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Foreword

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We do not need to be told one more time that the legal profession in our country suffers from a moral and spiritual malaise from which it is not going to be extricated either by the Model Rules of Professional Conduct or by the pursuit of "professionalism" in the councils of the organized bar. The papers in this volume are unique only in the variety of ways in which they demonstrate that this is the case. Professor Quick considers how the rules can be made to hold lawyers to the basic decencies of a pluralist society without becoming either ludicrous or oppressive or both. Her conclusion is by no means optimistic. Mr. Davis and Ms. Grimaldi argue persuasively that the problem of lawyer-client sex is not adequately addressed by the rules now in place or by those currently under consideration. They anticipate considerable opposition to the stringent rule they would like to see adopted. Professors Collett and Shaffer address themselves to whether a couple of commonsense forms of legal practice can be squared with the rules. They come up with only hesitant affirmatives. Ms. Pregenzer shows us that lawyers are under such pressure that many of them turn to drink and drugs, and we have no adequate procedures for turning them back. Ms. Bartholomy, instead of addressing the inadequacy of the ethical rules, offers them new worlds to conquer by forbidding lawyers to take advantage of bad Supreme Court decisions.

Professor Hughes offers an analysis of a case in which lawyers had more than malaise to cope with. Their actions on behalf of a defunct savings and loan association and its owners got them into trouble with the federal regulators, and cost them $41 million in damages. Hughes argues that the misdeeds of the law firm involved in this case were reachable under the Model Rules, so that there is no need shown for regulators to deploy against lawyers the devices with which the law arms them against lay wrongdoers. She is particularly careful to reassure lawyers that "[t]here was nothing in the charges or in the settlement that focused upon the need for any whistle blowing by attorneys. . . ."

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She makes a strong case, but in the end I am not persuaded by it. Rather, she convinces me that nobody can effectively regulate a business without regulating the participation by lawyers in its affairs. The Model Rules, like other internally generated ethical standards for our profession, are based on a traditional ideology of individual rights, which the lawyer's highest duty is to serve. It was established more than half a century ago that such an ideology is inadequate to deal with the managers of our great corporate enterprises. Hughes's account leads inexorably to the conclusion that it is also inadequate to deal with their lawyers.

Professor Abramson and Professor Sammons both offer prescriptions for the ills their fellow authors bring forward. Abramson hopes that a more sophisticated pedagogy, supported by carefully chosen classroom hypotheticals, will guide law students and future lawyers to a higher level of moral awareness. He hopes that in this way "their sense of duty and obligation may be broadened away from the selfish interests of their clients and themselves, towards more social and communal concerns; toward, indeed, a deeper conception of justice." I am afraid I am skeptical. I have friends and colleagues who take very different positions on the balance between "the selfish interests of. . . clients" and "more social and communal concerns." I believe some are right and others wrong, and others somewhere in between. But almost all of them are pretty sophisticated in their moral analysis, and the naïve ones are at least as apt to be right in their bottom line judgments as the sophisticated ones. Abramson may be showing us how we can stop undermining the moral formation our students bring with them when they come to law school; if so, he is performing a valuable service. But he is not offering any general solution to the problems of anomie and malaise among lawyers.

Sammons argues that the problem is really not with the legal profession but with the society in which its members have to practice. Society has been so taken over by value-neutral liberalism that there is no philosophical basis on which professional values can operate. But Sammons hopes that lawyers, by falling back on their own traditions, "telling our story," and adhering to the internal decencies of legal practice as our predecessors have taught them to us can "serve the larger society. . .by standing against it. . . ." Against this background, he finds the pursuit of professionalism by the organized bar more promising than most academic lawyers do.

Here again, I am skeptical. I do not believe that value neutrality has been imposed on the legal profession by the wider

society. Rather, I think it has been imposed on the wider society by a governing elite of which the legal profession is a prominent part. My remedy of choice, therefore, is not so much to recapture our professional traditions—though there is no harm in doing that also—as to come out from under the professional, academic, and juridical rhetoric, and accept the standards of common decency that our people customarily apply to their intervention in other people's affairs.

Indeed, this is the lesson that I take away from all these papers, and the reason I do not respond to them with total gloom despite the bad news they carry. As far as I understand the American people from being one of them, the customs of good people in dealing with one another are still intact at the grassroots. There are no problems raised in these papers that cannot be solved by plugging into these customs. As the spouse of a noted trial lawyer put it in a recent address: "There is nothing wrong with America that cannot be cured by what is right with America."