

Northeastern University

School of Law Faculty Publications

School of Law

October 01, 2010

Human rights and the model rules of professional conduct: intersection and integration

Martha F. Davis Northeastern University School of Law

Recommended Citation

Davis, Martha F., "Human rights and the model rules of professional conduct: intersection and integration" (2010). *School of Law Faculty Publications*. Paper 162. http://hdl.handle.net/2047/d20002521

This work is available open access, hosted by Northeastern University.

HUMAN RIGHTS AND THE MODEL RULES OF PROFESSIONAL CONDUCT: INTERSECTION AND INTEGRATION

Martha F. Davis*

I. INTRODUCTION

The American Bar Association's Model Rules of Professional Conduct, standards that shape the ethical practice of law in the United States, nowhere explicitly mention human rights. Yet human rights concepts have many implications for, and connections to, legal ethics. Human rights norms, at their most basic, recite fundamental principles of morality intended to govern behavior of governments as well as individuals. In contrast, legal ethics norms focus on individual ethical decisionmaking. But both human rights and legal ethics share common ground as mechanisms for implementing moral principles. For example, central to human rights norms is the recognition of inherent human dignity, also identified by Professor David Luban as a core component of legal ethics in the lawyer-client relationship.

^{*} Martha F. Davis is Associate Dean for Clinical and Experiential Education and Professor of Law at Northeastern University School of Law. Thanks to Risa Kaufman, Hope Lewis, Emily Spieler, George Kuhlman and my symposium co-panelists Rick Wilson, William Simon and Deena Hurwitz, for useful discussions relating to this topic, and to Kyle Courtney for information assistance. Sarah Delorey provided excellent research support and Rick Doyon offered superb technical support.

^{1.} Model Rules of Profil Conduct (2010) [hereinafter Model Rules].

^{2.} See Louis Henkin, The Age of Rights 3–4 (1990).

^{3.} See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., pmbl., U.N. Doc. A/810 (Dec. 12, 1948) ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."); David Luban, Legal Ethics and Human Dignity 65–95 (2007) (arguing that the protection of human dignity lies at the foundation of lawyers' work).

Indeed, it is not difficult to imagine how human rights norms might be incorporated into domestic legal ethics codes, both as means and ends of legal representation. As means, legal ethics provisions could, in theory, structure lawyering relationships (between lawyers and clients, lawyers and courts, and lawyers and lawyers) in ways that are informed by concepts of human rights.⁴ For example, a human rights lens might yield insights on the rules relating to confidentiality or to client communication. As ends, ethical codes could encourage lawyers to strive for results that accord with human rights principles, either through lawyers' general role in pursuing justice or more specifically in the context of meeting their pro bono obligations.⁵ The ABA's Model Rules, drafted in the shadow of contract, tort, criminal, constitutional law, agency law, and civil rights law, rely on a wide range of domestic laws for these dual purposes. Human rights law, however, is not currently referenced in the ABA's domestic legal ethics standards.

This article examines this omission, asking why references to human rights might have been left out of U.S. legal ethics norms and what might be gained by including human rights principles in the ABA Model Rules. In Section II, I explain the origins and functions of the successive ABA models for legal ethics, looking particularly at how these rules shifted over time in response to changes in the legal profession. In Section III, I review the parallel twentieth century history of the ABA's opposition to, and eventual embrace of, human rights norms, particularly relating to domestic law. In Section IV, I propose ways to incorporate human rights norms more directly into the domestic rules of professional responsibility, and examine the consequences of such revisions. This section draws on some comparative examples as well as a very preliminary analysis of the existing ABA Model Rules of Professional Conduct, and I discuss examples of professional codes that incorporate human rights norms. Section V concludes.

^{4.} See infra Part IV.B.

^{5.} See infra Part IV.C.

^{6.} See, e.g., Model Rules R. 1.6(b) ("a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to prevent the client from committing a crime or fraud..."); Model Rules R. 1.0(d) ("Fraud' or 'fraudulent' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction..."). See generally Bruce A. Green & Fred C. Zacharias, Permissive Rules of Professional Conduct, 91 Minn. L. Rev. 265, 267 (2006) (discussing the effect of external law on legal ethics codes).

II. ORIGINS AND FUNCTIONS OF ABA MODEL ETHICS FRAMEWORKS

A. ABA Ethics Codes and Human Rights

In the United States, the ABA effectively serves as a coordinating and standard-setting body for issues of legal ethics.⁷ It has been issuing ethical standards for more than a century.⁸ The current Model Rules of Professional Conduct represent the third generation of professional ethics codes promulgated by the ABA.⁹

Importantly, none of the ABA-drafted model ethics provisions has the force of law. The model ethics codes simply serve as reference points for regulation of the legal profession. In the U.S., this regulation generally occurs at the state level, through state bar codes of ethics adopted by individual state supreme courts. ¹⁰ Federal regulation also plays a role, however. In 2002, in response to the Enron debacle, the federal government, over the ABA's protest, took up some modicum of direct lawyer regulation through the Sarbanes-Oxley Act and federal SEC regulations. ¹¹ In contrast to the advisory ABA model ethics provisions, these federal regulations and the state level professional standards have the full force of law. Lawyers can be, and are, disciplined for violating these codes. ¹²

^{7.} The ABA is the largest organization of lawyers in the United States, with nearly 400,000 members. Stephen Gillers et al., Regulation of Lawyers: Statutes and Standards xy (2010) (hereinafter Gillers Statutes).

^{8.} *Id.* at 4.

^{9.} Professional Responsibility Standards, Rules and Statutes 3 (John S. Dzienkowski ed., 2009–2010 abr. ed.).

^{10.} See, e.g., Lisa G. Lerman & Philip G. Schrag, Ethical Problems in the Practice of Law 17 (2d ed. 2008). At the time of this writing, California is the only state that has not adopted an ethics code based on the content and the structure of the Model Rules. See ABA Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Sept. 19, 2010).

^{11.} Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C.A., 18 U.S.C.A., 28 U.S.C.A. and 29 U.S.C.A.). See Keith R. Fisher, Repudiating the Holmesian "Bad Man" Through Contextual Ethical Reasoning: The Lawyer as Steward, 2008 J. Prof. Law. 13, 37–39.

^{12.} See generally Mary M. Devlin, The Development of Lawyer Disciplinary Procedures in the United States, 2008 J. Prof. Law. 359. The specifics of the disciplinary structure are beyond the scope of this article, but one representative example is the Massachusetts Rules of Professional Conduct 8.5, which discusses the jurisdiction's disciplinary authority over lawyers practicing or admitted to practice in Massachusetts. Mass. Rules of Prof1 Conduct R. 8.5(a) (2009).

For purposes of assessing specific ethical breaches and the application of disciplinary rules, the ABA model provisions do not stand in for these operationalized state and federal standards. In fact, because no state has adopted the ABA model standards in full, the ABA rules alone are not always a reliable proxy for determining when a disciplinary violation has occurred. But particularly in a nation with ethical standards for lawyers that vary from jurisdiction to jurisdiction—and in the case of the federal regulations, from forum to forum—the ABA's formulation of baseline principles is an important starting place for ethical analysis. Furthermore, although no state has adopted the ABA standards in full, all states have adopted some elements of the ABA's approach.¹³

While state-level ethical standards appeared even earlier, the ABA approved the first national model provisions—the ABA Canons of Professional Ethics—in 1908. The Canons remained in force for more than sixty years. According to the ABA account, the original thirty-two Canons of Professional Ethics were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887. These, in turn, had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of *Professional Ethics*, and from the fifty resolutions included decades earlier in David Hoffman's *A Course of Legal Study* (1836). As proposed by U.S. Supreme Court Justice David Brewer, an ABA leader and a member of the ABA's ethics drafting committee, the 1908 Canons were "few in number, clear and precise in their provisions, so there can be no excuse for their violation."

Considered and drafted over a period of several years, the Canons reflected input and debate from across the legal profession.¹⁸

^{13.} Gillers Statutes, *supra* note 7, at 3–4.

^{14.} Model Code of Profil Responsibility preface (1980).

^{15.} Id. The Alabama State Bar Association was the first state bar to adopt an ethics code, with ten more state associations joining Alabama by 1907. See Ted Schneyer, How Things Have Changed: Contrasting the Regulatory Environment of the Canons and the Model Rules, 2008 J. Prof. Law. 161, 167.

^{16.} See Robert K. Vischer, Moral Engagement Without "Moral Law": A Post-Canon View of Attorneys' Moral Accountability, 2008 J. Prof. Law. 214, 215–16 (noting drafting committee's reliance on Sharswood and Hoffman). For a close analysis of the Canons' text and origins, see James M. Altman, Considering the A.B.A.'s 1908 Canons of Ethics, 71 Fordham L. Rev. 2395 (2003).

^{17.} ABA Comm. on Code of Prof1 Ethics, Final Rep. 3 (1908).

^{18.} See Altman, supra note 16, at 2416–18 (discussing the ABA's process for drafting the Canons).

According to the drafting committee's report, it received more than one thousand letters and postcards from around the country raising issues for its consideration. A significant portion (20 percent) of this correspondence was generated by concern over the Canon on contingent fees, the most controversial topic addressed by the Canons.¹⁹

The Canons focused principally on issues of professionalism and the importance of maintaining the "integrity and impartiality of the administration of justice" as a cornerstone of democracy.²⁰ Scholars have debated the range of factors that contributed to moving this project forward. Some have asserted that it primarily reflected the ABA's concern about the expansion of the legal profession's membership to new echelons of society, e.g., "ethnic minority groups—the profession's new and growing underclass."21 Professor Susan Carle has brilliantly argued, for example, that a less formal, pre-Canons legal ethics regime that was originally built around a community of elite lawyers shifted to respond to a more diverse profession.²² Whereas lawyers had previously come almost exclusively from the so-called "Brahmin" classes of elite, highly educated, wealthy families, new immigrant populations were increasingly represented at law schools and in the ranks of practicing Similarly, women were becoming lawvers unprecedented rates; indeed, in 1908, the Portia School of Law opened in Boston, admitting only women as law students.²⁴ This cadre of new lawyers, the legal establishment feared, would not have the innate understanding of ethical practices that had previously

^{19.} See ABA Comm., supra note 17, at 5.

^{20.~} In re Meeker, 76 N.M. 354, 357, 414 P.2d 862, 864 (1966), appeal dismissed, 385 U.S. 449 (1967).

^{21.} Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 40 (1976) (noting role of immigration in changing the face of the legal profession); Judith S. Kaye, *Keynote Address: ABA Canons of Professional Ethics Centennial*, 2008 J. Prof. Law. 7, 8–9 (speculating as to whether "highminded ideals, base protectionism, bigotry, or some mixture of all of them" were the motivations that led the ABA to develop the Canons).

^{22.} See Susan Carle, From Buchanan to Button: Legal Ethics and the NAACP, 8 U. Chi. L. Sch. Roundtable 281, 284–85 (2001); Susan Carle, Race, Class and Legal Ethics in the Early NAACP (1910–1920), 20 Law & Hist. Rev. 97, 100 (2002).

^{23.} Auerbach, supra note 21, at 17–21.

^{24.} See A Women's Law School, New England School of Law, http://www.nesl.edu/historyproject/1908 (last visited June 6, 2010).

been assumed of lawyers hailing from the upper classes.²⁵ Under this perspective, the establishment-dominated ABA promulgated the Canons of Professional Ethics to protect clients and the profession's public standing by spelling out ethical standards for this new breed of turn-of-the-century lawyer.²⁶

Other scholars have focused on the role of highly public assertions that lawyers had become hired guns for big business, who were unconcerned with issues of justice.²⁷ For example, in his 1905 speech at the Harvard University commencement, President Theodore Roosevelt accused the profession of abandoning morals in favor of furthering big business.²⁸ Roosevelt called on Harvard graduates to take a different path: "Surely Harvard has the right to expect from her sons a high standard of applied morality, whether their paths lead them into business, or into the profession of the law"²⁹ This attack contributed directly to the ABA's appointment, in 1906, of a drafting committee for a professional code.³⁰

Perhaps the most defensible conclusion is that all of these factors played a role, and that the Canons came to fruition precisely because of these multiple motivations and interests.³¹ Notably, these motivating elements relate principally to the legal profession's standing in the community rather than the specifics of attorney-client relationships. No wonder, then, that the concept of "dignity" is specifically mentioned only with reference to the "dignity of the profession," not the dignity of the individual.³²

Yet at the same time, the Canons do not ignore individual ethical decisionmaking: a central part of the Canons' attempt to shape the profession focuses on the role of morality. In the Canons,

^{25.} Auerbach, *supra* note 21, at 261, 285.

^{26.} Id.

^{27.} Altman, *supra* note 16, at 2399 (quoting President Theodore Roosevelt's 1905 Harvard University commencement address, in which he described corporation lawyers as "hired cunning").

^{28.} *Id.* at 243–44.

^{29.} *Id.* at 244.

^{30.} Id. at 248.

^{31.} *Id.* at 246, n.68 (noting Auerbach's discussion of the multiple meanings of "commercialization," all used to express the profession's general unease).

^{32.} Canons of Prof1 Ethics Canon 29 (1908). See Schneyer, supra note 15, at 166 (noting concern about regulating lawyer behavior in early 1900s when lawyers came from increasingly diverse backgrounds).

lawyers are admonished to "impress upon the client and his undertaking exact compliance with the strictest principles of moral law."33 Other individual canons recognized the role of lawyer's own conscience, rather than client directives alone, in dictating the lawyer's actions.³⁴ In the pre-World War world of the ABA Canons, the fledgling examples of formal international human rights law did not figure in the mix, but the Canons' references to morality, conscience and the "approval of all just men" presage the intersections between formal human rights norms and legal ethics.³⁵ In fact, the Canons were drafted at a time when the ABA was increasingly involved in international outreach. For example, Justice Brewer, active in the Canons' drafting effort, was also a leader in the developing area of international comparative law, spearheading an ABA initiative to bring "lawyers and jurists from all parts of the world into contact for the purpose of exchanging views on the principles and methods of the correct administration of justice."36

The Canons, amended on a piecemeal basis over six decades to take account of intervening Supreme Court cases and other developments, were revisited on wholesale terms in 1964 at the behest of ABA President Lewis Powell, later appointed to the U.S. Supreme Court.³⁷ Responding to President Powell's request, in 1964 the ABA's House of Delegates created a Special Committee on Evaluation of Ethical Standards to consider revising the Canons.³⁸ Five years later, in 1969, the ABA accepted the Committee's recommendation and adopted the ABA Model Code of Professional Responsibility.³⁹ Where the earlier Canons constituted a relatively short list of hortatory ethics pronouncements, the Model Code set out detailed norms to address the complexity of modern law practice with

^{33.} Canons of Prof1 Ethics Canon 32 (1908).

^{34.} Vischer, supra note 16, at 216.

^{35.} Canons of Prof1 Ethics pmbl. (1908).

^{36.} David Clark, Establishing Comparative Law in the United States: The First Fifty Years, 4 Wash. U. Glob. Stud. L. Rev. 583, 586 (2005).

^{37.} Stephen Krane, *Regulating Attorney Conduct: Past, Present and Future*, 29 Hofstra L. Rev. 247, 252 (2000); John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 195–96 (2000) (describing Powell's call for comprehensive legal ethics reform while serving as ABA President).

^{38.} Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 St. Mary's L.J. 343, 433–39 (2008); *see also* Report of the Special Committee on Evaluation of Ethical Standards, 94 A.B.A. Rep. 729 (1969) (detailing creation of the Special Committee).

^{39.} Model Code of Prof l Responsibility preface (1980).

a multi-layered structure of interrelated canons, ethical considerations and disciplinary rules.⁴⁰

Also in contrast to the Canons, which did not explicitly invoke human rights, the "dignity of the individual" figured in the Model Code's Preamble, which eloquently stated that, "[t]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government."41 It is possible that this phrase migrated to the Model Code from ongoing conversations at the time in the international law arena. 42 For example, the International Covenant on Civil and Political Rights, approved in 1966 by the U.N. General Assembly, just three years before the completion of the Model Code, recognized that "the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."43 Endorsed by the world community decades earlier, in 1948, the Universal Declaration of Human Rights also gave the concept of "dignity" a central place in human rights law. 44 Through its reference to individual dignity, the Code may well have signaled that its textual references to the "rule of law" were intended to encompass international human rights law as well as domestic law. 45

Despite the appearance of "dignity" in its Preamble, however, the Model Code nowhere directly cited human rights law and the Code's treatment of morality is actually less expansive than that of the Canons. In the Canons, morality was invoked as a call to justice

^{40.} Jeffries, *supra* note 37, at 195; Richard K. Greenstein, *Against Professionalism*, 22 Geo. J. Legal Ethics 327, 337–38 (2009).

^{41.} Model Code of Prof'l Responsibility preface (1980).

^{42.} See, e.g., Judith Resnik, Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry, 115 Yale L.J. 1564, 1652 (2006) (describing mechanisms by which international ideas enter the domestic legal system).

^{43.} International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 1, S. Exec. Doc. E, 95-2, at 95 (1978), 999 U.N.T.S. 171, 172 (entered into force Mar. 23, 1976).

^{44.} Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

^{45.} Thanks to George Kuhlman for this insight.

and the higher purposes of the legal profession.⁴⁶ In the Model Code, references to morality generally admonish lawyers to refrain from lying, stealing or otherwise acting without "moral integrity" in a much narrower sense.⁴⁷

In part because of its complex structure, the Model Code was soon deemed unsatisfactory. Indeed, during a key debate in late January 1982 over whether to replace the Model Code with the Model Rules, one member of the ABA House of delegates described the nine canons, 129 ethical considerations and forty-three disciplinary rules of the Model Code as "a three-dimensional chess game that lawyers played at their own peril." The negative publicity for legal ethics during the 1970s Watergate scandal gave even more momentum to those urging reform. In 1983, the Model Code was replaced by the third generation of ABA legal ethics standards, the current Model Rules of Professional Conduct.

Responding to the criticisms of the complex Model Code, the Model Rules reverted to a simpler structure with more straightforward rules. ⁵¹ But while certainly clearer than the predecessor document, the Model Rules have nevertheless been criticized for providing too much flexibility to lawyers. ⁵² Many of the central admonitions in the Model Rules are phrased not as imperatives, but as choices for practitioners, giving rise to the concern that these ethics standards leave too much to individual attorney discretion and provide inadequate guidance. ⁵³

^{46.} See Greenstein, supra note 40, at 337 (noting "hortatory" nature of Canons). See also Canons of Profl Ethics pmbl. (1908) (noting that the Canons are a "general guide").

^{47.} Greenstein, *supra* note 40, at 337–38 (describing evolution of legal ethics standards from broad principles to rule-based, quasi-statutory approaches).

^{48.} Ctr. for Prof'l. Responsibility, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at xiii–xiv (2006).

^{49.} Auerbach, *supra* note 21, at 264, 285.

^{50.} Professional Responsibility Standards, *supra* note 9, at 3.

^{51.} See, e.g., Carrie Menkel-Meadow, The Lawyer as Consensus Builder: Ethics for a New Practice, 70 Tenn. L. Rev. 63, 63 n.2 (2002) (noting that the Model Rules "omitted the three levels of canons, disciplinary rules, and ethical considerations and included only simplified blackletter rules and comments").

^{52.} See, e.g., Green & Zacharias, supra note 6, at 266.

^{53.} See, e.g., Model Rules pmbl. ¶ 14 ("Some of the Rules are imperatives, cast in the terms of 'shall' or 'shall not'.... Others, generally cast in the terms 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.").

Once again, there is no direct reference to human rights norms, as either means or ends of legal representation, in the Model Rules. Even the Model Code's earlier reference to "individual dignity" was excised as the ethics rules were rewritten. The Model Rules' legislative history does not mention this change to the Preamble, suggesting that it may not reflect any substantive policy judgment by the drafters about the role of human rights in legal ethics. On the other hand, the Model Rules were being drafted in the early years of the presidency of Ronald Reagan; as journalist Tamar Jacoby has observed, the new Administration "made no secret of its contempt for former President Jimmy Carter's human rights policy."54 This change in the zeitgeist could have encouraged the deletion of the "individual dignity" reference. In any event, the deletion of this single allusion to human rights norms in the legal ethics code certainly contributes to the overriding impression that the ABA Model Rules do not incorporate human rights, either explicitly or implicitly, into the domestic legal profession's ethical standards.

B. Revising the ABA's Ethics Codes

As suggested above, the social context for legal ethics rules has shifted over time.⁵⁵ For example, with the rise of public interest advocacy, the profession has responded to the particular ethics challenges of public interest lawyering.⁵⁶ Similarly, the ethical rules have attempted to respond to specific crises in the legal profession such as the ethics challenges of the Watergate and Enron scandals.⁵⁷

However, the profession's responses to external developments are seldom rapid. The mechanics of revising the model ethics codes are cumbersome and highly deliberative. For each of the major revisions to date, the ABA's governing body, the House of Delegates, has appointed a high-level Commission to undertake the work. For

^{54.} Tamar Jacoby, *The Reagan Turnaround on Human Rights*, 64 Foreign Affairs 1066, 1066 (Summer 1986) (arguing that after this initial period of hostility, the Reagan administration actually strengthened aspects of U.S. human rights policy).

^{55.} Some of these shifts are reviewed in Schneyer, *supra* note 15.

^{56.} See generally Cause Lawyering: Political Commitments and Professional Responsibilities (Austin Sarat & Stuart Scheingold eds., 1998). See, e.g., Model Rules R. 7.3(a) (barring solicitation only "when a significant motive for the lawyer's so doing is the lawyer's pecuniary gain").

^{57.} Arnold Rochvarg, Enron, Watergate and the Regulation of the Legal Profession, 43 Washburn L.J. 61, 66–68, 84–86 (2003).

example, it appointed the Commission on Evaluation of Professional Standards, chaired by Nebraska lawyer Robert J. Kutak and known as the Kutak Commission, to develop the current Model Rules of Professional Conduct. 58 The Kutak Commission worked over a period of five years with the assistance of a "reporter" to refine the drafting.⁵⁹ Its proposal was presented to the ABA House of Delegates as a discussion draft in 1980, with a final draft presented in 1981. In addition to comments from the House of Delegates, the Commission also entertained comments from many other individuals as well as organizations.60 After several sessions during Commission's proposed approaches to specific issues such as confidentiality were approved, rejected, or modified, the ABA House of Delegates ultimately approved the complete Model Rules in 1983. 61

A similar process occurred more recently with the ABA's Ethics 2000 Commission, chaired by then Chief Justice E. Norman Veasey of the Delaware Supreme Court. ⁶² Though initially heralded as another major re-thinking, the changes resulting from the Commission's work did not substantially alter the fundamental framework of the Model Rules. ⁶³ Rather, the amendments ultimately

 $^{58.\}quad$ Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 10 (8th ed. 2009).

^{59. &}quot;Reporters" are typically academic experts who assist the ABA Commission with the task of refining the language of the standards and the accompanying commentary. The primary Reporter for the Kutak Commission was Professor Geoffrey Hazard, who has been described as having occupied "the dual role of chronicler and prime mover of the final stage of the transition." David Luban & Michael Milleman, Good Judgment: Ethics Teaching in Dark Times, 9 Geo J. Legal Ethics 31, 46 (1995).

^{60.} Among those invited to comment on a draft were the Society of American Law Teachers and Mark Green and Jethro Liberman, who had both recently written books which were critical of the ABA. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 Law & Soc. Inquiry 677, 697–98 (1989), reprinted in Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession 95, 110–11 (Robert L. Nelson et al. eds., 1992).

^{61.} Center for Profl. Responsibility, *supra* note 48, at ix.

^{62.} Laurel S. Terry, U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives, 4 Wash. U. Glob. Stud. L. Rev. 463, 508 (2005).

^{63.} See, e.g., David W. Raack, The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?, 27 Ohio N.U. L. Rev. 233, 265 (2001) (claiming that Ethics 2000 Commission proposals do not represent a rethinking of the Model Rules); Menkel-Meadow, supra note 51, at 64 n. 2 (asserting that the Ethics 2000 Commission "only submitted proposals for relatively minor amendments to the Model Rules").

adopted were tailored to fill in some of the gaps exposed by the Enron scandal.⁶⁴

During the drafting process, the Ethics 2000 Commission received comments from organizations ranging from the National Legal Aid and Defender Association to the conservative Washington Legal Foundation.⁶⁵ Legal organizations more directly identified with human rights practices, such as Human Rights First, Amnesty International, Human Rights Watch, or the ABA's own Section on Individual Rights and Responsibilities, did not offer comments to the Commission. 66 According to Professor Nancy Moore, the reporter for Ethics Commission 2000, human rights "was not a consideration that the Commission discussed,"67 though the Commission did hear testimony from Spanish lawyer and European Bar leader Ramon Mullerat.⁶⁸ The same appears to be true of the ABA Commission on Multijurisdictional Practice, created in 2000. The Commission heard testimony offering a comparative perspective from representatives from Canada's Law Society of Alberta, the Law Society of England and Wales, and the Union Internationale de Avocats. 69 However, no discussion was devoted to human rights law; the testimony was limited to the laws and practices of other nations that were narrowly and directly implicated by U.S. proposals for multijurisdictional practice.70

In 2009, ABA President Carolyn B. Lamm created the Ethics Commission 20/20. The Commission was charged with performing "a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments." As the Commission wrote, "[o]ur challenge is to study these issues and, with

^{64.} Ariens, supra note 38, at 450.

^{65.} Comments Received by Ethics 2000 Commission,

http://www.abanet.org/cpr/comments/index.pdf (last visited Oct. 23, 2010).

^{66.} *Id*

^{67.} E-mail communication from Professor Nancy Moore, Boston University School of Law, to author (May 19, 2010) (on file with author). Professor Moore of Boston University School of Law served as chief reporter to the ABA Commission on the Evaluation of the Model Rules of Professional Conduct, known as the Ethics 2000 Commission.

^{68.} Terry, *supra* note 62, at 496–97.

^{69.} Id. at 499.

^{70.} *Id*.

^{71.} ABA Commission on Ethics 20/20, http://www.abanet.org/ethics2020/(last visited Oct. 23, 2010).

20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts and the public now and well into the future."⁷² The Ethics Commission 20/20's first open hearing was conducted in 2009 and as of August 2010, the Commission was refining the list of issues that it will address.⁷³ None of the issues identified at that point directly concerned human rights. Instead, they focused on questions regarding "admission of foreign lawyers," outsourcing of legal work, choice of law, and other challenges arising from increased travel and technology.⁷⁴

III. THE ABA AND HUMAN RIGHTS: AN EVOLVING RELATIONSHIP

A. The ABA's Historic Antipathy to Human Rights

The relationship between ABA ethics standards and human rights is further illuminated by a review of the ABA's historic perspective on human rights law more generally. The ABA now officially embraces the value of human rights approaches both internationally and domestically, and is a leading voice in support of implementation of human rights norms. But that was not always the case; after an initial period of openness to international law and human rights norms, the ABA's position shifted dramatically before returning more recently to its current, supportive stance. A number of scholars have written compelling accounts of the U.S. government's suppression of domestic human rights advocacy during

^{72.} *Id*.

^{73.} ABA Commission on Ethics 20/20, Comments, http://www.abanet.org/ethics2020/comments.html (last visited Oct. 23, 2010).

^{74.} See Memorandum, ABA Commission on Ethics 20/20, Preliminary Issues Outline 3 (Nov. 19, 2009) available at http://www.abanet.org/ethics2020/outline.pdf.

^{75.} See Mission, ABA Center for Human Rights, http://www.abanet.org/humanrights/about/mission.html (last visited Oct. 23, 2010). The ABA Center for Human Rights' mission is:

To develop educational programs in the field of human rights; promote a greater understanding of and belief in the importance of human rights; collaborate with other ABA entities in the development and encouragement of human rights efforts, activities and programs; and assist in the development of appropriate ABA polices on human rights issues.

the mid-twentieth century, particularly during the Cold War period.⁷⁶ The ABA was a partner in those efforts.⁷⁷

In the early part of the twentieth century, however, the ABA was generally internationalist in orientation and supportive of human rights.⁷⁸ As early as 1907, the ABA organized a Comparative Law section, publishing an annual bulletin on comparative law from 1908 to 1914.⁷⁹ In the ensuing decades, the ABA was involved in the creation of the American Foreign Law Association and, in 1935, it created the ABA Section on International and Comparative Law. 80 During these decades, U.S. lawyers and advocacy organizations were already noting the relevance of international human rights law to domestic legal issues. For example, the internationalist origins of the American Civil Liberties Union have recently been chronicled by historian John Witt. 81 Similarly, beginning as early as 1916, and involving some of the same legal advocates, the National Women's Rights Party, led by attorney Alice Paul, pursued international human rights strategies as one of several vehicles for achieving women's equality in the U.S.⁸² Shortly after women achieved suffrage in 1921, Paul and others began to fight for equal citizenship rights by using an international law platform to create domestic momentum

^{76.} See Dorothy Thomas, Advancing Human Rights Protection in the United States: An Internationalized Advocacy Strategy, 9 Harv. Hum. Rts. J. 15, 19–20 (1996) (asserting that government efforts to insulate the domestic legal system from international law deterred the NAACP Legal Defense Fund from pursuing international human rights advocacy approaches); Carol Anderson, Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955, 6, 111–12, 209 (2003) (same).

^{77.} Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in American Exceptionalism and Human Rights, 147, 157 (Michael Ignatieff ed., 2005).

^{78.} Id.

^{79.} Clark, *supra* note 36, at 584.

^{80.} *Id.* at 590–92.

^{81.} John Fabian Witt, Crystal Eastman and the Internationalist Beginnings of American Civil Liberties, 54 Duke L.J. 705 (2004).

^{82.} See Martha F. Davis, Not So Foreign After All: Alice Paul and International Women's Rights, 16 New Eng. J. Int'l & Comp. L. 1 (2010). Crystal Eastman, a graduate of New York University School of Law, was centrally involved in both the suffragettes' international campaign for women's citizenship and the creation of the American Civil Liberties Union. For more information on Eastman, see Phyllis Eckhaus, Restless Women: The Pioneering Alumnae of New York University School of Law, 66 N.Y.U. L. Rev. 1996 (1991).

for women's legal equality.⁸³ Women's rights lawyers and advocates were active in the League of Nations and in the founding period of the U.N., looking for ways that emerging international human rights norms might influence rights at home.⁸⁴ The ABA was not directly involved in this work, but neither did it do anything to thwart it.⁸⁵

As chronicled by historian Carol Anderson in her book, Eyes Off the Prize, the interest of domestic advocates in international human rights law only intensified as human rights norms emerged more concretely and formally after the end of World War II.86 In 1947, for instance, the NAACP filed An Appeal to the World, 87 using the U.N. complaint mechanism to challenge apartheid in the U.S. a full seven years before the U.S. Supreme Court recognized the illegality of racial segregation in Brown v. Board of Education.88 Yet in the 1940s and 1950s, coinciding with and reacting to the rising power of the civil rights movement and the solidification of Cold War polarities, the ABA's position shifted decisively away from support for international human rights law. Indeed, Frank Holman, ABA President from 1948–49, described even the aspirational Universal Declaration of Human Rights as "revolutionary in character," and "an attempt to promote state socialism if not communism throughout the world."89

ABA skepticism about the domestic relevance of human rights law was expressed repeatedly and effectively during Senate consideration of the Genocide Convention, submitted for Senate

^{83.} See Candice Lewis Bredbenner, A Nationality of Her Own: Women, Marriage and the Law of Citizenship 153–56, 199 (1998).

^{84.} See Davis, supra note 82; Paula F. Pfeffer, 'A Whisper in the Assembly of Nations': United States' Participation in the International Movement for Women's Rights from the League of Nations to the United Nations, 8 Women's Stud. Int'l F. 459 (1985).

^{85.} Discussing the period between the wars, one author observed that "[t]he World War put a temporary stop to many A.B.A. projects" and that "[p]ostwar concern with international problems rested largely with a few A.B.A. members who interested themselves in the World Court, which the Association endorsed." Norbert C. Brockman, *The History of the American Bar Association: A Bibliographic Essay*, 6 Am. J. Legal Hist. 269, 274 (1962).

^{86.} See generally Anderson, supra note 76.

^{87.} *Id.* at 103–12.

^{88.} Brown v. Board of Educ., 347 U.S. 483 (1954).

^{89.} Mark Mazower, *The Strange Triumph of Human Rights*, 1993-1950, 47 Hist. J. 379, 396 (2004).

ratification by President Harry Truman in 1949.90 Powerful opponents of ratification, including Republican Senator John Bricker of Ohio and Frank Holman, president of the ABA from 1948-49, contended that treaty ratification would undermine the supremacy of the U.S. Constitution and interfere with the nation's constitutional principles of federalism.⁹¹ Known as the "Old Guard," Holman, Bricker and their allies were successful in facing down both Truman and his successor, President Eisenhower, who ultimately withdrew the Genocide Convention from Senate consideration in 1953.92 Decades later, in 1986, the Convention was finally ratified with significant reservations.⁹³

More than one commentator has noted that the issue of race was lurking just below-and sometimes on-the surface of this controversy. 94 For example, Frank Holman cautioned in 1949 (eighteen years before the Supreme Court's ruling in Loving v. Virginia⁹⁵) that Article 16 of the Universal Declaration "means that mixed marriages between the races are allowable without regard to state or national law or policy forbidding such marriages."96 In a second appeal to the U.N. in 1951, members of the Civil Rights Congress, led by activists Paul Robeson and William Patterson, again specifically raised the issue of human rights and racial discrimination, stating squarely before the international body that "[w]e charge genocide" of black Americans at the hands of the U.S. government.⁹⁷ If the Genocide Treaty were to be ratified, the ABA leaders feared, civil rights activists would have an even more powerful tool to challenge the Jim Crow status quo—one that would invite the nation's international enemies to meddle in domestic affairs.98

The ABA's concern about U.S. ratification of international human rights treaties was apparent again in 1967, when the U.S.

^{90.} Natalie Hevener Kaufman, Human Rights Treaties and the Senate: A History of Opposition 16-20 (1990).

^{91.} Id. at 17, 42–54, 106–116.

^{92.} Id. at 116.

^{93.} Id. at 181-82.

Susan Waltz, Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights, 23 Third World Q. 437, 443 (2002).

Loving v. Virginia, 388 U.S. 1 (1966).

Frank E. Holman, International Proposals Affecting So-Called Human 96. Rights, 14 Law & Contemp. Probs. 479, 483 (1949).

Anderson, supra note 76, at 181-82.

^{98.} Kaufman, supra note 90, at 52, 54.

Senate was considering three treaties: The Supplementary Slavery Convention, the Convention on the Political Rights of Women, and the Convention Concerning the Abolition of Forced Labor. 99 When these treaties were initially taken up by the Senate, the ABA's Committee on Peace and Law Through United Nations, which had sided with Frank Holman during the Genocide Convention debates, prepared recommendations for the ABA as a whole. As historian Natalie Kaufman reports, the ABA committee opposed ratification of all three conventions, stressing that they "would alter existing federal-state relations, that they would set lower standards than those in the United States, that they would contribute to increased international authority, and that they would violate U.S. domestic jurisdiction."100 The ABA Section on International and Comparative Law, conducting its own study, also recommended against ratification of the Women's Convention, while supporting the Slavery Convention and recommending the Labor Convention only with several reservations. 101 The ABA House of Delegates ultimately adopted a position closer to the ABA Section on International and Comparative Law, urging the Senate to support the Slavery Convention, to oppose the Women's Convention and to postpone consideration of the Labor Convention. 102

Given the ABA's ambivalence and, on many occasions, outright opposition to incorporation of international human rights standards into domestic law during this period, it is not surprising that no references to human rights appear in the ABA's contemporary legal ethics models. At least through the early 1970s, the ABA maintained its vocal opposition to the United States' endorsement of the Universal Declaration of Human Rights as well as to U.S. ratification of baseline human rights treaties such as the International Covenant on Civil and Political Rights. 103

^{99.} *Id.* at 119.

^{100.} Id. at 126.

^{101.} *Id.* at 126.

^{102.} The Slavery Convention was approved by the Senate after hearings and debate in 1967; the Women's Convention was approved in 1975; the Labor Convention has yet to be approved. Id. at 143–46.

^{103.} See Jerome Shestack, The Legal Profession and Human Rights: The Globalization of Human Rights Law, 21 Fordham Int'l L.J. 558, 562 (1997) (noting that the ABA did not become active in the human rights arena until the mid- to late-1970s); Margaret E. Galey, The Universal Declaration of Human Rights: The Role of Congress, 31 Pol. Sci. & Pol'y 524, 524 (1998); Kaufman supra note 90, at 103–106.

The ABA's position today is dramatically different. Particularly following Frank Holman's death in 1967, the center of power within the ABA shifted. According to Kaufman,

> the ABA in the mid-1970s reversed its position on all of the human rights treaties covered in this study and recommended Senate approval with reservations The ABA has, in fact, been engaged in a very active campaign in support of the treaties, working diligently to persuade the Senate that the treaties should be ratified. 10

For example, the ABA has actively supported U.S. ratification of CEDAW since 1984, when the House of Delegates passed a resolution in support of the treaty. 105 More recently, the ABA has urged U.S. ratification of the U.N. Convention on the Rights of Persons with Disabilities. 106

B. Human Rights in Domestic Law Today

The continued absence of human rights references in the ABA's legal ethics materials may well reflect the legacy of this earlier time, the residual effect of the ABA's prior opposition to domestic implementation of human rights law. Or it may be simply that the process of human rights integration into domestic legal ethics is gradual, accretional and largely silent—akin to the sort of unheralded legal migration that Judith Resnik has insightfully described in other areas of common and constitutional law.¹⁰⁷

In either event, a deliberate and open examination of ethics guidelines through a human rights lens is now entirely in order. International human rights are standard fare for lawyers today, whose introduction to these topics often begins early in law school. 108

Kaufman, supra note 90, at 199. 104.

See American Bar Association Section of Individual Rights and 105. Responsibilities, http://www.abanet.org/irr/cedaw/home.html (last visited Oct. 23, 2010).

The ABA passed a resolution urging ratification of the Disabilities 106. Convention at its 2010 Midyear meeting. See ABA Washington Letter, Mar. 2010, at 7, available at http://www.abanet.org/poladv/wl/10mar/march10wl.pdf. (last visited Oct. 23, 2010).

^{107.} Resnik, supra note 42, at 1576.

^{108.} See, e.g., Georgetown University Law Center's Week One: Law in Global Context, http://www.aals.org/documents/curriculum/documents/ GeorgetownWeekOne.pdf (last visited Oct. 23, 2010) (requiring that all first-year students participate in a week-long program in which "students analyze a

Indeed, many lawyers will have represented clients in human rights contexts when, as law students, they worked with law school human rights clinics. ¹⁰⁹ Similarly, issues of human rights are not at all rare in domestic legal practice, and domestic courts are increasingly called on to adjudicate these issues or to simply opine on the relevance of human rights norms to domestic disputes. ¹¹⁰ As a result, domestic law is increasingly informed by the content of international human rights norms. ¹¹¹ Legal ethics norms, as articulated in the ABA Model Rules, should be reassessed in light of these developments in legal practice.

complex legal problem involving not only U.S. law, but also international and/or foreign law in a transnational legal setting."); Harvard Law Programs of Study, International and Comparative Law, http://www.law.harvard.edu/academics/degrees/jd/pos/internationcomparativelaw /index.html (last visited Oct. 23, 2010) (noting that "every first year J.D. student at HLS is required to take a course in international legal studies"); Columbia Law School: First-Year Courses, http://www.law.columbia.edu/jd_applicants/ curriculum/11 (last visited Oct. 23, 2010) (offering several 1L electives addressing international law topics); NYU School of Law, First-Year Courses, http://www.law.nvu.edu/academics/courses/requiredfirstvearcourses/index.htm (last visited Oct. 23, 2010) (offering international law as a first-year elective); Emory Law School, http://shared.web.emory.edu/emory/news/releases/2010/03/ emory-law-approves-first-year-curriculum-changes.html (last visited Oct. 23, 2010) (adding international law elective to first-year curriculum).

109. See, e.g., University of Virginia International Human Rights Law Clinic, http://www.law.virginia.edu/html/academics/practical/ihrclinic.htm (last visited Oct. 23, 2010); Penn Law Transnational Law Clinic, http://www.law.upenn.edu/clinic/transnational.html (last visited Oct. 23, 2010); University of San Francisco School of Law, Human Rights Clinic, http://www.usfca.edu/law/clinics (last visited Oct. 23, 2010); Columbia Law School, Human Rights Clinic, http://www.law.columbia.edu/focusareas/clinics/Humanrights (last visited Oct. 23, 2010).

110. See The Opportunity Agenda, http://opportunityagenda.org/human_rights_united_states (last visited Oct. 23, 2010) (surveying citation to international and foreign law in 50 states).

111. See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2033 (2010); Martha F. Davis, The Spirit of Our Times: State Constitutions and International Human Rights, 30 N.Y.U. Rev. L. & Soc. Change 359, 360 (2006); Judith Resnik, Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism, 57 Emory L.J. 31, 34 (2007).

IV. INCORPORATING HUMAN RIGHTS NORMS INTO DOMESTIC ETHICS MODELS

As suggested above, human rights norms are relevant to legal ethics both as means, informing the contours of lawyer-client relationships, and as ends, informing legal goals and decisionmaking. A human rights approach could undoubtedly serve as the basis for a thorough review which completely reworked the ABA Model Rules. Such a revision would examine both approaches by which human rights could be integrated into domestic legal ethics.

However, this paper does not undertake such comprehensive review. I instead give some examples of each approach, drawing on the existing ABA Model Rules. In discussing these examples, I reference ethics codes developed by other bar associations that incorporate and integrate human rights. Examples from these codes, including the CCBE Code of Conduct of the European Union, the Canadian Code of Ethics, and the Japanese Code of Ethics, as well as the U.N.'s Basic Principles on the Role of Lawyers, demonstrate that a dramatic shift in the terms of the ABA rules may not be necessary to include key human rights concepts in domestic lawyers' professional practice.

A. International Codes that Incorporate Human Rights Concepts

The legal ethics codes that recognize a role for human rights norms and those that do not are notable for their similarities. Lawyers' professional codes outside of the U.S., some of which were developed for lawyers working in the human rights legal system, share many, if not all, of the basic principles of domestic legal representation, such as communication, competence, and lovalty. 112

^{112.} See, e.g., Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (hereinafter Basic Principles); Basic Principles, princ. 15 ("Lawyers shall always loyally respect the interests of their clients."); Basic Principles, princ. 9 ("Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have the appropriate education and training "); Basic Principles, princ. 13(a) (stating that lawyers' duties include "[a]dvising clients as to their legal rights and obligations, and as to the working of the legal system "); see also Model Rules R. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."); Model Rules R. 1.4(a)(2) (stating that a lawyer shall

Both these international and domestic ethical rules draw from many of the same sources in the common law of agency and universal concepts of due process.¹¹³

Yet these codes differ in emphasis and language, if not in broad outline. For example, international professional codes written in the shadow of human rights norms are more likely to emphasize the role of the legal advocate as an officer of the tribunal, deemphasizing the reflexively "zealous" advocacy that has long been a mantra of domestic lawyering. Similarly, some international lawyers' codes do not discuss issues of fee structuring and discipline that are significant elements of domestic rules.

Nevertheless, as explained below, these examples point to simple ways, short of complete overhaul, to enable the ABA Model Rules to acknowledge core principles of human rights law and to open the door to greater awareness of the significance of this body of law for ethical practice by domestic lawyers.

"reasonably consult with the client about the means by which the client's objectives are to be accomplished"); Model Rules R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

113. See, e.g., Basic Principles, princ. 13(a) ("The duties of lawyers towards their clients shall include: Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients."); Basic Principles, princ. 1 ("All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."); Model Rules R. 1.2(a) ("[A] lawyer shall abide by a client's discussion concerning the objectives of representation, and . . . shall consult with the client as to the means by which they are to be pursued."); Model Rules R. 3.8(b) ("A prosecutor in a criminal case shall . . . make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel.").

114. Compare Basic Principles, princ. 13(b) ("Assisting clients before courts, tribunals or administrative authorities, where appropriate . . .") with Model Rules pmbl. para. 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

115. Compare International Criminal Court, Code of Profl Conduct for Counsel, U.N. Doc. ICC-ASP/4/Res.1 (Dec. 2, 2005), available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP4-Res-01-ENG.pdf (last visited Sept. 7, 2010) (omitting entirely any mention of fee-structuring or discipline), with Model Rules R. 1.5 (discussing at length the fees a lawyer may charge).

B. Human Rights Norms as Means to Ethical Lawyering

Incorporation of human rights norms into the ABA's professional code could begin with a review of the ways in which such norms might inform and infuse attorney-client relationships. Rather than focusing on human rights ends, this approach to incorporation of human rights norms would emphasize the means, or processes, of human rights and their relevance to the processes of legal representation. Human rights principles with substantial relevance to process include respect for human dignity, participation (and leadership) of those most affected in crafting solutions to their problems, and recognition of the interrelationships between the full range of human rights. 116

Outside of the U.S., human rights law has been invoked as a framework to inform basic processes of ethical legal practice. For example, the Canadian Bar Association Code of Professional Conduct references human rights norms as a standard for non-discrimination provisions applicable to lawyers. The Code specifically admonishes that with respect to non-discrimination, "[t]he lawyer shall respect the requirements of human rights and the constitutional laws of Canada."117 With this phrase, the bar not only accepts the significance of human rights norms but also holds Canadian lawyers to non-discrimination standards that may be distinct from those in domestic law.

There are a number of ways in which human rights norms could be similarly operationalized in the text of the ABA's professional code. First, the pre-1983 language that identified the protection of individual dignity as an element of legal representation should be restored to the Preamble to the Model Rules. This simple change, entirely consistent with the thrust of the Model Rules and with broader developments in modern law practice concerning clientcentered lawyering, would provide a basis for evaluating legal

See, e.g., International Covenant on Economic, Social, and Cultural Rights, opened for signature Dec. 16, 1966, general cmt. 4, para. 12, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (in developing government housing strategy, "[b]oth for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives.").

^{117.} Canadian Bar Association Code of Professional Conduct, ch. XX (2009).

representation in human rights terms. The reference to dignity would not only add shape to legal representation through its direct meaning, but would also draw in the extensive law, both domestic and international, on human dignity, ranging from *Lawrence v. Texas* to the Universal Declaration of Human Rights. This approach to incorporation within the Model Rules is not novel. Familiar common law concepts such as "reasonableness" or "fraud" are similarly incorporated into the ABA Rules, bringing with them extensive interpretations that are external to the four corners of the professional code but that directly and indirectly inform its interpretation. 119

A prefatory reference to dignity in the ABA Model Rules would also inform the meaning of subsequent, more specific provisions of the Model Rules, such as Rule 1.4 addressing Communication. Thus, the lawyer's obligation to "keep a client reasonably informed" and to "explain a matter to the extent reasonably necessary" would arise from the recognition of the client's individual dignity consistent with human rights norms, not merely from common law principles of agency. This reformulation of attorney-client obligations would also be tied to human rights norms valuing participation in problem-solving of those most affected by the problems at issue. It is the current Model Rules, the moderating

^{118.} Lawrence v. Texas, 539 U.S. 558, 560 (2003) (stating that "[a]lthough the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged"); *Universal Declaration of Human Rights*, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., pmbl., U.N. Doc. A/810 (Dec. 12, 1948) (stating that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world").

^{119.} See, e.g., Model Rules R. 1.1, 1.3, 1.4(a) (using a "reasonableness" standard within each rule); see also Model Rules R. 3.3 (prohibiting a lawyer from knowingly representing a client who is engaged in "fraudulent" conduct).

^{120.} Model Rules R. 1.4.

^{121.} Interestingly, theories of "client-centered lawyering" where the client is actively engaged in "identifying problems, generating a range of options and making decisions" advocate a similar approach. Melissa Crow, From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions, 26 Mich. J. Int'l L. 1097, 1117 (2005). See generally David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977) (discussing the benefits of clients' participation in the legal process). This approach explicitly seeks to promote client dignity. See Douglas E. Rosenthal, Lawyer and Client: Who's in Charge? 168–69 (1974); Luban, supra note 3, 65–95. (arguing that performing pro-bono

qualification of "reasonableness" sits in tension with a human rights value—derived from the concept of human dignity—of ensuring participation and, where feasible, leadership by those most affected by rights violations. 122 Changing the terrain underlying the requirement of "reasonableness" in Rule 1.4 to reflect these human rights norms would likely shift the content of the reasonableness standard toward greater expectations for communication and client participation.

The third human rights principle identified above, the recognition of the interrelationships within the range of human rights, comes into play in evaluating Model Rule 1.8. The comment to current Model Rule 1.8 admonishes:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. 123

Instead of focusing on potential conflicts of interest and the integrity of the judicial system, a human rights approach to the question of subsidy would acknowledge the inequality of power and resources between the lawyer and client, and would take into account that a meritorious lawsuit might be thwarted if the client cannot subsist during its pendency.124 Further, viewed through a human rights lens, it is clear that a client's lack of access to subsistence support (that is, access to economic rights) has a critical impact on his or her ability to vindicate other procedural or substantive legal

work for those who cannot pay is a necessary component of defending "human dignity").

See Office of the High Comm'r for Human Rights, General Comment 122. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) (articulating the right of participation).

Model Rules R. 1.8 cmt. 10.

In practice, lawyers working for low-income clients often avoid the terms of this rule by setting up a trust with funds that the client can draw down to pay for necessities. Personal communication from William Simon, Arthur Levitt Professor of Law, Everett B. Birch Professor in Professional Responsibility, Columbia Law School, to author (June 12, 2010) (on file with author).

rights. 125 A human rights approach would reformulate this rule, explicitly balancing the importance of a lawyer's independence with competing considerations regarding the practical availability of legal processes to litigants who are seeking to defend important rights. Such a rule could explicitly encourage lawyers to extend subsistence support to clients when such support would contribute to vindicating important human rights.

This approach is apparent in states that recognize human rights concepts in local law. The Louisiana Rules of Professional Conduct go farther than the Model Rules, providing that all lawyers "may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter," and those representing the indigent "may pay court costs and expenses of litigation on behalf of the client." Perhaps not coincidentally, Louisiana has one of only three state constitutions in the nation that explicitly protects "individual dignity." Two other states, Illinois and Montana, also permit greater lawyer support for indigent clients. 128

There are undoubtedly other ways in which viewing human rights as a "means" to ethical legal practice would inform professional expectations spelled out in ethical codes. Other candidates for such re-evaluation include the recently revised rules regarding confidentiality, the rules concerning attorney discipline, and the rules regarding client solicitation. A thoroughgoing survey of the Model Rules of Professional Responsibility through a human

^{125.} See Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (granting the plaintiff the right to a pre-termination welfare hearing because "his need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.").

^{126.} La. Rules of Prof'l Conduct R. 1.8(e)(1)–(2) (2010).

^{127.} La. Const. art. I, § 3; see also Mont. Const. art. II, § 4 ("the dignity of the human being is inviolable"); Ill. Const., art. I, § 20, (entitled "Individual Dignity").

^{128.} Mont. Rules of Prof'l Conduct R. 1.8(e) (2004) (allowing lawyers, in addition to paying court costs and expenses on behalf on an indigent client to "guarantee a loan from a regulated financial institution...if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits..."); Ill. Rules of Prof'l Conduct R. 1.8(d)(3)(2010) (excepting lawyers from the default rule not to advance or guarantee financial assistance to a client by allowing them to "advance or guarantee the expenses of litigation...if... the client is indigent").

rights lens, though not undertaken here, would fully address each of these possibilities.

C. Human Rights as an End of Ethical Lawyering

Revisions to the ABA Model Rules could also identify achievement of human rights as an end of ethical lawyering. Some lawyers' codes of professional conduct from other nations, as well as international ethical codes, have already taken this step, and provide instructive models.

For example, the European Bar's Code of Conduct for Lawyers in the European Community (CCBE) embraces human rights as a goal of ethical lawyering in its preamble at Rule 1.1, which explicates "The Function of the Lawyer in Society." According to this provision of the Code, a lawyer's moral and ethical obligations include those that he owes to "the public for whom a free and independent profession . . . is an essential means of safeguarding human rights in face of the power of the state and other interests in society." While lacking the detail of the ABA Model Rules, the CCBE is not simply a rhetorical document; it addresses ethical issues ranging from lawyer-client relationships to lawyer diligence and competence to segregation of client funds. The CCBE has been implemented in every member state of the European Community.

Japan's Basic Rules on the Duties of Practicing Attorneys address human rights even more directly, providing at Article 1 that "An attorney shall be aware that his or her basic mission is to protect fundamental human rights and realize social justice and shall strive to attain this mission." Japan's constitution, written after World War II, specifically addresses human rights and may therefore invite

^{129.} CCBE, Code of Conduct For European Lawyers (May 19, 2006), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228 293527.pdf; see generally, Laurel S. Terry, An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct, 7 Geo. J. Legal Ethics 1 (1993) (describing the structure of the CCBE Code and its substantive differences with the ABA's Model Rules).

^{130.} CCBE, supra note 129.

^{131.} Crow, *supra* note 121, at 1129.

^{132.} Japan Federation of Bar Associations, *Basic Rules* (preliminary provision, adopted Nov. 10, 2004) art. 1 *available at* http://www.nichibenren.or.jp/en/about/regulations.html (last visited Sept. 30, 2010).

this sort of language in the country's legal ethics code. ¹³³ However, the Japanese Bar has notably embraced this framework, offering annual reports that often explicitly adopt a human rights approach. ¹³⁴ Further, Japan appears to have influenced the non-binding standards articulated by the regional bar group, the Presidents of Law Associations of Asia (the POLA). ¹³⁵ Among the stated objectives of the POLA is to "provide regional cooperation for the promotion of peace and human rights activities."

Some codes that are more aspirational in character, in the vein of the ABA's Canons, have followed the "working codes" of Canada, Japan and Europe cited above. For example, the U.N.'s Basic Principles on the Role of Lawyers provide that "Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession." Though not binding, these principles were developed specifically to "assist Member States in their task of promoting and ensuring the proper role of lawyers," with the hope that they would be "respected and taken into account by Governments within the framework of their national legislation and practice." 138

Like these international and foreign Codes, the ABA Model Rules could affirmatively identify upholding human rights as a goal of representation. In addition to mentioning human rights in the Model Rules' Preamble, this goal might be accomplished by including human rights groups among those with which lawyers can fulfill their pro bono responsibilities. The current list in the Model Rules

^{133.} For example, Article 11 of the Japanese Constitution provides that the "fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights." Nihonkoku Kenpō [Kenpō] [Constitution] art. 11 (Japan), available at http://www.ndl.go.jp/constitution/e/etc/c01.html.

^{134.} Japan Federation of Bar Associations, JFBA Public Statements and Opinion Papers, available at http://www.nichibenren.or.jp/en/activities/statements/countryreports.html.

^{135.} Presidents of Law Associations of Asia, http://pola2010.org/?page_id=80 (last visited Sept. 25, 2010).

^{136. 21}st POLA Conference, http://pola2010.org/?page_id=80 (last visited Sept. 25, 2010).

^{137.} Basic Principles, princ. 14.

^{138.} Basic Principles, pmbl.

identifies "groups or organizations seeking to secure or protect civil rights, civil liberties or public rights," or "charitable, religious, civic, community, governmental and educational organizations" as possible recipients of primary or secondary pro bono services, but makes no mention of organizations pursuing human rights goals.¹³⁹

There is now a particular reason to be explicit about the place of human rights norms and human rights law in legal ethics. Just as the organized bar has responded to the rise of public interest lawyering, the Watergate crisis and lawyers' role in the Enron debacle, so too the affair of the "Torture Memos" originating with the Office of Legal Counsel Where government lawyers searched for rationales to justify U.S. government avoidance of Geneva Convention restrictions on torture of prisoners—demands a more systemic response from the profession than mere censure of the lawyers involved. The Torture Memo controversy involved both human rights ends and means, i.e., not only the underlying morality of waterboarding and other forms of torture, but also the role of government lawyers in defining, protecting and promoting human

^{139.} Model Rules R. 6.1(b)(1). The comment accompanying this section indicates that the types of issues that might be addressed include "First Amendment claims, Title VII claims and environmental protection claims." *Id.* at R. 6.1 cmt 6.

^{140.} See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–40A (Aug. 1, 2002), available at http://www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited Sept. 25, 2010); Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., on Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), available at http://www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited Sept. 25, 2010).

^{141.} Watergate triggered the requirement that all law students take a professional responsibility class while in law school. See Peter K. Rofes, Ethics and the Law School: The Confusion Persists, 8 Geo. J. Legal Ethics 981, 981 n.1 (1995). The Enron debacle triggered changes in the ABA Model Code to mandate disclosure of client confidences in certain circumstances through a "reporting up" mechanism; that revision was followed by a legislative change in the SEC rules. See ABA Task Force on Corporate Responsibility, Recommendation to Amend Rule 1.6(b) of the ABA Model Rules of Professional Conduct and to Amend the Related Comment at Report sec. II (Aug. 11–12, 2003), available at http://www.abanet.org/leadership/2003/journal/119a.pdf (last visited Sept. 25, 2010); SEC Standards of Profl Conduct for Attorneys, 17 C.F.R. § 205.3 (2004).

rights. ¹⁴² As part of its broader response, the organized bar should revise professional ethics obligations to take explicit account of human rights norms, providing a platform for ethics teaching and legal practice that moves these norms out of the shadows. In addition to its domestic benefits, such a change would demonstrate to the world that the U.S. legal profession takes such norms seriously, regardless of the outcome of disciplinary proceedings in this particular instance. ¹⁴³

V. CONCLUSION

It is beyond the scope of this article to set out a comprehensive roster of recommendations for revising the ABA's Model Rules of Professional Responsibility. Rather, this article simply sets out a basis for advocating that the ABA should incorporate a human rights lens into its ongoing processes for reviewing the profession's ethical standards. Indeed, this response would be appropriate given the mandate incorporated into the Basic Principles on the Role of Lawyers, adopted by the United Nations in 1990. 144 That document stated that "Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law." 145

Human rights organizations in the U.S. that operate in the legal sphere have a responsibility to aid the ABA in this endeavor. In the past, it appears that few, if any, human rights organizations have submitted comments during revisions of the ABA's professional

^{142.} See generally Jeremy Waldron, Torture and the Common Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 1684 (2005); Ross L. Weiner, Note, The Office of Legal Counsel and Torture: The Law as Both Sword and Shield, 77 Geo. Wash. L. Rev. 524, 530–31 (2009).

^{143.} The US has faced international criticism for its treatment of detainees in Guantanamo, including a UN report condemning the government's attempts to redefine torture. See U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Situation of Detainees at Guantanamo Bay, \P 46, UN Doc. E/CN.4/2006/120 (Feb. 15, 2006) (prepared by Leila Zerrougui et al).

^{144.} Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, Havana, Cuba, *Basic Principles on the Role of Lawyers*, 118–123, U.N. Doc. A/CONF.144/28/Rev.1 (1990).

^{145.} *Id.* at 121.

ethics code. Given the profession's recent experiences with lawyers at the highest levels of government who eschew the relevance of human rights ends as well as means, human rights advocates should be more vigilant and expansive in their advocacy.

Inclusion of human rights in the ABA Model Rules is not a panacea. Language alone will obviously not change lawyer behavior that skirts morality or human rights principles. However, legal ethics holds an importance place in the law school curriculum: in most law schools, it is the only required course after the first year, and all law students must study the topic in preparation for passing the Multistate Professional Responsibility Exam (MPRE), a prerequisite to the practice of law in every domestic jurisdiction. Inclusion of human rights norms in the ABA's Model Rules would provide an important occasion for educating lawyers about these norms and for opening up a significantly higher level of professional consciousness concerning the role of human rights in domestic legal practice, with long-term implications for the ethical practice of law.

^{146.} The MPRE examines knowledge of the Model Rules rather than the ethics provisions of individual jurisdictions. *See Description of MPRE*, National Conference of Bar Examiners, http://www.ncbex.org/multistate-tests/mpre/mpre-faqs/description0/ (last visited Sept. 25, 2010).