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# Empirical Professional Ethics Symposium of the University of St. Thomas Law Journal

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## FOREWORD

# EMPIRICAL PROFESSIONAL ETHICS SYMPOSIUM OF THE UNIVERSITY OF ST. THOMAS LAW JOURNAL

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The professionalism movement continues to evolve. This symposium marks an important moment in this evolution by providing a forum for existing empirical research and lighting a path for future research. It continues the Holloran Center's leadership in understanding professionalism and ethics and in challenging lawyers to engage in needed empirical research on this topic. The authors whose work is in this issue enhance our insights into professionalism and, as is the case with good research, raise significant questions that will inspire and challenge others.

Our understanding of professionalism has come a long way in twenty-five years. The modern professionalism movement began with the Stanley Commission Report, published in 1986 by the American Bar Association Commission on Professionalism.<sup>1</sup> The report, which set out twenty-seven specific suggestions for increasing the professionalism of lawyers, generated a variety of local, state, and federal initiatives, including: the establishment of commissions and committees on professionalism;<sup>2</sup> the adoption of

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1. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, "...IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley\\_Commission\\_Report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf).

2. One of the first was the State Bar of Georgia's Chief Justice's Commission on Professionalism, which became a model for other states, many of which established their own professionalism commissions or committees. For a summary of this history, including the establishment of the Consortium of Professionalism Initiatives, see *Chief Justice's Commission on Professionalism*, STATE BAR OF GEOR., [http://www.gabar.org/related\\_organizations/chief\\_justices\\_commission\\_on\\_professionalism/](http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/) (last visited May 16, 2011). For a summary of landmark dates in the history of professional responsibility, see also AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, *Landmark Dates in Professional Responsibility*, AM. BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/landmark\\_dates\\_brochure.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/landmark_dates_brochure.authcheckdam.pdf) (last visited May 16, 2011).

lawyer creeds;<sup>3</sup> and increased attention to the role of law schools in developing professionalism.<sup>4</sup>

The early and important professionalism discussion focused primarily on reminding lawyers of their obligation to behave with civility towards each other, the courts, their clients, and the public, and of the consequences of failing to act professionally. Over time the conversation broadened as practitioners and scholars grappled with the complexities of both defining professionalism and affecting lawyers' behavior and identities. It is now accepted that a variety of institutional actors are responsible for enhancing and enforcing lawyers' professional and ethical behavior, including legal educators, bar leaders, judges, and those responsible for workplace environments. It is also accepted that professionalism is an important collective aspiration, which goes beyond civility and beyond adherence to ethics rules and is worthy of time, commitment, and attention. Even as the discussion has broadened and our understanding has deepened, however, there remains a tendency towards anecdotal or intuitive approaches to the topic of professionalism rather than empirical research.<sup>5</sup> This symposium, therefore, marks a significant step in our understanding by demonstrating the application of social science research methods to issues of professionalism.

The authors in this symposium are forging new paths in other ways. Their research takes us beyond a historical—and limiting—focus on character. Too often those charged with developing and monitoring ethical conduct adopt a view that ethical behavior is primarily an outcome of personal character traits, which are formed early in one's life and usually attributed to family, religious, and developmental factors. This shallow understanding of professionalism lets institutions and individuals off the hook. After all, if behavior is an outcome of personal character, and if personal character is formed early in life, legal educators and institutional actors within the profession play merely a gatekeeping role—they bar the wrong kind of people from becoming lawyers or they exclude them from the profession through disciplinary enforcement. This perception creates a barrier to understanding the ways in which one can affect human behavior by encouraging ethical

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3. For a list of lawyer creeds from the Nelson Mullins Riley & Scarborough Center for Professionalism at the University of South Carolina School of Law, see *Initiatives & Awards*, NELSON MULLINS RILEY & SCARBOROUGH CTR. FOR PROFESSIONALISM, <http://professionalism.law.sc.edu/barinitiatives.php> (last visited May 16, 2011).

4. The Holloran Center, the host of this symposium, and its activities exemplify the role of law schools in promoting professionalism. For more information, see HOLLORAN CENTER FOR ETHICAL LEADERSHIP IN THE PROFESSIONS, <http://www.stthomas.edu/ethicalleadership/> (last visited May 24, 2011). See also NAT'L INST. FOR TEACHING ETHICS AND PROFESSIONALISM, <http://law.gsu.edu/niftep/> (last visited May 16, 2011).

5. I am one who has taken an anecdotal approach to discussing professionalism. I believe that such an approach has great value, and I have defended it. See Daisy H. Floyd, *We Can Do More*, 60 J. LEGAL EDUC. 129, 130 (2010). The lack of empiricism, however, has limited our understanding and has left professionalism scholarship subject to criticism and vulnerable to dismissal.

conduct and discouraging unethical actions. The authors demonstrate that professional behavior can be affected by specific means at any stage of a lawyer's professional development.

This symposium is also innovative in joining discussions of what happens in law schools and in law practice. It is common for conversations about professionalism to focus on only one setting—law school or practice—and for experts in each setting to talk at cross-purposes. In this issue, however, the authors approach professionalism as a continuum, thereby highlighting the relationship between academia and practice.

The articles by Dr. Verna Monson and Professor Neil Hamilton,<sup>6</sup> Professor Lawrence Krieger,<sup>7</sup> and Professor Jerome Organ<sup>8</sup> focus on developmental aspects of professionalism and help us to see the ways in which one's professional identity can vary over time. These authors discuss multiple factors that affect professional behavior.

Monson and Hamilton demonstrate that professionalism is complex and develops over a lawyer's career, continuing beyond law school.<sup>9</sup> They refute the commonly held notion that professionalism is a function of one's personality or style and urge that professionalism be viewed as a path of transformational development, which is about "the individual changing the complexity and capacity of their consciousness."<sup>10</sup> They add to the literature with the first ever study of professionalism in early career lawyers, applying Robert Kegan's theory of lifespan identity development to lawyers within the first five years of practice.<sup>11</sup> The authors synthesize Kegan's stages of mental complexity with existing research on professional identity to develop a theory of "transformational professionalism."<sup>12</sup> They used multiple means to measure respondents' understanding of professionalism, including short essays and interviews.<sup>13</sup> The authors measured lawyers' current understanding of professionalism and obtained a self-assessment of the ways in which their understanding of professionalism changed since they became lawyers and of the factors that affect how they define professionalism.<sup>14</sup>

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6. Verna E. Monson & Neil W. Hamilton, *Ethical Professional (Trans)formation: Early Career Lawyers Make Sense of Professionalism*, 8 U. ST. THOMAS L.J. 129 (2011).

7. Lawrence S. Krieger, *The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST. THOMAS L.J. 169 (2011).

8. Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 226 (2011).

9. Monson & Hamilton, *supra* note 6, at 130.

10. *Id.* at 155.

11. *Id.* at 132–33, 141.

12. *Id.* at 133.

13. *Id.* at 142–43.

14. *Id.*

Monson and Hamilton further track the development of professional identity by measuring how professionals move from understanding professionalism in terms of external requirements or rules to understanding it as the “self-defined, internal demands of a core ethical identity.”<sup>15</sup> The authors offer two very important and practical insights: (1) how lawyers’ understanding and manifestation of professionalism develop over time and (2) how specific assessment tools can be used by institutional actors, such as law schools and law firms, who are charged with developing and assessing professionalism.<sup>16</sup>

In his piece, Krieger uses self-determination theory to connect two issues that have gained attention from the profession: (1) lawyer and law student well-being and (2) lawyers’ and law students’ understanding of and adherence to standards of professionalism.<sup>17</sup> His article calls for future investigation of the relationship between principles of human psychological development and a lawyer’s ethical and professional behavior.<sup>18</sup>

Krieger describes the three primary domains of self-determination theory—fundamental needs, values, and motivations—that produce positive psychological outcomes (or “thriving”) in humans.<sup>19</sup> Based on his hypothesis that the same things that produce thriving also produce ethical behavior, he explains the ways that researchers can use the three domains to predict professionalism.<sup>20</sup> He posits that professionalism and ethical behavior (in addition to well-being and emotional health) are most often manifested by those who exhibit core traits of psychological health and personal maturity.<sup>21</sup> Therefore, environments—both in law school and in practice—that allow people to fulfill their fundamental needs, values, and motivations foster professionalism and ethical behavior.<sup>22</sup>

Krieger goes further than just focusing on the positive. He also summarizes the values, motivations, and needs that do not produce thriving, calling them “psychological distractions,” and suggests a correlation between those distractions and unprofessional behavior.<sup>23</sup> We learn that eliminating these distractions may reduce unprofessional and unethical behavior.

In addition to offering substantive conclusions, Krieger urges researchers to use the established, reliable measures developed in self-determination theory to conduct empirical work showing the correlation between ethical and professional attorney/judge behavior and the sources and experiences of

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15. Monson & Hamilton, *supra* note 6, at 134 (citing WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 135 (2007)).

16. *Id.* at 155–58.

17. Krieger, *supra* note 7.

18. *Id.* at 188–89.

19. *Id.* at 172–75.

20. *Id.* at 179–84.

21. *Id.* at 171.

22. *Id.* at 185–86.

23. *Id.* at 181.

human thriving.<sup>24</sup> He makes this suggestion concrete by demonstrating the ways in which several recent studies could have been enhanced by the addition of self-determination measures.<sup>25</sup>

Organ, likewise, helps us to understand the relationship between professionalism and both lawyer wellness and lawyer satisfaction.<sup>26</sup> His article provides a helpful summary and analysis of twenty-five years of research regarding the issue of lawyer satisfaction and dissatisfaction.<sup>27</sup> By providing a meta-analysis of existing research, he takes issue with what he calls the “widespread ‘common wisdom’”—that there exist relatively high levels of lawyer unhappiness.<sup>28</sup> He also cautions against overgeneralization and urges readers to pay particular attention to the fact that the data provide quite different conclusions for different sub-sets of respondents.<sup>29</sup> His analysis reveals several noteworthy conclusions. First, older attorneys are more satisfied than younger attorneys.<sup>30</sup> Second, attorneys in private practice are less satisfied than attorneys working in public interest or government positions.<sup>31</sup> Third, gender and racial differences do not significantly affect the rates of satisfaction experienced.<sup>32</sup> Finally, he notes that there may be a predisposition among legal academics to overstate the level of attorney dissatisfaction.<sup>33</sup>

In addition to his careful parsing of the research, Organ makes valuable suggestions for future research agendas. First, he suggests that researchers should correlate evidence of depression or substance abuse with evidence of satisfaction levels.<sup>34</sup> Second, Organ cautions that current economic pressures may cast doubt on the results of studies being completed now or in the near future.<sup>35</sup> Finally, he provides valuable recommendations for ways that law schools can better prepare their students for career satisfaction.<sup>36</sup>

The pieces by Professor Steven Boutcher<sup>37</sup> and Professor Leslie Levin<sup>38</sup> focus on specific influences on lawyer behavior. Boutcher looks to law firm culture to understand conditions that lead to change, and Levin

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24. *Id.* at 188–89.

25. *Id.* at 186–88.

26. Organ, *supra* note 8.

27. *Id.*

28. *Id.* at 265.

29. *Id.*

30. *Id.*

31. *Id.* at 266.

32. *Id.* at 267–68.

33. *Id.* at 269–70.

34. *Id.* at 270–72.

35. *Id.* at 269–70.

36. *Id.* at 273–75.

37. Steven A. Boutcher, *Rethinking Culture: Organized Pro Bono and the External Origins of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108 (2011).

38. Leslie C. Levin, *Specialty Bars as a Site of Professionalism: The Immigration Bar Example*, 8 U. ST. THOMAS L.J. 194 (2011).

demonstrates the impact of a specialty bar organization on immigration lawyers' practices.<sup>39</sup>

Boutcher analyzes the recent growth in organized pro bono activities at large law firms to gain insights into law firm culture and potential mechanisms for change.<sup>40</sup> His interviews with pro bono coordinators throughout the United States highlight the factors that have driven the phenomenon of organized pro bono activities within large law firms.<sup>41</sup> More broadly, his conclusions help us understand the culture of large law firms and the ways in which culture drives decision-making about the use of financial and time resources. Boutcher notes the ambiguity in the meaning of the term "law firm culture" and examines this ambiguity through the lenses of his interviews with pro bono coordinators and existing research on organizational development.<sup>42</sup> He finds that members of a law firm may regard the firm's distinctive culture as threatened by negative outside factors, including recent business pressures, growth in the number of attorneys, the increase in multiple locations of law firms, the departure of firm founders, and the prevalence of lateral hires.<sup>43</sup>

Boutcher relies on this evidence to reach a hopeful conclusion. He finds that the rise of organized pro bono within firms is primarily a result of external factors.<sup>44</sup> He makes the broader conclusion that external factors, usually viewed as a threat to positive law firm culture, should also be understood as a source of potentially positive change.<sup>45</sup> While it was not uncommon for the pro bono coordinators to point to a distinctive firm culture of service as a historical reason for organized pro bono efforts, Boutcher argues that the more important factors are external.<sup>46</sup> He focuses on three specific external factors: competition among firms in hiring law students, criteria used by clients in awarding business, and the advent of national pro bono ranking systems.<sup>47</sup>

Boutcher's research encourages law firms to examine the possibility for change through an understanding of organizational development theory and to recognize the ways in which internal and external factors can work together to effect positive change.<sup>48</sup> He also suggests that law firms are not as unique as they may consider themselves, encouraging additional studies that replicate his methodology.<sup>49</sup>

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39. Boutcher, *supra* note 37, at 109; Levin, *supra* note 38, at 198.

40. Boutcher, *supra* note 37, at 109–110.

41. *Id.* at 118–19.

42. *Id.* at 121–25.

43. *Id.* at 115–16.

44. *Id.* at 117–18, 127.

45. *See id.* at 127–28.

46. *Id.* at 117.

47. *Id.* at 122–27.

48. *Id.* at 117, 127–28.

49. *Id.* at 128.

Levin's research likewise examines external influences on lawyer behavior, but, unlike Boutcher, her focus is on the effect of external forces on the individual rather than on the institution.<sup>50</sup> In her study of specialty bars and their influence on a lawyer's professional development, she interviewed immigration lawyers in New York. Her work builds upon existing research that identifies four institutional areas in which lawyers' conceptions of professionalism are produced—bar associations, legal education, disciplinary enforcement, and the workplace.<sup>51</sup>

Levin interviewed seventy-one lawyers who practice immigration law, discovering the ways in which membership in the American Immigration Lawyers Association (AILA) affects their professional development.<sup>52</sup> Interestingly, her original study was not designed to focus on AILA, but the organization became such a consistent theme in her conversations with immigration lawyers that she was able to offer conclusions about its impact.<sup>53</sup> She concludes that membership in AILA contributes in several ways to lawyers' ethical development: it serves as a source of community and information; it provides education and instruction; it is a source of needed information and facilitates lawyer-to-lawyer sharing of such information; it is a source of mentors; and it provides norms and values by which the members practice, including specific ethical influences.<sup>54</sup>

Levin's work prods the future in specific ways. It encourages further studies about the impact of other specialty bars.<sup>55</sup> It also provides practical information for bar association leaders about the influence they can have on the ongoing professional and ethical development of their members.<sup>56</sup> By demonstrating the positive effect of AILA on its members, she offers concrete ideas that can be used by other organizations seeking to positively influence lawyer behavior.<sup>57</sup>

Empirical research about professionalism holds great promise. The work featured in this symposium should serve as a call to action for those involved in the professionalism movement both to implement the changes recommended by these authors and to encourage further empirical research. This kind of research faces challenges, including that lawyers are not generally trained in social science research methods. These authors, however, demonstrate the value of stretching beyond our accustomed methods as well as the value of interdisciplinary collaboration. Empirical research will lead to new understandings that will strengthen the profession and enhance the lives of lawyers and those they serve.

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50. Levin, *supra* note 38, at 198.

51. *Id.*

52. *Id.* at 198–99.

53. *Id.*

54. *Id.* at 223–25.

55. *Id.* at 222–23.

56. *Id.* at 223.

57. *Id.*