

1-1-1999

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Recommended Citation

Mashburn, Amy R. (1999) "Pragmatic Professionalism: An Exercise in Applied Ethics," *Journal of the Institute for the Study of Legal Ethics*: Vol. 2, Article 10.

Available at: <https://scholarlycommons.law.hofstra.edu/jisle/vol2/iss1/10>

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PRAGMATIC PROFESSIONALISM: AN EXERCISE IN APPLIED ETHICS

Amy R. Mashburn*

I. INTRODUCTION

In a sense, mine is a cautionary tale. While I was on sabbatical and out of the country, our dean decided that we were going to have a Center for Professionalism at the University of Florida College of Law, and I was going to be the director of it. This was an interesting career development because my reaction to the professionalism movement has been skeptical, to say the least. I was persuaded, however, that law schools, and in particular, state schools like mine, should respond to persistent calls from the bar and bench to do something about the so-called professionalism crisis.¹ Ironically, the process of developing a program for our students has proven educational for me. After six months of working with these issues, I now believe that instruction in professionalism, broadly defined, can encompass many worthwhile pursuits and that the benefits of engaging in an ongoing conversation about such matters may be justification enough for our efforts.

Our dean wanted the committee that I chaired to explore what he called a “value-driven” program. Of course, any list of values and ideals to which the legal profession and lawyers ought to be devoted invariably includes a commitment to encourage or ensure access to justice for all persons.² Thus, one of the issues confronting legal educators designing a

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1. See, e.g., Jerome J. Shestack, *President's Message Pervasive Professionalism Must be Part of Legal Education*, 84 A.B.A. J. 6 (March 1998) (stating that “legal educators [need] to teach professionalism and its fundamental values from the start of a would-be lawyer’s career”). The bar and judiciary’s often singular focus on legal education as the cure for perceived problems with lawyer professionalism may be one source of academic cynicism about such projects.

2. See, e.g., *Missions and Goals of the American Bar Association* (1998)(available from the American Bar Association) (stating “II. To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition” and *Lawyer’s Pledge of Professionalism*). See also STEPHEN GILLERS AND ROY D. SIMON, JR., *REGULATIONS OF LAWYERS, STATUTES AND STANDARDS* 621-622 (1997)(stating “I will work with the other participants in the legal system, including judges, opposing counsel and those whose practices are different from mine, to make our legal system more accessible and responsive;” *Creed*

professionalism program is determining what we can or should be doing to instill a commitment to equal access to justice in our students or to otherwise advance that interest.

II. NIEBUHRIAN PRAGMATISM

I decided to use this planning experience to test the predictive accuracy and utility of an ethical problem-solving methodology I had previously extracted from the works of Reinhold Niebuhr.³ I would also employ Niebuhrian guidelines for insight into what type of program features I should advocate and as a template for organizing my observations of the decision-making process. Reinhold Niebuhr was a moral philosopher, ethicist and theologian who wrote extensively during the 1930's, 40's and 50's. His influence has been enormous and few who have encountered his ideas has been untouched by their power and provocativeness. The longevity of his thought is attributable, I believe, to stunning insights into human nature and a persuasive practicality. What I gleaned from his many books, essays and speeches is a psychological ethic grounded in pragmatism and Niebuhr's own peculiar and compelling version of moral realism. With a warning that abbreviation necessarily distorts, what follows is a short description of this decision-making methodology.

First and foremost, Niebuhr believed that consequences determine the rightness of actions. Unattainable ideals, such as justice and equal access to justice, were to Niebuhr the appropriate and primary source of desirable goals and ends (*i.e.*, good consequences) because they offer "immediate possibilities of a higher good in every given situation" for which we should strive.⁴ But his version of idealism is, nonetheless, essentially pragmatic because ideals provide only directional guidance. We should choose to do what we believe will actually work given what Niebuhr viewed as the limitations of individuals and collectives. Niebuhr termed this practical awareness "moral realism" and defined it as the "disposition to take all factors in a social and political situation which offer resistance to established norms into account, particularly the

of Professionalism of the Florida Bar, Ideals and Goals of Professionalism (1998)(available from the Florida State Bar Association) (stating "(5) contributing one's skill, knowledge and influence as a lawyer to further the profession's commitment to serving others and to promoting the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system").

3. Amy Mashburn, *Pragmatism and Paradox: Reinhold Niebuhr's Critical Social Ethic and the Regulation of Lawyers*, 6 GEO. J. OF LEGAL ETHICS 737, 797 (1993).

4. *Id.* at 776.

factors of self-interest and power.”⁵ For Niebuhr, this sensibility was inextricably bound up with recognition of individual responsibility and the pervasiveness of evil. He defined evil as the assertion of self-interest without regard for the whole, and is best known for his theory that selfishness and, hence, the capacity for evil are core components of human nature.⁶

Niebuhr’s thought suggests five strategies for accomplishing movement in the direction of ideals.

(1) *Adopt a realistic perspective.* Rules and prescriptions should be drafted with the limitations of human nature in mind, and in particular, with an understanding of the shortcomings of collective behavior, which I will describe in a moment. Unfortunately, many ethical rules are based on conveniently superficial, and most often, erroneously optimistic assumptions about human nature. Niebuhr often said that humanity’s good opinion of itself is unshakeable and noted that we tend to rationalize our failures by asserting that humans are essentially good, but are the victims of bad institutions. Some would argue that a belief in moral relativism and the plasticity of human nature (both of which Niebuhr professed) make assumptions like these invalid and dangerous. The brilliance of Niebuhr’s ethic is that it shows that this is not necessarily so. It encourages us to make moral choices and policy decisions even though we know our intuitions and judgments *are* necessarily subjective and irrational.⁷

(2) *Accept ethical dualism.* The moral sensibilities of groups and individuals differ, and a straight transfer of one to the other is to be avoided. Niebuhr cautioned that trusting that an individual’s uneasy conscience can be transferred to a community is both sentimental and utopian. This conclusion is supported by what is perhaps Niebuhr’s most controversial hypothesis — the lesser morality of groups. In his works, Niebuhr attempted to demonstrate that groups inevitably water down ideals and morals. This occurs, according to Niebuhr, because modern, inorganic collectives delegate the vices of individuals (primarily self-interestedness and a drive to acquire power) to larger communities. As a consequence, groups are capable of actions and policies that would be embarrassing to a purely individualist ethic, and the justifications they offer to obscure the straight facts of collective life are hypocritical and unsatisfying, hence depressing and demoralizing.⁸ Ethical action in a

5. *Id.* at 777.

6. *Id.* at 755.

7. *Id.*

8. *Id.* at 757-760.

Niebuhrian world does not exist in the absence of self-criticism, and that process is too threatening to the cohesive forces necessary to hold a group together. Niebuhr inflamed his critics by describing the collective identity of groups as “morally complacent,” “self-righteous,” “lacking in a sense of humor,” and “woodenly committed to the “idealism of simple moral distinctions.”⁹ Groups, unlike individuals, lack the power of self-transcendence and cannot recognize their own pretensions and unrestrained egoism. Therefore, society’s greatest hope for movement in the direction of its ideals is to encourage and exploit the greater, but latent, moral capacity of individuals.¹⁰ For that reason, ethical systems should be designed to allow individuals the greatest possible freedom and otherwise to promote radical moral action, which deviates from group norms. Group influence on individuals should be managed carefully because of the collectives’ diminished ethical norms and false sense of community. A fundamental paradox for Niebuhr, however, was his conclusion that the individual’s inherent desire for self-realization can be fulfilled only in genuine relations with others, but that modern communities and group affiliations are more often than not mechanically contrived forms of togetherness, *i.e.* false communities.¹¹

(3) *Seek proximate justice and apply principles of relative morality.* To Niebuhr, moral absolutes do not exist and should not be invented. The best we can hope to achieve is an approximation of an ideal such as justice which is temporarily tolerable to most members of society. In the hands of groups, contingent moral principles have a troublesome propensity to transmute themselves into absolutes, inalienable rights, and self-evident truths. A historical perspective teaches that the virtues we identify today have the ironic tendency to become the vices of tomorrow. Consequently, we must challenge ourselves to re-examine our judgments, particularly those which self-righteously give advantages to those who make the judgments. To Niebuhr, moral relativism is wrongly maligned because it promotes a healthy sense of moral restlessness, guilt and responsibility.¹²

(4) *Create power equilibriums.* Conflict is inevitable and omnipresent; the challenge is to direct discord to further societal goals. Niebuhr contended that justice is maintained, rather than threatened, by tensions

9. *Id.* at 758.

10. *Id.* at 757-760, 779-780.

11. *Id.* at 764-67.

12. *Id.* at 780. In a recent article in THE NEW REPUBLIC, “radical individualism, moral relativism, and materialism” were identified as “broad cultural problems.” (February 23, 1998, at 16.) Niebuhr would argue that these realities are problematic primarily because we misunderstand and mismanage them. *See id.*

among competitive forces. It can be achieved only if power is properly distributed among clashing interests. Injustice does not diminish itself voluntarily or without force. For Niebuhr, the legitimacy of relative, contingent moral norms depends, quite simply, upon the inclusiveness of the consensus which produces them.¹³

(5) *Maintain institutional control.* Although groups have a lesser morality than individuals and individuals are the source of self-transcendent radical moral action, Niebuhr was convinced that reliance upon individual morality would not create justice and, therefore, is no substitute for institutional control with sufficient protections and constraints. Legislation and other forms of political and social governance can, and ultimately must, provide adequate safeguards against the dangers of individual and collective self-interest.¹⁴

III. PRAGMATIC PROFESSIONALISM

This system of beliefs may not sound like a promising frame of mind for a professionalism planning project. In fact, it proved very helpful. Thinking in Niebuhrian ways is a powerful coping tool for dealing with group dynamics and conflicts among different factions. Demands and pressures from faculty, students, administrations, bar organizations, and individual members of planning committees, make a project like this almost insurmountably difficult. In this age of tolerance, egalitarianism, and accommodation, whether the institution could identify its goals and design an educationally innovative and meaningful program for our students was (and to some extent, still is) unclear. Acknowledging the obstacles and forces of resistance, however, was a necessary, albeit somewhat adolescent, phase in the growth of our collective consciousness on these issues. Appreciation of the irony that realism, rather than idealism, produces movement in the direction of ideals, is perhaps one of the greatest gifts of Niebuhr's thought.

If we accomplish nothing else, I hope that we will ensure that other members of our legal community have the opportunity that those of us on the planning committee did to engage in an ongoing conversation about issues of collective identity and mission. I have previously stated that I believe that the benefits of such an exercise are self-justifying. I reached this conclusion by observing the transformative potential of this type of dialogue and encounter. Over and over again, I have seen initial skepticism and cynicism give way to excitement and creativity. My colleagues

13. *Id.*

14. *Id.*

and our students have been surprisingly eager to examine what it means ideally to be a professional and what the role of law school should be in instilling shared values. The following are some of the observations, experiences, and insights which converted a professionalism doubting Thomas into what Justice Frankfurter would call a “believing unbeliever.”¹⁵

(1) The professionalism dialogue is full of unproductive stereotypes, *e.g.*, ivy tower academics who know nothing about the real world producing new entrants into the legal profession who have no practical legal education, have no manners and are driven to obtain clients at the expense of everything else the profession has to offer; and lawyers who have become jaded, concerned more about themselves than their clients, and are unaware of the extent to which their own self-interest is driving agendas rationalized in the interest of the profession, the public and legal consumers. Getting past this negative imagery requires understanding that none of us knows the extent of our own self-interest and hypocrisy or is in any particularly privileged position to assess blame. Although all of our convictions and visions are *necessarily* contingent and conflicting, the best choice for any group becomes apparent only after these differences have been explored, rather than suppressed through artificial consensus (in other words, producing unity at the level of the lowest common denominator). In addition, the short history of the professionalism movement demonstrates that the dangers of empty gestures and taking the path of least work and resistance pose very real threats that our students will be forced to endure a program that has little educational value.

(2) Groups simply do not have the same potential for devotion to ideals that individuals do. If we consider a commitment to equal access to justice, for example, among individuals we would discover a spectrum of beliefs ranging from “I will make advancing that interest a personal and professional priority” through “I think it is an important goal and will use my power and influence to advance it, but it will not be a professional or personal priority,” to “while I acknowledge that it is an admirable goal, I am opposed to the social, political, and financial measures which would be necessary to accomplish it.” It is unlikely and utopian to believe that any generalized legal group—including the ABA—would adopt the strongest statement of commitment to the undiminished ideal and actually implement a program designed to ensure equal access to

15. *Id.* at 747. After hearing a nondenominational sermon by Niebuhr, Justice Frankfurter said to him, “Reinie, may a believing unbeliever thank you for your sermon?” Niebuhr replied, “May an unbelieving believer thank you for appreciating it?” *Id.* at 747 note 38.

justice for all persons. It may not seem that it costs us anything to be a part of a group that gives lip-service only to its ideals. The damage, however, may be a subtle, yet pervasive, poisoning of the group's individual members' higher potentiality with the group's diminished norm. The inorganic connections among groups like the ABA, the state bars, law school faculties and student bodies may produce, vis-à-vis any particular ideal, a false community which should not be the source of the content of its individual members' values. The possibility of this happening is especially high in an educational setting.

These observations suggested two strategies to me. One is that we should seek out the genuine connections among our students and assist them in forging sub-communities founded on common interests and commitments. Some members of the committee were shocked to hear that our students do not consider the law school a community and are resistant to any effort to create a greater sense of community. Their lowered expectations should not determine or limit our goals, but their attitudes may predict that a genuine law school community may be as unworkable and non-existent as a community comprised of members of The Florida Bar. Most inorganic groups such as these are, in reality, a composite of sub-communities or potential sub-communities bound together by common interests, practice settings, ideology, race, etc. We should consider fostering those types of connections among students as one of the purposes of a professionalism program. A benefit of this approach may be that the ideals of these more genuine sub-communities would be less diminished. Another strategy to consider is that, if we are sincerely concerned about improving justice, inspiring *individuals* to reach their altruistic potential should be the centerpiece of our program. To that end, we might consider ensuring that every one of our students has the opportunity to perform some form of personally meaningful public service. Engaging in public service is an unaffordable luxury for many of our students from poor or working class backgrounds.

(3) The bar and our students contend that one problem with using traditional methods of legal instruction to teach legal ethics and professionalism is that it provides no answers. Their argument is that in professionalism matters (defined as questioning what a professional lawyer would do in any given situation), we should be providing answers and instilling values. This is one of the sources of our Dean's inspiration that the professionalism program should be value-driven. Unfortunately, I have yet to encounter a law teacher on our faculty who agrees. Teachers are skeptical of the notion that answers are the answer, and Niebuhr suggests we are correct to insist on a commitment to dialogue, rather than on

articulation of solutions. Professionalism discussions among lawyers tend to evince a lack of self-examination and blind faith in simple moral formulas and exhortations. The resulting hypocrisy is almost unbearable. As Niebuhr points out, although simply recognizing our flaws will not destroy them, true self-knowledge—which Niebuhr defined as self-accusation coupled with examination of the “dark labyrinths of the human heart”—obliterates the illusions and hypocrisies that perpetuate evil (defined as self-interest).¹⁶ Along those lines, re-examining self-evident truths is an important component of a professionalism program. For example, is it really true that the law has become a business and that this development has robbed lawyers of the values they used to derive from being members of a profession? Should we spend more of our time thinking about a modern conception of being a member of a profession which also acknowledges that most lawyers practice law to make a living?¹⁷ Despite the bar’s criticisms of the academy, I remain convinced that law teachers are the best-equipped members of the legal community to foster self-examination and a commitment to dialogue. When colleagues ask me to define professionalism, I tell them I do not yet know all that it entails, but I know it involves ensuring that a certain type of conversation takes place among our students, faculty, the bar, bench, clients, and the public.

(4) Following up on Niebuhr’s notion that legitimacy is contingent on inclusion, one of the most exciting and challenging aspects of the professionalism program we are contemplating is involving the consumers of legal services in non-tokenistic ways. This may seem obvious, but of all of the professionalism events I have attended, none has involved clients or focused on their interests. A professionalism program should entail an exploration of our clients and the public’s concerns with lawyers. In theory, all members of the legal community should be bound by the common goal of empowering and encouraging all lawyers to serve their clients well.

(5) Finally, as legal educators we should not be fearful of making decisions contrary to our students’ expectations, but in their best interests nonetheless. Perhaps, we should challenge their notion that schools are not genuine communities. Maybe we can do better than that. On the other hand, another important objective of a law school’s professionalism program should be to protect and, to some extent, insulate our programs from those of the organized bars. After all, a law school’s function is to

16. *Id.* at 778.

17. See, e.g., Richard Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 781-811 (1996).

produce an individual who has received instruction in the basic skills of lawyering, exposure to certain fundamental, substantive legal concepts, and who is, ideally, an independent and courageous problem-solver committed to serving his/her client. External constituencies have varied and inconsistent objectives that are difficult to characterize accurately. One cannot determine with any certainty what "the Bar" hopes to accomplish with its professionalism agenda, nor what law schools should do with this information if they can get it. Conversely, we do know that legal educators have their students' attention for a brief three years, whereas the organized bars will have them for the rest of their practicing lives. It is imperative that we spend our limited time with the students efficiently and in service to our own educational ideals, rather than subjecting them to a series of ill-conceived responses to the Bar's poorly-articulated, dreamy wishes and demands.

IV. CONCLUSION

In conclusion, those of us on the planning committee have attempted to give the concept of professionalism what we call local meaning, *i.e.*, to determine what will be useful and meaningful to our own students. Although we do not yet have the faculty's approval, we are designing a program with the goals of assisting the students with the transition between law school culture and world of practice; encouraging a commitment to ideals; enhancing their instruction in ethics; and acquainting them with the lore of the profession and the accomplishments of lawyers, generally, and our graduates, in particular. We have been struck by the lack of knowledge about the history and sociology of the legal profession and question whether we should continue to trust that students either come to us with this basic information or acquire it indirectly in their substantive courses. We should not forget or become blasé about how important inspiration and heroes are to those searching for values.

Perhaps a more straightforward reason for my conversion is simply that in our search for local meaning, we have defined professionalism broadly enough to make it acceptable in an academic setting. Some might caution that defining a concept too broadly robs it of meaning and utility. Our focus, however, has not been on language or labels, but figuring out what will work. After all, using another's agenda to accomplish some of the things you want to do anyway—what I call pragmatic professionalism—is quintessentially Niebuhrian.

