

# Teaching Professional Ethics

HON. TOM C. CLARK\*

More than two years ago, on June 17, 1972, Washington police officers arrested five would-be burglars in the offices of the Democratic National Committee and, 782 days later, on August 8, 1974, the reverberations of that pitiful incident brought down the President of the United States. In the intervening months, each new revelation in the national scandal known as Watergate seemed to give the legal profession another mark of shame, for the majority of those who had participated in the cover-up had been trained as attorneys.

As a result, the news media concluded that these events constituted tangible proof of the sad state of ethics in our profession. Indeed, one editorial writer sardonically noted that the journalist's pet phrase, "so-and-so engineered the break-in", should be changed to read, "so-and-so lawyered the break-in", on the grounds that the engineering profession was being unjustly slandered, while the real culprit was passing unnoticed. Of course, our better side is lost to the public because, as Professor Jon Waltz of Northwestern Law School points out, "the worst among us paint our portrait, so that we are viewed as avaricious and egomaniacal, all style and no substance, seeking and wielding power without having the strength of character to wield it well."<sup>1</sup> Nevertheless, I believe that Watergate

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\* Associate Justice of the United States Supreme Court (Ret.)

1. Waltz, *Some Thoughts on the Legal Profession's Public Image*, 23 DE PAUL L. REV. 651, 657 (1974).

represents more than behavioral aberration among a few misfits; it is instead a direct product of what the late Chief Justice Earl Warren called "the tendency of the profession to develop as a craft rather than as an instrument of justice."<sup>2</sup>

At the recent American Bar Association convention in Honolulu, Senator Sam Ervin of North Carolina, whose homilies about our constitutional form of government made him a nationally respected figure during the televised Watergate committee hearings, addressed a prayer breakfast for the assembled attorneys. Warning them that law alone will not suffice to prevent future Watergates, he emphasized that the only antidote for such abuses lies in the "intellectual and moral integrity, which is the priceless ingredient in good character."<sup>3</sup> If there is any single lesson that must be learned from the agony of the past months, it is precisely this message.

No matter how explicit we make our criminal laws relating to breaches of the public trust and no matter how lucid we make our constitutional provisions safeguarding our civil liberties, we can give no meaning to our rules unless those who administer them have integrity. To illustrate this same point, the late Chief Justice used to quote from the Constitution of the Union of Soviet Socialist Republics. The Russian Constitution of 1936, as amended in 1965, contains the following astonishingly libertarian provisions:

Article 125. In conformity with the interests of the working people, and in order to strengthen the Socialist system, the citizens of the U.S.S.R. are guaranteed by law: (a) freedom of speech; (b) freedom of the press; (c) freedom of assembly including the holding of mass meetings; (d) freedom of street expressions and demonstrations.

Article 124. In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens.

Article 127. Citizens of the U.S.S.R. are guaranteed inviolability of the person. No person shall be placed under arrest except by decision of a court of law or with the sanction of a procurator.

Article 122. Women in the U.S.S.R. are accorded all rights on an equal footing with men in all spheres of economic, government, cultural, political and other social activity.<sup>4</sup>

Despite these high-sounding phrases, unfortunately, it is indisputable that civil liberties are little more than "paper rights" in the So-

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2. Warren, *Law, Lawyers and Ethics: A Challenge to the Profession*, 23 DE PAUL L. REV. 633, 635 (1974).

3. Speech delivered at the American Bar Association Prayer Breakfast, Honolulu, Hawaii, August 16, 1974.

4. 3 A. PEASLEE, *CONSTITUTIONS OF NATIONS* 1005 (3d ed. 1968).

viet Union. There exists a difference between individual rights in that country and in ours, Chief Justice Warren would say, "because our people, remembering the lessons of history, have enshrined the Bill of Rights in their hearts as well as in our Constitution."<sup>5</sup> Many Americans today, however, seriously question whether the legal profession remains dedicated to those fundamental ethical and political principles.

Traditionally, the organized bar has prided itself upon being a profession, based upon the well-accepted view that the primacy of service over profit is the criterion which distinguishes a profession from a business.<sup>6</sup> Now, though, strong voices have begun to challenge the bar's complacent view of itself. For example, in a recent speech to a joint luncheon of the American Judicature Society and the National Conference of Bar Presidents, Senator John V. Tunney of California criticized what he perceived as the bar's over-emphasis on pecuniary return and declared that "the profession is kidding itself if it views Watergate as the flaw in an otherwise heroic tapestry of public service."<sup>7</sup>

In scholarly articles as well as in the popular press, lawyers are being condemned as valueless technicians who are more concerned with the tactical than with the ethical, and the blame for this general erosion in integrity is being attributed to the failure of the profession to discipline itself. Most of that criticism centers around enforcement of our canons of ethics—the tools by which the bar polices itself and the goals by which we judge ourselves. It is charged that our Code of Professional Responsibility does not in fact protect either the public or the recipients of professional services, but rather safeguards only the interests of an entrenched segment of the profession.<sup>8</sup> Many would agree with Professor Waltz's comment that: "By regulating ourselves and brooking no lay interference in the process, we too often avoid disciplining even the most venal and inept among us."<sup>9</sup>

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5. Warren, *supra* note 2, at 639.

6. See J. H. Cohen, *LAW: BUSINESS OR PROFESSION* 331 (rev. ed. 1924); Weckstein, *Training for Professionalism*, 4 *CONN. L. REV.* 409, 421 (1971).

7. Speech delivered to a joint luncheon of the American Judicature Society and the National Conference of Bar Presidents, Honolulu, Hawaii, August 13, 1974.

8. Weckstein, *supra* note 6, at 416.

9. Waltz, *supra* note 1, at 653.

There is no doubt in my mind that the present state of our disciplinary machinery is deplorable and that we must perfect the professional system of disciplining and weeding out judges and lawyers who are inept, lazy, corrupt or dishonest. Happily, the organized bar has finally begun to move in this direction, but this is an effort which has a crucial prerequisite, the same prerequisite that Senator Ervin alluded to in his Honolulu speech: integrity. Unless the bar is uniformly imbued with that spirit of honesty and decency and unless it is inspired to insist upon the exercise of the highest ideals in the day-to-day practice of law, then no disciplinary system can be effective and no code of professional conduct will be anything more than a hypocritical farce.

#### THE RESPONSIBILITY OF THE LAW SCHOOLS

How can such an ethical renaissance take place? That, to be sure, is the question and to my mind there is but one possible answer. It must begin in the law schools of this country and spread from there—through continuing legal education programs and through recent graduates—across the land. But to be successful, law schools must consciously undertake the one task that they have universally rejected: instilling normative values in their students.

Seemingly without exception, academicians have emphasized the impossibility of “teaching” integrity. Dean Donald T. Weckstein of the University of San Diego Law School, an influential voice on the subject of legal ethics, for example, has expressed the opinion that “moralizing about basic honesty and decency is probably futile at best and counter-productive at worst.”<sup>10</sup> Dr. Jerome Carlin, whose 1966 survey of the New York City bar entitled *Lawyers’ Ethics* is a major contribution to the subject, argues that law schools’ efforts to inculcate appropriate values in law students are doomed to failure “because it assumes that professional norms and values can be ‘internalized’ during law school, and fruitless also because it assumes that ethical conduct is determined mainly by the strength of the lawyer’s moral or ethical commitments.”<sup>11</sup> More philosophically, Professor Bob Mathews of the University of Texas has argued that law schools have a positive duty to *avoid* teaching basic principles:

The learning process in a free country must abhor the coercion of values, of their insinuation without an understanding espousal. We must devote ourselves to discovering a means of training in

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10. Weckstein, *supra* note 6, at 424.

11. Carlin, *What Law Schools Can Do About Professional Responsibility*, 4 *CONN. L. REV.* 459 (1971).

the capacity to perceive the presence of an ethical issue, to appreciate the values at stake and the considerations which must govern a choice between them. We must hope that the choice will then be wise, but we must protect the freedom to make a choice we deem unsound, even the freedom to reject the very values we treasure most.<sup>12</sup>

Yet however difficult it may be for academic institutions to come to grips with the most basic sorts of human values such as honesty and a sense of fairness, it is precisely these basic principles which were so lacking in Watergate and which are so sorely needed in the world. Our law schools, it seems to me, must shoulder the burden of "teaching" honesty because there is simply no one else to do the job. The sad fact of the matter is that integrity is the sort of virtue that once was more or less reliably developed through the joint socializing influences of the church, the family, schools, and peer groups. For a number of reasons, however, the first two contributors to this process have drastically diminished in importance in this country, and no other force has arisen to take their place. The burden, therefore, has come to rest on our law schools, and it is one which they must shoulder alone and shoulder well, for the profession's other tools cannot perform the task.

Screening procedures of bar admissions committees probably can never identify and sift out the potential malefactors in the profession, and the ill-fated suggestion of one ABA Committee in 1973 that law students be screened for possibly dangerous character traits caused such a sharp outcry that it was promptly dropped. As for disciplinary enforcement of our ethical code against members of the bar who violate these standards, it is certainly important but, like punishment in a criminal justice system, it is no more than the handmaiden of pre-existing values, incapable on its own of molding conduct and instilling those values. So, as I noted earlier, that leaves it up to the law schools. Unfortunately, they have only just begun to recognize their responsibility to do something about it, and, as one law school dean is reputed to have said, changing a curriculum is more difficult than moving a graveyard.

Perhaps, though, we shouldn't be too critical of law schools, since, after all, they are fairly recent in the legal world.

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12. Quoted in Weckstein, *Boulder II: Why and How*, 41 U. COLO. L. REV. 304, 312 (1969).

My grandfather, father, and older brother, for example, each received their legal education in a law office. During the days of my grandfather, there was some regulation of apprenticeship, a couple of proprietary law schools, and an introductory law course or two in a few universities, but the buffeting that Andrew Jackson gave the legal profession retarded institutional training until 1858 when Columbia's School of Jurisprudence was organized by Theodore Dwight. It was not until 1870 that Christopher Columbus Langdell introduced the case method, and that potent format had still not filtered down to "ole Miss" by the time my father graduated there in the classics in 1881. Since he had no funds to attend Harvard where a three-year law program had barely begun, he went to Lebanon Law School in Tennessee for a one-year course and then went to Texas and was admitted by the judges. By 1916, when my brother was admitted in Texas on court examination without formal instruction, some 75 full-time day law schools and 64 part-time—mostly night—law schools had come into existence. I was lucky enough to attend one of those—the University of Texas Law School—and after graduation was admitted to practice without examination. In those days, legal education was a pretty bleak affair. The law school had no law review, no moot court, and no clinical programs. The students had no instruction in trial tactics and only a smattering in practice and procedure, consisting of a course offered by Senator John Cofer, formerly a State Senator, who prepared and circulated to the students in the course a mimeographed outline of his offering. As for ethics, Dean John C. Townes gave a short lecture course based upon a booklet on the subject which he had prepared and published. During their studies, none of the students had ever been in a courtroom, and, on graduation, the public was our "guinea pig".

To be autobiographical for a moment, times were hard, and law business was scarce when I graduated in 1922. Ethics lessons were taught in the courtroom and not in the classroom. Top students, of whom I was not one, were being offered positions and taking them at \$50 a month. Unable to find a place for myself, I returned to Dallas by force of necessity and joined the law firm of my father and brother. Theirs was a "hand to mouth" sort of practice and I took what I could get, handling collections for retail merchants, which was neither lucrative nor satisfying. At my first opportunity, I joined the state district attorney's office, handling tax collections and representing the Commissioner's court (the fiscal managers of Dallas County) as civil district attorney. My trial experience up to that time had been limited to an occasional appearance in the justice court, a sort of small claims court for collections.

My new job, though, required almost daily appearances in courts of general civil jurisdiction, and, at first, I suffered a "buck fever" so disquieting that it initially brought on a nausea. There was, however, no one else in my office to appear, so, being forced into it, I gradually wore out this mortification and appeared, but I must confess that, some twenty-five years later, upon beginning an argument before the United States Supreme Court, I still experienced a touch of "buck fever", and frankly, in the interim had had a similar experience in many U. S. district courts across the land.

Undoubtedly, if I had been exposed to courtroom appearances while at the law school, this problem would not have plagued me over the years. Indeed, in relating the story of my initial terror to my father and brother, I learned that neither had ever experienced it in their court appearances. The reason was simple: each of them had grown up in the courtroom, and I had not done so. But I was, so to speak, the "wave of the future". In my student days, only a half dozen states required law school attendance for bar admission; however, by 1940 a majority of the states required law school attendance and all but eight required two years of college as well. Today few states even permit admissions to the bar by apprenticeship; rather, most require an academic degree and three years of law school as well.

In fifty years, we have gone from a profession trained largely through apprenticeship in offices and courts to one almost entirely trained in schools. The result is that new members of the bar lack any experience either in courtroom work or in exercising their sense of professional responsibility, which I look upon as indispensable to the true and faithful practitioner. The over-concentration of law schools on the case method affords students neither and has, therefore, come increasingly under attack. Some say that the case method should be dropped after the first year; others say that lectures should be re-introduced with class discussion replacing the Socratic method; and nearly everyone agrees that the third year must be rescued from the doldrums. Promisingly, the whole atmosphere of the law schools has changed. There were some abortive attempts in the fifties and early sixties to integrate law and social policy, but it was not until more socially conscious students gained admission to the law schools and O.E.O.'s Legal Services Program got underway that the law school became "the place where the action is." As Professor Robert Stevens of Yale points out:

"Law students were no longer silent and even more obviously were not coming to law school to be scholars."<sup>13</sup>

By 1968, even the staid Association of American Law Schools recognized that fundamental changes soon had to be made, that law students and some faculty were in revolt, and that the educational process was too rigid, narrow, and drawn out. Much of the credit for promoting this advanced thinking must go to the Council on Legal Education for Professional Responsibility (CLEPR) and its predecessors, the National Council on Legal Clinics (NCLC) and the Council on Education in Professional Responsibility (COEPR), each of which made numerous grants to law schools for the organization of clinical programs. Law Schools were thus induced to give academic credit for clinical work, and all but two states now have been persuaded to establish practice rules allowing students to appear in court under supervision. CLEPR and its predecessors are to be both heartily thanked and congratulated for spearheading this effort.

However, it must be pointed out that the law schools are still dragging their feet on student clinics. They say that clinics take up too much time of the student, require too much supervision by the faculty, and are too costly. The truth about the average program is that too few students are allowed in it; too few faculty members have the know-how or willingness to supervise it; and too little money is allocated to it. I believe that if the law schools had the will to organize effective clinics, the ways to do it could easily be found and the money for it readily secured.

I have dwelled on the subject of effective student clinics in this article on teaching professional responsibility because I believe that they go hand in hand. Student practice clinics can furnish students a meaningful experience in exercising their sense of professional responsibility and can give to a more formal course on legal ethics a content and efficacy not otherwise available. And this is vital, for a legal ethics course is worthless if it doesn't deal with the subject in a way that students can understand and identify with. In this regard, law schools, it seems, have always been afflicted with an inadequate approach to legal ethics. Professor Costigan, who prepared one of the earliest casebooks in the field in 1917, has said:

A thoughtful observer has placed a share of the blame for the ignorance of the ethical aspects of practice in the law schools themselves . . . .

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13. R. Stevens, *Legal Education: Historical Perspectives*, Clinical Education for the Law Student, working papers prepared for CLEPR Conference, June 6, 1973, at 43, 53-4.



. . . Lapses from professional propriety are being more and more reproved, and it remains for the law schools to do their part in the prevention of such lapses by giving adequate instruction in legal ethics.<sup>14</sup>

More recently, in 1973, Professor David B. Goshien charged:

The student's introduction to the Code of Professional Responsibility is at best perfunctory, with his understanding of its application to fact situations in the practice of law probably non-existent. This sorry result may be exemplified by the young attorney who graduated from a top flight law school which purported to employ the pervasive method of communicating ethics. After some years of practice he accepted an offer to begin teaching. In his first year of instruction he happened to prepare a course in ethics and professional responsibility; only at that time did he discover that the 'selling' of his practice to another attorney violated the then Canons of Professional Ethics. . . .<sup>15</sup>

The problem in the law schools is well highlighted by the 1968 Symposium on Education in the Professional Responsibility of the Lawyer, conducted by the AALS Committee on Education for Professional Responsibility, known as Boulder II.<sup>16</sup> From the record of that meeting we can see illustrated the old jest about law school professors—put ten in a room and you'll produce eleven opinions. At Boulder II, some allowed as how it was unlikely that commitment to professional norms and values can be learned in the course of professional training; others asserted ethics is not the responsibility of the law schools; still others assured their audiences that it is impossible to interest the lawyers in ethical rules. Some pointed out that the lawyer in practice often does not realize that an ethical question is present while the more cynical suggested that there is no possible resolution for most ethical questions anyway. Much time was consumed by the battle over whether the regular curricula should be "pervaded" by reference to professional ethics problems or, on the other hand, whether a specific, separate course must be utilized. At the same time, the necessity for law schools to address themselves to public policy matters and local social concerns floated in and out of the discussions. Sadly, Boulder II illustrates the tendency of academics to raise all possible problems and

14. G. Costigan, *Foreward to Cases on the Legal Profession and Its Ethics* at VII, VIII (2d ed. 1924).

15. Goshien, *Education in Professional Responsibility*, 21 CLEV. ST. L. REV. No. 2, at 79 (1972).

16. The papers in this symposium are reprinted at 41 U. COLO. L. REV. 303 (1969).

to resolve none of them, which is reminiscent of Robert Frost's words:

Oh, some as soon would throw it all  
As throw a part away  
And some will say all sorts of things  
But some mean what they say.<sup>17</sup>

Law schools have been stalling on making the hard decisions and mouthing little more than "platitudinous exhortations."<sup>18</sup>

What good is knowledge of the law when those who possess it are corruptible? Would it not be the better for the law schools to recognize as their highest duties, first, the development in every student of a firm commitment to the earnest, deliberate, and inexorably fair search for truth, and, second, but equally important, the application of law to the facts so found, equally in manner, fairly, and truthfully. To say that this cannot be done is an insult not only to our forbears and to ourselves but to our progeny. As early as the Apocrypha, we have been taught the lessons of the three wise men who debated what was the most sterling influence for good. The first wrote: wine. The second: the King. The third: women. But all wrote: Above all things truth beareth away the victory. And so it must be in the legal professions; yet the law schools have not sought to teach this simple lesson.<sup>19</sup>

#### RECOMMENDATIONS

It is appropriately said that fools rush in where angels fear to tread, and here I go, not rushing in but rather a "johnny come lately" to the subject of teaching legal ethics. Having studied the problems of professional responsibility and the means for its enforcement for some years, I modestly find myself to be an expert, so I will apply that expertise to the matter at hand. I propose the following steps:

First, we must focus the attention of the profession on ethical behavior and convince them of the necessity to adopt such stan-

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17. ROBERT FROST, *ENDS, IN THE CLEARING* (Holt, Reinhart and Winston).

18. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 14 (1934).

19. Professor Lester B. Snyder, of the University of Connecticut School of Law, in his article *Teaching Professional Responsibility in Tax Courses*, 41 U. COLO. L. REV. 336 (1969), said, for example:

Hopefully we are not talking about teaching students to be honest, or to walk upright, or to 'turn square corners.' Nothing would be gained in this day and age by pontifically and sanctimoniously reiterating the standards that *we think* were developed in the 1920's for county court practice by a malapportioned segment of the Bar. What we are talking about is whether there is any significant advantage to some sort of a marriage between the teaching of tax policy and the development of guidelines to the practical problems that arise in defining 'good tax practice.'

dards in their daily lives. This should be done through a combination of disciplinary proceedings and leadership. We must, of course, continue to do what we can to cleanse the bar of those not worthy of its membership, but we must also provide exhortation and instruction by the leaders of the bar to inspire acceptance of high ethical standards. For example, let us organize seminars on professional responsibility within the unified bars, with attendance compulsory. In jurisdictions not having a unified bar, the seminars could be sponsored by the Supreme Court of the state, the ultimate authority on such matters.

Second, let us have strict enforcement of the Code of Professional Responsibility, with no if's, and's, or wherefore's. The 1970 report of the ABA Special Committee on Evaluation of Disciplinary Enforcement, which I had the privilege of chairing, contains a host of recommendations on how to go about this task. The ABA has now entered into a new period of activity with respect to lawyer discipline with the creation of a Center for Professional Discipline, which will hopefully bring about some positive results.

Third, let us examine the present courses on professional responsibility offered by the law schools, debate the merits of what is being offered and buckle down long enough to produce a basic program of instruction; revise the offerings to meet any inadequacy that thus arises; and make professional responsibility a required course on the subject in every law school. I am pleased to note that the ABA House of Delegates at its 1974 annual meeting approved a resolution that requires instruction in the duties and responsibilities of the legal profession and encourages law schools to involve members of the bench and bar in such instruction. As far as I am concerned, the exact subject matter of such a course should be at the sound discretion of each school or professor but, above all, it would have to come to grips with the need to instill integrity in each and every student, and not just give a superficial familiarity with the Code, its annotations and amendments.

In addition, common sense dictates a more pervasive approach to ethical issues in every course offered in the law school. Moreover, weekly informal, evening seminars at which a panel of active practitioners could be questioned by students—like that used to great effect at the University of Florida<sup>20</sup>—should be set up. There,

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20. See Maloney, *The Legal Ethics Program at the University of Florida*, 41 U. COLO. L. REV. 420 (1969).

specific fact patterns which raise ethical issues would be discussed by the students and lawyers.

Finally, we must "beef-up" the clinical programs; make them compulsory; implement the teaching staff with practicing lawyers by court assignment if necessary; and enlist judges on a statewide basis and at all levels to head up clinical programs in their respective courts. In addition to the trial techniques taught in these clinics, there should be constant discussion and examination of the problems of professional responsibility as they arise.

### CONCLUSIONS

It is time that we stopped the sort of bickering about "modalities" of teaching such as that at Boulder II. We should stop arguing about which one method may be useful; rather we should use all of them, in the hope that one of them is useful. Some will say, as they do now, that such a detailed handling of the problems of professional responsibility is not the law schools' job, or it is too expensive, or it will absorb too much time from the rest of the curriculum. My answer is this: if this be true, we must still make the most of it. Let the third year be a combined clinical and professional responsibility year. In order to save the present courses offered in the three-year course—if that is thought necessary—then add 15 hours to each of the first two years' work.

There is only one thing about professional responsibility that I am adamant about: we must do something effective about it. The oratory should cease. We have been meeting and talking about it for over 50 years, but the truth is that we have done little to correct the ethical emptiness in our law schools. Congress is now exploring the necessity for regulating the profession. Several state legislatures have done this in the past, and, come January, more will do so. We must act quickly and definitively if we wish to retain the right of self-discipline. Three hundred and seventy five thousand lawyers have been smeared by the action of a handful. As a result the profession is now at its lowest ebb in our history. Are we going to continue to take this abuse or stand up and be counted for truth and fair dealing in the law? I vote for the latter and I hope that the law schools will do the same.