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John M. Levy

William & Mary Law School

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THE JUDGE'S ROLE IN THE ENFORCEMENT OF ETHICS—FEAR AND LEARNING IN THE PROFESSION

John M. Levy*

A token course on ethics might be worse than none, for it may create an illusion pregnant with mischief.¹

I. INTRODUCTION

This article deals with one small, though important, part of the professional disciplinary system—the duty of judges to report unprofessional conduct of which they become aware.² The genesis of this article was my work as a clinical law teacher simultaneously observing the academic and the practical parts of the profession. As a law teacher working with students in their early experiences with the practice of law, I have been struck by what appears to be a lack of ethical sensitivity—awareness of problems of professional responsibility.³ For example, when students are interviewing clients, analyzing problems, and exploring various alternatives open to the clients, they often fail to spot the ethical questions that arise.⁴

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* Associate Professor of Law and Director of Clinical Education, Marshall—Wythe School of Law; B.A., 1962, New York University; J.D., 1968, Syracuse University.

1. Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A.J. 295, 296 (1980).

2. “A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.” ABA CODE OF JUDICIAL CONDUCT CANON NO. 3B(3) (1980).

The requirement in Canon 11 of the Canons of Judicial Ethics, the predecessor of the Code of Judicial Conduct, was similar. “A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.” ABA CANONS OF JUDICIAL ETHICS NO. 11.

3. “[W]e observe that issues about the lawyer’s role, his ethics, and his competence are largely unnoticed or ignored in approaching and solving a client’s problem.” T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 118 (1977).

4. It is possible that the students do “spot” the ethical questions but fail to

Yet, these same students in the same interviews usually are able to spot and articulate most legal issues with alacrity. As most students have had courses in both the substantive law and professional ethics, it piqued my curiosity as to why the legal issues were spotted and articulated while the ethical issues were apparently neither spotted nor articulated.

The other impetus for the ideas suggested here came from a specific incident that arose in working with a student on a case. We were handling a case in which we believed there had been a violation of the Code of Professional Responsibility by another lawyer. As a result, we were obligated to file a complaint⁵ with the Virginia State Bar.⁶ The lawyer had withheld the decree of divorce from a woman because she had not paid all of the lawyer's fee. The Virginia State Bar has previously found to be improper the similar practice of a lawyer's refusal to obtain the divorce decree because the lawyer's fee had not been paid.⁷ The student did some additional research on the question before we ultimately made the decision to file the complaint. In his research the student came upon the Virginia Supreme Court case of *Moore v. Moore*.⁸ In the statement of the facts was the following sentence: "Counsel denied that he had failed to communicate with his adversary, asserting that during the previous October he had notified the husband's attorney that he would not seek entry of a final decree because his attorney's fee had not been paid by the wife."⁹ The court did not say anything about what appears to be a prima facie case of a violation of the Code of Professional Responsibility.¹⁰ This posed a dilemma. Here was the highest arbiter of Virginia lawyers' ethics setting out in a published opinion an admission of an apparent ethical violation by an

articulate them. It is, however, difficult to determine whether that is the case, and in either event, it is doubtful that that question is particularly relevant to the ethical problems of the profession.

5. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE NO. 1-103(A)(1976)(duty to file).

6. The Virginia disciplinary system is found in VA. CODE §§ 54-74 (1980). See also *Green v. Virginia State Bar Assoc.*, 411 F. Supp. 512 (E.D.Va. 1976)(a description of the system in use).

7. VIRGINIA STATE BAR PROFESSIONAL HANDBOOK, INFORMAL LEGAL ETHICS OPINIONS NOS. 62 and 445 (January 1975). See also ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINION NO. 1455 (June 1980).

8. 218 Va. 790, 240 S.E.2d 535 (1978).

9. *Id.* at 792, 240 S.E.2d at 536.

10. See note 7 *supra*.

attorney, yet there was not even a comment by the court on the possibility that the conduct described might be prohibited. Did this indicate that in the court's view such action was permissible, no matter what the Ethics Committee of the State Bar might say? If such was the case, it made no sense to make the complaint, and it might even be considered malicious or wrong to do so. Further research made it apparent that courts rarely comment on what appears to be clear ethical violations set out in their description of lawyer's actions in the cases they were deciding.¹¹ Therefore, we concluded that the absence of a statement in *Moore* did not indicate the Virginia Supreme Court's position on the ethical violation which it had set out in the facts of the case. A complaint was made to the disciplinary committee of the Virginia State Bar.¹² Our resolve, however, was sorely tested by the court's opinion in *Moore*.

It is the premise of this article that there is a connection between the fact that law students do not identify and articulate ethical questions when they are presented with them in actual practice situations and the fact that courts, especially appellate courts, do not discuss ethical violations presented by the cases before them. Courts, therefore, have a significant role to play in both the enforcement and teaching (fear and learning) of the ethical responsibilities of lawyers. Appellate courts in their written opinions must, *sua sponte*, set out any serious ethical question which the record or the conduct of the lawyers brings to their attention and, moreover, state that the question is being referred to the appropriate agency for investigation.

This article will set out two separate but complementary justifications for this proposition. First, that such action by courts is essential for the teaching of ethics in law school. Second, that action is equally essential for the effective operation of the disciplinary system.

11. See, e.g., *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980).

12. The action complained of was subsequently found not to have been a violation. VIRGINIA STATE BAR PROFESSIONAL HANDBOOK, INFORMAL LEGAL ETHICS OPINION No. 450 (1975). The Committee, however, was not unanimous. Letter to author from Committee Chairman on file.

II. THE ROLE OF COURTS IN TEACHING (LEARNING) ETHICS

The teaching of professional ethics, like other subjects in law school, had traditionally been segregated in a separate course.¹³ We in effect told students, "Now you will think and learn about Torts. Now stop. Now you will think and learn about Ethics. Now stop." The limitations and distortions from this type of teaching and learning are clear.¹⁴ For quite some years the "pervasive approach" to the teaching of ethics has been advocated¹⁵ and probably adopted by most law schools and law professors. That approach "requires that . . . the faculty take special care to point out and discuss in their regular courses *various latent professional responsibility issues* [T]he aim is to lead the student to recognize professional responsibility issues that are suggested by cases in the casebook"¹⁶ If one of the objects of legal education is to "sensitize the student to professional responsibility issues—to enable him to recognize and be concerned about them,"¹⁷ in addition to having students memorize a set of rules,¹⁸ clearly then that task must "pervade" legal education. The question then presents itself: How can the teaching of ethics in law school be "pervasive" in any meaningful way when what law students spend the huge bulk of their time reading, thinking about, discussing and truly making a part of him or her-

13. M. KELLY, LEGAL ETHICS AND LEGAL EDUCATION, 23-29 (1980)(history of teaching ethics in law school).

14. "We cannot expect too much from ethics classes held, like church services, a couple of hours a week." Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 454 n.16 (1972)(quoting Weckstein, *Boulder II: Why and How*, 41 U. COLO. L. REV. 304, 308-09 (1969)). See also T. SHAFFER AND R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977); Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, A.B.F. RESEARCH J. 247 (1979).

15. Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment"*, 15 J. LEGAL EDUC. 435 (1963). It has been pointed out "[t]hat changes in the curriculum are the answer to all public deficiencies is, of course, in keeping with the great American tradition of painless reform. Everything from the study of Chaucer to the pursuit of 'social science' has been proposed to this end." J. SHKLAR, LEGALISM 19 (1964).

16. Smedley, *supra* note 15, at 437 (emphasis added).

17. *Id.* at 436. See also D. CALLAHAN & S. BOK, ETHICS TEACHING IN HIGHER EDUCATION (1980). "How to stimulate the moral feelings and imagination of students . . . so that an ethics course is not merely 'an abstract intellectual exercise?'" *Id.* at 117.

18. Memorizing the rules will also be more important with the advent of the "Ethics Exam" for admission to the Bar. California, Georgia, Kansas, New Hampshire and South Carolina have adopted such an exam. 12 NAT'L BAR J. 1 (1980).

self—the appellate opinion—is completely devoid of any discussion of ethical issues?

The significance of teaching professional responsibility in law school should be more than merely to enlarge the meaning of “thinking like a lawyer”¹⁹ to include the ability to spot and analyze ethical issues. In educating students to be professionals, the law school has an impact on how the person will ultimately behave in that role.²⁰ If one accepts the proposition that law school can and should have an important part to play in the formation of a person’s “identity” as a lawyer, then one must look closely and analyze the role models for lawyering which are provided for law students.²¹

In the traditional legal educational setting the student will have the law professor as the only live role model for a lawyer.²² This is clearly not *all* bad. The stereotypical image of the law professor is of a very bright, articulate, intellectual

19. See, e.g., K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1951); Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735 (1978).

20. Our society prolongs the period of adolescence to a large extent through the intensive and extensive imposed process of education. The issue of a person’s “identity” is thus kept open for quite a long time. It is precisely upon this area of personality function that the important lessons of professional behavior should focus The universal human need to have objects for modeling and identity formation may be the single most important psychological factor in the educational process It is critical then that legal educators avoid reinforcement of inappropriate lawyer behavior and avidly grasp every opportunity to reinforce positively those behaviors which are vital to effective and appropriate professional practice.

Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, in NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY, MATERIALS & PROCEEDINGS FROM THE NATIONAL CONFERENCE 631, 633 (P. Keenan, ed. 1979).

21. “It is axiomatic that professional ethics are taught by precept and example.” Hyde, *The Duty and Obligations of the Bar for the Maintenance of Professional Standards*, 29 S. CAL. L. REV. 81, 82 (1955) (emphasis in original). This same analysis can be made from a more sociological perspective. In those terms one would speak of “socializ[ing] students adequately into the ethical norms of the legal profession.” Pipkin, *supra* note 14, at 265.

22. “Because law students only rarely have conceptualized the way in which they shall become working lawyer-professionals, the law faculty and other persons who teach them how to behave as lawyers become extremely important to such ultimate shaping.” Watson, *On Teaching Lawyers Professionalism: A Continuing Psychiatric Analysis* in CLINICAL EDUCATION FOR THE LAW STUDENT 139, 141 (1973) (working papers prepared for the Council on Legal Educ. for Professional Responsibility, Inc. Nat’l Conference). See generally L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 829-31 (1969) (discussion of role theory).

and all-knowing person.²³ However, the law-teaching profession has successfully separated itself into a category distinct from the lawyering profession,²⁴ and to that extent students do not see law professors as appropriate role models or mentors. There has been some change in the last ten years with the advent of clinical programs in most law schools.²⁵ Still, the clinical programs are most often in a public interest type of practice, and the clinical teacher is frequently seen as an outsider in academia—a “do-gooder,” not really accepted or acceptable as an appropriate role model as a professional.²⁶

If this analysis is correct as to the difficulty of having the law professor as an important role model, then the pervasive approach will not ring true to the student. If the teacher points out the “latent”²⁷ ethical issues in a case, most students will assume that the “ivory tower” academic is again playing an analytical game.²⁸ If this ethical issue were truly important in the “real” world of lawyering it would not be “latent,” but explicit.

To look at this same point from another perspective, one must realize that law students spend far and away the most time with the written appellate decision. When law students are asked a non-statutory legal question, the thought process which they go through is one of retrieving the most analogous case or cases from their memory and comparing the facts given in the question to what the court said and did. In this sense law students and practicing lawyers are legal realists.²⁹ To the practicing lawyer the law is what the judge before whom the case will be heard says it is. To the student the law is the “majority opinion” or the state’s highest court’s written

23. SHAFER & REDMOUNT, *supra* note 14, at 157.

24. J. AUERBACH, *UNEQUAL JUSTICE* 74-75 (1976); SHAFER & REDMOUNT, *supra* note 14.

25. COUNCIL ON LEGAL EDUC. FOR PROFESSIONAL RESPONSIBILITY, INC.: *SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION—1978-1979* (1979).

26. Watson, *supra* note 20, at 619.

27. Smedley, *supra* note 15.

28. “[I]deas about professional behavior which are picked up from practicing lawyers, whatever the character of that behavior may be, will be eagerly grasped and emulated by the student, who *must* learn how to live and practice as a lawyer.” Watson, *supra* note 22, at 142 (emphasis in original).

29. See, e.g., Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). See also W. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); J. FRANK, *LAW AND THE MODERN MIND* (1930); K. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1951).

opinion. The students' image of both the real world and "the law" is built from their study of appellate opinions, the raw material of most law school courses.

Legal education spends considerable time and effort teaching and testing "issue spotting." Issue spotting is the lining up of the elements in a narrative of an event against a legal rule (as derived from and delineated by appellate opinions) and analyzing and articulating where they clearly fit together, where they clearly do not fit together, and where there can be arguments as to whether they do or do not fit.³⁰ The ability to spot issues determines to a large extent a student's academic success. In most law school exams the student is told that how one resolves the "issue" is not nearly as important as spotting it and making the right arguments concerning it.

These two central features of legal education bear directly on the ability to teach ethics.³¹ The students' image of the "real world" of the law is built on the appellate opinion, and the students are told that there is great value and great reward³² given to the ability to spot issues. With the importance of these two aspects of legal education, assigned appellate opinions which are not sensitive to and do not deal explicitly with the ethical issues inherent in them create powerful negative ethical models.³³

The student sees that it is in court opinions that one finds the real world of the profession, and that world is not concerned with ethical issues. From the student's perspective it appears that only ivory tower academicians worry about such things. The real world of the legal profession does not have a pervasive approach to ethics. Courts which appear blind to ethical issues in their opinions can only reinforce the impression that ethical issues are not worth spotting—that a

30. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1948). See also Elkins, *supra* note 19, at 742 ("mental categorization and classification").

31. A statistical analysis using a law student's perceptions of his education, albeit with somewhat different factors, comes to the same conclusion. "[T]he prevailing mode of instruction in fact socializes students into the belief that legal ethics are *not* important." Pipkin, *supra* note 14, at 274 (emphasis in original).

32. The system shows them that good issue spotting equals good grades, which equals good jobs, which equals the good life—success.

33. "To a large extent people behave as they are expected to behave and their expectations arise less from what they are told than from the examples they observe." Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 278 (1975).

lawyer will not be rewarded for dealing with them openly and honestly.³⁴ The appellate opinion, the most meaningful model and professional identity maker, teaches that one deals with ethics only when forced to. That makes a mockery of what we are trying to communicate—that as professionals, ethics should pervade our thoughts and actions because that is one of the major factors which differentiates our profession from a business.³⁵

Teaching ethics will never be done “well enough,” yet the need to strive for this goal must still be nurtured. If we give up, we teach “contempt for ethical behavior . . . [P]latitudes not only cannot overcome example, they turn the example into destructive hypocrisy.”³⁶ Although a change in how the bench approaches the ethical behavior of the profession will obviously not solve all—or even most—of the problems of producing lawyers who behave ethically, it certainly must be a component of any movement toward solutions.³⁷

III. THE ROLE OF COURTS IN THE ENFORCEMENT OF ETHICS

Many studies have determined that a core problem of the structure of the legal profession's ethical-disciplinary system is the initiating mechanism for investigations of lawyers' conduct.³⁸ The three major sources of information, or the initia-

34. See generally E. FROMM, *MAN FOR HIMSELF—AN INQUIRY INTO THE PSYCHOLOGY OF ETHICS* (1947). “Indeed, the fear of disapproval and the need for approval seem to be the most powerful and almost exclusive motivation for ethical judgment.” *Id.* at 11.

35. “In short, with respect to a capacity to distinguish in ethical matters, we may be fast losing our status as a profession and becoming nothing more than skilled merchant clerks.” E. CAHN, *CONFRONTING INJUSTICE* 257 (1962). See also note 104 *infra*.

36. J. LIBERMAN, *CRISIS AT THE BAR* 208 (1978). Chief Justice Burger's quotation at the beginning of this article—the pregnant illusion—makes the same point, *supra* note 1.

37. Rosenhan, *Moral Character*, 27 *STAN. L. REV.* 925, 934-35 (1975).

38. “Only after the identification function is improved are prosecutorial and adjudicatory procedures and policies of primary importance. Without adequate information input, the system cannot attend to, because it does not know about, the majority of instances of lawyers' misconduct.” Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 *ABF RES. J.* 917, 1005. See also ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT 168 (Final Draft, June 1970) (hereinafter cited as CLARK REPORT); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 *TEX. L. REV.* 267, 282 (1979); Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 *UTAH L. REV.* 95.

tion of investigations, are (1) the public, usually a client, (2) the profession, or (3) a professional police force of some sort. The first source, the public, has been and will continue to be the major triggering mechanism in the disciplinary system. The deficiencies and gaps in this "de facto delegat[ion] to nonprofessionals"³⁹ is well established.

The source which, at least since the Clark Report, has received the most attention has been some sort of professional policing force.⁴⁰ Having an omniscient and omnipotent police force would, of course, end most of our profession's ethical violations. If professional police were everywhere, very few lawyers would violate the law. But this extreme remedy would have such a chilling effect on advocacy that our profession would lose its *raison d'être*. Clearly the reforms and expansion of the professional policing mechanism which the Clark Report seems to have set in motion have been beneficial without approaching this totalitarian extreme. Movement in that direction is still needed and will be beneficial for both the profession and the public.⁴¹ Nevertheless, there must be a viable and visible counterweight to slow the movement toward more and better policing. Without such a counterweight, the pressure from the public⁴² will push the expansion of the professional police force to a point where there will be a significant diminution of the profession's ability to be the zealous advocate and champion of the individual caught in the tentacles of the legal system.⁴³

The only other source of a counterweight is from the profession itself, but reports by lawyers of other lawyers' ethical violations have been a very small percentage of the work of

39. Steele & Nimmer, *supra* note 38, at 974.

40. Steele & Nimmer, *supra* note 38, at 1005.

41. For example, the work now being done on peer review with the emphasis on remedial rather than punitive action towards the lawyer. ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM—(Discussion Draft April 15, 1980). The medical profession is going through the same process. F. GRAD & N. MARTI, *PHYSICIAN'S LICENSURE AND DISCIPLINE* (1979).

42. This pressure will most likely grow if for no other reason than that there is an increasing number of lawyers, law suits and areas into which litigation is reaching. With almost all lawsuits there will be losers, some of whom will transfer their disappointment or anger to their lawyer.

43. "[T]he bar increasingly will become the object of public scrutiny through nonjudicial, and thus more explicitly political, regulation." Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 621 (1978).

disciplinary committees.⁴⁴ The reasons for ineffectiveness of the intraprofession reporting have been catalogued repeatedly.⁴⁵ All of the economic, social, and emotional pressures on lawyers militate against making accusations against other members of the bar.

In our society the person who blows the whistle occupies a very ambiguous position.⁴⁶ In common parlance and even in law review articles⁴⁷ pejorative terms such as "squeal," "rat," "stool pigeon," and "gestapo" are used freely. People often say and believe that such action somehow does violence to "basic ethical notions."⁴⁸ As a parent one can remember using the devastating "put down" of, "Don't be a tattletale." On the other hand, we give and have been given messages such as, "Why didn't you tell me that Johnny was . . . ?"⁴⁹ Or think of press treatment of incidents where large numbers of people do nothing while some horrendous crime is unfolding before them. At best, our culture gives us very ambiguous guidance.⁵⁰

One must add to this general ambivalence the special pressures on a lawyer. The other lawyer is a colleague, and therefore one empathizes with him or her. There is also the real problem of the lawyer who is not a member of the "club": he also makes mistakes,⁵¹ he needs help and favors, and he has to work with these people.⁵² The Clark Report found "outright hostility" from the practicing bar toward discipli-

44. See Steele & Nimmer, *supra* note 38; Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?* 1974 U. OF ILL. L.F. 193 (1974).

45. See authorities cited in note 38 *supra*. See also McCracken, *The Maintenance of Professional Standards: Duty and Obligation of the Courts*, 29 S. CAL. L. REV. 65 (1955).

46. CALLAHAN & BOK, *supra* note 17, Chapter XI.

47. See, e.g., Weckstein, *supra* note 38; Note, *The "Stool Pigeon" Canons: A Comment on Certain Sections of Canons 28 and 29 of the ABA Code of Ethics*, 41 CONN. BAR J. 339 (1967).

48. *The Model Rules of Professional Conduct: Report of New York City Regional Hearings Before the Commission on Evaluation of Professional Standards*, 66 ABA J. 704 (1980) (Testimony of Professor Gray Thoron).

49. CALLAHAN & BOK, *supra* note 17, at 289. Also relevant is the Biblical admonition: "He that is without sin among you, let him first cast a stone at her." *John* 8:7.

50. V. NAVASKY, *NAMING NAMES* (1980).

51. "This factor of identifying the potential evil in oneself with the misbehavior of others is probably the single greatest factor that inhibits peer discipline." Watson, *supra* note 20, at 637 n.29.

52. "[A] much stronger relationship was found between their needs for affiliation and helpfulness and their tendency to cheat." Rosenhan, *supra* note 37, at 929.

nary enforcement.⁵³ A lawyer who follows the ethical duty and reports instances of questionable conduct will be viewed with, if not hostility, at least suspicion and as a consequence the lawyer's practice may suffer.

I have never heard of (or been able to find reported) a lawyer disciplined or even investigated for violating DR 1-103(A): "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [any other Disciplinary Rule] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."⁵⁴ It is interesting to note that the present "Discussion Draft of ABA Model Rules of Professional Conduct"⁵⁵ would weaken the language of the reporting requirement. The draft proposes that a lawyer only be required to report a violation if it is "substantial."⁵⁶ It has been pointed out that "lawyers with their quibbling minds will always be able to rationalize a breach as less than substantial by some defensible theory."⁵⁷ Even this emasculated reporting requirement, however, appears to be too much for a segment of the ABA, which wants the entire rule abandoned.⁵⁸ But this debate is as hypocritical as it is academic. In the past lawyers have not initiated significant numbers of complaints against their colleagues and there is no indication that they will do so in the future.

If the bar does not function as the counterweight to the professional police force, then the only other segment of the profession which might fill the role is the bench. The Code of Judicial Conduct, 3B(3) provides that a judge has the responsibility to initiative disciplinary measures against judges or lawyers for unprofessional conduct. Although there may be some question about the mandatory nature of the reporting requirement for judges,⁵⁹ there is no ambiguity that the Code says it should be done. Yet the literature⁶⁰ and my own survey of reported opinions indicate that judges are no more likely to

53. CLARK REPORT, *supra* note 38.

54. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT DR 1-103(A)(1980).

55. 48 U.S.L.W. 1 (Supp. No. 32, 1980).

56. *Id.* at 30.

57. 49 U.S.L.W. 2126, 2127 (1980)(Testimony of Michael Franck).

58. *Id.*

59. Robinson, *The Arkansas Code of Professional Responsibility*, 33 ARK. L. REV. 605, 608 n.13 (1980).

60. See Steele & Nimmer, *supra* note 38.

report lawyer misconduct than are mere lawyers.

The lack of judicial activity in reporting ethical violations has been the subject of some rather caustic criticism:

The failure of grievance committees to stalk incompetence is mirrored by the abysmal record of the courts. During the past several years, many judges, most notably Chief Justice Warren E. Burger, have complained that a significant number of advocates who appear before them are incompetent. Trial judges constantly swap stories about lawyers they had to rescue discreetly from a sinking case. Numerous courts have had to grapple with the serious question of whether to overturn a criminal conviction because the defendant had 'inadequate assistance of counsel' Yet neither the Chief Justice nor the other judges have forwarded the names of obviously unskilled and incompetent attorneys to disciplinary committees for appropriate action.⁶¹

The standard explanation of this judicial inactivity parallels that for lawyers in general.⁶² Judges are lawyers and are subject to the social and personal feelings for the members of their profession. Nevertheless, judges are different from lawyers in ways which should mandate a more active role, or at least make the excuses less tenable.

If judges are excused from their duty to initiate disciplinary actions because they were once lawyers, one could as easily throw out their function as impartial decision makers, since judges were all biased advocates prior to their "elevation." Our system requires that judges shed their role as advocates upon taking the oath of judicial office. As in all human activities, some judges are more successful in being impartial than others. It is, however, expected both by the system and by the people within the system that judges will be impartial, and to some extent at least this is a self-fulfilling expectation. By becoming a judge a lawyer is expected to change. He or she is being paid to make decisions, often hard decisions, concerning people and their actions. It certainly does not seem too much to expect that judges take their separation (elevation) from the bar seriously enough to be able to fulfill their duty to

61. LIBERMAN, *supra* note 36, at 203-04. See also Aronson, *Reforms Needed to Correct Malaise in Enforcement of Canons of Ethics*, NAT'L L.J., Nov. 26, 1979 at 27, col. 1; FREDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 101 (1975).

62. See, e.g., Steele & Nimmer, *supra* note 38.

report ethical violations. Until they do so, the lack of judicial action will be the highest level of hypocrisy in the entire self-regulatory system.

Other factors should also be considered to give judges greater obligations to initiate ethics complaints. A judge is a salaried employee of the government and thereby is not vulnerable by being excluded from the bar. This situation is clearly much different from a lawyer in private practice, especially outside of the large urban areas, whose business and financial well-being is to a significant extent dependent on not being a "pariah."

The higher up in the judicial structure, the weaker are the pressures not to report. The appellate judge will have fewer official contacts with any one lawyer.⁶³ On a less tangible level, there are factors of status and role which give the appellate judge a greater ability to act. Such judges regularly are called upon to make decisions that put them at odds with the judges below them. Logically, the hard and painful questions about individual lawyer's conduct should be one more step removed, and therefore somewhat easier.

A final factor to be put in the balance on the side of judicial activism in this area is the "inherent power doctrine." This judicially-created doctrine keeps the regulation of the legal profession almost exclusively within the judicial branch of government.⁶⁴ A judicial position that "we and only we have the power to regulate the legal profession, but that we, as individuals, will not do it because it is so unpleasant or not a proper function of a judge," is indefensible.

A. *Dangers of an Activist Judiciary*

If judges become more active in enforcing ethical rules there is a danger that advocacy before them will be compromised. There are instances of courts, usually in league with others, using disciplinary procedures against lawyers who are representing unpopular clients and causes.⁶⁵ If more judges

63. An exception to this would be some government lawyers.

64. Wolfram, *supra* note 43; *Wajert v. State Ethics Comm.*, 420 A.2d 439 (1980). "[This] Court declares that it has inherent and *exclusive* power to supervise the conduct of attorneys . . ." 420 A.2d at 442 (quoting Pa.R.D.E. 103).

65. Note, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.—C.L. L. REV. 301 (1970). A suit by a well known Virginia civil rights attorney charging that State Bar officials used their disciplinary process to harass him was

saw their roles as ethical activists there would be a greater likelihood of blatant political use of the process.

A general chilling of zealous advocacy before courts might also be a side effect of having lawyers know that both they and their clients are being "judged." In *In Re Bithronney*,⁶⁶ Judge Coffin discussed the dangers of inhibiting zealous advocacy and the need for "breathing room for the fullest possible exercise of the advocacy function."⁶⁷ He went on to state:

Even at this point we might hesitate to take disciplinary action, sensitive to even the slightest possibility of casting an inhibitory shadow upon the ardor of those who practice before us. But even more serious [than filing appeals in bad faith] in our view was respondent's complete failure to diligently pursue prosecution of four of the appeals.⁶⁸

Nevertheless, no matter how sensitive courts are in enforcing ethical conduct, there will inevitably be actions which a lawyer will not take, due to fear of having his or her ethics publicly questioned.

Another problem posed by an ethically-activist bench would be the greater danger of unfairly, if unintentionally, causing damage to an "innocent" lawyer.⁶⁹ It is advocated in this article that judges, *sua sponte*, and explicitly in written opinions, state that what they have read in the record or actually seen before them in court is enough to warrant an investigation. The court would then refer the matter to the appropriate body to determine whether there has been a violation of an ethical mandate. This would be done without the matter

settled and the officials admitted that they had engaged in "unfairness and procedural irregularities." *Richmond Times Dispatch*, Dec. 20, 1975, at A-1, col. 2. *See also* *Greene v. Virginia State Bar Ass'n.*, 411 F. Supp. 512 (E.D. Va. 1976), in which an activist Black lawyer found that the regional disciplinary committee had "an extensive file . . . on his activities . . . apparently contain[ing] information on his professional and non-professional background." 411 F. Supp. at 517.

66. 486 F.2d 319 (1st Cir. 1973).

67. *Id.* at 322.

68. *Id.* at 323. The court's reasoning appears to be inconsistent. If the respondent-lawyer had "diligently" pursued the frivolous appeals he would have compounded his abuse of the system. The court, however, must have felt that it had to support its action with a statement about a lawyer's duty to his or her client and therefore reached out for this "zealous advocacy" basis for decision.

69. "[The] dangers of whistleblowing: of uses in error or in malice; of work and reputations unjustly lost for those falsely accused; of privacy invaded, and trust undermined." CALLAHAN & BOK, *supra* note 17, at 279.

having been presented to the court as an issue in the case, and the lawyer would not be given the opportunity to present his or her side.⁷⁰ Obviously it will sometimes happen that what was in the record was not in fact correct or was ethically justifiable when other factors are considered.⁷¹ In such cases an innocent lawyer will have had his or her reputation damaged by a court opinion questioning the propriety of an action.⁷²

Fairness to the accused person is a serious problem whenever the system has questions about a person's actions (*e.g.*, investigation or indictment). Courts might mitigate possible damage through careful use of language in these opinions. Ironically, the fact that the accusations would be in appellate court opinions would probably lessen the damage to the lawyer's reputation because of one of the factors which keeps lawyers from turning in other lawyers—empathy. While reading the cases for this article I found myself thinking of all the possible things that would justify or excuse the conduct of the lawyer about whom I was reading. Generally, lawyers are the only people who regularly read appellate opinions and by their identification with the lawyer in the opinion, they are more inclined to take the accusations for what they are.

The danger that a false accusation will be spread on the record is inherent in any open system of discipline. One has to weigh the possibility of damage to innocent lawyers against the benefits.⁷³ Part of this process will depend on the weight one gives to the need to strengthen the enforcement system, which in turn depends on one's view of the degree of deficiency of lawyers' ethics.⁷⁴ Such an evaluation is not undertaken in this article, but there seem to be grave and substantial deficiencies.

A question might also arise concerning the due process

70. What is being suggested is merely the reporting-triggering mechanism, not the investigatory or adjudicatory procedures.

71. "Justification plays such a large role in behavior that its openness creates serious difficulties for moral education." Rosenhan, *supra* note 37, at 930.

72. In an analogous area, in making public the disciplinary/adjudicatory procedure, the A.B.A. has recommended openness. There appears, however, to be very strong opposition because of "the specter of sensationalist newspaper publicity about a flimsy allegation of misconduct." *Nat'l L.J.*, Dec. 8, 1980, at 12, col. 3.

73. With the admonitions about the appearance of impropriety in the Code, the number of "completely innocent" lawyers should be quite small. ABA CANONS OF PROFESSIONAL ETHICS No. 9.

74. Or how bad the public thinks it is. See notes 42 and 43 *supra*.

implications posed by a court which initiated the investigation and then sat in judgment on it. If the highest court of the state made the complaint the possibility exists that the same court might be required to review on appeal any disciplinary action. There would be a somewhat analogous situation when an attorney is convicted of a crime and an appeal is heard by the state's highest court and then that court is asked to review disciplinary action flowing from the conviction. Also, it is certainly not unusual for appellate courts to review cases, aspects of which they had reviewed and made decisions on before. Our notions of fundamental fairness⁷⁵ would not be offended by an appellate court reviewing disciplinary action which resulted from an investigation it had requested.⁷⁶

B. *Effectiveness of Active Judicial Enforcement*

There clearly are dangers and costs to judicial activism in this area. The benefits to be derived from active judicial enforcement must be analyzed in order to make an informed decision. The first part of this paper set out the benefits to the next generation of lawyers and their clients from an educational experience that is meaningful and real in terms of what will be expected of lawyers. Also, more immediate benefits will be derived for each of the three traditional functions of self-regulation:⁷⁷ (1) to identify and remove seriously deviant members of the bar (the cleansing function);⁷⁸ (2) to deter

75. See generally *Morgan v. United States*, 304 U.S. 1, 19 (1938).

76. However, the Oklahoma Supreme Court recently declared it a violation of due process for the same court to prosecute and judge an ethical violation.

While as a legislator in the arena of bar ethics and discipline, this court can and does fashion, by rules, the necessary prosecutorial machinery, it cannot itself exercise enforcement powers for, or on behalf of, the instrumentality it has created An exercise of both functions would be inconsistent with this court's constitutionally-mandated responsibility for adjudication of bar disciplinary proceedings.

Tweedy v. Oklahoma Bar Ass'n., 624 P.2d 1049, 1055 (1981). There is, of course, a significant difference between prosecuting ethical violations and merely reporting or initiating investigations.

The Massachusetts Court of Appeals, in a more apposite situation, reasoned differently. Counsel moved for recusal of the judge in a case where the presiding judge had referred a matter to the disciplinary committee. The court held that: "[t]here is no basis for concluding that the prior incident affected the judge's ability to render impartial judgments." *Commonwealth v. Cresta*, 3 Mass. App. Ct. 560, 565, 336 N.E.2d 910, 915 (1975).

77. See *Steele & Nimmer*, *supra* note 38, at 999.

78. This category should be expanded to include a competency identification

other lawyers; and (3) to maintain enough action to forestall public intervention.

First, the "cleansing" function of the disciplinary system would obviously be furthered by the removal of "deviant" lawyers whom the court identified and referred for investigation. It is undoubtedly true, however, that much seriously unethical conduct never comes to the attention of any court (for example, those things that lawyers do for and to clients in the privacy of their offices). One might assume, however, that most of the lawyers whose unethical practices come to the notice of a court are engaging in a substantial amount of evil in private. Therefore, if a court-initiated investigation eventually removes them from practice or forces them to change their ways, one would assume that both their overt and covert damage will be ended. On a much larger scale (and in the long run probably much more beneficial) courts would be able to identify lawyers who need help to become competent practitioners, and could require individualized education and training for them.

Second, the deterrence function⁷⁹ would clearly be enhanced in those cases which the lawyer knows will end up before a court. In much of what lawyers do there is the possibility that some part will end up before a court. Unethical conduct is more likely to be deterred if it is known and understood by lawyers that conduct that looked unethical and comes to the notice of a judge will be automatically and openly referred for investigation.

One quasi-deterrent effect would be in educating (or re-educating) lawyers as to what is, in fact, unethical. The specific ethical rule would be articulated in the opinion. Therefore, the fact that such conduct is accepted practice by lawyers in an area will not diminish the ethical standards for other lawyers in the area by "custom and usage." Court opinions would bring to lawyers' consciousness the impropriety of the action and the knowledge that in the larger world of the

and educational procedures aimed at remedying deficiencies in a lawyer's knowledge and/or skills. *See, e.g.*, *In re Edmondson*, 518 F.2d 552 (9th Cir. 1975) (lawyer suspended from practice before the court for six months and until the court is satisfied that he is familiar with the Federal Rules of Appellate Procedure).

79. *See generally* H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Hughes, *Should Alfie Be Let Off?*, 27 N.Y. REV. OF BOOKS No. 18 at 47 (Nov. 20, 1980).

profession it will not be tolerated.

Finally, the third function of our disciplinary system—to maintain enough action to forestall public intervention—would be enhanced. This is essentially a public relations or image problem and an active bench would take away the charge of hypocrisy with which judges are so effectively attacked.⁸⁰ By openly and honestly dealing with ethical questions, courts would have to have a salutary effect on the image of the entire legal profession.

IV. HOW MIGHT A CHANGE COME ABOUT?

There are reported cases in which courts, apparently on their own motion, publicly refer attorneys to ethics committees. A court will probably act if the situation is particularly egregious. In one case the Supreme Court of New Jersey directed "that proceedings be had"⁸¹ against an attorney for neglect⁸² in a capital case which subjected his client to the danger of execution. The same attorney, the court added, had been disbarred and readmitted once before. There are a few other instances in which it appears courts acted out of petulance or exasperation in referring lawyers to ethics committees.⁸³ In these situations there is almost no residual deterrence or lesson except for the lawyer involved in the action (i.e., there is only a specific as opposed to a general deterrence). In the first type of case the lawyer's conduct is so outrageous that others will quickly put the decision out of their minds as an aberration. The second case could not deter or teach in a meaningful way since it does not set out the conduct and the ethical standard.

The United States Court of Appeals for the Ninth Circuit appears to be the only court which has consistently published opinions with the names and deeds of attorneys who have been derelict in their ethical duties to their clients.⁸⁴ It also

80. See, e.g., authorities cited in note 61 *supra*.

81. In re McDermit, 96 N.J.L. 17, 114 A. 144 (1921).

82. *Id.* at 21, 114 A. at 146. The inference can be drawn that the attorney's action was more like extortion. He apparently was trying to get more money by holding up further work on the appeal.

83. See, e.g., *Gullo v. Hirst*, 332 F.2d 178 (4th Cir. 1964)(the case appears to have grown out of a messy domestic battle in which one of the lawyers was related to a party).

84. See, e.g., In re Young, 537 F.2d 326 (9th Cir. 1976); In re Morris, 521 F.2d 794 (9th Cir. 1975); *United States v. Ferrara*, 469 F.2d 83 (9th Cir. 1972); In re Chan-

appears from these opinions that the court is initiating the disciplinary proceedings, but these cases are criminal cases and it is possible that the United States Attorneys' Offices are the real moving parties. These opinions go back a number of years, and it would be valuable to design a study to determine whether there are measurable differences in either ethics or advocacy in that circuit compared to other circuits.

A recent development is a formal announcement of the Supreme Court of Arkansas that it will publish the names of attorneys who "without good cause" miss a deadline for filing an appeal, and that they will be referred to the Committee on Professional Conduct.⁸⁵ One wonders what the disciplinary committee will do other than determine an appropriate sanction since the court will apparently have determined the lack of "good cause." Also, one wonders how the "good cause" issue is to be decided?

By contrast, the Second Circuit has stated: "The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it."⁸⁶ There clearly appears to be a strong presumption in the minds of most judges against being active in ethical matters. This attitude most often manifests itself in a lack of comment or action in cases which presumptively include ethical issues such as ineffective assistance of counsel,⁸⁷ legal malpractice,⁸⁸ or Rule 11 (honesty in pleading cases).⁸⁹ Nevertheless, when one reads cases and articles with this question in mind, one finds explicit comments on how judges perceive their role.

bler, 450 F.2d 813 (9th Cir. 1971).

85. Robinson, *supra* note 59.

86. W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976). *But see* Lowenschuss v. Bluhdorn, 613 F.2d 18 (2d Cir. 1980) where the Second Circuit affirmed disqualification of counsel who was also class representative in an antitrust suit, and where there was a "pattern of highly improper conduct . . . making baseless and unjustified personal and professional attacks upon numerous reputable persons in the case." *Id.* at 20. Moreover, the court stated that "the Pennsylvania Bar Association is requested to review [the counsel's] conduct in this case, *see Amer. Bar Ass'n. Code of Jud. Cond.* Canon 3 B(3) and to take such action as is appropriate." *Id.* at 21.

87. *See, e.g.,* Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978); Schwartz, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980).

88. *See* Schwartz *supra* note 87, cases cited at 648 n.67.

89. *See* FED. R. CIV. PROC. 11. Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

For example, in *Quality Molding Co. v. American National Fire Ins. Co.*,⁹⁰ the court had to make a decision as to what to do with a serious misquotation in a brief. Opposing counsel stated that the same misquotation had been made in the district court and that it had been specifically called to counsel's attention in the trial brief. The court concluded: "[A] deliberate misquotation calls for strong condemnation. However, we do not initiate disciplinary action in this court because there is a *bare possibility* that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this court"⁹¹ This sets the appropriate procedure on its head. One needs proof beyond a reasonable doubt—"bare possibility"—before one initiates an action.

In a volume devoted to the teaching of ethics in law schools, a United States district court judge implied that such misquotation is not uncommon: "On several occasions my law clerks and I have had conferences about certain lawyers and their use of misquotations from opinions. Sometimes quotations are manufactured. It's hard to give fair consideration to briefs from such lawyers the next time around."⁹² It appears that to this judge the issue is not ethics, but mere credibility.

Any movement in this area will have to come about through changes in individual judges' perceptions of their role.⁹³ Changing how a powerful and insular group of people perceive their job, after they have been trained and have performed on the job in a different way, is a long-term proposition. One sensible place to begin would be at the top. The Supreme Court's opinions are the primary written source of teaching and learning in the legal profession, both during and after law school. Also, one would assume that the Justices are judicial role models.⁹⁴

Although the present Chief Justice's speeches might suggest otherwise, it seems clear that the Court does not see itself as having a significant role to play in this area. Take for ex-

90. 287 F.2d 313 (7th Cir. 1961).

91. *Id.* at 316 (emphasis added).

92. P. KEENAN, TEACHING PROF. RESP., MATERIALS & PROCEEDINGS FROM THE NATIONAL CONFERENCE 9-10 (1979).

93. Legislative or executive action would be nullified by the "inherent powers" doctrine. See note 64 *supra*.

94. See *Watson supra* note 22.

ample the recent case of *Roadway Express, Inc. v. Piper*.⁹⁵ The question presented to the Court was whether attorney's fees could be assessed against the plaintiffs' attorneys personally, pursuant to certain statutes.⁹⁶ The opinion catalogues the lawyers' abuse of the judicial process. The list goes from "uncooperative behavior"⁹⁷ and "deliberate inaction"⁹⁸ to their having "improvidently enlarged and inadequately prosecuted"⁹⁹ the action. From the description of the lawyers' conduct the inevitable conclusion is that a prima facie case had been made that various disciplinary rules had been violated.¹⁰⁰ Yet not one word about ethics appears in the opinion.¹⁰¹ The entire discussion is in terms of money—who should bear the costs of the presumptively unethical conduct.¹⁰² When the Supreme Court's perception of ethical violations is solely in terms of dollars and cents one can hardly expect lawyers (and law students) to see themselves in a "profession" as opposed to a mere business.¹⁰³

95. 447 U.S. 752 (1980). The only reference I have found to this case starts off with a statement implying that the Court was *too* concerned with matters of "competence and the abuse of judicial processes."

It is a remarkable commentary on the level of rhetoric in the continuing debate over lawyer competence and the abuse of judicial processes that the U.S. Supreme Court can find itself blandly citing Charles Dickens' *Bleak House* for the proposition that "[d]ue to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices."

Sinclair, *Dilatory Behavior of Counsel: Roadway's Warning on Liability*, Nat'l L.J., Aug. 11, 1980, at 19, col. 1.

96. 28 U.S.C. § 1927 (1976) (allowing a court to tax excess costs incurred when a lawyer unreasonably and vexatiously increases costs); 42 U.S.C. §§ 1988, 2000 e-5 (k) (Supp. II 1978) (allowing recovery of attorney fees as a part of the costs of litigation).

97. 447 U.S. at 754.

98. *Id.* at 755.

99. *Id.* at 756.

100. ABA CANONS OF PROFESSIONAL ETHICS, DISCIPLINARY RULE 1-102 (misconduct); DISCIPLINARY RULE 6-101 (failure to act competently); DISCIPLINARY RULE 7-101 (failure to represent client zealously).

101. Nor is there a mention of ethics in the opinions of the courts below. *Monk v. Roadway Express, Inc.*, 73 F.R.D. 411 (W.D.La. 1977), *aff'd* 599 F.2d 1378 (5th Cir. 1979). Nor from what I have been able to find has any disciplinary investigation or action been taken. Letter on file.

102. Even this discussion seems rather short-sighted. If the attorneys have to pay, it may be a deductible business expense and the public ends up paying.

103. In one sense there is an unhealthy elitism in the use of the profession versus trade example. "[T]he belief that lawyers are somehow above trade has become an anachronism." *Bates v. State Bar of Arizona*, 433 U.S. 350, 371-72 (1977). It is, however, inherent in the concept of self-regulation. The pursuit of profit is not the only motivating factor (and at least arguably not the primary factor) in the individual

If the Supreme Court started the process of openly commenting on ethical issues inherent in their cases, other courts would follow. Without leadership or a role model there will be no movement.¹⁰⁴

V. CONCLUSION

Although the role of the judiciary in the enforcement of our profession's ethical standards is but one scene, it affects the entire play. The judge's ethical code says that judges should be active, but that mandate is ignored. This sets the stage for the hypocrisy of the entire production. If self-regulation is to be viable and believable, both to the public and to the players themselves, there must be some minimum level of honesty and commitment.

There will be difficult cases where it is questionable whether a referral to the disciplinary system should be made. There will probably be an even greater number of cases where no mention of ethical problems should be made in the published opinion, even if a referral is made. But surely there are cases where both the educational and deterrent values are paramount. "The answer perhaps is that courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail' at some time."¹⁰⁵

lawyer's work. If there is no validity to "the delicate balance between need to earn a living and his obligation selflessly to serve," *id.* at 368, then the entire ethical system is merely a mask to hide the pursuit of the profession's economic self-interest.

104. Alternatively, the political pressures may become so great that the entire structure of the legal profession is changed radically as, for example, it was during the Jacksonian Era. C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).

105. *Lavery v. Pursell*, 39 Ch. D. 508 (1888).