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ASSOCIATION OF AMERICAN LAW SCHOOLS (AALS), PROFESSIONAL RESPONSIBILITY SECTION ESSAY CONTEST: ETHICS IN THE YEAR 2050

INTRODUCTION

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It seemed like a "traditionally modern" American idea when I proposed to the Executive Committee of the AALS Section on Professional Responsibility that we start an essay contest about the professional ethics difficulties our graduating students will face in the next half-century. Most of our current students who stay with the practice of law will be retiring, or thinking about retiring, in 2050—hence, the 2050 Essay contest.

Most of us who are now becoming gray in the legal academy were born during those heady days when to be modern meant to look toward the promise of the future and forget as much of the past as possible. From the ranch house architecture of our homes to the proliferation of plastics-based furnishings and equipments to our obsession with space, to be modern meant to be forward-looking. The fantasy world of our generation, Disneyland, promised Tomorrowland, where everything was sleek, fast, and exciting. And, in the TV world we grew up with, the Jetsons (circa 1962) projected the problems of a "modern" family with two parents, two children and a dog onto a futuristic canvas in which virtually every material barrier to work was eliminated.¹

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Housekeeping was managed by Rosie the robot, the dog cared for by the electric dogwalker (though at the cost of entangling George every night),² and professional work was reduced to talking, thinking, and meeting (hmmm, a lawyer's life?) because robots and devices handled the rest.

Of course, while the Jetsons of 1962-63 foresaw something like today's iPods, cell phones, and robotic vacuum cleaners, not every innovation we take for granted in the twenty-first century was accounted for—I do not recall, for example, any references to anything like the Internet (wi-fi or not), faxes, or the World Wide Web. Yet, as the Jetsons presciently suggested, the problems of human relationships do not disappear with the innovations of technology and science, even if we are not prepared to assent to those doomsayers who predicted that science would produce significantly more of those problems than the present or the past. And, at bottom, the discipline of legal ethics is largely a set of moral problems in human relationships.

Yet, the reality that legal ethics deals with recurring human relationship problems that almost transcend notions of time would not seem to completely explain why only a few legal ethicists have imagined our profession in the distant future and what that might mean for the way in which we understand our discipline.³ We

¹ Those of you young enough to have missed the Jetsons, a staple of Saturday morning TV in 1962-63, with with nostalgic reprises in the 1980s and 1990s, may consult Wikipedia, the Jetsons, <http://en.wikipedia.org/wiki/Jetsons> (visited Mar. 19, 2006) to learn all you need to know about George, Jane, Judy, Elroy and (dog) Astro Jetson, and, of course, Mr. Spacely.

² *Id.*

³ For an incomplete list of articles discussing the problems facing lawyers in the twenty-first century, see Matthew Diller, *Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 673 (1998); Sharon Dolovich, *Colloquium, What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?: Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1630 (2002); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-first Century*, 69 FORDHAM L. REV. 83 (2000); Bruce A. Green, *Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century* (June 2000), available at, http://www.abanet.org/cpr/mjp-bruce_green_report.html; Alan W. Houseman, *Civic Legal Assistance for the Twenty-First Century*:

might be able to explain our narrow focus on the present or near future—what will happen next year, or in five years—by recognizing that the recent influences on modern legal ethics are not teleological but deontological. Much of contemporary teaching of legal ethics focuses on helping students to apply rules—whether they are "the law of lawyering" or professional responsibility codes—to hypothetical or real client problems in the present. To the extent we teach students how to counsel clients ethically, we urge them to focus on the short-term consequences of their clients' acts—e.g., whether they should pollute a river now, or press some advantage in court that will severely hurt their adversaries.

A second explanation for our preoccupation with the ethics of the moment may be a function of legal ethicists' humility. Lacking the knowledge or experience to predict how the practice of law might be configured in the future, we focus on those myriad intractable problems that we can barely find answers for in the present world. Our consciences are perhaps moved by the greed and overreaching and indifference we see in today's lawyers, and we see our role as prophets to a profession that operates on norms we find familiar from our days as lawyers or even as law students learning ethics in the wake of Watergate.

While some humility in the face of such uncertainties is a virtue, we do our students a disservice if we do not least attempt an

Achieving Equal Justice for All, 17 YALE L. & POL'Y REV. 369, 380-81 n.41 (1998); Nancy J. Moore, *Conference on Legal Ethics: "What Needs Fixing?": Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923 (2002) Nancy J. Moore, *"In the Interests of Justice:" Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775 (2002); Thomas D. Morgan, *Practicing Law in the Interests of Justice in the Twenty-First Century*, 70 FORDHAM L. REV. 1793 (2002); Carl A. Pierce, *Ethics 2000 and the Transactional Practitioner*, 3 TRANSACTIONS 7 (2002); Mark Pruner, *The Clash of 20th Century Regulation with 21st Century Technology*, 16 ST. JOHN'S J. LEGAL COMMENT. 587 (2002); Yvonne A. Tamayo, *Doing Good While Doing Well in the Twenty-First Century: One Cuban's Perspective*, 70 FORDHAM L. REV. 1913, 1916-19 (2002); E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1 (2002). There are also numerous articles on legal education in the twenty-first century.

imagination about how their professional lives might differ from our own, or even from the lawyers from whose fictional and real lives we draw our images of the practice of law—Clarence Darrow, Atticus Finch, Thurgood Marshall, Sir Thomas More, or Ruth Bader Ginsburg. If the tradition of the practice of law—that individuals change jobs but not their identities as lawyers—holds throughout our current students' lifetimes, many will be "lawyers," whatever their practice, until the middle of this new century. Unless our profession changes its view about how we "do" ethics in public, the chances that our current students will have the opportunity for a continuing reflective dialogue in community on how the swiftly changing nature of their practice affects their ethical obligations are slim.

Of course, Professor Frederick Moss's prize-winning essay in this symposium issue suggests that by 2050, legal ethics will be superseded by legal regulation, and his prediction to the class of 2050 may well come to pass.⁴ But even in the interstices of a highly publicly regulated industry, ethics problems recur—as any lawyer who currently works for clients in one of these industries will attest. So long as ethics problems are human problems, technological advances and institutional restructuring will add some new ethical complexity for every problem that they eliminate.

The contributions to this symposium speaking about the diversity of issues that face our students in their lifetime of practice. Professor Moss predicts the demise of the client as a way in which we consider whom we serve, and what kind of relationship we will have with these human beings—in the place of clients, he suggests that we will have a mammoth "employer" and work as "Certified Public Legal Technicians" instead of attorneys bound by loyalty to individuals.⁵ He identifies risks to key traditional values of our profession—professional independence,⁶ client loyalty,⁷ self-regulation,⁸ and personal freedom.⁹

⁴ Frederick C. Moss, *A 2006 Law Grad's Speech to the Graduating Class of 2050*, 15 WIDENER L.J. 243 (2006).

⁵ *Id.* at 244.

⁶ *Id.* at 249-50.

⁷ *Id.*

⁸ *Id.* at 246-49.

Professor Fred Zacharias sounds similar themes, predicting not only more external regulation, but increasing prosecution of lawyers and civil liability suits, as well as the demise of a "brotherhood" organization such as the ABA to propose and enforce standards of civility and conduct.¹⁰ He tells us the story of a Brave New World, where criminal prosecutors are really federal agents,¹¹ clients pay for legal services through "LMOs,"¹² lawyers practice in multidisciplinary firms,¹³ and law schools are staffed by adjuncts.¹⁴

Professors Langford and Burger highlight the complications that are increasingly being felt with cross-jurisdictional, particularly cross-national, legal practice, including the problem of how lawyers will cope with directly conflicting ethical rules and laws from these different national jurisdictions.¹⁵

Professor Randy Lee sounds a contrarian's note, arguing that nothing has really changed since Charles Dickens, and nothing really important (for legal ethics, at least) is likely to change by 2050.¹⁶ The seven deadly sins—and more of them—will continue to mark human existence and lawyers' practice.¹⁷ At the same time, the traditional virtues that lawyers have embodied—courage, hope, diligence, persistence, compassion, mercy and justice—will continue to be needed.¹⁸

How we teach our students to imagine their lives as ethical lawyers in a future they can surely not predict, anymore than the writers of the Jetsons accurately predicted the world we live in, is a

⁹ *Id.* at 251-52.

¹⁰ Fred C. Zacharias, *The Legal Profession in the Year 2050*, 15 WIDENER L.J. 253 (2006).

¹¹ *Id.* at 256

¹² *Id.* at 265-66.

¹³ *Id.* at 259-61.

¹⁴ *Id.* at 265.

¹⁵ Carol M. Langford & Ethan S. Burger, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267 (2006).

¹⁶ Randy Lee, *Nineteenth Century Visions of a Twenty-First Century Bar: Were Dickens's Expectations for Lawyers Too Great?*, 15 WIDENER L.J. 283 (2006).

¹⁷ *Id.* at 286

¹⁸ *Id.* at 294, 296-97.

daunting problem. A promising place to start is where everyone has started since before humans crossed the land bridges from continent to continent—with human imagination and, as Professor Lee suggests, human courage.¹⁹

Human imagination begins in play—we play at the task of thinking how our world might be different, and how lawyers might live differently in that world, as our essayists have done. Play is, in part, the freedom to jumble up and rearrange the past without the pretense that we can throw it away. Like Legos, the basic building blocks of anthropology, philosophy, theology and the other human disciplines can only be put together in so many (albeit very many) ways, but they are absolutely required to build any new creation. For each of those difficult contemporary problems we put our students through in legal ethics, perhaps we might give them a chance to play, to rearrange the dilemmas and circumstances and rules to fit a new time and new set of conditions. If nothing else, we might give our students, for the most part a generation behind us, the chance to rearrange *their* dilemmas and circumstances, and not our own.

Courage is perhaps the more difficult part, both for us and for our students. There is some safety, at least in our society, in becoming a lawyer. Apart from the social and material safety, there is the safety in numbers—though the "fraternity" is not nearly as tight as it once was, to be a lawyer still means to command a respect and mutuality in the legal system that others cannot secure.²⁰ No one who has ever watched an indigent and inarticulate client attempt to defend her rights by herself in court can think otherwise, especially after watching how the typical judge, court administrator, and other party's lawyer treat her by contrast to the ways in which they treat that same client represented by a lawyer. We lawyers also live in the safety of knowing that we have some control over the fortunes, not only of ourselves and our clients, but of the arc of history in our own communities, local to international. At the heart of progress on international human rights norms are

¹⁹ See *id.* at 296-97.

²⁰ See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 1 (2003) (positing that a lawyer acts as "an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

lawyers,²¹ just as they are at the heart of decisions to go to war, to impose or forgive debt on poor nations, to collect taxes or choose not to collect them, to distribute rights to property, family and personal security.²²

It is difficult to say what it might mean if we taught our students to have courage for the future. Not simply courage in the face of an existing dilemma—shall I advise my client to wiretap a terrorist without a warrant, shall I advise my client that she can report her company's earnings in a different way if she creates some corporate shells? Rather, we must think about what it might mean if we taught our students to have courage for the future, to embrace not just the uncertainties of their own contribution to their communities and clients, but also the uncertainties of the settings, rituals, and rhythms in which they practice. Can we teach them to live with the big uncertainties—whether there will even *be* such a thing as torts as we know it in 2050? Can we teach them to be courageous in the face of the seemingly little uncertainties—whether they will need to wear suits to court, whether there will be such a thing as a partnership track, whether they will be able to

²¹ See Okechukwu Oko, *Lawyers in Chains: Restrictions on Human Rights Advocacy Under Nigeria's Military Regimes*, 10 HARV. HUM. RTS. J. 257 (1997).

The legal profession, more than any other group, is uniquely situated to act as a countervailing force to despotism and tyranny. Lawyers must champion society's effort to develop a civil society that holds rulers accountable for violations of legal rights and in which civil liberties are respected. Citizens expect lawyers to openly condemn human rights violations whenever they occur, provide legal assistance to victims of human rights violations, and exert moral leadership. Lawyers, by training and tradition, can and ought to lead society's fight for justice. Fighting against injustice is consistent with the lawyers' role in preserving the society.

Id. at 286-87.

²² In today's society, federal and state legislators decide these important issues; and most likely, they are attorneys. See George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637 (2003).

[I]n elected offices for which a law degree is not a prerequisite, lawyers prevail. Although lawyers are less than 1% of the population, lawyers for many years made up approximately 25% of state houses and 40% of state senates. They were 39% of the 2001-02 members of the U.S. House of Representatives and 55% of U.S. Senators. Similarly large numbers of governors have been lawyers. Two-thirds of U.S. Presidents have been lawyers.

Id. at 653 (citations omitted).

count on billing by hours worked? Indeed, can we teach them to ask a most difficult question—whether there will still be power, financial remuneration, or honor in the practice of law—and what it should mean for how they live their lives if lawyers are viewed and compensated like carpenters or waitresses—or teachers?

The 2050 Ethics Essay contest only purports to open the door to these questions. The question will be who will step through it. For the contributors to this symposium, including Professor Moss and his prize-winning essay, for Professor Randy Lee's hard work at putting this symposium together, for the efforts of my co-judges, Professor Jack Sammons from Mercer and Professor Susan Martyn from Toledo, for Thomson-West's offer of a prize to make this a "real contest," for the contestant contributions, and for the efforts of those in the AALS Section on Professional Responsibility to make this happen, I am truly grateful.