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Work Only We Can Do: Professional Responsibility in an Age of Automation

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I. INTRODUCTION

Automation can help us do our work as lawyers; but in the process, it should also force us to be more thoughtful about what our work really is or ought to be.[1] The challenge for the profession, as I see it, is not simply to survive the advent of new technology, nor even merely to make effective use of new tools. While addressing those immediate concerns, we should also welcome the concomitant opportunity to develop and refine our understanding of what it means to be a good and ethical lawyer. As technological developments free us from—and prevent us from hiding behind—the ministerial aspects of our profession, we should embrace the opportunity to think more deeply about what "professional responsibility" ought to mean.

Most obviously, automation presents business challenges. As automation takes over more of our work, we will need to figure out what human lawyers have to offer. This phenomenon is neither new nor unique to the law. Businesses and professions of all sorts face the possibility that automation will render some of their services obsolete or less valuable. As in any such context, lawyers who hope to thrive must identify work that—at least for the time being—automated systems cannot do as well as we can. Good lawyers will

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1. I use the terms "automation" or "automated systems," rather than "artificial intelligence" (AI), throughout this Essay in order to set aside the question of just how smart our current automated systems really are—and whether they yet merit description as true "AI."

embrace this challenge. They will welcome the ability to shed or delegate automatable tasks and focus instead on the deeper skills and capacities they bring to the table.

In a similar way, automation can also highlight for us ethical aspects of good lawyering. I do not just mean that automation may exacerbate particular ethical dilemmas. It may do that,[2] but I hope to suggest something deeper here. Nor do I just mean that automation may help address some ethical issues. It may do that also.[3] Here, however, I hope to explore a different kind of connection between automation and professional responsibility—a connection analogous to that between automation and professional business success.

In the ethical realm, as in the business realm, automation can and ought to encourage us to think about what human lawyers have to offer—what it is that automated systems cannot do for us. And one thing they will never be able to do for us is take responsibility for what we use them to do. Increasingly, then, taking responsibility for what we do and how we do it will or should become a more crucial aspect of the work of human lawyers.

An age of increasing automation should thus highlight for us our obligation to be not merely expert and ethical providers of legal services but also thoughtful bearers of ethical responsibility for the services we provide. And that frames the question: What does or should it mean to embrace our role as the conscience of the profession? What do I mean by saying that we should be thoughtful bearers of ethical responsibility? And what sort of things do I suggest we should bear this form of responsibility for?

What follows below, therefore, is not so much about automation, per se. Rather I highlight and address a set of ethical questions—questions, in fact, as to which automated systems are likely to offer us little direct help or guidance. My aim here is manifestly to use the challenge presented by automation to prompt reflection, rather than to reflect about how to use automation. I am concerned here with what confronts us when technology makes it harder for us to hide behind technocratic expertise, and thus forces us to confront the more fundamental roles and responsibilities of our profession.

The concerns on which I focus here may seem abstract or academic. They are not the concrete rule-based dilemmas lawyers are forced to confront

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2. For example: automated research may complicate the evaluation of due diligence and competent representation; shared databases may raise confidentiality concerns; and work outsourced to systems may raise questions of the unauthorized practice of law. The profession will need to address those sorts of concrete concerns, just as we have addressed the ethical implications of other developments and changes in the practice of law.

3. For example: automated systems may help us fulfill our obligations of competence and diligence; smart databases may help us identify and avoid conflicts; and efficient delegation may allow us to better meet our obligation to provide pro bono legal services.

regularly in practice—not the sorts of things actual lawyers actually worry about. That is part of my point. I hope to question our implicit assumptions regarding what lawyers ought to worry about. I suggest that a set of ethical concerns we might easily ignore or dismiss as merely theoretical ought to be seen as important components of professional responsibility. Some of these concerns are reflected in particular legal or professional rules. But, as the ABA Model Rules of Professional Conduct (ABA Rules) remind us, "[t]he Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[4] My aim here is to highlight some of those non-obvious considerations and suggest that some should be seen increasingly central to our work and to our conception of what it means to be a good and ethical lawyer.

This Essay proceeds as follows: Part II draws a distinction between external legal or professional *accountability* for our conduct and internal personal or moral professional *responsibility* for that conduct and its consequences. I suggest that some more subtle aspects of professional responsibility, while perhaps ill-suited to external or rule-based enforcement, should nonetheless form an important part of our conception of what we do. Part III focuses on our responsibility to the profession—a responsibility that should extend not just to the public perception of the legal profession but also to the well-being of our fellow lawyers. Part IV highlights our responsibility for and to the law itself—by which I mean not just the fair administration of the law, but also its coherence, dignity, and perceived legitimacy. Part V explores what at first blush may seem a tenuous or particularly theoretical aspect of professional responsibility, but which I think matters a great deal. There, I suggest that we attend to what I describe as the constitutive consequences of our work—how our work, and in particular our efforts at persuasion, may influence not just what people do but also who they are. In conclusion, Part VI offers some observations about the nature and scope of the points I make here.

II. ACCOUNTABILITY V. RESPONSIBILITY

The most obvious questions about automated systems are those regarding the capability of such systems. What are the tasks that automated systems can do as well as or better than human lawyers? Were all else equal, the question of what work we should allow automated systems to do would be relatively straightforward. Were there no other considerations, we would automate that

4. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 16 (AM. BAR ASS'N 2016).

work that systems are able to do better than human lawyers—taking into account efficiency and cost, of course. But all else is not equal, and there are considerations besides capability and efficiency.

One such consideration might be called *accountability*. How and how well can we make sure automated systems do what we want them to do? Human lawyers are, at least in principle, subject to reputational concerns and potential discipline if they do incompetent work or behave poorly. Other methods will need to be devised to monitor the work of automated systems. For the time being, it may be easier to check up on automated systems than on human lawyers. Current systems are programmed to perform clearly defined tasks using complex but transparent algorithms. Redundant systems and periodic audits should suffice to make sure they are not malfunctioning.

But as algorithms become more complex, they can also become more opaque, making accountability potentially more problematic. The medical profession is confronting this issue now with systems sometimes described as "black box medicine."[5] Treatment algorithms based on large data sets have advanced to the point where they are in some contexts quite good at telling us what treatment will likely be effective. However, it is sometimes now not possible to say exactly what factors made the machine spit out a particular recommendation. Nor, in at least some contexts, is it possible to identify exactly why—in terms of disease mechanisms and the like—the recommended treatment makes sense.[6] We just have to trust it. Or not. It is hard to figure out whether an automated system did its job right if we no longer know exactly what it did.

As automated systems used by lawyers come to rely on more opaque algorithms, we will need to confront the problem of accountability more often. In its extreme form, this difficulty can be described as the problem of control. The smarter that systems get, the more we will need to worry about whether they are doing what we want. This may seem like the stuff of science fiction, but the line between opaque algorithms and seemingly rogue behavior may not be as clear as we would like to believe. But for the time being, let us assume that our automated systems are using algorithms that are transparent enough to be double-checked—thus forestalling for the moment the problem of accountability. There remains another key concern—one often conflated with accountability. That remaining concern is perhaps best captured by the term *responsibility*.

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5. *See generally* W. Nicholson Price II, *Regulating Black-Box Medicine*, 116 MICH. L. REV. 421, 423–24 (2017) (describing the benefits of medical algorithms and how regulation of those algorithms needs to be tailored to allow for further innovation and development).

6. *Id.* at 430.

By *responsibility* here I mean a sense of agency in and ownership of our work. This is not just a matter of being held accountable externally—whether by clients, colleagues, the profession, or society as a whole—for our actions. It is also, and more essentially, a matter acknowledging internally and bearing the moral weight of what we do.

Bearing responsibility for things we do does not, of course, resolve the question of whether those things should be done. Sometimes, having explored, acknowledged, and internalized a sense of responsibility for the consequences of our actions, we may decide to act differently. On other occasions, however, we may conclude that things are worth doing, and appropriate, despite some unfortunate consequences. The obligation to bear responsibility is to some extent a distinct duty. Whatever we do, right or wrong, we should own.

Why might this matter? First of all, it may have consequences for our behavior. Those who feel a sense of internal responsibility for their actions may be less likely to act badly. Second, it may have consequences for the way in which our profession is perceived. Respect is often and appropriately accorded to those who stand behind their conduct and show strength and character enough to carry the moral weight of what they do. Third, it may have consequences for the way in which the law itself is perceived. Will the public perceive the law as merely a set of soulless processes to be maneuvered and gamed—valued only when and insofar as useful? Or will the law be seen as an aspirational human endeavor worthy of respect—an endeavor for which we bear and share responsibility?

Ultimately, however, the strongest argument for encouraging the sort of internal responsibility taking I describe here is not a narrowly instrumental one. Rather, it is a matter of character and identity—the character and identity of the legal profession and that of each of us who work in the law. In ways I try to flesh out below, we should strive for a vision of professional responsibility that extends beyond external accountability and encompasses a deeper sense of what the idea of responsibility does or ought to entail.

Increasing automation poses a potential threat to this vision of responsibility taking. As we delegate more of our work, we may be tempted to distance ourselves from it. Some consequences, of course, cannot be ducked, regardless of the technology we employ. Lawyers should and will remain accountable to clients, the profession, and society as a whole for what we do, whatever technology we use to do it. But internal responsibility taking will be harder to encourage. Piloting a potentially deadly drone may not feel the same as wringing a man's neck.[7] This risk of potential distancing is particularly

7. *See* David Axe, *How to Prevent Drone Pilot PTSD: Blame the Bot*, WIRED (June 7, 2012), https://www.wired.com/2012/06/drone-pilot-ptsd/.

salient when we look beyond externally enforceable rule-based ethical obligations on matters such as confidentiality, competence, conflicts, and the like. Those obligations matter a great deal, of course. But thoughtful ethical lawyers have always recognized that professional responsibility extends deeper—to matters that cannot be expressed in rules.

It is with the more subtle, albeit no less important, aspects and implications of our professional conduct that I am concerned with here. So then, what are the sorts of matters about which I suggest we should feel this sense of personal and professional responsibility?

III. CARE FOR THE PROFESSION

It is well-established that lawyers have an obligation to preserve public confidence in the profession.[8] This flows, in part, from our special role in society and from our relatively unique autonomy and self-governance.[9] As the ABA Rules recognize, if we hope to perform that role well and preserve that autonomy, it is vital that we preserve public confidence in our work and in our capacity for responsible self-governance.[10] Here, I want to go beyond our well-recognized obligation to preserve the external reputation of the profession and suggest that we have a deeper, albeit harder to enforce, obligation to nurture what might be described as the internal dignity and humanity of the profession.

Ideas like dignity and humanity are, I readily grant, amorphous and difficult to define. But that does not make them useless. Indeed, our inability to pin down these ideas with precision is part of what makes them both potentially useful and particularly apt objects of human, rather than automated, responsibility. It is in fleshing out their value that we give them meaning. And it is in part through our efforts to give meaning to ideas like dignity and humanity that they have their deepest value—by forcing us to think beyond narrow reductionist accounts of our professional roles and responsibilities.

So for the moment let this much suffice. By dignity, I mean a sense that our profession is engaged in an endeavor worthy of thought, care, and respect. And by humanity, I mean a sense that our profession should show thought, care, and respect for those with whom we deal and on whom we have an impact. Given those admittedly tentative and general definitions, why should we care about the dignity and humanity of the profession? And what might our

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8. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 6 (AM. BAR ASS'N 2016).

9. *Id.* cmt. 12.

10. *Id.*

reasons for caring about dignity and humanity help us realize about what these ideas ought to mean?

One reason the dignity and reputation of the profession matters—apart from protectionist business concerns—will be fleshed out in Part IV, below, where I address our responsibility to the law itself, of which we are stewards. In short, we will not be able to inspire respect for the law if we ourselves are not respected. And one reason that the humanity of the profession matters—in addition to concern for our own humanity—will be fleshed out in Part V, where I highlight what I describe as the constitutive human consequences of our work and speech.

Here, I want to focus on two aspects of the dignity and humanity of the legal profession—aspects that may be particularly at risk as automation takes over more of our work. Those aspects are: (1) our conception of law as a profession rather than merely a business; and (2) care for the thriving and well-being of our fellow professionals.

No one is quite sure exactly what it means to emphasize the fact that the practice of law is a profession rather than merely a business. It seems to signify many different things to different people. It means, among other things, that we view our work as an aspect of identity, rather than merely a source of income and that we take pride in the work itself—in the craft. It means, as the ABA Rules emphasize, that we bear special responsibility. I would suggest that it also means, or ought to mean, that we feel a sense of community and shared responsibility. The claim that we are a profession certainly seems to mean, or at least be deployed to suggest, that we are entitled to a certain respect. I do not aim to resolve here the question of just what it means to be a profession. What I do argue, however, is that the idea of law as a profession matters, and it is something we have an obligation to preserve, even if we cannot agree on exactly what it means.

Clear-eyed experienced lawyers are fond of reminding bright-eyed young ones that the law is a business. They are right to do so. And legal education should do a better job helping young lawyers understand the business of the law. But if experience leads a lawyer to become so jaded as to insist that law is just a business, then he probably does not merit the business he has, and he certainly does not merit our professional respect.

Here, it is worthwhile to draw a distinction between hollow hypocrisy and capacious aspiration. If talk of the law as a profession is empty rhetoric used as mere cover for protectionist or other self-serving policies, that is hypocrisy. If, however, we use the idea of law as a profession as a way to frame and prompt thought about our responsibilities, that is aspiration. And because thoughtfulness and responsibility are valuable, aspiration is valuable—even if the vision to which we aspire is hard to define with precision. In fact, the very

openness of the idea of law as a profession provides a space—a space that adamantly resists reductionist or easily quantifiable definitions of what we do.

In this Essay, I identify some of the responsibilities that might inform our conception of law as a profession. But the matters I highlight are intended to prompt thought—not to forestall it by purporting to offer any definitive list or vision. Articulating an aspirational but pragmatic conception of the legal profession is a task that not only cannot be delegated to automated systems; it is also one that cannot be delegated to any one lawyer, let alone to an academic. And it is a task that will never be completed. Nor should it be, because ongoing reflection about our professional responsibilities is itself, I suggest, one of our primary responsibilities. The more essential point, therefore, is that as we continue to flesh out what it means to be members of a profession, we need to retain a sense that we are in fact professionals rather than merely moneymakers. And that means rejecting the cynicism that sometimes greets efforts to articulate an elevated vision of what we do.

Granting that much, if one thing that defines a profession is a sense of community and shared responsibility, then professional responsibility ought to extend to concern for the well-being of our fellow professionals—particularly the young and potentially vulnerable members of our profession. The forms this concern should take are so numerous, and vary so much by context, that I will not attempt to list or even summarize them. Instead, I will highlight one example of the sorts of things I mean. We should take responsibility for the hostility and harassment experienced by women in our profession.

It is now clear that women in all professions, including ours, confront sexual harassment and unwanted sexual advances.[11] Those who have never done the sorts of things now coming to light may be tempted to distance ourselves—to believe that the responsibility lies entirely on those who have committed acts of harassment. That would be a dodge and, I suggest, a failure of professional responsibility. Those of us, particularly the men among us,

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11. *See, e.g.*, CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm; DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION (2001), https://www.americanbar.org/content/dam/aba/marketing/women/unfinished_agenda_4920029.authcheckdam.pdf; Kathryn Rubino, *#MeToo: No, A Law Degree Doesn't Insulate You From Sexual Harassment*, ABOVE THE LAW (Oct. 16, 2017, 3:25 PM), https://abovethelaw.com/2017/10/metoo-no-a-law-degree-doesnt-insulate-you-from-sexual-harassment/; *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*, L.J. NEWSLETTERS (Apr. 2016), http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2016/04/01/sexual-harassment-in-the-legal-profession-its-time-to-make-it-stop-2/?slreturn=2010125153326.

who have thrived in the law have at least indirectly enabled, perhaps even indirectly benefited from certain culture. That culture, we are now belatedly acknowledging, has as one of its features the regular sexual harassment of women. Women have known this. They have told us this. We have not listened. Or we have not cared.

Selfish passivity alone has contributed to the problem, as has a certain willful blindness. Who among the men among us has not known of powerful lawyers, even judges, with whom we would not want our wives and daughters to work? But why then have we turned a blind eye—or at least not been eager to take a closer look? Why have we willingly let other women deal with those men? Are the experiences of women in our profession of concern only when those women are our daughters?

Even well-intentioned and seemingly innocent conduct may contribute to the tenuous position of women in the law. Allow me to offer an illustration from my own experience. When offering recommendations for students, I try to identify particular traits and capacities that I believe will make that student a particularly good lawyer, or a particularly good fit for a given job. So, for example, I might observe that a student writes very clearly, or has shown a commitment to public service, or works well in groups, or displays great attention to detail in his or her work, and such. And one thing I have sometimes said, when applicable, is that a particular student is "drama-free" or "won't make a mountain out of every molehill." What I meant by that, of course, is that the student is not one who will lose confidence or freak out if his or her work is criticized, or make a big issue out of every difficult interaction, or need a hug every time things get a bit stressful. That sort of level-headed resilience is important in law practice, particularly in some contexts and at some firms. So, nothing wrong with saying that about a student, right?

Wrong. Or possibly wrong. As I reflect on it, I realize that when I say that student is "drama-free" or "won't make a mountain out of every molehill," some lawyers might take me to mean that the student will put up with being treated poorly. Sexual harassment and unwelcomed sexual advances are not molehills. They are mountains that loom over the women in our profession. Some interactions are not merely difficult. They are inappropriate and unacceptable. I never meant to suggest otherwise, but perhaps I inadvertently did. It is fine to be informal in speaking with lawyers about the strengths and capacities of different students; and it is essential to be honest about those strengths and capacities. But it is not at all fine, let alone essential, to signal, even inadvertently and indirectly, that a student will not stand up for herself if mistreated.

This may seem like a subtle or attenuated concern. And it may be subtle, but it is not overly attenuated—not if it contributes, even slightly, to women

not getting the jobs they merit or being mistreated when they get those jobs. I am not yet sure how to solve this particular problem—or even how big a problem it is. But I am sure that it is my responsibility as a member of this profession to think hard and self-critically about it, and about the indirect impact I may have on the thriving of my fellow professionals more broadly. This particular concern is simply meant to be illustrative—of both the nature and the potential subtlety of the sorts of things to which we have a professional responsibility to attend.

The list of potential concerns regarding the well-being of our fellow professionals is long. Have we given young lawyers the opportunities they need and deserve for professional growth? Have we structured our firms and billing practices in such a way as to require inhumane hours? Have we been sensitive to the concerns of LGBT lawyers? Have we structured the profession, including legal education, such that too many young lawyers end up with tremendous debt that is not matched by tremendous job prospects? Have we considered the impact of a lack of diversity on our fellow lawyers?

It is not easy to think about these sorts of things, both because they are subtle and because they call upon us to question ourselves. And of course these issues must be considered in the pragmatic context of law practice. Lawyers who take high-paying jobs should often expect long hours. Law students who borrow large amounts of money despite objective indications that they may not be able to get high-paying jobs should expect to struggle with debt. Here, as in all of the contexts I explore, accepting responsibility will not automatically mean we can find solutions. But that is just the sort of difficult work that we as members of a profession must do. We should seek solutions. And even if some of the issues impacting the well-being of our fellow professionals cannot immediately be solved, we should at least acknowledge and accept responsibility for the human costs of a system in and through which so many of us have thrived.

IV. STEWARDSHIP OF THE LAW

The ABA Rules recognize that lawyers bear a responsibility to the law itself, as well as to particular clients. The first paragraph of the Preamble puts it this way: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[12] A subsequent paragraph elaborates: "As a public citizen, a lawyer should seek improvement of the law, access to

12. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 1 (AM. BAR ASS'N 2016).

the legal system, the administration of justice and the quality of service rendered by the legal profession."[13] Appearing in the Preamble, and stated at this level of generality, these principles are not meant to be particular enforceable rules but rather aspirational statements about the way in which we should conceive our responsibilities as professionals. They call on us to look beyond narrow rule-based ethical obligations to the broader responsibility we bear as stewards of the law and the legal system.

The clearest responsibility we bear to the law is to the fair administration of justice. This Preamble to the ABA Rules includes, for example, an exhortation to help increase access to justice by providing pro bono legal services.[14] And the rules themselves include specific provisions regarding the way we conduct ourselves in the context of particular cases. For example, we should not bring meritless claims,[15] lie to the court,[16] cause undue delay,[17] destroy, falsify, or obstruct access to evidence,[18] or improperly influence judges and juries.[19]

Beyond responsibility for the fair administration of particular cases, however, lawyers should also bear some responsibility for the wisdom and coherence of the law itself. The exhortation to "seek improvement of the law,"[20] might be read to mean simply that we should engage in activities aimed at improving the law outside of our normal work—American Law Institute (ALI) service, advice to legislative committees, scholarship, and the like. And we should do those things. But the responsibility for the quality of the law should extend also to the impact we have on the law through our day-to-day work.

This is particularly true for litigators because cases influence the development of the law. This influence can be foundational, where high courts actually and explicitly make law. But even cases purporting merely to interpret extant rules can have substantial precedential impact. More subtly, a case can have an indirect influence on the law not just through its bottom line result but also through the way it is explained, understood, or justified. Primary responsibility for the coherence of the law may rest with legislators and judges—or even with academics—rather than practicing lawyers, whose

13. *Id.* cmt. 6.
14. *See id.*
15. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2016).
16. *See id.* r. 3.3(a)(1).
17. *See id.* r. 3.2.
18. *See id.* r. 3.4(a)–(b).
19. *See id.* r. 3.5(a).
20. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 6 (AM. BAR ASS'N 2016).

primary obligation is to secure a result in the case at hand. But practicing lawyers have substantial impact as well; and with impact comes responsibility.

We have an explicit obligation not to deceive the court and to disclose precedent directly on point.[21] But that leaves us with a great deal of analytical and argumentative space. In our effort to win cases, therefore, we can sometimes use our argumentative agility in ways that, while perhaps producing a desired immediate result, may render the law less wise or coherent going forward. This is problematic for at least three reasons. First and most obviously, it leaves future litigants with unwise law. Second, incoherent law burdens future lawyers and judges, who will have to sort out the confusion. Third, and most essentially, unwise and incoherent law is less likely to be understood and perceived by the public as legitimate and worthy of respect.[22]

I am tempted to offer illustrations of contexts in which the law, driven in part by litigants seeking results in particular cases, has evolved or been interpreted in ways that are less coherent and wise than they might be. But of course each such example would require explication and would amount to a separate law review article—each perhaps longer than this Essay.[23] So rather than indulge in substantive legal analysis so far beyond the scope of this Essay, allow me to use this opportunity to acknowledge and reemphasize a point made above. The point is that recognizing and taking responsibility for the consequences of our work, which I suggest every lawyer should do, does not resolve the question of whether that work should be done.

As with all of the indirect consequences of our work that I highlight and suggest that we should accept responsibility for, a lawyer may well decide that the consequences, while perhaps unfortunate, are necessary or acceptable. In the particular, regarding the impact our work may have on the wisdom and coherence of the law, a lawyer in a given case might sensibly and reasonably decide that other considerations are more important. In general, the primary obligation will be to the particular client and the particular case. Indeed, it would often be unethical to elevate abstract concerns for the future development of the law over the concrete obligation to current clients. A

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21. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 2016).

22. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 6 (AM. BAR ASS'N 2016) ("[A] lawyer should further the public's understanding and confidence in the rule of law and the justice system . . . .").

23. One example, which I have addressed elsewhere, would be the law dealing with the antitrust status of the NCAA—a context in which case-driven evolution has produced a great deal of uncertainty about a set of issues impacting hundreds of colleges and thousands of student-athletes. *See* Sherman J. Clark, *College Sports and the Antitrust Analysis of Mystique*, 71 WASH. & LEE L. REV. 215 (2015).

lawyer might sensibly decide that legislators, judges, and legal academics are the ones who should emphasize the law's long-term wisdom and coherence. Granting all that, however, it remains the case that lawyers should remain attentive to and retain a sense of responsibility for such consequences. There will be cases in which the best result for the client can be reached in ways that clarify and improve the law, rather than muddle it. But, more to the point, here as in the other contexts I have highlighted, taking responsibility matters even apart from what such responsibility causes us to do. Even in cases where we decide that the demands of the moment outweigh the consequences of what we do, we should bear responsibility for what we have done.

This obligation extends not just to the wisdom and coherence of particular laws but to the rule of law more broadly. As the Preamble to the ABA Rules puts it: "[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[24] On this point, the biggest current challenge may not be automation but rather the apparent willingness of powerful interests, including political leaders, to undercut public confidence in the law and legal institutions. We bear the responsibility to eschew such tactics and resist such efforts, even when they might further immediate interests.

That said, the responsibility to nurture public trust in the law cannot mean a refusal to challenge rules, practices, or institutions that are flawed. We must insist that our legal system merits trust, rather than simply insist that people trust it; but we must also be wary of undercutting the very trust we aim to build. The ABA Rules highlight one aspect of this obligation in the Preamble, which counsels us to be cautious in criticizing the rectitude of other lawyers, judges, and public officials.[25] More broadly, it is our responsibility to challenge aspects of the system that merit criticism, while at the same time give thoughtful consideration to how and when we do so. No formula can tell us exactly how best to nurture confidence in the rule of law while at the same time work to make the law worthy of that confidence. But a necessary first step is to see that obligation as a component of our work—and to accept responsibility for the impact we have.

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24. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE cmt. 6 (AM. BAR ASS'N 2016).

25. *Id.* cmt. 5 ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

V. THE CONSTITUTIVE CONSEQUENCES OF OUR WORK

Acknowledging responsibility for our impact on the legal profession and on the law itself can be seen as particular manifestations of a more general obligation to take responsibility for the consequences of our work—even when those consequences are indirect. Some of those consequences, moreover, will fall not just on the profession or on the legal system, but also on others with whom we deal or over whom we have indirect influence. If so, we should acknowledge and accept responsibility for those consequences as well. And we should do so even if those consequences are seemingly subtle, difficult to explain, and impossible to quantify with precision.

Most obviously, we should take responsibility for the concrete, material consequences of our work. This responsibility, of course, must be addressed in the context of our obligations as advocates, advisors, and officers of the court. We are not, for example, free simply to substitute our own concerns for those of the clients we represent. As the ABA Model Rules of Professional Conduct provide, "a lawyer shall abide by a client's decisions concerning the objectives of representation."[26] Nor should we feel as though any action taken on behalf of a client must be fully internalized as our own. On this point, the ABA Rules reassure us that "representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[27]

Nor, however, are we free simply to wash our hands of responsibility for what we do on the theory that we are merely following orders. Even when executing decisions made by clients, we retain a form of accountability, and, more to the point, responsibility for our work. This is recognized most explicitly in the ABA Rule providing that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[28] Other rules indirectly recognize that we are obligated to consider the consequences of our work. For example, lawyers are required to consider the interests of third parties—at least insofar as avoiding tactics designed to harass or embarrass.[29] Even the duty of client confidentiality gives way in the face of a lawyer's reasonable belief that divulging information is

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26. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

27. *Id.* r. 1.2(b).

28. *Id.* r. 1.2(d).

29. *See id.* r. 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

necessary to prevent or mitigate certain harmful consequences.[30] So, even in the context of an extant representation, where we have an obligation to defer to a client's decisions, it is clear that we bear some responsibility for at least the concrete, material consequences of what we do.

Even more salient for my purposes are those circumstances in which we, rather than a client, are in control. The most obvious such context is of course when we are deciding who to represent and what matters to take on. There, it is fully appropriate—indeed, I would argue, a responsibility—to consider the impact of what we are thinking about doing. But even once we have taken on a representation, and thus an obligation to defer to client decisions, we retain a broad realm of autonomy, and thus responsibility. While we are required (within specified limits) to abide by client wishes as to the aims of representation, we are instructed only to consult with clients regarding the means used to pursue those ends.[31] It thus remains ultimately our obligation to decide, and take responsibility for, how we pursue even the legitimate and appropriate aims of those we chose to represent.

Nor is this a trivial concern. While the most obvious material and economic consequences of our work may flow from the concrete ends we accomplish on behalf of clients, the more subtle impact of our work—what I refer to here as constitutive consequences—may result from how we choose to accomplish those ends.

By "constitutive consequences" I mean our potential impact on the character of the people with whom we deal—our impact on their values, priorities, understandings, and ultimately, on their capacity to thrive as human beings. I have elsewhere highlighted some of the ways in which law and legal procedure may have this sort of impact;[32] but I know that these may seem an

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30. *See id.* r. 1.6(b) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . . .").

31. Rule 1.4, referred hereto, outlines the lawyer's obligation to communicate with clients and keep them informed. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

32. *See, e.g.*, Sherman J. Clark, *The Juror, The Citizen, and The Human Being: The Presumption of Innocence and the Burden of Judgment*, 8 CRIM. L. & PHIL. 421 (2014) [hereinafter *The Juror, The Citizen, and The Human Being*] (suggesting that a criminal trial,

abstract or academic set of concerns. So, in highlighting the possibility that our work as lawyers may have these sorts of constitutive consequences, it is useful to focus on a particular context—how we choose to argue and persuade.[33]

Much of our work as lawyers involves persuading or coming to terms with others. This is true not only when we act as advocates, where we seek to reach judges and juries. It is also true of our work as negotiators, where we seek to come to terms with those with whom we deal. Persuasion of a sort is important even in our role as counselors, where we often seek to help clients think well about their own best interests and obligations. So persuasion, broadly understood, is central to our work. It is also work that automated systems are unlikely to be able to do for us. Thus, persuasion is work over which we will retain a great measure of control. Consequently, and more to present purposes, it is work over which we should retain a particular sense of responsibility.

When we persuade people, we do not simply influence what they do, we may also have an impact on what sort of people they become. We should face that possibility—and bear responsibility for it. This is what I mean when I say that we should attend to the potential constitutive consequences of our speech. As is the case with each of the somewhat subtle responsibilities to which I call attention, this concern requires some explanation, and some thought. So allow me to approach it from both an abstract and a concrete perspective—first with a somewhat theoretical description and then with a specific illustration.

If and when we succeed in persuading others, we do so not solely or even primarily through the logical force of our arguments. We have all had the following experience: We have made solid logical arguments—arguments to which our listener has, or at least has offered, no adequate response; yet, our listener remains unpersuaded. Those we hope to persuade have numerous preconceptions, commitments, and cognitive biases, as do we all. This Essay is not the context to explore the social psychological research on how people come to form—and become attached to—their worldviews, beliefs, and opinions. For our purposes, however, it is crucial to recognize that the most

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framed by the presumption of innocence, impacts the character of the jurors and their communities); Sherman J. Clark, *Ennobling Direct Democracy*, 78 U. COLO. L. REV. 1341 (2007) (discussing that direct democracy may be ennobled for the development of public character).

33. *See* Sherman J. Clark, *A Lawyer's Odyssey: Constitutive Conversation in Literature and Law*, 1 REV. J. UNIV. PALERMO 15 (2017); *see also* Sherman J. Clark, *To Teach and Persuade*, 39 PEPP. L. REV. 1371 (2013) (discussing how lawyers should take responsibility for what they persuade people to do and pay attention to the impact they may have on people).

persuasive argument is not necessarily the one with the soundest logic or strongest empirical support. Experienced lawyers know this. Rather, our arguments persuade, if they persuade, by finding or making space in the worldview of the particular person or persons we hope to reach. In our efforts to be persuasive, therefore, we must figure out what sorts of arguments, made in what sorts of ways, will resonate with the people with whom we speak.

This fundamental insight has a number of implications—both pragmatic and ethical. Most obviously, if we hope to make arguments that will resonate within the worldviews of particular listeners, we must strive to understand how they view the world. This alone is a vital first step—highlighting what might be called the diagnostic aspects of rhetoric. As obvious as this first step may seem, however, it is something we often seem to forget. When asked why a particular judge, jury, or negotiating adversary was not persuaded by what we considered to be bulletproof arguments, we are often tempted to put the blame on them. We are tempted to say that their refusal to be persuaded is because they are foolish, biased, racist, greedy, stupid, or the like. While these descriptions may sometimes be accurate, they are rarely helpful. Indeed, such explanations for failed persuasion can evince a sort of cognitive failure on the part of the would-be persuader.

No one wakes up in the morning and says to himself or herself: "How can I be a foolish, biased, racist, greedy, stupid person today?" No one is the bad guy in his or her own life story. Rather, each person has some set of ways of seeing the world in which his or her beliefs and opinions make sense and seem right—or at least appealing. If we hope to reach people, we must learn to see the world, at least provisionally, as they see it.

Pragmatically, this means that lawyers who hope to be persuasive must nurture the capacity to understand other human beings as well as possible—a capacity we are unlikely to find in automated systems, however sophisticated they may become. Only to the extent that we can put ourselves in the minds of others can we hope to find or make space in their worldviews for the results or agreements we seek.

Ethically, the key implication of this insight is suggested by the phrase "find or *make* space in their worldviews." None of us has a fixed or comprehensive or completely coherent worldview. All of us, including those we hope to persuade, are always in the process of making sense of our world and our experiences. As we do that, we get by with a set of provisional and sometimes inconsistent collection of priorities and beliefs. We abide this flux and incompleteness and incoherence easily enough most of the time, because we are able to deploy our priorities and beliefs serially—emphasizing those that seem to fit a given set of circumstances. We shift and develop our worldviews. This means we sometimes persuade others not simply by

exploring a fixed and fully furnished internal landscape in search of space for our arguments but also by subtly altering that landscape with our arguments.

One way to describe this mode of persuasion is to say that we can create cognitive dissonance. We can highlight internal contradictions and subtly encourage our listeners to resolve the dissonance by emphasizing certain priorities and beliefs. Alternatively, the process can be described as helping our listeners make better sense of and flesh out their own priorities and beliefs in a particular context. We can also, of course, provide information or insight, thus adding features to our listeners' internal landscapes—features that may then alter the way in which they see the relationships between their various priorities and beliefs in the context at hand. But, however we describe it, the upshot is the same. We cannot and should not assume that when we persuade, we are navigating a fixed worldview. We are, at least potentially, helping constitute that worldview. And that, I suggest, is something for which we should acknowledge responsibility.

If this seems abstract, consider a set of hypotheticals. Imagine that you are trying a case and realize that you could increase the chance of a favorable verdict by making a subtle appeal to jurors' racial prejudice. Or, to make clear that the concern is not limited to trials, imagine that you represent a community development organization, and you realize that you could sway citizens in favor of some project by appealing to their fears and prejudice. Perhaps in advocating for a new recreational facility, you could subtly suggest that such a facility would reduce the need for white kids in your community to interact with the black kids in the next town. You would, one hopes, eschew that strategy. But why?

One reason, of course, is that it would at least arguably be against the rules.[34] But that begs the question. Why should such an argument strategy be prohibited? Conscientious lawyers might respond that they would need no reason. It just feels wrong. But that too begs the question—at least if we hope to use this relatively straightforward illustration to shed light on potentially more subtle situations. Why does it just seem wrong to make arguments designed to appeal to racial prejudice?

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34. The rules in many jurisdictions preclude lawyers from making appeals to racial bias. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.3(c) (AM. BAR ASS'N 2011) (obligating judges to require "lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others").

One reason, I suggest, is that we recognize the potential constitutive impact of our arguments. We sense intuitively—at least in the case of something so obviously pernicious as racial prejudice—that by appealing to a thing, we may nurture it. We recognize that by grounding our arguments, however subtly, in the racial prejudice of our listeners, we may be helping to entrench or foster that prejudice.

Granted, few of us as individual lawyers, regardless of how irresponsibly we might argue, will have the same large-scale corrupting influence as might, for example, a high-profile politician who appeals to fear and prejudice. We can, at worst, debase at the margins. But "at the margins" need not mean trivial. In ethics, as in economics, marginal differences add up. And if we envision a situation in which (or recall a time when) lawyers regularly appealed to racial prejudice, it is easy to see how that might (or did) foster and entrench that prejudice.

In a sense, however, this illustration is too easy. What is less easy is to recognize and take responsibility for the less obvious constitutive consequences of the ways in which we argue. For example, no form of argument is more common than an appeal to material self-interest. But it is not at all clear that these arguments are constitutively harmless—at least cumulatively. If we as lawyers in our various roles constantly and cynically appeal only to material self-interest, we should not be surprised to find that the clients and communities we serve grow increasingly cynical, materialistic, and self-interested.

Ideally, we should try to remedy or mitigate the potentially corrosive, constitutive impact of our arguments. We should challenge ourselves to craft and employ arguments that elevate rather than debase. This will not be easy. It will require sustained and serious thought about both the impact of our arguments and, more deeply, about the substantive value of traits and attitudes we might inadvertently foster or entrench.

This in turn inevitably implicates difficult judgments about what it means to debase or elevate. Some traits and attitudes clearly reduce people's capacity to thrive. Others seem to contribute to the ability to live a good life—or are even constitutive of such a life. Some ways of being, of course, are merely matters of preference or taste. Wresting with these sorts of questions is not something we will ever be able to delegate to automated systems.

Nor, it may be noted, are these questions a subject of particular legal expertise. Thus, they may seem to be beyond the appropriate scope of a lawyer's professional responsibility. Given that philosophers have debated for millennia about what traits ought to be cultivated, it might be argued that lawyers should not try to wrestle with such matters at all. In fact, given the commitment to individual autonomy that undergirds so much of our legal and political system, some might further argue that it would be illegitimate for

lawyers to reckon the constitutive consequences. Perhaps we should just leave such matters alone entirely?

For better or worse, however, leaving such matters alone is not an option. We have whatever constitutive impact we have; and ignoring that impact would not make it go away. It would just mean failing to accept responsibility for what we do.

By analogy, we might suggest that the food processing industry should just leave alone matters of public health, or that the chemical industry should just leave alone matters of the environment. And that might make sense if we could be sure that those industries have no impact on our health or our environment. But we cannot so assume. And it would be the height of irresponsibility simply to disregard the impact they have on the theory that public health and environmental preservation are not their particular professional expertise. Were they to make that defense in an effort to disregard the potential health and environmental impact of what they do, we would rightly tell them that it is their responsibility either to make sure they have no impact on public health or the environment or, that being impossible, to learn as much as they can about, acknowledge, and take responsibility for the impact they have.

Such is the situation of the legal profession vis-à-vis the constitutive consequences of our work and speech in the law. Such matters may well be outside of our professional expertise, at least narrowly conceived; and they are certainly outside of our comfort zone. But that does not make them go away. We may well be doing things to people's character—marginally, incrementally, and inadvertently, yes, but doing things nonetheless. And true professional responsibility ought to mean learning as much as we can about, acknowledging, and above all, taking responsibility for what we do.

Of course, responsibility for the constitutive impact of our arguments must be taken in the context of our more obvious responsibility to advocate effectively for clients and constituents. However, the reconciling of these responsibilities need not be seen as merely a matter of trade-offs—of balancing the duty of zealous representation against the obligation to accept responsibility for the broader consequences of our work and speech. Indeed, elevating arguments, although perhaps requiring more thought, may also prove more persuasive. Appeals to material self-interest—not to mention appeals to fear and prejudice—may be in the political and legal rhetorical ascendancy at the moment. But it need not always be so; nor has it always been such. Lincoln was quite persuasive—both as a politician and as a lawyer. He was so in part because he appealed to the better angels of our nature—as have at least some lawyer/politicians of much more recent memory.

Our challenge, then, even as we fulfill our more obvious professional and ethical obligations, is to also do the intellectual and moral work required to

identify as best we can, acknowledge, and take responsibility not just for what we help people do but also for what sort of people we help them become. This will be difficult work and work with which automated systems will offer little direct help. It is also work that can be easy to ignore or dodge—at least so long as we can hide behind a vision of the profession grounded primarily in technical expertise. But that is where automation can, if we let it, be indirectly helpful. By taking over more of the ministerial work behind which we might be tempted to hide, automation can, or should, cause us to turn our attention to the difficult human, responsibility-taking work that only we can do.

This is a context in which the distinction between external accountability and internal responsibility taking is particularly salient. It is difficult to imagine a system under which particular lawyers could be held accountable for the individually incremental but potentially collectively substantial constitutive impact of our actions and arguments. Instead, our best hope is that we each internalize our obligation to elevate rather than debase the people to and for whom we speak and act.

VI. CONCLUSION

Allow me to acknowledge three things that I have *not* done in this Essay. First, I have not focused on the advent of particular forms of artificial intelligence, but have rather spoken generally about "automation" and "automated systems." I have taken this approach in part because it is a bit of a stretch, perhaps even a bit of hype, to describe what we have in law practice at the present as actual artificial intelligence. What we have now are primarily automated research, discovery, and data analysis systems. It remains to be seen whether and when law practice will confront what science writers call "strong artificial intelligence"—systems capable of something more like independent and creative human thought. Nor is it even clear what it does or should mean to describe a system as true artificial intelligence, given that the line between complex opaque algorithms and actual independent thinking is itself conceptually unclear. Perhaps even human thought is for some purposes best described as a sort of particularly complex and opaque algorithm.

For present purposes, however, it is not necessary to resolve either the predictive technological questions about the advent of artificial intelligence or the conceptual definitional questions about the nature of artificial intelligence—as fascinating and important as those questions are. The current state of affairs, in which automated systems do largely ministerial work, is more than sufficient to frame the relevant ethical concerns. And, if and when systems become dramatically smarter and more capable, these questions will simply become more central and salient. The more the machines do for us, the

more important it will be for us to retain a sense of responsibility for what we have them do.

Second, I have not tried to exhaust the range of concerns for which we should feel this sense of responsibility. Our work certainly has consequences other than those I have highlighted. And it is up to each of us to explore and acknowledge those consequences. While I have offered illustrations, the larger point is thus twofold: (1) each of us should remain thoughtfully attentive to the consequences of what we do; and (2) we should each retain a sense of felt responsibility for those consequences.

Nor do I claim to have outlined fully even the particular issues I have highlighted—care for the profession, stewardship of the law, and attention to the constitutive consequences of our work. These are not amenable to comforting comprehensive elucidation. Unlike some aspects of legal ethics, these concerns cannot be reduced to checklists that we can complete and set aside, safe in the assumption that we have met our obligations. Once we have done thorough conflicts checks, we can sometimes put that issue out of mind and concentrate on the deal or the case. Responsibility taking is not like that. Instead, it requires us to attend in an ongoing way to the consequences—indirect as well as direct, subtle as well as obvious, inchoate as well as concrete—of what we do.

Third, and perhaps most crucially, I have not made what theorists might consider a complete argument for one of my central claims—the claim that taking responsibility for the consequences of our work matters, even apart from how doing so may alter how we act. This lacuna is not fatal to my argument. The potential impact of responsibility taking on conduct is enough to make it important. But the underlying question does call for attention. Elsewhere, I have offered tentative partial accounts of why responsibility taking matters—accounts grounded in the further intuition that if we are to learn and grow from our actions, we must acknowledge our agency in and responsibility for those actions.[35] In future work, I hope to deepen that exploration. But those accounts will remain tentative and incomplete, as does

35. *See, e.g.*, *The Juror, The Citizen, and The Human Being*, *supra* note 32 (suggesting that a criminal trial, framed by the presumption of innocence, impacts the character of the jurors and their communities); Sherman J. Clark, *What We Make Matter*, 109 MICH. L. REV. 849 (2011) (discussing how lawyers should take responsibility for what they persuade people to do and pay attention to the impact they may have on people); Sherman J. Clark, *Promise, Prayer, and Identity*, 38 TULSA L. REV. 579, 581 (2003) (suggesting that avowals taken by some professionals should be understood as acts of self-definition and as such, they should think carefully about that when they take one); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999) (suggesting that lawyers think about the potential consequences of their arguments).

this one, and as any account of the value and content of any worthwhile activity must always remain.

Good and ethical lawyering, like many good things, is what philosopher Talbot Brewer would call a "dialectical activity."[36] We enter into it with some initial and largely intuitive vision of why it is valuable and how that value might best be pursued and instantiated. That vision is clear enough to be compelling but is far from complete. As we engage in the activity, we then do two things in an ongoing cycle of growth. We get better at it—approaching our initial vision of the good inherent in the worthwhile activity. But we also deepen and clarify that vision—developing a richer sense of what makes that activity good and worthwhile. That process does not end. Indeed, a key aspect of what gives good things their value is that this process can never truly be completed—that experience and thought continue to bring not just greater expertise but also a deeper understanding of that which makes the good and valuable activity good and valuable.

Law is like that—or can be, if we are willing to see it as a profession potentially embodying some value and worth. We can and should thus continually both pursue and seek to clarify our vision of what it means to be a good and ethical lawyer. I have suggested here that our vision ought to include a sense of responsibility for the consequences of our work; and I have tried to illustrate what that might mean. But these thoughts are more invitation than injunction. No other lawyer, academic, or automated system can do for us the ongoing dialectical work of crafting and pursuing a compelling vision of good lawyering. It is work only each of us can do, and which, therefore, each of us must.

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36. TALBOT BREWER, THE RETRIEVAL OF ETHICS 37 (Oxford Univ. Press ed. 2011).

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