THE RECONSTR UCTION OF A DISTINCTLY CANADIAN ROLE MORALITY "IN THE INTERESTS OF JUSTICE" AND THE IMPLICATIONS FOR REFORM

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1. INTRODUCTION

The current dialogue on the meaning of legal professionalism that is taking place at the professionalism colloquia in Ontario provide us with an important opportunity to critically evaluate our profession and send a powerful message to students, lawyers and the public about what is the essence of legal professionalism in this country.[2] This dialogue started by the Chief Justice of Ontario is critical because, I suspect that, the powerful influence of American media and commentators has led many students and lawyers to not

[2] As noted *infra* these colloquia are being organized by the Chief Justice of Ontario's Advisory Committee on Professionalism. Each year two law schools in Ontario host a colloquium. The rotating colloquia commenced in October, 2003 at the Faculty of Law, University of Western. The papers presented at each colloquium are available online. See *Colloquia On Professionalism* online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/updates/define_prof.jsp#task_prof1 (date accessed: 25 February 2005).

be reflective about Canadian legal culture and ethics.[3] As a result, the perceived prevailing or dominant conception of a Canadian lawyer seems to be zealous protection and maximization of the client's interests, the ethic that is so pervasive in American legal culture.[4] It is an ethic that many trace back to Lord Brougham's speech in the infamous 19th Century Queen Caroline's case:[5]

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedient, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[6]

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[3] In keeping with my thesis that we have failed to focus on a distinctly Canadian legal ethics, I have tried to limit my use of American citations and instead use Canadian references where at all possible. One of the problems, however, is that there is not a well developed scholarship in the areas of legal professionalism and ethics in Canada. For an overview of the historical "sounds of silence" in this context, see A.M. Dodek, "Canadian Legal Ethics: A Subject In Search Of Scholarship" (2000), 50 *University of Toronto Law Journal* 115.

[4] Support for this proposition comes from the virtual silence of scholarship in this country that suggests that our role morality (i.e. the set of values and norms that govern the conduct of individuals in their role as lawyers) is consistent with the interests of justice. Indeed, most of the critical commentary seeks to jettison the idea of role morality in favour of using common morality or some other other-regarding ethic as the yardstick by which to measure the ethics of a lawyer's decision. See *infra* at note 30.

[5] In 1820, King George IV of England wanted to remove his wife Caroline as Queen and to dissolve their marriage. In order to accomplish this task, a bill was entered in the House of Lords. The charge was that Caroline had committed adultery. The inquiry became, in effect, "The Trial of Queen Caroline." Henry Brougham, later Lord Chancellor, was chosen as her legal counsel. During the trial, he gave notice that he intended to prove that the King had previously married in secret. Many thought that proof of this might bring down the monarchy. In doing so, Brougham gave what is now one of the most famous speeches on role morality. The Bill was eventually withdrawn by the King. Caroline died shortly after King George's coronation. See online: <http://www.loyno.edu/history/journal/Mouledoux.html> (date accessed: 20 February 2005) and W. Simon, "'Thinking Like A Lawyer' About Ethical Questions" (1998), 27 *Hofstra Law Review* 1 at 4 (hereinafter *Thinking Like A Lawyer*).

[6] As quoted in *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 12.

It is my thesis that this ethic no longer represents our role morality.

The paper begins with an overview of what has been called the "professionalism problem" (Part II).[7] These problems can be linked to our failure to cast off the negative American experience and to come to terms with the evolving professional identity or role morality in this country. Part III moves on to provide support for the paper's central thesis that, over the last 15 years, we have begun to reconstruct a distinctly Canadian role morality that is no longer grounded in pursuit of the client's interests at all costs.[8] Using recent professional and jurisprudential statements on ethics and the Law Society of Upper Canada's Rules of Professional Conduct,[9] I argue that our evolving role morality is now

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[7] See, for example, D.L. Rhode, "The Professionalism Problem" (1997-1998) 39 *William and Mary L. Rev*. 283.

[8] It will be important throughout this piece and when thinking about these issues to distinguish between zealous pursuit of the client's interests and rights that are consistent with justice and those that are not. What is justice and how a client's rights that are not recognized by the positivist law can be furthered are discussed in more detail *infra*.

[9] I have chosen to focus on the Ontario Rules for a number of reasons beyond the fact that this is an Ontario colloquium. First, approximately 39% of all Law Society membership in Canada is in Ontario. In 2002, there were 85,863 lawyers (defined as members of a Law Society) in Canada, 33,593 or which were in Ontario. Following Ontario, the next largest provinces were Quebec (19,873) and British Columbia (10,448). See online: Federation of Law Societies, <http://www.flsc.ca/en/pdf/statistics2002.pdf> (date accessed: 25 February 2005). Second, the LSUC has been particularly proactive in revising its rules and as a result, they have undergone tremendous change since 2000. This then provides a good jurisdiction with which to test my thesis. Finally, the Code of Conduct of the Canadian Bar Association (CBA) has also recently revised its Rules and the changes will bring the CBA Code, generally speaking, in line with the Ontario Rules. The CBA Code, however, has not yet been officially released. See online: Canadian Bar Association, http://www.cba.org/CBA/activities/code/ (date accessed: 25 February 2005). Throughout this paper, I will use Rules (Ontario) as a shorthand for the Ontario Rules of Professional Responsibility, online: Law Society of Upper Canada, <http://www.lsuc.on.ca/services/RulesProfCondpage_en.jsp> (date accessed: 22 February 2005).

firmly grounded in the pursuit of truth and justice.[10] This is the very ethic urged by Lord Chief Justice Cockburn in his 19th century response to Brougham:

> My Noble and learned friend Lord Brougham said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction — that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client per fas; not per nefas; it is his duty to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, *with the eternal and immutable interests of truth and justice*.[11]

Part IV begins a dialogue on what kinds of recommendations will be necessary both in our law schools and practice in order to truly access the justice in legal professionalism and give effect to our evolving role morality.

I. THE PROFESSIONALISM PROBLEM

In September of 2000, Chief Justice Roy McMurtry of the Ontario Court of Appeal established an Advisory Committee on Professionalism. Its purpose is to:

> ... to maintain and encourage those aspects of the practice of law that make it a learned and proud profession. ... [T]he Committee acts as a steering committee and a clearinghouse to generate ideas and to make recommendations to other organizations and individuals within the legal community about initiatives to enhance professionalism.[12]

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[10] For a history of the Ontario Rules, see D. Robinson, "Ethical Evolution: The Development of the Professional Handbook of the Law Society of Upper Canada" (1995), 29 *Gazette* 162.

[11] As cited in G.V. LaForest, "Integrity and the Practice of Law" (1987), 21 *Gazette* 41 at 42 (emphasis added). This response was given at a dinner where Brougham repeated his speech from the trial of Queen Caroline.

[12] Online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/updates/define_prof.jsp> (date accessed: 5 December 2004).

The Committee has developed a three-part action plan which includes, as noted earlier, the holding of bi-annual colloquia on professionalism at the law schools in Ontario; the creation of a working group to identify or define the components of professionalism;[13] and, a task force to investigate how to stimulate and advance the teaching of professionalism in law school and in law firms. The Chief Justice's initiative is reminiscent of the initiative by the Conference of Chief Justices in the United States to address a perceived decline in professionalism in that country:

> In August 1996, the Conference of Chief Justices passed a resolution for a *National Study and Action Plan Regarding Lawyer Conduct and Professionalism*. In that resolution the Conference noted a significant decline in professionalism in the bar, and a consequent drop in the public's confidence in the profession and the justice system generally.[14]

So what exactly is the professionalism problem in this country?

(i) Alienation And The Perceived Absence Of Meaningful Work

There is a growing disconnect and alienation between lawyers and the profession.[15] William Simon states the problem well at the beginning of "*The Practice of Justice*":

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[13] A working draft is available online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/definingprofessoct2001revjune2002.pdf> (date accessed: 26 February 2005).

[14] See "Implementation Plan for the Conference of Chief Justices' National Plan on Lawyer Conduct and Professionalism" (2002) online: American Bar Association, <http://www.abanet.org/cpr/impl_plan.pdf> (date accessed: 5 December 2004) at 1. The Plan was approved in 1999 and is available online: American Bar Association, <http://www.ncsc.dni.us/ccj/natlplan.htm> (date accessed: 5 December 2004).

[15] See G.J. Cohen, "Ontario Lawyers Dissatisfied, Concludes Law Society Report" *Law Times* (November, 1999). A recent survey did find, however, a much higher degree of satisfaction for lawyers practicing on their own or in small firms. See G.J. Cohen, "Lawyers Mostly Happy With Their Lot" *Law Times* (26 April 2004).

> Many young people go to law school in the hope of finding a career in which they can contribute to society. They tend to come out with such hopes diminished, and the hopes often disappear under the pressures of practice.[16]

Why is this happening? What is it about the law school and lawyering experience, for example, that is creating such despair?

In addition to alienation, many lawyers are concerned about the quality of life and work.[17] As Chief Justice McMurtry observed in his speech at the Ottawa colloquium last year:

> ... the Ipsos Reed survey presented at the annual CBA meeting in Winnipeg this year found that lawyers were more dissatisfied than other professionals . It concluded that lawyers who feel miserable in their jobs are "far from an endangered species."
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> Many of the causes of dissatisfaction are obviously related to long hours, little time for one's families and outside interests. While the remuneration may often be generous, there is often a feeling that the work is generally not particularly relevant to society as a whole.[18]

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[16] W. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Camb., Mass: Harvard University Press, 2000) at 1 (hereinafter *The Practice of Justice*).

[17] See the discussion in F.M. Kay, C. Masuch, P. Curry, "Diversity and Change: The Contemporary Legal Profession In Ontario" (Toronto: Law Society of Upper Canada, 2004) at 120 (hereinafter *Diversity and Change*). See generally, P. Fuchs, "Young Lawyers Lack Balance Between Career, Life: Poll" *The Lawyers Weekly* (27 August, 2004); and, P.J. Schlitz, "On Being a Healthy and Ethical Member of an Unhealthy and Unethical Profession" (1999), 52 *Vanderbilt Law Review* 871.

[18] "The Legal Profession and Public Service", presented at the Third Colloquium (Ottawa) (Law Society of Upper Canada, 2004) online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/third_colloquium_mcmurtry.pdf> (last accessed 10 February 2005) (hereinafter *The Legal Profession and Public Service*).

(ii) The Prevalence Of Bias

As with all institutions and structures of power in Canadian society, there are a number of systemic biases operating within the legal profession. These biases have created barriers to entry, mobility, "Bay Street", and other areas of practice for women and members of racialized communities.[19] In one of the most comprehensive studies of the issue, Kay, Masuch, & Curry recently reported in *Diversity and Change* that:

> Women's advancement in the profession remains seriously hindered by child-rearing responsibilities compared with their male colleagues. Little progress has been made, particularly in the private sector, toward accommodating parental responsibilities for both men and women. Workplace supports and flexibility remain inadequate. The career consequences of children and family responsibilities are borne primarily by women. The impact can be seen in the gender disparities in earnings, promotions, partnerships, career opportunities, and attrition of women from the profession.
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> The picture is less clear among people of racialized communities. Lawyers of racialized communities are disadvantaged in earnings, promotions, and partnerships. These lawyers also encounter discrimination by clientale, and express lower levels of job satisfaction. Across different contexts where lawyers work, people of racialized communities are under-represented relative to their numbers in the Canadian population. Yet, important inroads have been made across various fields of law, and across different practice settings, including law firms of all sizes.[20]

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[19] See generally, C.C. Smith, "Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession" presented at the Fourth Colloquium (Windsor) (Law Society of Upper Canada, 2005), online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/updates/define_prof.jsp> (hereinafter *Who is Afraid of the Big Bad Social Constructionists*); *Diversity and Change*, *supra* note 17; F.M. Kay, C. Masuch, P. Curry, Turning Points and Transitions: Women's Careers in the Legal Profession" (Toronto, Law Society of Upper Canada, 2004); F.M. Kay, "Crossroads To Innovation and Diversity: The Careers of Women Lawyers in Quebec" (2002), 47 *McGill L.J.* 699; J. Brockman, "Bias In The Legal Profession: Perceptions and Experiences" (1992), 30 *Alberta Law Review* 747; and, C. Tennant, "Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination" (1992), 15 *Dalhousie L.J.* 464 (hereinafter *Discrimination in the Legal Profession*).

[20] *Diversity and Change*, *supra* note 17 at 119-120.

Just last month at a Canadian Association of Black Lawyers conference in Toronto, it was reported that there are only four Black partners at major law firms in Ontario, a province with 33,000 lawyers.[21] This disturbing reality was also addressed by the Chief Justice at the Ottawa colloquium last fall:

> There is still the reality today that some minorities face greater barriers than others in joining the mainstream of the legal profession. In this context, I have retained a copy of a 1998 article by Michael St. Patrick [Baxter] entitled "Black Bay Street Lawyers and Other Oxymora."
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> Mr. Baxter's article makes both a compelling and disturbing reading. Mr. Baxter is a 1979 graduate of Western Law School, was on the Dean's Honour List, articled on Bay Street, finished in the top one percent of the Bar Admissions Course, clerked for the Chief Justice of Ontario, won a Canadian Council Doctoral Fellowship and attended graduate school at Harvard. What is very disturbing is that even with this impressive credentials, he failed to secure employment notwithstanding applying to over 50 Toronto law firms. ...[22]

In his article, Baxter provides his views on why racialized lawyers have not been able to access Bay Street:

> My own view is that the problem is attributable in large part to the fact that the people who, historically, have controlled the portals of the Bay Street firms have suffered from a lack of personal experience with blacks. These "gatekeepers" generally have had little interaction with blacks. Indeed, their firms may never have had a black lawyer. Their interaction with blacks is usually limited to blacks in subordinate positions. Without the benefit of substantial personal interaction with blacks, the gatekeepers tend to rely on stereotypes so readily available through the media and have a tendency to make conscious or unconscious assumptions about black lawyers based on these stereotypes.[23]

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[21] See T. Tyler, "Black Lawyers Decry Barriers" *The Toronto Star* (31 January 2005); Oliver Bertin, "Legal Job Market Still Challenging For Black Lawyers" *The Lawyer's Weekly* (11 February 2005); and, Kirsten McMahon, "Black Lawyers Share Advice On Developing A Practice" *Law Times* (7 February 2005).

[22] *The Legal Profession and Public Service*, *supra* note 18.

[23] (1998), 30 *Canadian Business Law Journal* 267 at 273-274.

In addition, to physical barriers, those excluded have, and continue, to suffer profound psychological harm. As Justices Cory and Iacobucci observed in *Vriend v. Alberta*, a case about the exclusion of sexual orientation as a prohibited ground of discrimination in Alberta's Human Rights Code:

> Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem.[24]

Similarly in *Law v. Canada (Minister of Employment and Immigration*) , Justice Iacobucci also held that:

> [T]he equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.[25]

That this is occurring in the legal profession which has truth, justice and equal protection of the law as its foundational principles is very troubling. As Charles Smith, equity advisor of the CBA, has pointed out "it is interesting and somewhat paradoxical that the very profession which has been the source of such insight and eloquence on equality

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[24] [1998] 1 S.C.R. 493 at para. 102.

[25] [1999] 1 S.C.R. 497 at para. 53. With respect to employment, the Supreme Court in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368, recognized that:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

requires a healthy does of self-examination and positive action to address inequality and outright discrimination within its own ranks."[26] There is no question that the Law Society of Upper Canada has done a good job in creating equity initiatives including, for example, the creation of an Equity office in 1997, a designated Discrimination and Harassment Counsel, an Aboriginal Elders' Program and Student Supporters, an equity and diversity education program, and a set of model equity policies for firms.[27] However, there remains little evidence that these initiatives are making a significant difference, particularly for racialized lawyers. Returning back to the findings of *Diversity and Change*:

> Lawyers of racialized communities are more likely to state that they were denied opportunities (frequently or a few times) to take responsibility for cases because of client objection (10% compared with 4% of non-racialized lawyers). They are also more likely to respond that this happened on at least one occasion. ...
>
> Lawyers of racialized communities ... were more often subject to inappropriate comments by judges and other lawyers.[28]

Why is this happening? Part of the reason is the continued unwillingness of law students, lawyers and judges to understand the nature, prevalence and effects of systemic racism and to take real and significant action. That is why year after year, systemic racism

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[26] "Next Steps On The Road To Equality In The Canadian Profession" *Touchstone* (Newsletter of the CBA's Standing Committee on Equality) (December 2002).

[27] A summary of these initiatives can be found online: Law Society of Upper Canada, <http://www.lsuc.on.ca/equity/promo_equity.jsp> (date accessed: 22 February 2005). See also, the Bicentennial Report on Equity Issues in the Legal Profession, online: Law Society of Upper Canada, <http://www.lsuc.on.ca/equity/pdf/bicentennial_nov0503.pdf> (date accessed: 22 February 2005). See also the discussion of additional measures that can be imposed in *Who is Afraid of the Big Bad Social Constructionist*, *supra* note 19.

[28] See *Diversity and Change*, *supra* note 17 at 118-120. The survey of lawyers was conducted in 2003.

commission reports continue to be shelved. Second, there is an apparent unwillingness of the Law Society to get tough with law firms and ensure that they are complying with the equity initiatives that have been established.[29] And finally, as Baxter points out, racialized lawyers are largely absent from the power structures in the profession.

(iii) A Questioning Of Zealousness

The last decade has also witnessed a questioning by academics of the utility of many of the fundamental principles that have grounded the traditional approach to role morality.[30] These include client loyalty, zealous advocacy and limited accountability. While the theoretical justification for zealousness is, in part, that justice will be served in the long run, we have seen over the last twenty years, particularly in the United States, that rather than serving justice, zealousness has enabled the accumulation of wealth, facilitated harm and shielded accountability.[31] In Canada, the recent Murray case serves as a reminder of

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[29] See the discussion of these issues in J. Brockman, "The Use Of Self-Regulation To Curb Discrimination And Sexual Harassment In The Legal Profession" (1997), 35 *Osgoode Hall L.J.* 209.

[30] See generally, F.C. DeCoste, "Towards A Comprehensive Theory of Professional Responsibility" (2001), 50 *U.N.B.L.J.* 109; A.C. Hutchison, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999); A. Woolley, "Integrity in Zealousness: Comparing the Standard Conception of the Canadian and American Lawyer" (1996), 9 *Can. J.L. & Jurisprudence* 61 (hereinafter *Integrity in Zealousness*); J.E. Bickenbach, "The Redemption of the Moral Mandate of the Profession of Law" (1996), 9 *Can. J. L. & Jurisprudence* 51; and, R.F. Devlin, "Normative, And Somewhere To Go? Reflections On Professional Responsibility" (1995), 33 *Alberta Law Review* 924.

[31] In the United States, the Enron and savings and loan cases (e.g. Kaye, Scholer case) serve as shining examples of the harms caused by zealousness. See "Hold Lawyers Accountable In Corporate Fraud Scandals", online: USA Today, <http://www.usatoday.com/news/opinion/editorials/2003-08-14-our-view-usat_x.htm> (date accessed: 27 February 2005) and *Integrity in Zealousness*, *supra* note 30 at 63-66. See also the discussion in D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) and, in particular,

this.[32] As Professor Roach has observed:

> The recent Enron affair has important lessons for lawyers of what can happen if they do not keep their ethical house in order. Accountants have allowed their professional role in providing objective audits to be compromised by lucrative consulting work. ...
>
> Lawyers, however, should not be complacent. There are signs of an emerging ethical crisis in the profession of law. The crisis is by no means restricted to the practice of criminal law, but criminal justice issues have, as usual, been at the forefront of debate. ...
>
> The Ken Murray affair has been something of a mini-Enron for the legal profession.[33]

With the growing lack of civility in our courtrooms, we are beginning to see appellate courts express similar concerns about the excesses of client loyalty and adversarial ethics.[34] In *Felderhof*, for example, Justice Rosenberg held:

> ... As Kara Anne Nagorney said in her article, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815 at 816-17: "Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society ... Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the

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Chapter 10 (hereinafter *Lawyers and Justice*).

[32] Murray kept in his possession videotapes depicting his client's (Paul Bernardo) involvement in the rape and torture of his victims. While he did eventually disclose the tapes, the damage had already been done. As a result of his unethical conduct, Bernardo's accomplice, Karla Homolka, was able to secure a plea bargain that only sent her to jail for 12 years. Murray was charged with obstruction of justice and acquitted. See *R. v. Murray* (2000), 144 C.C.C. (3d) 322 (Ont. S.C.J.). Disciplinary charges against Murray were also eventually withdrawn.

[33] "Ethics and Criminal Justice" (2003), 47 *Criminal Law Quarterly* 121 at 121. This issue was devoted to the Murray case.

[34] See the discussion in *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 (Ont. C.A.) (hereinafter *Felderhof*) and *Marchand (Litigation Guardian Of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.). See also, S.N. Turner, "Raising The Bar: Maximizing Civility In Alberta Courtrooms" (2003), 41 *Alberta Law Review* 547.

> goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." ...[35]

(iv) Public Discontent

There is a continued sense of a lack of public confidence in the profession.[36] A recent American survey revealed that two-thirds of the public did not believe that a lawyer was a "seeker of justice."[37] Moreover, as Justice Abella, now of the Supreme Court of Canada, recognized "the intensity of the public's disaffection is now so palpable that it has started to affect the profession's own perception of its professionalism."[38] This discontent has only been heightened with a number of highly publicized cases in both Canada and the United

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[35] *Supra* note 34 at 536, 539.

[36] See, for example, M. Wilhelmson, "Public's Perception Of B.C. Lawyers Found To Be Slipping" *The Lawyers Weekly* (26 March 2004). In 1998, Paul McKay, a reporter with the Ottawa Citizen, conducted a five month investigation into unethical and criminal behaviour of lawyers and the disciplinary response of the Law Society of Upper Canada. His findings were reported in a series of articles beginning on November 7, 1998 entitled "Lowering the Bar". In "How Crooked Lawyers Dodge Justice", *Ottawa Citizen* (7 November 1998), McKay made the following observations:

> It exists, according to its own august statement of purpose, to uphold the "integrity and honour" of Ontario's legal profession. But 201 years after the Law Society of Upper Canada was mandated to sniff out unscrupulous lawyers and guard the interests – and money – of unsuspecting clients, the self-governing body of Ontario's 27,000 lawyers is proving to be a watchdog with a muffled bark and no bite. ...
>
> The Law Society Act reflects a historic arrangement in Ontario that has given the legal profession – as a fully self-regulating profession – a parallel system of justice in which lawyers accused of wrongdoing face a panel of peers, and where no criminal findings are ever made. ...

[37] D.L. Rhode, "Law, Lawyers and the Pursuit of Justice" (2002), 72 *Fordham L. Rev.* 1543 at 1545.

[38] "Professionalism Revisited" (October 14, 1999), online: Ontario Courts, <http://www.ontariocourts.on.ca/court_of_appeal/speeches/professionalism.htm> (date accessed: 1 February 2005) (hereinafter *Professionalism Revisited*).

States involving unethical and unprofessional conduct.[39]

(v) Legal Practice As Profit Maximization

While the concern about law as a business rather than a profession has always been present,[40] the last two decades have seen elite firms grow and become more like corporations than problem-solving institutions.[41] Technology, globalization, multi-disciplinary practices and mergers dominant elite law firm discourse.[42] We have even come to the point where there was some discussion last year of allowing law firms to issue shares,[43] although in its Report to Convocation last month, the Professional Regulation Committee (LSUC) essentially rejected the idea.[44] This corporatization of legal practice has only served to perpetuate the idea that legal professionalism is about economics,

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[39] See, for example, the Murray and Enron cases discussed *supra*.

[40] See generally, The Honourable Mr. Justice Frank Iacobucci, "The Practice of Law: Business and Professionalism" (1991), 49 *The Advocate* 859; and, W.W. Pue, "Becoming 'Ethical': Lawyers' Professional Ethics In Early Twentieth Century Canada" (1991), 20 *Manitoba Law Journal* 227.

[41] In 2000, 76 law firms in Canada had more than 51 lawyers. The 10 largest of these firms employed 3,957 lawyers. These 76 firms are what I would call the elite firms. This information comes from Industry Canada, online: Legal Services, http://strategis.ic.gc.ca/epic/internet/indsib-legser.nsf/en/pc00007e.html (date accessed: 25 February 2005).

[42] For an excellent discussion of the challenges posed by the regulation of multi-disciplinary practices see P. Paton, "What Happens after 'Happily Ever After'? Regulatory Resistence and Rule-making after Canadian and American Bar Association Resolutions on Multidisciplinary Practice" (2003), 36 *U.B.C.L. Rev*. 259.

[43] See K. Makin, "Public Share Offerings For Law Firms Studied" *The Globe and Mail* (27 January 2004); and, T. Belford, "Law Firms Grapple With Going Public" *The Globe and Mail* (2 February 2004).

[44] Online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/convjan05_prc_report.pdf.> (date accessed: 25 February 2005).

competition and the maximization of profit and efficiency rather than public service and the pursuit of justice.[45]

I wonder if the time has not come to be thinking not about the issuance of shares or capital investments but rather placing a tax on the elite firms as a means of redistributing the wealth to truly ensure access to justice. In British Columbia, the legislature thought it was a good idea in 1993 to impose a tax on lawyers' professional services to provide funding for Legal Aid. Even though as seen in the recent British Columbia decision in *Christie v. British Columbia (Attorney General)*[46], the tax had the unintended consequence of creating additional financial barriers for access, the idea remains a good one if imposed on those who can clearly afford it. An access fund could be used not only to supplement Legal Aid but also to help fund law school clinics and provide debt relief for students who pursue social justice positions following graduation.

(vi) The Lack Of Meaningful Regulation And Discipline

There remains a lack of meaningful regulation and discipline of lawyers working

[45] The reality, of course, is that the vast majority of lawyers in Canada work as sole practitioners or in small firms and so while the elite firms often get most of the attention in the media and legal magazines (e.g. Lexpert) , they do not represent the bulk of the work done by lawyers in this country. See Industry Canada: Legal Services, http://strategis.ic.gc.ca/epic/internet/indsib-legser.nsf/en/pc00007e.html (date accessed: 25 February 2005).

[46] [2005] B.C.J. No. 217 (S.C.) (hereinafter *Christie*). The case is discussed *infra*.

in elite law firms.[47] For example, it has been more than 14 years since the five partners at Lang Michener were disciplined for failing to disclose the misconduct of one of their partners. The case was supposed to as Gavin MacKenzie put it "raise[] the profession's consciousness."[48] How many partners in elite law firms in Ontario have been disciplined since 1991? A search of the Law Society discipline database on Quicklaw reveals less than 10 cases and many of these involved misappropriation of significant trust funds (e.g. $1,029,693 in the case of Edward Freyseng and $238,000 in the case of Daniel Cooper). [49] Is it safe to conclude that the absence of a significant number of disciplinary cases is evidence that there are no problems of fraud, over-billing, document shredding, incompetence, sexual harassment, or discrimination in elite law firms? The lack of meaningful discipline only serves to reinforce the idea that lawyers and particularly those in power are simply not accountable for their actions.

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[47] See, in particular, H.W. Arthurs, "Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs" (1994-1995), 33 *Alberta Law Review* 800. In the American context, see generally, S.S. Fortney, "Am I My Partner's Keeper: Peer Review in Law Firms" (1995), 66 *U. Colo. L. Rev.* 329 and S.S. Fortney, "Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture" (1996), 10 *Geo. J. Legal Ethics* 217; D.B. Wilkins & E. Chambliss, "Promoting Effective 'Ethical Infrastructure' in Large Law Firms: A Call For Research and Reporting" (2002), 30 *Hofstra Law Journal* 691; and, T. Schneyer, "Professional Discipline For Law Firms?" (1991-1992), 77 *Cornell L. Rev.* 1.

[48] "Lawyers In Ontario Mindful Of Misconduct: Change In Attitude Cited As High-Profile Member Disbarred" *Vancouver Sun* (19 September 1991).

[49] See *Law Society of Upper Canada v. Cooper*, [1991] L.S.D.D. No. 93 (QL) (McCarthys); *Law Society of Upper Canada v. Donaldson*, [1992] L.S.D.D. No. 60 (QL) (Blakes); *Law Society of Upper Canada v. Freysang*, [1993] L.S.D.D. No. 136 (QL) (Blaney, McMurtry); *Law Society of Upper Canada v. Tulk*, [1993] L.S.D.D. No. 115 (QL) (Blaney, McMurtry); *Law Society of Upper Canada v. MacKay*, [1995] L.S.D.D. No. 173 (QL) (Gowlings); *Law Society of Upper Canada v. Roine*, [1996] L.S.D.D. No. 95 (QL) (Blaney, McMurtry); and, *Law Society of Upper Canada v. Ublansky*, [1995] L.S.D.D. No. 138 (QL) (Goodman, Carr).

The prevalence and nature of unethical conduct in elite firms along with why elite lawyers have escaped the disciplinary radar all need to be further researched. One of the problems is the wall of silence that forms part of the elite firm culture. In order for self-regulation and discipline to function properly, the Law Society has to rely on lawyers to report the misconduct of others. Indeed, Rule 6.03(3) specifically requires such reporting unless to do so would lead to the disclosure of privileged information. However, blowing the whistle is a dangerous business particularly in the elite firms. It can result in ostracization and loss of one's job.[50] What protection is provided by the Law Society for lawyers who want to report the misconduct of their superiors but are afraid of the ramifications?

(vii) Not Enough Access To Justice

Access to justice, the mantra of the Windsor Law School is a fundamental feature of any system of justice. As Chief Justice McMurtry noted in his 2004 Opening of the Courts Report:

> Access to legal advice and access to justice remains one of the essential bulwarks of our society and our individual liberties. Our freedoms are at best fragile and they depend on the ability of every citizen to assert in a court or a tribunal his or her rights under the law, and to receive sound legal advice as to rights and obligations. Our laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community. In affording this protection, legal assistance does make a deep and essential contribution to our social fabric and

[50] See the discussion in A.J. Rabinowitz and E.K. Gillespie, "'Blowing the Whistle' and the Lawyer's Duty to Report: Wieder v. Skala" (1994), 7 *Can.J.L. and Jurisprudence* 349.

> indeed to our very way of life. ...[51]

While exact definition has been elusive, there are a number of core elements of access to justice that can be identified including:

- full access to the courts or alternative dispute resolution mechanisms;
- procedurally and substantively just results.[52]

There have been and continue to be some very real concerns about whether both core elements are being given effect. For example, restrictions to Legal Aid eligibility and the absence of meaningful increases in Legal Aid rates have produced an increase in unrepresented litigants before our courts.[53] As Justice Koenigsberg observed in striking down a tax on lawyers' fees for low income clients in *Christie*:

> In spite of the existence of legal aid, there is an increase in persons representing themselves in our courtrooms. Most are there because they have no choice but to represent themselves since they do not have the financial resources to pay for legal services. .... Thus, I take judicial notice of the fact that many self-represented individuals in a wide variety of cases are denied effective access to justice when they

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[51] Online: Ontario Courts, <http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_speeches/coareport2004.htm> (date accessed: 1 February 2005).

[52] See the discussion of defining "access to justice" in "Report to Convocation" (Access to Justice Committee), online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/convjune02_accjust.pdf> (date accessed: 17 February 2005) at 4. See also, "Report to Convocation: June 26, 2003" (Access to Justice Committee), online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/convjune03_access.pdf> (date accessed: 22 February 2005).

[53] See generally, V. Krishna, "Ontario Citizens Denied Access To Justice" *Toronto Star* (30 September 2002) A21; B. Crosariol, "High Legal Fees Forcing Many Laypeople To Go Lawyerless" *The Globe and Mail* (4 October 2004) B11; C. Schmitz, "Week-long Protest In Ottawa Planned Over Legal Aid Tariff" *The Lawyers Weekly* (15 March 2002); and, J. Jaffey, "Legal Aid Funding Has Dropped Significantly Since Its Peak In 1995" *The Lawyers Weekly* (20 December 2002).

cannot afford appropriate legal representation.[54]

In addition, it has been reported that in one "court in Toronto 75% of the parties appearing in family law matters were not represented by a lawyer."[55]

Clearly, greater funding is required from government for Legal Aid and other clinic-based programs.[56] Even with greater funding, there will be an access problem and so there remains a corollary obligation on the profession to ensure that all individuals have access to legal advice. This can be accomplished in a number of ways. First, the LSUC should consider imposing a mandatory pro bono requirement on lawyers especially elite firm lawyers.[57] The 50 hour minimum standard recommended by Rule 6.1 of the American Bar Association Model Rules would appear to be a workable number.[58] In 2002, Ontario created

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[54] *Christie*, *supra* note 46. In a similar vein, see *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 (Div. Ct.) a case that addressed the effect of filing fees in Small Claims Court on access. The Divisional Court held that (at 631) "the common law constitutional right of access to justice compels the enactment of statutory provisions that permit persons to proceed forma pauperis in the Small Claims Court" and so ordered the provincial government to amend the relevant statute(s) to provide for such a provision. As the Court noted "[h]istorically, where an individual was indigent and was unable to pay the costs of bringing an action, the individual could proceed in forma pauperis, or 'in the manner of an indigent who is permitted to disregard filing fees and court costs." (at 618).

[55] R. Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002), 25 *Dalhousie L.J.* 335 at 351 (hereinafter *The New Economy*).

[56] This does not seem likely. See C. Schmitz, "Don't Expect New Legal Aid Money This Year, Says Cotler" *The Lawyers Weekly* (25 February 2005) 1.

[57] In *The New Economy*, *supra* note 55, Professor Devlin recommends a mandatory pro bono requirement for all lawyers in.

[58] See Rule 6.1. Online: American Bar Association, <http://www.abanet.org/cpr/mrpc/mrpc_toc.html> (date accessed: 22 February 2005) (hereinafter *Model Rules*). As Devlin points out, the CBA passed a resolution in 1998 suggesting a 50 hour or three percent of billings target but that "nothing came of this." See *The New Economy*, *supra* note 55 at 355.

Pro Bono Ontario to assist with pro bono lawyering in this province.[59] And most recently, the Attorney General of Ontario, Michael Bryant, commented:

> I am calling on law firms to recognize pro bono work as billable work, in some fashion. ...
>
> ... I call on all individual lawyers and law firms to set an annual target of five per cent of their billable hours to be devoted to pro bono work.
>
> Finally, I call on large and medium sized firms to send young associates or even seasoned lawyers for secondment to legal aid clinics.[60]

Second, we need to end the discriminatory entry requirements for foreign-trained lawyers. A column in the Toronto Star last week reminded us of a report on this issue that was prepared in 1990 and which has remained on the shelf:

> The task force spent two years doing its research. It heard from more than 200 individuals and organizations. .. Its conclusion [was that] highly trained immigrants face systemic discrimination. Their qualifications were consistently undervalued and their international experience was given little credence. Those who belonged to racial minorities fared worst.[61]

The third solution is for the licencing of non-lawyers such as para-legals which is currently being considered in Ontario.[62]

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[59] See online: Pro Bono, <http://www.probononet.on.ca/main.cfm> (date accessed: 22 February 2005).

[60] These were made in a keynote address at a Pro Bono Law Ontario Awards Dinner (May 6, 2004). See online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/may0704_probonospeech.pdf> (date accessed: 22 February 2005).

[61] See C. Goar, "Ontario Could Have Led The Way" *The Toronto Star* (21 February 2005) A18. A summary of the ACCESS report can be found online: Ministry of Citizenship, <http://www.regulators4access.ca/html/studrep.htm> (date accessed: 22 February 2005).

[62] See "Law Society Proposes New Model For Regulation of Legal Services" online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/sept2305_paralegal_regulation.pdf> (date accessed:

Access to justice is not just about access to our courts and a lawyer, it is equally about being able to access a lawyer who is competent as this impacts on the client's right to access a substantially just result. Traditionally, our focus on competence has been on skills and knowledge. However, given the diversity of the population and the reality that the marginalized are often those most in need of legal services,[63] lawyers who are predominantly white, heterosexual, middle-class, and able-bodied have to be culturally competent as well.[64]

(viii) The Failings Of Law School

Finally, there is an emerging recognition in this country that law schools have failed

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22 February 2005).

[63] As Chief Justice McMurtry observed in his 2000 Opening of the Courts Report (January 10, 2000):

> Stephen Wexler, whose writings inspired many of the leaders of the clinic movement in Canada, spoke eloquently of the needs of the disadvantaged when he said:
>
> > Poor people are not just like rich people without money. Poor people are always bumping into sharp legal things.
>
> We do know that the wounds felt from these "sharp legal things" are disproportionately felt. Because of the systemic discrimination which is still widespread, the wounds are particularly inflicted on racial and other minorities, women, Aboriginal people and those with literacy, learning and other disabilities.

Online: Ontario Courts, <http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_speeches/coareport2000.htm> (date accessed: 1 February 2005).

[64] This issue of cultural competence is further discussed *infra* as well as in Professor Rose Voyvodic's paper "Advancing The Justice Ethic Through Cultural Competence " presented at the Fourth Colloquium (Windsor, 2005), online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/updates/define_prof.jsp#other> (hereinafter *Advancing The Justice Ethic*).

miserably in their obligations to provide an environment in which students can develop the necessary skills, judgment and cultural competence to engage in an ethical and meaningful practice of law.[65] As noted earlier, part of the mandate of the Chief Justice's Advisory Committee on Professionalism is to investigate how ethics and professionalism can be taught in law schools. The sub-committee is currently headed by Justice Stephen Goudge of the Court of Appeal. His report describing the current state of ethics teaching in Ontario law schools and providing for recommendations is expected later this year.

II. CONSTRUCTING A DISTINCTLY CANADIAN ROLE MORALITY

(i) Overview

I would argue that a big part of the professionalism problem in this country is that the perception of role morality and legal ethics has become so "Americanized",[66] that we have failed to recognize that over the last 15 years, we have slowly been forging our own distinctly Canadian role morality.[67] This should come as no surprise.[68] There are significant

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[65] See generally, R. Voyvodic, "'Considerable Promise and Troublesome Aspects': Theory and Methodology of Clinical Legal Education" (2001), 20 *Windsor Y.B. Access Just.* 111; J. Downie, "A Case For Compulsory Legal Ethics Education In Canadian Law Schools" (1997), 20 *Dalhousie L.J.* 244 (hereinafter *A Case For Compulsory Legal Ethics Education*); D.E. Buckingham, "Rules and Roles: Casting Off Legal Education's Moral Blinders For An Approach That Encourages Moral Development" (1996), 9 *Can. J.L. & Juris.* 111 (hereinafter *Rules and Roles*); W.B. Cotter, *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education* (Montreal: Conceptcom, 1992); and, A. Esau, "Teaching Professional Responsibility In Law School" (1987-1988), 11 *Dalhousie L.J.* 403.

[66] Professor Harry Arthurs has made a similar observation. See "Poor Canadian Legal Education: So Near To Wall Street, So Far From God" (2000), 38 *Osgoode Hall L.J.* 381 at 407-408.

[67] Alice Woolley is to be credited with first attempting to differentiate ourselves from the American lawyer in her 1996 article *Integrity in Zealousness*, *supra* note 30. Comparing the American Bar Association (ABA) Model Rules with the Canadian Bar Association (CBA) Code of Conduct, she argued that the

differences in our legal, political and social cultures.[69] Canada has three legal cultures: common law, civil and Aboriginal.[70] Canadians are, generally speaking, less litigious and adversarial than Americans.[71] "Peace, order and good government" and not "life, liberty and the pursuit of happiness" are the prevailing norms of governance. Finally, Canada is not the land of "rugged individualism" but rather a social democratic state where communitarian values are reflected in our social policies. As Professor Allison Young has pointed out "... many writers have suggested, the political and legal culture of Canada is more receptive to the notions of community or social rights than is the political and legal culture of the United States."[72]

Canadian conception of a lawyer is far less zealous than her American counterpart. Woolley focus was on personal integrity. While I certainly agree with her conclusion, the evidence today using the Ontario Rules and other materials is arguably more compelling than it was almost a decade ago. I should also point out that my focus is not about infusing personal integrity or common morality into a lawyer's decision making process but rather on infusing ethics with justice. For an argument on common morality and ethics, see *Lawyers and Justice*, *supra* note 31.

[68] The idea that American approaches to ethics might not necessarily be suited to other legal cultures was raised by David Luban in his piece "Introduction: A New Canadian Legal Ethics?" (1996), 9 *Can. J.L. & Juris.* 3.

[69] For a discussion of Canadian legal culture, see generally, W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) (hereinafter *Courts and Country*).

[70] See Roderick A. MacDonald, "Legal Bilingualism" (1997), 42 *McGill L.J.* 119; and, J. Borrows and L. Rotman, "The Sui Generis Nature Of Aboriginal Rights: Does It Make A Difference" (1997), 36 *Alta. L. Rev.* 9.

[71] See *Courts and Country*, *supra* note 69 at 42.

[72] See "Joint Custody As Norm: Solomon Revisited" (1994), 32 *Osgoode Hall L.J.* 785 at 798. Young cites R.M. Elliot, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front" (1987), 12 *Queen's L.J.* 277 at 281-83; and, C.L. Smith, "Adding A Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992), 55 *Law & Contemp. Probs.* 211.

As a result of not differentiating ourselves from the United States, the idea of role morality has been given short shrift particularly by critical academics.[73] For many, role morality immediately conjures up the excesses of the adversarial process, namely, zealous advocacy and a "sporting theory of justice".[74] But this is, I would suggest, an historical relic in Canada. It is only because it continues to be talked about as the prevailing ethic in the United States and we are so influenced by American media and commentators (from within and outside of the academy) that we have failed to see to what is happening around us.[75] This is very troubling because we continue to send the message to the legal community and especially our students that zealousness remains the norm. Instead, we should be celebrating the idea of role morality and view it as a recognition that as officers of the administration of justice and guardians of the public trust, we have responsibilities and obligations that ordinary citizens do not have.

In the rest of this Part, I will try and establish that a distinctly Canadian role morality has been evolving over the last 15 years and that it continues to evolve. It is a role morality that is not guided predominantly by the pursuit of the client's interests at all costs. Rather,

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[73] See the articles cited *supra* at note 30.

[74] R. Pound, "The Causes of Popular Dissatisfaction With the Administration of Justice" (1937), 20 *J. Am. Jud. Soc.* 178 at 182.

[75] Whether in fact there is a move away from zealousness in the United States is beyond the scope of the paper.

it is guided by the pursuit of justice. In my opinion, Canadian lawyers are no longer "hired guns" but rather problem-solvers who seek justice not only for their client but also for the broader legal, social and political system within which they operate. In order to test the validity of this assertion, I begin with a brief look at a lawyer's over-riding obligation to act in the public interest. I then chronicle the evolving meaning of public interest and end by attempting to demonstrate how the current Rules (Ontario) reflect a distinctly Canadian role morality.

(ii) The Obligation Of Lawyers To Act "In The Public Interest"

The idea that Canadian lawyers are obligated to act in the "public interest" finds its most emphatic expression in the jurisprudential recognition of the utility of the self-regulating nature of the legal profession and in legislation the establishes the right of Law Societies to regulate.[76] So, for example, in *Pearlman v. Manitoba Law Society Judicial Committee*, the Supreme Court of Canada held that "the self-governing status of the

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[76] *The Legal Profession Act* (British Columbia), S.B.C., Chap. 9 (section 3(a)), for example, provides:

> 3. It is the object and duty of the society
>
> (a) to uphold and protect the public interest in the administration of justice by
>
> (i) preserving and protecting the rights and freedoms of all persons,
>
> (ii) ensuring the independence, integrity and honour of all its members, and
>
> (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership ...

professions, and of the legal profession in particular, was created in the public interest."[77]

(iii) Our Evolving Understanding Of What Is "In The Public Interest"

Historically, the prevailing ethic or role morality in this country was one of zealous advocacy, maximization of client interests and a separation of the personal and professional selves. The likely origins of this ethic of practice came from witnessing the lawyering process south of the border and in Canadian celebrations of Lord Brougham's speech in the trial of Queen Caroline. Its expression can be seen in Justice George Finlayson's address to the 1980 Call to the Bar Ceremony:

> ... We must have the ability to sit back and view a client's problems dispassionately and be able to advise as to what would be in his or her best interests. ... [The lawyer] is representing a person, and that person is entitled to be told what his circumstance is, not what he or you, his lawyer, would like it to be.
>
> ... our duty is not to motivate the clients or to involve them in our concerns, but to deal with the problem of a particular client and to obtain the best possible result in representing the client, keeping in mind the client and nobody else.
>
> ... so long as you choose to practice law in the traditional sense: the representation of a client in any sphere: *you must never forget that your duty is to that client alone. ... If you confuse your social or political conscience with your duty to that client, you betray his trust; you betray us all.*[78]

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[77] [1991] 2 S.C.R. 869 at 886-888 (as per Iacobucci J.). See also: *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17 at para. 1 (as per LeBel J.); *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 36, 37 and 40 (as per Iacobucci J.); *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 at para. 14 (as per McLachlin C.J. and Major J.); *Fortin v. Chretien*, [2001] 2 S.C.R. 500 at paras. 11-18, 52 (as per Gonthier J.); *Canada (A.G.) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-336 (as per Estey J.); and, *Harris v. Law Society of Alberta*, [1936] S.C.R. 88 at 104-104 (as per Rinfret J.).

[78] "The Lawyer As A Professional"(1980), 14 *Gazette* 229 at 230, 235 (emphasis added).

This is not to say that the prevailing governing ideology at that time was any different than today – namely that lawyers are to act "in the public interest." What is different between then and now is how we think about the public interest. Historically, the public interest justifications for zealousness and client loyalty have included the safeguards offered by an adversarial system and the promotion of client autonomy, access to justice[79] and the long term interest of justice.[80] The problem with these justifications, however, is that they are largely illusory and without foundation. For example, there is really nothing adversarial about our system of civil or criminal justice.[81] Most cases are settled well before trial. In criminal cases where adversarialism is purportedly most vibrant, many individuals are unrepresented while many are represented by incompetent lawyers.

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[79] The link to access is explained as follows. If lawyers are seen to be moral advisors to their client, then a lawyer who represents an unpopular or repugnant client will be viewed as endorsing the client's position. Role morality, therefore, protects the lawyer from being vilified in public. We recently saw an example of this when Stockwell Day suggested that a lawyer who defended an individual in possession of child pornography was personally in favour of child pornography. See "The Letter The Launched The Lorne Goddard Lawsuit" *The Edmonton Journal* (18 January 2001) A2.

[80] These long terms interests include ensuring that there is a free flow of information between the client and his or her lawyer in order to provide for competent representation. In other words, client loyalty ensures, in theory, that there will not be a chilling effect on communications. This chilling effect is seen to impact not only on the quality of representation but also on access. Individuals with problems may fear seeking legal help if they think that their lawyer will disclose their confidences. Finally, some have argued that client loyalty may, in fact, serve to protect the public from future harm. If clients feel that they can alert their lawyer as to their intentions, the lawyer may be in a position to dissuade them from so acting. See generally, M.H. Freedman, "How Lawyers Act In The Interests Of Justice" (2002), 70 *Fordham L. Rev.* 1717 and S.L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986), *1986 Am. B. Found. Res. J.* 613.

[81] See the discussion of the adversarial myth in G. MacKenzie, "Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism" (1995), 29 *Gazette* 122 at 132-140. See also *The Practice of Justice*, *supra* note 16 at 62-68.

While autonomy is an important goal, no one has the right to harm another under the guise of self-realization.[82] And finally, there is no evidence that zealousness has served to create greater access or promote the interests of justice. As William Simon has pointed out, there is simply no evidence that the confidentiality rule, for example, has served to promote trust and a free exchange of information between the client and lawyer.[83] Instead, excessive client loyalty has enabled the accumulation of wealth, facilitated harm including discrimination and shielded accountability. Indeed, one is only left to wonder how many lawyers have taken secrets to their grave that could have saved a life, spared great harm or freed an innocent person from prison.

In addition to a recognition of the harm that can be (and has been) caused by zealousness, what else has caused what I suggest is a rethinking of what we mean by lawyering "in the public interest"? First, the introduction of the *Charter* in 1982 and, in particular, section 15 and its guarantee of substantive equality.[84] This equality guarantee has provided us with a powerful measuring stick that can be (and has been) used as a guiding principle with which to assess the impact of our behaviour as lawyers on clients,

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[82] See generally, D. Luban, "Partisanship, Betrayal And Autonomy In The Lawyer-Client Relationship: A Reply To Stephen Ellmann" (1990), 90 *Columbia L. Rev.* 1004 at 1035-1043.

[83] *The Practice of Justice*, *supra* note 16 at 54-62.

[84] See the discussion of substantive equality in an extra-judicial article by Chief Justice McLachlin, "Racism and the Law: The Canadian Experience" (2002), 1 *Journal of Law & Equality* 7.

our colleagues and other members of the public.[85] Second, greater participation in the profession by traditionally excluded groups, particularly women, has impacted on how we think about ethics and professionalism. As Professor Cairns Way notes:

> The Honourable Bertha Wilson, in her capacity as chair of the Canadian Bar Association (C.B.A.) Task Force on Gender Inequality in the Legal Profession suggested that the influx of women had triggered a rethinking of the meaning of professionalism. For her, professionalism encompassed more than service to the client, it required a commitment to justice, and specifically to equality.[86]

Third, the last decade has seen a more diverse and representative group of Benchers who are ultimately responsible for governance and the development of the Rules. Some of these benchers are (and have included) Professor Constance Backhouse, Professor Joanne St. Louis who is African-Canadian, Mary Eberts, Tracey O'Donnell and Todd Ducharme both of whom are Aboriginal, Avvy Yao-Yao Go who is Asian, Beth Symes, Carol Curtis, Eleanour Cronk, and Vern Krishna who is South Asian.

Fourth, we are slowly beginning to recognize that we have a distinct legal culture and to give it effect. For example, as noted earlier, Aboriginal legal culture is part of that culture and as Professor Devlin has pointed out:

> While Aboriginal peoples have always had a sense of their own legal norms and structures, in spite of legal colonialism, it is only recently that they have managed to intervene effectively in Canadian jurisprudential debates.[87]

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[85] See generally, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002), 25 *Dalhousie L.J.* 27 (hereinafter *Reconceptualizing Professional Responsibility*).

[86] *Ibid.* at 32.

[87] "Mapping Legal Theory" (1994), 32 *Alta. L. Rev.* 602 at 617.

We can see this influence, for example, in our thinking about restorative justice.[88] Fifth, the recent recognition of the importance of pro bono work has heightened our understanding of the importance of the relationship between lawyers and the public. And finally, we have seen a greater willingness of the Supreme Court of Canada to impose ethical limits on the ability of lawyers to do harm.[89]

And so what then is our current understanding of the obligation of lawyers to act "in the public interest"? I would submit that acting in the public interest now means acting in the pursuit of justice, which I would define as follows:

- ensuring access;
- ensuring that legal disputes are resolved correctly, in a fair, unbiased and equitable manner;
- the promotion of dignity, tolerance, autonomy, accommodation and responsibility;
- the eradication of racism, sexism, homophobia and other systemic biases; and,
- harm prevention.

In many respects, this approach to justice mirrors Professor Cairns Way's equality seeking ethic:

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[88] In the context of sentencing, see *R. v. Gladue*, [1999] 1 S.C.R. 688. See also, L. Chartrand, "The Appropriateness Of The Lawyer As Advocate In Contemporary Aboriginal Justice Initiatives" (1994-1995), 33 *Alta. L. Rev.* 874.

[89] See, in particular, *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 (S.C.C.) (prohibiting the putting of false suggestions to a witness on cross-examination) (hereinafter *Lyttle*); and, *Smith v. Jones* (1999), 132 C.C.C. (3d) 225 (S.C.C.) (recognizing an exception to confidentiality/privilege to prevent future harm).

> It is "not OK do more harm than good." Being a legal professional requires a lifelong commitment to education, to professional development and critical self-awareness. A commitment to equality requires the habits of client service to be attentive to context, impact and the systemic dimensions of the legal issues. An ethical practitioner takes the public interest seriously, and takes responsibility for the consequences of their professional actions.[90]

Having set out what I suggest is our evolving understanding of acting "in the public interest" (i.e. in the interests of justice) and offering an explanation for why it is occurring, I end this section by marshalling the support for this thesis. I suggest that this construction of a distinctly Canadian "role morality" can be seen in the current version of the Rules (Ontario) and other professional material and jurisprudence. I start with the latter before embarking on a detailed look at the Rules.

By far, the most important professional statement of this new role morality and conception of public interest is the 1994 role statement of the Law Society of Upper Canada (LSUC). For the first time, we see an explicit link between the public interest and the pursuit of justice:

> The Law Society of Upper Canada exists to govern the legal profession in the public interest by
>
> - ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, and
>
> - upholding the independence, integrity and honour of the legal profession,

[90] *Reconceptualizing Professional Responsibility*, *supra* note 85 at 46.

for the purpose of advancing the cause of justice and the rule of law.[91]

This statement was endorsed by Justice Abella, in her address to the Law Society Benchers in 1999. As she put it:

> ... [T]here are three basic values which merge in a good lawyer: a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the other two values. ...
>
> To me, the Law Society got it right when it said in its 1994 Role Statement that the legal profession exists in the public interest to advance the cause of justice and the rule of law.[92]

In a later paper, Justice Abella stated that the essence of professionalism was "whether justice is seen as being done."[93] Chief Justice McMurtry has made similar observations:

> **(January 6, 1999 – Opening of the Courts Report)**
>
> I believe that in a changing world, the one thing that cannot change is our common pursuit of justice. That is and must remain the principal reason for the existence of the courts and the profession alike. They are bound together by that pursuit.[94]
>
> **(June 6, 2000 – Role of the Courts and Counsel in Justice - Advocate's Society)**
>
> Lawyers are not solely professional advocates or "hired guns." ... [T]hey are ...

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[91] Adopted by Convocation, October 27, 1994 (emphasis added). See online: Law Society of Upper Canada <http://www.lsuc.on.ca/conv/may2000/StrategicPlan.PDF> at 6 (date accessed: 17 February 2005).

[92] *Professionalism Revisited*, *supra* note 38.

[93] "Professionalism in the Justice System: The Divine Comedy of Roscoe Pound" (2002), 51 *U.N.B.L.J.* 3 at 5.

[94] Online: Ontario Courts, <http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_speeches/coareport1999.htm> (date accessed: 1 February, 2005).

> officers of the court with fundamental obligations to uphold the integrity of the judicial process, both inside and outside the courtroom. It is the duty of counsel to be faithful both to their client and to the administration of justice.[95]

The link between lawyers and the promotion of the public good was also recently emphasized by Attorney General Michael Bryant in a speech to Pro Bono Ontario:

> As Attorney General, it is my duty to act for the public good, in the public interest. ... But in a way, every lawyer in this Province has the opportunity to be their own private Attorney General. They can do so through pro bono work because collectively pro bono work is not just for the public good, but also in the broader public interest. ...
>
> Pro bono work embraces the core concept and meaning of what a true profession is, a profession that acts in the public interest. In other words, a calling, a pursuit of the higher good.
>
> Lawyering is a true profession. That means that as professionals there is a quid pro quo – a societal bargain if you will.
>
> The public gives lawyers a quasi-monopoly. That means the privilege of self-regulation, and soon for the regulation of legal services, and in exchange must help ensure the public interest. That is the bargain.[96]

And finally, in *Lyttle*, the Supreme Court of Canada recognized that the interests of the client cannot trump truth and fairness. In setting ethical limits on the cross-examination of witnesses in a criminal case, Justices Major and Fish, for the Court, held:

> ... we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, *provided that counsel has a good faith*

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[95] Online: Ontario Courts, <http://www.ontariocourts.on.ca/court_of_appeal/speeches/role.htm> (date accessed: 1 February, 2005).

[96] Online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/pdf/may0704_probonospeech.pdf> (date accessed: 22 February 2005).

> *basis for putting the question.* ... In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy ...
>
> *In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false.* ... The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; *to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.*[97]

Lyttle is an extremely important decision because it would appear to put an end to a long standing ethical debate, particularly emanating in the United States, about whether a lawyer can cross-examine a truthful witness in order to create a misleading impression that the witness is either lying or mistaken. This is a significant development that serves to further differentiate us from the American zealous advocacy ethic.

(iv) The Ontario Rules And A Justice-Seeking Ethic

The Rules are "intended to express to the profession and to the public the high ethical ideals of the legal profession"[98] and thus are a good place to find the minimum standards of conduct and aspirations of the profession. The following are the Rules that I would argue support my contention that we have moved to a justice-seeking ethic as the dominant conception of role morality in this country:

(a) The Improvement Of Justice

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[97] *Lyttle*, *supra* note 89 at paras. 43, 44, 47, 48,

[98] Rule 1.03(d).

Rule 4.06(1) provides for the advancement of justice as a general norm and states:

> A lawyer shall encourage public respect for and try to improve the administration of justice.

And in so doing, as the Commentary recognizes, "[a] lawyer's responsibilities are greater than those of a private citizen." While there is unfortunately little discussion of what improving the administration of justice actually entails,[99] this Rule has to be read in conjunction with the LSUC 1994 role statement which places an obligation on the Law Society and by proxy all lawyers to ensure that the cause of justice is advanced.[100] In addition, it should be read together with the Commentary accompanying Chapter XIII of the Canadian Bar Association (CBA) Code of Professional Conduct:

> The admission to and continuance in the practice of law imply a basic commitment by the lawyer to the concept of equal justice for all within an open, ordered and impartial system.[101]

(b) Lawyering With Integrity

Throughout the Rules, it is repeatedly emphasized that integrity, honesty and candour are the essential elements of a lawyer's role morality. We are constantly reminded

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[99] The *Model Rules*, *supra* note 58, do not have a similar rule although the Preamble does provide that a lawyer is a "public citizen having special responsibility for the quality of justice."

[100] This proxy is made explicit by Rule 1.03(1)(c) which states that "[t]hese rules shall be interpreted in a way that recognizes that ... (c) a lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals ..."

[101] Chapter XIII is the equivalent of Rule 4.06(1). See online: Canadian Bar Association, <http://www.cba.org/CBA/Epiigram/february2002/codeEng.asp> (date accessed: 23 February 2005).

that lawyers are to carry out their roles with "integrity" (Rules 1.03(1)(a);[102] 3.01;[103] and 6.01(1)[104]) and "candour" (Rule 4.01(1)[105]), "honourably" (Rules 1.03(1)(a) and 4.01(1)[106]), "honest(ly)" (Rule 2.02(1)[107]), and, in "good faith" (Rule 6.03(1)[108]).

(c) Giving Merit A Chance

The zealous advocate uses any lawful means to secure his client's goals even if that means preventing any chance for the legal merits of the claim to be determined. These include, for example, abusing the discovery process[109] and taking advantage of any mistake made by opposing counsel. One such example would be where the plaintiff in a civil action

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[102] The Interpretation Rule. It states, in part, that "[t]hese rules shall be interpreted in a way that recognizes that ... a lawyer has a duty to carry on the practice of law and discharge all responsibilities to the client, tribunals, the public, and other members of the profession honourably and with integrity."

[103] The Making Legal Services Available Rule. It states that "[l]awyers shall make legal services available to the public in an efficient and convenient way that commands respect and confidence and is compatible with the integrity, and independence of the profession.

[104] The Integrity Rule. It states that "A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession."

[105] The Lawyer as Advocate Rule. It states, in part, that "[w]hen acting as an advocate, a lawyer shall treat the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect."

[106] *Ibid.*

[107] The Quality of Service Rule. It states, in part, that "[w]hen advising clients, a lawyer shall be honest and candid."

[108] The Courtesy and Good Faith Rule. It states, in part, that "[a] lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice."

[109] Both the Rules (Ontario) and *Model Rules* (ABA), *supra* note 58, have specific Rules that countenance against abusing the discovery process. See Rules 4.01(4)(c) (Ontario) and 3.4(d) (ABA).

comes into privileged expert evidence that is detrimental to the defendant by mistake during discovery. Leaving aside the issue of waiver of privilege, the *Model Rules* (ABA) would not prohibit taking advantage of this kind of a mistake or inadvertence. The Ontario Rules, however, are very different in this regard. Rule 6.03(3) states:

> A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.[110]

I would suggest that this, in and of itself, is a significant difference in our role morality.

(d) Do No Harm

One of the most common themes expressed throughout the Rules is "do no harm" whether it be harm to your client, to the tribunal and its fact-finding mission, the profession, opposing counsel or the public at large.[111] This is very significant given that this is a fundamental element of justice. There are a number of "do no harm" exhortations that I want to highlight. The first is the interpretation rule. Rule 1.03(1)(b), in particular, states that:

> A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to ... protect the dignity of individuals.

The exhortation could not be any more explicit. Lawyers have an ethical obligation to

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[110] See the discussion of this very issue in M. Bouret and T. Harrison, "E-Mail Confidentiality and Solicitor-Client Privilege Issues" (2003), 26 *Advocates Quarterly* 23 at 39-40.

[111] See generally, A.M. Dodek, "Doing Our Duty: The Case For A Duty Of Disclosure To Prevent Death Or Serious Harm" (2001), 50 *U.N.B.L.J.* 215.

ensure that their conduct does not harm the *dignity of individuals*. There is no equivalent statement in the *Model Rules* (ABA).

The second is the adoption of the Supreme Court of Canada's approach to "future harm" in *Smith v. Jones* in Rule 2.03(3).[112] Historically, lawyers were prohibited from disclosing confidential information unless it involved future criminal conduct involving violence. This meant that a lawyer could not disclose, for example, the discovery that the other party had a life-threatening injury.[113] Under Rule 2.03(3), lawyers can now disclose confidential information where they have information that "there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being ..."[114] The Rule is not without its problems, namely, it gives the lawyer a discretion as opposed to making disclosure mandatory.[115] Moreover, it does not permit a lawyer to disclose conduct that

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[112] Rule 2.03(3) came into force on November 1, 2000.

[113] This is the classic dilemma from *Spaulding v. Zimmerman*, 116 N.W. (2d) 704 (Minn. 1962).

[114] In August, 2004, the Canadian Bar Association approved a change to its rules that would give lawyers a similar discretion to disclose. See online: Canadian Bar Association, http://www.cba.org/CBA/activities/code/ (date accessed: 6 February 2005). This will likely lead other provinces to change their narrow conception of future harm.

[115] The new CBA rule makes disclosure mandatory. It reads:

> **Public Safety Exception**
> 2. Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious
> bodily harm, including serious psychological harm that would substantially interfere with health or well-being, the lawyer shall disclose confidential information where it is necessary to do so in order

could cause significant financial harm.[116] However, these gaps could be filled in by lawyers applying a pervasive justice seeking-ethic which would permit, for example, a broad approach to psychological harm.[117]

While the ABA *Model Rules* now have a similar future harm exception, they have not included psychological harm.[118] This is a significant difference given that, in theory, this type of harm can be triggered by financial harm (e.g. conduct that would lead to bankruptcy of a farm or family-run small business). It could also include harm caused by serving a sentence for a crime that you did not commit and therefore permit a lawyer to disclose confidential information to expose a wrongful conviction. I recognize that the intent of the framers of the Rule is clear given that they voted against extending future harm to financial harm (they did not address the case of a wrongful conviction). However, my point is that our role morality is evolving and the Rules need to be applied in light of

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to prevent the death or harm, but shall not disclose more information than is required.

See online: Canadian Bar Association, http://www.cba.org/CBA/resolutions/pdf/04-01-A-Annex1.pdf (date accessed: 6 February, 2005).

[116] In its final report (April 28, 2000) to Convocation, the Task Force did, in fact, recommend that the disclosure exception be broadened to include "... limited disclosure where a lawyer has reasonable grounds for believing that there is an imminent risk of substantial harm to the welfare or security of a child or other vulnerable person (rule 2.03 (4)) and where a lawyer has reasonable grounds for believing that there is an imminent risk that a fraud that may cause substantial financial injury to another is likely to be committed (rule 2.03 (5))." See online: Law Society of Upper Canada, http://www.lsuc.on.ca/conv/apr2000/RulesTaskForce.PDF (date accessed: 5 February, 2005). *However, Convocation voted against adding sections (4) and (5)*. See online: Law Society of Upper Canada, http://www.lsuc.on.ca/conv/jun2000/special_convocation.pdf (date accessed: 5 February, 2005).

[117] This will be discussed *infra*.

[118] See Rule 1.6, *supra* note 58.

current standards as expressed earlier. The fact that the framers included psychological harm opens the door for this kind of ethical reflection.

The last "do no harm" Rule that I want to refer to came about in response to the Enron crisis and the *Sarbanes Oxley Act of 2002*. Rules 2.02(5.1) and (5.2) require a lawyer to withdraw when she discovers intended or ongoing dishonest, fraudulent, criminal or illegal conduct occurring in the organization that retains her and when her "up the ladder" attempts of dissuasion have failed.[119] While a more satisfactory approach would have been to require the lawyer to make a "noisy" withdrawal (i.e. disclose to the authorities the impugned conduct), a mandatory withdrawal obligation will serve as an important deterrent. Mandatory withdrawal means that unless the company ceases and desists their illegal conduct, the company will be unable to secure legal advice which in many cases will cause irreparable harm. Awareness of the mandatory withdrawal obligation should thus serve to deter illegal organizational behaviour.

This mandatory withdrawal requirement is stricter than the *Model Rules* (ABA) which has no similar requirement. While Rule 1.13 of the *Model Rules* permits disclosure of the illegal acts of an officer or employee of an organization to the relevant enforcement agencies, disclosure is only permitted where the acts will cause "substantial injury to the

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[119] The new rule was approved by Convocation on March 24, 2005. See online: Law Society of Upper Canada, http://www.lsuc.on.ca/services/contents/archive/rpc_archive_en.jsp and http://www.lsuc.on.ca/news/pdf/convmar04_prc_report.pdf (date accessed: 5 February 2005).

organization." Consequently, it does not cover the wide gambit of behaviour like fraud or corruption that would clearly financially benefit the company. Moreover, it is hard to imagine that the directing minds of the corporation would not take action upon learning of destructive behaviour by one of the officers or employees.

(e) Promoting Equality

The final set of Rules that I want to highlight are perhaps the most significant because they are ones that, not only truly distinguish the Rules from the *Model Rules* (ABA),[120] but which are likely to have the greatest impact on the pursuit of justice. These Rules have imposed an anti-discrimination norm that all lawyers must use in their ongoing obligation to remain competent and in the everyday decisions they make. The first relevant rule is interpretation rule. Rule 1.03(1)(b) specifically requires that the Rules (and ultimately all conduct of lawyers) be interpreted in a manner that "recognize[s] the diversity of the Ontario community ... and [that] respect[s] human rights laws in force in Ontario."

In addition to this anti-discrimination interpretative aid, Rule 5.04(1) further provides that lawyers are prohibited from discriminating against anyone the lawyer interacts with:

> A lawyer has a special responsibility to respect the requirements of human rights

[120] The *Model Rules* (ABA), *supra* note 58 do not have any anti-discriminatory provisions.

> laws in force in Ontario and specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person.

Rules 5.04(2) and (3) extend the anti-discrimination rule to the provision of services and employment practices.[121] Rule 5.04(1) further complements Rule 5.03 which specifically defines and prohibits sexual harassment. As the Commentary notes, Rule 5.04 "prohibits harassment on the grounds [enumerated] ..."

What is particularly significant about Rule 5.04 is that it not only provides for this general prohibition but the Commentary defines discrimination so as to make it clear that the Rule is directed not only at intentional discrimination but also systemic or adverse effects discrimination. As the Commentary properly recognizes:

> An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate.

The Commentary further observes that "Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code."

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[121] This would include ensuring accommodation for child care responsibilities. Indeed, the Commentary to Rule 5.04 provides that "[t]he right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."

The impact of this rule can be seen, for example, in the context of criminal defence work where the zealous advocate paradigm is seen by many as appropriate given that the client is pitted against the powerful state. In this context, many defence lawyers have traditionally believed that they are not accountable for their behaviour even if it was discriminatory or immoral. For example, using their peremptory challenges in a discriminatory fashion to remove women or racialized jurors from the jury. This issue became particularly acute in cases involving police officers charged with shooting racialized victims.[122] Rule 5.04 now clearly places an ethical prohibition on the use of peremptory challenges in this fashion. Another example would be the cross-examination of a truthful vulnerable witness such as a sexual assault complainant.[123] This issue has generated considerable debate.[124] However, properly interpreted, section 5.04 would prohibit this type of advocacy because the effects would be to perpetuate historical disadvantage and discrimination.[125]

In addition to these Rules, the Law Society of Upper Canada has also taken, as

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[122] See, for example, *R. v. Lines*, [1993] O.J. No. 3284 (G.D.). See also the discussion in *Discrimination in the Legal Profession*, *supra* note 19 at 484-487.

[123] See the discussion in *Discrimination in the Legal Profession*, *supra* note 19 at 481-482.

[124] There has been much written whether this conduct would be ethical. See "Cross-Examining The Truthful Witness" in M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 59-65. See also, *Partisanship, Betrayal And Autonomy*, *supra* note 82 at 1026-1035.

[125] Similarly, *Lyttle's* "good faith" requirement would also prohibit cross-examination of a truthful witness with the intent to mislead (e.g. by putting a false suggestion to the witness). See *Lyttle*, *supra* note 89.

noted earlier, significant steps to give them effect. There is a designated equity department and harassment and discrimination counsel. In addition, just recently, the Law Society linked this anti-discrimination norm with the idea of competence. As Professor Voyvodic discusses in her paper, the Law Society has approved rules of cultural competence in the handling of compensation cases involving Aboriginal residential school survivors.[126]

III. RECOMMENDATIONS

With what I have argued is an evolving "interests of justice" role morality, we can begin to re-think how we teach, practice, and regulate lawyers in order to access the justice in professionalism. What follows is a preliminary list of recommendations to think about:

(i) Make Public Service An Important Entrance Requirement For Law School

While some law schools in Canada like Windsor attempt to select students on criteria beyond marks and LSAT scores, it is not clear that we are doing a good enough job in predicting future lawyers who will make the advancement of justice, and in particular social justice, rather than profit the reason for their practice. One recommendation would be to require incoming students to demonstrate a strong commitment to public service.[127]

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[126] *Advancing The Justice Ethic*, *supra* note 64. See also online: Law Society of Upper Canada, <http://www.lsuc.on.ca/services/resource_centre.jsp> and <http://www.lsuc.on.ca/services/pdf/guideline_aboriginal_res.pdf> (date accessed: 17 February 2005).

[127] See Richard L. Abel, "Choosing, Nurturing, Training And Placing Public Interest Law Students" (2002), 70 *Fordham L. Rev.* 1563 at 1564-1566 discussing the admission requirements for the UCLA Program in Public Interest Law and Policy.

(ii) Make The Advancement Of Social Justice The Theme Of All Law Schools

As Professor Mosher points out in "Legal Education: Nemesis or Ally of Social Movements", law schools have largely failed in:

> ...systematically produc[ing] lawyers with the skill, knowledge, and ability to work with members of subordinated communities, and with the movements of which they are a part, in ways that facilitate social transformation. ... I do think that I am on safe ground in concluding that no Canadian law school can persuasively claim to have accomplished this, nor even to have made many major steps in this direction. Indeed, I doubt that any Canadian law school has self-consciously undertaken such an enterprise as part of its "mission."[128]

A good place to start to address Mosher's concern is to make social justice the theme of all schools through its mission statement. Mission statements are extremely important. As Professor Buckingham points out:

> If an institution is to encourage moral development, it should do so deliberately. It should create a vision, perhaps through the development of a mission statement, which outlines what the law school's objectives are with respect to the encouragement and development of moral growth amongst its students, keeping in mind the different conceptions of moral behaviour. Even participating in the creation of a mission statement might bring faculty members to a new appreciation of their ethical role in the law school. In addition, the institution must set some goals for achieving the objectives in the mission statement, and determine what the minimum involvement of each faculty member will be and how administrative units will function, so that a consistent message is transmitted by all units of the faculty.[129]

The pursuit of social justice is the organizing theme of Windsor's law school. Its mission statement provides:

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[128] (1997), 35 *Osgoode Hall L.J.* 613. See also, J.O. Calmore, "'Chasing the Wind': Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging In Professional Re-Socialization" (2004), 37 *Loy. L.A. L. Rev.* 1167.

[129] *Rules and Roles*, *supra* note 65 at 125.

> Our students acquire knowledge of both the law and its impact upon society. Although it is important to understand the technical aspects of the law, it is equally critical to see law in its complex social context and, thereby, gain an appreciation of the law as a vehicle for the pursuit of social as well as legal justice.[130]

In addition, the objectives of the law school include:

> 4. To enhance access to justice through a broad and progressive admissions policy which will focus upon the personal attributes of the individual applicant, which will permit the realization of the vocation of persons to serve the community; through educational programs which extend legal services and provide information about the law and the justice system to those for whom that would not otherwise be available, and through the inclusion of a desire to reform the law to better serve the community and to aid the oppressed and disadvantaged; ...
>
> 6. To create an academic and social environment conducive to learning and to the personal development of students, particularly women and those who are socially disadvantaged, differently abled, late vocational and from Aboriginal and various ethnic backgrounds, and in particular:
>
> (a) To provide opportunities for the development of social consciousness and self-awareness by students, and to examine and develop ethical and social values in relation to personal and professional responsibility; and in particular, to instill in the students a sense of social responsibility in the practice of law and the need for examination of social structures with a view to contributing to such changes as may ensure social justice ...
>
> (c) To encourage students to contribute meaningfully to society and to participate creatively in the process of legal development and social change.[131]

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[130] Online: Faculty of Law, University of Windsor, <http://athena.uwindsor.ca/units/law/lawTop.nsf/inToc/893D0E1DAC9C879185256D8700499342> (date accessed: 23 February 2005).

[131] Law Calender at 4, online: Faculty of Law, University of Windsor, <http://athena.uwindsor.ca/units/law/lawTop.nsf/inToc/EBD90A6395184D3185256DCA005A9E7D> (date accessed: 23 February 2005).

(iii) Require All Students And Full-Time Faculty To Engage In Pro Bono Practice Each Year

A requirement that students and particularly faculty engage in pro bono lawyering will serve a number of important functions.[132] It will, in addition to providing much needed legal services for the community, serve to remind students of the importance of public service. It will also assist faculty in better understanding of ethical, social and professionalism issues.[133] With Pro Bono Students Canada already in place, there is an existing structure to assist students and faculty in complying with their pro bono obligations.[134]

(iv) Make Legal Professionalism and Ethics A Mandatory First Year Course

Most students come to law school with a sense of what role morality is all about. Based on what they see in the media, particularly from the United States, and from lawyers they may know, the zealous advocate is likely the image of lawyering that most resonates with them. Consequently, it is imperative that this be addressed as soon as students walk through our doors. As well, "[t]he law school's curriculum, method of teaching, and

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[132] See the discussion in D.L. Rhode, "The Professional Responsibilities of Professors" (2001), 51 *J. Legal Educ.* 158 at 162-164; D.L. Rhode, "The Professional Responsibilities of Professional Schools" (1999), 49 *J. Legal Educ.* 24 at 30-36; and, D.L. Rhode, "Cultures of Commitment: Pro Bono for Lawyers and Law Students" (1999), 67 *Fordham L. Rev.* 2415 at 2416-2417.

[133] On the transformative potential for pro bono work, see M.F. Davis, "Access *And* Justice: The Transformative Potential Of Pro Bono Work" (2004), 73 *Fordham L. Rev.* 903. A mandatory pro bono requirement for all lawyers was discussed earlier in this paper.

[134] See Pro Bono Students Canada online: <http://www.law.utoronto.ca/probono/index.htm> (date accessed: 25 February 2005).

climate reinforce in students a bias towards intellectual conceptualism, verbal aggression, and competitive manipulation ..."[135] Thus, by the time that students take a related course in second or third year, it may be too late.[136] And, of course, most students never take these courses.

There, therefore, should be a mandatory ethics and professionalism course in law school.[137] A first year course that reorients a student's conception of lawyering from maximization of client interest to the pursuit of justice will serve other important purposes besides countering this standard conception which I have argued no longer reflects our modern conception of role morality. First, it will alert students that legal ethics does not necessarily have to be about morality which many may see as an abstract and relativist inquiry. Rather, it is a question of what course of conduct will contribute to a just result.[138] Second, since an anti-discriminatory norm is a critical part of role morality, such a course

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[135] *Rules and Roles*, *supra* note 65 at 117.

[136] At Windsor, there are a number of upper year courses that in which students are exposed, in a substantial way, to issues professionalism and ethics. These include The Legal Profession, The Lawyering Process: Interviewing, Counselling and Negotiation, and Lawyer As Conflict Resolver, Clinical Law, and Mediation Clinic.

[137] See *A Case For Compulsory Legal Ethics Education*, *supra* note 65. We are now seeing some mandatory courses in Canada. These include the law schools at Alberta (Professional Responsibility), Manitoba (The Legal Profession and Professional Responsibility), Western (Legal Ethics and Professionalism), Dalhousie (Legal Profession and Professional Responsibility) and New Brunswick (Professional Conduct and Law). Only Western does it in first year. Although not a course, Toronto includes professionalism during their first year Bridge Week.

[138] This is discussed in more detail *infra* when I provide an overview of William Simon's philosophical approach to ethical reflection.

would allow for serious discussions about the inequality in our society and the differences between formal and substantive equality.[139] And finally, by emphasizing lawyering as the pursuit of justice, the course will encourage students to get involved in the clinical and community-oriented experiences their school provides.[140] It may even serve to stimulate those seen destined to head to Bay Street to think about poverty law, for example.

(v) Ensure That Cultural Competence Is A Key Part Of The Law School And Continuing Legal Education (CLE) Curriculum

If we want lawyers to pursue justice and, in particular, social justice, we need to ensure that they are competent to represent members of the communities that most require their help (e.g. racialized groups, the poor, and the disabled). This form of competence has been called "cultural competence." Moreover, teaching cultural competence is an important

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[139] My own teaching of upper year courses suggest that students have either never been exposed to this distinction or are struggling to try and understand it.

[140] At Windsor, students have an opportunity to participate in a number of clinical programs: Community Legal Aid (CLA); Legal Assistance of Windsor (LAW); the University of Windsor Mediation Service and the Osler Hoskin & Harcourt LLP Internship in Conflict Resolution Program. For a discussion of LAW, see R. Voyvodic and M. Medcalf, "Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor" (2004), 14 *Journal of Law & Policy* 101. The mission statement of LAW states (at 102):

> A project of the University of Windsor Faculty of Law and Legal Aid Ontario, LAW provides a range of legal and social work services to low-income communities of Windsor and Essex County. Through an interdisciplinary approach, lawyers and law students, social workers and social work students engage in casework, public legal education, law reform and community development activities in a learning environment. Inherent in this work is a recognition that assisting people to improve their lives or general community conditions may be done not only through case-by-case service, but also through community development activities.

Professor Voyvodic is the academic director and driving force behind LAW.

means of protecting against the pursuit of a majoritarian approach to justice. Cultural competence is an awareness of the significance of culture on our interactions with clients. As Susan Bryant points out:

> Through our invisible cultural lens, we judge people to be truthful, rude, intelligent or superstitious based on the attributions we make about the meaning of their behavior.
>
> By teaching students cross-cultural lawyering skills and perspectives, we make the invisible more visible and thus help students understand the reactions that they and the legal system may have towards clients and that clients may have towards them. ...
>
> In teaching about the importance of culture to lawyering, we want to avoid reinforcing stereotypes. ...
>
> When lawyers and clients come from different cultures, several aspects of the attorney-client interaction may be implicated. The capacity to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences.[141]

In other words, we need to be aware of the relevant social context if we are going to be able to consider all relevant circumstances in our determination of what conduct will likely promote justice. Consequently, all law schools should have critical race, First Nations, feminist, disability, and queer theory courses or seminars in their curriculum.[142] It is worth remembering that 16 years ago, the Royal Commission on the Donald Marshall,

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[141] "The Five Habits: Building Cross-Cultural Competence In Lawyers" (2001), 8 *Clinical L. Rev.* 33 at 40-42.

[142] See *Discrimination in the Legal Profession*, *supra* note 19 at 497-505. See also R.F. Devlin, "Jurisprudence For Judges: Why Legal Theory Matters For Social Context Education" (2001), 27 *Queen's L.J.* 161 (hereinafter *Jurisprudence For Judges*) for an excellent summary of these different critical schools of thought.

Jr. Prosecution made, what may be, the first cultural competence recommendation for our profession:

> **Recommendation 13**
>
> We recommend that the Dalhousie Law School, the Nova Scotia Barrister's Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.[143]

16 years later, how many law schools can say that they have complied with the spirit of this recommendation?[144] It is ironic that the judiciary is well ahead of the bar on issues of cultural competence as a result of their social context education.[145] What makes this so problematic are cases like *R. v. Hamilton* where, in the absence of submissions from counsel, a culturally competent Justice Casey Hill raised the issue of the link between systemic racism and gender bias in drug importing cases. On appeal, he was severely criticized for having done this.[146] Finally, it will be important to link cultural competence with pro bono work.

(vi) Provide Incentives For Teaching Ethics And Professionalism

In addition to adding a mandatory ethics course to our curriculum, we need to

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[143] (Province of Nova Scotia, 1989) at 429.

[144] While the recommendation was limited to Dalhousie Law School, systemic racism was, at that time, and continues to be a problem across the country.

[145] *Jurisprudence For Judges*, *supra* note 142 at 162. See also, *Reconceptualizing Professional Responsibility*, *supra* note 85 at 34-38.

[146] (2004), 22 C.R. (6th) 1 at 20-21 (Ont. C.A.).

ensure that ethics and professionalism pervade all law school teaching. As Professor Rhode has pointed out, the default position adopted by most legal academics is "professional responsibility as someone else's responsibility."[147] One way to do this is to provide incentives for faculty. For example, the creation of an annual national award for innovation and excellence in teaching ethics. The American Bar Association started doing this in 2003. In addition, we could make a commitment to the teaching of ethics and professionalism as an important criteria in tenure decisions.

(vii) Encourage Collaboration

In addition to teaching, we need the legal academy to collaborate with other disciplines to conduct research in order to provide an accurate picture of the delivery of legal services in this country. As Deborah Rhode has observed:

> To borrow Steven Hobbs' apt phrase, we are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews. We have made almost no attempt to provide the research ... [that] is essential to assess potential reform efforts. As *Access to Justice* similarly observes, we know far too little about the performance of programs for the delivery of legal aid and pro bono services: the satisfaction of our clients, the quality of assistance, and the impact on parties and their communities.[148]

(viii) Create Incentives For Social Justice Career Selection

One incentive would be provide for debt relief for students who agree to work in

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[147] "Law, Lawyers, And The Pursuit Of Justice" (2002), 70 *Fordham L. Rev.* 1543 at 1544.

[148] "*Access to Justice*: Again, Still" (2004), 73 *Fordham L. Rev.* 1013 at 1021.

a designated public interest position for a specified period of time.[149]

(ix) Promote Identity Lawyering In The Interests Of Justice

In "*Beyond Bleached-Out Professionalism*", Professor David Wilkins examines the "relationship between a lawyer's group-based identity and her professional role."[150] As he points out, the traditional approach to professionalism "requires lawyers to check their identities at the door when performing their professional roles. ... [B]ecoming a lawyer means adopting a 'professional self' that supercedes all other aspects of the lawyer's identity."[151] Justice is colour, gender or religion blind so the rhetoric goes and therefore, this part of the self is seen as irrelevant. As Wilkins observes:

> It is not surprising that bleached out professionalism has become a core professional ideal. Norms such as neutrality, objectivity, and predictability are central to American legal culture. Lawyers are the gatekeepers through which citizens gain access to these important legal goods. If the law is to treat individuals equally, the argument goes, then lawyers must not allow their nonprofessional commitments to interfere with their professional obligation to give their clients unfettered access to all that the law has to offer. A professional ideology that treats a lawyer's nonprofessional identity as relevant to her professional conduct appears to threaten this important role.
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> In addition to the benefits that bleached out professionalism offers to the consumers of legal services, it also appears to safeguard the interests of the women and men

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[149] See the discussion of this in L.A. Kornhauser & R.L. Revesz, "Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt" (1995), 70 *N.Y.U. L. Rev.* 829 at 952-954.

[150] "Beyond 'Bleached Out' Professionalism: Defining Professional Responsibility for Real Professionals" in D.L. Rhode (ed.), *Ethics In Practice: Lawyers' Roles, Responsibilities, and Regulations* (New York: Oxford University Press, 2000) at 209 (hereinafter referred to as *Beyond Bleached Out Professionalism*). The term "bleached-out professionalism" comes from S. Levinson, "Identifying The Jewish Lawyer: Reflections On The Construction of Professional Identity" (1992-1993), 14 *Cardozo L. Rev.* 1577.

[151] *Ibid.* at 209.

> who become lawyers. ... This "professional" status is particularly important for the profession's new entrants — Jews, women, blacks, and other racial and religious minorities – who, in their nonprofessional lives, have been subject to discrimination on the basis of certain aspects of their identities. These traditional outsiders have a powerful stake in being viewed as lawyers *simpliciter*; freed by their professional status from the pervasive weight of negative identity-specific stereotypes.
>
> Finally, bleached out professionalism appears to uphold the legal system's core commitment to the fundamental equality of persons.[152]

This formalized bleaching out occurred in Canada from 1876 to 1951 when Aboriginal lawyers had to give up their status of "Indian."[153] Today, it occurs more informally. Indeed, many traditionally excluded lawyers likely feel that they need to go great lengths to prove that their loyalty is to the profession.

Wilkins is rightly critical of this traditional conception of professionalism. As he argues, the problem is that by encouraging lawyers to not engage in identity lawyering (i.e. letting their non-professional self or group affiliations impact on their thinking process), we are perpetuating the systemic biases that exist in society and in the legal profession. This is certainly the case in Canada where there is now overwhelming evidence now that justice is neither gender nor colour blind. "Bleached out professionalism" has and continues to be a powerful means of socialization that has ensured that the White middle class male heterosexual privilege that has historically guided the direction of the profession

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[152] *Beyond Bleached Out Professionalism*, *supra* note 150 at 211.

[153] See *The Indian Act, 1876*, S.C. 1876, c. 18, s.86(1) as discussed in C. Backhouse, "Gender and Race In The Construction of "Legal Professionalism": Historical Perspectives" (2003) available online: Law Society of Upper Canada, <http://www.lsuc.on.ca/news/updates/define_prof.jsp#colloquium> (date accessed: 28 February 2005).

is not threatened by a more diverse group of lawyers.

Ironically, the times that race, gender or religion have been seen to matter are when the client or other members of the profession or society seek to exploit this aspect of the lawyer.[154] For example, the law firm that wants to celebrate their commitment to diversity, the White accused charged with a hate crime who wants a racialized or gay lawyer or the accused charged with sexual assault who wants a female lawyer. However, when a Black or female lawyer seeks to raise issues of race or gender, they are criticized for playing the so-called "race" or "gender" card. "Bleached-out professionalism" has thus become a powerful mechanism by which to silence attempts to address systemic biases in our society and to continue to perpetuate the formal equality myth.[155]

By bleaching out identity, we are losing an important voice that can identify inequality and other systemic problems in the legal profession. As Wilkins persuasively argues, contrary to popular belief, group consciousness doesn't make lawyers less neutral or objective - just the opposite in fact. Indeed, as he points out, feminist legal scholars have played an important role in advancing an alternative dispute resolution model.[156] There are other important benefits of group or identity consciousness in lawyering. Since identity

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[154] *Beyond Bleached-Out Professionalism*, *supra* note 150 at 215-216.

[155] *Ibid.* at 212-215.

[156] *Ibid.* at 218.

gives individuals special reasons for "caring about others who share their identity and to work together to advance the interests of their group" - we are losing a vital source of passion and commitment for the pursuit of social justice.[157] In addition, group consciousness allows us to celebrate success and to use lawyers as role-models.[158] And finally, compelling individuals to deny essential parts of their being will only lead to further alienation and dissatisfaction.[159]

Of course, as Wilkins notes, there is still a legitimate question – where do you draw the line? What aspects of one's non-professional self should be expressed in lawyering? It clearly goes without saying that some group consciousness is not appropriate, for example, heterosexual, white, male, middle class consciousness. Instead, the focus should be on attributes that are relevant to group advancement, social justice and fundamental fairness. What form should that expression take?[160] For example, should a racialized lawyer use identity consciousness to refuse to prosecute certain criminal offences because of the link

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[157] *Ibid.* at 219-220, 223.

[158] *Ibid.* at 220.

[159] *Ibid.* at 220-221.

[160] To assist in answering these questions, Wilkins proposes a moral justification and social purpose approach. For identity lawyering to be morally justified, Wilkins states that it must be capable of promoting fundamental fairness. By "social purpose" he is referring to "those aspects of a particular lawyering role or task that disinterested social actors would consider to be essential to the proper performance of the job in question." *Ibid.* at 222-234.

between those offences and systemic discrimination?[161] Can a female defence lawyer refuse to represent men charged with sexual assault because the rules of evidence and procedure continue to require defence lawyers to perpetuate stereotypes against women and children in the defence of their client?[162] These are all issues that the legal profession in this country need to begin to address.

(x) Adopt A Pervasive Justice-Seeking Ethic

Having identified a reconstructed role morality that places the pursuit of justice as its guiding principle, we need to take the next step and make pervasive a justice-seeking ethic. Generally speaking, the Rules provide the general norms for ethical reflection and, therefore, do not provide guidance on all possible conflicts between the client's interest and the public interest. Moreover, the Rules often leave the decision to the discretion of the individual lawyer. One such case is the future harm rule. It is not only discretionary but includes the prevention of "psychological harm" as a justification for disclosing otherwise confidential information. What qualifies as psychological harm will, I suspect, rest not so

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[161] This issue has generated considerable discussion in the United States. It is often referred to as the "Darden" dilemma following the selection of Chris Darden, an African American, to prosecute O.J. Simpson and his subsequent attempts to exclude the audiotapes that exposed his main witness, Mark Furhman, as a racist. See K.B. Nunn, "'The Darden Dilemma': Should African Americans Prosecute Crimes?" (2000), 68 *Fordham L. Rev.* 1473.

[162] Wilkins would say that the answer is no based on his criticism of the Nathanson case. See *Bleached-Out Professionalism*, *supra* note 150 at 228, 232. In the United States, Judith Nathanson, a well known Massachusetts divorce lawyer, was sued by a male client for discrimination. Nathanson refused to represent men in divorce cases in her effort to bring out about systemic changes in family law. The client successfully sued her for discrimination. See the forum discussion about the case in (1998), 20 *W. New Eng. L. Rev.* 23-142.

much on a medical assessment of the situation but rather on the lawyer's ethical sense. If the lawyer uses a justice-seeking ethic, for example, as her compass, then she could, in theory, disclose information to prevent a wrongful conviction or economic harm where it could reasonably be concluded that psychological harm will occur without the disclosure.

The one legal philosopher who has attempted to make practical a justice-seeking ethic is William Simon. The essence of his philosophy can be distilled down to the following principle:

> Lawyers should take those actions that, considering the relative circumstances of the particular case, seem likely to promote justice.[163]

Simon defines justice as "legal merit." And so, the pursuit of justice is accomplished by ensuring that legal disputes are resolved correctly. This looks like a more narrow conception of justice than set out earlier in this paper. However, when Simon speaks of legal merit, he is not talking about using positivist law (i.e. the law on the books) as the measuring stick, but rather what the relevant law or procedure should be or what he calls substantive law. In this way, other justice-oriented principles such as equality and harm prevention still impact on the lawyer's conduct since she will have to assess the extent to which the positivist law is consistent with these principles.

For Simon, an ethic of justice is more practical than an ethic of common morality

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[163] *The Practice of Justice*, *supra* note 16 at 138.

(which has additional problems of relativism and subjectivity) because lawyers are trained to assess what justice demands in a particular situation:

> If the problem involves the reconciliation of competing legal values, lawyers know how to address it. The range of solutions and authorities and the modes of analysis and argument that lawyers habitually employ in their everyday work are available and appropriate for the central issues of legal ethics. ...
>
> On the other hand, if the problem arises from claims of nonlegal values, then lawyers are likely to be uncertain how to deal with these claims collectively and individually. They have no common analytical and rhetorical tools for addressing them. The tools offered in popular culture for considering moral problems seem to formless and subjective; those offered by academic philosophy seem too abstract and multifarious.[164]

It is because Simon's approach is grounded in legal values, that it has been referred to as "conservative radicalism."[165]

Simon's theory also provides a powerful response to those who see a justice-seeking ethic, which will sometimes require the lawyer to refuse to follow the client's instructions or disclose confidential information to prevent harm, as client betrayal. As he puts it:

> A lawyer who limits the distance she will go for a client on the basis of norms of legal merit or justice does not deprive the client of anything he is entitled to; on the contrary, she simply insists on respecting the entitlements of others.[166]

In many respects, this is no different than the limit on the zealous advocate to act within the bounds of the law. Simon simply demands that lawyers engage in a reorientation of

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[164] *Ibid.* at 18.

[165] See R.W. Gordon, "The Radical Conservatism of *The Practice of Justice* (1998-1999), 51 *Stan. L. Rev.* 919.

[166] *The Practice of Justice, supra* note 16 at 50.

what the law demands in individual cases.

How is a justice seeking ethic actualized in Simon's theory? The answer is contextual judgment. Contextual judgment is, for Simon, thinking like a judge. In advocating that lawyers think like judges, Simon is clear that he is not suggesting that lawyers reach the same decision that a judge would but rather advocating that lawyers use a similar style of judgment. Contextual judgment requires an assessment of all of the relevant factors that impact on the legal merit of the relevant claim. This will include interests other than those that relate to the client. It is a style of decision making that is concerned with substance over procedure and purpose over form.[167]

In some cases, contextual judgment will call for conduct that is inconsistent with the Rules or the positivist law. This could occur, for example, where the Rules have not caught up to the demands of a justice-seeking ethic, the positivist law is unjust or where there is no other way to ensure a just result. In order to empower lawyers to deal with this situation, Simon suggests that lawyers engage in what he calls *ad hoc* nullification. In the criminal justice system, for example, casual nullification is not a foreign norm. The police do not enforce all laws and even when they discover a violation, they do not always lay a charge. Prosecutors sometimes dismiss charges because of the unconstitutional behaviour of the police. Judges sometimes refuse to strictly apply precedent in order to achieve a

[167] *Ibid.* at 139-149.

substantively just result and, in some cases, juries will refuse to convict a guilty person because of their dislike of the law or manner in which the evidence was obtained.

Nullification under Simon's theory is not a recipe for lawlessness but rather a re-orientation of prevailing norms to ensure the actuation of the goals of the profession and to assist the pursuit of justice when procedures break down. As Simon puts it " the lawyer should defy the rule, not as an act of lawlessness, but as an act of principled commitment to legal values more fundamental than those that support the rule."[168]

V. CONCLUSION

This paper has attempted to demonstrate that we have been witnessing a reconstruction of role morality in this country that is consistent with an "interests of justice" approach to lawyering. The problem is that we have failed to see this and continue to be influenced by the American standard conception and criticisms of that dominant view. The implications of this are significant. Our failure to recognize our true identity as professionals has contributed, in large part, to the professionalism problem. It has also led to resistence to the kinds of recommendations suggested in this paper that will further enhance lawyers' pursuit of justice.

There will, of course, be bumps along the road including resistence to the ideas and

[168] *The Practice of Justice, supra* note 16 at 164.

philosophy of lawyering presented in this paper. Much of the reorientation and resistence will require structural changes including the re-thinking of self-regulation.[169] These issues are beyond the scope of this paper. Unfortunately, we have had few attempts in Canada to systemically set out a coherent theory of ethical lawyering. This has been a problem because before we move on to reform, we need to have a working set of meaningful and workable aspirational standards.[170] This paper attempts to fill in the gap.

As a concluding note on a justice-seeking ethic which I have tried to develop, it is important to emphasize that when we talk about ethics and justice, it will always be necessary to consider the context within which the ethical reflection is going to arise. Some of these relevant contextual factors include: the nature of the client (e.g. are they disadvantaged or marginalized), the type of action (e.g. criminal versus civil), the merits of the legal claim, the impact the lawyer's conduct will have on the interests of justice (i.e. will it further it or obstruct it), and, the nature of harm that will be caused by the conduct of the lawyer or client. To illustrate the importance of context, it is instructive to return to

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[169] It will also require a commitment to interpreting and applying all of the Rules in a manner consistent with a justice seeking and non-discriminatory ethic. For example, the lawyer as advocate rule (Rule 4.01) is ambiguous enough that it could be read as a rule authorizing zealousness given its use of language such as "resolutely", "ask every question, however distasteful" and "[i]n adversary proceedings the lawyer's function as advocate is openly and necessarily partisan." However, the Rule also provides that the advocate's duty is moderated by her duty of candour, fairness, courtesy and respect. Moreover, the commentary also notes that "the lawyer is not obliged (save as required by law, or under these rules ...) to assist an adversary or advance matters derogatory to the client's case.

[170] The absence of a coherent and meaningful aspirational statement might also explain why some researchers have found that Codes of Conduct in Canada do not shape (and, in fact, inhibit) ethical reflection. See, for example, M.A. Wilkinson, C. Walker & P. Mercer, "Do Codes of Ethics Actually Shape Legal Practice" (2000), 45 *McGill L.J.* 645.

the trial of Queen Caroline. While many have used Lord Brougham's speech as the justification for zealous protection of the client's interests, William Simon has correctly pointed out that properly placed in context, it is really more a vigorous defence of a client's rights and ultimately of justice than interest:

> Brougham's threat [to disclose the King's will and potentially bring down the monarchy] was based on a far more complex set of judgments than simply the Queen's interests would be served by producing King George's will. In the first place, Brougham believed that his client was factually innocent of the acts with which she was charged. In the second place, the secret marriage was centrally relevant to an important substantive defense: if George had been married previously, then his later marriage to Caroline was invalid, and she was legally incapable of adultery. In the third place, Brougham shared the popular view that, even if the charges had been true, this extraordinary prosecution would have been inappropriate given the King's outrageous mistreatment of his wife from the beginning of their marriage.[171]

[171] *Thinking Like a Lawyer*, *supra* note 5 at 6-7.