It is a convention of the public dialogue today that Watergate and attendant scandals have created a crisis of public confidence in the moral integrity of lawyers. Probably this is so. But why should Watergate have had such an effect? Many lawyers did honor to themselves as the affair unfolded, and its eventual outcome revealed the powers of self-correction latent in American legal institutions. More to the point, Watergate was not the American public's first introduction to the duplicities of lawyers; these are among the oldest themes of American humor and folk wisdom. Watergate has a certain uniqueness, of course, because in this affair lawyers at the very top of the federal government engaged in forms of misconduct not merely crude and careless of the law but hostile to the fundamental spirit of constitutional processes. But it can hardly be said that Watergate revealed facts of life about the legal profession of which either lawyers or the American public had been unaware.

Why, then, its shock effect? The reason, I suspect, lies not in the new knowledge Watergate brought but in the old knowledge it made impossible any longer to suppress from consciousness. Watergate brought to the surface a condition of ethical malaise and confusion within the legal profession of such long standing that it can well be called chronic—a condition of which many have been cognizant, and not least the leaders of the legal profession itself. Doubts about the ethics of lawyers, indeed, have gone far deeper than doubts that individual practitioners live up to the rules which the legal profession has accepted as guides for professional conduct. The doubts have focused on the very significance, the practicality, the meaning and coherence of these rules, and, indeed, of any rules that might be substituted in their place.

The history of the adoption of codes of legal ethics in the United

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States suggests the caution with which lawyers have approached the business of formulating such rules.¹ In 1854 Judge George Sharswood published a series of lectures for lawyers under the title An Essay on Professional Ethics.² In 1887, thirty-three years later, the Alabama State Bar Association officially adopted a Code of Ethics based in part on Judge Sharswood's lectures.³ In 1908 the American Bar Association, taking its lead from the Alabama Code, officially adopted thirty-two Canons of Legal Ethics.⁴ Twenty years later, in 1928,⁵ and then again in 1933⁶ and in 1937,⁷ special committees of the A.B.A. ventured the opinion that these Canons needed revision. Seventeen years later, in 1954, a committee created by the American Bar Foundation at the request of the A.B.A. reiterated that judgment.⁸ But it was not until 1964 that the A.B.A., at the request of its President, Lewis Powell, created the Special Committee on Evaluation of Ethical Standards, which carried the task of revision through to completion and recommended a new Code of Professional Responsibility.⁹ That Code became effective for A.B.A. members in 1970 and has now been substantially adopted by forty-nine state bar associations.¹⁰

This is not a record of unseemly haste. It might be said that the legal profession has regarded questions of ethics as among the great eternal questions of mankind, and, because eternal, postponable. In this regard lawyers have not been different from the members of other professions like medicine and scholarship. For example, when the American Association of University Professors was established in 1915, it created two standing committees—Committee A on academic freedom and Committee B on professional ethics and responsibilities. Committee A has been meeting and working hard ever since. Committee B did not meet for a period of thirty-five years ending in 1956. Why this reluctance of the professions to deal formally with problems of professional ethics? Is it simply the desire to enjoy professional privileges and ignore professional responsibil-

¹ See generally H. Drinker, Legal Ethics (1953).
³ Code of Ethics, 118 Ala. xxiii-xxxiv (1899), reprinted in H. Drinker, supra note 1, at 352.
⁴ ABA Canons of Professional Ethics (1908).
⁶ Id.
⁷ Id.
ties? Perhaps, but I suspect there is more. The cause lies not only in bad will but in puzzled intelligence. For there are difficult questions which haunt any effort to frame an ethical code. Is an ethical code something which is better left informal and unwritten? Are the problems that professionals encounter too subtle for fixed rules? Can such rules be formulated if there is no agreement on the basic functions of the profession? Can there be such agreement if the members of the profession disagree, as they have a right to do, on underlying political, social and philosophic issues? It is with questions like these that the formulators of a code of professional ethics must ultimately grapple, and it is not surprising that they have repeatedly found their task more formidable than they had expected.

This, certainly, is what the Special Committee on Evaluation of Ethical Standards, which produced the new *Code of Professional Responsibility*, discovered. It worked for five years before it reached agreement, and it completed its task with a quite different conception of its mission than that with which it began. In the words of its chairman:

A completely changed document was not envisioned by either those who gave the Committee its task or the Committee members themselves. . . . The initial efforts of the Committee were directed toward reorganizing the concepts included in the Canons. . . . The Committee encountered many doubts as to what much of the language meant, which in turn led to detailed analysis of what in fact the duties of a lawyer are and should be. And so our original efforts merely to reorganize and reword the Canons became an extended search for the full meaning of professional responsibility in the context of modern-day society, a search that culminated in the formulation of the Code.11

The new *Code of Professional Responsibility* was produced by a committee that understood the magnitude and difficulty of the task to which it had been assigned. It produced a Code that represents a considerable improvement on the older Canons.

But has it succeeded in spelling out "the full meaning of professional responsibility in the context of modern-day society"?12 It is

impossible in the scope of a brief article to review each of the specific rules and recommendations which compose the Code of Professional Responsibility. I propose instead to focus more broadly on the fundamental intellectual distinction on which the Code is based—the distinction between "ethical considerations" and "disciplinary rules"—and to scrutinize the adequacy of its rationale.

II

The most obvious difference between the new Code and the older Canons of Legal Ethics is that the new Code has a tighter and more logical structure. The thirty-two old Canons have been reduced to nine.\(^\text{13}\) These "are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession."\(^\text{14}\)

The actual impact of these nine canons, however, is spelled out in the "ethical considerations" and "disciplinary rules" which are attached to each of them, and it is this apparatus of "considerations" and "rules" which represents the significant departure in the Code's mode of attack on the problems of legal ethics. The "ethical considerations" are described as "aspirational in character."\(^\text{15}\) They express "objectives" towards which every lawyer should strive, and enunciate principles by which he should be guided when he has moral choices to make. In contrast, the "disciplinary rules" are mandatory. They state "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."\(^\text{16}\)

As Lon Fuller\(^\text{17}\) and Samuel Stumpf\(^\text{18}\) have argued, this distinction between standards of excellence and standards of minimal performance is in many contexts an indispensable one. Among the values which society has an interest in promoting are some which

\(^{13}\) As the Special Committee's Reporter, Professor John F. Sutton, has said, these Canons might have been set at eight, for Canon 3 ("A Lawyer Should Assist in Preventing the Unauthorized Practice of Law") is for practical purposes only the converse of Canon 1 ("A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession") and of Canon 2 ("A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available"). Sutton, The American Bar Association Code of Professional Responsibility: An Introduction, 48 Texas L. Rev. 255, 259 (1970).

\(^{14}\) Preamble and Preliminary Statement, ABA Code of Professional Responsibility (1975).

\(^{15}\) Id. at 1.

\(^{16}\) Id.

\(^{17}\) L. Fuller, The Morality of Law (1964) (distinguishing between the morality of duty and morality of aspiration).

\(^{18}\) S. Stumpf, Morality and the Law (1966) (distinguishing between "legal order" and "moral order").
cannot be made the objects of direct command. To order people to be heroes, for example, or to command them to be charitable or forgiving or dispassionate, is to impose obligations which most people cannot realistically be expected to meet and which can expose them, if a serious effort to enforce such norms is undertaken, to punishing surveillance and tyranny. The law, in concert with other social institutions like the family, school, and church, can provide assistance and encouragement to such values, for example, by giving tax incentives favoring charity. But it can attach direct sanctions to them only at excessive cost. They must be seen as "aspirations," not legal duties. The new Code of Professional Responsibility is based on the belief that a similar distinction between aspirations and minimal duties is useful for the governance of the legal profession itself.

By using this distinction the new Code has made many useful emendations in those rules affecting some of the more technical aspects of legal practice. Two examples must bear the burden of many that could be offered. The older Canons stated that a lawyer should not ask to be excused from counseling an indigent client "for any trivial reason." The new Code states that a lawyer should not ask to be excused "except for compelling reasons." Again, with regard to the question whether a lawyer should testify as a witness for his client, the older Canons held that a lawyer should avoid doing so except when "essential to the ends of Justice." In contrast, the new Code, after reviewing the relevant issues, concludes that "doubts should be resolved in favor of the lawyer testifying and against his continuing or becoming an advocate." In each case, the new Code proposes a somewhat higher standard.

But is it true that, as the chairman of the Special Committee that produced the new Code has said, such changes introduce a "more stringent" test of professional conduct? These higher standards are placed among the "ethical considerations." They ask for a greater spirit of selflessness from the lawyer; but they do not demand it. The new Code in this way avoids a pitfall into which many ethical codes fall. Even the best intentioned of such codes, perhaps especially the best intentioned, often promote moral cynicism by failing to make clear whether they are pointing to ideal

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19 Canon 4, ABA CANONS OF PROFESSIONAL ETHICS (1908).
20 Ethical Consideration 2-29, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1975).
21 Canon 19, ABA CANONS OF PROFESSIONAL ETHICS (1908).
22 Ethical Consideration 5-10, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1975).
23 Wright, supra note 11, at 13.
behavior or to minimally acceptable rules of conduct. If I correctly divine their thinking, the authors of the new Code elected to try to lift lawyers' sights while avoiding the excesses of rigid "dos" and "don'ts," and this was a reasonable course to pursue. But if "more stringent" means raising minimal enforceable standards, the new Code is not generally more stringent than the older Canons. Further, the distinction between "ethical considerations" and "disciplinary rules" contains a number of puzzles not susceptible to resolution in terms of the difference between a morality of aspiration and a morality of minimal duty.

Ethical Consideration 2-21, for example, states, "A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure." Why is this only an "aspiration" and not a mandatory rule? As a layman I cannot imagine any but the most highly exceptional circumstances which would excuse departure from it. Again, Ethical Consideration 4-5 states, "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client . . . ." Admitting that the term "disadvantage" is subject to variable interpretations in concrete cases, I fail to see why this expresses only an objective towards which lawyers should strive. It seems to me to be the statement of a minimal condition without which the trust between lawyer and client would dissolve.

Is it possible that in placing such rules in the more permissive category of "ethical considerations" the authors of the Code had in mind not a distinction between a morality of aspiration and a morality of duty but something rather different—a distinction between an ethic of broad guidelines as against an ethic of rigid imperatives? In making their distinction between "ethical considerations" and "disciplinary rules," the authors of the Code have touched upon the classic jurisprudential problem of determining the proper line between "law" and "morality." On what basis do we distinguish between those areas of human conduct fit for regulation by an apparatus of determinate rules and punitive sanctions and those areas which should be regulated by less rigid and more informal methods? This large issue is buried, unless I am mistaken, in the Code's distinction between "ethical considerations" and "disciplinary rules."

There are at least three reasons for distinguishing between "law" and "morals." One is the reason the Code makes explicit: some values can only be projected as "aspirational." We cannot, for example, look to the comparatively precise rules and attached sanctions of the law to enforce such standards of high morality as "Love
thy neighbor" without risking excessive regimentation and invasions of individual autonomy. If we distinguish between "law" and "morality" on this basis, we look to the law—or, within a professional code, to "disciplinary rules"—only to enforce minimal obligations. As regards the "aspirational," the law—or a professional code—can try to give encouragement, but no more.

A second and independent distinction is also often embedded in the comparison between "law" and "morality." There are domains of conduct—e.g., the use of violence—with regard to which it is relatively easy to formulate rules free from undue vagueness and to expect that there will be few conditions excusing departures from them. At the other extreme, there are domains of conduct—e.g., relations between friends, between parents and children, between professional colleagues—where circumstances vary widely, where qualities like affection, integrity, imagination, sympathy, and judgment are the primary desiderata, and where hard-and-fast rules are likely to be encumbrances. To distinguish between "law" and "morals," or between "disciplinary rules" and "ethical considerations," with this contrast in mind carries implications different from a distinction resting on the contrast between ideal aspirations and minimally decent conduct. It is not because "ethical considerations" aim higher than "disciplinary rules," but because they deal with questions less easily codified, that they are to be treated as different. Lawyers face many issues of a subtle or highly exceptional character which call not for simple "dos" and "don'ts," but for an enlarged and more sensitive consciousness of the variety of values at stake.

The decision of the authors of the Code to place many rules that might otherwise seem minimal in the more fluid category of "ethical considerations" can be explained, I believe, only on these grounds. But the failure of the Code to articulate its rationale here leads to a generic ambiguity, for the distinction between rules that are more fluid and rules that are less so is not a categorical one; even more than the distinction between aspirations and minimal obligations, it is a matter of degree. The point at which we draw the line between an informal and hortatory "morality" on the one side and a system of formal rules and coercive sanctions on the other depends on a pragmatic judgment as to where the weight of the unforeseen and the exceptional is likely to be so heavy as to make formal rules inefficacious. All rules, not only moral rules, have a penumbra of indeterminacy around them. To take the standard illustration, does an ordinance prohibiting vehicles in a public park apply to baby carriages? Further, there are always excusing conditions in which it
is patently unfair to apply a given rule, and the list of these excusing conditions cannot be fully set out in advance.

Yet just as these considerations do not justify turning homicide laws or speeding laws into mere statements of aspiration, they do not adequately rationalize in all instances the merely "aspirational" character ascribed to the Code's ethical considerations. Ethical Consideration 7-16, for example, states that when a lawyer appears before a legislative body, either in connection with legislation or in an investigatory or impeachment proceeding, "he should identify himself and his client, if identity of his client is not privileged." Ethical Consideration 4-6 states that "a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets." I presume that such rules are not made "disciplinary rules" because exceptions and excuses can be imagined which limit their applicability. But if they were treated as disciplinary rules, it would be possible over time to build up an analogue to case law which would gradually fill out and make more precise the obligations they do and do not impose.

Why was this alternative not chosen? So far as I can guess, it is because still a third reason for distinguishing between "law" and "morality" is implicit in the Code. We sometimes distinguish between the two not on the ground either of the higher aspirations or greater fluidity of "morality" but on the ground of its comparative insusceptibility to reasonable or just modes of firm enforcement. Accordingly, the sanctions we wish to use to enforce morality must depend more on the hortatory and persuasive than on threats to life, liberty, or property. The problem of censorship is an example. The case against censorship can hardly be that it is unrealistic to try to prohibit the publication of subversive or pornographic materials. These have been suppressed fairly effectively in many societies. Nor does the case rest only on the vagueness of the criteria defining the subversive or the pornographic. If a lawmaker is willing to paint with a big enough brush and doesn't particularly care about the good that is sacrificed with the bad, he can be reasonably clear about what he means to forbid. But the case against censorship lies precisely in this tyranny of the big brush. To trust in censorship you have to be blind or indifferent to the probable stupidities, malice, and inflexibility with which the censorship laws will be enforced. In brief, a major reason for leaving certain matters to moral suasion is that we think they can be regulated by the blunt instruments of the law only at great risk to liberty, fairness, and other values.

The formulators of the new Code of Professional Responsibility
did not explicitly make this point. But they were influenced, I suspect, by a feeling that the disciplinary procedures available to the bar are not sufficiently trustworthy and do not possess the necessary general credibility and legitimacy to bear a heavy burden of enforcement duties. In consequence, they leaned hard on their category of "ethical considerations." They may well have made the prudent choice. The ideological and political differences in the nation at large have grown more acute, and the currents of distrust affecting all authority-laden institutions are considerable. The legal profession has not been, and cannot be, insulated from its larger environment. Under the circumstances, a decision to adopt only a minimum baggage of "disciplinary rules" is intelligible.

Nevertheless, the logic of the decision needs to be spelled out. To opt for exhortation as against definite sanctions requires a judgment in which the harm done by potentially increased violation of norms is weighed against the dangers implicit in close regulation and the use of an organized enforcement machinery. And this judgment depends, in turn, not only on an estimate of the probabilities of given risks but on a judgment of the relative importance of the social values involved in one alternative as against the other. It was once considered better, for example, to bet on the good will of employers and the benefits of free individual enterprise than to bet on closer regulation of the conditions of labor. The social judgment as to the wisdom of this bet has changed. In relation to the behavior of lawyers, the Code of Professional Responsibility makes its bet on lawyers' judgment and good will. Is this bet the wise one? Many in and out of the legal profession will disagree. If it is to be adequately defended, the Code requires a general discussion of the function of lawyers in society and of the relative weight to be ascribed to different social values. In the absence of such a discussion, many of the specific judgments made in the Code may seem, if not arbitrary, at least suspect.

III

In 1934, Justice Harlan Fiske Stone, in his address on The Public Influence of the Bar, said that the legal profession's "canons of ethics for the most part are generalizations designed for an earlier era." The need, he said, was to "pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental considerations of the way in which our professional activities affect the welfare of society as a
whole."

"The welfare of society as a whole" is a sweeping term. Can a profession composed of people who hold radically different political and moral outlooks come to an agreement about its meaning? Probably not, if what is sought is an official doctrine to which all must swear fealty. But the function of a professional code, as the authors of the new Code recognized implicitly, is not to provide practitioners with textbook maxims. It is to sensitize them to the scope, depth and complexity of the commitments they have undertaken in entering the profession.

The value of a code, therefore, lies less in its specific "oughts" and "musts" than in its utility as a catalyst for a continuing discourse on the profession's raison d'être. From this point of view the most conspicuous shortcoming of the new Code is its lack of a catalytic general discussion of the relation of the practice of law to "the welfare of society as a whole." Its authors have quoted Justice Stone's words approvingly, but they have not taken the cue. The new Code, although it is more sensitive to moral dilemmas and more ambitious in its expectations than the old Canons, is offered to the legal profession and the public in a form detached from an explicit consideration of the law's major functions in contemporary society and of the general context in which ethical problems arise for modern lawyers. If there had been such a discussion, to what problems might it have been addressed? I can merely suggest a few.

(1) Lawyers are professionals, and share with other professionals modes of conduct that clash with normal rules of everyday morality. One of the reasons for the widely-held view that morality is in a peculiar state of decline today and that a dangerous "relativism" has taken over is simply the proliferation in our society of specialized professions, like the law, which have distinctive functions and therefore distinctive ethical norms. What is seen as the "decline" of ethics is in part the emergence of multiple ethical systems, attuned to the performance of tasks more intricate and impersonal than those to which the great sweeping principles of traditional ethical codes apply. But when the specialized codes depart too frequently and radically from commonplace notions of acceptable behavior, demoralizing tensions are created within individuals and in society at large. A consequence is a disposition to look upon both professional and general moral codes with indifference or contempt.

Is there a remedy? An essential element in any remedy, though

of course not a sufficient one, is a process of continuing philosophic criticism and interpretation conducted within the legal profession and between it and the outside world. The purpose of such a process, on one side, would be to explain the legitimate differences that exist between professional and popular codes, and, on the other, to correct professional or popular codes when the clash between them is indefensible. What I describe, of course, is simply moral philosophy in one of its classic forms—reflection on moral norms and the critical reconstruction of them to restore their coherence. The present *Code of Professional Responsibility*, because it is not embedded in an explicit examination of the issues raised by the differences between professional and general ethical codes, seems incomplete; and it leaves untouched one major cause for the public distrust of lawyers and for lawyers' distrust of themselves.

(2) Over and above the specialized roles played by members of the professions, another circumstance also invites public suspicion. In the United States the professions have been surrounded by a democratic and egalitarian ethos. During the nineteenth century many states in the Union refused to license doctors and lawyers. The rationale was simple enough: by what right did lawyers or doctors claim to know something that other people did not know? Was their claim to special knowledge not simply a way of shutting off competition and exercising monopolistic control of the market? In fact, when the American Medical Association was formed in 1847, it adopted a code of ethics as part of its campaign for greater public respect for trained physicians.25

Much of the new *Code* for lawyers can be understood in a similar context. Of its nine canons, five are directly related to the defense of the profession against competitors and detractors and to the establishment of its claim to be accorded special rights and powers.26 Indeed, so much of the *Code* is devoted to matters of this sort

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25 The medical profession in the United States was faced with a crisis in public confidence in 1847. Medical regulations in most states had been repealed with the result that uneducated practitioners and rank imposters had begun to compete with regular physicians for patients. Exponents of the Code of Ethics hoped that the public would cooperate with doctors in establishing standards for medical practice which would prevent the worst abuses of the doctor-patient relationship and re-establish public respect for the medical profession.


that a malicious critic might question whether the Code is not really more concerned with the protection of a guild's privileges than with the advancement of the public interest. The indictment, I believe, is unjustified. But the indictment is invited because the Code says little or nothing, except by implication, about two basic issues: one, the special ways in which values like liberty and impartial justice require distinctive institutions manned by people with distinctive professional obligations; two, the dangers of converting this special role into a kind of professional imperialism.

An overhanging problem for lawyers today is whether their methods of dealing with human problems are invariably the appropriate ones. We have become a litigious society, attempting to settle more and more of our problems in the courts, and using adversary methods even in settings like universities where collegiality has traditionally been thought to be a primary desideratum. But surely it is a professional conceit, if not a kind of magical thinking, to suppose that all, or most, social problems can be compressed into the forms of an adversary system in which there are only two sides, one of which has to be right. What services can lawyers perform as negotiators, arbitrators, bargainers, compromisers? What services can they perform by stepping aside and allowing the better informed to make the fundamental decisions? For example, why is fault in malpractice decided by judges and juries, and not by doctors? Beyond this, do lawyers have an obligation to explore more systematically the social problems that might better be solved by leaving them to the political process? Further, what materials and questions ought to be introduced into law schools to sensitize future lawyers to the limits as well as the strengths of the law as a system of social control? So long as such issues are not conspicuous in the legal profession's examination of itself, its ethical preoccupations are

Legal System." Canon 9: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

27 There are two related characteristics of the law that contribute to making its output of "justice" unpalatable. One is the fact that the legal system tends to have written into it the assumption that in any dispute one side is right and the other side is wrong. The adversary system is built on this assumption and helps to reinforce it; and the court is ordinarily empowered only to decide a winner and a loser—not to find a way to help the loser adjust to his loss, or to avoid in the future the action that led to his loss, or to alter the conditions that led to the loser's behaving as he did.

The second difficulty is related to this. An assumption implicit in the operation of the law is that once rights and obligations have been authoritatively stated, individuals have only one mode of adaptation available to them: acceptance. The assumption, in other words, is that learning is the only response to a deprivation.

likely to seem distorted and somewhat provincial.

(3) Systematic examination is needed as well of the implications for legal ethics of the greatly altered setting in which lawyers now practice their profession. The preoccupations of the old Canons still lie heavy in the new Code, and they are the preoccupations of a profession composed overwhelmingly of individual practitioners serving individual clients. Only about a third of all lawyers today, however, are individual practitioners; about twenty-five percent work for government or for private corporations; and the remainder, for the most part, practice law in collective settings, working for large firms and serving clients who are not individuals but legally created entities. What are the responsibilities of individuals in such settings? What are the ethical issues, for example, when lawyers serve not as counselors to a corporation but as involved participants in its daily activities? What view of their responsibilities should lawyers hold, to take another example, when more and more of their work is devoted not to guiding individuals through a network of essentially settled rules but to changing the law to fit their client’s or employing organization’s needs? These are the kinds of issues, I suspect, that bear heavily on the consciences of young lawyers today and lead to their disaffection from their chosen profession. The obligations of the lawyer have become elusive in an environment in which rules from a simpler time still dominate ethical reflection.

This is a mere checklist of important problems, and an incomplete one, but it will suggest what I venture to think is a necessary supplement to the promulgation of a detailed Code. It is the emergence of a body of critical discourse on basic problems affecting the sense of purpose of the legal profession. The Code of Professional Responsibility is a useful point of departure for such a discussion, but its principal potential utility will be lost if the discussion remains at the starting line it has defined. For in the legal profession, as in most other domains of life, the elevation of standards comes in the main from neither exhortation nor codification. It comes from renewed attention to first principles, from a freshened awareness of the changed problems people confront, and from a sustained debate about the best ways to deal with them.
