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Br'er Rabbit Professionalism: A Homily on Moral Heroes and Lawyerly Mores

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BR'ER RABBIT PROFESSIONALISM:
A HOMILY ON MORAL HEROES
AND LAWYERLY MORES

ROB ATKINSON*

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I. INVOCATION AND LECTIO

The text of my professionalism homily comes from the Book of Br'er Rabbit.¹ As some of you may know, Br'er Rabbit is the principal character in a vast body of African folktales. They were collected in canonical form late in the nineteenth century by Joel Chandler Harris in the hill country of central Georgia. My daddy grew up there, and my brother and sister and I were raised on Br'er Rabbit stories. Our particular favorite was *Br'er Rabbit and the Tar Baby*, my text for today.

A. *The Gospel According to Br'er Rabbit*

To appreciate the story, which I'll tell you in a moment, you have to know a little bit about Br'er Rabbit. First of all, Br'er Rabbit is not to be confused with the Easter Bunny. Br'er Rabbit is of much older vintage and much stronger proof. Second, the original Br'er Rabbit stories are not to be confused with the highly adulterated Walt Disney version. Contrary to what Disney's truly egregious *Song of the South*² may imply, Br'er Rabbit is no Mickey Mouse.³

In fact, Br'er Rabbit is almost exactly the opposite of all that "Mickey Mouse" has come to mean. By contrast, Br'er Rabbit is very much like

* Professor of Law, Florida State University. B.A., Washington and Lee University, 1979; J.D., Yale University, 1982. I appreciate the opportunity afforded me by Dean Donald J. Weidner and J. Marion Moorman, respectively, to present an earlier version of this paper as part of the College of Law's annual Supreme Court Day program on April 3, 1997, and as part of the Florida Public Defender Continuing Legal Education Program on May 16, 1997. Perhaps this is also the place to re-thank my former colleague, Jeff Stempel, for including me in his symposium on legal professionalism, of which, I should emphasize, he was the sole inspiration and organizer.

1. JULIUS LESTER, *THE TALES OF UNCLE REMUS: THE ADVENTURES OF BR'ER RABBIT* (1987).

2. *SONG OF THE SOUTH* (DISNEY 1946).

3. Whether Uncle Remus, the slave narrator Harris invented for the stories, is an "Uncle Tom" is more of an open question. See LESTER, *supra* note 1, at xiv ("Uncle Remus became a stereotype, and therefore negative, not because of inaccuracies in Harris's characterization, but because he was used as a symbol of slavery and a retrospective justification for it."). See also 2 *THE NORTON ANTHOLOGY OF AMERICAN LITERATURE* 426 (Nina Baym ed., 5th ed. 1998) ("[I]t is easy to recognize Brer Rabbit and Brer Fox in such animated cartoon antagonists as Bugs Bunny and Elmer Fudd.").

Bugs Bunny. Pushed too far, Br'er Rabbit is bound to declare, with Bugs, "Of course, you know, this means war." Like Bugs, Br'er Rabbit had his enemies. He was particularly offensive to Br'er Fox and Br'er Bear.

The way they saw it, he was insufficiently deferential to their size and status. He saw things differently: they wanted to eat him. In that respect, they were a lot like Bugs's nemesis, Elmer Fudd. But unlike Elmer, Br'er Fox and Br'er Bear were pretty clever fellows themselves—so clever, in fact, that they came up with an almost foolproof trap for Br'er Rabbit. That is where our story begins.

B. Br'er Rabbit and the Tar Baby

Br'er Fox and Br'er Bear made a Tar Baby, a kind of asphalt effigy, and placed it along a path Br'er Rabbit frequently used. Sure enough, early the next morning Br'er Rabbit came bouncing down the path, saw the Tar Baby, tipped his hat, and said "Hey, how are you?" To which, of course, the Tar Baby said nothing. So Br'er Rabbit stepped closer and raised his voice: "I said 'Hey, how are you?'"

To make a long story somewhat shorter, Br'er Rabbit decides to teach the Tar Baby some manners; he socks him in the face. His fist, of course, gets stuck. The more Br'er Rabbit struggles to extricate himself, the more he gets entangled in the Tar Baby, until he can barely move. At that point, Br'er Fox and Br'er Bear emerge from the bushes, grab Br'er Rabbit, and begin to make plans for killing and eating him. They tell him they're going to skin him alive and roast him over hickory coals. They're feeling thoroughly triumphant; just to be sporting they offer him a last request.

Br'er Rabbit thinks it over. As he thinks it over, he says he doesn't much look forward to being skinned alive, and he'd really rather not be roasted, and he certainly doesn't want to be eaten. But none of that bothers him nearly so much as having his last remains thrown into the briar patch. Nothing, he shudders, could be worse than that. Except one thing, one truly unthinkable atrocity: being thrown into the briar patch *alive*.

You can pretty well guess—if you haven't already—what happened next.

C. Br'er Rabbit and the Professionalism Crusade

But what does Br'er Rabbit's run-in with the Tar Baby tell us about lawyer professionalism? The first point is that taking a crack at defining "professionalism" is a lot like taking a swing at the Tar Baby. I'm not going to take one now, mostly because I've done it before,⁴ and it's sticky business. To keep things tidy—and to keep from getting bogged down—let me tell you how the term has come to be used in what I call the Professionalism Crusade. In that context, it refers to lawyerly social obligation, if any, that lies beyond what the letter of the law strictly requires. These are aspirational, as opposed to mandatory, standards of

4. See Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) [hereinafter Atkinson, *Dissenter's Commentary*].

lawyerly conduct⁵—the kind of conduct that good lawyers expect of themselves and their peers, even though bad lawyers can't be formally sanctioned for failing to measure up.

It is thoroughly misguided to deny that there is any such thing—any norms that constrain lawyerly conduct more restrictively than the law. I'm emphatically not of that opinion; I firmly believe in lawyer professionalism (properly understood).⁶ But the really dangerous idea is not that there is no professionalism in this sense, nothing binding on lawyers beyond the letter of the law. The really dangerous idea is that there is one true way to be a good lawyer, and that it is a straight and narrow way. Unfortunately, that idea still enjoys an alarming popularity among my fellow professionalism fans. Using Br'er Rabbit as my role model, I want to show you why that idea is not only wrong, but dangerously wrong.

II. HOMILY: THE TROUBLED TRINITY OF PROFESSIONALISM TENETS

I want to discuss three related failings of the current Professionalism Crusade—a troubled trinity, if you will. First, I want to show that the Crusade seriously overstates the role of lawyerly candor, particularly in its categorical condemnation of deception. Second, I want to show that the Crusade badly distorts the nature of civility, principally by curtailing the expression of moral outrage. Finally, I want to suggest that the Crusade tends to give far too shallow an account of its third fundamental tenet: the law as a learned profession. On each of these three points—the proper scope of candor, the true nature of civility, and the necessary depth of professional learning—Br'er Rabbit has much to teach the professionalism movement.

A. *The Trouble with Categorical Candor*

No one, without profound self-contradiction, could candidly condemn candor.⁷ Nor would I want to. My point is not that candor is always a bad thing; of course not. But the Professionalism Crusade makes the opposite error. It insists that candor is always a good thing, the appropriate tack under all conditions. To see why the Crusade's categorical approach is wrong,⁸ we need to assess Br'er Rabbit's conduct under current standards of professionalism.

5. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1969) (describing the Code's tripartite division into canons, "statements of axiomatic norms," ethical considerations, "aspirational in character," and disciplinary rules, "mandatory in character"); see also LON FULLER, MORALITY OF LAW 3-9 (rev. ed. 1969) (distinguishing morality of duty from morality of aspiration).

6. For more on my understanding, see Atkinson, *Dissenter's Commentary*, *supra* note 4 and Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism from The Remains of the Day*, 105 YALE L. J. 177 (1995).

7. Technically, to attempt to do so would produce a "Russell paradox," the most famous brief example of which comes from the book of *Titus* 1:12-13—"Cretans are always liars"—quoting a prophet from Crete.

8. On the general problem of categorical thinking in professional discourse, of which this is but a particular, though particularly important, instance, see WILLIAM SIMON, *THE PRACTICE*

The Florida Bar has been generous in providing us with these. Every law student in Florida receives, bound with the Florida Bar Rules, a document called *Ideals and Goals of Professionalism* and another called *Guidelines for Professional Conduct*. In both documents, and under the heading of "Honesty and Candor" in the former, there is this: "The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone."⁹

Br'er Rabbit, of course, didn't just exaggerate his loathing of the briar patch; he made it up entirely. He didn't merely mislead Br'er Fox and Br'er Bear by silence and inaction; he flagrantly lied. More precisely, he contrived to trick them, and he succeeded.

In the emerging orthodoxy of professionalism, trickiness is bad per se. At a recent ABA-sponsored conference on teaching professionalism,¹⁰ a noted expert—an expert who had recently conducted a professionalism program for the Florida Bar—bemoaned a public survey about lawyers. In that survey, the vast majority of respondents described lawyers as "tricky." This seemed to strike the expert as doubly bad: He took it to mean that most people think of lawyers as tricky, and he took that to be part of the public's understandably low opinion of lawyers.

He obviously had in mind standards like the one I quoted above. Under such standards, trickery is bad, and being good at tricking is a character flaw. Under Br'er Rabbit's standard, things are more complicated: Trickery is not all bad, though not all good, either; more specifically, tricking the bad in a good cause is good, and tricking the good in a bad cause is bad. On the one hand, then, you have the categorical "trickery is always bad" version of professionalism. On the other hand, you have Br'er Rabbit's more subtle "trickery is sometimes good" tradition.

That latter tradition, I need to show you, is not just an odd or idiosyncratic or comic tradition; it is very close to the core of Western culture, or at least one strand of the Western ethical tradition. Br'er Rabbit should be very comfortable—indeed, very welcome—among us.

As I sat in the conference hall in Chicago, my first reaction to the professionalism expert's trickery survey was to think of the Revolutionary War hero Francis Marion. He was the commander of irregular, guerilla forces in South Carolina in the 1780s. His enemies, lordly commanders of the king's armies, intensely disliked his tactics. He didn't play by their aristocratic rules. He caught them napping, he cut their supply lines, and he wouldn't stand and fight like a gentleman on the field of honor. He struck at night and took refuge in the swamp. With a small, ill-equipped, and decidedly unprofessional army, he whipped the English regulars repeatedly. He was, in a word, tricky; they damned him as

OF JUSTICE: A THEORY OF LEGAL ETHICS 9 (1998) and William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

9. FLA. IDEALS AND GOALS OF PROFESSIONALISM § 3 (1999); FLA. GUIDELINES FOR PROFESSIONAL CONDUCT M.20 (1999).

10. Symposium, *Teaching and Learning Professionalism* (Chicago, Ill., October 2-4, 1996) (sponsored by the ABA Section of Legal Education and Admissions to the Bar Professionalism Committee and the Standing Committee on Professionalism and Lawyer Competence of the ABA Center for Professional Responsibility).

“the Swamp Fox.”¹¹ The nickname stuck, but not quite with the negative connotations they intended.¹²

Think, more generally, of Homer, the education of Hellas. Odysseus, who figures prominently in both the *Iliad* and the *Odyssey*, exemplified Br'er Rabbit values, in particular the value of trickery. To quote the ever-understated *Encyclopedia Britannica*, “Odysseus had many opportunities of displaying his talent for ruses and deceptions.” The Trojan Horse, to name only the most famous, was his idea.¹³

Think, too, of that other great source of the Western moral tradition, the literature of ancient Israel, the Hebrew Bible. The patriarch Jacob, to take but one example, was a notorious trickster. Jacob, you remember, was the son of Isaac and Rebecca, the grandson of Abraham and Sarah. Jacob was also known as Israel;¹⁴ it is his name that has become synonymous with the Jewish people and the Jewish nation. But Jacob was Isaac's second son, the younger brother of Esau; as such, he stood to inherit little or nothing.¹⁵ Fortunately for him, Esau was a bit of a block-head;¹⁶ Jacob tricked him out of both his inheritance¹⁷ and his father's blessing.¹⁸ And Jacob was aided and abetted in his trickery by his mother, the matriarch Rebecca.¹⁹

Remember also Joshua, the handpicked successor of Moses himself, who led the children of Israel into the Promised Land. The Biblical book that bears his name is filled with tricky espionage, tactical feints, and treacherous betrayals, invariably orchestrated or approved by Joshua himself. Accounts of his deceptive exploits, like those of Odysseus, can be multiplied almost at will.²⁰

In the anthology that Christians call the New Testament there is a second Joshua: “Joshua” is the Hebrew equivalent of “Jesus.”²¹ Jesus, no small contributor to the Western ethical tradition, was a trickster, too. The Gospels abound with verbal snares laid for him like tar babies by the

11. 7 THE NEW ENCYCLOPEDIA BRITANNICA 852-53 (Ready Reference ed. 1993).

12. Even “Honest Abe” studied Weems's *The Life of Francis Marion*. See CARL SANDBURG, 1 ABRAHAM LINCOLN: THE PRAIRIE YEARS 73 (1926); see also Amy Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U.L. REV. 657, 696 (1994) (noting that Rambo, the legal establishment's eponym of unprofessional conduct, is in fact a working-class embodiment of All-American values).

13. See 8 THE NEW ENCYCLOPEDIA BRITANNICA 878 (Ready Reference ed. 1993); see also HOMER, THE ODYSSEY 61 (Robert Fitzgerald trans., Farrar, Straus & Giroux 1998) (n.d.) (describing the ruse of the Trojan Horse).

14. For the account of how he won this latter name in a wrestling bout with an angel, see *Genesis* 32:22-30 (Revised Standard Version).

15. See *Genesis* 25:24-26.

16. See *Genesis* 25:27.

17. See *Genesis* 25:29-34.

18. See *Genesis* 27.

19. Jacob's wife, the matriarch Rachel, was an equally cool hand at active deception. See *Genesis* 31:17-35 (recounting how Rachel absconded with her father's household gods and concealed them in her own tent).

20. See, e.g., *Joshua* 2:4-7 (recounting Rahab the Harlot's lie about the location of Israelite spies she had hidden in her house); *Joshua* 8:3-29 (recounting Joshua's feigned retreat before the city of Ai to draw its defenders into an ambush).

21. See 1 JOHN P. MEIER, A MARGINAL JEW: RETHINKING THE HISTORICAL JESUS 205-08 (1991) (explaining the Hebrew and Aramaic origins of the name “Jesus” and discussing the popularity of such names in the first century as reflections of Jewish nationalism and religious identity with heroes and patriarchs from Israel's past).

lawyers of his day, the scribes and Pharisees.²² Like Br'er Fox and Br'er Bear, in the words of the Gospel of Matthew, "the Pharisees went and took counsel how to entangle him in his talk."²³ Time after time, Jesus lured them into their own traps and sprang them at their expense.²⁴

Jesus said to his disciples, "I send you out as sheep in the midst of wolves." Accordingly, he instructed them to be "innocent as doves." But he also advised them to be "wise as serpents."²⁵ "Now the serpent," the Book of Genesis warns, "was more subtle than any other wild creature . . ."²⁶ The serpent's trickery, according to the most ancient of Hebrew myths, led to the ultimate human calamity, the loss of paradise. How, then, could the prophet Joshua ben Joseph, Jesus, the founder of the second of the West's three great monotheistic religions, regainer of the Christian Paradise, urge the serpent's ways upon his disciples? It is no blasphemy—though it is a bit of an anachronism—to say that Jesus understood Br'er Rabbit values. Remember: Tricking the good in a bad cause is bad, perhaps even diabolical, but tricking the bad in a good cause is good, maybe even messianic.

Professionalism Crusaders might object at this point: "What's all this got to do with lawyers? Even if ancient heroes, military and religious, sometimes admirably resorted to trickery, surely modern lawyers should never stoop so low." Let me give you three examples to the contrary, one fictitious, the other two factual. First, take Atticus Finch, the hero of *To Kill a Mockingbird*. Atticus is virtually everybody's favorite lawyer—though not mine.²⁷ He is the poster-boy of the Professionalism Crusade; you can scarcely read a Bar President's monthly column without coming across another tribute to Atticus. Among the sorry host of red-neck and racist Southerners, Atticus alone stands out as pure and good, particularly in his defense of a black man, Tom Robinson, who was falsely accused of raping a white woman. Atticus, surely, would never stoop to deception anywhere, least of all in a court of law.

But consider this incident in the trial of Tom Robinson. It is Atticus's cross-examination of Robert E. Lee Ewell, the alleged rape victim's fa-

22. See, e.g., *Matthew* 12:10 ("And behold, there was a man with a withered hand. And they [the Pharisees] asked him, 'Is it lawful to heal on the sabbath?' so that they might accuse him."); *Matthew* 16:1 ("And the Pharisees and Sadducees came, and to test him they asked him to show them a sign from heaven."); *Matthew* 19:3 ("And Pharisees came up to him and tested him by asking, 'Is it lawful to divorce one's wife for any cause?'); *Luke* 10:25 ("And behold, a lawyer stood up to put him to the test, saying, 'Teacher, what shall I do to inherit eternal life?'); *Matthew* 12:2 ("But when the Pharisees saw it, they said to him, 'Look, your disciples are doing what it is not lawful to do on the sabbath.'"); *Matthew* 15:1-2 ("Then Pharisees and scribes came to Jesus from Jerusalem and said, 'Why do your disciples transgress the traditions of the elders?'").

23. *Matthew* 22:15.

24. See, e.g., *Matthew* 21:23-27; *Matthew* 22:15-46. According to this account, Jesus finally dispelled his interrogators by turning the tables on them with a riddle that could only be answered by blasphemy on the one hand or unintelligibility on the other. See *id.*

25. *Matthew* 10:16; see also *Luke* 10:3.

26. *Genesis* 3:1.

27. See Rob Atkinson, *Liberating Lawyers: Diverging Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 DUKE L.J. (forthcoming 2000) (arguing for Faulkner's Gavin Stevens over Harper Lee's Atticus Finch as a model of lawyer professionalism).

ther. She and he were the only complaining witnesses against Tom Robinson. Here is the scene as Atticus's daughter Scout sees it:

The little man [Bob Ewell] seemed to have forgotten his previous humiliation from the bench. It was becoming evident that he thought Atticus an easy match. He seemed to grow ruddy again; his chest swelled, and once more he was a red little rooster. I thought he'd burst his shirt at Atticus's next question:

"Mr. Ewell, can you read and write?"

....

"I most positively can."

"Will you write your name and show us?"

"I most positively will. How do you think I sign my relief checks?"

Mr. Ewell was endearing himself to his fellow citizens. The whispers and chuckles below us probably had to do with what a card he was.

....

Mr. Ewell wrote on the back of the envelope and looked up complacently to see Judge Taylor staring at him

....

"What's so interestin'?" he asked.

"You're left-handed, Mr. Ewell," said Judge Taylor.

Mr. Ewell turned angrily to the judge and said he didn't see what his being left-handed had to do with it, that he was a Christ-fearing man and Atticus Finch was taking advantage of him. *Tricking lawyers like Atticus Finch took advantage of him all the time with their tricking ways.*²⁸

Atticus tricked Bob Ewell into revealing that he was left-handed. Then Atticus showed that the bruises on Ewell's daughter had to have been made by someone with a strong left hand, and that the accused rapist's left hand was withered. Thus Atticus tricked Ewell into a virtual admission of guilt, an admission that Atticus might never have gotten by less guileful means. Bob Ewell was a liar, a perjurer, and a child molester; he was soon to attempt the murder of Atticus's children. If this Bob Ewell had answered the professionalism expert's questionnaire, he would happily have joined the majority in reporting that lawyers are

28. HARPER LEE, *TO KILL A MOCKINGBIRD* 179-80 (Popular Library 1974) (1960) (emphasis added).

tricky. Doubtlessly he would also endorse a ban on deception in every form, for good causes or for bad.

By the standards of the Professionalism Crusade, what Atticus did was wrong, or at least highly suspect, for the very reason that Bob Ewell cited—it was tricky. By Br'er Rabbit's standard, on the other hand, it was exactly what a good lawyer should do: Trick the bad, when necessary to help the good.

The second tricky lawyer example I want to give you is factual. It is a story that John Hart Ely tells his students at Stanford Law School, where he himself was once the dean.²⁹ According to Ely, in his days as criminal defense counsel, one of his clients ill-advisedly took the stand and was taking a beating on cross-examination. For a while, Ely tried to rescue his client with admittedly dubious objections to the prosecutor's questions. The judge warned Ely to watch it. At his wits' end, Ely intentionally knocked a glass water-pitcher off his counsel table and onto the floor. The pitcher shattered and finally disrupted the damaging line of questions. The judge promptly slapped Ely with a contempt citation; Ely still wears that citation as a badge of honor before his students.

Both the *Ideals and Goals of Professionalism* and the *Guidelines for Professional Conduct* condemn such conduct categorically. In identical terms, they declare: "A lawyer should abstain from conduct calculated to detract [sic] or divert the fact-finder's attention from the relevant facts."³⁰

I'm not entirely sure what to make of Dean Ely's case. But I think Br'er Rabbit would approve of Ely's ruse on the facts as I've given them. If we could add that Ely was convinced of his client's innocence, I'm absolutely sure Br'er Rabbit would congratulate him. And we have good reason to think he would be joined in that congratulation by the prophet Jesus and the patriarch Jacob.

The final tricky-lawyer example I want to give you is not only factual, but also local. One of my colleagues—someone I'm proud to say is not just my mentor, but also my friend—was the dean who desegregated the University of Mississippi School of Law. He didn't come from up North, and he didn't get his degree from an Ivy League college or law school. He was born in Pearl River County, Mississippi; he went to Pearl River College and the University of Mississippi School of Law. But he read every word William Faulkner ever wrote, and he has often been in the briar patch with Br'er Rabbit.³¹

I don't know the full story of the integration of Ole Miss's law school; ³² it's not in the nature of Br'er Rabbit professionalism to reveal too much too soon. But we know this much. When the walls of segregation

29. I have the story from my friend and colleague Mark Seidenfeld, Stanford Law School, Class of 1983.

30. See FLA. IDEALS AND GOALS OF PROFESSIONALISM § 2.14 (1999); FLA. GUIDELINES FOR PROFESSIONAL CONDUCT M.19 (1999).

31. See NADINE COHODAS, THE BAND PLAYED DIXIE: RACE AND THE LIBERAL CONSCIENCE AT OLE MISS 118 (1997) (describing Joshua M. Morse, III's approach to Ford Foundation officials, who ultimately gave him nearly \$500,000 in grants, as "candid if you agreed with him, condescending if you did not").

32. See *id.* at 118-27 (providing a useful and highly favorable brief account).

came down there, they came down, like the walls of Joshua's Jericho, because of an inside job.³³ And because of that inside job, fewer lives were blighted, and none were lost. It's no accident that Mississippi's fifth-columnist dean was named both for the Israelite spy who scouted out Canaan under Moses and for the Swamp Fox who harried the English in Carolina with LaFayette: Joshua Marion Morse.³⁴

B. *The Trouble with Pusillanimous Civility*

There is a second aspect of Br'er Rabbit's conduct I want to discuss. This has to do not with trickiness, but with civility. Civility is very high in the Professionalism Crusade's constellation of values, as it should be. But the Crusade's view of civility is narrow to the point of tunnel vision. With Br'er Rabbit as my rabbi, I want to recommend a broader perspective.

Let me quote again from Florida's professionalism standards: "A lawyer should treat all persons with courtesy and respect and at all times abstain from rude, disruptive and disrespectful behavior . . . even when confronted with rude, disruptive and disrespectful behavior."³⁵

This is civility à la Al Gore; this is George Bush when he's not doing his Skull-and-Bones skullduggery, when he's being the proper Andover-and-Yale educated son of Senator Prescott Bush, "our esteemed colleague from the great State of Connecticut." This is not courtesy, properly understood; it is pseudo-courtesy, Senatorial courtesy. It's pompous, and it's slightly preposterous. It's part and parcel of Mickey Mouse professionalism; Br'er Rabbit would have no truck with this.

If you detect the stale scent of Anglophilia here, you're barking up the right tree. If the Professionalism Crusade were a formal religion, it would be affiliated with the Church of England, and former Chief Justice Warren Burger would be its self-appointed arch-bishop. In his original pontification, back in 1971, Burger described English practice as "a model of the disciplined, calm civility that is essential to a trial," and went on to say: "Today English Barristers are the most tightly regulated and disciplined in the world and nowhere else is there more zealous advocacy."³⁶ If he and his ilk had their way, we'd all be wearing horsehair wigs (and apparently celebrating something other than America's revolutionary tradition

This silly, Piccadilly Circus civility would be profoundly funny if powerful people didn't take it very seriously. By this standard, Br'er Rabbit was censurably uncivil to the Tar Baby; in direct contravention of the *Guidelines for Professional Conduct*, when his initial civility wasn't reciprocated, he took a different tack. When the Tar Baby failed to return

33. See *id.* at 118 ("His [Joshua Morse's] credentials suggested that he was a safe choice. . . . But when he became dean, Morse surprised his supporters."); see also *A New Dean at Ole Miss*, TIME, July 19, 1969, at 53 (discussing the "new mood at Ole Miss"); J. Kenneth Vinson, *Mississippi Signs of Life, the Lawyers of Ole Miss*, NATION, June 23, 1969, at 791-93.

34. A final example, even closer to home, would be the founding of the FSU College of Law.

35. FLA. IDEALS AND GOALS OF PROFESSIONALISM § 5 (1999).

36. Warren E. Burger, *The Necessity for Civility*, Address Before the American Law Institute (May 18, 1971), in 52 F.R.D. 211, 213, 215 (1971).

his cheery greeting, and obstinately refused to mend his ways, Br'er Rabbit punched him out.

But what, you might ask, about turning the other cheek? If I'm entitled to cite Jesus's willness in my brief for Br'er Rabbit, surely the Professionalism Crusaders are entitled to invoke his pacifism in theirs. Jesus's disciples did indeed take for him the ancient Hebrew title the "Prince of Peace"; we ourselves associate him with the statement "Blessed are the meek."³⁷ But don't forget: Jesus himself also said, "I have not come to bring peace, but a sword."³⁸ And on at least one occasion, Jesus was disruptive a plenty. This is a passage from the Gospel of John:

The Passover of the Jews was at hand, and Jesus went up to Jerusalem. In the temple he found those who were selling oxen and sheep and pigeons, and the money-changers at their business. And making a whip of cords, he drove them all, with the sheep and oxen, out of the temple; and he poured out the coins of the money-changers and overturned their tables.³⁹

Jesus repeatedly denounced his opponents, the legal and academic establishment of his day, in the most radical of terms, terms that ring down to us through two millennia of Western law: "Woe unto you lawyers, hypocrites." "You serpents, you brood of vipers, how are you to escape being sentenced to Hell?"⁴⁰

Against that echo, how are we to hear these guidelines of professionalism: "Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue."⁴¹

Both more succinctly and more generally: "A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel."⁴² Compare the Gospel according to the Apostle Matthew, Chapter 23, beginning at verse 27: "Woe to you, scribes and Pharisees, hypocrites! For you are like whitewashed tombs, which outwardly appear beautiful, but within are full of dead men's bones and all uncleanness." If Jesus were here today, some of us would be "shocked, shocked" to hear him call parts of the Professionalism Crusade a snow job, and still more shocked if he specified what uncleanness some of its sponsors are full of.

As a final example, let me cite you the words of someone else, closer to our time and place, who felt compelled to respond to a charge of incivility and disruptiveness. These are his words: "You deplore the demonstrations taking place in Birmingham It is unfortunate that demonstrations are taking place in Birmingham, but it is even more unfortu-

37. *Matthew* 5:5.

38. *Matthew* 10:34.

39. *John* 2:13-17. For parallel accounts in each of the other Gospels, see *Matthew* 21:12-13; *Mark* 11:11, 15-19; *Luke* 19:45-48.

40. *Matthew* 23:33.

41. FLA. GUIDELINES OF PROF. CONDUCT C.2 (1999).

42. FLA. GUIDELINES OF PROF. CONDUCT M.6 (1999).

nate that the city's white power structure left the Negro community with no alternative."⁴³

This comes, of course, from Dr. Martin Luther King's *Letter from Birmingham Jail*. He was writing in response to an open letter by white clergymen, pillars of the community—Protestant, Catholic, and Jewish. They had urged him to be patient, to give negotiation a chance, to be less confrontational, more courteous and less disruptive—in a word, more *civil*. Dr. King reported he “was initially disappointed at being categorized as an extremist,” but he “gradually gained a measure of satisfaction from the label.”⁴⁴ The more he thought out his position, the more firmly he felt himself in the best of company—that of Jesus, the prophet Amos, the Apostle Paul, Martin Luther, John Bunyan, Abraham Lincoln, and Thomas Jefferson.⁴⁵ Proponents of professionalism might do well to heed his conclusion: “Perhaps the South, the nation, and the world are in dire need of creative extremists.”⁴⁶

What Dr. King wrote in his letter should be proof enough that his way is Br'er Rabbit's way: breaking social convention, breaking even law itself, when social convention and law become the means of oppression, and defiance the only alternative to submission. But we have other, more direct evidence that Br'er Rabbit's way is Dr. King's as well. In the collection of Br'er Rabbit stories I read to my children, the Tar Baby is on page ten.⁴⁷ This version was published by Dial Books in New York City in 1987, and in that year it won the Coretta Scott King award, which honors contributions to peace, non-violent social change, and brotherhood. If you understand Br'er Rabbit's professionalism, which is also Dr. King's, you will see no irony here, and a great deal of justice, poetic and otherwise.

To summarize, there is good news and bad news. The bad is that Br'er Rabbit professionalism is *not* the dominant mode of professionalism discourse today. There is, indeed, the dark prospect that some aspects of the Professionalism Crusade may be debasing a truly fundamental value. Insisting on an excessively narrow understanding of civility produces a most peculiar paradox: the expression of moral outrage becomes professionally outrageous.

But there is good news, too: Professionalism discourse is beginning to acknowledge diversity of moral viewpoints. We're moving away from promulgating catechisms and creeds, and toward sponsoring dialogues and discussions.⁴⁸ Here in Florida, Dean Donald Weidner, Justice Harry Lee Anstead, Judge William Van Nortwick, and others have played key roles in this change. Br'er Rabbit would be grateful, and all of his friends should be, too; I know one of them is.

43. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77, 79 (1964).

44. *Id.* at 92.

45. *See id.*

46. *Id.*

47. *See* LESTER, *supra* note 1, at 10-16.

48. *See* Atkinson, *Dissenter's Commentary*, *supra* note 4, at 261; *see also* KING, *supra* note 43, at 82 (“Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue.”).

(Before turning to my final topic, the law as a learned profession, let me parenthetically sound a word of caution. It cannot have escaped your notice that Br'er Rabbit's belligerence is what got him into trouble in the first place. Obviously an important moral of his story is that the vice of irascibility should not be mistaken for the virtue of moral outrage. But to do full justice to that moral, we must refine it further: Even if expressing moral outrage is sometimes virtuous, losing your temper is always dangerous. Unless you are ready to die for your cause, don't pick battles that will get you killed—literally or figuratively, personally or professionally. As General Marion might have said, even the best martyr is a very bad guerrilla.)

C. *The Trouble with Shallow Lawyerly Learning*

All of today's law students have, of course, heard of Dr. King. Here at Florida State, our Rotunda faces a street bearing his name; every year we take a holiday in his honor. When they walk in our doors as first-years, every single one of our students knows what Dr. King did: by non-violent direct action, sometimes in direct violation of the law, he radically changed the law; he made the law radically, not just racially, more just.

But, when they come to law school, no more than a handful of law students have any real grasp of why he did what he did, or how he decided to do it. Very few have read his *Letter from Birmingham Jail*.⁴⁹ In that letter he explains not only why he broke the evil laws of his day, but also how he came to believe those laws to be evil, and his own course to be just. He didn't think it up on his own, and he didn't go it alone. He was a brilliant and courageous man, but he was also a humble man, and a wise one. In his letter, which he wrote without the benefit of a single book, he discusses the writings of Reinhold Niebuhr, St. Augustine, St. Thomas Aquinas, Martin Buber, Paul Tillich, the prophet Amos, the Apostle Paul, Martin Luther, John Bunyan, Abraham Lincoln, Thomas Jefferson, and T. S. Eliot, just to name a few. Virtually none of our students come to us having read *Moral Man and Immoral Society*,⁵⁰ *City of God*,⁵¹ *The Summa Theologica*,⁵² *I and Thou*,⁵³ *The Shaking of Foundations*,⁵⁴ *The Prophecy of Amos*, *The Epistle to the Romans*, *The Letter to the Christian Nobility of the German Nation*,⁵⁵ *Pilgrim's Progress*⁵⁶ or *Murder in the Cathedral*.⁵⁷ Many undergraduates today are lucky if

49. See KING, *supra* note 43, at 77-100.

50. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932).

51. SAINT AUGUSTINE, *CITY OF GOD* (Marcus Dods trans., Random House 1994) (ca. 412-29).

52. SAINT THOMAS AQUINAS, *THE SUMMA THEOLOGICA* (Laurence Shapcote trans., Encyclopedia Britannica 2d ed. 1990) (1265-73).

53. MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans., Scribner 1970) (1933).

54. PAUL TILlich, *THE SHAKING OF THE FOUNDATIONS* (1948).

55. MARTIN LUTHER, *An Open Letter to the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate*, reprinted in *THREE TREATISES: AN OPEN LETTER TO THE CHRISTIAN NOBILITY OF THE GERMAN NATION CONCERNING THE REFORM OF THE CHRISTIAN ESTATE, A PRELUDE TO THE BABYLONIANS ON CAPTIVITY OF THE CHURCH, A TREATISE ON CHRISTIAN LIBERTY* (Charles Michael Jacobs trans., Muhlenberg Press 1947) (1520).

56. JOHN BUNYAN, *PILGRIM'S PROGRESS* (London: Religious Tract Society 1904) (1684).

57. T.S. ELIOT, *MURDER IN THE CATHEDRAL* (1935).

they've read *The Gettysburg Address* and the preamble to *The Declaration of Independence*. Few students come to law school—and, what is worse, few graduate—with the cultural materials Dr. King used to build his moral and legal position.

These materials were critical to him in three related ways, all three of which are directly relevant to our students as professionals. In the first place, the great moral thinkers and doers of the Western tradition were, in a very important way, Dr. King's conscience. He knew better than to act without consulting them; he was wise enough to live in constant, prayerful communion with them. This kept him—I am convinced—from very serious moral error. And if he had erred, much more of what he refers to in his letter as "our beloved Southland"⁵⁸ would surely have burned.

In the second place, these great figures of Western moral history comforted and encouraged Dr. King. Having helped him make up his mind, they helped him keep up his spirits. Even when he was denied visitors in jail, he was never really alone. There with him were the Apostle Paul and the Puritan John Bunyan, both prisoners of conscience in their own days. When Dr. King defied the evil laws of Alabama, he didn't stand alone, and he didn't just stand with the Southern Christian Leadership Conference. He stood with Martin Luther, even as Martin Luther had stood against pope and emperor not alone, but with St. Augustine and St. Paul, and with the prophets of ancient Israel.

In the third place, these moral heroes were the sources of Dr. King's law reform. He knew what was wrong with the law of his day, and he knew what needed to be done to change it, because he had traced the law's course all the way back to its wellsprings in the pastures of Palestine and the marketplace of Athens. He was on intimate intellectual terms with the lawgivers and law reformers of all time.

We must not send our students out of law school without that foundation. We must not mislead them, by what we say or by what we don't say, into living as if serious moral thought in the West began last Monday at 9:00 a.m. in Room 101. Like Dr. King, our students desperately need the moral guidance, and the moral support, and the breadth and depth of moral vision that one can only draw from deep cultural roots.

It's no secret how Dr. King tapped into these sources of inspiration. Dr. King went to an obscure theological seminary in Pennsylvania. But he didn't just study the Bible and the hymnbook there. He read theologians who were atheists and economists who were communists; he learned not just Martin Luther's Protestant Christianity, but also Mahatma Gandhi's protesting Hinduism.⁵⁹

And the reason he did lies close to my third theme. His professors at that undistinguished little seminary took very seriously every semester what we, for all our professed commitment to academic excellence, often only pay lip service to: the three classic professions—law, theology, and medicine—are learned professions. They are not learned because they

58. KING, *supra* note 43, at 82.

59. See DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 39-43* (Vintage ed., 1988).

are highly technical; so are dentistry and accounting. They are learned because they cannot be cut off from their essential roots in the humanities, in the deep culture of the West, or they will simply die, cease to be. Or worse: they will become horrible instruments of deprivation and destruction. The powerful technical skills we give our students are dangerous weapons in the hands of lawyers who don't know any non-legal, moral restraints—who don't believe, in a word, in professionalism. That's not just my opinion, of course; it is also the opinion of the Platonic Socrates, from the *Gorgias* dialogue,⁶⁰ as the students in Florida State University's Lawyers and Literature seminar can tell you.

III. COMMISSION AND BENEDICTION

In the final analysis, our professional responsibility to the next generation of lawyers is absurdly simple. It is the same as our responsibility to all the generations of lawyers and lovers of justice who have gone before us. Our job is just to make introductions, to start life-long friendships between our students and the great minds and hearts of history. Being a member of a learned profession is at bottom nothing more than being a part of a millennia-long conversation. But being a member of a learned profession is also nothing less.

If our students miss this greatest of all dialogues, it's not their fault; it's our fault. I defy anyone to say that they're not up to it. Here at Florida State, our students are the compatriots of Francis Marion and José Martí, the children of Israel and the cousins of Dr. King. They can engage the greatest minds of all time, East and West, and they will, if only we will let them, if only we don't distract them with things that, in the long run, don't matter nearly so much, or hardly at all. If our students ever fully realize who they are, and how much we have jeopardized their cultural patrimony, woe unto us, for we are their scribes, and their Pharisees.

But if we do our job well—if, surrounded by so great a cloud of witnesses, we run well the race before us, and set that ancient course before them—then our common reward, and the world's gain, will be great indeed. Great prophets are sometimes bred in cosmopolitan places like Rome and Jerusalem. But more often they come from towns like Birmingham and Bethlehem, Bartow and Chatahoochee. A mind, let us never forget, is a terrible thing to waste. But it is, conversely, a glorious thing to fill and to free. That is the one truth worth crusading for, for its triumph marks the end of crusades and the beginning of dialogue. In that dialogue is the only moral light in the West; in that light is the only just law in the world.

As we strive in that light toward that law, let's not lose Br'er Rabbit's benediction: When the shadows of oppression and injustice fall long and dark, as they have before and will again, there is always refuge in his briar patch, as there was in Joshua's wilderness and Marion's swamp.

Amen.

60. PLATO, *GORGIAS* 38-39 (Walter Hamilton trans., Penguin Classics 1960).