

July 2015

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Recommended Citation

Berenson, Steven K. (2005) "What Should Law School Student Conduct Codes Do?," *Akron Law Review*: Vol. 38 : Iss. 4 , Article 8.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol38/iss4/8>

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WHAT SHOULD LAW SCHOOL STUDENT CONDUCT CODES DO?

*Steven K. Berenson**

I. INTRODUCTION

With the highly publicized and financially devastating collapses of Enron, WorldCom, Global Crossing, and other large corporate entities, which were at least in part the result of malfeasance on the part of their corporate executives and the professionals who served the corporations, the topic of professional ethics has once again come to the forefront of public consciousness. Recent months have seen calls for increased instruction in ethics in undergraduate, business, and other professional schools,¹ new codes of conduct for individual corporations² and professions such as business and accounting,³ and the proliferation of ethics officers for corporations.⁴ And while it is true that most of the

* Associate Professor of Law, Thomas Jefferson School of Law. The author wishes to thank Ilene Durst, Anders Kaye, and Marc Rohr for thoughtful comments on an earlier draft. The author also wishes to thank Genail Anderson, Thomas Jefferson School of Law Class 2004, for helpful research assistance during the preparation of this article. Last, but certainly not least, the author wishes to thank Deanna Sampson for continuing support.

1. See, e.g., Stacy Humes-Schulz, *Ethical Soul Searching at Business Schools*, FINANCIAL TIMES, July 12, 2002, at 9; Lisa Eisenhauer, *Scandals Bolster Calls for Ethics Training*, ST. LOUIS POST-DISPATCH, July 15, 2002, at A5. Even President Bush called on business schools to do a better job of teaching business ethics to future executives. See Deborah L. Rhode & Paul D. Paton, *Enron: Lessons and Implications: Lawyers, Ethics and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 10 & n.8 (2002).

2. See Harry Wessel, *On the Job Ethics*, THE SAN DIEGO UNION-TRIBUNE, June 16, 2003. See also Amanda Sinclair, *Codes in the Workplace: Organisational versus Professional Codes*, in CODES OF ETHICS AND THE PROFESSIONS 88 (Margaret Coady & Sidney Block eds., Melb. U. Press 1996).

3. See Jenny B. Davis, *CORPORATE-CRIME FIGHTER: Ex-Prosecutor Teams With Prisoners to Teach Ethics to Executives*, 89 A.B.A.J. 26 (Feb. 2003).

4. See Elizabeth Chamblis and David Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 AZ. L. REV. 559 (2002); Deroy Murdock, *Corporate Need for Ethics*, SCRIPPS HOWARD NEWS SERVICE, August 28, 2003, at B8, available at http://www.shns.com/shns/g_index2.cfm?action=detail&pk=MURDOCK-

attention in these discussions has focused on “accountants, managers, and boards of directors[,]”⁵ it is also indisputable that lawyers were involved in virtually every questionable transaction these entities engaged in.⁶ Therefore, it seems appropriate that lawyers’ ethics undergo similar scrutiny.

It also seems that the time may be ripe for renewed interest in legal ethics in light of the apparent temporal cycles that effect such inquiries. It has often been noted that the Watergate scandal of the mid 1970s was a major force in driving the large-scale effort to focus on legal ethics as a subject meriting serious academic teaching and scholarship.⁷ And, a little more than a decade later, the financial scandals of the late 1980s gave rise to another call for increased attention to legal ethics.⁸ Thus, with another period of a little more than a decade having passed, perhaps the time is ripe for another round of inquiries in light of the most recent scandals.

All along the way, extensive literature has developed regarding effective and ineffective ways of teaching ethics in law school.⁹ It is not the intention of this article to repeat insights developed in that body of work. However, one aspect of what I am going to refer to as a law school’s “infrastructure” for teaching ethics,¹⁰ namely, the law school’s

08-28-03.

5. Rhode & Paton, *supra* note 1, at 10.

6. *Id.* at 10-11.

7. See, e.g., Kathleen Clark, *Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 675 (2000); Deborah L. Rhode, *Integrity in the Practice of Law: If Integrity is the Answer, What is the Question?*, 72 FORDHAM L. REV. 333, 339-40 (2003) [hereinafter *Integrity*]; Ronald D. Rotunda, *Teaching Legal Ethics a Quarter of a Century after Watergate*, 51 HASTINGS L. J. 661 (2000).

8. Major scandals during this time period that resulted in a re-examination of the ethical implications of the conduct of the lawyers involved included the OPM Leasing Services, Inc. scandal and the bankruptcy of Lincoln Savings and Loan Corp. See Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 143 & nn.2-3 (Nov. 2002). See also *Integrity*, *supra* note 7, at 340 & n.34.

9. See, e.g., Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998); Thomas G. Krattenmaker, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics: Introduction to the Keck Forum on the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 1 (1996); David Luban & Michael Milleman, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995); James E. Moliterno, *An Analysis of Ethics Teaching in Law School: Replacing Lost Benefits of an Apprentice System in an Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L. J. 719 (1998); Thomas L. Shaffer, *On Teaching Legal Ethics with Stories about Clients*, 39 WM. & MARY L. REV. 421 (1998); W. Bradley Wendel, *Teaching Values in Law School: Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711 (2002).

10. Of course, the ABA required course on legal ethics (often titled “Professional

code of student conduct, has received very little attention in the literature.¹¹ Yet law school codes, at least by their own terms, purport to have a constitutive function in educating students to become ethical members of the legal profession.¹²

Another reason to focus attention on student codes at this juncture is recent evidence of continued increases in student misconduct.¹³ For example, a recent study conducted by Rutgers University Professor Donald L. McCabe noted that thirty-eight percent of the undergraduate students surveyed indicated that they had engaged in at least one instance of “cut and paste” internet plagiarism, i.e., copying information directly from an internet source and using it without attribution in a paper submitted for credit in the past year.¹⁴ Moreover, recent suits brought by the record industry against college students who purportedly engaged in illegal “file swapping” involving copyrighted music indicate another instance of widespread student misconduct.¹⁵ And, additional evidence exists that academic misconduct has been increasing on campuses for some time.¹⁶

Responsibility”) is the core of the totality of instruction in ethics offered by law schools - what I am referring to here as the school’s infrastructure for teaching ethics. *See generally*, Luban & Milleman, *supra* note 9, at 38-39. Additionally, many schools offer upper level elective courses that devote some or all of their time to discussion of ethical issues, and some schools have gone so far as to require the teaching of ethics “pervasively” throughout the curriculum. *Id.* at 39 & n.31. *See also* DEBORAH L. RHODE, *ETHICS BY THE PERVASIVE METHOD* xxix (2d ed. 1998). More recently, a small number of schools have sought to encompass ethics teaching in a broader effort to teach “professionalism” throughout the law school experience. *See, e.g.*, Kimberly C. Carlos, Comment, *The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes*, 65 *UMKC L. REV.* 937, 940, 942 (1997) (citing codes from University of Alabama School of Law and Thomas M. Cooley Law School).

11. Notable exceptions include Carlos, *supra* note 10, at 937 and Larry A. DiMatteo & Don Weisner, *Academic Honor Codes: A Legal and Ethical Analysis*, 19 *S. ILL. U. L. J.* 49, 57 n.55 (1994).

12. *See, e.g.*, Carlos, *supra* note 10, at 942 (quoting Thomas M. Cooley Law School’s Honor Code).

13. Linda McGuire, *Lawyer or Lying? When Law School Applicants Hide Their Criminal Histories and Other Misconduct*, 45 *S. TEX. L. REV.* 709, 720 (2004).

14. *See* Sara Rimer, *A Campus Fad That’s Being Copied: Internet Plagiarism Seems on the Rise*, *NEW YORK TIMES*, September 3, 2003, at 7.

15. *See, e.g.*, *Monitoring of Internet Use Part of Campus Life at Reno University*, *SAN DIEGO UNION-TRIBUNE*, September 15, 2003, at A-5 (hereinafter *Monitoring of the Internet*).

16. For example, two 1993 surveys indicated that between two thirds and more than 80% of college graduates admitted to cheating at least once during their academic careers. *See* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 *COLUM. L. REV.* 289, 290 & n.1 (1999) (citing Donald L. McCobe & Linda Klebe Trevino, *Academic Dishonesty: Honor Codes and Other Contextual Influences*, 64 *J. HIGHER EDUC.* 522, 531 (1993) (stating two out of three students surveyed admitted cheating) and *University Tolerates Cheating, Professor Charges*, *GREENSBORO NEWS & RECORD*, May 17, 1997 (indicating that 82% admitted cheating). More recent empirical data points to similarly high incidences of academic

In any event, the connection to law school codes here may seem tenuous. First, both of the above discussed recent examples of misconduct involved undergraduate, rather than law students. Nonetheless, many, if not most law students are not far removed in time from their undergraduate days. Second, the morality, if not the legality of “file swapping” may be open to question.¹⁷ At least where prospective law students are concerned, however, the widespread lack of concern regarding the legality of file sharing,¹⁸ should give those concerned with legal education some pause. Third, at least as far as music sharing goes, while such conduct may be illegal, such illegality may not be addressed by academic conduct codes.¹⁹ In many instances, however, the illegal file sharing took place over the colleges’ computer networks,²⁰ therefore involving the academic institutions in the misconduct in a manner that may not take place with regard to other forms of “personal” misconduct.

For all of the foregoing reasons, an examination of law school conduct codes seems warranted. The purpose of this article, therefore, is to evaluate the role student codes may play in the development of ethical lawyers. In order to do so, the next Part of this article examines ethics codes generally, focusing in particular on the functions of such codes, the elements of such codes, and important considerations that must be taken into account in the development of such codes.²¹ Three commonly recognized functions of ethics codes are aspiration, education, and regulation.²² Typical elements of codes include prescriptions, sanctions, and procedures.²³ Because the different functions and elements of codes may call for different treatment in terms of the language and structure of the codes’ provisions, difficult choices must be made in prioritizing

dishonesty. See Sara Sun Beale, *Governmental and Academic Integrity at Home and Abroad*, 72 *FORDHAM L. REV.* 405, 406 (2003) (citing studies). See also McGuire, *supra* note 13, at 720-21.

17. Amy Harmon, *Download Dilemma: Talking to the Kids*, *SAN DIEGO UNION TRIBUNE*, September 15, 2003, at C-1. Of course, many of those surveyed also saw nothing wrong with “internet plagiarism” either. See Rimer, *supra* note 13, at 7 (stating nearly half of those surveyed saw internet plagiarism as “trivial” or “not cheating at all”).

18. See Ted Bridis, *Most Music Downloaders Don’t Care About Copyrights*, *SAN DIEGO UNION TRIBUNE*, August 4, 2003, at C-3.

19. While some academic conduct codes make it a violation of the code to engage in a broad range of misconduct, including illegality, which may or may not be directly related to the academic enterprise, other codes restrict their prohibitions to conduct that directly relates to the academic enterprise.

20. See *Monitoring of the Internet*, *supra* note 14, at A-5.

21. See *infra* Part II.

22. See *infra* Part II.A.

23. See *infra* Part II.B.

among possible functions and provisions in order to safeguard the codes' effectiveness.²⁴

In order to establish such priorities, this article next looks at possible differences between effective academic and professional codes.²⁵ In the following section, the article examines the particular context of law schools and considers whether that context should impact the content of student conduct codes.²⁶ For example, because legal education is a form of graduate education, a somewhat different form or function for a code might be appropriate as compared to that of an undergraduate institution.²⁷ Additionally, legal education is professional education, i.e., training for service in the legal profession. This fact may impact the form and content of codes and call for differences between codes in graduate professional education and other types of graduate education, for example, graduate education in the arts and sciences.²⁸ Also, the legal profession's own code of ethics plays an unusually prominent part in the profession's own identity. This fact, along with the history and development of the profession's code of ethics, may impact the desirable form and content of law school student codes.²⁹

Next, all of these considerations will be drawn together in making recommendations with regard to what the priorities for law school codes of conduct should be.³⁰ The conclusion, based upon the issues noted above and discussed herein, is that priority should be placed upon a law school code's regulatory function. While a law school code may be able to accomplish certain limited educational functions, such as providing examples in the code of conduct that will violate its prescriptions, providing for significant student involvement in code administration, and making code proceedings and decisions accessible to the student body, such a code is unlikely to achieve broader educational objectives such as enhancing education in ethics throughout the law school experience unless legal educators are willing to make significant changes to the present law school curriculum. Because the latter possibility seems unlikely, the educational function of a law school code should be a lower priority than its regulatory function. Additionally, because of the general difficulties codes have in achieving aspirational

24. *See infra* Part II.C.

25. *See infra* Part III.

26. *See infra* Part IV.

27. *See infra* Part IV.A.

28. *See infra* Part IV.B.

29. *See infra* Part IV.C.

30. *See infra* Part V.

objectives, along with tensions between codes' regulatory and aspirational functions, the conclusion here is that aspirational goals should largely be eliminated from law school conduct codes, and should be reassigned to a separate honor oath or pledge. Finally, in light of the above-described priorities, the article concludes by making specific recommendations regarding the appropriate substance and procedures that should be incorporated in a law school code.³¹

Before proceeding to the next section, a discussion relating to nomenclature is warranted. Use of the term law school "conduct code" in the above-discussion was neither accidental nor neutral. That term, is only one of a number of such terms that are used to describe the codes that govern student conduct during law school. Other familiar variations include "honor code," "ethics code," and "disciplinary code." The titles of most law schools' codes seem to have been chosen rather indiscriminately, with little apparent connection between the content of the code and the title chosen to describe it. However, it seems that the different titles that are applied to various codes imply very different things regarding the purpose and content of the codes attached to them. For example, use of the title "honor code" would seem to imply a system based on the concept of honor. Professor W. Bradley Wendel defines honor as:

an ethical system in which one's outward presentation as a worthy person is confirmed or challenged by others in the relevant social group, who confer honor on persons exhibiting valued characteristics and shame on those who deviate from prescribed standards.³²

As Professor Wendel further notes, while it would likely be possible to codify a true honor code in terms of a detailed set of rules, because determinations of honor and shame tend to be extremely context dependent, and based upon a great range of particular understandings of the relatively small social group involved, honor systems tend to be codified in very general terms, or not codified at all.³³ Therefore, a true law school "honor" code likely would feature a small number of very general standards,³⁴ or perhaps would be unwritten entirely, and would

31. See *infra* Part VI.

32. W. Bradley Wendel, *The Legal Profession: Looking Backward: Regulation of Lawyers Without the Code, The Rules, or the Restatement: Or, What Do Honor and Shame Have to do With Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567, 1577-78 (2003).

33. *Id.* at 1578-79. Indeed, Professor Wendel goes on to argue in his article that broad concepts of honor and shame might play a constructive role in curbing civil discovery abuse, in lieu of detailed codified legal rules governing the discovery process. *Id.* at 1599-1616.

34. Indeed, perhaps the best known academic honor code is that of the United States Military

be interpreted in terms of widely shared understandings within the law school community regarding the meaning of the terms of the code.

On the other hand, use of the term “code of ethics” seems to imply that the code reflects certain moral precepts.³⁵ While some philosophical traditions,³⁶ and even some legal scholars,³⁷ might argue for a sharp distinction between the concepts of ethics and morality, most would contend that the two are intertwined, and a code of ethics must therefore, of necessity, embody certain moral principles.³⁸ And, as will be discussed in greater detail below, the inclusion of broad moral principles in a conduct code may require a choice in terms of code provisions in favor of broad and abstract standards, rather than narrow and particular rules.³⁹ Use of the term “disciplinary code,” by contrast, seems to place a heightened emphasis on the sanctions available under the code in the event that its substantive provisions are violated.⁴⁰

Finally, use of the term law school “conduct code,” without reference to terms such as “honor” or “ethics,” would seem to reflect a more particular focus on specific rules regulating the behavior of law students, without regard to the informal community norms that are at the center of honor systems, or the moral precepts that are at the center of ethics codes.⁴¹ Of course, no set of rules governing conduct can be totally devoid of moral considerations, but use of the term conduct code clearly reflects a de-emphasis of such considerations.

It is contended here that the term “code of conduct” is the more appropriate title for law school codes, both as a descriptive and as a normative matter. As a descriptive matter, a review of law school codes indicates that, regardless of the title that is attached to them, the vast majority of law school codes consist primarily of a large number of

Academy (USMA) at West Point, which in its entirety consists of a mere thirteen words: “A cadet will not lie, cheat or steal, nor tolerate those who do.” DiMatteo & Weisner, *supra* note 11, at 56 (quoting UNITED STATES MILITARY ACADEMY PRESS, HONOR GUIDE FOR OFFICERS 4 (1958)). For a thorough historical and analytic account of the USMA code, see John H. Beasley, *The USMA Honor System - A Due Process Hybrid*, 118 MIL. L. REV. 187 (1989).

35. Cf. Luban & Milleman, *supra* note 9, at 49-50 (noting that removal of the term “ethics” from the title of the professional code governing lawyers was emblematic of the removal of moral precepts from the substance of the code itself).

36. See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS xv-xvi (3d ed. 2001) (discussing Hegel’s philosophy).

37. See Luban & Milleman, *supra* note 9, at 46 (discussing the views of Yale Law School Professor Geoffrey Hazard).

38. See RHODE & LUBAN, *supra* note 36, at xvi.

39. See *infra* notes 59-94 and accompanying text.

40. See *infra* note 55 and accompanying text.

41. Indeed, it is the change in terminology from “ethics” to “code” that Luban and Milleman decry. LUBAN & MILLEMAN, *supra* note 9, at 44-45.

detailed regulatory provisions covering a wide range of possible student behaviors, and such codes place a much lesser emphasis on broad moral precepts. Moreover, it is the contention of this article that this state of affairs is as it should be, and that the regulatory function of law school codes should, of necessity, be emphasized over the aspirational and educational functions that such codes may serve.⁴² Therefore, the term “conduct code” will be used throughout the remainder of this article.

II. CODES GENERALLY

Before turning to a more particular focus on law school codes, this section of the article will explore some issues that apply to codes generally. Specifically, this section will address the primary functions of conduct codes, the key elements of such codes, as well as some important issues with regard to the drafting of such codes.

A. Functions of Codes

There are three primary functions of codes as they relate to persons bound by them: aspiration, education, and regulation.⁴³ In their aspirational aspects, codes set forth the ideals towards which persons bound by the codes should strive to achieve.⁴⁴ Of course, a classic example of a code with clear aspirational aspects is the ABA’s Model Code of Professional Responsibility (Model Code).⁴⁵ Among other provisions, the Model Code contains nine Canons which “are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers”⁴⁶ In their educational

42. See *infra* Part II.A.

43. Mark S. Frankel, *Professional Codes: Why, How, and with What Impact*, 8 J. BUS. ETHICS 109, 110-11 (1989). In their excellent article regarding academic honor codes, DiMatteo & Wiesner combine Frankel’s first two categories, aspiration and education, into a single category of educational purposes. DiMatteo & Wiesner, *supra* note 11, at 57 n.55. However, the present discussion maintains Frankel’s three-part division. See also Loane Skene, *A Legal Perspective on Codes of Ethics*, in CODES OF ETHICS AND THE PROFESSIONS 111 (Margaret Coady & Sidney Block eds., Melb. U. Press 1996) (discussing aspirational and prescriptive aspects of codes—the latter corresponding roughly to Frankel’s regulatory category). Judith Lichtenberg notes that apart from the effect codes may have on those bound by them, codes may also have an “expressive” function vis-à-vis those outside of the group bound by the code. See Judith Lichtenberg, *What are Codes of Ethics For?*, in CODES OF ETHICS AND THE PROFESSIONS 23-24 (Margaret Coady & Sidney Block eds., Melb. U. Press 1996). Thus, codes may also express to the broader public the ideals and values of the group that promulgated the code. *Id.*

44. Frankel, *supra* note 43, at 110.

45. MODEL CODE OF PROF’L RESPONSIBILITY (1969).

46. *Id.* at Preliminary Statement. Examples of the Canons include Canon 8: “A Lawyer Should Assist in Improving the Legal System” and Canon 9: “A Lawyer Should Avoid Even the

aspects, codes seek to demonstrate with clarity the type of conduct that is prescribed or approved by the code.⁴⁷ Often, codes accomplish their educational aims through the use of examples, commentary, or interpretations.⁴⁸ A good example of codes which have educative aspects of this sort are the American Law Institute Restatements of the Law. The individual Restatement provisions include both commentary on how to interpret the principle rule and illustrations of how the rule applies in practice.⁴⁹ Finally, in their regulatory aspect, codes may include a detailed set of rules set forth to govern the conduct of the persons bound by the code.⁵⁰ As their name implies, the ABA's Model Rules of Professional Conduct provide an example of a code which is heavy on regulatory content.⁵¹

B. Elements of Codes

In addition to their primary functions, codes of conduct generally have three types of elements: prescriptions, sanctions, and procedures. Prescriptions include the substance of the code, namely provisions setting forth what the persons governed by the code "ought to do or not do, or more generally how they ought to comport themselves, or what they, or the [group] as a whole, ought to aspire to."⁵² Of course, the code's prescriptions can serve any or all of the above-discussed functions of the code. Thus, a code's prescriptions can have aspirational, educative, or regulatory functions.⁵³ And, as will be discussed in more detail below, the primary function of any of a code's prescriptions will have a definite impact on the content or manner of phrasing a given prescription.⁵⁴

Besides prescriptions, codes may incorporate sanctions which apply

Appearance of Professional Impropriety[.]” The Canons, as well as the other provisions of the Model Code are discussed in greater detail below. *See infra* at notes 117-43 and accompanying text.

47. Frankel, *supra* note 43, at 110.

48. *Id.*

49. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 821F (1977).

50. Frankel, *supra* note 43, at 111.

51. *See generally* MODEL RULES OF PROF'L CONDUCT (2002). Examples of regulatory provisions contained within the Model Rules include Rule 1.6(a): "A lawyer shall not reveal confidential information relating to representation of a client . . . ;" and Rule 1.15(a): "A lawyer shall hold property of clients . . . separate from the lawyer's own property." *Id.* The heavy regulatory focus of the Model Rules is discussed in greater detail below. *See infra* notes 137-141 and accompanying text.

52. Lichtenberg, *supra* note 43, at 25.

53. *Id.*

54. *See infra* notes 58-70 and accompanying text.

when the code's prescriptions are violated.⁵⁵ Sanctions are most likely to be present to the extent that the code has a regulatory function.⁵⁶ Thus, to the extent that a code has an exclusively aspirational or educational function, it may not include any sanctions at all; compliance may be purely voluntary.⁵⁷ Finally, to the extent that a code does employ some sort of sanctions, it must have a procedural component as well, to assure that the sanctions are imposed in a fair and consistent manner. In U.S. public schools, of course, the imposition of sanctions and the procedures utilized in doing so may be governed by Constitutional requirements of due process. The application of due process principles in the context of academic discipline is discussed below.⁵⁸

C. Drafting Issues

As implied above, some codes incorporate only one of the three functions of codes previously discussed. For example, as also suggested above, some codes may be purely aspirational, and therefore, may not incorporate any sanctions for failure to live up to the standards set forth in the code. Some of the lawyer "civility" codes adopted during the 1990s serve as examples of these types of "aspiration only" codes.⁵⁹ On the other hand, many codes combine all three functions in a single code. A good example of this is again provided by the ABA Model Code. The Model Code's Canons,⁶⁰ as well as its Ethical Considerations,⁶¹ represent the Code's aspirational function. On the other hand, the Model Code's Disciplinary Rules represent its regulatory function. "The

55. Lichtenberg, *supra* note 43, at 25. Some of the general categories of sanctions that are typically employed by professional codes are as follows: "imposition of a fine; declaration of a finding of impropriety; suspension from practice; imposition of conditions of practice; reduction of status of practice; removal of the right to practice." Ian Freckelton, *Enforcement of Ethics, in CODES OF ETHICS AND THE PROFESSIONS* 147 (Margaret Coady & Sidney Block eds., Melb. U. Press 1996).

56. See Lichtenberg, *supra* note 43, at 26; Frankel, *supra* note 43, at 111.

57. See Raymond Ripple, Student Article, *Learning Outside of the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J. LEG. ETHICS & PUB. POL'Y 359, 370 nn.61-62 (2001) (discussing lawyer "civility codes").

58. See *infra* Part VI.

59. See *supra* note 57. See also discussion *infra* at notes 86-94 and accompanying text.

60. See *supra* note 46 and accompanying text.

61. According to its Preliminary Statement, the Model Code's Ethical Considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive." MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement (1969). The Model Code makes clear that failure to live up to the aspirations set forth in the Ethical Considerations should not provide the basis for disciplinary action against the lawyer. *Id.*

Disciplinary Rules . . . are mandatory in character[] . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”⁶² At first glance, the Model Code’s educational function is less readily apparent than its aspirational and regulatory functions. This is because none of its three categories of provisions, Canons, Ethical Considerations, and Disciplinary Rules, are primarily identified as serving an educational function, with the first two serving an aspirational function⁶³ and the latter serving a regulatory function.⁶⁴ However, the Disciplinary Rules are heavily footnoted, and often these footnotes provide examples of how the Disciplinary Rules have been, and should be, applied.⁶⁵ Additionally, at least some of the Ethical Considerations are intended to “constitute . . . principles upon which the lawyer can rely for guidance in many specific situations.”⁶⁶ Moreover, the Ethical Considerations are also heavily footnoted with examples of how the principles stated therein have been, and should be, applied.⁶⁷ Thus, at a minimum, the footnotes and some of the Ethical Considerations serve the Model Code’s educational function.

The primary function of a particular provision of a code will likely have a significant impact on the manner in which that provision is drafted. To the extent that the purpose of a particular code provision is to state or to foster broad or abstract aspirational ideals and values, it is likely that the provision’s language will be similarly broad, general, or abstract.⁶⁸ On the other hand, if the purpose of a code provision is to mandate or prescribe certain behavior, then the language must

62. *Id.*

63. *See supra* notes 60-61.

64. *See supra* note 62.

65. For example, DR 1-102(a)(3) states that “[a] lawyer shall not [e]ngage in illegal conduct involving moral turpitude.” Footnote 13 to that provision then goes on to discuss examples of illegal conduct that courts have found amounts to moral turpitude. MODEL CODE OF PROF’L RESPONSIBILITY (1969).

66. MODEL CODE OF PROF’L RESPONSIBILITY Preliminary Statement (1969).

67. For example, Ethical Consideration 1-6 states in part that “[l]awyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice.” MODEL CODE OF PROF’L RESPONSIBILITY (1969). Footnote 9, which accompanies that statement, cites a case in which a lawyer was compelled by the court to demonstrate that his practice during a period of suspension was not “knowing.” *Id.* at EC 1-6 n.9 (citing *In re Sherman*, 58 Wash.2d 1, 6-7, 354 P.2d 888, 890 (1960), *cert. denied* 371 U.S. 951, 9 L.Ed.2d 499, 83 S.Ct. 506 (1963)).

68. Lichtenberg, *supra* note 43, at 25-26. *See also* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct Between U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117 (1999); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 233 (1993).

necessarily be more specific.⁶⁹ Educational provisions, in turn, require rather extensive commentary, interpretation, and examples, which demonstrate how the code's other provisions apply in particular contexts.⁷⁰

At least when we compare aspirational code provisions to regulatory ones, the drafting tradeoffs should begin to look familiar to all law students and legal academics. These tradeoffs implicate the recurrent contrast between standards and rules.⁷¹ Standards provide for the application of broad principles or policies to particular fact situations.⁷² Standards give the person applying them the discretion "to take into account all relevant factors or the totality of the circumstances."⁷³ By contrast, rules cabin the discretion of the persons who apply them.⁷⁴ The application of the background principle or policy is built into the rule itself and yields predetermined results when the fact pattern addressed by the rule arises.⁷⁵

The various advantages and disadvantages of standards and rules apply equally to aspirational and regulatory code provisions. For example, it may only be possible to phrase code provisions that encompass broad, aspirational principles as standards.⁷⁶ This also allows flexibility in applying the standards in particular contexts, including those that are new and were not anticipated at the time the code was drafted.⁷⁷ Moreover, because the standards are merely aspirational and the code drafters presumably would not want to sanction persons for failure to live up to those aspirations, it is not a problem that such broad standards do not lend themselves well to enforcement through disciplinary mechanisms.⁷⁸ On the other hand, code provisions may be stated so broadly as to open them up to charges of undue vagueness or meaninglessness. And the lack of enforceable sanctions for violation of such provisions may lead to similar cynicism as to their importance.

69. Daly, *supra* note 68, at 1133; Lichtenberg, *supra* note 43, at 26; Zacharias, *supra* note 68, at 244.

70. Frankel, *supra* note 43, at 110.

71. Daly, *supra* note 68, at 1117 nn.1-6 (citing to the wealth of scholarship discussing the dichotomy between standards and rules in a variety of legal subject areas).

72. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). *See also* Daly, *supra* note 68, at 1123.

73. Sullivan, *supra* note 72, at 59.

74. *Id.* at 58. Daly, *supra* note 68, at 1123.

75. Sullivan, *supra* note 72, at 58. Daly, *supra* note 68, at 1123.

76. *See* Charles Frankel, *The Code of Professional Responsibility*, 43 U. CHI. L. REV. 874, 879 (1976) (book review) [hereinafter Charles Frankel, *The Code*].

77. *See supra* note 73.

78. *See* Charles Frankel, *The Code*, *supra* note 76, at 879-80.

Rules, by contrast, in giving detailed notice of conduct that is prohibited or mandated, may do a better job of actually controlling such conduct and may form a more appropriate basis for coercive sanctions for violation of the rule. On the other hand, rules are often necessarily over or under inclusive.⁷⁹ Thus, some inappropriate conduct will not be addressed merely because the code drafters did not think of it at the time the rules were drafted.⁸⁰ On the other hand, some conduct, which may seem excusable given the circumstances, will nonetheless fall within a rule's formal prescriptions. Additionally, by turning application of the rules from an exercise in moral reasoning to one of relatively rote application, the code's educational and aspirational objectives may be inhibited.⁸¹

A final point along these lines is that in codes where the three possible functions (aspirational, educational, and regulatory) are combined, the necessary contrast in provision language (rules and standards) may cause its own inherent tension. A good example of this may be provided by what is perhaps the best known of all student conduct codes, that of the United States Military Academy (USMA). Even as amended, the formal USMA code consists of merely thirteen words.⁸² However, despite this extremely broad, perhaps aspirational standard, the code is embedded within a complex, multi-layered "honor system," which includes extensive regulations that provide a multitude of narrow rules to supplement the code itself.⁸³ At least one set of commentators has noted that the presence of the regulations has tended to replace students' moral reasoning regarding the code's application with a narrow focus on what is or is not permitted by the rules.⁸⁴ Another commentator has lamented that the regulations have tended to "obscure the spirit of the code and exacerbate the conflict . . . between . . . [broader notions of] honor and the regulations."⁸⁵

79. Sullivan, *supra* note 72, at 58.

80. See Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'L 25, 42 (2000).

81. David Luban and Michael Milleman have referred to legal ethics codes evolution from standards to rules in terms of the "de-moralization" of legal ethics. Luban & Milleman, *supra* note 9, at 41. See also Johnson, *supra* note 80, at 37.

82. See *supra* note 34.

83. DiMatteo & Weisner, *supra* note 11, at 56-57. In addition to the code and regulations, the honor system includes educational programs regarding the code's implementation. *Id.* at 56 (citing Beasley, *supra* note 34, at 187). Of course, to the extent that the code language itself represents the aspirational function of the USMA code and the regulations represent the regulatory function, the education programs necessarily represent the system's educational function. *Id.*

84. *Id.* at 57.

85. *Id.* (quoting Beasley, *supra* note 34, at 193).

Another example may lie with respect to some of the attorney civility codes adopted during the 1990s.⁸⁶ Beginning in the 1980s, in response to perceived crises with regard to both the broader issue of attorney professionalism⁸⁷ and the narrower issue of attorney civility,⁸⁸ a number of jurisdictions adopted “civility” codes: sets of provisions designed to increase civility in the practice of law.⁸⁹ Here, a distinction must be drawn between the relatively short and broadly stated honor or

86. A detailed analysis of the movement toward civility codes in legal practice is beyond the scope of this article—the following summary will suffice for present purposes. However, a number of detailed and useful analyses of civility codes and the “civility movement” have been written. See, e.g., Adam Owen Gilst, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 *FORDHAM L. REV.* 757 (2000); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 24 *VAL. U. L. REV.* 657 (1994); Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809 (1998); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the “Civil” War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 *U. DAYTON L. REV.* 151 (1998).

87. Former Chief Justice Burger likely began the chorus of voices bemoaning professionalism lost. See Chief Justice Warren W. Burger, remarks at *The Midyear Meeting of the American Bar Association* (Feb. 13-14, 1984), reprinted in 52 *U.S.L.W.* 2471 (Feb. 28, 1984). The ABA took up Burger’s rallying cry and subsequently issued its own “blueprint” for increasing lawyer professionalism. See ABA Comm’n on Professionalism, ‘. . . In the Spirit of Public Service:’ *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 *F.R.D.* 243 (1986). Nonetheless, the voices bemoaning the decline in attorney professionalism continued into the next decade. Though overall there were too many to mention, three of the most prominent, which may have caused a crescendo in what one might call the declination view, were MARY ANN GLENDON, *A NATION UNDER LAWYERS* (Ferrar, Straus and Giroux 1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (Harvard Univ. Press 1993); and SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (Charles Scribner’s Sons 1994).

88. Unfortunately, some discussions of these issues have improperly used these terms interchangeably. See Ripple, *supra* note 57, at 360. For present purposes, the term civility will be used to refer to “the act of treating other people with courtesy, dignity, and kindness.” *Id.* at 359. On the other hand, the term professionalism will be used to refer to a range of issues in the delivery of legal services that relate to the following elements, which are essential components of a definition of a profession: 1) performance for public good; 2) special knowledge and training requirements; 3) special vulnerability or dependency of the profession’s clients on the particular member of the profession performing the professional service; and 4) self regulation. See, e.g., Robert K. Fullinwider, *Professional Codes and Moral Understanding*, in *CODES OF ETHICS AND THE PROFESSIONS* 72,73 (Margaret Coady & Sidney Block eds., Melb. U. Press 1996); Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 *N.Y.U. L. REV.* 1229, 1240 (1995).

89. The best known such code was that adopted by the Seventh Federal Judicial Circuit, Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit (1992), reprinted in 143 *F.R.D.* 441 (1992) (hereinafter Final Report), which served as a model for many subsequent codes. See Christopher J. Pizzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 *U. COL. L. REV.* 1197, 1216 (2003). Indeed, in the three years following the Seventh Circuit’s action, more than 100 other jurisdictions adopted similar codes. *Id.* at 1216 n.114 (citing Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 *TEX. L. REV.* 259, 278 n.74 (1995)).

civility oaths or pledges adopted in some jurisdictions⁹⁰ and the much more detailed civility codes adopted in others.⁹¹ Though the purposes of both varieties of such codes were stated as being broadly aspirational,⁹² for example, to get attorneys to treat each other and other persons involved with the legal system with dignity and respect, the means chosen to achieve such ends were very different. And in the case of the more detailed codes, provisions adopted have many of the hallmarks of rules; they are “highly mechanical, technical, and context-specific.”⁹³ Indeed, critics of such an approach contend that the rule-like form of such provisions have prevented them from achieving their broadly aspirational objectives, by among other reasons, discouraging ethical deliberation about the rules and allowing the rules themselves to be used in an offensive manner inconsistent with the purposes behind the codes.⁹⁴

Regardless of how one feels about the effectiveness of the USMA code or the attorney civility codes discussed above, these examples serve to reinforce the point that code drafters have difficult choices to make regarding the nature of the language and provisions to include in the code and tensions that may be created by incorporating different types of provisions, with perhaps different purposes, in the same code.

III. SHOULD ACADEMIC CODES DIFFER FROM PROFESSIONAL CODES?

The foregoing discussion is based primarily on literature dealing with professional codes.⁹⁵ And while there are many similarities,

90. See, e.g., *Creed of Professionalism*, FLABAR ONLINE, at <http://www.thefloridabar.org> (last visited Feb. 5, 2005). See also Smith, *supra* note 86, at 160-61 & n.73.

91. The Seventh Circuit’s Code falls into this category: the final version contains over 50 separate rules, stated in terms of ethical imperatives and procedural rules. Pizzola, *supra* note 89, at 1217. See also Smith, *supra* note 86, at 160 & n.70. Smith also identifies “combination codes,” which contain attributes of both types of codes. *Id.* at 160 & nn.71-72.

92. See Ripple, *supra* note 57, at 360 & n.7; Final Report, *supra* note 89, at 448. Indeed, compliance with many such codes was purely voluntary. On the other hand, a few such codes were mandatory. See *Dondi Properties Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284, 287-88 (N.D. Tex. 1988) (adopting mandatory civility code for Northern District of Texas). Additionally, a number of courts, relying on their inherent authority to regulate the conduct of lawyers that appear before the court, have nonetheless imposed sanctions on lawyers for violating various aspects of such civility codes, even where compliance with such codes was intended to be purely voluntary. See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 797 & n.127 (1997); Ripple, *supra* note 57, at 370-71 & nn.63-66; Smith, *supra* note 86, at 167-69.

93. Pizzola, *supra* note 89, at 1217.

94. *Id.* at 1216-17; Moliterno, *supra* note 92, at 796; Smith, *supra* note 86, at 167.

95. Of course, the question of what is a profession has received a great deal of discussion, and remains controversial. See, e.g., Pearce, *supra* note 88, at 1229. For present purposes, what are considered to be the key elements of a profession are set forth at note 88, *supra*.

naturally, the objectives of professional codes vary somewhat from the objectives of academic codes.⁹⁶ At a minimum, professional codes seek to encourage members of the profession to act, or to refrain from acting, in certain prescribed ways.⁹⁷ Professional codes also may set aspirational standards for the profession as a whole, as well as for individual members of the profession to strive towards.⁹⁸ Additionally, professional codes may provide a basis for moral deliberation with regard to professional decision making.⁹⁹ Professional codes have an expressive function, communicating to the general public the ideals and values of the profession,¹⁰⁰ helping to establish expectations on the part of the public for their dealings with members of the professional group,¹⁰¹ and demonstrating to the public that the profession has engaged in its self-regulatory function in good faith.¹⁰² From a negative perspective however, professional codes have been criticized as primarily advancing the self-interests of the profession and its members, through such devices as barriers to entry and other competition reducing means.¹⁰³

Given the different objectives of the academic enterprise, one would naturally expect some differences from professional codes when attention is turned to academic codes. For example, one would expect to see a greater emphasis on the educational function of codes in academic versus professional codes. Indeed, many academic codes explicitly recognize their educational function.¹⁰⁴ Additionally, academic codes seek to foster an environment that provides for fair academic competition and preserves the institution's academic integrity.¹⁰⁵ Academic codes also seek to instill personal values in the students governed by them such as "honesty, integrity, individual responsibility,

96. Mark Frankel sets out the following list of professional code functions: 1) enabling document; 2) source of public evaluation; 3) professional socialization; 4) enhance profession's reputation and public trust; 5) preserve entrenched professional biases; 6) deterrent to unethical behavior; 7) support system; and 8) adjudication. Frankel, *supra* note 43, at 111-12.

97. Lichtenberg, *supra* note 43, at 27.

98. Freckelton, *supra* note 55, at 130, 131.

99. Margaret M. Coady, *The Moral Domain of Professionals*, in CODES OF ETHICS AND THE PROFESSIONS 28, 50 (Margaret Coady & Sidney Block eds., Melb. U. Press 1996).

100. *Id.* at 48. See also Johnson, *supra* note 80, at 38; Lichtenberg, *supra* note 43, at 23-24.

101. Frankel, *supra* note 43, at 111.

102. See *supra* note 88.

103. See, e.g., Fullinwider, *supra* note 88, at 84; Skene, *supra* note 43, at 111; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 48 (West Pub. Co. 1986).

104. See Sarah Ann Bassler, Article, *Public Access to Law School Honor Code Proceedings*, 15 NOTRE DAME J. LEG. ETHICS & PUB. POL'Y 207, 211 (2001).

105. DiMatteo & Weisner, *supra* note 11, at 55 n.42.

respect, trust, and fairness.”¹⁰⁶ Naturally, academic codes also identify particular acts and practices that students are not permitted to engage in and define procedures for determining whether the code has been violated and what sanctions may be appropriate for such violations.¹⁰⁷ In any event, the possible distinctions between academic and professional codes should be kept in mind in attempting to determine the appropriate purposes and content of a law school code.

IV. SHOULD LAW SCHOOL CODES DIFFER FROM OTHER ACADEMIC CODES?

Before launching into a discussion regarding the appropriate content of law school codes, a number of questions must be answered. First, are there distinctions between undergraduate and graduate education that should be reflected in the student conduct codes applicable at each of the different educational levels? Second, are there distinctions between graduate professional education and other types of graduate education that should be reflected in the student conduct codes applicable to each? Third, what should the impact be of the fact that, at least with regard to the legal profession, there is in existence a code of conduct that governs the profession, and indeed has been a long tradition of such codes? Finally, procedures under law school codes will be examined in this Part.

A. Graduate v. Undergraduate Education

Perhaps the fact that legal education is a form of graduate education in this country, as opposed to undergraduate education,¹⁰⁸ should have an impact on the content of the applicable code of student conduct. For example, we would expect students at the graduate level, as a result of their greater age, educational, and life experiences, to have obtained a higher level of moral reasoning than undergraduate students.¹⁰⁹ For this

106. Carlos, *supra* note 10, at 940 (citations omitted). *See also* Bassler, *supra* note 104, at 210.

107. *See* Jason J. Bach, *Students Have Rights Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. EDUC. & L. J. 1, 1.

108. This, of course, is not necessarily the case throughout the rest of the world. For example, in Europe, formal legal education begins at the undergraduate level. *See* Daly, *supra* note 68, at 1145.

109. *See generally* Maury Landsman & Steven P. McNeel, *Moral Judgment of Law Students Across Three Years' Influences of Gender, Political Ideology, and Interest in Altruistic Law Practice*, 45 S. TEX. L. REV. 891, 901 (2004); Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student*, 31 J. LEG. EDUC. 306 (1982) (applying Lawrence Kohlberg's theory of moral reasoning development to law students).

reason, it may be that the aspirational and educational aspects of a code of conduct are less important at the graduate level than at the undergraduate level. Similarly, one would expect that by the time they get to graduate school, most students have obtained a basic understanding of many of the types of substantive conduct generally prescribed by student codes, such as cheating on exams, plagiarism, and improper collaboration.¹¹⁰ This fact also seems to point toward a reduced emphasis on the aspirational and educational functions of graduate student conduct codes. There is also reason for skepticism regarding how much impact graduate education can have on the moral character of students.¹¹¹ Indeed, what little empirical evidence exists suggests that, at least to date, law school has had very little impact on the moral development of law students.¹¹² All of these facts seem to point in the direction of a greater regulatory emphasis for an academic code at the graduate level.

B. Graduate Professional Education Versus Other Types of Graduate Education

Another issue to consider is whether differences between graduate professional education and other forms of graduate education, for example masters or doctoral programs in the humanities, arts, or sciences, ought to have an impact on the content of student conduct codes. It may be the case that particular professions possess specific values or adhere to particular principles that ought to be embodied in the student codes applicable to graduate students training to become members of a given profession.¹¹³ Indeed, many law school codes expressly state training in the values of the profession as one of their objectives.¹¹⁴ Additionally, one of the key features that often

110. This is not to deny that some of these concepts have particular and perhaps unfamiliar applications in specific graduate educational contexts. For example, conventions regarding citation to authority in the legal education and practice context certainly provide applications of plagiarism principles that are likely to be completely unfamiliar to many new law students.

111. See *Integrity*, *supra* note 7, at 341-42.

112. See Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 124-25 (1995) (citing studies). Despite this empirical evidence, Aaronson remains optimistic that improved pedagogy might result in at least small improvement in the moral reasoning abilities of law students, at least vis-à-vis their roles as attorneys. *Id.* at 125-26.

113. See Carlos, *supra* note 10, at 941 (quoting language from the code of the Kellogg Graduate School of Management indicating a purpose of the code to instill core values of the “practice and profession” of management in its students).

114. See Bassler, *supra* note 104, at 211-12.

distinguishes professions from other occupations is the existence of a code of conduct that governs practice of the profession.¹¹⁵ It may be the case that a particular relationship between a profession's code of conduct and the code applicable to students studying to join the profession is warranted. Indeed, a number of law school conduct codes specifically incorporate the applicable professional code, making those standards binding on law students for purposes of academic discipline.¹¹⁶ These are also facts that should be kept in mind in the drafting of a law school code.

C. Codes and the Legal Profession

Given the importance of its code of ethics to the legal profession, as well as the fact that some law school conduct codes presently incorporate their jurisdiction's applicable code, it is worth reflecting on developments regarding the evolution of the American legal profession's code of conduct and what implications those developments might have for law school codes. As discussed in greater detail above, the ABA's Model Code of Professional Responsibility incorporated all three possible functions of a code: aspiration; education; and regulation. Indeed, the sometimes uneasy relationship between these functions is a ground for criticism of the code.¹¹⁷ In any event, the Model Code represents merely a middle point in the development of codes of ethics for the American legal profession.¹¹⁸

The first formal code of conduct intended to apply to all lawyers in the United States was the ABA's Canons of Ethics, which were adopted in 1908.¹¹⁹ There is little doubt where the Canons fell on the continuum

115. See generally, CODES OF ETHICS AND THE PROFESSIONS (Margaret Coady & Sidney Block eds., Melb. U. Press 1996).

116. See, e.g., AMERICAN UNIV. WASH. COLL. OF LAW HONOR CODE art. 1.02, available at <http://www.wcl.american.edu/studentaffairs/honorcode.pdf>, (last visited Feb. 5, 2005); CASE W. RES. UNIV. LAW SCH. CODE OF CONDUCT § I.1, available at <http://lawwww.cwru.edu/>, (last visited Dec. 19, 2003); UNIV. OF HAW. WILLIAM S. RICHARDSON SCH. OF LAW DISCIPLINARY RULES art. III.A.3, available at <http://www.hawaii.edu/law/academic/handbook/discReg.html#ART1>, (last visited Feb. 5, 2005).

117. See *supra* notes 82-94 and accompanying text.

118. The following discussion is an extremely truncated description of the history of codes of legal ethics in America, but will hopefully be sufficient for present purposes. More detailed descriptions and analyses appear in Daly, *supra* note 68, at 1125-34; Luban & Milleman, *supra* note 9, at 42-53.

119. Daly, *supra* note 68, at 1125. The State of Alabama adopted the first formal code of legal ethics in the United States in 1887. See Allison Marston, *The 1887 Alabama Code*, 49 ALA. L. REV. 471 (1998). The Alabama Code formed the template for the ABA's 1908 Canons. Luban & Milliman, *supra* note 9, at 43. The precursors to the Alabama Code, in turn, were David Huffman's

of specificity identified above;¹²⁰ they were broad and abstract standards.¹²¹ Moreover, the fact that no disciplinary enforcement mechanism accompanied the Canons and relatively few states adopted the Canons¹²² lends weight to the Canons' primarily aspirational character.¹²³ However, the Canons' generality ultimately proved to be their undoing.¹²⁴ The Canons' broad standards were simply inadequate to govern the increasingly diverse and complex activities of the modern legal profession. By the 1960s, it was clear that change was needed. As summarized by Dean Mary Daly: "too much imprecision and discretion produced ethical incoherence, or worse, paralysis. Rules, not standards, were needed."¹²⁵

The result was the previously discussed 1969 ABA Model Code of Professional Responsibility.¹²⁶ As indicated above, the Code's Canons, Ethical Considerations, and Disciplinary Rules represented an uneasy synthesis of rules and standards and a similarly tenuous combination of a code's aspirational, educational, and regulatory functions.¹²⁷ It is doubtless that the Code represented an improvement over the Canons, at least in terms of its ability to serve as an instrument governing the conduct of modern legal practice. Nonetheless, dissatisfaction with the Code was widespread and its reign short-lived. While more than sixty years passed between adoption of the Canons and the Model Code, the Model Code was replaced by the ABA's Model Rules of Professional Conduct in 1983, a mere fourteen years after the Model Code's completion.¹²⁸

A number of relatively widely-shared criticisms, which are not terribly important to the present discussion, led to the codes replacement.¹²⁹ It also seems likely that tensions between the Code's

1836 Rules of Professional Department, and Judge George Sharswood's famous 1854 lecture series. *Id.* Both of these precursors were largely aspirational. See Moliterno, *supra* note 92, at 787.

120. See *supra* notes 68-70, and accompanying text.

121. Daly, *supra* note 68, at 1125-27.

122. *Id.*

123. Accord Moliterno, *supra* note 92, at 790.

124. *Id.* at 792.

125. Daly, *supra* note 68, at 1128.

126. See *supra* notes 45-51 and accompanying text.

127. Daly, *supra* note 68, at 1127.

128. *Id.* at 1130.

129. Mary Daly identifies three such widespread criticisms. First, "the Model Code provisions were excessively concerned with the dilemmas of the courtroom lawyer and paid little or no attention" to issues facing transactional lawyers. *Id.* Second, the Model Code did not anticipate the growth of large, mega-law firms with hundreds of lawyers, and the particular issues raised by such entities. *Id.* Third, the Model Code did not contain a provision relating to "former client" conflicts of interest. *Id.* See also Johnson, *supra* note 80, at 43.

rules and standards, as well as between its various functions,¹³⁰ created at least some impediments to its effective implementation. Perhaps most importantly for present purposes, the changes in the legal profession that created the need to move from the Canon's broad standards to the Code's increased reliance on rules expanded further in the years following the Code's adoption.¹³¹ As will be discussed further below,¹³² some of the conditions that are often described as being necessary to the successful implementation of broad standards (as opposed to rules) are relatively small, homogenous communities with widely shared experiences and values among the members.¹³³ However, growth and diversity of the lawyer population,¹³⁴ the increasingly interstate and international character of legal practice,¹³⁵ and changes in law firm size, structure, and culture,¹³⁶ all continued to push in the opposite direction. Thus, a further need to move along the continuum of codification from standards to rules was perceived and led to the replacement of the Model Code.

As their name implies, adoption of the Model Rules of Professional Conduct represented a further step in the movement of the code governing the legal profession from standards to rules.¹³⁷ While there remain a number of standards sprinkled throughout the Model Rules as a whole,¹³⁸ the overwhelming balance of the Model Rules is in favor of strict legal rules rather than standards.¹³⁹ The views of the Reporter for the Model Rules in this regard are instructive. According to Yale law professor Geoffrey Hazard, "[i]t is time that lawyers and the organized bar came to understand that they are governed by law, bound by law, and answerable before the law, like other people."¹⁴⁰ Another important recent event in the "legalization" of American legal ethics was the

130. See *supra* notes 82-94, and accompanying text.

131. Daly, *supra* note 68, at 1130-32.

132. See *infra* notes 152-55, and accompanying text.

133. See Daly, *supra* note 68, at 1125-26.

134. *Id.* at 1131; Johnson, *supra* note 80, at 34-35.

135. Daly, *supra* note 68, at 1131 & n.78.

136. *Id.*

137. See Luban & Milleman, *supra* note 9, at 45; THOMAS L. SHAFFER AND MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 7-8 (Univ. of Notre Dame Press 1991).

138. See Daly, *supra* note 68, at 1133-34; Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TULANE L. REV. 527, 528-29 (2003); Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668 (2001).

139. Daly, *supra* note 68, at 1134.

140. Luban & Milleman, *supra* note 9, at 46 (quoting Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, REC. BAR CITY N.Y. 77, 84 (March 1981)).

completion of the American Law Institute's (ALI) Restatement of the Law Governing Lawyers (Third).¹⁴¹ Of course, the *modus operandi* of the Restatement project is to synthesize existing decisional law into concise legal rules.

As a normative matter, whether the above-described legalization of the code of ethics governing lawyers has been a positive or negative development is quite controversial.¹⁴² However, as a descriptive matter, the codes' movement governing lawyer conduct from standards to rules is indisputable.¹⁴³ In any event, the purpose in reiterating the above-described developments here is not to weigh in on the merits of the controversy, but rather to raise the question of the implications these developments may have regarding the appropriate content of law school conduct codes. First, to the extent that one of the primary goals of legal education is to train students for the practice of law, a subsidiary of that goal might be to train students to conduct themselves in accordance with the relevant professional code. And it may be the case that one way to do that is to have students conduct their academic career pursuant to a law school code that is similar in form and content to the corresponding professional code. Additionally, to the extent that the present code embodies the primary ideals and values of the profession, it may be the case that a similar code for law students might also properly incorporate the profession's most important ideals and values.

D. Procedures Under Law School Codes

As stated above, it may be helpful to the training of future lawyers to have a law school code that is similar in form and content to that which governs the profession. Similarly, to the extent that certain procedures are important in the practice of law, it may be beneficial to give students experience in those procedures by incorporating similar procedures into a school's conduct code. For example, many law school codes incorporate full blown adversary proceedings as a means toward final determination of charges of code violations. Often, students play major roles in such proceedings, including serving as prosecuting and defense counsel, as well as serving as members of the deciding judicial panel. Such students may gain a great deal of valuable experience as a

141. American Law Institute, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1 (1997). See Johnson, *supra* note 80, at 28; Luban & Milleman, *supra* note 9, at 51.

142. See, e.g., Luban & Milleman, *supra* note 9, at 41 (describing the above history as the "demoralization" of legal ethics).

143. Daly, *supra* note 68, at 1134; Johnson, *supra* note 80, at 27; Levine, *supra* note 138, at 528; Moliterno, *supra* note 92, at 787; Zacharias, *supra* note 68, at 223.

result of their participation in such proceedings. Additionally, to the extent that such proceedings are open to other members of the law school community,¹⁴⁴ they may serve an educational function even for those who do not participate directly in the proceedings.

On the other hand, adversary proceedings have been subject to strong criticisms for their failure to serve effectively either a truth finding or public education function.¹⁴⁵ And it may be the case that adversary proceedings are particularly poorly suited to serving the aspirational and educational functions of law school conduct codes. In such circumstances, it may be that the objectives of law school conduct codes are served better by some sort of less formal means of decision making, such as some of the mechanisms included within the modern alternative dispute resolution movement. However, while such forms of ADR are finding increasing acceptance within the legal community, they still remain, as their name implies, an alternative to traditional adversary proceedings. As such, the question becomes whether, in order to have the appropriate educative effect, procedures under law school conduct codes should mirror the most widespread, or the “best” practices in effect in the legal community, or whether there is even a difference between the two in the present context.

V. PRIORITIZING AMONG POSSIBLE FUNCTIONS OF A LAW SCHOOL CODE

Given the tensions that arise from trying to accommodate different functions within the same code, it seems advisable to prioritize among the possible functions of a law school code. As argued below, a law school code’s regulatory function should be its priority, followed by its educational function. A law school code’s aspirational objectives should necessarily be of a lower priority.

A. Regulation

Naturally, it is difficult to arrive at a single, overriding purpose for law school codes when the overall purpose of legal education itself remains subject to debate.¹⁴⁶ Whether one perceives the primary

144. The question of whether such proceedings should be open or closed is discussed in greater detail below. See *infra* notes 250-58 and accompanying text. See also Bassler, *supra* note 104, at 207.

145. See discussion *infra* at notes 232-33, and accompanying text.

146. See Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEG. EDUC. 48, 48 (2003).

purpose of legal education to be to train future legal practitioners, to develop the critical reasoning faculties of law students, or to groom future participants in democratic governance, for reasons discussed both above and below, there is cause to be skeptical that law school conduct codes will play a central role in that function. On the other hand, law school codes may very effectively support one of the other undeniable, if less admirable functions of legal education, namely, sorting graduates for their future roles in the legal profession.¹⁴⁷ A regulatory regime that underlies a system of fair academic competition is absolutely essential to the validity of a school's ability to carry out effectively its sorting function. Of course, a regulatory system that ensures the integrity of testing and other evaluative tools is also likely to have the effect of enhancing some of the more salutary learning goals of the law school mentioned above.

There are additional reasons for adopting effective regulation as the primary value to be served by law school codes. First, as legal academics, we likely are confident in our ability to draw relatively effective regulatory codes, whereas, the ability of codes to serve their other stated functions effectively remains highly controversial.¹⁴⁸ Second, a regulatory approach is most consistent with the type of code presently employed by the profession.¹⁴⁹ For reasons suggested above, this similarity may aid the school in its function of training students for effective participation in the profession. Moreover, training students to address the kind of ethical issues that they are likely to encounter in the practice of law requires training in dealing with problems in the context that they are likely to encounter in the practice of law,¹⁵⁰ rather than the context in which ethical problems arise in academia. Finally, a regulatory approach seems most consistent with the propositions that students have a pretty good general sense of right and wrong by the time that they get to law school and a fairly sophisticated understanding of the conduct that is permitted and prohibited in an academic setting.¹⁵¹ Thus, there may little need for additional education or aspiration along these lines in a law school code.

147. See Richard A. Ippolito, *The Sorting Function: Evidence from Law School*, 51 J. LEG. EDUC. 533 (2001).

148. See *infra* notes 152-67, 174-75, and accompanying text.

149. See *supra* Part IV.C.

150. See Luban & Milleman, *supra* note 9, at 40-41.

151. See *supra* notes 109-10, and accompanying text.

B. *Aspiration*

Unfortunately, there is less reason to be optimistic that a law school code can accomplish broadly aspirational objectives. This is true for a number of reasons. First, it is questionable whether general agreement could be obtained on a broad set of principles and values that a law school code should aspire to. As mentioned above, such widespread agreement on controversial judgments regarding the fundamental principles and values is most likely to occur in small homogeneous communities.¹⁵² At first blush, it may seem like certain law schools satisfy the criteria of being small and homogeneous communities. However, as the profession itself is becoming increasingly diverse,¹⁵³ the same is true of law schools.¹⁵⁴ Just as the effort to agree on a set of broadly stated aspirations for the profession became outmoded in the context of the codes governing the profession,¹⁵⁵ the effort is likely to meet a similar end in the context of law school codes.

Second, even to the extent that agreement could be reached on a set of fundamental principles and values that should be aspired to in a law school code, it is likely that such aspirations would have to be stated at such a high level of generality that they would undermine the regulatory purposes of the code.¹⁵⁶ In general, at least two conditions are necessary for successful regulatory implementation of broadly worded standards. The first is a publicly available set of interpretations of the standard. Of course, published judicial decisions serve this function with regard to statutes, regulations, and common law rules that take the form of broadly stated standards. These interpretations give content and meaning to the standard and cure the problems created by the vagueness of the language of the standard itself. Additionally, standards can only be effective regulatory measures if there is some sort of precedent system so that the previously mentioned decisions are somehow binding upon subsequent decision makers. Otherwise, the decisions lose their ability to give notice of the meaning of the standards. Again, such a system of precedent (*stare decisis*) applies with regard to the judicial interpretations of the types of standards mentioned above. It is far from

152. See *supra* notes 132-33. See also Wendel, *supra* note 32, at 1579.

153. See *supra* note 134, and accompanying text.

154. See Henderson, *supra* note 146, at 50. Indeed, as Berger and Berger point out in their study of academic codes generally, “[f]ew students would think of their school, as they would think of their fraternity or church, as a closely-knit membership body to which they belong.” Berger & Berger, *supra* note 16, at 314.

155. See *supra* note 125, and accompanying text. See also Johnson, *supra* note 80, at 35-36.

156. See *supra* note 124, and accompanying text.

clear, however, that either of these conditions apply in the context of law school codes. First, as will be discussed in greater detail below, most law school codes do not provide for published decisions in individual cases.¹⁵⁷ Additionally, it is also rarely the case that prior decisions under law school codes provide any sort of binding precedent for future decision makers under the code.¹⁵⁸ While these conditions could be changed,¹⁵⁹ at the present time they provide strong impediments to the ability of law school codes to serve an aspirational function.

Finally, there is reason to be skeptical of codes' general ability to serve as a tool for effectively serving broadly aspirational objectives. Here, it is again useful to turn to the example of civility codes in legal practice. For reasons discussed above, many view the more detailed versions of such civility codes as a failure due to the tension between their detailed, technical and mandatory language, and their broad aspirations.¹⁶⁰ Additionally, even with the more broadly stated honor oaths or creeds that were adopted,¹⁶¹ a number of factors have served to undermine their effectiveness. First, disagreement exists regarding the fundamental purposes to be served by such codes.¹⁶² Second, the language of such codes in many cases is so broad, it is virtually meaningless.¹⁶³ Third, such codes may cause confusion to the extent that they overlap with the provisions of existing codes such as the Model Rules.¹⁶⁴ Fourth, the lack of meaningful sanctions for violation of such codes likely lead many, if not most, attorneys to ignore them.¹⁶⁵ Additionally, whether one agrees with these criticisms or not, it is hard to argue that civility codes have had a major impact on the practice of law.¹⁶⁶ There are simply too many other factors that influence attorney behavior for such non-binding, aspirational standards to have much

157. See *infra* notes 264-66, and accompanying text.

158. *Id.*

159. Indeed I will advocate for such changes below.

160. See *supra* notes 93-94, and accompanying text.

161. See *supra* note 90.

162. See Mashburn, *supra* note 86, at 657 (arguing that civility codes maintain traditional hierarchies within the legal profession); Smith, *supra* note 86, at 151; Monroe Freedman, *Kinder, Gentler, But Not So Zealous*, THE RECORDER, Aug. 23, 1995, at 8 (explaining how the application of aspirational creeds undermines zealous representation of clients).

163. See Aaronson, *supra* note 112, at 114 & n.3.

164. See Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 13. See also Moliterno, *supra* note 92, at 800; Smith, *supra* note 86, at 162-65.

165. See Aaronson, *supra* note 112, at 114-15. On the other hand, enforcement may equally defeat the purposes of aspirational codes. Moliterno, *supra* note 92, at 801.

166. See Aaronson, *supra* note 112, at 113; Johnson, *supra* note 80, at 45; Smith, *supra* note 86, at 153.

impact.¹⁶⁷

The foregoing rather bleak analysis, however, should not lead to the abandonment of all forms of aspiration from law school codes. Rather, perhaps the best approach is to separate such aspirations from the regulatory code of conduct itself and present them independently in the form of an honor oath or pledge that compliments, rather than competes with the regulatory aspects of the code. In addition to their presence in the legal profession,¹⁶⁸ such separate honor oaths or pledges are in use at a number of academic institutions.¹⁶⁹ Such oaths or pledges may indeed have some psychological effectiveness in instilling the fundamental values of the relevant professional or institutional group in the members who take the oath.¹⁷⁰ Moreover, because the language of such oaths does not appear side by side with the provisions of the regulatory code, the problem created by the tension between the oath's broad, aspirational language and the more specific, regulatory language of the code is minimized. This is also the case with regard to a potential conflict between the oath's aspirational language and the sanctions available under the code. The oath or pledge can retain its voluntary character, as befits a broad, aspirational standard.

C. Education

Here, we must distinguish between different possible senses in which a law school code might serve an educational function. The first, discussed above,¹⁷¹ incorporates concrete examples into the code in order to illustrate the code's provisions. This seems like a relatively modest educational objective and one that would be hard to oppose. Concrete examples are likely to be particularly helpful with regard to issues such as plagiarism, which, though familiar to students generally, take on particular applications in the law school setting.¹⁷² Indeed, a number of law school codes incorporate examples of this sort.¹⁷³

167. Aaronson identifies pressures on attorneys of clients, finances, and time as some such factors. Aaronson, *supra* note 112, at 116.

168. *See supra* note 90.

169. *See* DiMatteo & Wiesner, *supra* note 11, at 63-64; Carlos, *supra* note 10, at 953.

170. *See* Moliterno, *supra* note 92, at 801 & n.159.

171. *See supra* notes 47-49, and accompanying text.

172. *See supra* note 116, and accompanying text.

173. *See, e.g.*, UNIV. OF ALA. LAW STUDENT HONOR CODE ch. 2.d., *available at* <http://www.law.ua.edu/students/info.php?re=honorcode> (last visited Feb. 5, 2005); ARIZ. ST. UNIV. COLL. OF LAW HONOR CODE §3(c), *available at* <http://www.law.asu.edu/Files/StudentResources/StudentPolicyManual/HonorCode.pdf> (last visited Feb. 5, 2005); CAMPBELL UNIV., THE NORMAN ADRIAN WIGGINS SCH. OF LAW CODE OF HONOR AND PROF'L RESPONSIBILITY art. III §2 (providing

The second sense in which a law school code might be used for educational purposes is as a teaching tool for instilling the moral and ethical reasoning skills that we desire law students employ when they become legal practitioners. Here, there is more reason to be skeptical of codes' ability to serve this function. In order for law school codes to be effective teaching tools, law school teachers would in fact need to "teach the code." In other words, professors would need to incorporate teaching the law school code into their traditional classes. However, my sense is that law school codes are seldom if ever taught in this manner at present. Moreover, law school professors are likely to have very little appetite for incorporating law school codes into their courses. Additionally, even to the extent that professors are willing to incorporate law school codes into their teaching, there is reason to question whether such codes would be very effective teaching tools for purposes of fostering moral and ethical reasoning and analytic skills. To the extent that such codes take the regulatory approach advocated here, teaching such codes is likely to face the same criticism that merely teaching the professional responsibility rules receives as a means toward advancing ethical decision making.¹⁷⁴ And, to the extent that codes are more aspirational, there is still reason to question whether broadly aspirational codes are themselves effective tools for the teaching of the principles and values embodied in such codes.¹⁷⁵ Finally, there is an increasing consensus that effective legal ethics teaching requires situating ethical decision making in contexts similar to those in which ethical decision making will be undertaken in legal practice.¹⁷⁶ However, the academic context in which law school conduct codes are applied may be too dissimilar from the legal practice context for experience in ethical decision making in the former context to translate well to the latter context.

A third sense in which a code might serve an educational function involves the extent to which the law school code mirrors the codes that will govern students' conduct in their legal practice careers and/or fosters roles within the student conduct system that provide training for similar roles students might play in their legal practice careers (such as honor court prosecutor, defender or judge). As indicated above,¹⁷⁷

commentary), available at <http://law.campbell.edu/Studentlife/honorcode.pdf> (last visited Feb. 5, 2005).

174. See, e.g., Luban & Milleman, *supra* note 9, at 39.

175. See *supra* note 163 and accompanying text.

176. See generally *supra* note 9.

177. See *supra* notes 113-16 and accompanying text.

persons may differ in opinion as to the value to be served by similarities between a law school code and the corresponding professional codes. In any event, even to the extent that one perceives educational value in such parallels, students are only likely to receive such benefits to the extent of their involvement with the code. And, as discussed above, since few if any professors actually “teach the code,” it is unlikely that students will have widespread or extensive contact with the code sufficient to foster learning based on its substance.

By contrast, those students who play important roles in the administration of the code are likely to receive significant benefit from that experience throughout their practice careers. For example, student prosecutors and student defenders may gain valuable trial practice skills that will come in handy in their later professional capacities. Student judges may also receive good practice in legal reasoning that will serve them well in their future legal careers. To the extent that student disciplinary proceedings are open to the rest of the student body, similar educational benefits may be available to those who observe the proceedings, although to a much lesser degree than would be the case for the actual participants in the proceedings. Yet a school’s ability to hold open disciplinary proceedings may be limited by the provisions of the Family Education Rights and Privacy Act (FERPA),¹⁷⁸ which allows for the withholding of federal funds from educational institutions which fail to preserve the confidentiality of “educational records.”¹⁷⁹ On the other hand, as will be discussed in greater detail below,¹⁸⁰ FERPA’s limitations on open disciplinary proceedings may be surmountable. Nonetheless, for all of the reasons stated here, it seems reasonable to expect only modest educational benefits to flow from a law school conduct code.

VI. LAW SCHOOL CONDUCT CODES - SUBSTANCE AND PROCEDURE

In light of the above discussion, it is possible to develop some priorities for the drafting of a law school conduct code. First, the code should take, as its overriding priority providing, a clear regulatory regime for safeguarding the integrity of the basic academic functions of teaching and evaluation. Next, the code should provide concrete examples of how its provisions work, to serve the function of providing education regarding the code’s provisions. The code should also allow

178. 20 U.S.C.S. §1232g (2002).

179. Bach, *supra* note 107, at 28; Bassler, *supra* note 104, at 230.

180. See *infra* notes 253-58 and accompanying text.

students to play significant roles in the procedures designed to administer and enforce the code and provide for as much openness in those procedures as is allowable under the law. Because of the problems created by combining broad, aspirational language with narrow regulatory language, along with the reasons outlined above, the code itself should be devoid of such language. However, rather than giving up entirely on the aspirational function perhaps the best solution is to supplement the law school conduct code with a relatively broadly stated honor oath or pledge. The latter would not be enforceable, but would embody the highest principles and values to which the law school stands. Perhaps recitation of the honor pledge would become a part of the orientation experience. In any event, keeping these priorities in mind, attention will now be turned to the substantive and procedural aspects that a code serving such priorities would encompass.

A. Substance

In terms of substance, it seems that the heart of a law school conduct code should be relatively uncontroversial. It should include provisions prohibiting familiar types of academic misconduct including plagiarism, improper collaboration, exam cheating, and unduly disruptive behavior. Two more controversial provisions that might be included in a law school code are incorporation of the relevant attorney code of professional responsibility and a non-toleration clause. Additionally, a code must provide for sanctions in the event of its violation.

1. Incorporation of Professional Responsibility Code

Some law school conduct codes incorporate by reference the applicable code of attorney professional responsibility in the relevant jurisdiction.¹⁸¹ Perhaps the decision whether to include an incorporation provision sounds more momentous than it is. In fact, most of the provisions included in an attorney code of professional responsibility will have little or no applicability to the law school setting. Indeed, the vast majority of the Rules contained in the Model Rules relate to attorney client relationships or conduct undertaken by attorneys on behalf of clients. The only provision of the Model Rules that likely would be implicated frequently in a law school discipline context would be Rule 8.4(c), which states that “[i]t is professional misconduct for a

181. *See supra* note 116.

lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation”¹⁸² While it seems that this provision alone could form the basis for a broadly aspirational code, it also seems that only confusion is likely to be spurred by incorporating numerous provisions that have no direct application in the law school setting into a law school conduct code. Language similar to that of Rule 8.4(c) could be included without incorporating the rest of the Model Rules. Nonetheless, doing so would be inconsistent with the priorities identified here.

2. Non-toleration Clauses

The issue of a non-toleration clause is likely more controversial. Non-toleration clauses require students to report instances of code violations by other students, and subjects students who fail to report misconduct to sanctions themselves.¹⁸³ As mentioned above, the Model Rules contain a non-toleration clause,¹⁸⁴ and indeed such provisions have long standing in the legal profession.¹⁸⁵ However, non-toleration clauses are often unpopular with those governed by them. Few people like to be in the position of “snitch.”¹⁸⁶ And the situation may be even worse in the academic setting, as students are torn between their loyalty to their fellow students and the requirements of the non-toleration clause.¹⁸⁷

In his thorough analysis of mandatory reporting provisions in the legal profession, Arthur Greenbaum identifies the primary purposes served by such non-toleration provisions.¹⁸⁸ First, mandatory reporting provisions may be a necessary correlate to the self-regulatory aspect of lawyer ethics and disciplinary systems.¹⁸⁹ Second, mandatory reporting requirements may enhance the legal profession’s public image.¹⁹⁰ Third,

182. The Model Rules also include a “non-toleration” clause, which requires attorneys to report misconduct by other attorneys. See MODEL RULES OF PROF’L CONDUCT 8.3 (2002). While this provision would be relevant in a law school discipline setting, such provisions will be discussed below. See *infra* notes 183-95 and accompanying text.

183. DiMatteo & Wiesner, *supra* note 11, at 76-77; Carlos, *supra* note 10, at 960.

184. See *supra* note 182.

185. See Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 261 (2003). Indeed, all but two states, Kentucky and California, have adopted some sort of mandatory reporting requirement. *Id.* at 262 n.9.

186. DiMatteo & Wiesner, *supra* note 11, at 77 n.174.

187. *Id.*

188. Greenbaum, *supra* note 185, at 263-64.

189. *Id.* at 264.

190. *Id.* at 267-68.

mandatory reporting may enhance lawyer professionalism.¹⁹¹ Finally, mandatory reporting may be justified to the extent that it uncovers misconduct more efficiently than other means.¹⁹²

Of all of these possible justifications, only the latter seems to apply to law school codes.¹⁹³ With regard to that justification, it does seem quite likely that students are in the best position to detect violations of the code by classmates, and that student reporting is more likely to lead to discovery of code violations than any other source. The increase in the number of violations discovered, however, must be balanced against likely widespread disregard for the reporting requirement, for reasons stated above. Then, the question is one of willingness to enforce rigorously the requirement. Indeed, in the legal practice context, bar authorities have been unwilling to do so, with only two known cases in which a lawyer has been punished for failing to report misconduct by another lawyer.¹⁹⁴ But while there may be good reasons to have a mandatory reporting provision in the legal practice context, even if that provision is not going to be rigidly enforced,¹⁹⁵ this is unlikely the case with regard to an academic code. Indeed, having a code provision that is widely ignored, especially in an area likely to be highly controversial, as non-toleration codes are, would only serve to undermine the seriousness with which the entire code is taken. For this reason, I recommend against inclusion of a non-toleration provision in a law school code. Of course, this does not mean that students will not be permitted to report code violations or indeed encouraged to do so. Indeed many students will see that their own interests are served by efforts to deter misconduct by fellow students, and it is expected that most violations will continue to be reported by students. However, students should not themselves be subject to discipline for failing to report code violations.

3. Sanctions

A final issue that should be addressed with regard to the substance of the code are the sanctions that are available for the code's violation. Typical sanctions include oral or written reprimand, temporary or

191. *Id.* at 268-69.

192. *Id.* at 271.

193. However, in their analysis of academic codes, DiMatteo & Wiesner analogize students to professionals. See DiMateo & Wiesner, *supra* note 11, at 61. Given that analogy, some of the justifications for non-toleration clauses that relate to notions of professionalism might seem to apply. Indeed, DiMatteo & Wiesner endorse the concept of non-toleration clauses. *Id.* at 75-81.

194. Greenbaum, *supra* note 185, at 272-73 & n.65.

195. *Id.* at 274.

permanent notation of the violation in the student's law school record, probation, suspension, expulsion, community service, and some impact upon the student's grade in the course in which the misconduct occurred.¹⁹⁶ Sanctions which relate to students' grades seem somewhat problematic, as they intrude upon what is traditionally regarded the province of the course professor to determine students' grades. However, in some cases, it does seem that merely giving no credit on an assignment, or reducing a grade, might be an appropriate sanction for certain types of misconduct. The notion of non-permanent or private reprimands also raises some questions because in virtually every state in the country, both students and law schools are under an obligation to report academic misconduct to bar authorities in conjunction with application for admission to the bar.¹⁹⁷ Thus, even if the notation of the violation is removed from the student's record, the duty to report remains. Naturally, the exact manner in which this plays out depends on the specific language employed by bar authorities in framing their reporting duty. For example, in California, bar applicants are required to disclose whether they have "ever been dropped, suspended, expelled, or otherwise disciplined by any school for any reason other than academic performance."¹⁹⁸ This wording seems to require reporting of even the mildest of sanctions, adding a degree of severity to the sanctions for even minor misconduct. Of course, it seems unlikely that minor law school misconduct would have much of an impact on bar admission; whereas, serious misconduct likely should be considered in the bar admission process.

B. Procedure

It seems that most of the writing that has been done to date regarding academic codes has focused to a large extent on the procedures that such codes require in implementing the code's substantive provisions.¹⁹⁹ Perhaps this is due in part to the fact that most

196. See Carlos, *supra* note 10, at 969.

197. *Id.* at 973-74.

198. The Committee of Bar Examiners of the State Bar of California, Office of Admissions, *Application for Determination of Moral Character*, at 13, available at http://calbar.ca.gov/calbar/pdfs/admissions/Moral-Character/adm_app_moral-character_1003.pdf (last visited Feb. 5, 2005).

199. See, e.g., Bach, *supra* note 107, at 12-30; DiMatteo & Wiesner, *supra* note 11, at 84-96; Karla H. Fox, *Due Process and Student Academic Misconduct*, 25 AM. BUS. L. J. 671 (1988); Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J. COLL. & UNIV. L. 289 (1989); Paul Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241 (1997); Bassler,

of the judicial decisions that have reviewed student disciplinary proceedings have focused on matters of procedural due process.²⁰⁰ Because much has already been written on this subject, this article will not attempt to provide a detailed analysis of the legal requirements for the procedural aspects of academic codes. Additionally, perhaps not surprisingly, law school codes tend to provide at least as much in the way of procedural due process protections, as is the case with regard to other types of academic codes.²⁰¹ Also, because, as demonstrated below, the legal requirements for the procedural aspects of such codes are in fact, extremely minimal, it makes sense to focus more attention on the normative question of what the procedural components of a good law school code ought to be. But first, a brief review of the legal landscape.

Naturally, the first question that must be addressed in determining what procedures a law school code must include is whether the law school in question is a public or private institution. This is because there is no question that the procedural due process requirements of the Fourteenth Amendment to the United States Constitution apply to public or state sponsored law schools.²⁰² The seminal case that is often cited as first recognizing this principle is *Dixon v. Alabama*,²⁰³ in which the Fifth Circuit found that students in good standing at a state sponsored university had a constitutionally recognized liberty and/or property interest in remaining enrolled at the school, and therefore, had a right to notice and a hearing before being dismissed.²⁰⁴ The United States

supra note 104, at 215-20; Carlos, *supra* note 10, at 944-52.

200. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

201. In their article reviewing undergraduate conduct codes, Professors Berger and Berger set forth the results of their admittedly “unscientific survey” of such codes regarding the procedural due process protections provided to students accused of code violations. Berger & Berger, *supra* note 16, at 297-99. In writing this article, this author conducted an even more “unscientific” review of the conduct codes of 77 of the 188 (slightly more than 40%) ABA approved U.S. law schools. *Id.* The codes reviewed here were selected on a relatively “random” basis, namely, which schools had posted their codes to their school websites in such a manner that they were easily “downloadable” by my research assistant. *Id.* It does appear, nonetheless, that the codes reviewed here come from a fairly representative cross section of the totality of ABA approved schools. *Id.* And with regard to each of the procedural protections surveyed by Berger and Berger, it appears that at least as high a percentage of law school codes provide that procedural protection, as was the case with regard to the undergraduate codes surveyed by Berger and Berger. *Id.*

202. “. . . nor shall any State deprive a person of life, liberty or property without due process of law . . .” U.S. CONST. amend. XIV, §1.

203. 294 F.2d 150 (5th Cir. 1961).

204. *Id.* at 157. The students in *Dixon* were expelled for conduct relating to efforts to desegregate a courthouse lunchroom in Alabama in 1960. *Id.* at 152 n.3. The Court of Appeals concluded that the students were expelled without any prior notice of the charges against them or hearing whatsoever. *Id.* at 154.

Supreme Court upheld this notion in the later case of *Goss v. Lopez*,²⁰⁵ while at the same time indicating that all the process due to students in the public school disciplinary context is “some kind of notice and . . . some kind of hearing.”²⁰⁶ While subsequent courts have struggled to define the contours of the notice²⁰⁷ and hearing²⁰⁸ requirements imposed by the Court, it seems quite clear that the Constitutional standard imposes at most very minimal requirements on the drafters of law school codes.²⁰⁹

At first blush it would seem that even fewer procedural due process requirements would apply to private law schools, in the absence of the state action required to render the Fourteenth Amendment applicable.²¹⁰ However, a number of theories have been applied to impose upon private schools similar procedural due process requirements to those that apply to public schools. First, it has been argued that because many private universities receive federal financial assistance, are heavily regulated, and engage in a variety of projects with government entities, such universities are “state actors” for purposes of due process analysis. However, such arguments have been rejected.²¹¹ Students have relied more successfully on contract theories to impose procedural due process type requirements on private universities.²¹² Because the relationship between student and university is contractual in nature, certain

205. 419 U.S. 565 (1975). The liberty interest involved in *Goss* was to a free public education, which the State of Ohio provided for by statute in the circumstances of that case. *Id.* at 567.

206. *Id.* at 579. *Goss* involved ten-day suspensions from public high schools for students involved in a variety of protest activities. *Id.* at 569-71. The students were suspended without any prior notice or a hearing regarding the charges against them. *Id.* at 568.

207. See *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984) (six weeks’ notice of hearing was adequate), *aff’d* 787 F.2d 590 (6th Cir. 1986); *Bleicker v. Bd. of Tr. of Ohio*, 485 F. Supp. 1381 (S.D. Ohio 1980) (refusing preliminary injunction against academic discipline even though plaintiff only received three days’ notice of initial hearing).

208. See *Hagopian v. Knowlton*, 470 F.2d 201, 204 (2d Cir. 1972), *overruled in part and on other grounds by* *Sampson v. Murray*, 415 U.S. 61 (1974) (overruling Second Circuit’s determination that preliminary injunctive relief is appropriate where cadet is dismissed from West Point Military Academy without procedural due process); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Henderson State Univ. v. Spadoni*, 848 S.W.2d 951 (Ark. Ct. App. 1993).

209. See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 663-64 (5th Cir. 1987) (stating there is no right to cross examine witnesses in academic disciplinary hearing); *Wasson*, 382 F.2d at 812 (finding there is no right to counsel in academic disciplinary proceeding); *Bleicker*, 485 F. Supp. at 1384, 1387 (stating that three days notice of honor code violation was adequate).

210. See, e.g., *Swanson v. Welsey College*, 402 A.2d 401, 403 (Del. Super. Ct. 1979) (determining that there is no state action in provision of education by private college).

211. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Beilis v. Albany Med. Coll.*, 525 N.Y.S.2d 932, 934 (N.Y. App. Div. 1988) (holding that state financial assistance does not make medical school a “state actor” for constitutional purposes).

212. See, e.g., *Berger & Berger*, *supra* note 16, at 289-94; *Carlos*, *supra* note 10, at 943-44.

documents, such as student handbooks detailing disciplinary procedures, may be viewed as being express parts of the contract between student and university.²¹³ In such circumstances, the contract may provide for greater²¹⁴ or lesser due process protections than would be provided under the Constitution.²¹⁵ The law of associations has also been looked to as a source of due process type rights for students regarding disciplinary proceedings.²¹⁶ However, in addition to adding legal force to provisions already adopted by the school, such theories have at most created a prohibition against arbitrary, unreasonable or bad faith discipline of a student.²¹⁷

An additional distinction must be noted between actions taken against students for academic reasons and those taken for disciplinary reasons.²¹⁸ The cases cited in support of the previous discussion deal exclusively with sanctions imposed against students for disciplinary type violations. While, as noted above, courts' review of a school's actions in such circumstances is limited, courts are willing to take a fairly hard look to ensure that, at a minimum, the school has followed its own adopted procedures for addressing the disciplinary charge. This is not surprising, given the fact that determining whether a school's quasi-judicial procedures have been followed, as well as whether the evidence presented to the school supports the finding that the alleged misconduct occurred, are well within the core competencies of courts of law. By contrast, where the question involved relates to assessments of the quality of academic performance, courts are far from their core competencies, and the desire to defer to professorial determinations of academic performance is great.²¹⁹ In such circumstances, courts will at most review the institution's decision to dismiss or otherwise sanction a student for inadequate academic performance for arbitrariness.²²⁰

213. See, e.g., *Cloud v. Tr. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975), *cert. denied*, 423 U.S. 898 (1975); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238 (D. Vt. 1994); *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Harvey v. Palmer Coll. of Chiropractic*, 363 N.W.2d 443 (Iowa Ct. App. 1984); *Tedeschi v. Wagner Coll.*, 427 N.Y.S.2d 760 (N.Y. 1980); *Beilis*, 525 N.Y.S.2d at 933.

214. *Berger & Berger*, *supra* note 16, at 291.

215. See *Jansen*, 440 F. Supp. at 1062.

216. *Tedeschi*, 427 N.Y.S.2d at 764.

217. *Harvey*, 363 N.W.2d at 444. See also *Anderson v. Mass. Inst. Tech.*, No. 94-0348, 1995 WL 813188, at *1 (Mass. Super. Ct. Jan. 31, 1985).

218. *Berger & Berger* refer to this distinction as being between "academic failure" and "academic wrongdoing." *Berger & Berger*, *supra* note 16, at 302.

219. *Id.*

220. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 (1985); *Bd. of Curators of*

In any event, the above discussion makes clear that law schools have a great deal of latitude in determining the procedures to be employed under their conduct codes. The following are some suggestions for such procedures.

1. Notice

As discussed above, adequate notice of the charges against a person is one of the fundamental requirements of due process.²²¹ However, the formulation of the notice to give students regarding the alleged violation should be relatively uncontroversial, provided it cites to the provisions of the code the student is accused of violating and makes some reference to the conduct alleged to have violated the code. Though some controversy has surrounded the question of how much notice is enough for due process purposes,²²² fairness would seem to require at least enough notice for a person to be able to prepare adequately for any hearing in the matter.

A perhaps more controversial issue surrounds what access the accused student should have to the evidence that will be presented against her or him in adjudication of the alleged code violation. Courts have not generally found a right to formal discovery in academic disciplinary proceedings unless such a right is provided for in the school's adopted procedures.²²³ However, discovery is now a hallmark of our civil justice system,²²⁴ and to the extent that it is desirable that law school conduct codes embody similar procedures to those employed in legal practice,²²⁵ discovery should be made available in law school disciplinary proceedings as well. Additionally, fundamental fairness would seem to dictate that the ability to respond effectively to charges presented at a hearing would require some advance knowledge of the

the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Susan M. v. N.Y. Law Sch., 556 N.E.2d 1104, 1107 (N.Y. 1990).

221. See *supra* note 206.

222. In *Goss*, the Court used the unfortunate language that "[t]here need be no delay between the time 'notice' is given and the time of the hearing." 419 U.S. at 582. Of course, a literal interpretation of that language would eviscerate the notice requirement entirely. But courts have found that relatively minimal notice will be adequate. See, e.g., *Nash v. Auburn Univ.*, 812 F.2d at 661-62 (finding that four days' notice of hearing was adequate); *Bleicker v. Bd. of Tr. of Ohio*, 485 F. Supp. at 1387 (finding that three days' notice of hearing was adequate).

223. See *Nash*, 812 F.2d at 661-62 (finding no right of accused to access statements of witnesses testifying against him at hearing).

224. See, e.g., FED. R. CIV. P. 26.

225. See *supra* notes 113-16 and accompanying text.

evidence that the accused will be called upon to respond to.²²⁶

A subsidiary issue regards whether the accused should be informed initially of the identity of the person who made the accusation. While the question is likely to be less controversial if a faculty member or other officer of the school is involved, it seems like a question of substantial significance where, as in a large proportion of cases, the accusation is made by a fellow student. Anonymity is likely to result in a higher incidence of reporting, although it might be contended that anonymity may lead to frivolous reports. In any event, in the interests of protecting students reporting other students' misconduct, it seems that anonymity should be maintained at least until the disciplinary process moves past a preliminary stage.²²⁷ However, by the time formal hearing procedures are reached, fairness would dictate that the accused need be made aware of the evidence against her or him,²²⁸ including, the identity of the person who made the complaint.

2. The Hearing

Whereas, the above-described cases make clear that some sort of hearing must be accorded law school students in conjunction with disciplinary proceedings, the specific form of the hearing lies within the wide discretion of those drafting the code.²²⁹ At one end of the

226. Virtually all of the commentators on the issue advocate for some opportunity for the accused to review the evidence and witnesses that will be presented against them at the hearing on the matter. See, e.g., Berger & Berger, *supra* note 16, at 351; DiMatteo & Wiesner, *supra* note 11, at 89; Carlos, *supra* note 10, at 946-49.

227. Some academic codes provide very detailed preliminary investigative procedures to determine whether charges of violations of the code should go forward. Carlos, *supra* note 10, at 966 & n.266. Some even go so far as providing for a "probable cause" hearing, in order to determine if a full and final hearing should go forward. *Id.* at 966 & n.267. However, given the relative informality that is permitted with regard to the final hearing to be provided in academic disciplinary contexts, providing for an additional probable cause hearing seems excessive. See *supra* notes 206-09 and accompanying text. Additionally, both the student and the institution have an interest in having allegations of misconduct resolved as expeditiously as possible. See Berger & Berger, *supra* note 16, at 345. Nonetheless, it does seem perfectly appropriate that some sort of preliminary investigation be conducted before an accusation of a code violation goes to a full hearing. No student should be required to go through a full hearing unless it is determined that there is some degree of merit to the allegation of wrongdoing. However, it is this author's view that student prosecutors and their faculty advisor are well suited to make such a "probable cause" determination without the need for an additional hearing. See *infra* notes 239-40 and accompanying text.

228. See *supra* notes 223-26 and accompanying text.

229. In cases involving public schools, courts have sometimes looked to the Supreme Court's now familiar formulation from *Mathews v. Eldridge*, 424 U.S. 319, 332-36 (1976), for determining what process is due in cases involving possible deprivations of constitutionally protected liberty or property interests. See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 13 (1st Cir. 1988); *Nash v.*

continuum of possibilities lies a full-blown trial type proceeding.²³⁰ One possible advantage of this type of proceeding relates to the educational function of the code. To the extent that law students are likely to be involved in trial work in the future, holding similar trials in code violation proceedings might help to prepare students for their future endeavors. This would be particularly true for students playing a role in such proceedings, such as student prosecutors, defenders, judges or courtroom officials. If such proceedings were open to the student body, even those merely observing the proceedings might obtain some educational benefit.

In addition to the educational benefits of full-blown adversarial hearings in law school disciplinary contexts, such proceedings might be most consistent by placing the priority upon the regulatory function of the code. In other words, to the extent that the primary purpose of a law school code is to prevent and punish academic misconduct, full-blown trial proceedings might be the most effective way to determine if such

Auburn Univ., 812 F.2d at 660. Under that formulation, the court is required to balance the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews*, 424 U.S. at 335). Applying these standards, courts have come up with a flexible approach, that may require more or less formal hearing procedures depending on what is at stake for the students involved. For example, in *Goss v. Lopez*, the Supreme Court intimated that a more formal hearing might have been required had the students in that case faced suspensions of longer than ten days. 419 U.S. at 584. As one court stated, in the academic discipline context, “[f]lexibility and elbow room are to be preferred over specificity.” DiMatteo & Wiesner, *supra* note 11, at 91 (quoting *Henderson State Univ. v. Spadoni*, 848 S.W.2d at 953).

230. *Marin v. Univ. of P.R.*, 377 F. Supp. 613 (D.P.R. 1974), represents the high water mark for procedural due process protections in the academic discipline context. *Marin* involved suspension for more than one year of two students who engaged in a variety of protest activities regarding the conduct of student elections at the University of Puerto Rico. *Id.* at 617-18. The Court ruled that in the circumstances, a constitutionally permissible hearing for the students would involve:

(1) adequate advance notice to the student of (a) the charges, (b) the specific, previously promulgated regulations under which the charges are brought, and (c) the evidence against the student; (2) a full, expedited evidentiary hearing (a) presided over by an impartial, previously uninvolved official, (b) the proceedings of which are transcribed, at which the student (c) can present evidence and (d) cross-examine opposing witnesses, (e) with the assistance of retained counsel; and (3) a written decision by the presiding official encompassing (a) findings of fact, (b) the substantial evidence on which the findings rest, and (c) reasons for the conclusion.

Id. at 623. As the previous discussion indicates, no other court has been willing to go nearly so far as the *Marin* court in formalizing the hearing procedures required in an academic disciplinary context.

misconduct has in fact occurred and to determine the appropriate sanction in the event that it has. Of course, whether adversarial proceedings are in fact the best way to serve these functions is subject to vigorous debate.²³¹ But in any event, it seems likely that students faced with serious allegations of academic misconduct with serious potential sanctions, up to and including expulsion, are likely to perceive formal, trial-like proceedings as fairer than less formal alternatives. This fact also militates in favor of more formal proceedings.

However, other values implicated in the law school context might weigh in favor of proceedings lying much closer to the informal end of the continuum of possible types of proceedings. First, adversary trials have been criticized as an ineffective means of determining the “truth” about what happened with regard to alleged wrongdoing.²³² Yet, it seems that the “truth finding” function might be a more important aspect of law school disciplinary proceedings than is the case with the typical civil or criminal trial. Secondly, “[s]ome educators . . . view the disciplinary process not as a forum to determine guilt or innocence or to impose sanctions, but rather as an instructional vehicle allowing students to gain wisdom and better judgment from their mistakes.”²³³ And students may be more likely to acknowledge and learn from wrongdoing in a setting where the allegations are resolved through a cooperative process, rather than in a setting where a resolution is imposed upon the student adversarially. Additionally, given that student misconduct may harm other students as well as the institution, and given the importance of such student-to-student relationships to the success of the institution, it might well be that informal, non-adversarial (or cooperative) resolutions of disciplinary charges are more important to the well-being of academic institutions than is the case regarding the typical civil or criminal trial.

Of course, efforts to resolve disputes non-adversarially are not necessarily incompatible with the availability of full blown adversarial proceedings at some point in the process.²³⁴ Indeed, most alternative

231. See *infra* note 232.

232. Perhaps the most effective version of this critique appears in DAVID LUBAN, *LAWYERS AND JUSTICE* 68 (Princeton Univ. Press 1988). Luban also critiques other justifications for the current American version of adversarial trial proceedings, including the protection of individual legal rights, *id.* at 74, and the protection of human dignity. *Id.* at 85. Luban finds all of these justifications for the adversary system in its current form to be wanting but in the end approves of the adversary system on the “pragmatic” grounds that the system appears to be no worse than the other alternatives that might replace it in terms of discovering truth and protecting legal rights, and therefore, the transaction costs involved in moving to a new system would not be justified. *Id.* at 92.

233. Berger & Berger, *supra* note 16, at 340.

234. Though a contrary example is provided by the collaborative divorce movement, in which

dispute resolution takes place in a context where trials are ultimately available if the cooperative efforts fail. Due to the educational and fairness aspects discussed above in conjunction with formal adversarial proceedings, such proceedings should remain available under law school codes. However, a variety of less formal means leading up to such proceedings should be employed in an effort to resolve law school disciplinary matters cooperatively.

Two subsidiary issues regarding the scope of the hearing afforded a person accused of a code violation which merit brief mention are the possible rights of cross-examination and representation by counsel. Not surprisingly, given the limited nature of the due process protections available at such hearings, neither “right” has been uniformly held to be constitutionally required in the academic disciplinary context. It has not generally been held that there is a right to cross-examination in student disciplinary proceedings.²³⁵ And while courts have divided over whether there is a right to counsel in academic disciplinary proceedings, most hold that there is no such right.²³⁶ Nonetheless, most commentators suggest that both be provided in the academic disciplinary context,²³⁷ and most law school codes presently provide for such rights.²³⁸ To the extent that, as suggested above, an appropriate goal of a

the parties to dissolution of marriage proceedings sign an agreement to resolve the matter through negotiation and agree to retain new counsel if the collaborative process does not succeed and resort is ultimately had to the courts. See Marsha Baucom, *Collaborative Divorce*, ORANGE COUNTY LAWYER 18 (July 1999).

235. See *Nash v. Auburn Univ.*, 812 F.2d at 664.

236. Compare *Marin v. Univ. of P.R.*, 377 F. Supp. at 623 (stating that due process requires right to counsel), *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (finding same), and *French v. Bashful*, 303 F. Supp. 1333, 1337 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), *cert. denied*, 400 U.S. 941 (1970) (stating that due process is denied by refusing students counsel of their choice), with *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (finding that a law student had no right to counsel in disciplinary proceedings), *Rustad v. U.S. Air Force*, 718 F.2d 348, 350 (10th Cir. 1983) (finding that Air Force Academy cadets have no right to counsel in disciplinary proceedings), *Madera v. Bd. of Educ.*, 386 F.2d 778; 780 (2d Cir. 1967) (finding no right to counsel), *Wasson v. Trowbridge*, 382 F.2d at 812 (finding no right to counsel), *Due v. Fla. Agric. & Mech. Univ.*, 233 F.Supp. 396, 403 (N.D. Fla. 1963) (finding no due process right to counsel for accused student), and *Barker v. Hardway*, 283 F. Supp. 228, 236-37 (S.D.W.Va. 1968) (finding no right to counsel).

237. See *Bach*, *supra* note 107, at 20 (cross examination) and 23 (right to counsel); *Berger & Berger*, *supra* note 16, at 338 (right to counsel) and 346 (right to cross examine); *DiMatteo & Wiesner*, *supra* note 11, at 92 (recommending right to cross-examination); *Carlos*, *supra* note 10, at 949-950 (advocating right to counsel). But See *DiMatteo & Wiesner*, *supra* note 11, at 93 (suggesting that there is no need for a right to counsel in a “well-structured student-run Honor System in which the accused is given notice and a hearing, along with the right to cross-examine adverse witnesses . . .”).

238. See, e.g., THE DRAKE U. SCH. OF LAW CODE OF STUDENT CONDUCT §E.3(f)-(g), available at <http://www.law.drake.edu/students/codeofstudentconduct.pdf> (last visited Dec. 19,

law school student conduct system is to have a final proceeding that closely resembles a full blown trial, it follows that both a right to cross-examination and a right to counsel should be provided. However, if another goal is to maximize educational potential, as well as substantive fairness by having significant student involvement in the system,²³⁹ then perhaps the default rule should be to provide for student prosecutors and defenders, who will generally serve as counsel during the proceedings, with the assistance, in preparation at least, of an experienced faculty supervisor. However, given the stakes involved, the accused student should also have the right to retain an actual lawyer to represent him/her in the proceedings should he/she desire to do so.²⁴⁰

Another question relating to the hearing provided to students under the code is the standard of proof that should be required to find a code violation. Even assuming that student disciplinary proceedings will approach typical legal proceedings in terms of formality, there remain a number of possible choices regarding the quantum of proof required to find a code violation. Of course, the familiar options are the beyond a reasonable doubt standard used in criminal proceedings,²⁴¹ the clear and convincing evidence standard utilized in, among other contexts, professional licensing disputes,²⁴² civil commitment proceedings,²⁴³ and

2003); U. OF MINN. LAW SCH. HONOR CODE §4.06(b)(2)-(3), available at <http://www.law.umn.edu/current/honor.htm> (last visited Feb. 5, 2005); SMU, DEDMAN SCH. OF LAW STUDENT CODE OF PROF'L RESPONSIBILITY § IX(A) & (F), available at <http://www.law.smu.edu/lawschool/scode.shtm#HEARING> (last visited Feb. 5, 2005).

239. Some academic codes provide for, and some commentators advocate for a student conduct system that is almost completely student run. See Carlos, *supra* note 10, at 957-59 & nn.202-209. However, while significant student involvement in the code is essential for educational as well as legitimacy and fairness reasons, there are a number of reasons why significant faculty or administrative involvement is desirable as well. First, students may lack the expertise, experience, and judgment necessary to adjudicate successfully alleged code violations on their own. Second, given students' limited temporal relationship to the institution, professional involvement is necessary to ensure that long term institutional interests are protected. Along similar lines, if student conduct systems are to adopt the type of precedential system that is advocated below, then some limitation on turnover of personnel within the system will be desirable. See *infra* notes 264-66 and accompanying text. Finally, professors and administrators also often have a large stake in the outcome of student conduct code proceedings. Thus, what is advocated here is a hybrid system, which includes significant involvement in the code by both students and professionals within the institution.

240. Though some commentators decry the imbalance created by a situation where student prosecutors are opposed by actual defense attorneys, see Carlos, *supra* note 10, at 951, of course providing such "advantages" for defendants is a hallmark of our criminal justice system and is not out of place in an academic disciplinary proceeding where the consequences to the accused if convicted may be similarly grave.

241. See, e.g., *In re Winship*, 397 U.S. 358, 358-59 (1970).

242. See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 18(c) (1996).

termination of parental rights cases,²⁴⁴ the preponderance of the evidence standard used in most civil cases,²⁴⁵ or the lesser substantial evidence standard used in many administrative contexts.²⁴⁶ Given the above-described jurisprudence regarding the requirements of due process in the academic disciplinary context,²⁴⁷ it is not surprising that courts have held that schools are not required to impose a higher burden of proof than the substantial evidence standard.²⁴⁸ However, numerous schools have chosen to impose more stringent standards, even up to the beyond a reasonable doubt standard.²⁴⁹ Given the stakes involved and the possible severity of the sanctions imposed in law school disciplinary contexts, it seems that a standard of at least a preponderance of the evidence or maybe even the clear and convincing standard would be appropriate, although the beyond a reasonable doubt standard would likely require too much in the way of proof for most disciplinary charges.

Another question that needs to be discussed is whether hearings under the student conduct code should be open or closed. As has been suggested already, there are a number of benefits that flow from open hearings. First, the code's educational function is served by allowing the largest possible segment of the student population to observe proceedings under the code. Additionally, given that "sunlight is the best disinfectant,"²⁵⁰ proceedings under the code are likely to function better, and more fairly to all of the parties concerned, if they are conducted in full view of the members of the entire law school community. Finally, the code's deterrent function is likely to be improved by the greater awareness of the code achieved through greater student knowledge fostered by open code proceedings.

On the other hand, legitimate interests are served by closed hearings. Both the accused and the accuser have privacy concerns that militate in favor of closed hearings. It is quite likely that an accused

243. See, e.g., *In Re Boyer*, 636 P.2d 1085, 1092 (Utah 1981) and cases cited therein.

244. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 752-57 (1982).

245. See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that "conventional rule of civil litigation," the preponderance of the evidence standard, generally applies in cases under Title VII of the Civil Rights Act of 1964).

246. See, e.g., 5 U.S.C.A. §706(2)(E) (West 2002).

247. See *supra* notes 199-220 and accompanying text.

248. See *Gorman v. Univ. of R.I.*, 646 F. Supp. at 813.

249. See *DiMatteo & Wiesner*, *supra* note 11, at 94; *Fox*, *supra* note 199, at 686-87 n.108; *Carlos*, *supra* note 10, at 967.

250. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

student who is subsequently exonerated would prefer that the proceedings had been closed to the rest of the student body. However, an effective pre-hearing investigatory procedure,²⁵¹ should prevent non-meritorious cases from going to a hearing. Similarly, for reasons also discussed prior,²⁵² anonymity for complainants under the code may lead toward more numerous and better supported reports of code violations.

The FERPA may tip the balance between open and closed hearings. As mentioned previously,²⁵³ FERPA provides for the withholding of federal financial assistance from academic institutions that fail to protect the privacy of certain “education records.”²⁵⁴ Some disagreement exists as to whether documents relating to academic disciplinary proceedings fall within the definition of education records in the statute,²⁵⁵ let alone whether the disciplinary proceedings themselves constitute education records. Nonetheless, the more recent and better reasoned decisions conclude that academic disciplinary records do fall within the statute’s purview,²⁵⁶ and that position is consistent with the Federal Department of Education’s interpretation of the statute.²⁵⁷ However, FERPA does

251. See *supra* note 227.

252. See *supra* notes 227-28 and accompanying text.

253. See *supra* notes 178-79.

254. 20 U.S.C.S. §1232g(b). See Bassler, *supra* note 104, at 230.

255. The statute defines education records as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C.S. §1232g(a)(4)(A). Certainly, a plain language interpretation of the definition would appear to include academic disciplinary records. *Accord* United States v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2002). Nonetheless, courts are divided on the issue. See *Caledonian-Record Publ’g Co., Inc. v. Vt. State Coll.*, 833 A.2d 1273, 1276-77 (Vt. 2003) (citing cases). The Vermont Supreme Court in *Caledonian-Record* found it unnecessary to decide the question of whether academic disciplinary records are covered by FERPA, holding that such records were barred from disclosure under the Vermont Public Records Act. *Id.* However, in many instances, the federal statute’s incentive for confidentiality may appear to conflict with state law requirements for disclosure under either state open meeting laws or state public records acts. See Bassler, *supra* note 104, at 233. In circumstances where courts see a direct conflict between federal and state law, of course, the federal law trumps. See, e.g., *Rim of the World Unified Sch. Dist. v. Superior Court*, 129 Cal. Rptr. 2d 11, 12 (Cal. App. 2002) (stating that FERPA’s confidentiality provisions trump state law requiring disclosure of records relating to student expulsions); *DTH Publ’g Co. v. Univ. of N. C.*, 496 S.E.2d 8, 12 (N.C. App. 1998) (stating that FERPA trumps state open meeting law). On the other hand, because FERPA does not *require* academic institutions to do anything, but rather, merely provides for the withholding of funds from schools that violate its provisions, other courts have viewed the statute as not directly conflicting with state statutes that require disclosure. See *Caledonian-Record*, 833 A.2d at 1276-77 (citing cases). Finally, some state disclosure laws specifically exempt from disclosure documents are deemed to be confidential under Federal law. See *Miami Univ.*, 294 F.3d at 811 (noting that Ohio Public Records Act does not compel disclosure of records where release is prohibited by Federal law).

256. See, e.g., *Miami Univ.*, 294 F.3d at 797; *Rim of the World*, 129 Cal. Rptr. 2d at 11.

257. *Miami Univ.*, 294 F.3d at 813 n.14 (citing 60 F.R. 3464, 3465 (1995)). See also Bassler,

provide a couple of exceptions to its financial incentive against disclosure, the most pertinent being that a student may consent to disclosure of records that would otherwise be considered “private” under the statute.²⁵⁸

This author contends that the benefits of open disciplinary proceedings outweigh any negative consequences that may result from such openness. However, both the FERPA and the involved students’ privacy interests seem to make an automatic rule requiring open hearings implausible. Thus, the code should state a preference for open hearings, and student prosecutors should be encouraged to seek the consent of both the accused and the accuser for an open hearing. However, both the accused and the accuser should have the opportunity under the code to choose a closed hearing if that is their desire.

3. Post Hearing Procedures

Most academic conduct codes provide for some type of review of the outcome of the disciplinary proceeding.²⁵⁹ While some law school codes provide for an actual appellate tribunal,²⁶⁰ others simply provide for review of the proceeding by the law school Dean²⁶¹ or the full faculty.²⁶² It is this writer’s view that if all of the above safeguards are applied to the initial disciplinary proceeding, review by the Dean is more than adequate to ensure that there was no miscarriage of justice in the original proceeding. Of course, in order to allow for a thorough review

supra note 104, at 232.

258. §1232g(d). FERPA also provides an exception for “the final results of any disciplinary proceeding conducted by [an] institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines . . . that the student committed a violation of the institution’s rules or policies with respect to such crime or offense.” *Id.* at §1232g(b)(6)(B).

259. *See* Carlos, *supra* note 10, at 969 & n.293.

260. *See, e.g.*, NOVA SOUTHEASTERN UNIV., SHEPARD BROAD SCH. OF LAW HONOR CODE art. VI, *available at* <http://www.nsulaw.nova.edu/students/documents/honorcode00.pdf> (last visited Feb. 5, 2005); SETON HALL UNIV. SCH. OF LAW CODE OF STUDENT CONDUCT §9, *available at* http://law.shu.edu/administration/student_services/honor_code/review_by_council.html (last visited Feb. 5, 2005).

261. *See, e.g.*, UNIV. OF ARIZ. JAMES E. ROGERS COLL. OF LAW HONOR CODE §7, *available at* <http://www.law.arizona.edu/Students/pdf/StudentHandbook.pdf> (last visited Feb. 5, 2005); STETSON UNIV. COLL. OF LAW CODE OF STUDENT PROFESSIONAL RESPONSIBILITY art. III, §4(i), *available at* <http://www.law.stetson.edu/studentlife/handbook/2000/policies.htm#art1> (last visited Feb. 5, 2005).

262. *See, e.g.*, YESHIVA UNIV. BENJAMIN N. CARDOZO SCH. OF LAW DISCIPLINARY CODE, RULES AND PROCEDURES art. IV, *available at* http://www.cardozo.yu.edu/current_students/pdf/handbk03.pdf (last visited Feb. 5, 2005); WILLAMETTE UNIV. COLL. OF LAW STUDENT HANDBOOK §VII, *available at* http://www.willamette.edu/wucl/students/law_handbook.pdf (last visited Feb. 5, 2005).

of the proceedings, the institution should audio or videotape the proceedings and allow the student to transcribe the proceedings at her or his own expense if the student desires the record to be reviewed at that level of detail.²⁶³

Additionally, decisions of the conduct code tribunal should be in writing and should be made available to the law school's student body. Additionally, such decisions should be given at least some precedential value in future conduct code proceedings. Somewhat surprisingly, such procedures are not presently followed at most schools. As mentioned above, to the extent that a school adopts a broadly aspirational code, with very general language, making decisions interpreting the code available is an essential step in adequately defining how the code's very generally language will be applied in particular contexts.²⁶⁴ However, even to the extent that a detailed regulatory code is adopted, published decisions provide a number of salutary consequences. First, such decisions help to educate students as to conduct that is and is not permitted under the code. Second, to the extent that such decisions are given at least some precedential weight in future conduct code proceedings, the prior decisions will help to ensure consistency in the treatment of similar conduct over time. Such consistency is particularly difficult to achieve in academic disciplinary contexts, given the turnover in the personnel involved with the conduct code, including key student participants such as code prosecutors, defenders, and judges. While a strict system of *stare decisis* might not be desirable in a conduct code context, at least some effort should be made to achieve consistency between decisions over time.

Of course, the FERPA concerns addressed above²⁶⁵ apply with equal force to the disclosure of decisions of academic disciplinary proceedings. However, courts have made clear that redaction of identifying information relating to particular students solves any FERPA concerns with regard to the results of academic disciplinary actions.²⁶⁶ And, redaction of such identifying information should not limit any of the benefits of published decisions identified above. Thus, conduct code tribunals should issue redacted versions of their written decisions following the completion of conduct code proceedings.

263. See Berger & Berger, *supra* note 16, at 344.

264. See *supra* notes 157-58 and accompanying text.

265. See *supra* notes 253-58 and accompanying text.

266. See, e.g., *Miami Univ.*, 294 F.3d at 814; *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Tr. of Ind. Univ.*, 787 N.E.2d 893, 908 (Ind. App. 2003).

VII. CONCLUSION

In light of the foregoing discussion, the conclusion here is that a law school code should be a relatively detailed set of regulatory rules, designed to foster an environment conducive to fair academic competition and equitable evaluation and review processes within a law school community. The code should include substantive provisions detailing conduct which is impermissible in light of that goal, as well as procedures to be utilized to enforce those substantive provisions, and sanctions to be imposed in the event that violations of the code are established. There are a number of positive reasons why a regulatory approach to law school codes should be preferred. First, such an approach is consistent with the knowledge that graduate professional students already have regarding conduct that is not permissible in an academic setting. Second, a regulatory approach is most consistent with both a decades long trend and the current state of regulation of the legal profession itself. Having a law school code which mirrors the relevant professional code in that respect may help serve the law school's goal of developing future legal practitioners who will practice effectively within the boundaries set forth by the relevant professional code.

Another reason favoring a regulatory approach to law school codes, is that law school professors, administrators, and others who might be called upon to draft such codes are likely to possess to a great degree the skills and experience needed to draft such codes effectively, given the similarity of such codes to other types of legal codes. Finally, given the conclusion here that providing a framework for fair academic competition and reliable evaluation and review mechanisms is the most important goal to be served by a law school code, the regulatory approach advocated seems most likely to serve that ultimate goal.

There are also negative reasons why regulatory objectives should be favored over aspirational and educational ones in the law school code context. First, for reasons outlined above, it is questionable whether, even under the best conditions, codes can effectively serve broadly aspirational functions. And, to the extent that codes can successfully serve aspirational functions, it seems unlikely that the conditions needed to do so are present in the law school context. For example, codes are most likely to be successful in serving broadly aspirational goals in small, homogeneous communities. Yet most modern law schools lack those characteristics. Additionally, aspirational codes must necessarily employ very broad standards and general language. Yet such provisions are likely to undermine the very important regulatory goals of a code.

There is more reason to believe that a law school code can effectively serve at least some educational functions. For example, a law school code can certainly provide examples of the types of conduct that are prohibited by the code, thus helping to educate students with regard to the code's requirements. Additionally, by allowing students to play important roles in administration of the code, and by opening code proceedings to the broader student population to as great an extent as is feasible, the code is also likely to serve additional educational functions. There is also reason to doubt, however, whether law school codes can have much impact on the education in ethics of future lawyers in the broadest sense (which of course, runs into the aspirational functions of the code as well). Unless and until legal academics are willing to incorporate the law school code into the substantive materials that they teach, it seems unlikely that the code will provide education in ethics to a greater degree than outlined above. And, there appears to be little appetite among legal academics to expand the role of the law school's code into the substantive curriculum.

Given all of these reasons, adopting a regulatory function as the primary goal of a law school code seems appropriate. In light of that goal, this article next attempted to present the broad outlines of a code that would serve that goal. Such a code would provide for an initial investigatory phase regarding alleged code violations, with students playing the key role in this and subsequent phases of the process under the code, in order to determine that only meritorious allegations be pursued. Efforts would then be undertaken to resolve the allegations cooperatively, utilizing any of a number of familiar alternative dispute resolution techniques. If efforts to resolve a meritorious allegation cooperatively are unsuccessful, however, then the opportunity for a full blown adversary hearing should be provided. All of the hallmarks of due process should be available to the accused in such hearings, including adequate notice, the opportunity to discover in advance of hearing the evidence and witnesses that will be presented, the availability of student or professional counsel (at the accused's expense), and the opportunity to cross-examine witnesses.

The standard of proof at hearings under the code should be at least a preponderance of, or perhaps even clear and convincing evidence. Such hearings should be open to the extent possible consistent with applicable federal and state law. Redacted versions of the decisions of the relevant code tribunal should be made available to the entire law school community, and a loose system of precedent should be adopted so that prior code decisions are given at least some weight in deciding

future code proceedings. Finally, there should be at least some opportunity for review of code tribunal proceedings by the Dean or some appellate body.

Perhaps in light of the possible objectives of a law school code discussed in the beginning of this article, the ultimate objectives advocated here may sound unambitious or uninspiring. However, the effective provision of an ethical environment within the law school for the conduct of the school's core academic functions is no small accomplishment. And, the provision of such an environment may well be at least a first step toward developing effective and ethical legal practitioners. And that, after all, is the ultimate goal for many of us in legal academia.