious achievement in the eyes of some. See JEROLD S. AUERBACH, UNEQUAL JUSTICE 41-42 (1976).

63. For example, Hoffman's reading list for the subject of professional deportment includes the Proverbs of Solomon, and the Books of Ecclesiastes, Ecclesiasticus, and Wisdom. See HOFFMAN, supra note 61, at 724; see also SHARSWOOD, PROFESSIONAL ETHICS, supra note 62, at 55, 181-82 (“There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law.”); Susan D. Carle, Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons, 24 LAW & SOC. INQUIRY 1, 10-13 (1999) (referring to Hoffman and Sharswood's legal ethics approach as "religious jurisprudence") (footnote omitted). Given the religious mores of the times and social status of Sharswood and Hoffman it is likely that both were heading off the criticism that any treatment of legal ethics beyond the moral and ethical responsibilities required by their religious faith was either superfluous, or worse heretical.

64. Hoffman's resolutions are somewhat eclectic, dealing with both specific details of etiquette, see HOFFMAN, supra note 61, at 752, 767 (stating in Resolution III, “[t]o all judges, when in court, I will ever be respectful . . . .”); in Resolution V, “[i]n all intercourse with my professional brethren, I will be always courteous.”; in Resolution XXXVI, “[e]very letter or note that is addressed to me, shall receive a suitable response, and in proper time.”) and business, see id. at 762-63 (stating in Resolution XXV, “I will retain no client's funds beyond the period in which I can with safety and ease, put him in possession of them;” in Resolution XXVI, “I will on no occasion blend with my own, my client's money: if kept distinctly as his, it will be less liable to be considered as my own;” and dealing with the treatment of retainers in Resolution XXIX), as well as broad exhortations concerning the nature of law and morality. See id. at 765-66 (stating in Resolution XXXIII, “[w]hat is wrong is not the less so from being common. And though few dare to be singular, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide;” Resolution XXXIV, “Law is a deep science: its boundaries, like space, seem to recede as we advance: and though there be as much certainty in it, as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed”).

Likewise, Sharswood's essay verges from specifics of practice, see, e.g.,
The Alabama Code similarly ran the gamut from the broadly moral to the narrowly practical. Although the Alabama code included an exhortation to expose "Corrupt Attorneys" before "the proper tribunals," the Codes themselves were non-enforceable. Like the academic work of George Sharswood and David Hoffman, these early codes were meant to guide lawyers, not bind them into specific behavior.

Thus, when the ABA first turned its attention to drafting the Canons in 1905, there was already a substantial body of academic writing and state rules to draw from. The impetus for the Canons

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SHARSWOOD, PROFESSIONAL ETHICS, supra note 62, at 124 ("The importance of a good handwriting cannot be overrated. A plain legible hand every man can write who chooses to take the pains. A good handwriting is a passport to the favor of clients, and to the good graces of judges, when papers come to be submitted to them."). to generalities of lawyerly virtue. See, e.g., id. at 55 ("High moral principle is [the lawyer's] only safe guide; the only torch to light his way amidst darkness and obstruction."). Sharswood's discussion of an attorney's duties to his client is the lengthiest in the essay, and also the most controversial among current commentators, who have claimed that Sharswood both supports and undermines a vision of the lawyer's role as dependent upon the "adversary ethic." Compare Bloomfield, supra note 61, at 687 (arguing that "[w]here Hoffman referred all problems to the practitioner's conscience—that mirror of universal morality—Sharswood opted for the external guidelines provided by the legal process itself.") and Marston, supra note 59, at 495–96 (arguing that Sharswood encouraged lawyers to represent clients "with the utmost zeal") with L. Ray Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 EMORY L.J. 909, 912–15 (1980) (arguing that Sharswood favored duty to the courts and public above duty to clients) and Hoeftlich, supra note 61, at 803–07 (arguing that Sharswood favored a "middle road" between duty to clients and duty to the system as a whole).

Both Hoffman and Sharswood have been identified as leaders in the "law as science" movement in legal education of the mid-nineteenth century. See Howard Schweber, The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education, 17 LAW & HIST. REV. 421, 438–39, 450–51 (1999). The influence of the law and science, and codification movements likely led both Hoffman and Sharswood to attempt to inscribe the previously informal norms of legal ethics.

65. The Code included broad rules such as "No Set Rule for Every Case" and "Must Not Be a Party to Oppression," ALABAMA CODE, supra note 60, at 353, 356, and specific practical advice, such as "Reputation of a 'Rough Tongue' Not Desirable" and "Promptness and Punctuality." See id. at 358–59.

66. See Marston, supra note 59, at 501 ("Despite its legal unenforceability, Jones authored the Code of Ethics for the benefit of practicing lawyers . . ."). During this period the bar associations were small and selective, see FRIEDMAN, supra note 53, at 563, and thus their pronouncements on ethics had little or no effect on practicing attorneys outside of the bar associations (of which there were many) or on disbarment proceedings. See WEEKS, supra note 52, at 144–223 (featuring an exhaustive listing of standards and cases of disbarment up to 1898 without mentioning any State codes of ethics). See generally, 1 EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW (1914) (published in 1914, and featuring an exhaustive listing of standards and cases of disbarment, without mentioning any of the State codes of ethics).

67. At the 1905 meeting the Association adopted a resolution forming a committee to
will sound familiar: a concern over the commercialization of the profession and its low public esteem.\textsuperscript{68} The original call for the Canons was explicitly religious and moral.\textsuperscript{69} The ABA adopted the Canons in 1908,\textsuperscript{70} and like their progenitors, the Canons included both the broadly moral\textsuperscript{71} and the practical,\textsuperscript{72} and were explicitly hortatory in nature.\textsuperscript{73}

\textbf{B. Stage Two: The Transition from Hortatory to Enforceable}

The Canons were extremely successful; by 1914 the Canons had been adopted by thirty-one of the forty-five state bar associations.\textsuperscript{74}

report “upon the advisability and practicability of the adoption of a code of professional ethics . . . .” \textsuperscript{68} See 28 A.B.A. REP. 131-32 (1905). The original committee consisted of four members of the ABA and no lay-people. \textsuperscript{70} See 29 A.B.A. REP. 604 (1906). The eventual committee that drafted the Canons consisted of fourteen male, Anglo-Saxon, Protestant lawyers. \textsuperscript{72} See Carle, \textit{supra} note 63, at 16 & Appendix A.


\textsuperscript{69} See Altman, \textit{supra} note 68, at 2407 (noting that ABA president Henry St. George Tucker called for the drafting of a code of legal ethics “in an explicitly religious context”).

\textsuperscript{70} See 33 A.B.A. REP. 55-86 (1908).

\textsuperscript{71} For example, Canon 16 deals with “Restraining Clients from Improprieties,” Canon 18 requires respectful “Treatment of Witnesses and Litigants,” Canon 22 requires “Candor and Fairness,” and Canon 32 broadly states “The Lawyer's Duty in Its Last Analysis.” \textsuperscript{72} See 33 A.B.A. REP. 579-81, 584 (1908).

\textsuperscript{72} The practical prohibitions were among the more controversial and actually foreshadow the ABA's future definitional struggles for minimum rules. The only Canon that caused any debate concerned contingent fees, which were allowed, but only under the supervision of court. \textsuperscript{71} See Altman, \textit{supra} note 68, at 2482-84. Certain members argued that contingent fees should be barred altogether. \textit{Id.} In the end, the Canon passed with compromise language. \textit{Id.} The compromise stated, “[c]ontingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.” 33 A.B.A. REP. 578, 579 (1908) (emphasis omitted). In a similar vein, the Canons barred lawyers purchasing “any interest in the subject matter of the litigation which he is conducting” or “stirring up litigation.” \textit{See id.} at 578, 583. The Canons also explicitly barred lawyer advertising, \textit{see id.} at 582, despite the fact that the Alabama Code and other progenitors explicitly allowed it. \textit{See, e.g., ALABAMA CODE, supra} note 60, at 356 (allowing newspaper advertisements, circulars, and business cards to be used to promote lawyers); Altman, \textit{supra} note 68, at 2484-91 (discussing the Canons, which prohibited a variety of types of advertising by lawyers).

\textsuperscript{73} \textit{See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS} 55-56 (1986) (“The Canons were probably not intended to have any direct legal effect . . . .”); Geoffrey C. Hazard, Jr., \textit{The Future of Legal Ethics}, 100 YALE L.J. 1239, 1250 (1991) (stating that the Canons had no “direct legal effect”). Nevertheless, the drafters hoped to have a concrete effect upon the standards for lawyer disciplinary proceedings. \textit{See} 29 A.B.A. REP. 602-03 (1906) (stating a hope that lawyers entering the bar would have to swear an oath to follow the canons, thus making the canons enforceable); Altman, \textit{supra} note 68, at 2499.

\textsuperscript{74} \textit{See} 39 ABA REP. 560-61 (1914). The reaction of the press was favorable, \textit{see AUERBACH, supra} note 62, at 50-51, as were the reactions of various eminent lawyers.
It is impossible to pinpoint exactly when the Canons first became the basis for disciplinary action in America. The Canons were cited almost immediately by scattered courts around the country, but were persuasive rather than controlling authority. By the 1920s, the line was beginning to blur. Courts still noted that the Canons were not "binding obligation," but held that "an attorney may be disciplined by [a] court for not observing" the Canons.76

This trend accelerated under the bar "integration" movement; in

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See, e.g., David J. Brewer, The Ideal Lawyer, 98 ATLANTIC MONTHLY 587, 595–96 (1906) (praising the canons in advance of their official adoption). A 1909 casebook relies almost solely upon the Canons to supply its chapter on legal ethics, see WILLIAM LAWRENCE CLARK, ELEMENTARY LAW 333–43 (1909), and a 1917 Legal Ethics Casebook includes the Canons, as well as Hoffman's fifty resolutions as appendices. See GEORGE P. COSTIGAN JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 555–82 (1917). Costigan was involved in the drafting of the Canons, see Carle, supra note 63, at 21, and was an early supporter. George P. Costigan, Jr., The Proposed American Code of Legal Ethics, 20 THE GREEN BAG 57, 58–59 (1908).

75. For example, in a 1909 Illinois case, Wiersema v. Lockwood & Strickland Co., the court first cited a number of cases for the specific point of law, and then quoted both "the able and eminent Edward G. Ryan" and the ABA's Canons to establish a general point concerning over-zealous advocacy. Wiersma v. Lockwood & Strickland Co., 147 Ill. App. 33, 37–41 (1909); see also In re Egan, 123 N.W. 478, 487 (S.D. 1909) (quoting a local "eminent" lawyer and the ABA's canons for the same general proposition); State v. Kaufmann, 118 N.W. 337, 338–39 (S.D. 1908) (citing to a number of cases, and also quoting the Canons as "the best thought of the profession"). In these early days courts seemed clear that while the Canons were useful as a general statement of ethical standards, "legislation may perhaps be necessary to carry [them] fully into effect." Ransom v. Ransom, 127 N.Y.S. 1027, 1033 (N.Y. Sup. Ct. 1910) rev'd on other grounds, 133 N.Y.S. 178 (N.Y. App. Div. 1911).

76. Hunter v. Troup, 146 N.E. 321, 324 (Ill. 1924); see also In re Cohen, 159 N.E. 495, 496–97 (Mass. 1928) (stating that "[c]odes of legal ethics adopted by bar associations of course have no statutory force" but also quoting with approval a case stating that the canon against advertising "thus incorporates in the code of ethics an ideal standard of conduct which has been long and well recognized and . . . [the attorney who disregards the rule is properly subject to rebuke if not to disbarment"] (citation omitted); People v. Bereznik, 127 N.E. 36, 39–40 (Ill. 1920) (stating that Canon 27 "does not have the binding force of a statute in this state . . . but it does set forth very fully the class of advertisements and solicitations of business that is objectionable, unethical, and unprofessional, and is most commendable in all other respects," and applying the Canon's standard as if it were binding law); In re Schwarz, 161 N.Y.S. 1079, 1080 (N.Y. App. Div. 1916) (stating that the attorney at issue "has transgressed Canon 27 of the Code of Ethics of the American Bar Association . . ." and applying the Canon as if it were law). But see In re Clifton, 196 P. 670, 670–72 (Idaho 1921) (stating that "it would be going too far to hold that one may be disbarred solely because he has failed to live up to the ideals which the canons of ethics of a bar association set for its members as attorneys and citizens"). Courts particularly focused on the Canons in the commercial areas of advertising, solicitation and contingency fees. See, e.g., Bereznik, 127 N.E. at 38 (same); In re Schwarz, 161 N.Y.S. at 1080 (advertising); Ellis v. Frawley, 161 N.W. 364, 366 (Wisc. 1917) (contingency fees); Ransom v. Ransom, 127 N.Y.S. 1027, 1033 (N.Y. Sup. Ct. 1910) (same) rev'd on other grounds, 133 N.Y.S. 173 (N.Y. App. Div. 1911).
the 1920s and 1930s bar association membership became a mandatory prerequisite to the practice of law in many states. The integration movement naturally led to a greater importance for the Canons because a lawyer who violated a Canon might be removed from the bar association, and thus disbarred from the practice of law.

The ABA and other bar associations reacted to the increasing enforceability of the Canons in two now familiar ways. First, the ABA pursued extensive redrafting and retooling of the Canons in pursuit of "additional guidance" to lawyers in 1928, 1933, and 1954. The drafters of the Canons specifically expected that lawyers "failing to conform thereto should not be permitted to practice or retain membership in professional organizations, local or national, formed, as is the American Bar Association, to promote the administration of justice and uphold the honor of the profession." See 29 A.B.A. REP. 602 (1906). The 1920s and 1930s also saw the ABA and state bar associations working together to standardize enforcement and interpretation of ethical rules throughout the country. See RUTHERFORD, supra note 77, at 89-92. As of 1924 there was a feeling that "the easy days" for the alleged scofflaws were over: "The Bar is now awake. It has found and will find more ways of making its ideals real—its canons of ethics actual governing rules of conduct." See JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 156 (1924). As to whether many lawyers were actually disbarred, consider the general history of the American bar's long, and unimpressive, tradition of lawyer discipline. See ABEL, supra note 26, at 143-50.

80. See 58 A.B.A. REP. 153 (1933) (stating that thirteen additional canons were adopted in 1928 as a "specific guide" to situations unforeseen in the drafting of the original canons).

81. See 53 A.B.A. REP. 130-31 (1928) (noting the ABA approval of thirteen new Canons in addition to the original thirty-two, as well as substantial editing of Canon 28 on stimulating business). The new Canons again sought to squelch various entrepreneurial practices including the division of fees with another lawyer, employment by an intermediary (which essentially banned group representation through unions by allowing a lawyer to represent a group, but not allowing that lawyer to render advice to individual members), the acceptance of compensation or commission from non-clients, and paying
The tone of these debates and the care taken in drafting the new and revised Canons displays the ABA’s recognition of its role in drafting a *binding* ethics code.84

Second, bar associations began to establish ethics committees to advise inquirers respecting interpretations of the Canons, starting with the ethics committee of the New York County Lawyers' Association ("NYCLA") in 1912 and the ABA’s committee in 1913.85 From the outset the work of these ethics committees was meant to bring clarity and specificity to the ethical duties of lawyers under the

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82. In 1933 the ABA altered five Canons, and adopted an additional Canon, which allowed a lawyer to publish a "brief, dignified notice" of the fact of his representation to other lawyers. See 58 A.B.A. REP. 155–78, 428–36 (1933).

83. In 1937 there were additional changes to ten of the forty-six canons, and a new Canon 47 was adopted, which explicitly barred any possible involvement with, or aid to, the unauthorized practice of law. See 62 A.B.A. REP. 350–52, 761–67 (1937).

84. The tone of the ABA proceedings over the 1933 alterations was substantially different from the tone of the original adoption of the Canons in 1908, or even the addition of new Canons five years earlier in 1928, and clearly reflects the strain placed upon the ABA in managing the drafting of a *binding* code of legal ethics. In 1908 the only substantial controversy regarded contingent fees, and thirty-two other canons were adopted with little or no discussion. See 33 A.B.A. REP. 55–86 (1908). In 1928 there was controversy concerning lawyer bonding and the division of fees by lawyers, but otherwise there was no "unfavorable comment [or] criticism of any of the other Canons," 53 A.B.A. REP. 120 (1928). By 1933 the recommendations were "not free from controversy," there was "no general agreement in the profession as to some" of the changes, and "[t]he difference of opinion has extended to the committee meeting this week." 58 A.B.A. REP. 154 (1933). The suggestions received, and the discussion of each change, focused much more carefully on the specific wording of each change, reflecting a recognition that these rules would be binding, and therefore seeking to clarify their meaning as much as possible. See id. at 155–80, 430–37.

From 1937 until the adoption of the Code, the Canons remained essentially unchanged, with one notable exception. Canon 27, which dealt with advertising and solicitation, was amended in 1937, 1940, 1942, 1943, 1951, and 1963. See DRINKER, supra note 53, at 25–26; Armstrong, supra note 62, at 1066. Canon 43 was amended in 1942 and Canon 46 was amended in 1956. Otherwise, the Canons remained the same from 1938 until the adoption of the Code in 1969. See DRINKER, supra note 53, at 25–26; Armstrong, supra note 62 at 1066.

85. See 36 A.B.A. REP. 147 & n. 10 (1913) (announcing creation of ABA Committee to gather ethics information); Charles A. Boston, Practical Activities in Legal Ethics, 62 U. PA. L. REV. 103, 111 (1913) (discussing NYCLA Committee); Ted Finman & Theodore Schneyer, The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility, 29 UCLA L. REV. 67, 69 n.4 (1981) (same). It was not until 1922 that the ABA committee's responsibilities changed from information gathering to more direct interpretation of the Canons. The committee was empowered for the first time to hear and act upon ethical complaints concerning ABA members, 47 A.B.A. REP. 49–51 (1922), and "to express its opinion concerning proper professional conduct, and, particularly concerning the application of the tenets of ethics thereto" when requested by state or local bar associations. See id. at 49–51.
Canons. Though the opinions of the NYCLA and ABA committees were advisory and unofficial, they certainly had a strong influence.

C. Stage Three: The Code Separates the Broadly Ethical from the Minimalist

Despite these efforts to clarify and distill the requirements under the Canons, there were repeated cries that the Canons were too general. Starting in the 1950s the ABA appointed three separate

86. The NYCLA committee was meant to be an “educational force, in illustrating the practical application of the principles and sound traditions of legal ethics.” See Boston, supra note 85, at 113-14. Interestingly, the NYCLA apparently also had a “Discipline Committee,” which handled complaints against lawyers and discipline, that lacked the “resources for vigorous prosecution,” id. at 108, but attempted to compensate through the “ethical education of the Bar” through the committee’s handling of ethical questions. Id. This early allocation of resources well illustrates the bar’s long tradition of substituting education for enforcement.


88. See NYCLA OPINIONS, supra note 87; Finman & Schneyer, supra note 85, at 83-88. Each of the questions and answers was published for review, albeit with the caveat that “the questions are submitted ex parte, and the replies are predicated only upon the facts stated.” See Boston, supra note 85, at 117. Furthermore, the ABA ethics committee had responsibility both for answering questions and discipline of ABA members for a lengthy time, see 48 A.B.A. REP. 49-51 (1922); 58 A.B.A. REP. 404-05 (1933) (describing the ABA ethics committee’s dual roles in answering requests for advice from bar associations as well as individuals and member discipline), so any positions taken by the committee in its advisory opinions would be followed in disciplinary proceedings.

These opinions are unusual in two respects: they were offered before the conduct had occurred, or at least before the issues had been adjudicated (advisory) and were ex parte (non-adversarial). The fact that the bar association took, and takes, the effort to produce these opinions, despite the American tradition against advisory opinions, see, e.g., PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-72 (3d. ed.1988) (discussing the Constitutional history of the advisory opinion issue); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 47-53 (1994) (discussing tradition of advisory opinions in the federal courts); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 630-47 (1994) or non-adversarial proceedings, see, e.g., MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 3-4 (1975) (discussing the importance of the adversarial process); Finman & Schneyer, supra note 85, at 159-67 (criticizing the non-adversarial nature of the ABA committee’s work); Monroe H. Freedman, Are the Model Rules Unconstitutional?, 35 U. MIAMI L. REV. 685, 688-89 (1981), establishes the lengths that bar associations are willing to travel to clarify and simplify the regulatory duties of lawyers.

89. See 60 A.B.A. REP. 94-95 (1935) (arguing that the Canons offer little concrete guidance, and suggesting “a Code of Practice which will deal not with general principles but with the specific abuses involved”); BLAUSTEIN & PORTER, supra note 77, at 246-51 (noting that numerous Canons were not being followed, and suggesting specific alterations); Symposium, A Re-Evaluation of the Canons of Professional Ethics, 33 TENN. L. REV. 129 (1966); John F. Sutton, Jr., Guidelines to Professional Responsibility, 39 TEX.
committees aimed at reform. In the 1960s the ABA began preparing a code based upon an entirely new structure. The Code of Professional Responsibility, adopted by the ABA in 1969, is divided into three portions. The Canons and Ethical Considerations provide “fundamental ethical principles” for “the aspiring.” By contrast, the

L. Rev. 391, 422-23 (1961) (arguing that the Canons are insufficiently specific to set a reasonable minimum standard); Edward L. Wright, The Code of Professional Responsibility: Its History and Objectives, 24 Ark. L. Rev. 1, 4 (1970) (quoting a 1958 American Bar Foundation report stating that the Canons do not present “sufficient detail” in dealing with “specific situations encountered in actual practice”); Professional Ethics: Charity & Perjury, Time, May 13, 1966, at 81 (quoting Professor Anthony Amsterdam as describing the Canons as “vaporous platitudes . . . which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room”); cf. E. Wayne Thode, The Ethical Standard for the Advocate, 39 Tex. L. Rev. 575 (1961) (arguing that the Canons were not tailored to meet the needs of courtroom advocates and shouldn't be supplanted by non-authoritative standards).

There were also calls to broaden the Canons. In 1925 Henry Jessup criticized the Canons as insufficiently “generic.” See Henry Wynans Jessup, The Professional Ideals of the Lawyer: A Study of Legal Ethics xxx (1925) (“An astute petitifogger, and their name is Legion, may say, and many have said, Canon XY does not prohibit what I did—it specifies just what it prohibits—and he pleads ‘Expressio unius est exclusio alterius.’”). Similarly, Justice Harlan Stone argued for a new conception of legal ethics, “beyond the petty details of form and manners which have been so largely the subject of our codes of ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of our society as a whole.” Harlan F. Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1, 10 (1934) (“[W]e must give more thoughtful consideration to squaring our own ethical conceptions with the traditional ethics and ideals of the community at large.”). The ABA retorted that “while it might be more desirable to have the Canons consist of a statement of fundamental principles . . . rather than definite rules,” it would be inadvisable to change the Canons. See 49 A.B.A. Rep. 467 (1924); 58 A.B.A. Rep. 437 (1933) (stating that a “more comprehensible but concise” statement of “general principles” could be formulated, but rejecting an attempt to state “a philosophic basis of general principles” in lieu or in addition to the Canons).

During the 1950s the ABA formed the Special Committee on Canons of Ethics, see Philbrick McCoy, The Canons of Ethics: A Reappraisal by the Organized Bar, 43 A.B.A. J. 38, 38 (1957), and the “Joint Conference on Professional Responsibility,” which was aimed at formulating “an understanding of the nature of the lawyer's professional responsibilities.” See Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1159 (1958). In 1964 the ABA created a Special Committee on Evaluation of Ethical Standards, see American Bar Association Special Committee on Evaluation of Ethical Standards, Code of Professional Responsibility: Final Draft v (1969) [hereinafter Code]; John F. Sutton, Jr., Re-Evaluation of Professional Ethics: A Revisor’s Viewpoint, 33 Tenn. L. Rev. 132, 132 (1966), which was “directed to investigate the existing Canons of Professional Ethics and to recommend any changes therein which may be indicated.” 90 A.B.A. Rep. 221 (1965).


Code, supra note 90, at 1. The Canons are “axiomatic norms, expressing in general terms the standards of professional conduct,” while the Ethical Considerations are
Disciplinary Rules are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

The Code thus recognized and reacted to a process that began when the Canons began to serve as binding law. Throughout the twentieth century, bar associations sought to clarify and distill the minimum standards of lawyer conduct from the broader pronouncements within the Canons. The Code very consciously makes this distillation patent: the moral and ethical were physically placed in a separate category from the minimum rules. This change aimed to let the broader ethical considerations "serve their proper functions"—cease to serve as controlling law and to avoid "the misuse by disciplinary authorities of such generalities." Thus, the Code is the ABA's first explicit division between "professionalism" and minimum Rules: the Disciplinary Rules govern lawyer conduct, and the Canons and the Ethical Considerations are relegated to food for

"aspirational in character and represent the objectives toward which every member of the profession should strive." Id. at 2; see also John F. Sutton, Jr., The American Bar Association Code of Professional Responsibility: An Introduction, 48 TEX. L. REV. 255, 258 (1970) (describing Code's structure). Professor Sutton served as the reporter for the Committee on Evaluation of Ethical Standards. See 90 A.B.A. REP., supra note 90, at 221.

93. See CODE, supra note 90; Samuel J. Levine, Taking Ethics Codes Seriously, 77 TUL. L. REV. 527, 531 (2003) (describing the workings of the Code). Despite the change in form, the Code did not attempt to change or expand the minimum standards of professional conduct under the Canons, instead the Code sought to restate and clarify the governing law as represented by the Canons and the ABA Committee on Professional Ethics. See Bernard G. Segal, President's Page, 55 A.B.A. J. 893, 893 (1969); Sutton, supra note 92, at 264. In 1969 ABA president Bernard Segal formed a committee to "stimulate adoption and implementation of the code." See Segal, supra, at 893. The committee was extraordinarily successful, and by 1972 all but three states had either adopted, or were adopting, the Code. See H. Geoffrey Moulton, Jr. Federalism and Choice of Law in the Regulation of Legal Ethics, 82 MINN. L. REV. 73, 87-88 & n.52 (1997).

94. The guiding concept behind the new structure was that the "ethical climate of the legal profession is maintained by two forces . . . a lawyer's conscience [and] the application of, or threat of application of, legal sanctions." John F. Sutton, Jr., Re-Evaluation of Professional Ethics: A Reviser's Viewpoint, 33 TENN. L. REV. 132, 134 (1966); cf. Fuller & Randall, supra note 90, at 1159-60 (arguing that a "true sense" of professional responsibility comes from a broad understanding of the reasons that lie back of specific restraints" and that lawyers have a "special need of a clear understanding of [their] obligations"). Thus, a code of legal ethics should address both of those restraints, by providing "statements of guiding principles . . . to appeal to the lawyer's intelligence," and also providing "minimum standards made obligatory on all lawyers." Sutton, supra note 92, at 134-35. See also, Wright, supra note 89, at 10-11. The drafters of the Code recognized that the Canons attempted to reach both of these goals, but argued that the Canons were "an accidental combination of the two" and failed as aspirational statements because of gross "overstatement" and were too confusing to work as clear minimum standards. See Sutton, supra note 92, at 136-37; Wright, supra note 89, at 10-11.

95. See Sutton, supra note 92, at 264.
thought.

D. Stage Four: The Rules and the Triumph of Minimalism

Despite the high hopes of the Code's drafters for clarity and cohesion, the Code fell under attack almost immediately,\(^6\) and the ABA revised the Code four times between 1969 and 1977.\(^7\) By 1977 the ABA had decided that a more "comprehensive rethinking" of the Code was necessary, and the ABA President appointed the "Commission on Evaluation of Professional Standards."\(^8\) From the outset the drafters of the Rules expressed disdain for the tri-partite format of the Code\(^9\) and aimed for the "familiar" Restatement format.

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\(^6\) See, Auerbach, supra note 62, at 286–88; Geoffrey C. Hazard, Jr., Ethics in the Practice of Law (1978); Jethro K. Lieberman, Crisis at the Bar 64–67 (1978); Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977) (arguing that a reform in the Code was needed to shift emphasis from regulating attorneys to protecting clients); L. Ray Patterson, Wanted: A New Code of Professional Responsibility, 63 A.B.A. J. 639 (1977) (recognizing that the Code looked more like laws than ethical guidelines); John F. Sutton, How Vulnerable is the Code of Professional Responsibility, 57 N.C. L. Rev. 497 (1979) (contending that the Code's overemphasis on the principle of loyalty to the client lacks mitigating rules, such as a lawyer's duty of candor to the court or fairness to his opponent); Symposium, The American Bar Association Code of Professional Responsibility, 48 TEx. L. Rev. 255 (1970) (including articles criticizing Canons One and Two and the Code's treatment of lawyer specialization and group legal services arrangements); Charles Frankel, Book Review, 43 U. Chi. L. Rev. 874 (1976) (reviewing American Bar Association, Code of Professional Responsibility (1970)).

\(^7\) Morgan, supra note 96, at 703 & n.10.


of "black letter Rules accompanied by explanatory Comments." The Rules thus took "the next logical step:" the Canons intermingled both broad ethical language and specific rules, the Code separated the ethical from the purely legal, and the Rules jettisoned the broadly moral or ethical in favor of black letter minimums of lawyer conduct. Unsurprisingly, the Rules proved at least as controversial as the Code. Calls of a crisis in professionalism and


101. See Kutak, The New Model Rules, supra note 99, at 47.

102. There has been general scholarly agreement that the Rules represent the end of a journey from broader ethical norms to narrower, more legalistic rules. See GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 18–19 (1978); WOLFRAM, supra note 73, at 69–70 (1986) (arguing that the transition from the Canons to the Code to the Rules has marked a separation of ethics from the rules regulating lawyers); Mary C. Daly, The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers, 32 VAND. J. TRANSNAT'L L. 1117 (1999) (arguing that the transition from the Canons to the Code to the Rules has marked a transition from standards to rules); Hazard, Future of Ethics, supra note 73, at 1249–52. The Rules' elimination of the Code's ethical norms, and their increasingly legalistic approach, was not free from controversy at the time of drafting. See RULES LEGISLATIVE HISTORY, supra note 100, at 354 (listing the arguments of opponents of the Restatement format); Alexander Unkovic, The Current Format of the Code of Professional Responsibility Should Be Amended, Not Abandoned to Accommodate the Need for Change, 26 VILL. L. REV. 1191 (1981) (chiding those who are quick to criticize the Code), and has continued to be criticized. See, e.g., Tanina Rostain, Ethics Lost: Limitations of Current Approaches to Lawyer Regulation, 71 S. CAL. L. REV. 1273, 1279–1303 (1998) (arguing that the Code and the Rules show the emergence of a "regulatory approach" to legal ethics and criticizing this approach); Maura Strassberg, Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics, 80 IOWA L. REV. 901, 905–10 (1995) (arguing that the alterations in lawyer self-regulation reflects the emergence of a "positivist approach" to legal ethics and criticizing this approach).

103. As noted above, by 1972 all but three States had either adopted, or were adopting, the Code. Eventually, forty-nine states adopted the Code with few or no changes. See Duncan T. O'Brien, Multistate Practice and Conflicting Ethical Obligations, 16 SETON
the beginnings of various reform efforts began almost immediately. The contentious debates over the Code, the Rules, and the subsequent reform efforts of Ethics 2000 clearly demonstrate the challenges of proposing minimum standards of behavior to a self-regulated profession. The Bar's ever-increasing attention to the ease of compliance is based partially in the somewhat palatable goals of clarity and predictability, but it is also certainly motivated by self-interest. The clashes over these minimum Rules and the concurrent arrival of the latest series of professionalism crises are not unrelated events. To the contrary, they are the natural culmination of almost a century's effort to free the legal profession of any broader ethical requirements or even any duty to perform ethical deliberations.

HALL L. REV. 678, 679 (1986); Fred C. Zacharias, Federalizing Legal Ethics, 73 TEX. L. REV. 335, 339 (1994). By contrast, only two states had adopted the Rules by 1984. See WOLFRAM, supra note 73, at 63 & n.87; see also BLUEPRINT, supra note 4, at 258 ("The proposed Model Rules proved to be more controversial than the model code had been."). The Rules have now been adopted, with varying levels of alteration, in forty-four states. See Center for Professional Responsibility, Dates of Adoption of the Model Rules of Professional Conduct, at http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Mar. 15, 2004) (on file with the North Carolina Law Review). Rule 1.6, which controls lawyer confidentiality, has been the most modified provision. See Moulton, supra note 93, at 91–92. For an overview of the state-by-state alterations, see ABA/BNA, LAWYERS MANUAL ON PROFESSIONAL CONDUCT 01:3 to 01:49 (2004); Moulton, supra note 93, at 91–96.

104. For example, the establishment of the ABA's Commission on Professionalism was authorized in December 1984, a little more than a year after the ABA's adoption of the Rules and well before the Rules were widely accepted by the States. See BLUEPRINT, supra note 4, at 248.

105. For an overview of the work of the ABA Committee charged with drafting the Ethics 2000 changes, see supra note 22 and accompanying text.


107. My friend and reviewer, Professor Chris Sagers criticizes my lapse into "post hoc ergo propter hoc" causation here, and argues that at best I have established a correlation between any crisis and the change in regulation, and at worst I have established nothing. While I appreciate the superfluous Latin, I respectfully disagree. First, my analysis does not require that I prove any causation per se, it is enough to argue that my proposed regulatory structure would better address any perceived crisis. Second, while I agree that I
Lawyer regulators have now abandoned the unified original goal of the Canons and the legal ethics project—to define the moral, ethical, and practical boundaries of lawyering—and are now compelled to pursue two different and conflicting goals simultaneously.

II. THE PERILS OF DUAL GOALS

This Part argues that lawyer regulators undercut both the minimalist and the broadly ethical projects as they attempt to proceed in two directions at once. Current lawyer regulation has relegated the broadly ethical aspect of legal ethics to hortatory "professionalism" efforts and continuously narrowed the minimum standards of behavior in the minimalist project. It is interesting to note at the outset, however, that lawyer regulators do not always admit that there are two competing goals at work. These two goals are often treated as if they are identical, or at least overlapping.

A. The Ironic Uses of "Legal Ethics" and "Professionalism"

The confusion of goals can be best seen in the use of terminology. The word "ethics" has long since been wiped out of the official standards of minimum behaviors, starting with the replacement of the Canons of Professional Ethics by the Code of Professional Responsibility, and later the Rules of Professional Conduct. Many (if not most) law schools have renamed their legal ethics course "Legal Profession" or "Professional Responsibility." These linguistic choices reflect a particular truth: the Rules that now govern lawyer conduct are not rules of ethics.

Nevertheless, lawyer regulators and lawyers have yet to eliminate the phrase "legal ethics" from their lexicon. To the contrary, in legal parlance "legal ethics" has become synonymous with the minimum rules governing attorney conduct. In light of the

have not proven sole causation, I do think that the regulatory history coupled with an analysis of current regulatory weakness does allow a claim of more than mere correlation. See infra Section II.

108. See David Luban & Michael Milleman, Good Judgment: Ethics Teaching in Dark Times, 9 GEO. J. LEGAL ETHICS 31, 45 (1995) (noting the loss of the charged words "canons" and "ethics" from the ABA's standards). I am always puzzled when I consider the replacement of the word "responsibility" with "conduct." As a linguistic and ethical matter it is an extremely bad sign that the Rules that govern your profession are so narrow that the word "responsibility" is considered too strong and must be replaced by "conduct."


110. See JUSTICES ACTION PLAN, supra note 2, at 18 ("Professionalism is a much
explicitly moral use of "ethics" in common parlance,"111 the application of the phrase "legal ethics" to minimum rules carries substantial interpretive freight. The phrase "legal ethics" imbues the Rules with a depth and a meaning they no longer have.

In a further unlikely turn of nomenclature, professionalism has come to embody what a lawyer "should" do, i.e., professionalism has come to cover a lawyer's ethical duties.112 The dictionary and common parlance meaning of professionalism, however, is devoid of any moral significance; it simply embodies the "qualities or features, as competence, skill, etc., characteristic of a profession or a professional."113

Some of this confusion can be explained historically. Starting in the nineteenth century lawyers and legal academics first began to separate the category of "legal ethics" from natural law or religious morality, and to discuss the particular kind of ethical duties that might arise in legal practice.114 The original "legal ethics" were thus explicitly moral and ethical, as were the first official statements of legal ethics by various bar associations. Nevertheless, the term lost its moorings and meaning as the legalistic minimums of lawyer behavior
replaced the moral or ethical. The term endures, however, because either consciously or unconsciously the legal profession is unwilling to relinquish the connection between the Rules and some broader conception of "legal ethics."¹¹⁵

This linguistic sleight of hand is emblematic of the general conflation in goals and terminology of lawyer regulators. While it is clear that the minimalist goal is quite distinct from the broadly ethical goal, lawyer regulators regularly blur the lines between the two. This conflation serves three purposes. First, it allows lawyers to use ethical nomenclature when discussing the Rules with other lawyers or clients. I know a plaintiff's lawyer who regularly explains to his clients that he cannot "ethically" pay any "financial assistance" to a client ahead of an expected recovery.¹¹⁶ This turn of phrase allows the lawyer to turn a purely regulatory prohibition (and a rather self-interested one at that)¹¹⁷ into an "ethical" duty for purposes of client relations and moral gravitas.¹¹⁸

Second, it draws attention away from the elimination of the ethical and moral from the Rules and avoids the uncomfortable reality of the minimalist nature of the Rules. Third, it allows regulators to give some real substance to their professionalism efforts. They accomplish this feat by treating their minimalist program as part and parcel of professionalism, so that all of the activities associated with the minimum rules can be credited as an attempt to raise the

¹¹⁵. I refer to the use of the phrase "legal ethics" as a vestigial organ of the legal profession. "Legal ethics" themselves no longer do any real work on the body of the profession, but, like an appendix, the concept still lingers on.


ethical standards of the profession. Without the minimalist efforts, the professionalism project is a much less impressive collection of non-mandatory activities. The phrase "legal ethics" also allows lawyer regulators to imbue the minimalist project with moral heft. For example, the ABA trumpeted the announcement of the Ethics 2000 campaign (which focused mainly on reformulations of the minimum rules) as a crucial move towards "taking professionalism seriously" and the "advancement of the legal profession to a higher moral ground."

Regardless of this linguistic and programmatic confusion, an analysis of the bar's regulatory efforts since the demise of the Canons shows that lawyer regulators have eliminated a single goal in favor of two distinct and occasionally inapposite goals. I first argue that the bar's broadly ethical efforts greatly undermine the likelihood that the legal profession will follow the Rules of Professional Conduct. I next maintain that the focus on the minimalist project likewise cripples the broadly ethical effort.

B. The Broadly Ethical Project May Be More Influential Than Previously Realized—It May Be Undermining the Rules of Professional Conduct

There have been a number of recent studies and articles on the unhappiness and disillusionment of practicing lawyers and law students. Some have argued that law school itself causes student

119. See, e.g., JUSTICES ACTION PLAN, supra note 2, at 25–39 (listing activities primarily related to enforcing and teaching the minimal Rules among professionalism initiatives).

120. See infra notes 153–63 and accompanying text.


disillusionment and cynicism,¹²⁴ and some have postulated that the current approach to legal ethics has increased student cynicism.¹²⁵

One reason that law students, lawyers and law professors are growing cynical about “legal ethics” is the gap between the minimum standards of lawyer conduct and the broader conceptions embodied by professionalism.¹²⁶ Although there are both narrow and broad¹²⁷


125. One recent study of recent law school graduates found that new lawyers struggle mightily with the ethical and moral elements of their jobs and either find the Rules to be inapplicable or even to require immorality in the name of zealous advocacy. Clark D. Cunningham, How to Explain Confidentiality?, 9 CLINICAL L. REV. 579, 591 (2003) (noting that structuring professional responsibility class around “lawyers who were villains .4. increased an already troubling level of law-school-induced cynicism”); Robert Granfield & Thomas Koenig, “It’s Hard to be a Human Being and a Lawyer”: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice, 105 W. VA. L. REV. 495, 495–96, 508–19 (2003); see also ABEL, supra note 26, at 143 & n.8 (“Indeed, there is evidence that law school makes students more cynical about legal ethics.”).

126. The connection between professionalism and ethics or morals is sometimes based in a historical reference, see KRONMAN, supra note 30, or by a call to shared professional or societal values, Bruce A. Green, Public Declarations of Professionalism, 52 S.C. L. REV. 729, 737 n.18 (2001) (“It may fairly be argued that most, if not all, of the values conventionally associated with professionalism are simply common values given specific application in the context of legal practice.”); Jeffrey M. Vincent, Aspirational Morality: The Ideals of Professionalism-Part II, 15 UTAH B.J. 24, 24 (2002) (“Besides a knowledge of and ability to apply principles of the law, the general conception of legal professionalism includes loftier ideals—certain shared moral values—that imply a duty to act in the public good and with the purpose of obtaining justice. Dean Roscoe Pound described the profession as ‘a group . . . pursuing a learned art in the spirit of public service.’ “), or by a more complex philosophical approach. See generally LUBAN, supra note 38 (presenting a devastating argument against the “dominant view” lawyer role morality and presenting the “people’s lawyer” as a palatable alternative); SIMON, supra note 9.
conceptions of professionalism, the entire project has an overtly ethical-moral dimension that draws a sharp distinction between the minimum Rules of Professional Conduct and ethics writ large.

This distinction encourages cynicism in five interlocking ways. First, a comparison between even the least robust personal version of morality and the minimum requirements of the Rules leads inevitably to the reaction "is that all there is to being an ethical lawyer?"128 Second, and more depressingly, many practicing lawyers disregard even the minimal Rules we have.129 Third, actual enforcement of the Rules is relatively rare.130 Fourth, there is an inherent sadness to the

127. Professionalism has meant as little as simple civility. See Kathleen P. Brown, A Critique of the Civility Movement: Why Rambo Will Not Go Away, 77 MARQ. L. REV. 751, 754–55 (1994) (equating professionalism with civility); Morgan, supra note 41, at 45 (noting that some have attempted to define “professionalism” as “civility”); Kara Ann Nagorney, Note, A Noble Profession? A Discussion of Civility Among Lawyers, 12 GEO. J. LEG. ETHICS 815, 816 (1999) ("Civility is professionalism."). Professionalism has meant as much as William Simon's “contextual judgment.” See SIMON, supra note 9, at 109–37 (arguing that the key to legal professionalism is the “experience of work as the vindication of general norms in particular contexts, of simultaneous social commitment and self-expression, and of groundedness conjoined with creativity.”); William H. Simon, The Trouble with Legal Ethics, 41 J. LEGAL EDUC. 65, 65–66 (1991) (“The attractive implication of this notion of professionalism is that lawyers, not just in exceptional moments of public service, but in their everyday practice, participate directly in furthering justice,”). Professionalism has also meant as much as Deborah Rhode's call for lawyers "to accept personal moral responsibility for the consequences of their professional acts." See RHODE, INTERESTS, supra note 3, at 17. But at a minimum, professionalism attempts to reach outside of the mandatory Rules to reach a broader conception of morality.


130. See RHODE, INTERESTS, supra note 3, at 158–65 (describing infrequency and general leniency of bar sanctions); Levin, supra note 47, at 38–59 (same); see also Griffin, supra note 110, at 1102 (noting that clients are waiting for “a disciplinary system that effectively sanctions lawyers for their neglect of clients' matters”).
abandonment of the broadly ethical. Lastly, and paradoxically, all of the attention and reform efforts showered on the professionalism project have created the aforementioned self-fulfilling cycle of perceived crisis, inadequate solution, sense of failure, and further cries of crisis. Observing this cycle certainly fosters a sense of cynicism and despair. In sum, there is a significant tension between the ideals and study of legal ethics and professionalism and the reality and purposes of the Rules of Professional Conduct. This tension has a corrosive effect on the entire project: as the Rules get narrower (and therefore easier to follow and enforce) the sense of a shared professional ethic or a broader set of norms is devalued and may eventually be destroyed.

Moreover, the decision of lawyer regulators to separate the moral from the minimal in the drafting of the Code and the Rules, and then reintroduce the moral in a series of non-binding "professionalism" efforts, further lessens the likelihood that lawyers will follow the baseline prohibitions. There is voluminous literature describing the connection or overlap between commonly held morality and the law. Among the most influential work is the debate between Lon Fuller and H.L.A. Hart. Professor Fuller argued

131. Consider for example, David Luban and Michael Milleman's discussion of the rationalization of legal ethics and Weberian sociology:

Max Weber wrote that "the fate of our times is characterized by rationalization and intellectualization and, above all, by the disenchantment of the world." Rationalization, to Weber, meant the process by which ever-growing portions of the world—the physical world, but also the social world—are brought under rational and technical control; it is also the process by which non-rational norms are gradually purged from the world. Prominent among these norms are public ideals and moral constraints on the effective pursuit of one's preferred ends, and the phrase "the disenchantment of the world" refers in part to our reinterpretation of the physical and social worlds as reflections of rational, non-magical and normatively antiseptic forces.


132. *Cf. Stephen L. Carter, The Emperor of Ocean Park* 228 (2002) (observing that as society grows uncomfortable talking about a particular moral tenet, "within a generation or two nobody will think it either. What survives is only what we are able to communicate. Moral knowledge that remains secret eventually ceases to be knowledge.").

vociferously that at its most fundamental level law was based in, and relied upon, a broad conception of common morality. Hart rejected this explicit connection and argued that while law and morality intersect, law is not dependent upon morality in its creation or validity.

For purposes of this Article, however, the philosophical question of whether law itself derives from, or is legitimized by, morality is unnecessary. Most agree that when law and morality intersect, the law is at its most powerful and persuasive, and is most likely to be followed. For example, both Lon Fuller and H.L.A. Hart agree that, logistically, law works best when it jibes with commonly held morals. As applied to criminal law there is general accord that an intersection of law and morality makes enforcement easier and compliance more likely. Figure One uses a Venn diagram to show

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136. See Fuller, supra note 133, at 639 (“Fundamental Rules derive their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary.”); id. at 644 (“Good order is law that corresponds to the demands of justice, or morality, or men's notions of what ought to be.”); HART, supra note 135, at 82–91 (noting that when the “primary rules” are accepted from an “internal” view, i.e., morally, most people will obey the law regardless of punishment).
137. See, e.g., Richard A. Posner, Professionalisms, 40 ARIZ. L. REV. 1, 15 (1998) (“[The] more law conforms to prevailing moral opinions . . . the easier it is for lay people to understand and comply with law. The people subject to the law can avoid coming into conflict with it just by acting the part of well-socialized members of their community.”); Richard A. Epstein, Crime and Tort: Old Wine in New Bottles, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 247–48 (Randy E. Barnett & John Hagel III eds., 1977) (“The criminal law works best when it deals with conduct of the defendant that the law thinks worthy of moral condemnation . . . .”); John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”? : Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 193–94 (1991) (“The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance.”); Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. CAL. L. REV. 1331, 1338 n.36 (1989) (“[A]ny society that allows its rules of criminal responsibility to diverge too far from such deeply held moral feelings runs the unacceptable risk of severing the criminal law from its moral underpinnings and jeopardizing its moral legitimacy and practical efficacy.”); Jerome Hall, Interrelations of Criminal Law and Torts, 43 COLUM. L. REV. 753, 771 (1943) (“The most defensible position, stated broadly, is that the more general doctrines of the criminal law are founded on principles of moral culpability”); Robert F. Schopp, Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement, 51 LA. L. REV. 995, 1015 (1991) (“To the extent that the criminal law and conventional social morality diverge, members of the society are less likely to attach personal sanctions on the basis of illegality . . . weakening allegiance to [the criminal law]
the overlap between morality and the criminal law, with the area of overlap between the two noted as the area of "maximum efficacy." The bulk of criminal law falls within the "maximum efficacy" boundaries: regardless of governmental enforcement, the great majority of citizens will follow the law. This makes these prohibitions more effective and easier to enforce.\textsuperscript{38}

The area where criminal law diverges from morality has alternatively been named "regulatory offenses" or "\textit{malum prohibitum} crimes."\textsuperscript{39} Commentators have argued that the law has begun to "overcriminalize" and that the "\textit{malum prohibitum}" category is ever growing.\textsuperscript{40} Enforcement in this category is much more challenging, since the average citizen may feel unconstrained by moral obligation and base her conduct upon the odds of being caught.\textsuperscript{41} Therefore, many more people speed on a deserted road than drive drunk. Part of the explanation for this phenomenon is the penalties involved, but much of it is the moral opprobrium currently associated with drunk driving.\textsuperscript{42}

\textsuperscript{38} Dan Kahan has argued, however, that a critical element of criminal law's deterrent effect is the attempt to actually change societal norms, \textit{i.e.}, to move crimes from the \textit{malum prohibitum} category to the "maximum efficacy" category. \textit{See} Dan M. Kahan, \textit{The Secret Ambition of Deterrence}, 113 Harv. L. Rev. 413 (1999).

\textsuperscript{39} See Green, \textit{supra} note 137, at 1556–57 ("The terms 'public welfare,' 'strict liability,' 'malum prohibitum,' 'petty infractions,' 'economic,' 'white collar,' and 'regulatory' all have been used to refer to a group of crimes claimed to be lacking in moral content."); Dan M. Kahan, \textit{Ignorance of Law is an Excuse—But Only for the Virtuous}, 96 Mich. L. Rev. 127, 129 (1998) ("Crimes of this sort are often referred to as \textit{malum prohibitum}—wrong because prohibited—and are distinguished from crimes that are \textit{malum in se}—wrong in themselves independent of law."). \textit{See generally} BLACK'S LAW DICTIONARY 960 (6th ed. 1990) (defining "\textit{malum prohibitum}" as "a thing which is wrong \textit{because} prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law . . . ").

\textsuperscript{40} See, \textit{e.g.}, Coffee, \textit{supra} note 137, at 197 (noting commentators' warnings about the danger of overcriminalization, especially regarding actions that are not morally reprehensible).

\textsuperscript{41} There is some evidence, however, that the moral authority of the law is enough that some will not break even an irrational or amoral law, simply because of the powerful norm against violating any law. \textit{See} Green, \textit{supra} note 137, at 1591–93.

\textsuperscript{42} Drunk driving is a particularly apt example because over the last thirty years or so
The above analysis is highly probative when considering the current approach to lawyer regulation. Bar disciplinary procedures have generally been considered quasi-criminal in nature, and the

Figure One

Societal Norms

Morality

Maximum Efficacy

Criminal Law

Malum Prohibitum

it has moved from the malum prohibitum category to the maximum efficacy category. While enforcement and penalties have been increased, there has been an accompanying moral attack on drunk driving. See, e.g., Mothers Against Drunk Driving, Homepage, at http://www.madd.org/home/ (last visited Mar. 15, 2004) (delineating efforts to raise the social opprobrium associated with driving drunk) (on file with the North Carolina Law Review).

The upper circle represents commonly held morality; the lower circle, the criminal law. The non-overlapping section of the morality circle is titled "societal norms." For a general discussion of how societal norms, and not the government or laws, govern the great bulk of our activities, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). Figure One is a Venn diagram. For a general discussion of these helpful diagrams, see SUN-JOO SHIN, THE LOGICAL STATUS OF DIAGRAMS 16–20 (1994); Nancy B. Rapoport, "Venn" and the Art of Shared Governance, 35 U. TOL. L. REV. 169, 176 (2003) (describing Venn diagrams generally and using one to show the overlap of "faculty jurisdiction" and "decanal jurisdiction" for law school governance); Stewart J. Schwab, Limited-Domain Positivism as an Empirical Proposition, 82 CORNELL L. REV. 1111, 1112–14 (1997) (using a Venn diagram to show the overlap between morality and law, and to depict the debate between positivism and natural law).

143. The seminal case is In re Ruffalo, 390 U.S. 544, 550–51 (1967) (holding that the Due Process Clause applies to disbarment hearings and that they are "adversary proceedings of a quasi-criminal nature"). Ruffalo has not ended the story, however, as some courts hold that disbarment proceedings are "quasi-criminal." See Statewide Grievance Comm. v. Botwick, 627 A.2d 901, 906 (Conn. 1993); Levi v. Mississippi State Bar, 436 So.2d 781, 783 (Miss. 1983). Others hold that they are "neither civil nor criminal," (which may mean the same thing). Yoko泽ki v. State Bar, 521 P.2d 858, 865 (Cal. 1974); ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 20 (1991) (“Sanctions in disciplinary matters are neither criminal nor civil but sui generis . . . .”). Still others hold that disciplinary actions can be civil in nature. See In re Disciplinary Action Against Hawkins, 623 N.W. 2d 431, 437–38
Rules of Professional Conduct have been described as "quasi-criminal" \(^{145}\) or "statutory." \(^{146}\) The choice of the drafters of the Code and the Rules to focus upon clearly defined minimum standards was, in fact, an explicit reaction to the prospect of disciplinary actions based upon the ABA's Canons. \(^{147}\)

Therefore, the question is where the Rules leave us in Figure One. At the outset of the ABA's legal ethics program, the Canons of Legal Ethics fell largely within the category of generally held norms or morals. \(^{148}\) The original Canons were chiefly meant to be a statement of commonly held principles. Nevertheless, the decisions of courts applying the Canons in disciplinary situations certainly established the Canons as more than common morality and as enforceable standards. Because the Canons were drafted for general ethical purposes, they generally fell within the "maximum efficacy" category: lawyers felt both morally and legally obliged to follow them.

\(^{145}\) See Nancy J. Moore, The Usefulness of Ethical Codes, 1989 ANN. SURV. AM. L. 7, 14–16 (1989) (arguing that the Model Rules are "quasi-criminal" and take the legal profession to a new "fourth-level" of professional status); Thomas L. Shaffer, The Irony of Lawyers' Justice in America, 70 FORDHAM L. REV. 1857, 1867–68 (2002) ("The best our thinkers and drafters have been able to do... has been to remove the language of ethics, to call our flabby moral consensus 'professional responsibility,' and to pare our rules down to quasi-criminal law."). But cf. Nancy J. Moore, Lawyer Ethics Code Drafting in the Twenty-First Century, 30 HOFSTRA L. REV. 923, 927 & n.31 (2002) (quoting, but then partially disavowing her previous statement: "I do not believe, however, that all of the standards either in the current Model Rules or in the [Ethics 2000] Commission's proposed amendments are so clear that they constitute merely a 'quasi-criminal code.'").

\(^{146}\) See Hazard, supra note 73, at 1254 (describing the language of the Rules as "statutory"); Feldman, supra note 43, at 888–89 (noting that the Rules "self-consciously emulate the style, structure, and language of modern civil and criminal statutory codes.").

\(^{147}\) See Armstrong, supra note 62, at 1069 (stating that the drafting committees' goal in designing the Code was specifically designed to make it "capable of enforcement" and to "facilitate more effective disciplinary action"); Levine, Ethics Codes, supra note 93, at 530–31; Maura Strassberg, Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics, 80 IOWA L. REV. 901, 908 (1995) (noting that the need for an enforceable Code sparked the creation of the Code).

\(^{148}\) Some notable exceptions are the Canons governing specific instances of banned conduct, like Canons 13, 27, and 28 dealing with business creation and advertising. Interestingly, these Canons proved the most controversial, while the broadly moral statements generally remained unchanged until the adoption of the Code. See supra notes 89–95 and accompanying text.
The adoption of the Code began to break down this conjunction of moral and legal obligation by dividing the minimums from the broader conception of ethical lawyering. Nevertheless, the Code at least attempted to make the connection between commonly held legal ethics and the minimum rules. Because the Code sought to address the whole process of being a lawyer its authors could honestly claim that it "define[d] the type of ethical conduct that the public has a right to expect . . . of lawyers." 149

The Rules of Professional Conduct, however, are explicitly a series of "Model Rules" in the "restatement format." 150 The bulk of these Rules are so narrow and so divorced from their original ethical context, that the Rules clearly have lost the over-riding moral suasion that accompanied the Canons and even the Code. Lawyer regulators are thus inviting lawyers to obey the Rules based upon the likelihood of enforcement rather than as a statement of shared moral values.

There are, however, clearly activities barred by the Rules that most lawyers would recognize as violations of a commonly held morality. Stealing from a client, lying to a court, or abandoning your clients all fit in this category. Interestingly, these are exactly the types of violations that actually result in disbarment or license suspension, 151 so the moral authority supporting these Rules actually coincides with the possibility of enforcement.

The focus upon enforcement for the non-moral Rules, however, casts serious doubt upon the likelihood of lawyer compliance. Lawyer disciplinary authorities are notoriously underfunded, and actual enforcement of anything beyond substantial violations of the Rules is relatively rare. 152 As such, any focus upon enforcement will

149. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1982).
151. See Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 641 n.168 (1985) (reporting results of a survey of public discipline in three jurisdictions and finding that "[o]f the cited offenses, one-third involved neglect. Most of the other offenses concerned commingling (17%), misrepresentation (17%), and criminal convictions (16%)"); Ted Schneyer, Professional Discipline for Law Firms?, 77 CORNELL L. REV. 1, 22 (1992) ("The severity of taking away a person's livelihood made disbarment appropriate only in cases of truly reprehensible conduct, and, conversely, such conduct carried a sufficient moral stigma to justify ouster from the profession.").
152. The ABA itself has concluded that attorney discipline is, and always has been, a neglected area. See RHODE, INTERESTS, supra note 3, at 158–65 (quoting ABA research finding that the public thinks the attorney discipline system is "[t]oo slow, too secret, too soft, and too self-regulated" and discussing possible reforms); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter CLARK REPORT] (Describing
likely result in reduced compliance.

C. The Pursuit of Ever-Narrower Rules Likewise Undercuts the Goals of the Broadly Ethical Project

The regulatory goal of narrowing the Rules to a theoretically enforceable, quasi-criminal code undercuts the goals of the generally non-enforceable broadly ethical project in several ways. First, in considering the relationship of the mandatory to the hortatory, I always consider how my two-year-old daughter reacts to requests of each kind. The mandatory is followed depending on mood and the perceived odds of effective punishment, while the hortatory is generally disregarded out of hand.\textsuperscript{153} The bifurcation of legal ethics, with one portion labeled mandatory and another voluntary, places the broadly ethical at a tremendous disadvantage in terms of importance to the bar, attention from individual lawyers, and consideration in law school classes.

Second, by choosing the “familiar” restatement format for the attorney discipline as “a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions . . . .”); AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT xv–xx (1992) [hereinafter MCKAY REPORT] (noting positive changes since the Clark report, but listing additional necessary steps for improvement). Attorney discipline is underfunded. See MCKAY REPORT, supra, at xviii (detecting that the funding and staffing of disciplinary committees “have not kept pace with the growth of the profession,” and that “some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers”); Bruce A. Green, Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment, 78 IOWA L. REV. 433, 485 (1993) (“[B]ecause many disciplinary offices are underfunded . . . disciplinary authorities generally decline to proceed against attorneys who perform incompetently except where they are guilty of the grossest neglect.”); Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 VA. L. REV. 1051, 1121 (1996) (“[D]isciplinary boards are notoriously underfunded and [are] unable or reluctant to mount the effort needed to do battle with wealthy class action lawyers and powerful members of the defense bar”). There are backlogs for investigations. See Lisa J. Frisella et al., State Bar of California, 17 CAL. REG. L. REP. 339, 343 (2001) (“In his initial February 1999 report, Justice Lui reported that the Bar’s discipline system faces an unprecedented backlog of over 7,000 open complaints and reports against attorneys from consumers and courts.”). See generally Mark E. Hopkins, Open Attorney Discipline: New Jersey Supreme Court’s Decision to Make Attorney Disciplinary Procedures Public—What it Means to Attorneys and to the Public, 27 RUTGERS L.J. 757 (1996) (noting a backlog in New Jersey disciplinary cases in the 1980s).

153. I realize that lawyers are likely to differ in substantial ways from a two-year-old (for example, lawyers may have better and more developed excuses for their misconduct), but the two-year-old example helps to clarify the reactions one can expect to mandatory and non-binding requests.
mandatory Rules the drafters are actually triggering a very specific set of lawyer thought processes, or heuristics. A heuristic is a mental shortcut the brain uses to find order and make decisions in multifaceted situations. Heuristics are particularly important to the legal profession. Law schools regularly boast that they do not simply teach the law, they actually teach a series of heuristics, i.e., how to “think like a lawyer.” At bottom the critical skill that a lawyer sells is her brain and a specialized bundle of thought-processes and heuristics. Many clients think that hiring a lawyer entails purchasing rote knowledge of the law. Most practicing lawyers know that the process of learning the operative facts, discerning the law, and applying one to the other, rather than simple knowledge of the law, is the foundational legal skill.

Black letter rules trigger a particular heuristic in lawyers: we are trained to carefully read and analyze rules to find (as precisely as possible) the boundary between legal and illegal behavior. Boundary seeking is a basic element of the legal mind, and is perhaps the most marketable lawyer skill. Every lawyer—transactional, tax, or litigator—is often hired to find the boundaries of the pertinent law and apply it to the facts and circumstances of a client’s needs. Many lawyers leave broader questions of morals or ethics aside: the lawyer explains what actions are allowed, illegal, and in between, the gray areas, and then the client chooses. Some clients have limited

154. See RULES LEGISLATIVE HISTORY, supra note 100, at 353 app. D.
156. Barton, supra note 25, at 1196–98.
158. There is an ongoing debate over whether lawyers should play a greater ethical/moral role in counseling and representing clients. See, e.g., KRONMAN, supra note 30, at 53–108 (discussing lawyer’s role in sharing “practical wisdom” with clients); RHODE,
interest in paying a lawyer to consider the ethical implications of a given activity. Thus, many lawyers have habitually eliminated considering broader issues once the technical process of defining legal boundaries is completed. 159

When lawyers apply this boundary seeking process to issues of legal ethics the technical legal question (what am I allowed to do?) frequently eclipses the broader moral question (what should I do?). Under the black letter Rules, lawyers confronted with a complex ethical problem are not encouraged to ruminate upon the possible moral, social, and legal implications of any action. Instead, they are encouraged to mechanically apply the requisite Model Rule, and, unless the Rules specifically bar a contemplated action, it is presumed acceptable.

The boundary seeking heuristic does not end with a consideration of what the law allows and prohibits. Proficient lawyers also calculate the likelihood of being caught and the likely punishment if caught. It is this last step to the boundary seeking heuristic that cripples the efficacy of the Rules. Most lawyers can quickly deduce the slim odds that any violation of the rules will be discovered, 160 reported, 161 investigated, 162 or punished. 163 Thus, the

159. This narrow approach to client counseling has drawn significant negative scholarly attention. See, e.g., KRONMAN, supra note 30, at 122-34 (arguing against narrow conception of lawyer as counselor); Robert F. Cochran, Jr., et al., Symposium, Client Counseling and Moral Responsibility, 30 PEPP. L. REV. 591 (2003) (criticizing the client centered approach as a self-serving, cost-benefit analysis). For a historical version of this debate, consider the words of Elihu Root: “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.” 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938).

160. The bulk of the Rules govern the lawyer-client relationship, so it will most likely be up to the client (who most likely does not know the Rules or understand their requirements) to discover the violation.

161. Lawyers almost never report violations of other lawyers. Judges are similarly mum. See ABEL, supra note 26, at 144 (“Lawyers ... are reluctant to turn in their colleagues.”); RHODE, INTERESTS, supra note 3, at 159 (“Those with the most knowledge concerning many violations—lawyers and judges—rarely report misconduct.”). The great bulk of complaints thus generate from clients. See Julie Rose O’Sullivan, Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal, 16 GEO. J. LEGAL ETHICS 1, 10 & n.39 (2002).

162. A substantial portion of all complaints are dismissed without an investigation because they address lawyer competence, and thus do not trigger an applicable rule of Professional Conduct. See MCKAY REPORT, supra note 152, at vii (noting that (“In some jurisdictions over ninety per cent of all complaints filed were dismissed. Most of these complaints were dismissed for failing to allege unethical conduct”); Martin A. Cole, When Malpractice is an Ethics Issue, 59 BENCH & B. MINN. 10, 10 (2002) (noting that “the Director’s Office has for many years routinely dismissed without investigation complaints
true minimum standard of allowable conduct is far below the "minimums" in the Rules. The structure of the Rules in conjunction with the loss of moral suasion means that the Rules fail even as a baseline minimum. The full irony of the last forty years of legal ethics is that lawyer regulators have bifurcated the broadly ethical from the minimalist in a continuing effort to make the minimalist controls more effective, palatable, and enforceable. Nevertheless, eliminating the broadly ethical and continually sharpening the minimums has actually undermined even the minimalist project.

III. THE CLASH OF THE DUAL GOALS IN A SPECIFIC REGULATORY ACT, THE MPRE

Thus far I have argued that the last twenty years' worth of regulatory efforts by bar associations, state supreme courts, and legal academics have been doomed to failure because of a fundamental clash in goals. This Part applies this theory to a particular, recent regulatory act, the adoption of the Multistate Professional Responsibility Exam ("MPRE") as a prerequisite to bar admission. I choose to discuss the MPRE, rather than one of the other regulatory programs that straddles both the minimum Rules and professionalism, like civility codes or mandatory ethics CLE classes, because the MPRE is a uniquely important regulatory step and is

in which a client is unhappy about the quality of the lawyer's representation—or, as is more often the case, the results achieved—but does not specify any conduct that would violate a Rule of Professional Conduct").

163. See supra notes 151–52 and accompanying text.


165. These regulatory efforts are also so much less effective than the MPRE. The quality control, range of available subjects, and potential locations make CLE classes a notoriously ineffective regulatory step. Compare the list of vacation destination/CLE classes offered by the Lawyer Pilot Bar Association, see LPBA CLE Credits, at http://www.lpba.org/cle.html (last visited Mar. 15, 2004) (listing Sun Valley, Idaho, Branson, Missouri, and Tuscon, Arizona amongst the destinations) (on file with the North Carolina Law Review), with the State Bar Association of North Dakota's "Winter CLE and sun" in Belize, see State Bar Association of North Dakota, Belize or Bust, at http://www.sband.org/sband_blast/blast_102303.htm (last visited Mar. 15, 2004) (on file with the North Carolina Law Review), to get a flavor for just how serious the mandatory CLE requirement is.
among the professionalism campaign’s most notable successes.\footnote{166}{See Hayden, supra note 164, at 1300-02 (describing the MPRE’s prevalence and rapid adoption as an “immediate success”). I am also uniquely familiar with the test because on March 8, 2003 I took the MPRE together with more than 20,000 other bar applicants across the country. I draw this approximation from the National Conference of Bar Examiners’ data on the March MPRE examinations for 1996, 1997, and 1998 (the latest dates available). See \textit{National Conference of Bar Examiners, 1996 Multistate Professional Responsibility Examination Statistics (2001)} (20,278 applicants to the March 1996 MPRE); \textit{National Conference of Bar Examiners, 1997 Multistate Professional Responsibility Examination Statistics (2001)} (20,117 applicants to the March 1997 MPRE); \textit{National Conference of Bar Examiners, 1998 Multistate Professional Responsibility Examination Statistics (2001)} (20,940 applicants to the March 1998 MPRE). I was required to take the MPRE, as well as the Tennessee Bar examination because I was unable to waive in to practice in this jurisdiction. Despite the memory of studying for both exams, while teaching law students in the same jurisdiction, and practicing law under a temporary waiver, I have made every effort to remain as impartial as possible in considering the strengths and weaknesses of the MPRE. For a description of the evil (“advocacy scholarship”) I am attempting to avoid, see Jack Goldsmith & Adrian Vermeule, \textit{Empirical Methodology and Legal Scholarship}, 69 U. CHI. L. REV. 153, 155-56 (2002) (“The vice is that much legal scholarship is advocacy scholarship, and therefore rhetorical in the condemnatory sense: it is tendentious, sloppily or even deceptively reasoned, and rests upon unsubstantiated factual claims or the sort of empirical shibboleths that circulate in law schools (for example, that disagreement among the justices harms the Supreme Court’s public standing.”).}

\footnote{167}{See American Bar Association Section of Legal Education and Admission to the Bar & National Conference of Bar Examiners, Bar Admission Requirements 21 (2004) (showing that the only states that do not require the MPRE are Maryland, Washington, and Wisconsin).}

\footnote{168}{Hayden, supra note 164, at 1302 & n.18.}

The MPRE is almost nationally required. Law students in forty-seven states must now pass the MPRE prior to bar admission.\footnote{167}{The first MPRE was first offered on March 14, 1980. See Letter from the Chairman, 49 Bar Examiner 1, 4 (1980).}

\footnote{169}{The first MPRE was first offered on March 14, 1980. See Letter from the Chairman, 49 Bar Examiner 1, 4 (1980).}

\footnote{170}{See American Bar Association, Standards for Approval of Law Schools Standard 302(b) 24 (1999).}

\footnote{168}{Hayden, supra note 164, at 1302 & n.18.}

\footnote{169}{The first MPRE was first offered on March 14, 1980. See Letter from the Chairman, 49 Bar Examiner 1, 4 (1980).}

\footnote{170}{See American Bar Association, Standards for Approval of Law Schools Standard 302(b) 24 (1999).}
lawyer behavior. Given that actual enforcement of these minimum standards among licensed attorneys is minimal, the MPRE may actually be the single most important practical application of the black letter Rules.

While I have generally been skeptical about the professionalism efforts of the bench and bar, there is no question that on symbolism alone the MPRE is an important step in the right direction—students are told "this is important and this is required." Just having the exam, however, is not enough, and the MPRE falls prey to the clash between the twin goals of modern legal ethics. On the one hand the MPRE seeks to produce more ethical attorneys, in the broad sense of the word. On the other hand, at a minimum the MPRE seeks to block applicants who are ignorant of the Rules or other governing norms.

After taking the exam and researching this topic, I am convinced that the MPRE belittles serious ethical consideration and likely encourages lawyer cynicism about legal ethics. The idea of a multiple-choice ethics exam well captures the MPRE's fundamental and structural shortcomings. The MPRE fails to encourage more ethical behavior or to test minimal standards effectively for two main reasons: the first is the strictures of designing a multiple-choice ethics exam, and the second is the MPRE's effect upon the teaching of legal ethics.

171. My previous work in the field of legal ethics places me squarely within the camps of the skeptics and cynics, and I have previously argued that the great bulk of lawyer regulation is meant to benefit lawyers rather than the public, Barton, supra note 26, and that state supreme courts and bar associations should not be in charge of regulating lawyers. See Barton, supra note 25.

172. The MPRE's purpose is "to insure [sic] that [applicants] study and be prepared to cope with the ethical problems of the legal profession." Letter From the Chairman, 48 BAR EXAMINER 127, 128 (1979).


174. Although the MPRE has been the subject of some scholarly opprobrium, see, e.g., Mary C. Daly, et al., Contextualizing Professional Responsibility: A New Curriculum for a New Century, 58 LAW & CONTEMP. PROBS. 193, 195-96 (1995) (arguing that MPRE has a deleterious effect on teaching legal ethics); Leslie C. Levin, The MPRE Reconsidered, 86 KY. L.J. 395, 405-07 (1998) (arguing that the MPRE tests fictitious "national" law of ethics, and over-emphasizes the Rules at the expense of other sources of law); William H. Simon, "Thinking Like a Lawyer" About Ethical Questions, 27 HOFSTRA L. REV. 1, 11 (1998) (asserting that MPRE "takes 'thinking like a lawyer' to mean not thinking at all"); there has been no systematic attempt to discredit the use of a multiple-choice format to test legal ethics. There has, however, been an excellent overview of the history of the test and its place within the legalization of professional responsibility. See Hayden, supra note 164, at 1299-1302.
A. Multiple-Choice Test Design

The process of drafting a multiple-choice ethics exam amplifies many of the problems with the Rules. It rewards a "technocratic" approach to legal ethics because the MPRE only tests settled areas of the law with simple fact patterns and counter-intuitive Rules that must simply be memorized.

1. Settled Areas and Simple Fact Patterns

A multiple-choice exam can only test settled areas of the law because there must always be a single correct answer.\(^{175}\) This is a substantial loss because, despite the ABA's effort to reduce and clarify the rules, there are still a number of unsettled and gray areas\(^ {176}\) that would provide natural questions for a bar exam. Furthermore, choosing the clearest areas of the black letter law further emphasizes technocratic and legalistic thinking. Any student who finds herself ruminating on a question or thinking that there are several different applicable moral standards (or Model Rules) can be certain of only one thing: she is on the wrong track for the MPRE. Strategic students taking the exam will avoid thinking carefully about the facts presented and their ethical or moral ramifications. Instead, the strategic student recognizes the constraints of a multiple-choice exam and mechanically applies the letter of the law.

A multiple-choice exam also cannot easily test on complex situations where various overlapping legal (let alone moral or ethical) obligations are implicated. The MPRE, in comparison to the Multistate Bar Examination ("MBE"), generally uses simple fact scenarios attached to a single question.\(^ {177}\) This is because the test designers must write questions with clear answers, and a complex fact

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175. See LARZER EMMANUEL, STRATEGIES & TACTICS FOR THE MPRE 7 (2001) ("[I]n order for a multiple choice exam to be valid, the answers have to be unquestionably correct."); Daly, et al., supra note 174, at 196 (noting that the MPRE's "multiple-choice format" requires questions "capable of clear, correct resolution"); Eugene L. Smith, Can You Test Ethics?, 50 BAR EXAMINER 25, 29 (1981) (describing process of drafting the MPRE and noting that they "to the extent that it is possible, avoid cloudy areas of law").


177. Compare BOOKLET, supra note 164, at 37-57 (offering twenty-five practice questions, none of which rely on the same fact pattern) with NATIONAL CONFERENCE OF BAR EXAMINERS, SAMPLE MBE, FEBRUARY 1991 (1991) (including multiple questions that rely on a common fact pattern).
scenario would muddy the waters. Nevertheless, as any practicing attorney will attest, professional and ethical dilemmas are rarely simple or one-dimensional. The simplicity of the MPRE's fact scenarios again encourages a technocratic approach; the applicants are encouraged to see each Rule and fact scenario as separate and self-contained, instead of recognizing the kaleidoscopic nature of lawyering.

2. Making the MPRE Hard

The exam designers are thus limited to settled areas of the law and relatively straightforward factual scenarios. Nevertheless, the exam writers have several tools at their disposal to keep the MPRE from being too easy or too commonsense. The exam poses questions that are either based on esoteric rules one would only know if one memorized them or that have answers contrary to common sense. An advertisement for an MPRE study book warns students that the test makers "set traps that can catch you even if you think you know the rules, by using tricks that make the wrong answers seem right."

The MPRE regularly tests in areas of professional responsibility where the minimum standards are not common sense; these areas require simple memorization of the applicable standards. For example, on my MPRE there was a question about whether a judge could appear as a character witness at a family friend's trial. As Barbri's Conviser Mini Review for the MPRE states, the judicial "character witness issue is an exam favorite." The basic rule is that a judge may appear as a character witness in a trial only when subpoenaed. The MPRE generally tests the rule by stating sympathetic facts of a close friend or family member in a questionable prosecution, and then states several different rules in the answers: the judge may never appear as a character witness, the judge may

178. Note that the MPRE was meant to correct problems with legal ethics essays that did not require "applicants to discriminate in their answers." See Joe Covington, Multistate Professional Responsibility Examination, 50 BAR EXAMINER 21, 21 (1981). Furthermore, the exam-writers are likely aware of the scuttlebutt that the MPRE is an easy exam. See David A. Logan, Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility, 56 WASH. & LEE L. REV. 1023, 1029-30 (1999).


181. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2(B) (1990) ("A Judge shall not testify voluntarily as a character witness.")
appear if subpoenaed, the judge may appear if the other judge approves the appearance, or the judge simply may appear if she chooses to.\textsuperscript{182} This is a classic example of a non-intuitive rule. Exam-takers have either memorized the rule or they have not. Other examples of this phenomenon include test questions on when judges can sit on boards\textsuperscript{183} and on what lawyers must tell legislators when testifying before a legislature.\textsuperscript{184}

These sorts of questions further reinforce the technocratic lawyer model. Students are taught that the key to legal ethics is to memorize the tricky rules and simply to apply them. Too often the MPRE reduces legal ethics to the least common-sense rules, rather than a broader notion of shared lawyer values. These questions also invariably lead to student cynicism. After studying for and taking the MPRE I came to compare these questions to those on the various written driving tests I have taken.\textsuperscript{185} I have found that multiple choice driving tests frequently consist of highly technical questions that can only be known by memorizing the pamphlet of rules you receive before the test (questions about how many feet to park away from a hydrant, or how many yards to follow behind another car when you are both going thirty-five m.p.h.). These questions do little to test whether you are a good driver; they test your memorization skills or your skills at gaming the test. Similarly, the MPRE memorization questions do little to test whether you will be an ethical lawyer or even whether you have a good overall grasp on professional responsibility. Instead, they diminish and devalue the entire endeavor.

\textsuperscript{182} See BARBRI, supra note 180, at XLIV ("Often the examiners will give you the opposite rule as a possible choice.").

\textsuperscript{183} Consider the following "exam tip" from Barbri: "Be wary of questions where a judge is appointed to the board of a school. A judge may not accept appointment to the board of a public school other than a law school. A judge may, however, accept appointment to the board of any private school. Thus, you must remember that a judge can sit on the board of a public law school and any private school." \textit{Id.} at XLVIII.

\textsuperscript{184} Under Model Rule 3.9 a lawyer may appear in a representative capacity before a legislative body, if the lawyer informs the body she is there "in a representative capacity." MODEL RULES OF PROF'L CONDUCT R. 3.9 (2004). The questions in this area sometimes require the applicant to know the magic language "representative capacity," see BOOKLET, supra note 164, at 44, or sometimes depend on whether the lawyer is required to name her actual client, or just disclose that she is testifying for an unnamed client (the latter is all that is required). \textit{See BARBRI, supra} note 180, at 178, 203; MODEL RULES OF PROF'L CONDUCT R. 6.4 (2004).

\textsuperscript{185} Over the last seventeen years I have taken a written driving test in New York, Massachusetts, California, Michigan, and New Jersey. I pride myself on the skill of skimming the "Rules of the Road for State X" brochure for ten minutes and then passing the exam with flying colors.
The MPRE exam writers also tend to draft questions that require answers that cut against the applicant's common-sense ethical instincts. For example, the exam-writers love to ask about the propriety of legal fees (which is humorous in and of itself given the elasticity of Model Rule 1.5 and the rarity of any disciplinary actions under that Rule). One question on my MPRE asked about a grateful client who pays the lawyer her fees, and then gives the lawyer an extremely valuable gift as a thank you. The question was worded to make the reader uncomfortable with the gift, and to imply that Rule 1.5 might be violated. The correct answer is that since it was a gift, and not a fee, it does not matter how much it was worth. The exam writers purposely undermine common-sense intuition by using a student’s discomfort over receiving an inappropriate gift to lead to an incorrect answer. The MPRE thus teaches students to resist their initial, common-sense reaction to an ethical problem—an approach that does little to encourage more ethical behavior among future lawyers.

The MPRE also encourages students to "game" the exam. For example, the Emmanuel's study guide to the MPRE actually covers little substantive law. Instead, it is filled with "strategies and tactics" for taking the MPRE, including a section on bar examiner "traps" and a section on finding the "EZ-pass to the right answer." Although all bar examination methods will likely be subject to such a deconstruction, the MPRE's multiple-choice format is particularly vulnerable to, and specifically invites, game-playing.

The MPRE's focus on non-common sense Rules and its efforts to pit common-sense moral judgment against the requirements of the Rules further exacerbates the problem of malum prohibitum Rules. The MPRE actually reinforces the division between the moral and the Rules, and decreases the likelihood of future compliance based upon a common sense reaction for or against any particular course of conduct.

186. This may explain Professor Deborah Rhode’s MPRE advice: “when in doubt, pick the second most ethical course of conduct.” Deborah L. Rhode, Ethics by the Pervasive Method, 42 J. LEG. EDUC. 31, 41 (1992). Humorously, Professor Rhode is actually an optimist on the ethical standards of the MPRE. See Delgado, supra note 43, at 953 (noting that “[s]tudents preparing to take the MPRE . . . often conclude that the correct answer is almost always the third least ethical one”).

187. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2004) (listing the eight factors to consider in deciding the “reasonableness” of a lawyer’s fee).

188. EMANUEL, supra note 175, at 28–41. This section includes specific advice about what answer to choose when the answer’s modifier is “because,” “if,” or “unless.” See id.

189. See id. at 41–44.
B. "Facial Validity" and Legal Ethics

Educators and psychologists have extensively studied the subjects of assessment and test design. A critical aspect of test design is test validity. VALIDITY is a term of art in this context, and is subject to varying definitions, but generally validity involves both content and purpose: a test should actually test what it claims to be testing and then the collected data must be properly used. In evaluating the validity of a test's content, it is critical to canvas the goals of the test and its subject area coverage. "Face validity" is the most basic kind of comparison between the test's form and content; it "tells us the degree to which a test looks like it measures what it purports to measure." The test should seem appropriate and relevant: "[m]echanical engineers expect tests to assess mechanical engineering problems and catering students expect problems which are set in catering situations." 

Technically speaking, the MPRE is valid. The "MPRE is not a test designed to determine an individual's personal ethical values;" instead, it is an "awareness test," meant to guarantee fluency with the minimum standards of the profession. The MPRE's "facial validity" disconnect, however, is in the gap between legal ethics and the minimum standards of professional responsibility. No matter how many times bar examiners and the ABA avoid the word "ethics" and substitute the words "professional responsibility," bar applicants and professors still think of the area as "legal ethics." If one considers

190. See Thomas M. Haladyna, Developing and Validating Multiple-Choice Test Items 27 (1994) ("The most important consideration in testing is validity."); Steven J. Osterlind, Constructing Test Items: Multiple Choice, Constructed Response, Performance, and Other Formats 61 (2d ed., 1998) ("The concept of validity is the paramount concern in test item construction . . .").

191. See Osterlind, supra note 190, at 61–62 (quoting various scholarly definitions of validity).

192. See Samuel Messick, Validity, in Educational Measurement 13, 13 (Robert L. Linn, ed., 3d ed., 1989) ("[V]alidation is essentially a matter of making the most reasonable case to guide both current use of the test and current research to advance understanding of what the test scores mean,"); see also Julie Cotton, The Theory of Assessment: An Introduction 93 (1995) (stating that "a method of assessment is said to be valid if it measures the intended aims, goals, objectives, performance, or quality").


194. See Cotton, supra note 192, at 93.

195. See Boyd, supra note 173, at 98.

196. Consider for example the titles of casebooks, Monroe H. Freedman & Abbe Smith, Understanding Lawyer's Ethics (2002); Richard A. Zitrin & Carol A. Longford, Legal Ethics in the Practice of Law (2002); the title of The Georgetown Journal of Legal Ethics; or law school "legal ethics" centers at Mercer Law
the MPRE an effort to test legal ethics in any broader sense, the test does not meet the criteria of facial validity because the test actively ignores and denigrates ethical and moral considerations.

C. General Weaknesses of Multiple-Choice Exams

Aside from the specific problems with drafting a multiple-choice ethics exam, there are the general problems associated with standardized tests. The flip side to the applicants who successfully game the MPRE is that applicants who do not test well are disadvantaged. There has long been anecdotal evidence that some people simply do not react well to standardized, multiple-choice tests. Studies have shown that the selection of a testing format (typically between multiple-choice and free-response) has a powerful effect on testing results. Standardized, multiple-choice exams test more than their subject matter; they also measure the test taker’s abilities within the particular exam format.

Furthermore, recent studies suggest that standardized, multiple-choice tests may be inherently biased. It is problematic, therefore

School or Texas Law School.

197. See, e.g., ANDREW J. STRENIO, JR., THE TESTING TRAP 17–19 (1981) (telling story of bar applicant who excelled at every level of school but tested awfully on the SAT, LSAT, and MBE, and failed the bar examination multiple times despite graduating in the top ten per cent of his law school class). There has also been increasing awareness of the serious effects of test anxiety, especially for those taking standardized tests. See MOSHE ZEIDNER, TEST ANXIETY, THE STATE OF THE ART 218 (1998) (discussing anxiety and effects on SAT scores).


199. The bulk of the research has focused on the SAT, and the results are powerful and disturbing. SAT scores correlate strongly by gender (males score higher than females), see DAVID OWEN, NONE OF THE ABOVE: THE TRUTH BEHIND THE SATS 223–27 (1999) (listing multiple studies showing an SAT gender bias towards males); Marlane E. Lockheed, Sex Bias in Aptitude and Achievement Tests Used in Higher Education, in THE UNDERGRADUATE WOMAN: ISSUES IN EDUCATIONAL EQUITY (Pamela Perun ed., 1982); by race (white score higher than non-whites), see JAMES CROUSE & DALE TRUSHEIM, THE CASE AGAINST THE SAT 89–121 (1988) (noting gap in SAT scores between blacks and whites); ALLAN NAIRN, THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS 110 (1980) (observing the “systematic distribution of low scores” for minorities on ETS exams); William C. Kidder & Jay Rosner, How the SAT Creates "Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact, 43 SANTA CLARA L. REV. 131, 141–45 (2002) (noting gap in SAT scores between whites and
that the test which purports to advance a greater "professionalism" among lawyers is infirmed by inherent inequities.\textsuperscript{200} Given the great disparities in bar passage rates by race, there is also evidence to suggest that bar examinations may suffer from similar biases.\textsuperscript{201}

Although there are no specific studies as to the bias with regard to the MPRE, and it is therefore impossible to impute concretely the empirical research with regard to other standardized tests concretely onto the MPRE, there is nonetheless sufficient correlation to reason


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\textsuperscript{200} There is also evidence of similar biases in the LSAT. There is evidence of a high correlation between SAT and LSAT scores. \textit{See} Nairn, supra note 199, at 234 (discussing ETS study showing a high correlation between SAT and LSAT scores). There is also evidence of racial bias. \textit{See} Eulius Simien, The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action, 12 T. MARSHALL L. REV. 359, 378 (1986); William C. Kidder, Comment, Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students, 89 CAL. L. REV. 1055 (1991) (concluding that the LSAT systematically disadvantages minority law school applicants). There is also evidence of gender bias, \textit{see} William Kidder, Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education, 12 YALE J. L. & FEMINISM 1, 6 (2000) (discussing gender bias); and class bias, \textit{see} Richard Delgado, Official Elitism or Institutional Self-Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit), 34 U.C. DAVIS L. REV. 593, 601-06 (2001) (noting correlations between wealth and race in LSAT and other standardized tests).

This evidence of bias is even more indefensible because the SAT and the LSAT are actually relatively poor predictors of future academic success. \textit{See} Owen, supra note 199, at 196-203 (establishing the lack of a significant correlation between SAT scores and college grades); Warren W. Willingham et al., Predicting College Grades: An Analysis of Institutional Trends Over Two Decades (1990) (same); \textit{see also} William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 281 (1998) (showing the success of African American students admitted to universities under affirmative action programs with SAT below the institution's median score); Lani Guinier et al., Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 U. PA. L. REV. 1, 23 n.70, 27 n.74 (1994) (describing the weak relationship between LSAT and first-, second-, and third-year grades).

\textsuperscript{201} \textit{See} Kristin Booth Glen, When and Where We Enter: Rethinking Admission to the Legal Profession, 102 COLUM. L. REV. 1696, 1711-15 (2002) (discussing substantial differences in bar passage rates for blacks and whites); Linda F. Wightman, LSAC National Longitudinal Bar Passage Study 32 (1998) (showing that the "eventual" bar passage rate for blacks, American Indians, and Hispanics were all lower than for whites, and that the rate was 77.63% for blacks and 96.68% for whites).
that it too may suffer similar problems. It stands to reason that the MPRE may well suffer from some of the unconscious class and race bias that has been detected in other standardized test questions. As with other exams, the expense of review materials and courses gives an advantage to those who can afford them. The MPRE almost certainly further rewards those who naturally “test well,” and punishes those who do not. In sum, recent research has raised a number of troubling questions about the fairness and efficacy of large-scale, standardized, multiple-choice exams, and this research is germane to analyzing the MPRE.

Lastly, for all of the comforting certainty of a multiple-choice exam, sometimes the “correct” answers are simply wrong. Consider the February 2003 Multistate Bar Exam (“MBE”). After ACT

202. There are no similar studies of the MPRE, and without such studies it is impossible to state concretely whether the poor record of the SAT and LSAT can be imputed to the MPRE. Nevertheless, some of the root causes of the biases on the SAT and LSAT are certainly present with the MPRE. The MPRE “is assembled and administered by ACT on behalf of the National Conference of Bar Examiners.” See BOOKLET, supra note 164, at 3. The NCBE uses ACT to gather information about test question design, test validity, and test operations. See Francis D. Morrissey, Report of the Multistate Professional Responsibility Examination Committee, 50 BAR EXAMINER 18–19 (1981). ACT is best known for administering the ACT assessment college entrance exam. Although the ACT assessment has not been as widely studied as the SAT, the few available studies have shown a disparate impact by race. See Theodore Cross & Robert Slater, Special Report: Affirmative Action and Black Access to Higher Education, 17 J. BLACKS HIGHER EDUC. 8 (1997) (displaying results of a study of SAT, ACT, LSAT, and MCAT scores, and concluding that if standardized tests governed admissions decisions at America’s leading universities black enrollment would drop by at least one-half and at many schools by as much as eighty percent), and gender. See REBECCA ZWICK, FAIR GAME? THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION 144 (2002) (showing gender disparity on multiple ACT sections), and a similar lack of success in predicting student outcomes at university. See SACKS, supra note 88, at 268, 272 (citing two studies showing poor predictive value for the ACT); ZWICK, supra, at 147 (noting studies establishing that the ACT underpredicts women’s university grades). Given the relatively spotty track record of the large-scale testing industry, the involvement of ACT alone inspires suspicion.


204. For example, Professor Henderson has recently argued that the LSAT may have an adverse impact on minority students because of its emphasis on test-taking speed. See generally William D. Henderson, The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed, 82 TEX. L. REV. 975 (2004) (examining the impact of test-taking speed on LSAT scores).

205. See Delgado, supra note 200, at 598 & nn.28–30.
discovered a "clerical error" in the grading of the February 2003 MBE some bar applicants who had already been told that they had passed were told that their scores would be "recalculated," and they might have failed.\footnote{206}

D. Teaching to the Test

The MPRE requirement closely followed an earlier effort to increase the professionalism of new lawyers: the ABA changed its law school accreditation standards and required that all students take a mandatory class in professional responsibility.\footnote{207} At some schools this has meant little more than a grudging effort to teach the Rules themselves.\footnote{208} Nevertheless, there has been a growing scholarly attention to the teaching of legal ethics,\footnote{209} and multiple commentators have joined the call for a more thoughtful, contextual approach to legal ethics, with a concomitant move away from law school classes that simply drill the students on the Model Rules.\footnote{210}

The MPRE, by contrast, tends to turn any law school class on legal ethics into an MPRE review course. The existence of the MPRE places tremendous pressure on legal ethics teachers to teach to the exam.\footnote{211} Professors who attempt a more thoughtful approach

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\item[206] See Jon Craig, Bar Exam Error Puts Test Takers on Edge, COLUMBUS DISPATCH, May 9, 2003, at 3F (reporting that the error could effect the bar passage of approximately 4300 applicants); see also Nairn, supra note 199, at 139-40 (describing that thirty to forty exam answers were wrong on one multistate bar examination).
\item[208] See Rhode, Persasive Method, supra note 17, at 200 (describing this phenomenon as "legal ethics without the ethics"); see also Schlitz, supra note 8, at 908 ("Most likely, you will devote the majority of the time in your professional responsibility class to studying the rules, and you will, of course, learn the rules cold so that you can pass the Multistate Professional Responsibility Exam.").
\item[209] For example, Professor Deborah Rhode has been at the forefront of teaching ethics by the pervasive method, \textit{i.e.}, recognizing that ethical questions cut across the law school curriculum, and affect every aspect of teaching and practice. See Rhode, Persasive Method, supra note 17, at xxix (arguing that "[p]rofessional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives").
\item[211] See Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69
to legal ethics butt up against students who focus on the MPRE. Moreover, many law students are much more comfortable learning (and many professors are more comfortable teaching) professional responsibility as a series of rules.\textsuperscript{212} As one student told me, “teach it to me like the UCC.”

Of course, the students who complain that a contextual approach to legal ethics does nothing to prepare them for the MPRE have a fair point because the MPRE actively punishes such an approach. Students who stop to consider the moral and ethical ramifications of their actions are most likely caught by the structure of the MPRE’s questions. Thus, the MPRE itself undermines law school classes in professionalism—probably the Bar’s other most notable professionalism effort—by drawing focus away from broader ethical considerations and back towards the minimum rules.

\textbf{E. Why Not an Essay?}

The MPRE does serve some salutary purposes. The MPRE probably weeds out bar applicants who know little about professional responsibility, and it does force students to learn at least the minimum behavioral standards of the profession. The MPRE now also includes law from the ALI’s Restatement of the Law Governing Lawyers,\textsuperscript{213} which is a helpful recognition of the fuller scope of lawyer regulation.

Nevertheless, as currently structured, the MPRE amplifies much of the worst elements of the clash between the minimalist and broadly ethical projects.\textsuperscript{214} Students preparing to take the MPRE memorize non-commonsense Rules, learn to be wary of their natural instincts,

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FORDHAM L. REV. 817, 819 (2000) (reporting that most students expect their legal ethics course to prepare them for the MPRE); Roger C. Cramton & Susan P. Koniak, Rule, Story, and Commitment in the Teaching of Legal Ethics, 38 WM. & MARY L. REV. 145, 171 (1996) (“Because most law students must take this test, many of them approach their required ethics course with tunnel vision—viewing it as preparation for the MPRE”).

212. \textit{See} RHODE, INTERESTS, supra note 3, at 200.


214. Earlier in this Article I noted a common cycle in lawyer regulation that proceeds from the perceived crisis, to proposed solution, to recognition of solution’s limited effect, to additional calls of crisis. The MPRE itself has followed this cycle, as bar regulators in New York recently greatly raised the passing score on the MPRE to bar applicants ignorant of the Rules. See Glen, supra note 201, at 1708 n.32; Melissa Rourke & Meredith Schoenfeld, The Honesty Standard and the Need for a More Stringent Standard: An Update on Model Rule 8.1, 15 GEO. J. LEGAL ETHICS 895, 900–01 (2002).
and mechanically apply the Rules to every situation. In the parlance of the MPRE, if no rule bars their conduct they are not "subject to discipline,"²¹⁵ regardless of any broader ethical or moral ramifications. In short, the format and structure of the MPRE strangles the life out of the law school focus on legal ethics and inevitably fosters cynicism.

The irony, of course, is that many of the problems with the MPRE could be solved by a state specific essay exam, rather than a national multiple-choice test. A mandatory state essay testing professional responsibility would eliminate many of the MPRE’s most glaring faults and provide the same benefits. An essay question would still require students to study and know the law governing lawyers, but applicants would be forced to apply the law in context to more nuanced fact patterns. An essay question would also be based in the actual Rules of the jurisdiction, instead of the fictional “national” law tested by the MPRE.²¹⁶

The MPRE’s drafters would surely object that the exam itself was designed to correct the perceived failings of an earlier generation of ethics essays. One of the justifications for a separate ethics exam was the concern that an applicant could fail the ethics essay and still pass the bar.²¹⁷ This is an argument for a separate exam, however, not a multiple-choice exam.

Another difficulty involves coverage issues. A multiple-choice exam can always test on a much broader array of topics than an essay exam in a comparable time period. Nevertheless, there is a difference between breadth and depth, and arguably an essay exam would require students to actually study harder because they would be expected to analyze a fact situation, apply the relevant Rules, and write a cogent analysis. The MPRE allows applicants to key off of the answers themselves; an essay would require a deeper understanding of the material, and a better facility with ethics as applied to complex

²¹⁵. Anyone who has studied for or taken the MPRE will surely recognize these three underlined words, as they are frequently the call of the question on the MPRE. See BOOKLET, supra note 164, at 37–57 (using underlined phrase “subject to discipline” in nine of twenty-five model questions).

²¹⁶. The “national” character of the MPRE has been subject to criticism. See Levin, supra note 47, at 404–05.

²¹⁷. See Morrissey, supra note 202, at 18 (“Most jurisdictions integrated the results of ethics questions with the results of the entire examination. Thus, an individual could demonstrate absolutely no awareness of ethical principles and no ability to apply ethical principles and yet receive a license because of high scores in contracts, torts, property and other substantive areas.”). This criticism from a bar examiner is a little odd, since it is true of any bar exam subject, and seemingly undermines the whole process. Theoretically, any applicant could know nothing about several subjects and still pass the bar (and go on the day after bar passage to practice in the know-nothing area).
A RETURN TO THE CANONS

situations. Because an essay exam would involve more analysis and application, it might actually require students to study harder, and more thoughtfully.218 A final objection involves bias in grading. The grading of an essay is inherently more subjective than grading a multiple-choice exam. Nevertheless, given the extensive evidence of bias in the drafting and design of standardized tests,219 multiple-choice exams are hardly a cure-all for subjectivity. In fact, many experts in assessment have been moving away from multiple-choice tests and towards more performance-based examinations.220 While an essay exam would not be a true performance based exam,221 it would test a broader and more relevant array of skills than a multiple-choice test.

In fact, given the oxymoronic nature of a multiple choice ethics exam, the choice to reject an essay alone tells us a lot about the current approach to lawyer regulation. The MPRE establishes that while both the minimalist and broadly ethical goals are given lip service, the emphasis is on rote knowledge and mechanical application of the Rules.

IV. PROPOSED SOLUTIONS—NARROW AND LARGE

This is the third Article in a series that criticizes the goals and programs underlying lawyer regulation, and I inevitably arrive at the “solutions” portion of my projects with hesitancy. It is always easier to point out the flaws in someone else’s efforts than to present a coherent alternative.222 Nevertheless, any critique that does not lend itself to some form of redress is of little use.

This Part offers two proposed solutions, one easy and narrow

219. See supra notes 199–201 and accompanying text.
220. See generally HOWARD GARDNER, MULTIPLE INTELLIGENCES (1993) (arguing for an emphasis on ongoing assessment rather than formalized testing); RUTH MITCHELL, TESTING FOR LEARNING: HOW NEW APPROACHES TO EVALUATION CAN IMPROVE AMERICAN SCHOOLS (1992) (arguing that methods in addition to multiple-choice should be used to assess performance); Outtz, supra note 198 (discussing the relationships between test characteristics, performance, and validity). By analogy, a recent test procedure for mediators is grounded in performance-based measurements, rather than a more traditional exam. See, e.g., TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS (1995) (providing a framework for programs to select, train, and evaluate mediators).
221. For an example of a true performance based approach to bar admission, see Glen, supra note 201, at 1722–39.
222. For a short reflection on the multifarious joys of being a critic, see Barton, supra note 28, at 593–94 & nn.21–22.
and the other difficult and broad. The easy solution is for lawyer regulators to recognize that they are pursuing two goals—minimum compliance and ethical lawyering—and to refocus explicitly their efforts based around these two goals. The harder solution is to reunite the twin goals into the single goal of providing ethical, moral, and practical guidance to lawyers and adopt a new approach based more squarely on the model of the Canons.

A. The Easier Solution—Goal Clarity

The easy solution is that lawyer regulators should be much clearer in their thinking about what they are trying to accomplish and how. They now have two distinct goals. Rather than treating these goals as if they are identical or substantially overlapping, we should recognize these goals explicitly and pursue them jointly in light of their effect on each other.

As noted at the very outset of this Article, lawyer regulators have been fuzzy on almost every aspect of their professionalism project. There is little clarity about the crisis or problem they are trying to solve, and little understanding of the meaning of the goal of increased "professionalism." Obviously a clear understanding of the parameters of the problems and the goal are necessary before any real attempts at a solution can be attempted. A first step would be clarity on the underlying problems and a definition of the goal. A second step would be recognition that bar regulators are pursuing two distinct and sometimes contradictory goals.

Thus far these solutions seem relatively uncontroversial: who is against clarifying underlying problems and the goals for addressing those problems? As it turns out, lawyer regulators are probably consciously or subconsciously against it because the current fuzziness and conflation of goals serves to hide some rather unpleasant truths.

223. Other commentators have similarly pleaded "for a little more rigor in the use of concepts like professionalism and ethics." Wendel, supra note 11, at 1028; see also Rhode, supra note 12, at 459 ("A threshold question is whether we are all on the same page, or even in the same book, with respect to what we are trying to fix.").

224. See, e.g., Vincent, supra note 126, at 24 ("In spite of the attention devoted to the subject, however, professionalism has no uniformly accepted definition."); Rhode, supra note 8, at 315 (noting that at a recent ABA Conference on Teaching and Learning Professionalism, "[t]here was universal disagreement about what professionalism is").

225. The debates over the meaning of the word "professionalism" affect how ethical lawyers should be, not whether the goal is to raise the bar, i.e., lawyer regulators know they want to improve lawyer ethics, the question is whether they want a small improvement (try to be civil) or a large improvement (try to broadly conceive of the lawyer's role to include the interests of justice, the public, and the courts).
about lawyer regulation. For example, any clarity here requires recognizing the great disparity in the importance of the two goals. One of the reasons that the bar’s professionalism efforts have failed is that they are so patently less valued and less rigorously pursued than the minimalist project. Since the 1960s the great bulk of effort has gone into the minimalist project, redrafting the Rules, increasing knowledge of the Rules, offering assistance in complying with the Rules, and attempting to increase enforcement. By contrast the professionalism efforts appear languid, non-mandatory, and hamstrung: civility codes, accelerated public relations, and more professionalism conferences for the bar, law professors, and judges. In short, the bar has taken the minimalist project relatively seriously, while paying lip service to the broadly ethical goal.

Lawyer regulators have veiled their lack of effort on professionalism by presenting two goals as one. The only way to justify the claim that lawyer regulators care deeply about professionalism is to argue that both the minimalist and the broadly moral, as well as the minimalist nature of the Rules themselves, however, belies this claim and leads to the clash in goals described earlier.

Recognizing two distinct goals would also raise the uncomfortable question of why regulatory efforts are so heavily biased towards the minimalist project. As I have noted elsewhere, the surest proof that the regulation of lawyers is self-interested is to compare the efforts and treatment of a regulatory area that impinges lawyer self-interest with one that does not. Given that the Rules

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227. The MPRE, mandatory law school classes, and mandatory ethics CLE all serve this goal.

228. The work of ethics committees, ethics hotlines, and Lawyer Assistance Programs all fit this purpose.

229. See generally CLARK REPORT, supra note 152 (discussing problems with disciplinary enforcement and making recommendations); MCKAY REPORT, supra note 152 (discussing similar disciplinary enforcement problems).

230. See Center for Professional Responsibility, supra note 5.

231. See BLUEPRINT, supra note 4, at 302; JUSTICES ACTION PLAN, supra note 2, at 39-44.

232. See LEARNING PROFESSIONALISM, supra note 24, at 33-34 (suggesting “[s]ponsoring and participating in bench/bar conferences where the current issues of civility, etiquette, and professionalism can be openly discussed”).

233. See Barton, supra note 25, at 1208-09 (comparing the treatment of bar admissions (a natural area of lawyer self-interest for economic and anti-competitive reasons) with bar
may be used to discipline or disbar a lawyer, lawyer self-interest dictates that they be as clear, narrow, and easy-to-follow as possible. By contrast, professionalism is a much harder sell on self-interest grounds. Predictably, the regulatory efforts have flowed in the direction of the minimalist project.

In sum, a simple solution is to acknowledge the existence of two distinct goals and to recognize that they frequently conflict. Because of the inherent benefits of blurring these goals, however, the adoption of even this solution seems unlikely.

B. The Broader Solution—Redraft the Canons

This Article has argued that the clash of goals began with the adoption of the Code and the abandonment of the Canons. Prior to the Code, bar associations and lawyer regulators pursued a single goal—presenting moral, ethical, and practical guidance to lawyers. With the adoption of the Code and then the Rules the goal was divided in two. The simplest, but most difficult solution, is to reunite the two goals, and focus the efforts of the bar and lawyer regulators on providing the blend of the moral and the practical offered by the Canons and predecessor statements of legal ethics. Representatives from among lawyer regulators, bar associations, judges, law professors, and lawyers (i.e., the entire profession) could approach this new statement of lawyer principles as an opportunity to unite the profession and agree on common principles of lawyering, ethics, and morality. The profession would start from first principles, broadly stated, and work top-down towards the specific guidance for the discipline (a natural area of disinterest)).

234. It may well benefit all lawyers to have the profession be more ethical, but professionalism raises a classic collective action problem. Each individual lawyer might prefer higher ethical standards for all, but will likely resist the work involved in raising her own standards, let alone raising the standards of the profession at large. For the seminal work identifying and explicating collective action problems, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 43–52 (1968).

235. Of course, recognizing a problem alone may not really be a “solution” in the strictest sense; it is more of a precursor to more effective solutions. Nevertheless, since current “solutions” are based on a misunderstanding of the underlying problems and goals, and are actually undermining the entire project, a better understanding of our goals can at least fend off future damage. As for specific solutions following recognition of dual goals, one is to embrace a return to the Canons. Another might be to beef up and make mandatory more of the broadly ethical project. Lastly, bar regulators might abandon any attempt to address the broadly ethical.

236. A welcome addition to the input of the profession would be some meaningful role for the public at large. Deborah Rhode has long argued that the lack of public involvement in the drafting of lawyer regulations has increased their self-serving nature. See RHODE, INTERESTS, supra note 3, at 208.
practice of law. Many of these principles are already to be found in the abandoned text of the Canons and Code, and others could be added. It is also likely that much of the substance of the practical/minimum standards would also be retained, but in connection with their broader purposes rather than as free standing regulation.

Other commentators have similarly suggested a common law of legal ethics, or a rethinking of our approach to legal ethics based upon a broader conception of the meaning of lawyering. This solution is both more modest and more radical. It is modest because it does not make any specific claims about the content, methods, or ends of the profession's ethical deliberations. It is more radical because it suggests a rethinking of the entire project of legal ethics around a statement of shared ethical values, requiring an abandonment of our current regulatory focus on clarity and enforceability.

This broader solution explicitly rejoins the moral with the regulatory, and would require a reconsideration based explicitly on shared ethical ground, working from the general to the specific and from the ethical to the practical. The resulting standards would be easier to understand and more likely to be followed. The current Rules, by contrast, have worked backwards, continuously retreating from any moral baseline in favor of greater amoral specificity.

The most obvious objection to this suggestion is that there will be “no there there,” i.e., the modern legal profession has insufficient shared values to meet the task. In contrast to the ever-increasing

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237. One such norm might be the elimination of discrimination within the profession. The Minnesota Bar requires its members to attend mandatory “elimination of bias” CLEs to “educate attorneys to identify and eliminate from the legal profession and from the practice of law, biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.” See Kari M. Dahlin, Note, Actions Speak Louder than Thoughts: The Constitutionally Questionable Reach of the Minnesota CLE Elimination of Bias Requirement, 84 MINN. L. REV. 1725, 1725 (2000) (quoting the announcement of the Minnesota Supreme Court).


239. The big three in this area are Deborah Rhode, William Simon and David Luban, see RHODE, INTERESTS, supra note 3; SIMON, supra note 9; LUBAN, supra note 38, although others have joined the fray. See Samuel J. Levine, Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation, 37 IND. L. REV. 21, 46–61 (2003) (arguing that professional responsibility should require lawyers to perform some meaningful ethical deliberation); Strassberg, supra note 102, at 934 (applying Ronald Dworkin’s “interpretive integrity” thesis to legal ethics).

240. See Rhode, Opening Remarks, supra note 12, at 459 (arguing that “whatever consensus exists about professionalism at the symbolic level often fades when concrete practices or sanctions are at issue”); Stephen B. Burbank & Linda J. Silberman, Civil
diversity of our current profession, the drafters of the Canons were lawyers of remarkably similar backgrounds and practices. Nevertheless, I think this objection overstates the challenges involved in finding common ground and understates the profession's shared moral ground. While the legal profession has certainly diversified in every possible measure (including by gender, race, religion, areas of practice, and political philosophy), much of the moral content of the Canons and Code would certainly still garner support, and other shared norms might also be added.

Others may argue that the original Canons themselves were heavily based in self-serving economic protectionism, and even

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Procedure Reform in Comparative Context: The United States of America, 45 AM. J. COMP. L. 675, 691 (1997) ("There is reason to question whether there is any longer a 'legal profession,' if by that term one means a group of trained individuals pursuing a set of common goals and united, even if loosely, by shared values."); Robert L. Nelson & David M. Trubek, New Problems and New Paradigms in Studies of the Legal Profession, in LAWYERS' IDEALS/LAWYERS' PRACTICES 14 (David M. Trubek et al. eds., 1993) (positing that professionalism relies on "vague and general invocation of 'shared' values that really aren't shared"); Paul R. Tremblay, Shared Norms, Bad Lawyers, and the Values of Casuistry, 36 U.S.F. L. REV. 659, 681 (2002) (noting the "'moral diversity' of the legal profession and the absence of shared values among lawyers."). Cf. Ted Schneyer, Some Sympathy for the Hired Gun, 41 J. LEGAL EDUC. 11, 13 (1990) (suggesting that the "personal values" of most lawyers correspond with ordinary or common morality). Moreover, some of our shared values may be undesirable. See W. Bradley Wendel, Informal Methods of Enhancing the Accountability of Lawyers, 54 S.C. L. REV. 967, 981 (2003) (noting that some of the legal profession's "shared values might not be the values we should cultivate among lawyers").

241. See Carle, supra note 63, at 34-39 (listing extensive background information on the white, male, Anglo-Saxon, Protestant drafters of the Canons).

242. Professors Dwight Aarons and Chris Sagers raised serious objections to my analysis here, with Professor Aarons going so far as to suggest that our visions of human nature may be so diametrically opposed that we should just agree to disagree. While I agree that it is easier to create broad maxims based on a common religion and background, I simply disagree that a set of broad principles governing lawyer behavior would be impossible to draft. Consider, for example, the work of drafting new constitutions in South Africa or the European Union. See generally Gráinne de Búrca, The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?, 61 WASH. & LEE L. REV. 555 (2004) (describing the ongoing drafting process in the European Union); Samuel Issacharoff, Constitutionalizing Democracy in Fractured Societies, 82 TEX. L. REV. 1861, 1870-83 (2004) (describing the South African experience of constitution drafting). If those documents can be drafted against the historical and cultural backgrounds involved, a new set of Canons is not impossible.

243. This objection also verges so closely on the nihilistic as to undercut virtually any approach to lawyer regulation. If we cannot agree at all on the basic principles governing the practice of law, there is no hope that we can ever create any meaningful regulation of the profession because under this argument there is no profession to govern, just a group of people bound together by a government license and nothing else.
conscious or unconscious racism.\textsuperscript{244} Economic self-protection, however, is endemic to each of the ABA’s statements of legal ethics,\textsuperscript{245} and as long as lawyers dominate the drafting process, will remain so. The charge of institutional racism is more worrisome, but an inclusive drafting process would hopefully limit any economic or racial bias.

Others might object to the goal of seeking broader ethical advice for lawyers. Critics have referred to the Canons themselves as “empty exhortations”\textsuperscript{246} and “pious homilies.”\textsuperscript{247} I am generally underwhelmed by this objection. As a general rule, I would much prefer to read even empty platitudes—although I prefer the term “uplifting exhortation”—than the narrow hair-splitting and amoral “ethics” of the current Rules.

The real grist of the above objection, and the main reason the Canons were abandoned, is that a statement of general principles cannot be enforced as a minimum standard of legal behavior and will not offer guidance to practicing lawyers.\textsuperscript{248} In fact, critics of this Article will likely claim that the two goals identified—the minimalist and broadly ethical—were inherently at odds under the Canons and would again be under my proposed reformulation. It is unquestionably true that the application of the Canons to specific instances of misconduct brought the tension between enforcement and exhortation into stark focus. Nevertheless, given the current

\textsuperscript{244} See Barton, supra note 25, at 1194 (noting that the adoption of the Canons, among other regulatory acts, can be seen as an economic “battle between the ‘upper’ bar (white middle-class males) and the ‘lower,' entrepreneurial bar (immigrants and minorities that had to struggle for business”)'). See also AUERBACH, supra note 62, at 40–45 (decrying the Canons, and particularly their treatment of contingent fees, as economically and racially motivated); Alfred L. Brophy, Race Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons, 12 CORNELL J.L. & PUB. POL’Y 607, 607–22 (2003) (same).

\textsuperscript{245} See, e.g., Barton, supra note 26, at 432.


\textsuperscript{247} See Patterson, supra note 96, at 639; see also John F. Sutton, Jr., Re-evaluation of the Canons of Professional Ethics: A Reviser’s Viewpoint, 33 TENN. L. REV. 132 (1966) (asserting that many lawyers criticized the canons as pious, precatory statements concerning manners and virtue).

\textsuperscript{248} See, e.g., Peter A. Joy, Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers’ Conduct, 15 GEO. J. LEG. ETHICS 313, 325–26 & n. 51 (2002) (arguing that the “vague ABA Canons . . . left open so many questions that lawyers often needed greater guidance beyond the minimal language of the text”); Moore, Lawyer Ethics Codes Drafting, supra note 11, at 926 & n.21 (stating that the Canons were rejected because they “were incomplete, ambiguous, impractical for enforcement, insufficient as a guiding and teaching tool, and not up to the challenges of a more complex legal community and society”).
sorry state of disciplinary enforcement the "capacity for enforcement" objection is quite ironic. Since only the most serious misconduct currently results in discipline, we have little to lose enforcement-wise by moving to a less specific set of guidelines.249

It is also interesting to note that both the drafters of the Code and the Rules stated explicitly that their reformulations of the minimum required conduct did little to change the underlying substantive law.250 In other words, the categories of lawyer behavior that were barred or mandated under the Canons did not change significantly under the Code or the Rules. If the drafters were correct on the substantive law, this admission contradicts the idea that the Canons were unworkable or unenforceable. To the contrary, the Canons set the baselines that were later adopted and sharpened by both the Code and the Rules.251

A lack of guidance is a more substantial question, but not a showstopper. First, it is ironic for the same lawyers who expect the public at large to structure their behavior around the vague iterations of the negligence standard (among other amorphous legal standards) to complain of a lack of guidance in legal ethics.252 If there is any group of people in America who should be equipped to operate under a loose, common law set of guidelines it should be the legal

249. One of my readers asked me to delineate how I could “ensure” compliance or enforcement of a regulatory scheme based on the Canons. Currently only the most obvious and egregious misconduct results in disbarment or suspension. See supra note 130 and accompanying text. This sort of misconduct will be punished under virtually any regulatory scheme, so realistically speaking, a Canons based system would likely at last equal (if not surpass) the current levels of enforcement. Logistically speaking, I would expect that the mechanisms of enforcement (informal reputational effects, bar complaints, court disciplinary systems, and malpractice actions) would likely remain the same, only the substantive law applied would change.

However, selective enforcement or politically motivated punishment may prove more prevalent under a broader standard. Cf. WOLFRAM, supra note 73, at 86 (arguing that this was an occasional problem under the Canons); Morgan, supra note 37, at 419 & n.23 (citing example of politically motivated bar admission refusal). Yet, selective enforcement is certainly also a possibility under the Rules, and after In re Ruffalo, 390 U.S. 544 (1968), any accused would have at least the minimum due process and constitutional protections available in a quasi-criminal proceeding. Id. at 550–51.

250. See supra note 100 and accompanying text.

251. See Hazard, supra note 73, at 1246–49; Hodes, supra note 100, at 743–44; Gaetke, supra note 100, at 63–71.

profession.

Second, even after almost a century's effort at narrowing the standards that govern lawyer behavior, there are still regular complaints that the Rules are too vague, or not specifically suited to a certain type of practice. This may just be an eternal complaint—regardless of the level of specificity there will always be unseen situations and uncertain applications.

Third, when courts and lawyer regulators analyzed the original Canons they used the broad as an interpretive aid in determining the narrow, and a substantial common law of legal ethics grew up through court decisions and the work of ethics committees. These interpretations of the Canons themselves yielded the great bulk of the law underlying the Rules and the Code, it just appeared in a different form, with the specific mixed in with the general. While the Canons required more thought from lawyers, there is little evidence that lawyers were disciplined excessively under the Canon's more vague standards, or for unforeseen reasons. Further, with the application of the Due Process Clause to lawyer disciplinary proceedings in Ruffalo and companion cases there is a constitutional baseline protection against punishment without adequate notice or specificity.

Lastly, increasing uncertainty might actually help compliance.

253. See, e.g., WOLFRAM, supra note 73, at 87 (arguing that "if anything is clear, it is that many provisions of the lawyer codes are plainly imprecise."); Levine, supra note 93, at 538-45 (noting the existence of vague Rules and defending them).

254. See, e.g., Nancy B. Rapoport, Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics, 6 AM. BANKR. INST. L. REV. 45, 49 (1998) ("Bankruptcy needs its own ethics code."); Stanley Sporkin, The Need for Separate Codes of Professional Conduct for the Various Specialties, 7 GEO. J. LEGAL ETHICS 149, 149-50 (1993) (asserting that additional ethical codes are necessary for non-litigators); cf Neuner, supra note 112, at 2051 & n.47 (listing "specialty" codes adopted by narrower portions of the bar to address specialized interests).

255. See supra note 100 and accompanying text (noting that the substantive law governing lawyers changer very little for the Canons through the Code to the Rules).

256. Cf. DRINKER, supra note 53 (listing relatively limited interpretations of the Canons).


258. Professor Fred Zacharias has argued that lawyer regulations should be created along a specificity continuum, from broad to specific, depending on the goals of the regulation, and the importance of roles and introspection. See Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 239-49 (1993).
Broader, common sense standards of conduct would be easier to remember, and overlap more with commonly held morality, making compliance a matter of conscience as well as of legal sanction. The thought process involved in analyzing the standards of conduct would also differ greatly from the narrow boundary-seeking heuristic triggered by black letter Rules and would more closely parallel authentic ethical deliberation.  

In fact, the problem with narrow rules may be that they offer too much guidance. When faced with a fuzzy standard, a risk averse actor will err on the safe side and avoid even potentially lawful behavior. While in many contexts a broad standard may have an unwelcome chilling effect, in an area like legal ethics we may

259. See Feldman, supra note 43, at 945–46. Many lawyers would still naturally seek boundaries, but the applicable heuristic would be the analysis of common law rules, a synthesis of law, policy, and precedents, instead of the strictly linguistic and logical heuristic of boundary finding for black letter rules.

260. See Paul G. Mahoney, Chris W. Sanchirico, General and Specific Rules (2004) (arguing that more general rules may lessen the effects of agency capture) (draft on file with author).


262. Consider Fredrick Schauer’s persuasive argument against broad speech
actually be interested in chilling even ambiguously unethical behavior, rather than easing compliance right up against the line of illegal/unacceptable conduct. As Kathleen Sullivan has noted "bright-line rules allow the 'bad man' to engage in socially unproductive behavior right up to the line; on a pessimistic view of human nature, the chilling effect of standards can be a good thing."

In an area where judges and lawyers once expected the profession to avoid even "the appearance of impropriety," it may be better to have broad standards chill a whole class of possibly unethical conduct.


CONCLUSION

The seeds of this Article, and my overall interest in the field of legal ethics, were actually sewn the very first time I sat down to read the Rules of Professional Conduct. Fall semester of my third year in law school, I enrolled in Michigan’s two credit Legal Ethics class because it was required for graduation. When I bought my books for the semester, I dutifully bought a compendium of ethics rules and, on a whim, sat down and read the Rules of Professional Conduct. I was immediately struck by how little they said. The next day I attended the first day of class and was greeted by an Adjunct Professor who immediately bombarded the class with a series of war stories and challenged us to apply the applicable Rules to his stories from practice. Ten minutes into class I was consulting my class schedule and discovered that I could satisfy my ethics requirement by taking one of the law school’s clinics. Immediately after class I signed up for the Child Advocacy Clinic and never saw the Adjunct Professor again. Nevertheless, the fruitlessness of the entire enterprise stuck with me. The Rules were so banal and seemingly useless. The class was supposed to teach us something about ethics, but it would apparently be little more than sitting through a series of hypotheticals and mechanically applying the Rules of Professional Conduct.

My very first impressions of the two goals and the professionalism movement stuck with me, and I have now come to think that much of what the bar, legal academia, and lawyer regulators have to offer lawyers is deeply misguided and actually harmful. But, I have tried resolutely not to fall into full-metal cynicism because my initial reaction was also tinged with sadness for the loss of possibilities. There is so much that could be, and should be, done within the field of legal ethics. Finding the will, the spirit, and the integrity, as well as the clarity of vision to recognize what we are doing and why will be difficult (impossible?) but that does not mean that we should not try.

266. Note that this description perfectly matches the relative unimportance of the legal ethics curriculum in many law schools. See RHODE, INTERESTS, supra note 3, at 200–03.