Legal Ethics in the Next Generation: The Push for a New Legal Realism

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In the Articles Section of this issue, *Law & Social Inquiry* is proud to join an emerging "push" in sociolegal studies and legal scholarship toward what some are calling a new legal realism—a synthesis that would draw together empirical work on law and the legal profession, legal and policy scholarship, and the insights of those "in the trenches" (from practitioners and policymakers to the subjects of law themselves). David Trubek, founder of the Institute for Legal Studies at the University of Wisconsin Law School, first noted the need for this new synthesis a number of years ago, calling for "a new realism" in sociolegal studies (1977, 545). In recent years, this call has been renewed by scholars concerned with narrowing the divide between much of what is written about law and the practices that constitute law "in action" (e.g., Fineman, Garth, Larson, McEvoy, Mertz, and Wilkins 1997; Cross 1997).[1]

In this issue, *Law & Social Inquiry* brings together theoretical work on legal ethics with a heated "Trenches and Towers" exchange examining legal ethics "on the ground." Andrew Goldsmith's article, "Is There Any Back-

1. There has also been heightened debate over the relevance of some forms of legal and interdisciplinary scholarship to any aspect of legal practice, in part as a result of responses to Judge Harry Edwards's article entitled "The Growing Disjunction between Legal Education and the Legal Profession" (1992). In his article in this issue, Andrew Goldsmith comments on those who disputed Edwards's characterization, warning that "it is easier to assert the influence of theory than to demonstrate its influence to everyone's satisfaction," and urging that there "is the potential for more empirically oriented scholarship in this area." Similar complaints about the relevance of doctrinally based scholarship and law teaching have also been heard for some time now (see, e.g., Cutler 1951; Dallimore 1977; Llewellyn 1948; White 1986). For a view that urges the potential benefits of empiricism to legal studies—albeit with a somewhat "non-critical" edge, see Tamanaha (1997).

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bone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice," asks whether attorneys can and should rise above serving as "butlers" to their clients. Butlers, after all, simply do their employers' bidding whatever the moral implications. Focusing on the "less exalted sphere of everyday legal practice," Goldsmith argues for the importance of examining the "mundane world of what lawyers do, and can do" to developing a truly self-critical approach for a legal profession charged with policing itself. Goldsmith is concerned that because of a sense of loyalty to their community and its norms of practice, lawyers might be less than open to rigorous self-questioning, noting that "the bases for enabling the profession to be more self-critical, in particular by becoming more responsive to wider community interests, continue to be elusive."

One avenue suggested by Goldsmith is change in the way lawyers are trained.[2] Unlike Judge Edwards, Goldsmith argues that an interdisciplinary approach could help bridge the gap between theory and practice, providing more practical, on-the-ground, empirically informed learning while also offering "a method for redefining the social role of lawyers and of contributing to the reassessment of their professional responsibilities and social significance." Goldsmith's article thus takes issue with Stanley Fish's account of legal practice as deeply determined by conventional ways of thinking and acting. Instead, Goldsmith offers a challenging vision of how legal practice and education might be changed. Here, then, is an opportunity to see how issues debated in the seemingly arcane world of postmodern theory can apply to problems of immediate interest to the profession of law.

Like Goldsmith, William Simon is skeptical of the adequacy of standard professional practices and professional self-regulation in assuring that lawyers comport themselves in ethically responsible ways. Thus, Simon arguably provides a case study that gives practical effect to Goldsmith's critical vision and theoretical framework. Simon's article, "The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology," examines a recent controversy over the ethical standards to be applied to attorneys who represented a failing savings and loan. As Simon views the situation, these attorneys at the firm of Kaye, Scholer, Fierman, Hays, & Handler "devoted themselves to keeping the government off the back of Charles Keating while he engaged in financial and political exploits that eventuated in criminal convictions for Keating and several of his associates, formal criticism by the United States Senate of five of its members, and a loss to the federal banking insurance system estimated at $3.4 billion." When governmental banking agencies eventually obtained

2. Here Goldsmith echoes, in a somewhat different vein, calls from several corners of the profession—most recently from the president of the Association of American Law Schools, in her 1998 speech to the AALS House of Representatives (Rhode 1998).

access to communications between these attorneys and their client, the Office of Thrift Supervision (OTS) charged the attorneys with misconduct.

Simon argues that the response of the legal profession to these charges was disappointingly defensive—for the most part attacking the OTS's charges rather than critically examining the attorneys' performance. He concludes that in this case the bar failed to engage in the kind of self-criticism and ethical reflection that we would expect if professional self-regulation is to work: "The bar failed to meet these challenges, and indeed spent considerable energy and ingenuity in evading them. Its performance has . . . fueled doubts about its capacity for self-regulation." Simon also uses Kaye Scholer's performance in this case to question traditional rationales for protecting attorney-client confidentiality in such situations; he enlarges on this point and several others in his rejoinder to the commentators as well.

In spirited replies to Simon, a number of commentators dispute aspects of his argument.[3] Jonathan Macey essentially agrees with Simon's concerns about the ability of the profession to self-regulate, but he accuses Simon of a romanticized view of the profession's capacity in that regard—and of an insufficiently critical view of the conduct of the government attorneys in this case. Geoffrey Miller also affirms Simon's call for the bar to "consider carefully the nature of the substantive standards that should apply in this difficult representational setting," while disagreeing with Simon's more global indictment of the profession's response in this case. In response to Simon's comments about his own conduct as legal adviser to the law firm, Geoffrey Hazard reasserts his "moral option"—if not duty—to maintain silence in light of governing norms and rules. Keith Fisher also defends the conduct of the bar in responding to the Kaye Scholer affair, including the performance of the ABA Working Group on Lawyers' Representation of Regulated Clients to which he belonged. Fisher concludes by describing the situation in this case as "so unusual and so unlikely of repetition that detailed study was not a fruitful expenditure of time and resources."

Robert Gordon, however, takes seriously Simon's deep concern about the bar's response in the Kaye Scholer case, sharing his sense that this case reveals some all-too-common problems marring the bar's capacity to self-regulate. Indeed, like Goldsmith, Gordon points to "protectionist guild defensiveness, pure and simple" as a key difficulty elucidated by events in the Kaye Scholer case, and also decries an expansion of "libertarian ideology into lawyers' common consciousness." On the other hand, Gordon reminds us that "the everyday practice of responsible lawyers" stands as an antidote to this expansion, a reminder that directs our attention to the same kind of on-the-ground, empirical reality in which Goldsmith is interested. Stephen Pepper is similarly interested in learning more about the complexities of

3. *Law & Social Inquiry* also invited a response from Peter Fishbein of Kaye Scholer; Mr. Fishbein declined the invitation because of the press of other schedule demands.

ethics "on the ground"—in particular, with assessing the value of attorney-client confidentiality in light of how both "the law" and the people seeking to obey it operate "in the real world." Donald Langevoort makes an even stronger case that we need this kind of empirically based understanding of legal practice in action in order to strengthen and develop legal ethics: "I come away from this exercise wishing that I knew much more about how lawyers think in practice, especially on matters relating to ethics and social responsibility." Langevoort points out that social scientific research on these issues is surprisingly sparse.

In a similar spirit, David Luban, a noted expert on legal ethics, recently commended the value of empirical legal studies in addressing the "discrepancy between the law in books—the profession's ethics codes—and the law in action" (Luban 1998, 1). Luban views social science as an important tool in thinking "accurately and rigorously" about law, using the example of experiments on wrongful obedience to highlight potential ways to put lawyers "on guard against doing the unforgivable" (1998, 1, 10).

Interestingly, then, this issue of *Law & Social Inquiry* contains calls from both the theoretical and practical realms for empirical work to elucidate the world of legal ethics. There have been few systematic empirical studies in this area. David Wilkins, director of the Program on the Legal Profession at the Harvard Law School and visiting research fellow at the American Bar Foundation, has been at work for some time on a study of the legal profession, with a particular focus on the experiences of black lawyers, that addresses issues of legal ethics (see, e.g., Wilkins 1993, 1995). And another major study of lawyers' ethics, focusing on conflicts of interest, conducted by Susan Shapiro at the American Bar Foundation, is just now nearing completion (see Shapiro 1995, 1997). Shapiro's study describes an extraordinarily rich self-regulatory system that has grown up "on the ground" in varied legal practice settings. A number of Shapiro's respondents expressed dismay about the gap, also pointed to by a number of our contributors, between lawyers' experiences of ethical dilemmas in day-to-day practice and the understandings of scholars and experts charged with formulating rules of professional conduct:

> But, you know, these guys sit around and the Kutak Commission [which produced the *Model Rules of Professional Conduct*] fooled around for years and years and years. And they ducked all the questions where we need guidance. You know, any fool could have written 1.9, 1.7. You know, "big deal, thanks a lot." But there's absolutely no guidance on parent/subsidiary. . . .There's almost no guidance on the whistle-blower problem. You know, "thanks a bunch, guys!" (Respondent quoted in Shapiro n.d.)

In Shapiro's work we can hear practitioners' voices from "the trenches," while in Wilkins's work we see the difficult ethical problems posed for some lawyers by the current structure of legal work and categories. Shapiro and Wilkins are providing the kind of detailed empirical research and analysis that is necessary to developing an adequate understanding of how practicing attorneys identify, negotiate around, and respond to ethical dilemmas in their everyday experiences. And, several of our contributors suggest, it is only through a conversation that brings together many threads—empirical, theoretical, practical—that the next generation of legal ethicists can move the debate to a new level.

In conclusion, this issue of *Law & Social Inquiry* demonstrates why there might be a "push" for a new synthesis that brings together legal theory, legal practice, and empirical research on law. Although several of our authors strongly criticize some aspects of current professional self-regulation, embedded in their critiques is arguably a high aspiration for the practice of law—one in which the best traditions of self-reflection and honest self-criticism are more fully developed. Some of our authors also warn of the difference in perspective that exists between those who study ethics and those who must engage in daily ethical decision making in the practice of law, calling for more social science study to help bridge these divergent perspectives. We are pleased to have had the opportunity to bring our readers such a compelling set of examples of the nascent effort to open communication between those parts of the legal and scholarly communities concerned with similar issues.

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