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Jonah J. Horwitz[i]

Most can readily agree with Professor Boothe-Perry that lawyers routinely act badly, and that they do so with a regularity that is, alarmingly, on the rise. The question of what to do about it is a more vexing one. Professor Boothe-Perry suggests that the problem can be nipped in the bud, as it were, through the imposition of non-academic honor codes at law schools.[ii] In this way, she argues, attorneys-in-training will learn how to behave themselves before they join the bar and will behave themselves ever after.[iii]

It is a hopeful vision, and one with the virtue of simplicity: just teach law students about proper conduct while they are in school, and you solve the scourge of unprofessional behavior.[iv] Unfortunately, however, the real world is rarely so simple. The fatal flaw of Professor Boothe-Perry's reasoning is neatly captured by her lament that law students "often carry into society [the] attributes of 'bad lawyering.'" Young lawyers do not acquire such attributes in law school, and they consequently cannot "carry" them into practice. They acquire them during the course of practice itself. They learn unprofessionalism from the profession.

How do we know this? Just consider the most pernicious traits of the modern-day lawyer.

As Professor Boothe-Perry acknowledges, such a list must reserve a prominent place for incivility.[v] But incivility in the legal world is a far different beast from civility on the law school campus. Incivility between attorneys (which is indisputably the type of incivility that most plagues the profession) occurs because our adversarial system has run amok. Zealous representation has become wildly over-zealous representation; cordial opposition has become open warfare.[vi] Incivility at law schools is far more likely to flow from immaturity, political disagreements, or hyper-competitiveness. The first two have little to do with attorney behavior.

The final category - hyper-competitiveness - is closest to the species of incivility observable in rude courtroom behavior or in nasty messages from one attorney to another, insofar as both are presumably based on a desire to succeed (by beating one's opponent in the judge's eyes or one's classmate in the professor's, respectively).[vii] Nevertheless, students rarely behave as meanly to their peers as attorneys consistently do to theirs.[viii] If a student acts rudely to a fellow-student as a result of competitiveness, it is far more likely to be of the passive-aggressive variety, e.g., tearing pages out of a book needed by others to prepare for an exam.[ix] By contrast, many lawyers feel perfectly comfortable explicitly conveying their contempt for one another.[x]

This difference flows naturally from the radically different environment that in a law school as opposed to an adversarial setting. In the former, nearly everyone professes (even if without conviction) that they are living and working in a *community*, with shared values, mutual respect, support and so forth.[xi] Indeed, the principle is not so naïve as it may sound. An alum of a law school *does* have an interest in seeing fellow alumni succeed in the general sense (if not

always in the more specific sense of a curved class), because each benefits from the prestige of the institution as a whole, and that prestige depends upon the accomplishments of its graduates.[xii] Quite the opposite in the adversarial setting, where the triumph of one attorney is often, though not always, the defeat of the other. If the temptations to behave uncivilly are so different in law school than they are in practice, and if the temptations lead to behavior that is uncivil in such different ways, surely we cannot effectively make law students civil lawyers. For the lessons will all relate to a dynamic they have not experienced first-hand. A student will learn how to be civil in law school and, promptly upon graduation, either become civil in practice or uncivil in practice for the same reasons they would have done so in the absence of Professor Boothe-Perry's honor code.

To be sure, not all misconduct in law schools is so distinct from misconduct in the legal marketplace. Take another important example. Honesty. Or the lack thereof, as the case may be. The ubiquitous incidence of dishonesty at a law school is plagiarism, cheating, or some other similar variety of academic foul-play. This is a simple phenomenon, with an obvious explanation: a student seeks to obtain a better grade (or publication) while expending less effort.[xiii] That is not so different from dishonesty in the legal world, which typically surfaces in something like the failure to turn over evidence to another party or the court. Such an act is based on the same basic equation: unethical behavior to save time and energy and increase the chance of personal advancement, and committed at the risk of detection and sanctioning.[xiv] The question remains, though, as to whether Professor Boothe-Perry's proposed cure will treat the disease. Alas, it will not.

As an initial matter, it is important to remember that Professor Boothe-Perry encourages the use of *non-academic* honor codes.[xv] Nearly all schools enact rules to protect *academic* integrity, prohibiting plagiarism, cheating and so on.[xvi] If such honor codes, directly targeted at the conduct in question, are doing so little to curtail similar misconduct in the workplace, why would a *less direct* honor code be of any use? There is therefore already cause for concern that Professor Boothe-Perry's remedy will be of far less utility than she promises outside the confines of the ivory tower.

Set that objection aside. Even if certain types of bad behavior *begin* in law school (say, dishonesty), there is little reason to believe that it can *end* there, regardless of how good the moral instruction is. For the young attorney's motivation to renounce his scruples in practice remains, the bad influences in practice remain, and the risk-benefit calculation in practice remains. Professor Boothe-Perry encourages us to think about "how precedent for behavior is set . . . that will ultimately govern the professional behavior in lawyers."[xvii] Good advice. The answer: it is set *in and by the profession*. We can lecture the student all we want about how he should be honest. At most, he won't cheat on his exam or submit a plagiarized note to his law review. But when he gets a job at a firm where duplicitousness is encouraged, or at a prosecutor's office where *Brady*[xviii] violations are overlooked,[xix] the lesson will be mooted. As Professor Boothe-Perry rightly reminds us, to stem certain behaviors, we must look to where the "precedent" is set.[xx] The precedent for a *Brady* violation or a misleading discovery response is not set in a seminar, and it cannot be re-set there.

Now, one could respond, "yes the bad behavior is *set* in practice, but we can *prepare* the attorney to avoid it while in law school." To this I answer, "absolutely, and are you interested in buying a bridge in the outer boroughs?" Believing that we can adequately prepare a law student

to reject the standard behavior at his office immediately upon graduation is a bit like believing that I am qualified to deliver babies because I carried around a sack of sugar in sex education class in high school. A recent J.D. recipient may have the purest of intentions, but when he becomes a junior associate at a firm where all of his superiors demand he adopt dubious billing practices, and all his peers satisfy that demand, he is in no position to act on those pure intentions. In the best-case scenario, he will leave the firm. The same can of course be said for an assistant district attorney at an office where plea negotiations are conducted coercively or under false pretenses, or for any young attorney working for any employer with a culture of bad behavior. Such cultures are shaped by forces far more powerful than that surrounding honor code enforcement: in the case of a law firm, money, and in the case of a government office, re-election or bureaucratic turf-wars.[xxi]

Some might say that the problem is partially that legal education has little to do with legal practice. I would not. Though there has been much belly-aching over the disconnect between the legal academy and the practice of law,[xxii] I support such a disconnect. It is the role of a law school to direct the student to the intellectual underpinnings of the law, the big picture. It is the role of an employer to devote itself to practical skills. The grand tradition of legal academia is an important one in American history. It is responsible for inventing great ideas, producing brilliant and influential lawyers and jurists, and ennobling society. Law schools should not forsake the legacy that made them great for the sake of a shallow, anti-intellectual conveyor belt approach to legal education. The law is the foundation of our society, it is something far bigger than a vocation, and a law school should be something far bigger than a vocational school.

At any rate, it matters not to Professor Boothe-Perry's theory whether law schools become closer to the profession. Even if they do, young lawyers do not shape the culture of the

trade——their bosses do. However one looks at the problem, the fact remains that bad behavior emanates from the top down. Once that behavior starts changing, law schools can certainly play a supporting role in solidifying a new mindset. To begin with law schools, however, is to damn the whole endeavor to failure before it gets off the ground.

Everyone hates a critique without a constructive suggestion. That, unfortunately, is what this response is. The task of reshaping the legal profession to discourage poor behavior is a huge and complicated one. One solution may be one of the roots of the problem itself: the market. As law firms grapple with the worst legal recession in living memory, clients may finally have the nerve to stand up en masse to outrageous billing practices, as some appear to already be doing.[xxiii] Other solutions will no doubt be advanced more fully elsewhere. The crucial point to make here is *where* such solutions should look to be implemented. Professor Boothe-Perry writes that "law schools are the singular institutions with the opportunity, the resources, the institutional capacity, and the leverage to effectuate meaningful training in professionalism." They are not. In fact, they have none of those things. Meaningful change in the practice of law begins with the practice of law.

Just as the practice of law teaches the practice of law, the study of law teaches the study of law. Professor Boothe-Perry's article shows why the legal academy is an excellent incubator of big dreams and why it should remain so, and why her own dream will unfortunately never become a reality.

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[ii] Nicola A. Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 636 (2011).

[iii] *Id.*

[iv] *Id.*

[v] *Id.* at 675.

[vi] *See, e.g.*, Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation can be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 144 (2004) ("[A] number of commentators have criticized the use of the adversarial model . . . because it encourages increased animosity between the parties, exacerbates the underlying conflict, and often results in a polarization of their respective positions.").

[vii] *See, e.g.*, Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 716-17 (1998) (observing that from the perspective of law firm associates "[t]here [is] no reward for cooperative behavior").

[viii] *Compare* Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 113, 124 n.66 (2007) (describing poor law student behavior as including "being unprepared, rude, inappropriately demanding, and offensive") *with* Kevin Hopkins, *The Politics of Misconduct: Rethinking How we Regulate Lawyer-Politicians*, 57 RUTGERS L. REV. 839, 874 (2005) (describing poor attorney behavior as including "evasion, obfuscation, misdirection, loophole lawyering, and a willingness to advance frivolous claims and defenses").

[ix] *See* Erik M. Jensen, *Death by Bluebook*, 9 ROGER WILLIAMS U. L. REV. 207, 208 (2003) (reviewing S. Scott Gaille, THE LAW REVIEW (2002)) (commenting on this practice).

[x] *See, e.g.*, Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 378-79 (1997) (noting the widespread view that attorneys are "increasingly prone to behave as combatants, refusing to extend common courtesies to one another").

[xi] *See, e.g.*, Charles G. Kels, *Free Speech and the Military Recruiter: Reaffirming the Marketplace of Ideas*, 11 NEV. L.J. 92, 95 (2010) (remarking on an example of law schools showing commitment "to their expressive right to choose their own members, so as to speak with one voice as a community of shared values").

[xii] *See generally* David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527 (2000) (examining the careers of attorneys who benefit from the prestige of elite institutions).

[xiii] *See, e.g.*, Kevin J. Worthen, *Discipline: An Academic Dean's Perspective on Dealing with Plagiarism*, 2004 B.Y.U. EDUC. & L.J. 441, 444 (2004) ("A student who submits plagiarized work . . . creates the risk . . . that he or she will receive a benefit . . . solely by creating the mistaken belief that the student has done more work or been more creative than is actually the case.").

[xiv] *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 438 (1992) (observing that a "prosecutor's decision to suppress favorable evidence [is] a perfectly rational, albeit unethical, act").

[xv] Boothe-Perry, *supra* note ii., at 637.

[xvi] *See* Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 40 J. LEGAL EDUC. 236, 236 (1999) ("[M]ost [law] schools . . . offer up a blanket prohibition" against plagiarism").

[xvii] Boothe-Perry, *supra* note ii., at 650.

[xviii] *Brady v. Maryland*, 373 U.S. 83 (1963).

[xix] *See, e.g.*, *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (describing a prosecutor's office that committed repeated *Brady* violations).

[xx] Boothe-Perry, *supra* note ii., at 650.

[xxi] *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 895-903 (1999) (discussing how the culture of law firms is shaped by money); David Barnhizer, *Walking from Sustainability's "Impossible Dream": The Decisionmaking Realities of Business and Government*, 18 GEO. INT'L ENVTL. L. REV. 595, 669 (2006) (noting the "territorial, turf-protecting culture of bureaucracy").

[xxii] *See, e.g.*, Christopher Edley, Jr., *Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School*, 100 CAL. L. REV. 313, 320 (2012) ("Those law school academics who believe that our research, even the theoretical genres, can be professionally valuable have largely failed to build bridges to the realm of practicing lawyers.").

[xxiii] *See, e.g.*, Peter Lattman, *More Partners Leave Dewey & LeBoeuf*, N.Y. TIMES, March 23, 2012.