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## Comment on Rule, Story, and Commitment in the Teaching of Legal Ethics, by Roger C. Cramton and Susan P. Koniak

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COMMENT ON *RULE, STORY, AND COMMITMENT IN THE TEACHING OF LEGAL ETHICS*, BY ROGER C. CRAMTON AND SUSAN P. KONIAK

JOHN M. LEVY\*

In *Rule, Story, and Commitment in the Teaching of Legal Ethics*,<sup>1</sup> (the "Article") Professors Cramton and Koniak challenge the academy by wondering whether we, as educators, really take responsibility for the ethical education and training of future members of the legal profession, or whether we just engage in "[t]rendy lip service to our better selves"—the Doonesbury Thesis.<sup>2</sup> They present a tight case for both retaining the ABA requirement of a mandatory ethics course<sup>3</sup> and for taking steps to disprove the Doonesbury Thesis by making the teaching of legal ethics and the law of lawyering more effective.<sup>4</sup>

Overall, I agree with their diagnosis and prescription.<sup>5</sup> My only criticism is that their focus is too narrow. In one sense I am saying that I would have written the Article differently, or at least I would have added some things. In another sense I believe that by focusing only on the academy and law schools,<sup>6</sup> we are doomed to failure because that, too, is a form of "lip service to our better selves."<sup>7</sup>

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1. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145 (1996).

2. *Id.* (quoting Garry B. Trudeau, *Doonesbury* (1975), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 1 (6th ed. 1995)).

3. *Id.* at 150-64.

4. *See id. passim.*

5. As a teacher of legal ethics of course I would agree. In fact, one can assume that everyone involved with this conference believes that what they do, teach, and write is important.

6. Cramton & Koniak, *supra* note 1, at 146-48.

7. *See supra* note 2 and accompanying text.

I agree with the Authors that law schools have responded poorly to the ethics teaching requirement, and that such a response is inexcusable.<sup>8</sup> I think, however, that we need to keep our bit of reality in perspective, realizing that the notion "[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."<sup>9</sup> Law schools' weak commitment to teaching ethics parallels the ABA's half-hearted enforcement of the mandate to teach ethics.<sup>10</sup> The possibility that a connection between the two exists is an issue that the Authors fail to address.

In the first section of the Article, the Authors ask, "Should the [e]thics [r]equirement [b]e [s]crapped?"<sup>11</sup> The Authors acknowledge the debate concerning the extent to which the ABA can or should exercise authority over law schools, especially in curricular matters.<sup>12</sup> Understandably, however, the Authors do not attempt to resolve that debate in their Article. Another "unmentionable" question that I believe the Article should address, but does not, is whether the ABA should energetically enforce the ethics teaching requirement.

Much of the Article illustrates the number of ways that the academy has forsaken, or in some cases ignored, the ABA's ethics teaching requirement.<sup>13</sup> The academy's failure in this area parallels failures in other parts of the legal profession: judges fail to enforce lawyers' ethical duties<sup>14</sup> and lawyers fail to enforce the ethical duties of their peers.<sup>15</sup> Viewed as a whole,

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8. Cramton & Koniak, *supra* note 1, at 146-48, 153-55 (noting that students perceive ethics classes to be easier than other classes and that law schools tend to at least implicitly undervalue the importance of legal ethics through "casual" teacher selection and through offering lower credit ethics courses).

9. JUDITH N. SHKLAR, *LEGALISM* 19 (1964).

10. *See* Cramton & Koniak, *supra* note 1, at 153-54 (noting that law schools have not taught ethics well partly because the ABA has not rigorously enforced its ethics teaching requirement).

11. *Id.* at 150.

12. *See id.* at 150-54.

13. *See id. passim.*

14. ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 453-60 (3d ed. 1989).

15. *Id.*

these parallels seem to suggest a general failure of the system. Perhaps, however, the parallels do not point to systemic failure so much as they may just indicate the inevitable imperfections of a regulatory or legal system.

I return to the question of whether the ABA should energetically enforce the ethics teaching requirement. When the ABA, or anyone outside of the academy, such as legislators, seeks to impose requirements on law schools, issues arise that are as sensitive as the character questions raised by the Authors.<sup>16</sup> The Article argues that the character of the teacher is crucial in teaching ethics.<sup>17</sup> We must, therefore, ensure as sensitively as possible that teachers of legal ethics, or of any law course for that matter, are virtuous and of good character.<sup>18</sup> The Authors acknowledge the danger of abuse inherent in inquiring into the character of candidates.<sup>19</sup> They point out, however, that we make similarly sensitive judgments about the teaching and scholarship of potential colleagues during the hiring process.<sup>20</sup> Because character is so central to ethics instruction, we should evaluate the character of candidates for those teaching positions as we would evaluate any other job requirement.<sup>21</sup>

I submit that the same analysis and conclusion would apply to the question of enforcing the ABA's ethics requirement on law schools.<sup>22</sup> Surely, enforcement of the ethics requirement bears some of the same dangers, such as penalizing difference and creativity.<sup>23</sup> I wonder, however, if, as the Authors say, the "real problem" with looking at character "is not potential injustice," but, rather, is "that[] by opening up the question of virtue

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16. See Cramton & Koniak, *supra* note 1, at 189-93.

17. See *id.*

18. See *id.*

19. *Id.* at 193-94.

20. See *id.* at 191.

21. See *id.* at 190-93. For example, state bars evaluate character as part of the admission process. See Deborah L. Rhode, *Moral Character As a Professional Credential*, 94 YALE L.J. 491, 546-49 (1985) (discussing the current ethical double standard regarding disbarment procedures and certification procedures).

22. See Cramton & Koniak, *supra* note 1, at 153-54. One could argue that the ABA ethics requirement for law school accreditation is analogous to the character requirement for bar admission.

23. See *id.* at 191-92.

at all," we cross a line "that makes many of us feel especially vulnerable."<sup>24</sup>

I agree with the conclusion that taking "character out of the closet. . . . makes ethics real and a thing of consequence."<sup>25</sup> It could even make the law school hiring process a meaningful, ethical, and moral experience for law school communities; what a marvelous thing *that* would be! As the Authors say, however, it would also make most of us feel vulnerable and very uncomfortable.<sup>26</sup>

Although this reasoning, which inquires into character, poses dangers, it seems to me, to be a worthwhile endeavor and it seems equally valid for the ABA accreditation process. Because William and Mary was recently reaccredited, I realize how hard this type of inquiry would be. I want to believe, however, that the law school community of which I am a part would benefit from being forced to justify what it does, and does not do, in the teaching of ethics and character. I believe, or perhaps more accurately, I *want* to believe, that enough countervailing forces exist against orthodoxy, prejudice, vindictiveness, jealousy, and fanaticism to allow the benefits of such an inquiry to prevail.

The Article does raise the possibility that the ABA might give its teaching of ethics requirement some teeth and use "coercion,"<sup>27</sup> by announcing that: "if it cared to enforce its requirement, [the ABA] could insist that full-time faculty teach the course."<sup>28</sup> The Authors, however, then stop that line of inquiry and, I submit, resume preaching to the choir. I hope that "tunnel vision," the charge leveled against the bar, is not at work here.<sup>29</sup> I wonder if putting law faculty in control of remedying this problem is similar to "[p]utting lawyers in charge of their own ethics [and, therefore, is] like putting Dracula in charge of the blood bank."<sup>30</sup> I would argue that resorting to sanctions is

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24. *Id.* at 191.

25. *Id.*

26. *See id.* at 191.

27. *See id.* at 157.

28. *Id.*

29. DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 52 (1994) (quoting Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 720 (1981)).

30. *Id.* (citing MILTON R. WESSEL, SCIENCE AND CONSCIENCE 67 (1980) (quoting

the appropriate course of action; however, the appeal to conscience, the approach outlined by the Authors, seems to be the approach currently advocated by many reformers.<sup>31</sup>

We need someone to explore what it might mean if the profession becomes serious and decides to use coercion to enforce ethical mandates. I challenge us, the ethics teaching establishment, in addition to looking inward or preaching to ourselves, to petition the ABA to enforce its ethics teaching requirement. I wonder what would happen if the ABA began denying or even pulling accreditation from those schools that do not have primarily tenured or tenure track people teaching ethics,<sup>32</sup> and that do not use the pervasive approach with some "institutional monitoring [measures to ensure] that individual faculty members take their responsibility seriously."<sup>33</sup> If we do not do something along these lines, perhaps we are engaging in the self-deception of which the Doonesbury Thesis spoke, or worse yet, contributing to a form of "anti-ethics."<sup>34</sup>

The Authors offer their vision of the ideal curriculum for the

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Michael Knight, *Lawyer Panel Urges Public Control of Legal Ethics*, N.Y. TIMES, Jan. 17, 1979, at A14)). The Authors provide support for this analogy by noting the low value that full-time faculty place on teaching legal ethics. See Cramton & Koniak, *supra* note 1, at 146-47 & n.14.

31. See Rob Atkinson, *A Dissenter's Commentary on The Professionalism Crusade*, 74 TEX. L. REV. 259, 276-80 (1995) (discussing the current crusade to restore lawyer professionalism). Atkinson states that the leaders of this reform crusade do not advocate coercive enforcement measures, but, rather, advocate voluntary enforcement with "the hope of transcending, or at least supplementing, law with gospel." *Id.* at 275. The state bars and the academy have implicitly utilized this approach. See *id.* at 277-78 (discussing state bar professionalism drives). First, however, state bars employ what Atkinson calls the "legalism" remedy by "bringing legally enforceable prescriptions or proscriptions to bear on the problem." *Id.* at 280. When the problem remains, state bars then shift tactics to the gospel approach by emphasizing a "communal recommitment to shared values." *Id.* An undercurrent to both approaches is the current reluctance to enforce regulations, ostensibly on the grounds that the profession is over-regulated—a condition that is anticompetitive and stifling in the current legal market. See *id.* at 277.

32. See Cramton & Koniak, *supra* note 1, at 146-47 & n.11 (noting that several prestigious law schools do not have a mandatory ethics course and yet remain accredited).

33. *Id.* at 168 (noting that the current approach to teaching ethics may naturally impart negative lessons to students).

34. See *id.* at 154.

law and ethics of lawyering.<sup>35</sup> Their vision requires law schools to: teach some ethics in the first year;<sup>36</sup> establish a survey course of at least three semester-hours;<sup>37</sup> use the pervasive method to teach ethics and the law of lawyering throughout the curricula;<sup>38</sup> offer an array of courses dealing with more specialized or particularized aspects of ethics;<sup>39</sup> and have tenured and tenure track members of the faculty, with a serious scholarly interest in the law and ethics of lawyering, teach these courses.<sup>40</sup> The Authors' plan is refreshing and complete, although I would go a step further with respect to their first point. I would require a first-year survey course that provides a foundation in the basic concepts of the law of lawyering and in the institutional structure and ethics of the profession. I would establish this requirement because, after the first year, I believe that many law students treat required courses less seriously just because they are required and are offered during the second or third year.

As with my earlier point, I would suggest that the Authors expand their focus, again, to outside the academy. I agree that stories are important; they "illuminate society's commitment—or lack of commitment—to the enforcement of the literal text of rules."<sup>41</sup> Moreover, the stories that have the most meaning to law students are those told by judges in their opinions.<sup>42</sup> The overwhelming importance of judicial opinions as stories,<sup>43</sup> however, creates a large problem because many, if not most, opinions ignore, or at least appear to ignore, violations of the ethical rules that are readily apparent in the cases and the lawyers' actions.<sup>44</sup>

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35. *See id.* at 164-69.

36. *Id.* at 166.

37. *Id.*

38. *Id.* at 166-68.

39. *Id.* at 168-69.

40. *Id.* at 169.

41. *Id.* at 176. The Authors note that "[s]tories provide the context and detail essential to understanding and applying legal rules." *Id.* at 177. *See also id.* at 177 n.114 (listing scholarship on the use of narrative in legal education generally).

42. *Id.* at 177 ("The heartland of legal education involves the case method.").

43. *See id.* at 177-79.

44. *See KAUFMAN, supra* note 14, at 674 (noting the reluctance of lawyers and

One early and useful definition of the pervasive approach requires that every member of 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."<sup>45</sup> Pointing out and discussing the "latent" ethical issues that arise in judicial opinions, however, does not explain why the judges failed to explicitly deal with them in the first place.<sup>46</sup> Many law students might, and rightly should, wonder about this state of affairs.<sup>47</sup> When courts fail to see, or to call attention to, problems in the stories that they tell, students often conclude that the "real world" must not see them as problems and, therefore, they must not *be* problems.<sup>48</sup> Of course, we law teachers can draw out, or help students draw out, "latent" ethical issues in stories. This exercise poses another problem. When we raise these "latent" issues, students may see us, once again, as living in our ivory towers.<sup>49</sup>

In taking this inquiry one step further, suppose that students understood, hopefully because we had taught them, that these judges were breaching their ethical duties by failing to report the possibly unethical conduct of the lawyers in their stories to the proper authorities. The Model Code of Judicial Conduct states:

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action.

A judge having knowledge that a lawyer has committed a

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judges to report misconduct) (quoting from the ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970)).

45. Theodore A. Smedley, *The Pervasive Approach on a Large Scale—The Vanderbilt Experiment*, 15 J. LEGAL EDUC. 435, 437 (1963) (emphasis added).

46. See, e.g., RHODE, *supra* note 29, at 385 (discussing divorce negotiations in which one of the lawyers engaged in some questionable conduct). Professor Rhode noted that "[i]nterestingly enough, the appellate court made no comment about the conduct of the husband's attorney. Should it?" *Id.*

47. *Id.*

48. See John M. Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95, 100 (1982).

49. See *id.*

violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.<sup>50</sup>

Students who had read the Model Code of Judicial Conduct would know that the judge should report the lawyer. Because the opinion gave no indication that the judge had reported the lawyer, or even that the judge had perceived a problem, students would likely think that the Model Code of Judicial Conduct was just another example of Doonesbury's "lip service."<sup>51</sup>

The fact that judges apparently ignore their ethical duty to report lawyers' violations, I think, speaks to another problem that the Authors raise. They state that "[i]t is a fact of life that professional discipline is not the principal sanction that influences or controls lawyer behavior."<sup>52</sup> Is this a good thing? I am not asking whether the profession's "normative vision"<sup>53</sup> or other state laws<sup>54</sup> should control in case of conflict. Rather, I question why, when a rule, alone and not in conflict with other law, covers the lawyer's conduct, the fear of discipline fails to act as "the principal sanction that influences or controls lawyer behavior."<sup>55</sup> For years the reason has been that the chance that the lawyer's behavior will be reported is very remote; thus, the imposition of any disciplinary or remedial action is similarly unlikely.<sup>56</sup> To state the obvious, lawyers and judges are in the best position to know of many ethical violations. As long as both

50. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(2) (1990) (citations omitted).

51. See *supra* text accompanying note 2.

52. Cramton & Koniak, *supra* note 1, at 172.

53. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1392 (1992).

54. *Id.* at 1390-95 (outlining the struggle between the bar and states to define what the law governing lawyers means); see also Cramton & Koniak, *supra* note 1, at 173-74 (discussing the conflict between state laws and rules of ethics).

55. Cramton & Koniak, *supra* note 1, at 172.

56. See Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 1005. "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 lawyer misconduct." *Id.*

groups continue to ignore their reporting duties,<sup>57</sup> the Rules will continue to have very little meaning for the profession. The profession jealously guards its authority to self-regulate.<sup>58</sup> Even when threatened with proposals for legislative or executive branch regulation of lawyers' conduct,<sup>59</sup> however, the commitment from all parts of the profession to enforce the Rules has been halfhearted at best.<sup>60</sup> The profession's own conduct validates the Doonesbury Thesis.<sup>61</sup>

I end this Comment with an expression of thanks and admiration to Professors Cramton and Koniak for an Article that takes risks in striving for "the jewel."<sup>62</sup> The Article serves as an example of the moral courage needed to make changes in our small, but important, corner of the profession. The Article makes an important and elegant appeal to the conscience of the academy. My only point is that we need to remind ourselves that if the "law of lawyering" is ignored by teachers, judges, and lawyers, appeals to conscience will be, in effect, "lip service"<sup>63</sup> and will be utterly hollow.

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57. See KAUFMAN, *supra* note 14.

58. See RHODE, *supra* note 29, at 39-45 (providing an overview of regulation of the profession).

59. See Koniak, *supra* note 53, at 1390-95 (outlining the struggle between the bar and the state over whose view of the law is supreme).

60. See KAUFMAN, *supra* note 14.

61. See *supra* note 2 and accompanying text. By failing to enforce the ethical rules, the profession sends the message that these rules are not very important and thus only "lip service" needs to be paid to them. *Id.*

62. Cramton & Koniak, *supra* note 1, at 198 (quoting SOREN A. KIERKEGAARD, PARABLES OF KIERKEGAARD 15-16 (Thomas C. Oden ed., 1978)).

63. See *supra* note 2 and accompanying text.