

# FOREWORD—THE LEGAL ETHICS SCHOLARSHIP OF TED SCHNEYER: THE IMPORTANCE OF BEING RIGOROUS

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This collection on “Lawyer Regulation for the 21st Century” celebrates Ted Schneyer’s legal ethics scholarship. From my perspective as Ted’s friend and colleague in the field of legal ethics, it is obvious how richly he deserves this festschrift, and it is my privilege to be invited to contribute its foreword. But to someone outside the field, many questions might be raised. Why celebrate legal scholarship? Why celebrate *legal ethics* scholarship? Why celebrate *Ted Schneyer’s* legal ethics scholarship? And why celebrate it by collecting writings on the theme of *Lawyer Regulation for the 21st Century*?

Though I have no desire to put a damper on the celebration, it strikes me that no one writing in the field of legal ethics has been more questioning, more probing, more skeptical than Ted. Therefore, what better way is there to celebrate his contributions than by asking why we are celebrating them and why we do so in this manner?

Let me start with the last question. “Lawyer Regulation for the 21st Century”: what makes this a fitting theme for a collection in Ted’s honor? Two things, actually.

First, although lawyer regulation is a wide and ever-expanding landscape, Ted has captured it with extraordinary discernment over the course of a career that has spanned more than three decades. The legal profession’s regulatory framework consists of all the institutions that create norms for lawyers, the institutions that interpret and enforce those norms, and the processes by which these institutions go about doing so.<sup>1</sup> That has been Ted’s principal subject. A century ago, lawyers were primarily regulated by state courts and bar associations. State courts adopted ethics rules based on an American Bar Association (ABA) model code; bar

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1. Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 J. PROF. LAW. 161, 161; see also Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 5 AM. B. FOUND. RES. J. 939, 939 (1980) (“Regulating lawyers is a three-part process. Rules must be formulated, they must be interpreted, and they must be enforced.”).

associations and courts then interpreted the rules and enforced the rules in disciplinary proceedings. But, to the ABA's consternation, institutions external to the legal profession have become increasingly prominent regulatory forces by adopting and enforcing other bodies of regulatory law. Ted has charted their development and rise. In particular, as law practice has become more specialized since the 1960s, federal regulation of lawyers has become increasingly important.<sup>2</sup> Examples Ted noted several years ago in an article on regulatory developments include the Justice Department's use of criminal law to police bankruptcy, securities, and tax lawyers, among others; the application of federal consumer protection law to lawyers; and the statutes and regulations aimed specifically at bankruptcy, securities, and tax lawyers.<sup>3</sup>

Ted would call himself an "institutionalist." He pays particularly close attention to the operation and role of the institutions that regulate lawyers. How well do they do their regulatory jobs? Which institutions are more competent to make a rule or law governing lawyers<sup>4</sup> or to enforce one on any given subject?<sup>5</sup> As might be expected, bar institutions responsible for adopting, interpreting and enforcing professional norms are most prominent among those that he has scrutinized. While federal agencies and other institutions have assumed previously unaccustomed roles in lawyer regulation, the bar maintains and has sought to preserve a significant and perhaps dominant regulatory role. Ted has given particular attention to bar institutions' regulatory roles and how they have evolved.<sup>6</sup>

For instance, Ted has studied the ABA as a rulemaking body. This was the focus of his 1989 tour de force, "Professionalism as Bar Politics: The Making

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2. Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 566 (2005).

3. *Id.* at 573–82.

4. *See, e.g.*, Ted Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?: Asserting Judicial Independence Through the Power to Regulate the Practice of Law*, 48 ARIZ. L. REV. 419, 452–58 (2006) (concluding that the state court is better situated than the state legislature to adopt rules governing corporations' attorney-client privilege, in part because the judiciary is more competent to coordinate the privilege with other law, less susceptible to institutional bias with regard to the relevant interests, and more respectful of the trans-substantivity principle, and that the state court should invoke its exclusive authority to regulate law practice to supersede legislation on this subject).

5. *See, e.g.*, Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371, 373–74 (1998) (comparing the capacities of different institutions to enforce restrictions on legal fees).

6. *See, e.g.*, Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245 (1998); Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991); Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125 (1991); Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 8 AM. B. FOUND. RES. J. 1 (1983); Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW. 13.

of the Model Rules of Professional Conduct,”<sup>7</sup> which is a political account of the six-year process leading to the ABA’s adoption of the Model Rules. While the account is ultimately sympathetic in its depiction of the drafters’ openness to competing professional viewpoints, it also demonstrates the extent to which professional subgroups sought to exploit the opportunity to shape the rules to their ends.<sup>8</sup>

Bar politics has been one of Ted’s abiding scholarly interests,<sup>9</sup> and when he returned to the ABA’s ethics rulemaking role in a significant piece published in 1993, his account was less sympathetic.<sup>10</sup> This time, he examined the 1991 “ancillary business debate”—the debate within the ABA over whether the Model Rules should permit lawyers to own or operate businesses providing non-legal services, such as environmental consulting services, which are ancillary to the practice of law. Ted analyzed the rhetoric successfully employed by opponents of ancillary businesses. He showed that their rhetoric, centering on considerations of “professionalism,” distracted the ABA leadership from the kinds of questions that should go into good public policymaking—for example, what are the perceived risks of ancillary businesses, what does data show about the magnitude of those risks, how can the risks be reduced, and whether the benefits outweighed the costs.<sup>11</sup>

Ted has also studied the ABA as an interpreter of professional norms. In 1981, he and his Wisconsin colleague, Ted Finman, published the first comprehensive critique of the work of the ABA standing committee that issues opinions interpreting the provisions of the ABA’s model ethics code. The article was quite critical of both the committee’s writings and the process by which they were produced. (Around a quarter century later, Ted spent a few years as the AALS (Association of American Law Schools) representative to the committee, and I was also a member. I think Ted would agree that, by then, both the committee’s product and its process had improved considerably, and I would not discount the possibility that Ted’s article played some role in inspiring that development.)

Likewise, Ted has examined bar associations’ disciplinary role, which has largely been superseded by the work of independent disciplinary agencies supervised by state courts. In 1983, he published a definitive, comprehensive account of unified bars—that is, bar associations in the minority of states that require their lawyers to join, in contrast to the more prevalent voluntary bar

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7. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

8. *Id.* at 700–01.

9. See, e.g., Schneyer, *An Interpretation of Recent Developments*, *supra* note 2, at 564; Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 305–10 (2008).

10. Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993).

11. *Id.* at 366, 372–90. The article speculated that “the crusade against ancillary business” was a reaction to an identity crisis in the legal profession occasioned by cultural changes, *id.* at 391–92, and suggested that the “cure for this policymaking disease” would be adherence to “principles of tolerance and careful inquiry in future debates.” *Id.* at 393.

associations. The unified bars arose in the early twentieth century largely out of the expectation that their responsibility for lawyer regulation would lead to better admission and disciplinary standards and practices.<sup>12</sup> Focusing on Wisconsin's experience, Ted showed convincingly that the preservation of unified bar associations is not justified by their regulatory role, nor by their role in promoting law reform or by any other contribution, particularly given political and legal challenges and other costs of maintaining them.

At the same time, while not discounting the bar's importance, Ted has been a leader in recognizing that other institutions loom increasingly large on the regulatory landscape.<sup>13</sup> He has marked the shift from professional self-regulation to external regulation of legal practice by studying how lawyers are governed by institutions aside from bar associations and state courts.

Some of Ted's writings look at the regulatory role of government institutions other than state judiciaries. An example is Ted's 1994 article on the regulatory response to lawyers' alleged failings in connection with the Savings & Loan Crisis. Ted began with the observation that "in contrast to the barrage of lawsuits and enforcement actions launched against S&L lawyers, nearly all had been quiet on the disciplinary front."<sup>14</sup> He asked why. Why had professional disciplinary bodies essentially played no role, and what was the significance of the regulatory role undertaken by a federal administrative agency, the Office of Thrift Supervision, which initiated civil actions to hold some of the lawyers accountable? The article described the limitations of the disciplinary process and ethics codes that made them inadequate to the regulatory task at hand. Drawing on the political concept of corporatism—the development of laws governing an occupation through negotiation between the government and the occupation's leading membership association—Ted predicted that in the future, standards of conduct would be developed for lawyers through what he termed "bar corporatism," that is, through negotiations or dialogue between government agencies and the ABA.<sup>15</sup>

Ted has also emphasized that lawyers are regulated informally by private actors. These include external actors, such as malpractice insurers. But lawyers are also regulated, informally but significantly, by the private institutions, including the law firms, in which they work. This insight is a predicate of Ted's influential 1991 *Cornell Law Review* article, in which he argued that professional discipline, which until then could be imposed only on lawyers individually, should be extended to law firms.<sup>16</sup> Ted recognized that law firms have a significant role, for better or worse, in regulating the conduct of their lawyers, and that they would be encouraged to regulate better if they were themselves subject to professional

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12. Schneyer, *The Incoherence of the Unified Bar Concept*, *supra* note 6, at 15–18.

13. Schneyer, *How Things Have Changed*, *supra* note 1, at 161–62.

14. Schneyer, *From Self-Regulation to Bar Corporatism*, *supra* note 6, at 640.

15. *Id.* at 658.

16. Schneyer, *Professional Discipline for Law Firms?*, *supra* note 6, at 8–11; see also Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 *GEO. J. LEGAL ETHICS* 335, 336 (2003) ("Schneyer's arguments have profoundly influenced subsequent debate about law firm discipline. Indeed, it is difficult to find a law review article or bar debate on the subject that does not begin with Schneyer's article.").

discipline, just as corporations are subject to criminal prosecution based in part on a principle of vicarious liability.<sup>17</sup> His article was the first to employ the idea of a law firm's "ethical infrastructure"—meaning the "organization, policies, and operating procedures" of a law firm that influence its lawyers' professional conduct<sup>18</sup>—a concept that is now commonly employed in the academic and professional literature. Ted argued that, for the same reasons criminal law applies to corporations, disciplinary rules should be applicable to law firms. He further argued that alternative regulatory mechanisms such as "malpractice litigation, disqualification, civil sanctions, peer review, and [administrative] oversight" had gaps and limitations that professional discipline would fill.<sup>19</sup> In the wake of the article, two states—New York and New Jersey—have been persuaded to adopt law firm discipline.<sup>20</sup>

All of this is simply to say that, if one seeks to honor Ted Schneyer's prodigious scholarly contributions, as his colleagues have done, it makes sense to do so with a collection on lawyer regulation. But why focus on lawyer regulation in the *21st Century*? That brings me to the second reason why the theme of this festschrift is so apt.

When it comes to *21st Century* lawyer regulation, Ted got a head start on the rest of us. He tackled the subject in an essay entitled "Professional Discipline in 2050: A Look Back," published in 1991, nine years before the dawn of the new century and fifty-nine years before its midpoint, which Ted took as his vantage point.<sup>21</sup> In Ted's description, American lawyers in the year 2050 would be allied in mega-firms with accountants and other professionals;<sup>22</sup> "the sole practitioner," he predicted, would be "as extinct as the bald eagle."<sup>23</sup> Additionally, Ted painted a regulatory landscape in which lawyers would be federally licensed and regulated<sup>24</sup> and in which regulators would focus "on entities as disciplinary targets" rather than on individual lawyers,<sup>25</sup> a result foreshadowed by his aforementioned 1991 *Cornell Law Review* article on law firm discipline.<sup>26</sup>

Ted's article on professional discipline in the mid-twenty-first century was somewhat whimsical, but as a general matter, Ted has been a trend spotter, if not a time traveler. Many of his writings survey the changing nature of law

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17. Schneyer, *Professional Discipline for Law Firms?*, *supra* note 6, at 27–31.

18. *Id.* at 10.

19. *Id.* at 23–45.

20. Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1473 (2000).

21. Schneyer, *Professional Discipline in 2050*, *supra* note 6. On second thought, a collection of writings on "Lawyer Regulation for the 21st Century" may be too nearsighted to honor Ted sufficiently. Fewer than ninety years remain in the twenty-first century. Perhaps, in the spirit of Ted's farsighted essay, we should be contemplating lawyer regulation for the *22nd Century* and leaving the next nine decades to the unimaginative and unambitious among us.

22. *Id.* at 129.

23. *Id.*

24. *Id.* at 125–28.

25. *Id.* at 131.

26. Schneyer, *Professional Discipline for Law Firms?*, *supra* note 6, at 8–11.

practice and ask what the changes portend for the future of lawyer regulation.<sup>27</sup> His prediction of the rise of bar corporatism,<sup>28</sup> already noted, is one example, but there are important others. One that should garner renewed interest is a 2000 *Minnesota Law Review* article in which Ted took it as a given that the ABA would eventually amend its rules to permit lawyers to practice in multidisciplinary partnerships (MDPs)—that is, professional service partnerships between lawyers and nonlawyer professionals.<sup>29</sup> Ted posed the question of what future regulation of MDPs would look like; in particular, whether it would be possible to prevent and remedy nonlawyers' interference with lawyers' exercise of independent professional judgment. The article cast doubt upon the notion that professional regulation, such as through certification or audits, as then anticipated by the ABA, would be effective. It concluded that the most significant regulatory mechanisms would be internal controls developed within the MDPs themselves and *ex post* liability. Although MDP proposals were defeated a decade ago, Ted's insights have become relevant again. The ABA's Ethics 20/20 Commission—recently appointed to evaluate lawyer regulation in light of globalization and evolving technology—now has the opportunity to reevaluate professional partnerships between lawyers and nonlawyers. Happily, Ted was appointed to the Commission, and so at least one member will be familiar with his work.

Ted's writings are far too extensive to review completely, or even nearly. He has written about conflicts of interest,<sup>30</sup> contingent-fee contracts<sup>31</sup> and attorney-client privilege;<sup>32</sup> collaborative divorce lawyers,<sup>33</sup> corporate lawyers<sup>34</sup>

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27. See, e.g., Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 594 (2002) (contrasting techniques for regulating large-firm practice with those aimed at solo and small-firm practitioners, in part because of the distinctive source of large firms' ethical problems); Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 REV. LITIG. 537, 540–46 (1997) (criticizing disqualification case law responding to litigation conflicts in an era of growing federal litigation involving sophisticated corporate clients); Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 458–59 (1988) (exploring the development of law occasioned by the growth of in-house counsel); Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777, 1777–79 (1998) (critiquing economics-based arguments that certain rules of legal ethics are unduly limiting law firms' growth and other structural change); Ted Schneyer, *The Regulatory Implications of Trends in Law Practice: Thoughts on the Data Reported in Urban Lawyers*, 2006 PROF. LAW. 47, 47–49 (considering the regulatory implications of the American Bar Foundation's (ABF) second Chicago bar study as compared with its earlier one).

28. Schneyer, *From Self-Regulation to Bar Corporatism*, *supra* note 6, at 671–76.

29. Schneyer, *Multidisciplinary Practice*, *supra* note 20, at 1476.

30. Schneyer, *Nostalgia in the Fifth Circuit*, *supra* note 27.

31. Schneyer, *Legal-Process Constraints*, *supra* note 5.

32. Schneyer, *Who Should Define Arizona's Corporate Attorney-Client Privilege?*, *supra* note 4.

33. Schneyer, *The Organized Bar and the Collaborative Law Movement*, *supra* note 9.

and white-collar defense lawyers;<sup>35</sup> professional reforms in Australia, the U.K., and the United States;<sup>36</sup> and so much more. He gives us both the trees and the forest; he scrutinizes particular aspects of lawyer regulation to make bigger points about where we are and where we are going. Even so, the above sampling of Ted's scholarship should be enough to make the small point that, if one is to celebrate Ted's works, the regulation of the legal profession in the twenty-first century is a fitting theme.

But that leaves the tougher questions. In recent years, some have challenged the value of legal scholarship altogether. Two decades ago, Judge Harry Edwards famously worried that legal scholarship was becoming less relevant to what lawyers and judges do,<sup>37</sup> and more recently, federal circuit judge Dennis Jacobs one-upped him by declaring that he never reads law review articles because they are completely irrelevant to judges.<sup>38</sup> So why celebrate legal scholarship at all?

And why celebrate *legal ethics* scholarship in particular? Legal ethics is a sometimes maligned academic field. Most infamously, in the last Supreme Court term, Justice Scalia took a shot at it in his dissent in *Holland v. Florida*.<sup>39</sup> The case involved a criminal defendant named Holland whose lawyer failed to file a timely petition for post-conviction relief in federal court.<sup>40</sup> The question for the Supreme Court was whether, under the particular circumstances, the statutory time period within which Holland had to file his petition should be tolled on equitable grounds. A group of legal ethics professors, Ted among them, filed a friend-of-the-Court

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34. Ted Schneyer, *Fuzzy Models of the Corporate Lawyer as Environmental Compliance Counselor*, 74 OR. L. REV. 99 (1995); Schneyer, *Professionalism and Public Policy*, *supra* note 27.

35. Ted Schneyer, *Getting from "Is" to "Ought" in Legal Ethics: Mann's Defending White-Collar Crime*, 11 AM. B. FOUND. RES. J. 903 (1986) (book review).

36. Schneyer, *Thoughts on the Compatibility*, *supra* note 6.

37. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-42 (1992).

38. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 ("I haven't opened up a law review in years," said Chief Judge Dennis G. Jacobs of the federal appeals court in New York. "No one speaks of them. No one relies on them.").

39. 130 S. Ct. 2549 (2010).

40. *Id.* at 2554. Holland was convicted of murder and sentenced to death. *Id.* at 2555. After his conviction and sentence were upheld on appeal, he engaged a lawyer to move for post-conviction relief in state court and, if that failed, in federal court. *Id.* Holland sent repeated communications to his lawyer as well as to the courts to try to ensure that the lawyer did what he agreed to do, which the defendant, confined on death row and unschooled in the law, was not well-situated to do for himself, which was simply to file a petition on time. *Id.* at 2555-56. However, after state court proceedings ended unsuccessfully in the Florida Supreme Court, *id.* at 2556, Holland's lawyer failed to file the federal claim within the statutory time limit. *Id.* at 2559. This was not just the result of a simple mistake about when a petition had to be filed; the lawyer had not researched the filing requirement. *Id.* at 2558. Beyond that, the lawyer did not notify the client when the state supreme court ruled against him despite Holland's requests to be told, and the lawyer generally failed to respond to requests for information, making it impossible for Holland to correct for his lawyer's deficiency. *Id.* at 2557-59.

brief describing how the lawyer's conduct violated professional norms regarding attorney competence, diligence, and communications with the client. The Court's opinion, authored by Justice Stevens, graciously referenced the amicus brief. Justice Scalia's dissent was not quite as friendly. He criticized the Court's implicit approval of professional norms "articulated by an ad hoc group of legal-ethicist *amici* consisting mainly of professors of *that least analytically rigorous and hence most subjective of law-school subjects, legal ethics.*"<sup>41</sup>

To respond to Justice Scalia first: legal ethics is no more subjective than any other legal academic subject.<sup>42</sup> Legal ethics professors study and teach regulation that is like any other regulation, except that it happens to apply to us as lawyers. The subject produces scholarship that employs the methodologies of other legal scholarship, and no less rigorously.

One need look no further than the writings of Ted Schneyer. I would happily select him as our legal ethics champion and invite Justice Scalia to compare Ted's writings on legal ethics to those of legal academics on other subjects. Ted asks interesting, important questions and explores them deeply, building on evidence. He draws insights from other disciplines—legal history,<sup>43</sup> the sociology of the professions,<sup>44</sup> law and economics,<sup>45</sup> empirical studies,<sup>46</sup> organization theory,<sup>47</sup> moral and political philosophy<sup>48</sup>—and in so doing, contributes to those fields at the same time he contributes to the field of legal ethics.

And Ted is nothing if not rigorous. In fact, some of Ted's most satisfying works are those that employ a rigorous inquiry to expose the intellectual laziness of others both in the profession and in academia. His work, already noted, on the rhetoric employed by bar leaders in the ancillary business debate is one example, but hardly the only.

41. *Id.* at 2575 (Scalia, J., dissenting) (emphasis added).

42. This is not to say that law is objective in the way that math and hard sciences are. Well-trained lawyers can look at a close question and come up with very different answers, as the many non-unanimous Supreme Court decisions reflect.

43. See, e.g., Schneyer, *The Incoherence of the Unified Bar Concept*, *supra* note 6; Ted Schneyer, *Change and Persistence in the Bar President's Speech*, 41 MERCER L. REV. 581 (1990).

44. See, e.g., Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529; Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 42 (1993); Schneyer, *Getting from "Is" to "Ought" in Legal Ethics*, *supra* note 35.

45. See, e.g., Schneyer, *Reputational Bonding*, *supra* note 27.

46. See, e.g., Ted Schneyer, *Empirical Research with a Policy Payoff: Market Dynamics for Lawyers Who Represent Plaintiffs for a Contingent Fee*, 80 TEX. L. REV. 1829 (2002); Schneyer, *The Organized Bar and the Collaborative Law Movement*, *supra* note 9; see also *infra* text accompanying notes 49–53 (discussing response to moral philosophers).

47. See, e.g., Schneyer, *The Incoherence of the Unified Bar Concept*, *supra* note 6; Schneyer, *Professional Discipline for Law Firms?*, *supra* note 6.

48. See *infra* notes 49–53 and accompanying text.



My own favorite is Ted's well-known article "Moral Philosophy's Standard Misconception of Legal Ethics."<sup>49</sup> Although Ted has never been interested in writing about legal ethics doctrine per se, he has written many interesting works that, at least in substantial part, explore the nature of professional rules and norms,<sup>50</sup> and this is one of them. It takes on moral philosophers who have attacked the profession's ethics rules for purportedly compelling lawyers to act as their clients' "hired guns" without regard to lawyers' own moral values or the interests of third parties. Showing that an ounce of empiricism is worth a pound of theory, Ted draws on sociologists' studies to refute the assumption that lawyers characteristically act as hired guns. And showing that generalizations about professional norms may be belied by a careful reading of the ethics rules,<sup>51</sup> Ted makes a convincing case that, insofar as lawyers do act as hired guns, they are often violating ethics rules, and certainly are not acting under the rules' compulsion.

Along the way, Ted's response to the moral philosophers offers an observation that captures both Ted's elegant writing style<sup>52</sup> and his spirit of scholarly inquiry. He expresses disappointment that the philosophers who criticize the legal profession and its norms:

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49. Schneyer, *Moral Philosophy's Standard Misconception*, *supra* note 44.

50. See, e.g., Schneyer, *From Self-Regulation to Bar Corporatism*, *supra* note 6, at 666–67 (demonstrating that the potentially applicable Model Rules were too indeterminate to be applied to the lawyers whose conduct was questioned in the Savings & Loan Crisis); Schneyer, *How Things Have Changed*, *supra* note 1, at 172–78 (showing how the 1908 ABA Canons and the 1983 ABA Model Rules reflect differences in the nature of lawyers' practices and workplaces and in the relationship between disciplinary rules and external law); Schneyer, *Professionalism as Bar Politics*, *supra* note 7, at 677–81 (comprehensive account of the drafting of the ABA Model Rules); Schneyer, *The ALI's Restatement and the ABA's Model Rules*, *supra* note 44; Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, *supra* note 1.

51. Or, as Yogi Berra said, you can observe a lot by watching. See generally YOGI BERRA & DAVE KAPLAN, *YOU CAN OBSERVE A LOT BY WATCHING* (2008). Another illustration is Ted's 1986 response to an essay by Erwin Chemerinsky criticizing professional responsibility courses and casebooks on the ground that they are incompatible with the objective of encouraging critical thinking about the lawyer's role in society, how to recognize and resolve ethical issues that lawyers face, and the regulation of the legal profession—objectives that Ted embraced in teaching the subject. Ted gave the casebooks in question a close reading to demonstrate that many of Chemerinsky's characterizations were "simply incorrect." Ted Schneyer, *Professional Responsibility Casebooks and the New Positivism: A Reply to Professor Chemerinsky*, 10 AM. B. FOUND. RES. J. 943, 953 (1985).

52. I had the privilege of serving with Ted on the Multistate Professional Responsibility drafting, which relied on him to resolve tough grammatical questions. One of the joys of reading Ted's articles is that he not only can make nouns and verbs agree, he can turn a phrase. See, e.g., Schneyer, *From Self-Regulation to Bar Corporatism*, *supra* note 6, at 645 (observing that while federal agencies netted \$147 million in settlements against law firms alleged to have acted improperly in representing financial institutions, "[n]o such pot of gold lies at the end of the disciplinary rainbow"); Schneyer, *The ALI's Restatement and the ABA's Model Rules*, *supra* note 44, at 30 ("Of course, the *Restatement* is not just an ethics code in drag. It is designed to cover in depth many topics that the ABA codes do not address or only touch upon."); see also *infra* text accompanying note 53 (quoting Ted's reply to moral philosophers).

approach their subject in a temper that blinds them to the possibility of learning anything of use to non-lawyers. They find nothing of general value in the way lawyers address their ethical problems, and no solutions to specific problems which would be valuable as analogies in other ethical domains. This is not only curious, since in other respects philosophers have been eager to generalize from their study of law and legal institutions, but regrettable as well. Because law practice so frequently involves moral risks, lawyers' reflections on ethics just might contain, like law itself, a vein of hard-won understanding that philosophers could mine for the benefit of non-lawyers. But mining cannot be expected from those who come to new territory as missionaries rather than prospectors. And missionaries bent on converting the bar are what the philosophers have mostly been.<sup>53</sup>

In contrast, Ted has examined the legal profession, its regulatory institutions and mechanisms, and its norms in an open-minded spirit. He has been very much the prospector.

One cannot help but wonder about the source of Justice Scalia's misconception. One possibility is that the Justice confused legal ethics with judicial ethics, which, at the Supreme Court level, is not governed by rules, but at best by the individual justice's understanding of "established principles and practices."<sup>54</sup> But perhaps Justice Scalia was reminiscing on his own law-school student days in the late 1950s, when lawyers' ethics may still have been the province of boozy after-dinner speakers.<sup>55</sup> Or he may have conceived that questions of professional conduct are resolved exclusively with reference to each individual lawyer's personal ethical compass—that legal academics teach their students to make ethical judgments, as some practitioners have been known to do, by asking themselves such questions as, "how does it feel in my gut?," "does it pass the 'smell test'?", or "how will I sleep at night if I act one way or another?" If so, the Justice should have known better—lawyers are subject to ethics rules and

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53. Schneyer, *Moral Philosophy's Standard Misconception*, *supra* note 44, at 1531.

54. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 916 (2004).

55. Bob Gordon has referred to "the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real." Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13 (1988). Whether Professor Gordon's description fairly captures the nature of legal ethics discourse at mid-twentieth century might be a subject of debate. But even by then, distinguished lawyers and academics had made efforts to make legal ethics a subject of serious study. For example, John Dos Passos (father of the novelist of the same name) wrote insightfully about the American lawyer in 1907. JOHN R. DOS PASSOS, *THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE* (1907). Professor George Costigan, Jr., of Northwestern University published the first casebook on legal ethics in 1917. GEORGE P. COSTIGAN, JR., *CASES AND OTHER AUTHORITIES ON LEGAL ETHICS* (1917). Professor Henry Jessup of Columbia University wrote about lawyers' professional ideals in 1925. HENRY WYNANS JESSUP, *THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS* (1925). Professor Elliott Cheatham, also of Columbia University, published a casebook on the legal profession in 1938. ELLIOTT E. CHEATHAM, *CASES AND OTHER MATERIALS ON THE LEGAL PROFESSION* (1938).

other law. Indeed, one reading Ted's article on the development of the ABA Model Rules of Professional Conduct might note that Justice Scalia had a peripheral role in the process; he engaged in special pleading on behalf of the Administrative Law Section, which he chaired, urging that the conflict-of-interest rules be liberalized for former government lawyers in private practice.<sup>56</sup>

No responsible academic would suggest that lawyers can resolve questions of professional conduct by ignoring professional regulation in favor of their own subjective preferences.<sup>57</sup> As Ted once observed in the course of defending legal ethics casebooks:

Lawyers in our society live in a sea of rules . . . . We can either teach [law students] that morality is a separate, land-based realm or teach them that they must find their moral bearings in that sea of rules. If we imply that the professional codes are not worth intensive study by anyone disposed to be virtuous—that legal ethics is to be studied on land—then we should not be surprised if as lawyers they disregard those codes and other legal rules as well, interpret rules woodenly, use them cynically. If we teach them instead that rules and moral judgment must and usually can be *made* to correspond, that there is no escape to shore, then they may try harder to make moral sense of the rules they encounter, including . . . the model rules of professional conduct.<sup>58</sup>

If legal ethics professors think that they can be helpful to the Court in cases involving questions of lawyer conduct, it is not because they are particularly virtuous but because they make a living intensely studying their profession's professional codes in relation to other law, actual practice, and common morality.

Ted's scholarship shows that one can tackle the normative side of lawyer regulation as rigorously as any other body of law. He did so when the ABA Model Rules were in draft, when he explored whether proposed revisions to ethics rules solve the problems of interpretation and enforcement created by the then-existing rules.<sup>59</sup> These deficiencies, which had created the need for change, included insufficient specificity regarding the desired professional conduct and ambiguity in the relationship between the disciplinary rules and other law. He did so several years later, when the Restatement provisions on the law of lawyering were in draft. He questioned the wisdom of developing a rival normative code for legal practice, and made a persuasive case that, in areas where the two sets of standards covered

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56. Schneyer, *Professionalism as Bar Politics*, *supra* note 7, at 716 & n.227.

57. *Cf.* Schneyer, *Professional Responsibility Casebooks and the New Positivism*, *supra* note 51, at 944 (discussing use of problem method in legal ethics pedagogy to teach students how to apply ethics rules in concrete situations, how to recognize the underlying policies, how to interpret them, how to reconcile them with moral values and actual practice, and how to critique them); Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 12 (1991) (“[W]hy should we privilege lawyers’ off-the-job values over values forged in professional debate and practice?”).

58. Schneyer, *Professional Responsibility Casebooks and the New Positivism*, *supra* note 51, at 957.

59. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, *supra* note 1, at 952.

the same ground, many of the contemplated Restatement provisions were unjustified departures from the Model Rules.<sup>60</sup>

This is not to say that normative scholarship must invariably be practical. As a self-described “academic lawyer with no formal training in moral philosophy but a sustained interest in what moral philosophy can (and cannot) contribute to normative legal ethics,”<sup>61</sup> Ted has made a series of contributions to the normative scholarship that explore the intersection of moral philosophy and legal ethics.<sup>62</sup> But as the earlier-described work on the moral philosopher’s standard misconception illustrates, these writings are as objective and as rigorous as others.

Ted has not hesitated to challenge fellow academics who make exaggerated or questionable claims,<sup>63</sup> but it is plain that if there is a *rigor deficit* in the field of legal ethics, it is not primarily on the side of the academy. The organized bar’s approach to questions of professional regulation often lacks the level of objectivity, sharpness, and depth that one would expect of good lawyer discourse. Bar leaders’ resort to vague “professionalism” rhetoric, as in the ancillary business debate, is one example that Ted has exposed.

Nor are the courts immune from criticism, as Ted demonstrated in a 1988 article titled “Professionalism and Public Policy: The Case of House Counsel,” which offers a model of normative scholarship in the field.<sup>64</sup> The article examined three bodies of state judge-made law regulating corporate in-house counsel: (1) cases on whether in-house counsel may have access to information under a protective order; (2) cases on whether insurance companies’ staff attorneys may defend policyholders; and (3) cases on whether in-house counsel may seek compensation for wrongful discharge. Ted showed that judges in these cases made various assumptions about in-house lawyers as compared with outside counsel—about their relationships with the corporate clients and their non-lawyer officers, their level of involvement in clients’ business decisions, their susceptibility to client pressure, and their job mobility—that are not self-evident, that are in some cases inconsistent with each other, that lack empirical foundation, and that appear

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60. Schneyer, *The ALI’s Restatement and the ABA’s Model Rules*, *supra* note 44.

61. Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer’s Point of View*, 16 *YALE J.L. & HUMAN.* 45, 46 (2004).

62. See Schneyer, *Fuzzy Models*, *supra* note 34; Ted Schneyer, *Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging “Public” over Professional Values*, 70 *FORDHAM L. REV.* 1831 (2002); Schneyer, *Some Sympathy for the Hired Gun*, *supra* note 57; Schneyer, *The Promise and Problematics of Legal Ethics*, *supra* note 61.

63. See, e.g., Schneyer, *Moral Philosophy’s Standard Misconception*, *supra* note 44 (critiquing moral philosophers); Schneyer, *Professional Responsibility Casebooks and the New Positivism*, *supra* note 51 (responding to criticism of legal ethics casebooks); Schneyer, *The Promise and Problematics of Legal Ethics*, *supra* note 61 (critiquing Daniel Markovits’s article on the contemporary American bar).

64. Schneyer, *Professionalism and Public Policy*, *supra* note 27, at 457 (“[S]cholars . . . add a new strategy to the campaign to put professionalism in context. They should analyze policy decisions in order to identify the decisionmakers’ assumptions about various practice settings, compare those assumptions with what is actually known, and bring any discrepancies to light.”).

to derive from tacit premises about in-house lawyers' status as professionals.<sup>65</sup> He concluded that judges are "apt to approach the regulation of law practice in terms of traditional professional principles tempered by their own notions about professional status."<sup>66</sup> He assigned scholars the task of "foster[ing] a state of affairs in which judges nonetheless base their policy decisions on solid evidence about the pressures and temptation under which various types of lawyers work."<sup>67</sup> In other words, the problem of subjectivity in the field of legal ethics is on the professional side; the academy's job is to ride to the rescue.

Having explicitly defended the position that *legal ethics* is a subject of academic study at least as worthy of celebration as any other legal academic subject, I hope that I have also shown that legal scholarship, *especially* on the subject of legal ethics, should be celebrated. The body of legal ethics scholarship speaks not only to academics who train future lawyers on this important subject but to other institutions of the legal profession, including bar associations and the judiciary, that play a central role in regulating lawyers. No one can make bar leaders and judges read law review articles; unfortunately, there is hostility, or at least skepticism, toward legal academic writing in some parts of the bench and bar. But those who are open to legal ethics scholarship may be led to think differently—more critically and more deeply—about how they and the institutions they represent perform their functions as rule- and law-makers, interpreters and enforcers of professional norms. And the scholarship can be influential in other ways, including through the teaching and professional service of legal ethics professors such as Ted, whose understandings are enhanced by participating in scholarly reading, writing, and discussion.

And that brings me to the last question: why celebrate *Ted's* legal ethics scholarship? By now, the answer should be obvious: Ted's body of work is exemplary.<sup>68</sup> For scholars in the field, Ted's writings offer models for how to write seriously about legal ethics. A new legal ethics professor can do no better than to begin by sitting down with some of Ted's work in order to get an idea of the kinds of questions one might ask and approaches one might adopt to answering them. For lawyers and judges engaged in facets of the regulatory process, Ted's articles offer models for how to think seriously about legal ethics.

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65. *Id.* at 458–83.

66. *Id.* at 483; *see also id.* at 459 (“[T]he courts are making public policy on the basis of findings which may again reflect nothing so much as the bar’s ambivalence as to whether house counsel are truly professionals.”).

67. *Id.* at 483; *see also id.* at 457 (“[Scholars] should analyze policy decisions in order to identify the decisionmakers’ assumptions about various practice settings, compare those assumptions with what is actually known, and bring any discrepancies to light.”).

68. There is another reason that one would not know simply from reading Ted’s writings, but that I have come to know by spending time with Ted and his wife, Kathy, in the context of Multistate Professional Responsibility Examination (MPRE) drafting committee meetings, ABA ethics committee meetings, and academic and professional conferences. It is that there is no finer couple than the Schneyers; there is no more generous teacher than Ted; there is no nicer guy. And so, I hope this festschrift is seen as a celebration not only of Ted Schneyer the legal ethics scholar, but of Ted Schneyer the man. On both counts, it is a very fitting celebration indeed.

We will need serious thinking in the days ahead, because the legal profession will face hard regulatory questions, some of which Ted's writings anticipate, others of which may be yet unforeseen. As law practice becomes increasingly specialized and continues to branch into areas where lawyers compete with other professionals, government agencies will continue to challenge state judiciaries' dominant role in regulating law practice. The ABA is heady with its recent success in beating back an attempt by the Federal Trade Commission (FTC) to extend identity theft regulations to lawyers as creditors,<sup>69</sup> but there exists plenty of other government regulation that the bar cannot seriously challenge, and there is more to come.<sup>70</sup> When lawyers serve as lobbyists, for example, they may (or may not) be subject to the rules of professional conduct governing the lawyer-client relationship and other aspects of law practice,<sup>71</sup> but even if so, lawyer-lobbyists cannot seriously expect to be exempt from the specialized regulation governing lobbyists generally. Will bar corporatism eventually become the favored ABA response to the expansion of external regulation—if you can't beat 'em, join 'em?

Specialization and experimentation within the bar also put pressure on the bar's traditional effort to centralize lawyer regulation by maintaining and enforcing a single set of general legal ethics rules.<sup>72</sup> Professional subgroups that regard their regulatory issues as unique may come to welcome government agencies to develop special regulatory rules and processes for them, as the large corporate law firms have in the UK.<sup>73</sup> Can the center hold? And at a time when the rising cost of a legal education may make it unaffordable for new lawyers to represent low- and middle-income clients, one can expect mounting pressure to liberalize "unauthorized practice of law" provisions that give lawyers a monopoly to practice law. Should the bar meet challengers halfway by, for example, endorsing the development of mechanisms to license and oversee nonlawyers, allowing them to provide legal assistance within the limited areas for which they would be trained?<sup>74</sup>

As the pace of change within the legal profession hastens,<sup>75</sup> an ever-higher premium will be placed on critical, honest thinking about the profession.

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69. Pursuant to 2003 legislation, the FTC established a Red Flags Rule requiring creditors to adopt programs to prevent identity theft, and initially regarded lawyers as creditors to whom the rule would apply. In August 2009, the ABA filed suit to prevent enforcement of the rule and prevailed on a summary judgment motion. *See Am. Bar Ass'n v. FTC*, 671 F. Supp. 2d 64, 66–67 (D.D.C. 2009). In late 2010, a law was enacted exempting practicing lawyers from the rule. *See Red Flag Program Clarification Act of 2010*, Pub. L. No. 111-319, 124 Stat. 3457 (to be codified at 15 U.S.C. § 1681m(e)(4)). This success built on the ABA's earlier one in preventing the FTC's regulation of law practice under the Gramm-Leach-Bliley Act. *See Am. Bar Ass'n v. FTC*, 430 F.3d 457, 458–59 (D.C. Cir. 2005).

70. *See Schneyer, An Interpretation of Recent Developments, supra* note 2, at 568–70.

71. *See, e.g., D.C. Bar Ass'n Legal Ethics Comm., Op.* 344 (2008).

72. *See Schneyer, The Organized Bar and the Collaborative Law Movement, supra* note 9, at 334–36.

73. Schneyer, *Thoughts on the Compatibility, supra* note 6, at 27–28.

74. *See Ted Schneyer, Introduction: The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 521, 523, 532 (2002).

75. *See Schneyer, Thoughts on the Compatibility, supra* note 6, at 16–24.

Unsubstantiated assumptions, vague rhetoric, and received wisdom about law practice—often masking perceived professional self-interest—will lose force.<sup>76</sup> Ted's writings deserve to be celebrated because, at this critical time in the legal profession's history, they remind us of the importance of being rigorous.

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76. Schneyer, *Change and Persistence in the Bar President's Speech*, *supra* note 43, at 1023 (observing in 1990 that "even in the face of the dramatic changes that are now making law practice more businesslike, the bar clings to the fuzzy concept of professionalism as its remedy of choice for whatever ails the legal system").

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