A MORAL APPRAISAL OF LEGAL EDUCATION: A PLEA FOR A RETURN TO FORGOTTEN TRUTHS

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What we do is what we are—for that I came.
What I do is me.
For that I came into the world!
Ray Bradbury, *Zen in the Art of Writing*[1]

I. INTRODUCTION

Critics of legal education abound.[2] Nevertheless, because

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1 RAY BRADBURY, ZEN IN THE ART OF WRITING 145 (1990).

2 The Journal of Legal Education and law reviews regularly include critiques of legal education. It would be impossible to list all the critiques and other sources that I have drawn upon in formulating my thoughts on law and legal education. To my colleagues at Seton Hall Law School, I owe more than I can say. I want to acknowledge and give special thanks to Reverend Msgr. Harold P. Darcy and Professors Robert Diab, Thomas Holton, Gene Gressman, Michael Zimmer, William Garland and James Boskey for their suggestions and encouragement.

The following is a far from inclusive list of some of the books and articles that stand out in my mind as having affected my thinking about law and legal education over the years: THE HOLY BIBLE (New Jerusalem (1983)); GREAT DIALOGUES OF PLATO (W.H.D. Rouse trans., 1963); ARISTOTLE, NICOMACHEAN ETHICS (M. Ostwald trans., 1st ed., 1987); JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); A.P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY (2d ed. 1970); BERNARD J. LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING (2d ed. 1983); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987); RICHARD A. MCCORMICK AND PAUL RAMSEY, DOING EVIL TO ACHIEVE GOOD: MORAL CHOICE IN CONFLICT SITUATIONS (1978); MARY WARNOCK, ETHICS SINCE 1900 (1966); JEROLD S. AUERBACH, UNEQUAL JUSTICE (1976); HADLEY ARKES, FIRST THINGS (1986); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); KARL N. LLEWELLYN, THE BRAMBLE BUSH (1960); M.P. GOLDING, THE NATURE OF LAW (1966); Robert P. George, *Recent Criticisms of Natural Law Theory*, 55 U. CHI. L. REV. 1371 (1988); ROBERT W. MCELROY, THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY (1989); *Natural Law Symposium*, 38 CLEV. ST. L. REV. 1 (1990); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S (1983); HUSTON SMITH, BEYOND THE POST-MODERN MIND (1989); ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109 (1989); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978); Owen M. Fiss, *The Death of Law*, 72 CORNELL L. REV. 1 (1986); Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Paul G. Haskell, *Teaching Moral Analysis in Law*

law teaching is what I do and is perhaps the reason I came into this world, I feel compelled to offer this appraisal. I am about to complete my third sabbatical leave during twenty-two years as a law professor. The policy of sabbatical leaves is just one of many things that is very right about legal education. A sabbatical provides an opportunity to re-evaluate one's personal and professional life and to open one's mind to new thoughts and new challenges.

On my first sabbatical I studied legal philosophy, on my second I studied moral philosophy and on my current sabbatical I am studying holy scripture. Had I to live my life over again I would reverse the process and begin with holy scripture. Reflecting upon my experience in legal education over the years, I have come to a similar conclusion. I would teach the perspective courses traditionally part of the third year curriculum, especially jurisprudence, legal history and professional responsibility, in the first year. I would also encourage students to draw upon

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School, 66 NOTRE DAME L. REV. 1 (1991); Symposium, *The Moral Lawyer*, 64 NOTRE DAME L. REV. (1989); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); *Symposium on Kantian Legal Theory*, 87 COLUM. L. REV. 1 (1987); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WISC. L. REV. 29 (1978); THE GOOD LAWYER (David Luban ed. 1984); DAVID LUBAN, LAWYERS AND JUSTICE (1988); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND BEING A LAWYER (1981); Michael J. Swygert, *Striving to Make Great Lawyers-Citizenship and Moral Responsibility: A Jurisprudence For Law Teaching*, 30 B.C. L. REV. 803 (1989); GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978); DAVID GRANFIELD, THE JURISPRUDENCE OF SUBJECTIVITY (1988); WILLIAM J. FRANKEENA, INTRODUCTION TO ETHICS (1973); David A.J. Richards, *Moral Theory and Professional Development*, 31 J. LEGAL ED. 359 (1981); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RONALD DWORKIN, LAW AS EMPIRE (1986); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); JOHN RAWLS, A THEORY OF JUSTICE, JUSTICE AS FAIRNESS (1971); W.D. LAMONT, LAW AND THE MORAL ORDER (1981); JAMES W. HURST, THE GROWTH OF AMERICAN LAW (1950); ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD (1966); Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); HAROLD J. BERMAN, LAW AND REVOLUTION (1983); HAROLD J. BERMAN, THE INTERACTION BETWEEN LAW AND RELIGION (1974); MONROE H. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM (1975); RICHARD A. WASSERSTROM, MORALITY AND THE LAW (1971); RHEINHOLD NIEBURHR, MORAL MAN AND IMMORAL SOCIETY (1960); ROBERT S. SUMMERS, LON F. FULLER (1984); EDUCATION AND VALUES (Douglas Sloan ed. 1979); RAND JACK & DANA C. JACK, MORAL VISIONS AND PROFESSIONAL DECISIONS (1989); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); J.C. SMITH & DAVID N. WEISSTUB, THE WESTERN IDEA OF LAW (1983); THOMAS HIGGINS, BASIC ETHICS (1983); MICHAEL J. PERRY, MORAL REASONING AND TRUTH (1976); BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM (1976); JACQUES ELLUL, THE THEOLOGICAL FOUNDATIONS OF LAW (1960); T.Z. LAVINE, FROM SOCRATES TO SARTRE: THE PHILOSOPHIC QUEST (1984); THE ENCYCLOPEDIA OF PHILOSOPHY (1972).

their cultural and religious heritage as a source of knowledge and inspiration. Most importantly, I would emphasize the wisdom of putting first things first, mindful of the biblical exhortation to "seek first the kingdom of God and his Justice and all these things will be given you besides."[3]

The tradition of pluralism and the doctrine of separation of church and state have contributed to a secular mood at American law schools that is indifferent to, and perhaps, at times may even appear hostile toward religion and religious values. Law schools at church sponsored universities, especially those at Catholic universities, would seem to have a special obligation to insure that students are exposed to the tradition of natural law and the social teachings of the Church.[4] Indeed, the reason for the existence of many religious sponsored law schools is the belief that for the good of human society it is necessary to foster the values of community, justice, liberty, equality, tolerance and reason. These values and other even more basic values, such as life, knowledge, friendship, play, art and religion are obviously not the exclusive concern of religion. They have been reaffirmed throughout the history of Western civilization and are at the core of the Western idea of law. They are the foundation of our American democracy.

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[3] *Matthew* 6:33.

[4] The Code of Canon law of the Roman Catholic Church provides for the right to a Christian education. Catholic law schools have a corollary duty, at least to those students who are Catholic and whose decision to enroll was, in part, based on the desire for a Catholic or Christian education, to explore the concepts of natural law and Christian ethics. *See* CODE OF CANON LAW Canons 217, 793-95 (1983); *see also* Canons 807-14 (generally on Catholic Universities and Other Institutes of Higher Studies); LADISLAS ORSY, THE CHURCH, LEARNING AND TEACHING (1987) (describing six models of a Catholic University with different relations to Canon Law and a discussion of the identity of the 235 Catholic Colleges and Universities in the United States which are chartered by the state, governed by independent self-perpetuating boards of trustees and independent of ecclesiastical jurisdiction); Steven M. Barkan, *Jesuit Legal Education: Focusing the Vision*, 74 MARQ. L. REV. 99 (1990) (discussing the history of Jesuit law schools).

Exposure to the widely different conceptions of law and morals in the spirit of free inquiry would serve the interest of all the students regardless of religious background or affiliation. The natural law philosopher John Courtney Murray exhorted religious communities to encourage talented religious men and women to enter those professions such as law, teaching, medicine and journalism which have the power to mold public opinion. Murray hoped to heal what he saw as the apostasy of the nation's intellectuals by producing intellectuals who would advance the order of truth by recreating within the academic milieu an understanding of and an appreciation for the insights of natural law. *See* ROBERT L. MCELROY, THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTIONS OF JOHN COURTNEY MURRAY 75 (1989).

Although what I have to say may appear to some to be a harsh general indictment of legal education and law professors, that is not my intent. There is much that is good about legal education and many have been quick to point that out. My theme in this essay is that justice and the relationship between justice and law must be the primary focus of legal education. The point I wish to make is simply that the fault in legal education lies in its failure to put the proper emphasis upon the moral foundations of the law, the relationship between law and morals and the teaching of the methods of moral analysis essential for moral discourse and moral appraisal.

Few lawyers are prone to engage in serious moral discourse. This is not to say that lawyers are not concerned about morality or that they do not draw upon their individual notions of right and wrong in their personal and professional lives. It is simply to say that lawyers, in general, have neither the knowledge and training nor the inclination to evaluate critically their own or commonly accepted notions of morality, the morality of law or the morality of what lawyers do.

Over the course of twenty-two years of law teaching, I have made it a habit to conduct my own very unofficial survey of lawyers and law professors I have met concerning the subject of justice. I have asked them to tell me to what extent, if any, their law school experience dealt with the subject of justice or the relationship between law and morality. I also asked if at any point in their legal education any of their professors had ever tried to elicit their understanding of the concept of justice or to determine to what extent they had a reasonably clear and consistent notion of justice. With few exceptions, the answers I received to my questions indicated that little, if any, attention was given to the concept of justice or the relationship between law and morality. Rarely had anyone recollected in their law school experience any exploration of different conceptions of justice or any need to articulate an understanding of the concept of justice beyond vague notions of fairness, protection of individual rights, and the utilitarian calculus of the greatest good for the greatest number. A surprising number of lawyers I have spoken with over the years have rather cynically rejected the very idea of justice as nothing more than a matter of personal opinion about an unattainable ideal.

I was recently called upon to represent a lawyer and part time municipal judge in disciplinary proceedings in which he was

charged with violating the conflict of interest provisions of the Code of Judicial Conduct. During a lunch break during our preparation for the disciplinary hearing, he commented about the division among his law firm partners about whether to let go a bright young associate who constantly raised moral objections to the manner in which the firm represented certain clients and who generally questioned litigation tactics. He explained that among the partners there were those who admired the young man's moral rectitude because it reminded them of their early days in law practice. There were others who simply lacked the patience and did not want to take the time to deal with the young man's probing questions. Still others feared that he was offending clients by the moral judgments he was prone to make about their conduct and thereby risked the loss of their business. I suggested to my client that it is precisely that kind of ethical or moral sensitivity that he and his law partners should look for in those they hire and that it was their job to teach prudence in its exercise.

When we returned to work to determine how someone in my client's firm had violated conflict of interest standards by filing a tax appeal against the township where he presided, our investigation discovered that upon a partner's instructions a young associate had filed the tax appeal despite his belief that it was wrong to do so. My client turned and looked at me, as if to say, I wish this associate had the ethical sensitivity and courage to resist blindly following a partner's instruction that he believed was wrong.

I begin with what I consider to be the basic failing of law schools and the reasons why law schools should focus on the relationship between law and morals. Next, I set forth a synopsis of moral and legal theory, the understanding of which is essential for a sound legal education. I then show how the teaching of the traditional first year courses requires consideration of the nexus between law and justice. I go on to explore how different perspectives of the nature and function of law ultimately impact upon the performance of lawyers and the operation of the legal system. Finally, I offer a not-so-radical proposal for reform.

II. LAW SCHOOLS SHOULD FOCUS ON THE RELATIONSHIP BETWEEN LAW AND MORALS

The feminist scholar Professor Catharine MacKinnon has said that law schools urge students to forget their experience and

become bright maze rats.[5] The conservative jurist and scholar Richard Posner bemoans the failure of law schools to teach students to deal with facts and other disciplines besides law.[6] The Critical Legal Studies movement faults legal education for its perpetuation of the political status quo and preservation of the existing power hierarchy.[7] Neo-Kantians oppose what they perceive as the reigning orthodoxy of law schools which emphasizes a utilitarian approach to legal decision making and insists that the promotion of governmental interests is the only sound basis for any law.[8]

In a provocative article entitled *The Ordinary Religion of the Law School Classroom*,[9] Professor Roger Cramton, former Dean of Cornell Law School, examined the unarticulated values and assumptions of legal education. He found "a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism and a faith in reason and democratic processes tending toward idolatry."[10] If these observations are correct, and I believe they are, law schools need to make more than cosmetic curriculum changes to fulfill their social responsibility as the moral and intellectual gate keepers of the legal profession.

Law is value-laden and purposeful. It is morally fallible. It does not exist as simply data to be described, analyzed and explained without regard for the quality of justice or morality which it reflects or fails to reflect. If law schools are to serve the ends of justice, it should be obvious that the concept of justice must be included as an important part of the substantive content of the curriculum. Of course, simply teaching about alternative conceptions of law and justice is no guarantee that students will acquire either the ability to engage in moral discourse or the inclination to pursue justice.

Law schools are responding in new and more creative ways

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5 Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, October 6, 1991, § v.140 THE NEW YORK TIMES MAGAZINE 28, col. 1 (Magazine) at 53.

6 RICHARD A. POSNER, THE PROBLEMS IN JURISPRUDENCE 100 (1990).

7 *See* Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1, 2 (1983-84); Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982).

8 George Fletcher, *Why Kant*, 87 COLUM. L. REV. 421, 421-22 (1987).

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

10 *Id.* at 262.

to the concerns about declining professionalism and the amorality, if not the immorality, of lawyers. For the most part, however, the response is too little, too late in the law school experience, and for too few students. Required third-year courses in professional responsibility, clinical programs with very limited enrollment, more public law courses and interdisciplinary seminars, and exhortations to law professors that instruction in professional ethics should pervade the curriculum are insufficient if law schools are to prepare students for moral discourse and moral appraisal.

Legal positivism, which treats law as a system of rules and considers law as separate and distinct from morals, is the prevailing model of law study and law teaching. The law school curriculum deals almost exclusively with legal doctrine and ignores the normative principles that underlie legal doctrine.[11] There is an absence of any pervasive coverage of morality as related to law. Claims of moral obligation and obligations of citizenship are more often than not ignored by law professors who consider discussion of such claims outside the scope of their course and expertise. There are too few law teachers committed to emphasizing persistently the intertwining of legal obligations with moral obligations and the obligations of citizenship. Most seem to believe that discussion of moral obligations can be either omitted or left to elective jurisprudence courses and seminars.

Law schools emphasize training for advocacy. There is a climate of moral neutrality that pervades classroom discussions of the law as it is. Claims about what the law ought to be and a moral appraisal of existing law are given short shrift for various reasons. The apologists for the positivist model claim that there is not enough time to consider the moral justification of legal doctrine, that before students can consider what the law ought to be, they must first know what it is, and that if students are interested in justice and fairness they should study philosophy or theology, not law. Such attitudes fail to take account of a fundamental reality—that law is deeply rooted in the moral norms and the shared values of society. Although in our pluralistic society there is wide disagreement about whether accepted

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[11] Meuller & Rosett's *Contract Law and Its Application* (3rd ed. 1988) is an example of a casebook that begins with legal theory. In recent years, there have been more coursebooks that include materials on legal and moral theory. *See* DANIEL W. FESSLER & PIERRE R. LOISEAUX'S, CONTRACTS: MORALITY, ECONOMICS AND THE MARKETPLACE 19-26 (1982); THOMAS D. MORGAN AND RONALD D. ROTUNDA, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 11-19 (4th ed. 1988).

moral norms are derived from community expectations, universal and immutable principles, an unfolding of reason, divine revelation or utilitarian self interest, there is little disagreement that perceptions of moral obligations influence private, public and professional life.

Professor Thomas Shaffer, former Dean of Notre Dame Law School, aptly described the practice of law as moral discourse.[12] Ethical Consideration 7-8 of the 1969 ABA Code of Professional Responsibility[13] and Rule 2.1 of the 1983 ABA Model Rules of Professional Conduct[14] specifically permit a lawyer to raise moral and other non-legal factors when advising clients. The 1991 American Bar Association Task Force on Law Schools and the Profession included within in its Tentative Draft Statement of Fundamental Lawyering Skills and Professional Values the striving to promote justice, fairness and morality.[15] The traditional law school classroom, however, encourages students to be adversarial, argumentative and zealous. It fosters the view that lawyers are only the means through which clients accomplish their

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[12] Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979).

[13] THOMAS D. MORGAN AND RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 176 (1992).

[14] *Id.* at 56.

[15] The Task Force Report states:

> *2. Striving to Promote Justice, Fairness, and Morality*
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> As a member of a profession that bears "special responsibility[ies] for the quality of justice," a lawyer should be committed to the values of:
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> 2.1 Promoting Justice, Fairness, and Morality in One's Own *Daily Practice*, including:
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> (a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client;
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> (b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society;
>
> (c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;
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> 2.2 *Contributing to the Profession's Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them*;
>
> 2.3 *Contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.*

A.B.A. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUE 85 (Tentative Draft, June 6, 1991) (citations omitted).

ends—what is "right" is whatever works for a particular client or a particular case. There is a tendency to extol loyalty to client above all and to neglect the lawyer's responsibility to counsel the client about moral and other concerns.

Law schools may not be able to teach morality as such but they clearly have a moral obligation to teach students the vocabulary, the normative principles and the analytical skills needed to engage in moral discourse; to sensitize students to the moral dilemmas that they will face in the practice of law; and to encourage students to draw upon their spiritual, religious and cultural heritage, as well as professional standards, when making difficult choices. It is not enough to teach law students to think like lawyers, if that means only to manipulate legal doctrine so as to achieve what clients want regardless of moral or social implications. Law students have to learn to deal with the value conflicts that are an integral part of professional life. The process of professionalization requires an understanding of how one can incorporate professional values into one's scale of personal values while advancing just ends.

Discussions in court and amongst lawyers will commonly follow much the same course as would a straightforward debate between moral philosophers or theologians who knew nothing of that time and place. Although the law consists of rules and sanctions, the ultimate authority of law depends on its justice, or at least its ability to secure justice. Justice may need to be secured by force. The purpose of law, however, is not primarily to coerce or to punish, but rather it is to teach civic virtue—the correct path—and to achieve the common good by establishing the conditions for human flourishing and facilitating the coordination of diverse life plans of individuals and the groups of which they are a part.[16]

There are many examples of real and fictional lawyers who, when confronted with difficult choices, found ways to give expression to moral values in the performance of their professional roles. One of the most dramatic examples of a lawyer who remained true to his morality is that of Thomas More.[17] More

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16 The concept of the common good is central to the idea of natural law. It is not to be confused with the utilitarian principle of the greatest good for the greatest number. Rather it entails the conditions necessary for the full flourishing of all members of society. *See* JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 154-56 (1980); *see also* JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 47-89 (1947) (detailed discussion of the concept of common good).

17 ROBERT BOLT, A MAN FOR ALL SEASONS (1962).

maintained his fidelity to his vision of the truth and his commitment to his moral principles at the cost of his life. Refusing to succumb to the pressure of King Henry VIII, More did not grant approval to the King's divorce. Atticus Finch, the fictional lawyer in *To Kill a Mockingbird*,[18] showed the same moral courage, when in the face of his community's bigotry, he undertook the defense of a black man accused of raping a white woman. One need not look to historical or literary figures for examples of moral rectitude and courage. Indeed, many lawyers represent unpopular causes and clients. Those who seek to reconcile their personal morality with the morality of their professional roles are the rule and not the exception. I question, however, whether law schools sufficiently prepare students to face the value conflicts and moral dilemmas that are an inherent part of law practice.

Legal educators might ask whether, and to what extent, law schools are helping students address the following two questions: What are the criteria for a good law and a good legal system? Can a good person be a good lawyer? Obviously, to answer these questions it is necessary to define a good law, a good legal system, a good person and a good lawyer. It is equally obvious that the meaning of the word "good" must also be defined. The word good, like most words, is not univocal. Indeed, much of the confusion in legal education, and perhaps in education in general, can be traced to disagreement as to the meaning or definition of the word good and the different senses in which the word good is used.

Moral philosophers from antiquity to the present era have sought to define "the good" for human beings. Socrates posited that the "unexamined life is not worth living."[19] From this starting point of critical reflection on the self and the world, Socrates raised the fundamental questions of ethics: What is a good life? What should I do? How ought I to live? These questions are practical. For both Plato and Aristotle the good for human beings was related to a social context. From them we received two fundamental but distinctly different conceptions of how a human being acquires knowledge of the good. For Plato, knowledge of the good was only attainable by those trained in mathematics and other forms of abstract reasoning. The good was part of the world of ideas, an extra-mundane or transcendent reality, acces-

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[18] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

[19] PLATO'S APOLOGY, GREAT DIALOGUES OF PLATO 443 (W.H.D. Rouse trans. 1956).

sible only to the very few, philosopher kings, who would then govern and instruct the many in the path of civic virtue. Aristotle contended that the good is in this world and, as such, knowledge of the good is more readily knowable through reason. Natural law philosophy, or the tradition of reason as it is sometimes called, which is grounded on Aristotle's insights, distinguishes non-moral good from moral good and speculative or theoretical reason from practical reason. From Aristotle comes the notion that through speculative reason, roughly equated with scientific method, one can acquire knowledge of non-moral good. Through practical reason, with the use of syllogism or logical methods, one can acquire knowledge of moral good.

Drawing upon the insights of Plato and Aristotle, moral philosophers have provided alternative conceptions of the good for human beings from which different notions of a good person and a good life were derived. The epistemic starting point and premise of classical philosophers of the West is that through the ability to think or reason human beings have the capacity to acquire knowledge of moral values, the knowledge of right and wrong. With the advent of the modern era in the 19th century, following what Alasdair MacIntyre called the failure of the enlightenment project of justifying morality,[20] widely accepted conceptions of the good for human beings, and the view of a human being as a free, rational and social being, distinct from all other forms of being, were rejected. The emergence of philosophical and political liberalism, with its emphasis on human freedom or autonomy, led ultimately to the moral skepticism and moral relativism characteristic of modernity. Moral philosophy took what Bernard Williams called a linguistic turn.[21] The new skeptical philosophers defined the word good to mean simply that which one prefers, gives approval to, has a taste for, or likes.[22]

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[20] ALASDAIR MACINTYRE, AFTER VIRTUE 51 (1981).

[21] BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 12-31 (1985).

[22] *Id.* at 120-31; *see also* WILLIAM K. FRANKEENA, ETHICS 105-07 (2d ed. 1973); THOMAS HIGGINS, BASIC ETHICS 48-52 (1968). The recent emphasis on the linguistic nature of philosophical problems is in large measure due to the influence of Ludwig Wittgenstein, who sought to show that philosophical puzzlement is frequently due to confusions of language and that with complete clarity of language philosophical problems would disappear. *See* HENRY L. FINCH, WITTGENSTEIN THE EARLY PHILOSOPHY 240 (1971). A.J. Ayer was among the most influential linguistic philosophers who advanced the philosophy of emotivism which considers value statements as essentially emotional ejaculations. *See* A.J. AYER, LANGUAGE, TRUTH AND LOGIC (2d ed. 1946).

III. THE IMPORTANCE OF MORAL AND LEGAL THEORY

With the advent of the modern era,[23] Western moral philosophy turned away from what had been its focus, the objective grounds for a justifiable morality leading to a good or happy life. Legal philosophy, traditionally considered a branch of moral philosophy, also changed focus. The problem of definition is central to both moral and legal philosophy. Without satisfactory definitions of law and morality, or at least a clearer understanding of different moral and legal theories, it is difficult to begin to explore the nexus between the two disciplines. The absence of a common moral language impedes discussions about the grounds for standards of justice and the moral appraisal of laws and legal systems. A major source of the difficulty of dealing with the concepts of law and morality stems from the distinctly different meanings of common terminology used in moral and legal discourse, e.g., rights, duties, obligations, authority, justice, etc.[24] If the words common to moral and legal discourse are used in classroom dialogue without drawing attention to their different meanings, then it is inevitable that the nexus between law and morals will be obscured. Conversely, attempts to explain the distinctions between legal and moral rights and duties or between

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[23] There are a number of opinions about when the modern era began. HAROLD BERMAN, LAW AND REVOLUTION 14 (1983) (suggesting that the modern era began between the tenth and eleventh century with the rise of nation states). The early sixteenth century has been used by many historians, but the end of the eighteenth and beginning of the nineteenth century is the generally accepted view. *See* STIG STROMHOLM, A SHORT HISTORY OF LEGAL THINKING IN THE WEST 132, 213 (1985).

[24] Ronald Dworkin rejects the argument that unless lawyers and judges share factual criteria about the grounds of law there can be no significant thought or debate about what the law is. Dworkin calls this argument the semantic sting and suggests that it has caused great mischief in legal philosophy. He claims that those who hold a certain picture of what disagreement is like and when it is possible fall prey to this semantic sting:

> They think we can argue sensibly with one another, if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are. You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is.

RONALD DWORKIN, LAW'S EMPIRE 45 (1986).

Dworkin argues that disagreement in law is theoretical rather than empirical and that legal philosophers who think there must be common rules try to explain away the theoretical disagreement. He concludes that there is wide agreement on shared practices and traditions and that disputes arise over the best interpretation when there is disagreement about what a particular practice or tradition requires in concrete circumstances. *Id.* at 45-86.

legal justice and objective standards of justice would seem to be necessary to avoid confusion.

Some description of the schools of thought in legal and moral philosophy is necessary to evaluate their impact on legal education. At the risk of gross oversimplification, perhaps even caricature, the following constitutes a brief sketch of the basic categories of legal and moral theory and the linkage between them.

Although there are many schools of legal philosophy and a wide divergence of views, even among those who share the same general theory of law, all legal theories can generally be divided into two or three very broad but distinct categories, namely natural law, legal positivism and legal realism.[25] The third category, legal realism, is generally considered a movement rather than a separate school of thought. For present purposes legal realism can be included as a specie of legal positivism in that it is a descriptive theory of law and accepts the central tenet of positivism that law and morals are separate and distinct spheres.[26] St. Thomas Aquinas' classic definition of law as "an ordinance of

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25 *See* SURYA PRAKASH SINHA, WHAT IS LAW (1989) (describing legal theories including divine or prophetic theories, natural law theories, the idealist theories, the positivist theories, the historical theories, the sociological theories, the psychological theories, the realist theories, the phenomenological theories, and the critical legal studies movement); *see also* LORD LLOYD OF HEMPSTEAD & M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (1985) (comprehensive survey of legal theories and modern trends in jurisprudence).

26 *See* JEROME HALL, FOUNDATIONS OF JURISPRUDENCE (1973) (discussing different forms of legal realism and the distinction between American and Scandinavian Realism premised on the divorce of the is and the ought, facts and values, and classical realism which affirms the existence of moral facts). For the meaning of "realism" in modern Christian ethics, see WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS 527-28 (James F. Childress & John Macquarrie eds., rev. ed. 1987).

The following is a synopsis of the salient points of its definition of "realism." In contemporary philosophical ethics, "realism" often designates a cognitivist theory that affirms the existence of moral facts. In the *Christian Realism of Ronald Niebuhr (1892-1968)*, which was very influential in the United States from the 1930's to the 1960's, "realism" in moral and political thought denoted the disposition to take into account all factors in a social and political situation that offer resistance to established norms, particularly the factors of self-interest and power. Nieburhr appealed to Augustine as "the first great realist" in Western thought and tried to avoid the cynicism of such realists as Machiavelli, by emphasizing the relevance of ethical ideals and norms as a source of judgment. Because he believed that cynicism and even nihilism results when what is is construed as what ought to be, Niebuhr attempted to hold the is and the ought in a dialectical relation. The theology of hope and liberation theology that have emerged since the 1960's have challenged realism's concentration on limits and criticize its failure to give sufficient attention to the virtue of hope and to the transformative power of grace, the Holy Spirit, and the Christian community.

reason made by him who has care of the community for the common good and promulgated" reflects the central features of a natural law view of law.[27] Natural law philosophy stresses the interrelationship and interconnectedness of law and morals. It has been described as the point of intersection between law and morals and the moral foundation of law.[28] Since the Greeks first coined the term, the concept of natural law has been understood to mean a higher or moral law common to human beings that is derived from the exercise of human reason and is the basis for a moral appraisal of human or positive law.[29] Despite many criticisms and objections to the concept of natural law and the emergence of widely different conceptions of natural law over the course of the more than two thousand years it has been in existence, the concept of natural law has maintained a remarkable vitality and resilience.[30]

The common thread of natural law theories is the belief that reason is the essence of law and the establishment of justice its primary function. The ultimate justification of a law is the extent to which it fosters both individual good and the common good. Thus, the basis of all legitimate legal authority as well as the moral obligation to obey the law is reflected in the requirements of practical reason and commutative and distributive justice. Commutative justice concerns relations between individual members of a society and rectifies both voluntary transactions, such as contracts, in which both parties consent, and involuntary transactions, such as theft or robbery, in which only one party consents. Distributive justice focuses on the community's distribution of benefits, such as honors and wealth, and burdens, such as taxation, to individuals and groups.[31]

Until the emergence of nineteenth-century legal positivism in the works of Jeremy Bentham and John Austin, lawyers uniformly understood law as a moral judgment. Different natural law theories posited conceptions of law as reflections of the order of the physical universe, God's justice or right reason. Objective

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[27] THOMAS AQUINAS, SUMMA THEOLOGICA, Questions 90-97, art. IV, obj. iii, reprinted in THOMAS AQUINAS, TREATISE ON LAW 10-11.

[28] A.P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 144 (1970).

[29] *Id.* at 14.

[30] *See* SURYA PRAKASH SINHA, WHAT IS LAW? 61-90 (1988) (discussing fifteen specific objections to natural law).

[31] WESTMINSTER DICTIONARY OF CHRISTIAN ETHICS 330 (James F. Childress & John Macquarrie eds., rev. ed. 1986).

principles of morality or the moral law were accepted as the predicate for human or positive law.

John Austin's definition of law as "a command of the sovereign (political sovereign) for the violation of which a sanction is imposed" reveals the positivist emphasis on law as a body of rules and an expression of political power.[32] Legal positivism was in part a response to ill-conceived ideas of natural law (rationalistic natural law theories of the 17th and 18th centuries) invoked to justify patently unjust or immoral laws.[33] The central tenet of positivism—that law and morals are separate and distinct realms—was never intended by the early positivists, such as Bentham and Austin, to divorce law from morals in any strict sense. Austin distinguished human law from divine law and positive morality, what we would call customary or conventional morality. He believed that positive law can be judged by either standard but that the obligations of the divine law are superior to those of positive law or conventional morality. Thus, Austin recognized a theological foundation for moral judgments and the idea of objective morality.[34]

The positivist separation thesis was never meant as a rejection of moral standards. Rather, its purpose was to clarify legal rules with a view toward their reform. Positivists focused their attention on the written rules of law. They looked at law narrowly from a descriptive or analytical point of view in contrast to the normative, prescriptive perspective of natural law. Law was perceived as a science and individual laws as the data or social facts whose validity depended only upon their existence and not their merit. Whether a law was moral or immoral was not within the province of jurisprudence. Such questions were for moral philosophers and theologians but not for lawyers. This narrow conception of law fit comfortably with the new epistemological skepticism that rejected traditional certainties and the existence of transcendent, objective truths. It was also quite consistent with the moral relativism, materialism, existentialism, pragmatism and consequentialism characteristic of the modern era.

Legal realism brought a new and very different perspective to the study of law. Skeptical of the capacity of courts to accurately determine the facts or the applicable law, legal realists emphasized the need for empirical research to predict the behavior

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[32] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13 (1832).

[33] *See* STROMHOLM, *supra* note 23, at 212-21.

[34] DAVID LYONS, ETHICS AND THE RULE OF LAW 9-10 (1984).

of law officials. Founded on the belief that legal rules are indeterminate until interpreted by a judge or other legal decision maker, legal realism rejected the positivist notion of law as an aggregate of rules. Realists defined law as the acts of legal officials, what courts and other institutions charged with administering legal rules do. By its acceptance of the positivists' insistence on the separation of law and morals, legal realism furthered the tendency to remove from the subject of jurisprudence its traditional focus on the requirements of justice.

The subject of ethics has three basic branches: descriptive ethics, normative ethics and meta-ethics. Descriptive ethics is concerned with identifying the elements of morality, i.e., notions of right and wrong and good and evil, held by particular persons, groups, cultures, etc. Normative ethics is prescriptive and evaluative rather than descriptive. It is concerned with the bases or justifications for actions. Meta-ethics is concerned with discovering the meaning of language used in moral discourse. The term meta-ethics, as contrasted with normative ethics, is used to describe the central task in ethics as one of analyzing the meaning of ethical terms and judgments and their justifications. Given the ambiguity of moral utterances and the nature of moral reasoning, many twentieth century philosophers have concluded that normative ethics is not possible in the absence of a far more adequate meta-ethics.[35]

There are three basic categories of normative ethics: relativism, consequentialism and deontological theories. Relativism comes in many forms, including individual relativism, emotivism, egoism, cultural relativism and social relativism. Relativist theories are non-cognitivist theories. They reject the idea that there is an objective basis for morality and thereby deny the existence of objective standards through the application of which a justifiable moral decision can be made. Deontological theories are cognitivist theories. They affirm what relativists deny—the existence of objective moral standards derived from moral rights, duties or virtues. Deontologists are opposed to utilitarianism. Consequentialist or teleological theories base moral judgments in accordance with the consequences or ends that result from a given action or rule. Different variations of Act Utilitarianism and Rule Utilitarianism are consequentialist theories. Ethical theories are sometimes divided into theistic, i.e., based on the existence of God, and non-theistic theories. The command the-

35 *See* WILLIAM K. FRANKEENA, INTRODUCTION TO ETHICS 93 (1963).

ory is an example of a theistic ethical theory because judgments of good and bad and right and wrong are based on God's will or God's commands. Relativist theories are non-theistic. Deontological theories include theistic and non-theistic theories.[36] Before the advent of the modern era in the 19th century, modern philosophers recognized the moral law as ultimately transcending politics, personalities and conventional wisdom. They were part of a tradition that provided the resources for those who would continue to argue that the capacity for social criticism and ethical deliberation lies at the heart of what it means to be learned. They affirmed an intimate relationship between the unity of knowledge and the possibility of meaningful moral discourse. They saw an essential unity in the three dimensions of moral inquiry: the cultural—the search for common values; the intellectual—the investigation of the philosophic ground of values and moral action; and the individual—the formation of character and conduct.[37]

Natural law theories are linked with deontological ethics because they are prescriptive and evaluative rather than simply descriptive. Legal positivism and legal realism, as descriptive theories founded on the premise that law and morals are separate and distinct, are linked with ethical relativism. The positivists' descriptive analysis and the empirical observations of legal realists provided valuable insights into the nature and function of law and legal systems. By insisting that law was an expression of will (the will of the political sovereign) or social fact, rather than a construct of reason, the positivists and realists challenged natural law's basic assumption that the essence of law is reason. In their efforts to bring a scientific approach to analysis of law and legal systems, they advanced knowledge and understanding of the day to day workings of the legal system and thereby established a better basis for moral analysis and appraisal of law.

The polemic between adherents of natural law and adherents of legal positivism significantly impacted on legal education. As legal positivism became the dominant influence at American law schools and the working philosophy of American lawyers, too much importance was attached to the separation thesis. The advice of the legal realist Professor Karl Llewellyn to first year law

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[36] *Id.* at 14-39.

[37] Douglas Sloan, *The Teaching of Ethics in the American Undergraduate Curriculum, 1876-1976*, *in* EDUCATION AND VALUES 191, 199 (Douglas Sloan ed. 1980).

students illustrates the amoral approach to legal education which resulted from the narrow positivist view:

> The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary amnesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with all ideas all fuzzed along the edges. You are to acquire ability to think precisely, to analyze coldly, [and] to work within a body of [material] that is given. . . .[38]

Law became an autonomous discipline divorced from its moral underpinnings. This distinct paradigm shift in the view of law and morals and the amorality and moral relativism adopted by those with a positivist outlook is manifest in the following remark by an early legal realist, Oliver Wendell Holmes, Jr.:

> [N]othing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights of man in the sense of the constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and give some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time.[39]

Various forms of legal positivism have advanced narrow conceptions of law as merely an aggregate of rules, or predictions of what courts do, or a science or sociology separate and distinct from morals. One intent on nothing more than engaging in a value free descriptive analysis of legal phenomena would appear to have no need for ethical theories or the insights of moral philosophers. It is to be expected that law professors who hold a positivist view of law will consider ethics and moral philosophy essentially irrelevant to legal education and law practice. However, any description, analysis and evaluation of human actions, habits, dispositions and discourse can be fully understood only by understanding their point, that is to say, their objective, their value, their significance or importance. Regardless of how careful and scholarly the effort, a value-free descriptive analysis and explanation of law and the legal enter-

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[38] KARL LLEWELLYN, THE BRAMBLE BUSH 101 (1930).

[39] Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

prise is simply impossible. Conceptions of the point, value, significance or importance of any given aspect of the nature and function of law will inevitably be reflected in the distinctions one draws or fails or refuses to draw.

Undoubtedly, part of the reason why law schools neglect the moral dimension of law is that most university philosophy departments have all but ignored moral philosophy for most of this century.[40] A growing number of law professors and moral philosophers, however, are beginning to recognize the relevance of moral theory to legal education and law practice. There has been a re-emergence of interests in normative philosophy. Following the horrors of the Third Reich in Nazi Germany and its regime of unjust laws, the world witnessed the Nuremberg Trials and the invocation of a higher law to punish those who sought to justify immoral acts on the ground that they simply followed lawful orders. In his early 1950's debate with H.L.A. Hart, Professor Lon Fuller challenged the fundamental assumption of legal positivism that law and morals are separate and distinct spheres.[41]

Although the insights of legal positivism and legal realism provide the means to critically analyze the ambiguities, inconsistencies and incoherence of legal doctrine and the legal enterprise in general, they offer an inadequate explanation of the relationship between law and morals. Only with the broader perspectives of the natural law tradition can one even attempt a moral evaluation or rational justification of existing law or legal decisions. Natural law theories can readily draw upon the insights of legal positivism and legal realism. Positivist and realist theories of law, however, standing on their own, tend to ignore the insights of the natural law tradition and are skeptical that there are right answers to legal questions. Neither analytical positivism nor legal realism denies the importance of morality. They simply urge the separation of law from morals "with reference to a single end, that of learning and understanding the law."[42]

In the absence of jurisprudence and other perspective courses that deal directly with the relationship between law and morals and the historical and other interdisciplinary approaches to law study, law students and lawyers too often fall prey to the moral relativism

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[40] Sloan, *supra* note 37, at 211-220; *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 68 (1986).

[41] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

[42] Holmes, *supra* note 39, at 459.

and amorality characteristic of legal education in general. Some end up equating law and morality while others consider morality a private and subjective matter.

Lawyers need to be trained to engage in moral discourse. They have to acquire at least a basic understanding of the nature and significance of the related concepts of law, justice, rights, duty, authority and community. Law professors should be prepared to teach in a manner calculated to raise moral issues. They will need a knowledge of moral and legal theory if they are to explore effectively normative issues and teach with a greater sensitivity to the demands of distributive and commutative justice. Rather than putting off the hard questions for third year courses in jurisprudence or professional ethics, which are typically only two credit hours and do little more than survey different theories of law and the law regulating lawyers' conduct, every law school course and every law professor should explore the ethical dimension of law and law practice.

Law professors serve as models of the good lawyer. What law schools and law professors teach and how they teach have far-reaching moral implications. What is left unsaid may be as critical to the formation of the future of the profession as what is said. Absent a curriculum and a faculty aimed at providing students with knowledge of legal and moral theory and an understanding of the ethical dimension of law and lawyering, law schools cannot fulfill their responsibilities to their students or to society.

Although clinical education has emerged as a permanent part of legal education, it is still far from achieving its promise as a training ground for ethically sensitive and socially responsive lawyers. Because of the expense of clinical training, only a small number of students are afforded the opportunity to practice law under the student practice rule. Clinicians have little influence at most law schools. They are often treated as second class citizens by the regular faculty, too many of whom are fugitives from the practice of law and have disdain for practicing lawyers. Moreover, clinical faculty probably have the same misconceptions about the importance of moral and legal theory as traditional faculty. They are no more prepared and may even be less inclined to teach in the grand manner I have suggested.

What kinds of questions, then, should law schools address more persistently with their students? To what extent are our laws and legal institutions morally justifiable? What are the criteria of a good or just law or legal system? Should lawyers be held morally accountable for the ends their clients seek as well as the means chosen to

pursue those ends? Can lawyers avoid moral responsibility for the quality of justice when they are the principal participants in the administration of our justice system? Are the Rules of Professional Conduct morally justifiable? Do they strike an appropriate balance among client interest, public interest and lawyer interest? Can one have a good, happy and meaningful life as a lawyer? These kinds of questions not only concern lawyers and the legal profession but they also concern the nature and function of law and the legal system. It is important for the training of socially responsive lawyers that moral justification for any given rule or decision be considered of paramount importance. Every law school class provides an opportunity to explore the competing moral values at stake in legal disputes and the professional responsibility of lawyers in dealing with the moral dimension of their roles in the legal system.

Legal education is unavoidably about what the law ought to be as much as it is about what the law is. When moral factors are ignored in the law school classroom there is a not-so-subtle message that moral questions can be ignored in the practice of law. Legal issues large and small are value laden. Every class in law school and every encounter between lawyer and client presents an opportunity for moral discourse. Unless law school is perceived as a continuous ethical conversation between faculty and students, it is not likely to inculcate in students the moral obligations of lawyers to their clients and to society.

Although a required course on professional ethics can be valuable in raising consciousness about ethical issues that arise in the practice of law and in acquainting students with the prevailing professional standards, such courses send the wrong message if they do not deal with the subject of ethics as distinct from professional ethics or the Rules of Professional Conduct. The Preamble to ABA Model Rules appropriately states the limitations of rules when it says that "Rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by rules. The Rules simply provide a framework for the ethical practice of law."[43]

Ethics is about how one practically goes about the task of living. How to decide what to do? How to determine what is a good life and what conduct is right or wrong, just or unjust, good or bad? Personal and professional morality are intimately intertwined. At the core of the concepts of morality and professionalism is concern for others and the duty to respect human beings as ends in a king-

[43] MORGAN & ROTUNDA, *supra* note 13, at 5.

dom of ends. Legal rights reflect our perceptions of human or moral rights.

III. The Need to Reexamine the Moral Implications of Teaching Methods and Curriculum Content

The history of American legal education is replete with efforts to reform the law school curriculum.[44] Among the most significant developments in legal education was the paradigmatic shift from lectures to the case method of study, ushered in by Christopher Columbus Langdell at Harvard Law School in 1870. The lasting impact of the case method of study is evidenced today as it clearly remains the dominant method of legal instruction. The case method is sometimes referred to as the Socratic method. This is far from accurate. Were he able to observe a typical class discussion of cases in a modern American law school, Socrates would likely disapprove of what goes by the name of the Socratic method.

In the dialogues of Socrates, given us by Plato, the cross examination questioning process that is the Socratic method is just a continuation and extension of the inner questioning process of an extraordinarily self-reflective individual. It is important to remember that the subject of ethics began with this constant questioning process, this continual examination and reassessment of values. Socrates shows us that the highest operations of human consciousness consist in discovery, discrimination, coordination and activation of our greatest human potentialities, giving rise to acts of virtue. The Socratic method involves reevaluation. It is not to be equated with the case method, especially when, as often happens, discussion of cases seriatim fails to include careful and probing examination of the competing values at stake and the moral implications of court decisions. In the absence of philosophical detachment and the moral point of view, and an elementary understanding of epistemology, metaphysics, ethical theory and logic on the part of both teacher and student, it is unlikely that anything approaching the kind of moral discourse to be expected at a university will take place.

Despite the continuing efforts of law school curriculum committees, the American Association of Law Schools, the American Bar Association and other organizations, such as the Council on

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[44] *See* Robert B. Stevens, Law Schools: Legal Education in America from the 1850's to the 1980's 111-41, 264-67 (1983) (exhaustive treatment of the various reform movements in legal education).

Legal Education for Professional Responsibility (CLEPR), to improve the quality of legal education, the problem may lie with the inadequacy of the teachers. Law professors as a whole may not have the requisite knowledge, training or ability to prepare students to practice law as moral agents with the circumspection to balance the many roles they will be called upon to play. The ordinary religion of the law school classroom aside, even the generally accepted view that, at a minimum, legal education should develop in students the ability to think like a lawyer needs to be reexamined. What does it mean to think like a lawyer? Can it be said with any confidence that there is a certain kind or quality of thinking characteristic of lawyers in general acquired from exposure to the rigors of three years of law school? Is such thinking acceptable in view of the responsibility of the legal profession for the administration of the justice system and society's effort to achieve the salutary goals of our constitutional democracy?

There is a fairly wide consensus among legal educators about curriculum content and teaching methods.[45] The emphasis is on doctrinal instruction and the case method of study. Despite the reform efforts of the legal realists that came out of Columbia Law School in the 1920's and 1930's, the attempts to usher in a policy-oriented approach to instruction as suggested by Yale's Lasswell and McDougal in the 1940's, the movement toward more interdisciplinary studies and social science methods in the 1960's, and the advent of clinical legal education in the 1970's, the 1920 Harvard Law School curriculum essentially still remains the model for most American law schools.[46] Although in recent years clinical education has emerged as a competing model for legal education, it has yet to achieve more than a begrudging acceptance at most law schools.

In recent decades, law schools have added more interdisciplinary seminars, have begun to emphasize more skills training through greater use of the problem method and simulation and have increased efforts to teach professional responsibility. With very few exceptions, however, the emphasis remains on private commercial law courses and the traditional case method of study. The emergence of the law and economics movement, the critical legal studies movement and feminist jurisprudence has stirred up greater interest in legal theory and jurisprudence. Scholars iden-

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45 E. GORDON GEE & DONALD W. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN THE LAW SCHOOL CURRICULUM (1975).

46 Stevens, *supra* note 44, chap. 4.

tified with those movements have challenged some of the basic assumptions of legal education but, for the most part, their criticisms offer no cure for the moral skepticism which for so long has been the driving force behind prevailing theories of jurisprudence and legal education.[47]

Despite all the challenges to the traditional model and the changes that are constantly taking place in our nation's law schools, there remains a woeful neglect of the relationship between law and morality, a failure to teach methods of moral analysis and a tendency to ignore the pervasive influence that religious traditions have had on the development of law and legal institutions. A perusal of law school catalogues reveals that exposure to legal philosophy, i.e., alternative conceptions of the nature and function of law, and the development of the capacity for moral judgment, is generally not considered an essential ingredient of a sound legal education. One can only speculate why this is so. It may be that those in control of law schools too readily assume that principles of objective justice do not exist or that one's ability to make moral judgment cannot be enhanced or that virtue cannot be taught. Perhaps these are the prevailing assumptions upon which the curriculum is based because law professors, like lawyers in general, tend to have too little appreciation for the value of moral and legal theory and the influence of religious traditions on legal decision making. If all that is so, it would not be surprising that law professors generally feel neither competent nor inclined to consider the meaning of morality, the interplay between law and morality, and the role of religion and religious values in political and legal debate.

If legal education is going to combat what has been perceived as its current moral malaise, born of moral relativism tending toward nihilism, there must be a concerted effort to develop a cadre of law professors who by virtue of training and disposition are able to deal effectively with the very hard questions that law students and lawyers should ask and attempt to answer. The evaluation of law schools and their curricula must be founded on the careful articulation of the objectives of legal education. That necessarily involves an assessment of what is a good lawyer, the nature and function of law and the connection between law and morals.

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[47] *See* Kennedy, *supra* note 7, at 14 (providing a good example of a critique of legal education by a member of the Critical Legal Studies movement).

IV. EXPLORING THE CONCEPT OF JUSTICE IN TRADITIONAL FIRST-YEAR COURSES

By failing to explore persistently the intimate and indissoluble connection between law and morals, law schools have put at the periphery of legal education that which should be at the center—the concern for justice. There are obvious reasons why learning about the concept of justice as well as particular conceptions of law and justice cannot be ignored if law schools are to meet their obligation to train lawyers in the public interest. The need to discuss the meaning of justice arises sooner or later in every first year course.

The salutary goal of justice is included in the Preamble to the United States Constitution, which states:

> We the people of these United States, in order to form a more perfect union, *to establish justice*, to provide for the common defense, to secure the blessings of liberty for ourselves and our posterity, and to promote the general welfare do, hereby, ordain and establish this constitution.[48]

It is hard to imagine how anyone can presume to teach constitutional law without addressing the meaning of the preamble and the relative importance of the goal of establishing justice. Regardless of which theory of constitutional interpretation one might favor, discerning the meaning of "to establish justice" should be more than a matter of passing historical interest alone. At every turn the lawyer is confronted with the need to understand and to discourse about the requirements of justice. The pursuit of justice is continually affirmed as the basic and most fundamental goal of the legal enterprise. Virtually every case that goes to the United States Supreme Court concerns a choice between competing moral values. In our pluralistic society, the Court has become the arbiter of our society's moral values. Attempts to side step the moral questions are nothing more than a decision to opt for the moral choice reflected in the existing state of the law or constitutional interpretation.

Constitutional law scholar Professor Eugene Gressman describes Chief Justice Earl Warren's concern for justice as the very essence of constitutional adjudication. Gressman writes:

> At the Supreme Court level, as dissenting opinions indicate, there are usually impressive arguments available to support any choice or result one cares to reach. It is thus the choice

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48 U.S. CONST. pmbl. (emphasis added).

> and not the argument that is all-important. It is precisely at this critical point of choice making that Earl Warren brought to bear his instinct for seeking a "fair" or "just" result. In doing so, he was not imposing, as dissenting opinions are fond of saying, his personal predilections and prejudices on a given case. Rather he was selecting and choosing as between competing constitutional or legal factors those which he deemed the most just and equitable. And making that kind of choice is of the very essence of Supreme Court adjudication.[49]

Reaction to the Warren Court's judicial activism led to the assertion of neutral principles of constitutional adjudication.[50] Supposed neutral principles, however, when looked at closely, are not neutral at all.[51] They lead to decisions that reflect current court members' predilections or recognition of current social beliefs. Although the moral issues reflected and intertwined in legal arguments may be more pervasive, or, perhaps, more controversial in the area of Constitutional Law, other areas of the law addressed in the traditional first year curriculum are no less affected and shaped by the concern for justice.

In Civil Procedure, the very premise of the Rules of Civil Procedure is to meet the requirements of justice or fairness in a procedural sense. Rule 1, entitled Scope of Rules, of the Federal Rules of Civil Procedure provides that "[t]hey shall be construed to secure the just, speedy, and inexpensive determination of every action."[52] Rule 1:1-2 of the Rules Governing the Courts of New Jersey, entitled Construction and Relaxation, states this premise of the Rules in clear and uncertain terms:

> The Rules in Part I through Part VIII, inclusive shall be construed to secure a just determination, simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes.[53]

In Torts, the idea of negligence is founded upon the duty in

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49 Eugene Gressman, *The World Of Earl Warren As "Chief Chancellor,"* 60 A.B.A. J. 1228-30 (Oct. 1974).

50 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1958).

51 Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

52 FED. R. CIV. P. 1 (emphasis added).

53 N.J. CT. R. 1:1-2 (1992).

justice to render to each their due, i.e., one owes to every other person in the world the duty to act as a reasonably prudent person so as to avoid harm or injury to others. The question which often troubles students is why there is no duty in the law to be a good samaritan, especially under circumstances when one or more individuals could have saved the life of another with no risk of harm to themselves, e.g., by simply making a phone call to the police. The purpose and scope of so-called good samaritan laws are generally quite limited. Their purpose is merely to encourage individuals to come to the aid of others by providing immunity from suit for simple negligence to members of the medical profession and others who undertake to render first aid to an injured person. It does not seem possible to explore these kinds of issues without a consideration of the requirements of justice or a justifiable morality. To simply conclude a classroom discussion by stating that the law imposes no duty to act as a good samaritan without examining whether the law ought to impose such a duty, and why or why not, would be to show a callous disregard for the moral dimension of the legal enterprise. Indeed, every time students read the phrase "a reasonably prudent person," which they will encounter in virtually every case they read in their Torts textbook, they are confronted with the need to define what it means to be a person, to be prudent and to be reasonable. That is precisely what moral theory and moral philosophy is all about.

The moral duty to keep one's promises is arguably the basis for the entire structure of the law of Contracts. Of course, the moral duty to keep one's promises is only prima facie. It is subject to excuses for nonperformance connected with considerations of justice. Although the capacity to contract is predicated upon the assumption that human beings have free will and are responsible for the consequences of their actions, the legal enforceability of promises largely depends upon the relationship of the parties and concern for the common good. The free exchange of goods and services through the medium of private contract fosters individual autonomy and the efficient use of resources. Freedom of contract that gives expression to individual autonomy and concern for efficiency, however, is limited by the requirements of justice and the common good. Thus, central to a determination of the legal enforceability of a promise is the absence of any morally blameworthy conduct of the promisee measured by the application of equitable doctrines such as fraud, mistake, unconscionability and good faith, as well as considerations of public policy, i.e., the public interest or the common good. Con-

tract cases reflect the effort of courts to grapple with the competing values of freedom, individual autonomy, fairness, certainty and efficiency. They inescapably raise questions about how best to reconcile individual good with the common good.

The Property Law course concerns the right to private property and its limitations. The moral quality of any society must be judged on the importance it attaches to individual property because the right to property is an external condition for the creative expression of personality. Along with the rights to life and liberty, the right to private property is a fundamental condition of the existence and enjoyment of other rights. For example, the right to private property is a necessary corollary to the right to freedom of contract. Unless individuals are permitted exclusive control and ownership of property which they may freely alienate, they will have nothing to exchange and the right to contract will be rendered meaningless.

Questions of distributive justice or the right of each person to their fair share of the common stock are central to a consideration of the definition of private property and the distinction between private and public property. Limitations on the right to private property are predicated upon considerations of the moral claim of others not to be injured by one's use of property. This moral claim is expressed in the equitable maxim "Sic utere tuo ut alienum non laedas," which literally means that one should use his own property in such a manner as not to injure that of another.[54] On a more fundamental level there is the growing gap between the rich and the poor that raises profound questions about the role of government in the regulation of the use of private property and the redistribution of wealth. Legal disputes often give rise to perplexing moral and legal questions that involve the right to private property and its limits. Cases involving the exercise of eminent domain, environmental pollution, exclusionary zoning and public access to open beaches are illustrative of the tension between individual property rights and the public interest or the common good.

Perhaps the best example of where conceptions of justice and moral theory are at the heart of the subject matter is the course in Criminal Law. The determination of what is a crime emanates from the society's moral sense. Any analysis of the actus reus and mens rea requirements will necessarily include consideration of individual responsibility and the underlying assumption of free will. The tests for the insanity defense set forth in the M'Naghten Rules[55] and the

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[54] BLACKS LAW DICTIONARY 1380 (6th ed. 1990).

[55] The M'Naghten Rules have, since 1843, comprised the most significant part

Durham Rule[56] raise the most profound questions about human nature and the human condition. The capacity to understand the difference between right and wrong was the test for legal sanity under the M'Naghten Rule. The test under the Durham Rule is that an accused is not responsible for acts which are the product of a diseased mind. Thus, while the M'Naghten Rule emphasizes individual free will, the Durham Rule simply recognizes that, at times, free will is impaired. Underlying both rules, however, is the assumption that "ought" implies "can" (i.e., one ought to be held responsible for only those actions one can freely choose) and that criminal liability is premised on the capacity for moral judgment.

V. VIEWS OF LAW AND MORALS AFFECT THE PERFORMANCE OF LAWYERS AND THE OPERATION OF THE LEGAL SYSTEM

Justice is equated with what is right, equitable, fair, moral, proper, correct, evenhanded, fit, honest and in good conscience. Since Aristotle first described two kinds of justice, which he called corrective justice and distributive justice, moral philosophers have used those terms in arguing for or against a particular conception of justice. Until the advent of the modern era, the concept of justice was the central focus of moral, political and legal philosophers. Indeed, the Western idea of law is inextricably linked to the idea of justice. The search for a universal definition or conception of justice has occupied the best thinkers throughout the history of the world.

The words "morals" and "ethics" were once synonymous. Moral philosophy historically consisted mainly of the intellectual effort to justify by philosophical analysis alone, without reference to divine revelations, the main tenets of the Judeo-Christian moral code. It sought to determine the natural basis for moral obligations and to serve as a guide to conduct and as a determination of right and wrong.

Despite the number of moral theories and wide areas of disa-

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of the Anglo-America law on insanity in relation to criminal responsibility. Of the several rules then published, the most important one is the following:

> [T]o establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing: or, if he did know it, that he did not know he was doing what was wrong.

JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 472 (2d ed. 1960).

[56] Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954).

greement, there is some consensus among contemporary moral philosophers about the nature of ethics. First, it is agreed that the concept of ethics or moral right is marked not by certain feelings or experiences but by certain forms of reasoning used to justify actions. Second, modern moral philosophers believe that ethical reasoning, as such, is radically different from social convention, and affords an impartial point of view in terms of which people rise above and critically assess the ethical validity of the beliefs of their state, society, religious, ethnic, racial, family or any other social group to which they belong or with which they identify. In holding that ethics is radically different from social convention, contemporary philosophers are in accord with the great classical philosophers. Third, there is agreement that ethical reasoning depends upon certain kinds of cognitive as well as emotional capacities, including the complex verbal and intellectual skills required to universalize, the ability of the actor to place herself in the position of the person affected by her act. Finally, contemporary philosophers maintain that the fundamental concepts of ethics appear to be autonomous rationality (freedom and reason) and equality. From the moral point of view, despite various differences in natural endowments and social and economic position, people are equally persons by virtue of distinctive capacities to be self critical, to evaluate and, within limits, to change their lives.[57]

In our pluralistic society there are serious disagreements about standards of morality. Even those who share the same moral values often disagree about how to give them expression. It is nonetheless clear that there has emerged from our history as a people a significant degree of agreement on moral values. Those values are inevitably reflected in legal decisions. The critical reevaluation of the moral values reflected in law is the responsibility of all citizens. Law schools bear a special responsibility to train students for this basic obligation of citizenship. Only if lawyers are sufficiently trained to undertake this obligation of citizenship are they likely to have any disposition to encourage their clients and others they encounter in their professional roles to be mindful of the duties of citizenship and the need to reconcile their individual good with the common good. Moral obligations are not the same as legal obligations. Lawyers have a critical role and a unique opportunity in counseling clients to remind them

[57] David A.J. Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL ED. 359, 363-64 (1981).

that the law's minimum requirements need not be considered the maximum required of them. Although lawyers may not be the keepers of their clients' consciences, neither are they merely technicians whose sole function is to ensure that the minimum requirements of the law are obeyed. They can and should encourage the pursuit of what is right and just, rather than merely legal, and concern for unenforceable obligations as well as enforceable rights.

The criteria for and the extent of judicial discretion is a fundamental problem of jurisprudence. The language of rules is, like language in general, unavoidably ambiguous. Unfortunately, there are no rules as to how to interpret rules. Various sources of statutory interpretation are available to assist in the interpretation of statutes, but they are not rules of law. They are merely guidelines that a judge can pick and choose from, but is not bound by, in deciding the meaning of a statute. Interpretation inevitably involves background norms which are value-laden.[58]

A positivist view of law as an aggregate of legal rules fails to take sufficient account of the role of discretion in legal decision making. Modern legal realism recognizes the problem of judicial discretion but provides no solution. The modern legal realists view the law as vague and changeable, not precise, certain or always predictable. Law is manipulative, not normative. Critical legal studies, which is considered by many as essentially within the realist tradition, goes so far as to assert that law is completely indeterminate and is no different from politics. Thus the law is perceived as the expression of political ideology and a justification for the existing hierarchy of power. Legal positivism, legal realism and critical legal studies share a common epistemological premise that defines reality in terms of facts. This empiricist faith in facts leads them to reject any belief in universal or transcendent truth. This, of course, also leads them to their conclusion that law is not, nor can it ever be, an expression of universal moral values. These approaches view the law alternatively as an expression of sovereign will, social fact, or hierarchical political power.

Although lawyers deal with law as it is, they must also be concerned with what the law ought to be. As the principal participants in the administration of justice, lawyers bear a special responsibility for the quality of legal decisions. To assume that

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58 DWORKIN, *supra* note 24, at 337-38; Cass Sunstein, *Statutory Interpretation*, 103 HARV. L. REV. 405, 413 (1989).

the lawyer's role can be understood separate and apart from its moral implications is to ignore or deny the significance, point or value of that role. Although justice is the generally stated goal of the law and legal system, lawyers, especially when performing as advocates, generally do not view themselves as moral agents or advocates for justice. In our adversary system the lawyer as advocate is expected to zealously represent client interests within the bounds of the law. The advocate's duties of loyalty and zeal, as they have been traditionally perceived, require the pursuit of any lawful objective of the client without regard to how unjust that objective might be. When acting as advisors outside a litigation context, however, a lawyer may encourage a client to consider the moral implications of legally permissible courses of action.

The role of the lawyer as legal interpreter, adviser and advocate will be performed differently by lawyers who seek to maintain moral neutrality than by lawyers who accept that they are primary agents in the pursuit of justice. In whatever role they may perform, lawyers who are committed to the pursuit of morally justifiable ends through morally acceptable means will need to understand the relationship between law and morality and the ethical dimension of law and law practice. A lawyer has varying degrees of discretion to decide which clients to represent, how to advise and counsel clients, what means are appropriate to pursue client objectives, whether to disclose client wrongdoing of one kind or another to prevent serious harm to another, etc. These discretionary decisions will inevitably reflect personal as well as professional and moral value judgments.

Lawyers with a natural law perspective will more readily accept the obligation to promote justice, fairness and morality in their daily practice than those with a narrow positivist or realist outlook. When confronted with clients who seek lawful objectives that are morally repugnant, lawyers who view the law as value-laden, purposeful and an expression of justice are apt to decline representation or, better still, explore with those clients reasons why they might want to forego legally permissible but morally objectionable actions. Conversely, lawyers habituated to view the law from a morally neutral or amoral point of view might even feel obliged to accept their clients without regard for the possible injustice they seek to perpetrate through legal means. For example, absent a concern for justice, a lawyer who is asked by a client of many years to change a last will and testament so as to replace the natural objects of that client's bounty, spouse and

children, with a newly found younger companion, might simply prepare and execute a new instrument at the direction of the client without exploring the moral implications of such conduct. The morally neutral advocate is less likely than a lawyer who accepts moral agency to have any qualms about commencing a law suit on behalf of a client against that client's parents, or asserting a statute of limitations defense against the just claim of a poor widow or orphans, or maintaining confidentiality in the face of impending serious harm to innocent third persons.

VI. The Need to Return to Forgotten Truths About Human Nature and a Reconsideration of the Concept of Natural Law

Beginning in the 19th century, interest in moral philosophy markedly declined in American universities and an impoverished view of human nature emerged. Darwinism and an arid rationalism combined to produce a notion of human beings as essentially no different from other animals. With evidence that man ascended from the apes rather than descended from God came the death of transcendence. In the wake of Nietzsche's declaration of the death of God, Spencer's social darwinism, Marx's dialectical materialism and economic interpretation of history, Freud's discovery of the subconscious and the emergence of logical positivism, it is not surprising that legal positivism, with its separation of law and morals, emerged as the working philosophy of American lawyers and the dominant influence in legal education. A descriptive and analytical approach to law was simply a logical extension of all these philosophical currents that denied transcendent reality and embraced an empiricist epistemology and a faith in science.

Legal positivism has made a significant contribution to the study of law. It challenged the extravagant claims of false conceptions of natural law. It focused attention on the importance of language and the need for a precise descriptive analysis of law and legal systems essential for assessing their nature and function. Likewise, the legal realist movement, rooted in the same moral skepticism and scientific ethos as legal positivism, has given rise to a broader perspective and a better understanding of the nature and function of law. Despite the validity of many, perhaps most, of their claims and observations, neither legal positivism nor legal realism, in all their various forms, adequately address the relationship between law and morals. They are

linked to a moral relativism that is clearly incompatible with the exalted view of human nature and the elemental truths, purposes and organizing principles which are the very basis of America's social and political order.

The framers of the Declaration of Independence expressed this exalted view of human nature in language reflecting a belief in a law of nature, conceived as a universal moral law founded in the nature, constitution and mutual relations of human beings and things:

> When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate but equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect for the Opinions of Mankind requires that they should declare the causes which impel them to the Separation. We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain Unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . . .[59]

In this postmodern age, we must return to first principles and the too-often forgotten truth that human beings are created by God as free, rational and social beings and, thus, have a nature distinctly different from all other forms of being. Although other animals have consciousness and feeling, only human beings have the capacity for self-consciousness and self-transcendence. Endowed by nature and by nature's God with rights to life, liberty and the pursuit of happiness, only human beings have dignity. The source of that dignity is the capacity of metaphysical or speculative reason, which transcends the concerns of everyday life. Alfred North Whitehead has beautifully described this capacity for reason through which human beings can pursue a good and happy life:

> It is not concerned with keeping alive. It seeks with disinterested curiosity an understanding of the world. Naught that happens is alien to it. It is driven forward by the ultimate faith that all particular fact is understandable as illustrating the general principles of its own nature and of its status among other particular facts. It fulfills its function when understanding has been gained. Its sole satisfaction is that experience has been understood. It presupposes life, and seeks life rendered good with the goodness of understanding. Also so long as understanding is incomplete it remains to that extent unsatisfied. It

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[59] THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776).

> thus constitutes itself the urge from the good life to the better life.[60]

The affirmation of the fundamental, transcendent and forgotten truths upon which this nation was founded is a good starting point for assessing the shape and substance of legal education in the twenty-first century. Only by persistently exploring the dictates of reason, i.e., the requirements of rationality, through which we exercise our capacity for morals, can we responsibly exercise our freedom. Any hope of constructing a social order that not only respects the inherent dignity of every human being but also establishes the conditions for a happy and good life for all depends upon that responsible exercise of freedom.

In the latter half of this century there has been a revival of interest in the concept of natural law as a method of establishing standards of social justice. John Courtney Murray, the influential Jesuit theologian and foremost American proponent of natural law, sought to demonstrate how natural law had been misunderstood in the past and to present natural law in a way that was coherent, nonparochial and attractive to the American people. He began by clearly establishing that the theory of natural law was not a "Catholic" theory but rather a valid description of the moral experience of all humankind:

> It is sometimes said that one cannot accept the doctrine of natural law unless one has accepted its "Roman Catholic presuppositions." This, of course is quite wrong. Its only presupposition is threefold: that man is intelligent; that reality is intelligible; and that reality, as grasped by the intelligence, imposes on the will the obligation that it be obeyed in its demands for action or abstention. Even these statements are not properly "presuppositions," since they are susceptible of verification.[61]

Murray emphasized that natural law, having come from the age of Greek and Roman philosophers long before the founding of the Catholic Church, is not sectarian in its claims and origins. To underscore its universal appeal, he referred to natural law as "the tradition of reason" or "the tradition of civility" and "as the acquisitions of the human mind and spirit reflecting on the meaning of human life as it has historically developed." He viewed it as the

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60 ALFRED N. WHITEHEAD, THE FUNCTION OF REASON 20 (1958).

61 2 ROBERT W. MCELROY, THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY 55 n.30 (1989) (citing *John Courtney Murray, Natural Law and the Public Consensus*, *in* NATURAL LAW AND MODERN SOCIETY 62 (John Cogley ed. 1963)).

philosophia perennis[62] of the human heritage rather than the accomplishment of a particular culture.

In his discussions of the role of moral discernment vis-a-vis the natural law, Murray stressed the complexity of formulating ethical rules and the need to ground moral discernment in human experience. At the same time, he argued, the ability of people to come to some clear understandings of their ethical obligations must not be underestimated. He believed the greatest power in society was not in the role of government but in the conscience of the community, which had the obligation to criticize both the business system and the actions of government. The conscience of the community, founded on principles derived from experience and the intelligent reflection on that experience, was to be both the binding force and the corrective force in society. Murray saw the theory of natural law, the tradition of reason, as the means to build a public consensus of the moral values for directing American society to set the parameters for public life in the United States. Murray observed that the "learned and the wise" in American society rejected the tradition of natural law in favor of technological secularism, practical materialism and philosophical pluralism. Murray argued that the legitimacy of the university in society must be based upon its contribution toward helping society face the momentous moral choices produced by the age of "modernity." In assessing this moral contribution, Murray concluded, the universities had failed miserably. He sought to stimulate a debate about the social functions of the university and the social consequences of the universities' decision to banish religious viewpoints and to adopt the dogma of philosophical pluralism. He hoped for a change in the academic ethos that would, if not grant authoritative status to religion and the tradition of reason, at least grant them admission into the academic world.

Murray believed that the legal community bears a special responsibility to elaborate and periodically renew the public philoso-

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62 A phrase coined by Liebniz indicating:

> [The] meta-physic that recognizes a divine Reality substantial to the world of things and lives and minds; the psychology that finds in the soul something similar to, or even identical with, divine Reality; the ethic that places man's final end in the knowledge of the immanent and transcendent Ground of all being — is immemorial and universal. Rudiments of the Philosophia Perennis may be found among the traditionary lore of primitive peoples in every region of the world, and in its fully developed forms it has a place in every one of the higher religions.

HUSTON SMITH, BEYOND THE POST-MODERN MIND 47 (1989) (quoting ALDOUS HUXLEY, PERENNIAL PHILOSOPHY vii (1945)).

phy or moral consensus. He was critical of the legal community for having, in large part, failed in its role as architect of the public consensus and for having lost sight of its important social role. Murray argued that American lawyers must return to the tradition of the Revolutionary era and confront the fundamental questions of public policy by retrieving the working language of natural law and communicating to the people as a whole. He envisioned a public philosophy based upon the tenets of the ancient principles of truth and justice, of freedom and order, of human rights and human responsibilities. He looked to the legal community to renew the public consensus by injecting the principles of natural law, not only into the legal system narrowly defined, but into the broad public philosophy as a whole.

The widely different conceptions of natural law obscure that which is distinct about natural law. Although there are other theories of justice worthy of study, the natural law theories of John Rawls and John Finnis, despite their complexity, are especially appropriate for training law students in the methods of moral analysis. Both theories are comprehensive, internally consistent and systematic attempts to establish rational grounds for objective standards of justice. They incorporate the utility principle into their respective theories yet at the same time they convincingly refute the utilitarian calculus of the greatest good for the greatest number as the sole basis for a rationally justifiable moral standard. They are good vehicles for exploring the meaning and purpose of law and the criteria for a just legal order and the good society.

Whereas Rawls' theory reflects the natural rights tradition of philosophical and political liberalism, Finnis' theory follows in the classical natural law tradition. Finnis reconciles the natural rights tradition with the natural law tradition. Despite their common Aristotelian and Kantian roots, Rawls and Finnis base their natural law theories on different epistemologies, methodologies and conceptions of the good. Rawls' thin theory of the good consists of four primary goods: self respect, income and wealth, liberty, and opportunity.[63] Consistent with classical liberalism, Rawls allows for individual autonomy by adopting a relative standard of good. For Rawls, individual rational life plans can be constructed on the basis of different conceptions of the good so long as the principles of justice are not violated. Thus, for Rawls, the right is prior to the good. In constructing his principles of justice, Rawls does not take into

[63] JOHN RAWLS, A THEORY OF JUSTICE, JUSTICE AS FAIRNESS 395-99 (1971).

account the existence of any absolute or intrinsic human values as being objective final ends for human life.

Rawls' theory of natural law is contractarian and procedural. He uses the heuristic device of a hypothetical social contract of individuals who are committed to the principles of theoretical rationality and who are also cloaked with a veil of ignorance so that they do not know what position they will have in the society to be formed. The principles of justice are those that would be chosen by rational, self-interested and unenvious persons, persons who know they are to enter a society structured to their agreement but who are ignorant of what positions they would have or what their natural endowments and particular interests would be.[64] Rawls' principles of justice are easily stated but are very complex in their application. He calls them the liberty principle, the principle of equality of fair opportunity and the difference principle. They are as follows:

> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> Offices and positions are to open to all under conditions of equality of fair opportunity—persons with similar abilities and skills are to have equal access to offices and positions.
>
> Social and economic inequalities are to be arranged so that they are both to the greatest benefit to the least advantaged, consistent with the just savings principle and attached to offices and positions open to all under conditions of fair equal opportunity.[65]

Finnis' natural law theory builds on the natural law theories of Aristotle and Aquinas. His theory is much more explicit than Aristotle's theory and, unlike Aquinas' theory, begins with reason rather than with the existence of God. For Finnis, the good is prior to the right. In contrast to Rawls' thin theory of the good, Finnis has an exhaustive theory of the good consisting of seven basic goods, or non-moral values, that he considers objective final ends for human life. For Finnis, full human flourishing is the product of participating in the seven basic goods of life, knowledge, friendship, play, practical reason, art and religion. These basic goods are irreducible in the sense that they constitute the fundamental categories of human good that consist of many particular concrete acts. They are

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64 *Id.* at 136-50.

65 *See* RONALD L. COHEN, JUSTICE 26-34 (1986) (concise description and criticism of Rawls' theory of justice).

non-commensurable because each is equally important and as such no one can be ignored if a human being is to flourish fully.

Finnis' theory of natural law is foundational rather than contractarian. Its foundation is the seven self-evident basic goods required for human flourishing.[66] For Finnis, the truth of the proposition that flourishing is good or valuable is not only self-evident, it is unquestionable and underived. Finnis cautions that a lack of derivation is not to be confused with a lack of justification or lack of objectivity:

> Non-derivability in some cases amounts to lack of justification or lack of objectivity. But in other cases it betokens self-evidence; and these cases are to be found in every field of inquiry. For in every field there is and must be, at some point or points, an end to derivation and inference. At that point or points, we find ourselves in face of the self-evident, which makes possible all subsequent inferences in that field.[67]

In positing his exhaustive theory of the good, Finnis draws upon the empirical studies of cultural anthropologists which indicate that every society or culture that has been studied gives expression to the seven basic values, albeit in different ways.[68] In other words, although the seven basic goods are universal values, they are given widely different forms of expressions by different cultures. For example, every society values knowledge which it transmits to the young, but the knowledge that is valued and transmitted will vary from a primitive society to a more complex society. Thus despite the objective and universal character of the basic values, Finnis recognizes the particular and concrete expression of those values is relative to the peculiar historical experience and contingent facts that shape and determine every culture. Finnis describes his theory as consisting of the following interrelated features:

> (1) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and

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66 Michael Perry takes issue with Finnis' contention that the good of human flourishing is obvious and self-evident and as such constitutes the foundation for morality or moral knowledge. Rather than saying, with Finnis, that the good or value of flourishing is self-evident he asserts that the value of flourishing is not at issue for most of us. He suggests that it would be better to say that the value of flourishing lacks justification but that it no more requires justification than does the value of rationality. He contends that every theory of natural law is foundational in the sense that it is founded on a commitment to human flourishing and human rationality. *See* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 14-23 (1988). *But see* Robert P. George, *Self-Evident Practical Principles and Rationally Motivated Action: A Reply to Michael Perry*, 64 TULANE L. REV. 887 (1990).

67 Finnis, *supra* note 16, at 69-70.

68 *Id.* at 83.

realized, and which are in one way or another used by everyone who considers what to do, however, unsound his conclusions; and

(2) a set of basic methodological requirements of practical reasonableness (itself one of those basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all is brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered, i.e., between ways of acting that are morally right or morally wrong—thus enabling one to formulate

(3) a general set of standards.[69]

Finnis asserts that the principles of natural law are traced out in moral philosophy or ethics, political philosophy and jurisprudence, as well as in individual conduct, political action, adjudication and the life of the citizen. They justify the exercise of authority in the community. Finnis sets out nine basic requirements of practical reasonableness. These nine requirements are principles of natural law that provide a method for determining morally justifiable choices. They concern the reasons why and the ways in which there are things that morally ought to be or ought not to be done. As with Rawls' principles of justice, Finnis' requirements of practical reasonableness are quite complex in their interrelationship and in their application. The following is a brief statement of these requirements or principles that are the core of Finnis's natural law theory:

1. A coherent life plan—one must have a harmonious set of purposes, orientations, and commitments.

2. No arbitrary preference amongst values—there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values.

3. No arbitrary preference amongst persons—fundamental impartiality among the human subjects who are or may be partakers in the basic human goods.

4. Detachment—one must avoid fanaticism or succumbing to the temptation to give one's particular project the overriding importance and unconditional significance which only a basic value and a general commitment can claim.

5. Commitment—one must avoid apathy and look for new and better ways to carry out commitments.

6. The (limited) relevance of consequences: efficiency,

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69 *Id.* at 23.

within reason—one must bring about good in the world by actions that are efficient for their reasonable purposes.

7. Respect for every basic value in every act—one must not choose or do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of human good (i.e. one must not act directly against a basic value).

8. The requirements of the common good—one must act to foster and favor the common good of one's communities.

9. Following one's conscience—one should not do what one judges or thinks or feels—all-in-all should not be done (i.e., one must act in accordance with one's conscience).[70]

For Finnis, natural rights are synonymous with human rights and moral rights. He concludes a long analysis of the semantical problems posed by rights talk with the following summary in which he ties the concept of natural rights to the concept of the common good:

> On the one hand, we should not say that human rights, or their exercise, are subject to the common good: for in the maintenance of human rights is a component of the common good. On the other hand, we can say that human rights are subject to or limited by each other and by other aspects of the common good, aspects which could probably be subsumed under a very broad conception of human rights but which are fittingly indicated (one could hardly say, described) by expressions such as "public morality," "public health," and "public order."[71]

For Finnis, human well being and the exercise of human rights can only be securely enjoyed in a context or framework of mutual respect, trust and common understanding consistent with the maintenance of public order. He concludes that most assertions of right made in political discourse need to be subjected to a rational process of specification, assessment and qualification. Additionally, human rights problems should be resolved by an authoritative decision-making procedure which does not pretend to be infallible, silence further rational discussion or forbid the reconsideration of the decision. In the following passage, Finnis reconciles the notion of natural rights with the concept of natural law:

> Human rights (not to mention the public order which constitutes a necessary framework for their employment) can certainly be threatened by uses of rights talk which, in bad faith or

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70 *Id.* at 100-27.

71 *Id.* at 218.

> good, prematurely ascribe a conclusory or absolute status to this or that human right (e.g., property, contract, assembly, speech). However, if its logic and its place in practical reasonableness about human flourishing are kept in mind, modern usage of claims of right as the principal counter in political discourse should be recognized (despite its dubious seventeenth century origins and abuses by fanatics, adventurers, and self-interested persons from the eighteen century until today) as a valuable addition to the received vocabulary of practical reasonableness (i.e. to the tradition of "natural law doctrine").[72]

Finnis recognizes the value of modern rights talk not only as a valuable addition to the vocabulary of practical reason or natural tradition but also because it emphasizes human equality, tends to undercut consequentialism and amplifies the undifferentiated reference to the common good.

Finnis' natural law theory incorporates many of the insights of legal positivism and legal realism and draws upon the insights of every major moral and political philosopher who has contributed to the tradition of reason. It articulates intermediate principles of natural law that follow from the first principle that good is to be done and evil is to be avoided. It places these principles in an historical and modern context. Although Finnis does not rely, even implicitly, on the term "human nature" his explanation of the meaning and purpose of law is consistent with a view of human nature as being free, rational and social with a capacity for morals. It presents a view of justice as other-directed and tied to the concepts of duty and equality. It offers principles of justice that are alternatives to the moral relativism and consequentialism that have dominated legal thinking in the 20th century. Although Finnis posits universal values and absolute moral norms, he accepts that individuals can make different yet morally justifiable decisions or choices. He asserts that each of us has a subjective order of priority amongst the basic values and that one's reasons for choosing a particular ranking of the basic values is relative to one's temperament, upbringing, capacities and opportunities.

Finnis argues for a morality that is the product of the deep structure of practical thinking or moral thought. The requirements of practical reasonableness generate a moral language utilizing moral distinctions that can only be discerned by an effort of reflection that is not easy. Whether or not one disagrees with all or some

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72 *Id.* at 220-21.

part of Finnis' natural law theory, the attempt to understand it requires a temporary departure from one's belief system and the expansion of one's intellectual frame of reference. The insights to be gained about the moral point of view, the process of reasoning and the perception of self will empower law students and faculty alike to reflect more profoundly upon the meaning and purpose of law and the concept of justice.

Finnis's natural law theory is not antithetical to descriptive social and legal theories. He asserts that a natural law theory has a two-fold purpose: to provide a justified conceptional framework for descriptive theory and to assist the practical reflections of those concerned to act, whether as judges, statesmen or citizens. He describes the relationship between the evaluation and description of law as a mutual, though not quite symmetrical, interdependence.[73]

It has been suggested that there are far closer affinities between the approach of legal realism and that of natural law than exist between conventional analytical jurisprudence (positivism) and the natural law tradition. In The Riverside Lectures, delivered in 1956, Columbia Law Professor Harry Jones defended American legal realism against the indictment of Catholic, Protestant and Jewish legal thinkers who charged that realism is an un-moral and unworthy approach to law, subversive of basic human values. Jones proposed that the quest for the moral dimension of law is not in precepts and rules, but rather in the process of responsible decision that pervades the whole of law in life. He rejected as utterly unrealistic an approach to law that is entirely focused on the positivist view—and that ignores the fact that in the operation of the legal system there is discretionary power of judges to determine what the law ought to be. Jones asserted that outside the areas of legal certainty, one cannot know the law if one thinks of it as a body of rules and principles. As did Cardozo in *The Nature of the Judicial Process*,[74] Dworkin in *Law's Empire*[75] and a host of other contemporary legal thinkers,[76] Jones recognized the moral dimension of law in hard cases where the law is indeterminate:

> We, see, then, the impossibility of a rigid separation of the is and the ought to be in the areas of law-in-action which I have

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73 *Id.* at 18-19.

74 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9-50 (1921).

75 DWORKIN, *supra* note 24, at 4-11.

76 Scholars of the Critical Legal Studies movement assert that legal doctrine is totally indeterminate and that, because there is no distinction between law and politics, legal discourse is a stylized version of political discourse. *See* CRITICAL LEGAL STUDIES 4 (A. Hutchinson ed. 1988).

> described as outside the zones of certainty. And these are the very areas—otherwise described as areas of inescapable choice, or leeway, or responsible decision—in which we apprehend most clearly the moral dimension of the law. The legal here is a mere authorization, a fixing of outer bounds on the exercise of discretion. . . . Where the legal is does not provide a controlling imperative—as so often in law—direction and consistency must be found in the ought to be. It is nonsense in this context to insist on a rigid analytical separation of the is and the ought to be.[77]

In hard cases where the law, i.e legal doctrine as well as legal policy, is indeterminate both the judges who render final decisions as well as the lawyers who present arguments aimed at persuading them will necessarily draw upon their notions of what the law ought to be.

Much of contemporary jurisprudence is focused on questions about the meaning of language and theories of interpretation.[78] These are questions of fundamental importance especially because they are a necessary aspect of rational inquiry of what is good and right for humankind. The philosophical pluralism of modernity has led us to a healthy skepticism of every assertion of knowledge, i.e., knowledge of the truth. Although rigorous scrutiny of ideas to expose incoherence, contradictions and false dichotomies is essential to advancement of truth, care must be taken to avoid falling into

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77 Harry Jones, *Legal Realism and Natural Law*, *in* M.P. GOLDING, THE NATURE OF LAW, READINGS IN LEGAL PHILOSOPHY 261, 273-74 (1966).

78 Ronald Dworkin asserts that law is an interpretive concept and that any jurisprudence worth having must be built on some view of what interpretation is. *See* Dworkin, *supra* note 24, at 85-113 (discussing semantic theories of law). Critical legal theory is based on the premise that any act of interpretation or judgment has political and historical dimensions. Critical legal scholars, especially of the irrationalist branch, in claiming that law is ideological and indeterminate, draw upon the linguistic theory of Wittgenstein which rejects the view that self-contained, objective meanings are determined by a reference to a reality outside language. To Wittgenstein no single reality exists independently of the observers interpretations and language is a series of games in which arbitrary symbols, governed by arbitrary rules, operate to create meaning that appears clear, obvious and certain, but only from the viewpoint of those who accept the rules. *See* Joan C. Williams, *Critical Legal Studies: The Death of Transcendence And The Rise Of The New Langdellians*, 62 N.Y.U. L. REV. 429 (1987) (discussing how Critical Legal Studies reflects major currents of twentieth century thought and the extent to which critical legal scholars draw upon Wittgenstein's linguistic and epistemological views); *see also* Richard M. Fischl, *Some Realism About Critical Legal Studies*, 41 MIAMI L. REV. 505 (1987) (analysis of the relationship between Legal Realism and Critical Legal Studies); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed. 1988); CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds. 1991).

cynicism and nihilism.[79] Under the name of tolerance and the spirit of free inquiry we must not ascribe equal value to every notion or theory of law or morals. Despite the post-modernist insistence on the impossibility of acquiring knowledge of objective truth, legal educators would do well to reevaluate whether and to what extent there is a place in the law school curriculum for those enduring fundamental first principles and necessary truths[80] that for over two thousand years have been indicated by the name of natural law. If we assume that those who consider themselves adherents of Critical Legal Studies, Feminist Jurisprudence, Law and Economics, Practical Legal Studies or any other school of thought are committed to rational discourse, they need an acceptable definition of reason. Conceptions of natural law, particularly those of John Rawls and John Finnis, which seek to define the requirements of practical reason, should therefore be of interest to legal scholars and lawyers regardless of their philosophical outlook or perspective of law and morals.

VII. CONCLUSION

Inherent in the idea of a university as an institution of higher learning is the search for knowledge of truth and justice, i.e., knowledge of what is (facts) and knowledge of what is good and bad, right and wrong (values). It is unfortunate that so many of those responsible for American higher education, including legal education, regard with disdain any claim to knowledge of good and bad, right and wrong. It is ironic that this is sometimes the prevailing attitude even at universities founded on the belief that human beings are created in the image and likeness of God and through their God-like reason have the capacity to know what is good and bad, right and wrong. The antidote for this denial of the human capacity for morals and the embrace of moral relativ-

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79 Paul Carrington's claim that members of the Critical Legal Studies movement have no place in law schools because they advocate a nihilistic approach to law and legal education is unfounded. The best of critical legal theory, especially the views of Roberto Unger and others in the rationalist branch of the movement, clearly reject the moral neutrality of classical liberalism and the liberal idea of the state and offer differing cogent critiques of the moral values and ideological assumptions reflected in legal doctrine. If one looks beyond its method of deconstruction and its radical skepticism, Critical Legal Theory is essentially normative in its orientation. The notion that law is politics is not so radical. Indeed, John Finnis asserts that the requirements of practical reasonableness apply no less to political decisions than they do to legal decisions.

80 HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE 51-115, 159-174 (1986).

ism bordering on nihilism lies in a reaffirmation of the historic role of the university in exploring the meaning of life and providing moral instruction and moral elevation.

In place of the prevailing moral malaise produced by the so-called value-free approach to education, which is committed to radical, rationalistic and supposed scientific skepticism, there must be a commitment to return to teaching what have been aptly called first principles and necessary truths. Only by exposing students to the tradition of reason, with its concern for justice and the moral values that are the underpinnings of civil society, can we expect to lead them to a better understanding of human nature and the requirements for a peaceful and just social order. Our students must be taught to know the difference between those propositions and arguments which merely sound good from those which are good and sound. Nothing less than an aggressive pursuit of a justifiable morality (i.e., objective moral standards, principles of practical reason, natural law properly perceived), and a commitment to moral discourse, is required if a university law school is to be an institution of higher learning instead of simply a trade school. A good legal education consists of more than the study of laws and legal institutions and the analytical skills needed to function as a lawyer within the adversary system. It must include an exploration of the meaning and purpose of law, the relationship between law and other related disciplines and the development of the cognitive skills required to engage in moral discourse. A good legal education should not only prepare students for the demanding roles that lawyers perform, it should also be a positive experience in the formation of moral character.

There are many obstacles in the path of progress toward the goal of a legal education that puts primary emphasis on the concern for justice and the quest for objective moral principles. It is understandable why many might consider the effort futile. There are those who are too closed-minded to put aside their suspicions and mistrust to reconsider whether moral knowledge is attainable. For example, many who reject the concept of natural law, i.e., a higher moral law discoverable through reason, base their objection on the fact that the Roman Catholic Church has been its principle exponent. Thus, they suspect that the concept of natural law, or as I prefer to call it, the tradition of reason, is nothing more than disguised religion or that it is necessarily premised on a belief in God. Then there are those, perhaps even of

a religious bent, who would say that reason is not a path to moral truth or that they have found their truth and see no need to engage in a quest for objective moral principles. Others, convinced that they have already found moral truth, will assume they have all the truth and that they have correctly perceived the truth and its implications. Of course, one who has knowledge of truth, especially one who proclaims a knowledge of God, should know how much more truth there is to know. Still others will be either too fearful, too foolish, too lazy or too preoccupied with lesser goals to enter the discourse.

Despite what all manner of naysayers might claim, there is yet reason to believe that progress toward the goal of a justifiable universal objective standard of morality is possible. The events of recent years evidence the possibility of progress toward the goal of universally recognized moral standards. There is a growing recognition in the international community of universal human rights. Developments in computer science and communication technology that increase our ability to organize and communicate information may provide the means to develop a common moral language. Within the law schools there is a revival of interest in normative jurisprudence, a reexamination of professional values and a healthy dialogue about the goals and purposes of legal education.

The tradition of reason that is the hallmark of Western civilization has produced a legacy of thought which those of us who are its heirs should feel compelled to understand, to clarify, to explore more fully and to develop and enrich. Who among us, in the journey through life, especially those of us privileged to have a place within the ranks of university professors, has not marveled at our capacity for learning and the power of reason. Can anyone of us readily deny that it is better to be than not to be, that it is better to have knowledge than to be ignorant, and that through our reason we can acquire the knowledge of the truth, share friendships, experience the joy of work and play, appreciate the beautiful and aspire to know God. We need not start from scratch in the search for a justifiable, objective and universal morality. We can stand on the shoulders of giants, those intellects who have discovered insights into human nature and the human condition. We must avoid the cynicism and despair born of the belief that good and bad, and right and wrong, are essentially meaningless, except as indicators of personal preferences and taste. By returning to first principles and forgotten truths we can

reclaim the high ground and with faith, hope and love work together toward the day when "justice will fall down like rain and righteousness shall flow like a mighty stream."[81]

Beginning law study with the perspectives of moral and legal philosophy, the history of the law and the legal profession, and training in the methods of moral analysis will not be easy for students or teachers. It will require law professors committed to the pursuit of justice, who have knowledge of disciplines besides law and who understand the difference between moral discourse and moral indoctrination. It will require students willing to take responsibility for their education and capable of disciplined inquiry into first questions about human nature and the human condition. Although it may not be a panacea for legal education in the twenty-first century, I think placing the emphasis on the concept of justice is a necessary starting point. It is the best way to encourage students to maintain their fidelity to truth and to draw upon their cultural and religious heritage that is the richest source of inspiration and hope for the future.

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[81] *Amos* 5:24.