University of St. Thomas Law Journal

Volume 9
Issue 2 *Winter 2011*

Article 1

January 2011

Foreword

Robert K. Vischer
University of St. Thomas School of Law, rkvischer@stthomas.edu

FOREWORD

ROBERT K. VISCHER

Over the past several years, legal education has faced a challenging landscape. Turmoil in the legal services market and rising student debt have increased pressure on law schools to demonstrate the value proposition of a law degree. The disaggregation of legal services, increasing competition among an expanding pool of providers, and technology-driven improvements have empowered clients to demand greater efficiency from their lawyers. Legal employers consequently expect law school graduates to contribute meaningfully from day one. Law school can no longer function as a signaling device to show would-be employers that graduates have an aptitude for law. Increasingly, employers expect that graduates will already possess the various competencies that are essential to professional success.

As a result, law schools have been thinking more deeply about the means and ends of legal education. Curricular reform is a hot topic, with a particular emphasis on deepening commitments to experiential learning, reducing unnecessary expenses, and the importance of producing "client-ready" graduates.

At the same time, legal ethics scholars have been immersed in a long-running debate about the nature of the lawyer's role in society. Is a lawyer's first commitment best understood as fidelity to her client, fidelity to law, fidelity to justice or common morality, or something else? What does it mean for a lawyer to behave ethically? Our answers will invariably shape our understanding of the sort of professional identity to which law students and lawyers should aspire. And our understanding of what it means to be a professional will, in turn, help us think more deeply about the aims of professional formation. The question of how we should educate lawyers must be informed by empirical insights regarding the current and future legal services market, but it cannot stop there.

This symposium, "The Lawyer's Role and Professional Formation," seeks to bring these conversations together. To grasp fully the stakes of the current challenges facing law schools, we must step back and think clearly about the nature of the lawyer's role. The more theoretical exploration of lawyering can only gain traction by being accessible to the debates over the future direction of legal education, and the debates over legal education can only avoid the extremes of market-driven overcorrections by taking the broader view offered by strong and historically grounded theoretical work.

This is a conversation of vital importance for legal education and the profession, and we cannot afford to permit the recurrent disconnection between theory and practice to derail our shared project. The effort to avoid derailment is reflected in these pages.

The first article, *How Do Lawyers Serve Human Dignity?*, is my attempt to set the stage for the conversation by exploring one of the foundational commitments of the legal profession: a belief in human dignity.[1] I argue, however, that the conception of human dignity that prevails within the legal profession is roughly interchangeable with individual autonomy.[2] That is, lawyers serve the cause of dignity by facilitating the client's autonomy. In this regard, the legal profession's dignity discourse lacks the nuance and depth that is found in the discourse occurring in other fields, bioethics in particular. As far as it goes, autonomy is a key component of individual dignity, but autonomy does not exhaust the nature or implications of dignity, particularly the narrow conception of autonomy employed widely within the legal profession. The narrowness results, in significant part, from lawyers' failure to invest in the dialogue necessary to pursue a fully relational sense of client autonomy, rather than a simplistic autonomy of individual self-interest secured through the maximization of legal rights and privileges. In reality, there are multiple layers of human dignity, not all of which are centered on individual autonomy. Whether or not a more authentically relational conception of autonomy can be reclaimed, it is important to articulate how the human orientation toward relationship can help provide substantive content to, and draw professionally relevant implications from, the elusive concept of human dignity.

Katherine Kruse, in *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, explores the relationship between the exercise of professional judgment and academic theories about lawyers' professional role.[3] She argues that the academic project of developing a coherent conception of lawyers' role in the legal system and in society is essential for the ethical practice of law, but the theoretical project does not, by its nature, produce tools that practitioners can utilize directly.[4] In exercising professional judgment, a lawyer draws on an implicit underlying understanding of professional role that strikes a balance between competing professional values, even if the balancing process remains under the surface. A lawyer's exercise of professional judgment thus contains within it an operative theory about the role of lawyers in the legal system and in society. The aspiration of theorists in legal ethics, Kruse argues, is to bring

1. Robert K. Vischer, *How Do Lawyers Serve Human Dignity?*, 9 U. ST. THOMAS L.J. 222, 222 (2011).

2. *Id.* at 227–31.

3. Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS. L. J. 250, 251 (2011).

4. *Id.* at 251–52.

to the surface these implicit and operative conceptions of professional role and to subject them to analysis and critique.[5]

Building on the insight that ethical decision-making requires normatively grounded intuitions, Alice Woolley argues that lawyers need normative commitments to what being an ethical lawyer requires but also, more importantly, lawyers need the ability to respond to ethical dilemmas intuitively, as a matter of sense and perception.[6] In her article, *Intuition and Theory in Legal Ethics Teaching*, she points out that simply being able to reason through a problem using a set of principles is insufficient.[7] This means that in teaching ethical theories, legal ethics teachers should encourage students to incorporate and adopt the theory of reasoning that best makes sense of their existing intuitions, and that can be the basis for forming deeper and more practice-specific intuitions going forward. Woolley grounds her argument in the literature of moral psychology and, in particular, Kohlberg's analysis of moral reasoning and Haidt's social intuitionist theory of moral decision-making.[8] She also considers the main theoretical explanations (and critiques) of the lawyer's role, and the implications of teaching moral pluralism for legal practice.[9]

Neil Hamilton and Verna Monson explore the most effective pedagogical methods for forming students' professional identities. In *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, they examine an extensive body of empirical research and scholarship from ethics education in other professions.[10] Their interdisciplinary approach to defining, measuring, and teaching professionalism produces a definition that is a synthesis of scholarship across the professions that also is grounded in research with exemplars in the legal profession using in-depth interviews. Professionalism in law is thus defined as "an internalized moral core characterized by a deep responsibility to others, particularly the client, and some restraint on self-interest in carrying out this responsibility. . . a standard of excellence for lawyering skills, integrity, honesty, adherence to ethical codes, public service (especially for the disadvantaged), independent judgment and honest counsel."[11] Hamilton and Monson identify four principles of effective instruction to foster formation, including (1) students arrive with unique backgrounds and abilities, and instruction should consider each

5. *Id.* at 284.

6. Alice Wooley, *Intuition and Theory in Legal Ethics Teaching*, 9 U. ST. THOMAS L.J. 285, 287 (2011).

7. *Id.* at 289.

8. *Id.* at 297–307, 312, 322.

9. *Id.* at 316–24.

10. *See generally* Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 332–46 (2011).

11. *Id.* at 381.

student's unique developmental level along a continuum of lifelong growth; (2) positive conflict, in which the learner is both sufficiently challenged and supported, is an essential element of professional formation spurring cognitive, emotional, and social development and growth in a holistic fashion; (3) throughout the curriculum, instructors should foster in each student the habit of actively seeking feedback, moral dialogue and reflection (FDR); and (4) instructors should integrate opportunities for self-assessment and formative assessment throughout the curriculum.[12]

Turning a critical eye to legal education, Eli Wald and Russell Pearce argue that law schools, notwithstanding their denials, "have been implicitly yet actively engaged in forming students' professional identities."[13] The problem is that they have been instilling a type of professional identity based on autonomous self-interest. In *Making Good Lawyers*, Wald and Pearce offer workable definitions of professionalism and professional identity that will enable an informed discussion of the formation of professional identity in and by law schools.[14] Their proposed definitions of professionalism and professional identity build on a distinction between autonomously self-interested and relationally self-interested accounts of lawyering. Because legal education reflects a deep commitment to the dominant culture of autonomous self-interest, the authors do not believe that reform proposals that are inconsistent with that culture are likely to succeed in the near future.[15] They believe, however, that exposing the dominant culture and the professional identity it fosters is a necessary step toward providing a workable framework for reformers committed to promoting professional values in the long term.[16]

In a related vein, Amelia Uelmen explores generational possibilities for pushing beyond the current framework of "ontological individualism" that prevails in current understandings of professional norms.[17] In *"Millennial Momentum" for Revising the Rhetoric of Lawyers' Relationships and Roles*, she begins by examining the characteristics of today's law students and asks how these characteristics might bring fresh insight to our conceptions of the professional role.[18] She then asks how these insights might in turn inform legal educators and the legal profession as a whole.[19] Uelmen is hopeful that the openness of Millennial students to cross-cultural models

12. *Id.* at 374–75.

13. Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L. J. 403, 405 (2011).

14. *Id.* at 407–14.

15. *Id.* at 406.

16. *Id.* at 407.

17. Amelia Uelmen, *"Millennial Momentum" for Revising the Rhetoric of Lawyers' Relationships and Roles*, 9 U. ST. THOMAS L.J. 446, 447 (2011).

18. *Id.* at 447–52.

19. *Id.* at 456–67.

might help the profession revise and refine its rhetoric about lawyers' relationships and roles.[20]

Deborah Rhode turns our attention to what she sees as another key oversight of legal education in her article, *What Lawyers Lack: Leadership*.[21] She points out that virtually all lawyers will, at some stage of their careers, occupy significant leadership roles in their workplaces and their communities.[22] Often they will be leading from the middle: calling the shots in some capacities and following directions in others.[23] Many skills are relevant at all levels, including influence, decision making, responsive listening, and conflict management. Legal educators also lead in law schools and non-profit organizations, modeling leadership behavior for students in the process. Rhode believes that legal educators owe it to students to make preparation for leadership a more significant priority in legal education. Her essay explores why, and then how, that should occur.[24]

Brad Wendel urges caution in drawing conclusions from the recent report on legal education by the Carnegie Foundation for the Advancement of Teaching.[25] In *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, Wendel dissents from the Carnegie Report's indictment of law schools for emphasizing a preoccupation with "the procedural and formal qualities of legal reasoning" to the exclusion of "the moral and social dimensions."[26] He argues that the moral and social dimensions of legal reasoning are already embedded within legal reasoning.[27] Legal practice can best be understood as a craft—that is, a distinctive way of doing something called deliberation, practical reasoning, or the exercise of judgment. Legal educators should not over-draw the distinctions made in the Carnegie Report between the cognitive, expert knowledge, and identity-and-purpose apprenticeships that comprise legal education. Professional identity for lawyers, according to Wendel, is "performing well the complex task of representing clients effectively within the bounds of the law."[28]

In *Calling Law a "Profession" Only Confuses Thinking About the Challenges Lawyers Face*, Tom Morgan expresses skepticism about "pro-

20. *Id.* at 467.

21. Deborah L. Rhode, *What Lawyers Lack: Leadership*, 9 U. ST. THOMAS L.J. 471, 471–72 (2011).

22. *Id.*

23. *Id.*

24. *Id.*

25. W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS. L.J. 497, 497–99 (2011).

26. *Id.* at 497.

27. *Id.* at 498.

28. *Id.*

fessionalism" talk.[29] While it is appropriate to want lawyers to be mature, moral people and to help legal education reinforce those qualities, and while it is also appropriate to ensure that students understand lawyers' fiduciary responsibilities and the ways lawyers fall short of meeting them, he believes that it only confuses work on those issues to call them part of teaching "professionalism."[30] Law is not a "profession" as that term has traditionally been used, according to Morgan, and calling law a profession does not help understand the challenges lawyers face.[31]

Paul Tremblay and Judith McMorrow focus on how the organizational contexts in which lawyers' work affects their ethical behavior and decision-making.[32] In *Lawyers and New Institutionalism*, the authors explain that lawyers develop powerful assimilated informal norms, practices, habits, and customs that sometimes complement and other times supplant formal substantive law on professional conduct.[33] Structural choices in practice settings influence the creation of these informal norms. The challenge for the legal profession, and particularly academics who teach legal ethics, is how to better prepare law students and lawyers to recognize and analyze the norms in their practice setting and to encourage management choices within practice settings that provide norms that enhance rather than degrade ethical decision-making.

Kimberly Kirkland offers empirical evidence to help understand the ways in which theory meets practice on these issues.[34] In *Self-Deception and the Pursuit of Ethical Practice: Challenges Faced by Large Law Firm General Counsel*, she reports the findings of her interviews with general counsel at some of the largest law firms in the United States.[35] She investigated how general counsel conceive of and approach their roles, examining the assumptions and beliefs that frame their decision-making.[36] Kirkland's findings provide an opportunity to separate empirical and normative claims and to compare the varying narratives generated when we examine the data first through the lens of ethical learning theory and then through the lens of ethical fading theory. This comparative methodology allows the reader to identify, test, and evaluate whether the norms each theory posits are the appropriate starting points for evaluating lawyers' ethics. She concludes

29. Thomas D. Morgan, *Calling Law a "Profession" Only Confuses Thinking About the Challenges Lawyers Face*, 9 U. ST. THOMAS. L.J. 542, 543 (2011).

30. *Id.* at 558–59.

31. *Id.* at 565–67.

32. Paul R. Tremblay & Judith A. McMorrow, *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS. L.J. 568, 568–69 (2011).

33. *Id.*

34. Kimberly Kirkland, *Self-Deception and the Pursuit of Ethical Practice: Challenges Faced by Large Law Firm General Counsel*, 9 U. ST. THOMAS. L.J. 593, 595 (2011).

35. *Id.* at 593.

36. *Id.*

that making judgments about lawyers' ethics based on empirical data requires a deliberative approach.[37]

Also on the intersection of professionalism and practice, Christine Parker and David Ruschena examine whether lawyers' experience of time-based billing and billable hour budgets subjects them to pressures that encourage unethical practices.[38] In *The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms*, they argue that billable hour pressure is merely the 'face' of more fundamental pressures stemming from the way that lawyers in private practice perceive their work environments.[39] Even without excessive billable hour targets, lawyers may be more likely to engage in unethical behavior where they believe that unethical behavior is necessary in order to meet performance indicators; that 'everyone' within the firm in which they work is engaging in such behavior; and that there are no other ways to succeed at the firm—whether or not their beliefs are correct. If this is the case, the interventions necessary to prevent billing fraud must deal with lawyers' perceptions and not merely the billable hours regimes in which lawyers work. Parker and Ruschena conclude that fundamental reform of the way in which firms manage their lawyers and communicate expectations about billing and ethics might be necessary to achieve a healthier environment for lawyers and a less exploitative environment for clients.[40]

At the University of St. Thomas School of Law, our mission of "integrating faith and reason in the search for truth through a focus on morality and social justice" has been the impetus to serve as a venue for the exploration of some of the most pressing challenges facing the law and lawyers today.[41] We do not aim to provide the final word, but to expand the conversation. Given the diversity and breadth of views offered in this symposium, we have succeeded on that front. As legal education continues to discern the prudent path forward that best serves our students, our profession, and the public, we need to maintain a conversation that is large enough to include both a deep understanding of professional identity and a real-world grasp of the pressures and pitfalls facing today's lawyers. We hope that this symposium is a helpful model of what that conversation could look like.

37. *Id.* at 618.

38. Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619, 619 (2011).

39. *Id.* at 623.

40. *Id.* at 662–63.

41. University of St. Thomas School of Law Mission & Vision, http://www.stthomas.edu/law/missionvision/ (last visited Oct. 1, 2012).