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ETHICAL COMMITMENTS

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The spirit of collaboration inspiring the W.M. Keck Foundation Forum on the Teaching of Legal Ethics reinvigorated the historical commitments of many to the development of a significant scholarship, pedagogy, and practice of ethics within legal education and the profession as a whole. Roger Cramton and Susan Koniak vividly display the strength of that spirit in their jointly crafted work, *Rule, Story, and Commitment in the Teaching of Legal Ethics*.[1] Exceptional scholars of long standing, Cramton[2] and Koniak[3] advance a forceful argument in defense of the curricular integration of rule, story, and commitment in the context of a legal ethics course. In this Essay, I present a brief response to their argument, offering a mix of praise, quar-

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1. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145 (1996).

2. *See, e.g.*, Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995); Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113 (1991); Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467 (1995); Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992).

3. *See, e.g.*, Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 (1995); Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993).

rel, and sympathy.

Cramton and Koniak deserve praise for both elegance and courage. Undaunted by student and faculty skepticism toward ethics instruction at law school, they skillfully defend the American Bar Association's (ABA) mandated curricular requirement in ethics.[4] Enacted during the Watergate era, the ABA requirement demands that law schools provide "instruction in the duties and responsibilities of the legal profession."[5] Conceived broadly, the instruction encompasses diverse pedagogical methods.[6] To pass muster, however, each method need only survey the "history, goals, structure and responsibilities of the legal profession."[7]

Overcoming the breadth and vagueness of the ABA's substantive requirement, Cramton and Koniak marshal an affirmative case for formal instruction in the law and ethics of lawyering.[8] To make the case for an ethics-teaching requirement, they assert that effective instruction in the law of lawyering heightens ethical sensitivity and increases the capacity for reflective moral judgment.[9] Implicit in this assertion is the premise that good judgment forms the core of moral reasoning. Absent this premise, a lawyer's moral discretion operates without foundation and guidance. The effort to link ethics instruction to moral training signals an intent to cure the antifoundational tendency encouraging, and thereby condoning, the exercise of unguided lawyer discretion in determining client ends and the means to achieve such ends.

Casting legal ethics as a field of independent moral complexity doubtlessly promotes the affirmative case for an ethics-teaching requirement. Although others recognize the moral tensions embedded in the tradition and practice of lawyering,[10] Cramton

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4. Cramton & Koniak, *supra* note 1, at 150-56; *see* ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS Standard 302(a)(iv) (1995).

5. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS Standard 302(a)(iv) (1995).

6. *See id.*

7. *Id.*

8. *See* Cramton & Koniak, *supra* note 1, at 157-64.

9. *See id.* at 159.

10. *See* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

and Koniak enhance this appreciation by locating these tensions within the constraining obligations of courts, third persons, the public, and the law itself.[11] This contextual treatment of obligation is significant. By grounding their analysis of ethical obligation not only in abstract rule,[12] but also in concrete story,[13] Cramton and Koniak encourage an interdisciplinary scholarship devoted to the study of lawyers and law practice in action.[14] In this way, they urge rejection of the anti-practice ethos tolerated, and sometimes espoused, by certain theoretical schools of legal scholarship.[15] This rejection repudiates the theory/practice dichotomy predominant in legal education.[16] The importance of this repudiation cannot be overstated. Embracing theory and practice in the investigation of law, lawyering, and legal institutions affords both coherence and insight. The cultivation of judgment depends on this bridge.

Of course, no acclaim comes without quarrel. The account that Cramton and Koniak jointly produce generates both large and small quarrels. To their credit, such quarrels in part arise out of a willingness to address the thorny issues of curricular revision and faculty recruitment that emerge as matters ancillary to the approval of an ethics-teaching requirement.[17] The small quar-

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11. *See* Cramton & Koniak, *supra* note 1, at 169-81.

12. *See id.* at 170-77.

13. *See id.* at 177-81.

14. For examples of interdisciplinary scholarship devoted to lawyers, see *Lawyering Theory Symposium*, 37 N.Y.L. SCH. L. REV. 1 (1992); *Lawyers As Storytellers & Storytellers As Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 567 (1994); Symposium, *Critical Theories and Legal Ethics*, 81 GEO. L.J. 2457 (1993); Symposium, *The Many Voices of Clinical Legal Education*, 1 CLINICAL L. REV. 1 (1994); Symposium, *Race, Gender, Power, and the Public Interest: Perspectives on Professionalism*, 8 ST. THOMAS L. REV. 1 (1995); Symposium, *Speeches from the Emperor's Old Prose: Reexamining the Language of Law*, 77 CORNELL L. REV. 1233 (1992); *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

15. Strands of an anti-practice ethos have been discovered in the scholarship of both the Critical Legal Studies and Critical Race Theory movements. *See* Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888 (1988); Leroy D. Clark, *A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23, 49-50 & n.148 (1995).

16. For a discussion of the theory/practice dichotomy in legal education, see Binder, *supra* note 15, at 890-905.

17. Cramton & Koniak, *supra* note 1, at 149-50, 189-93.

rels embody three objections.

Astutely setting out curricular revision as a starting point, Cramton and Koniak propose that first-year courses assess "some ethics issues," especially those emphasizing the lawyer's roles in counseling and negotiation.[18] Rather than find fault with this proposal, perhaps something broader in coverage might be imagined. Consider, for example, a course examining ethics and the lawyering process that also combines interviewing, fact investigation, case theory, and the study of advocacy as the pursuit of civic virtue.[19] Here, the notion of virtue contemplated extends beyond the conditions of individual moral choice to the circumstances of collective moral decision-making. Studying the roots of civic virtue underlying advocacy uncovers methods of fostering moral deliberation in the attorney-client relationship.[20]

In a bid to expand the scope of curricular revision, Cramton and Koniak also propose the pervasive teaching of ethics throughout the curriculum.[21] To be effective, they point out, pervasive instruction must highlight the contextual nature of lawyer decision-making under particular institutional arrangements and in light of specific ethical obligations.[22] Surely they are correct in making this observation. Yet, reliance on faculty commitment and institutional monitoring measures to reach this overarching goal seems misplaced. The history of faculty indolence and antagonism toward the study of ethics dictates enlisting the support of alumni, the bench, and the bar in shared curricular development.

Similarly, reliance upon standard faculty selection procedures to meet wider curricular objectives seems equally misplaced. To be sure, Cramton and Koniak give apt attention to the protocol of faculty selection, curricular inclusion, and research support.[23] Yet again, standard protocol may be inadequate to accomplish

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18. *Id.* at 166-67.

19. *See* Heidi L. Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996).

20. *See id.* at 904-05.

21. *See* Cramton & Koniak, *supra* note 1, at 166-69; DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994).

22. *See* Cramton & Koniak, *supra* note 1, at 181-89.

23. *See id.* at 189-92.

the more fundamental task of recruiting faculty capable of revitalizing the often "stock scholarship" and conventional pedagogy of ethics. Standard protocol regimes, in fact, are more likely to reproduce, rather than renew or reinvent, accepted academic practices. Reinventing ethics scholarship and pedagogy requires the recruitment of faculty dedicated to studying the intersections of theory and practice in the classroom and in advocacy.

Plainly, these are small quarrels of modest consequence. Parsing some larger quarrels may prove more fruitful. Consider five objections. For example, at critical points in their analysis, Cramton and Koniak appear to conflate personal identity and professional role.[24] Identity turns on the multiple categories of race, gender, ethnicity, age, disability, and sexual orientation.[25] Categorical identification may carry special obligations to a community[26] or a cause.[27] In the same way, role commitment may entail specific obligations to a client, rule, or story.[28] Thus, though identity and role may overlap in advocacy, divergence and dissonance seem plausible outcomes as well.

Having conflated identity and rule, Cramton and Koniak seem to divide narratives by position and function, finding distributions at the center and at the margins of rule-based story depending upon levels of dissonance. They observe: "At the margins, narratives embodying one principle will inevitably compete with conflicting narratives."[29] The core-periphery distinction, albeit attractive and even useful at times, clashes sharply with the Critical Legal Studies concept of fundamental contradiction[30] and the postmodern notion of immanent tension.[31]

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24. *See id.* at 159-60, 172-77, 179-81, 186-89, 195-99.

25. *See* Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993).

26. *See* Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901 (1995).

27. *See* David Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993).

28. *See* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996); Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996).

29. Cramton & Koniak, *supra* note 1, at 176.

30. *See* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L.

Moving next to methodology, Cramton and Koniak recommend case analysis of legal ethics over alternative teaching techniques, primarily in deference to the "deep dynamic of legal education."[32] Deference relegates role-playing, simulations, and audiovisual materials to a limited place in ethics teaching. The logic of this hierarchy, according to Cramton and Koniak, rests on the potency of the case method in nourishing the formation of prudence and practical judgment among students.[33] To the extent that prudence demands disengagement, however, it risks the loss of empathy, a skill essential to ethical decision making in the important service of rights and virtue.

Simply to laud Cramton and Koniak for their embrace of rights and virtue-based ethical traditions overlooks the provocative elements of their account. Their condemnation of "contemporary" jurisprudential movements for a "preoccupation with 'rights',"[34] for example, invites quick rebuke from Critical Race Theory (CRT) scholars.[35] Likewise, their enchantment with virtue in a community setting omits mention of the experience of exclusion historically suffered by people of color. CRT scholars point to this outsider experience of segregation as an enduring characteristic of community in America.[36]

Notwithstanding such quarrels, the project that Cramton and Koniak undertake evokes sympathy. Indeed, a cluster of themes central to that project warrant sympathetic extension. Consider the theme of obligation. Cramton and Koniak seem to reconceive the field of law and ethics as a body of obligations, rather than as a bundle of rights.[37] This intriguing formulation challenges communitarians to take up and to settle CRT charges of exclu-

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REV. 205 (1979).

31. *See* Symposium, *Beyond Critique: Law, Culture, and the Politics of Form*, 69 TEX. L. REV. 1595 (1991).

32. Cramton & Koniak, *supra* note 1, at 178 n.116.

33. *Id.* at 178-79.

34. *Id.* at 179.

35. *See* Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

36. *See* Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209 (1994); Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835 (1992).

37. *See* Cramton & Koniak, *supra* note 1, at 188-89.

sion and neglect.

A similar reconciliation of meaning must occur in winnowing out the competing narratives of story that Cramton and Koniak so deftly reveal.[38] Searching for methods of reconciliation involves the consideration of virtue. By "opening up the question of virtue,"[39] Cramton and Koniak implicate the issue of character and the consequence of role modeling in teaching ethics. Like Cramton and Koniak, we must renew the value of moral character in the classroom. At the same time, we must stand wary of heroic moral absolutes. This tension is the ultimate import of Cramton and Koniak's *Rule, Story, and Commitment*: the dual commitment to ethical precept and particularized context.

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38. *See id.* at 177-81.
39. *Id.* at 191.