Volume 105 | Issue 2 Article 8

January 2003

It's Hard to be a Human Being and a Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice

Robert Granfield
University of Denver

Thomas Koenig Northeastern University

"IT'S HARD TO BE A HUMAN BEING AND A LAWYER": YOUNG ATTORNEYS AND THE CONFRONTATION WITH ETHICAL AMBIGUITY IN LEGAL PRACTICE

Robert Granfield[*]
Thomas Koenig[**]

I. INTRODUCTION

Less than one year after graduating from Harvard Law School, Gloria resigned from the legal profession.[1] The precipitating incident was Gloria's success in obtaining a crucial admission from a poorly educated woman who had been permanently disabled in a pressing machine accident.[2] As she described the case:

* Associate Professor, Department of Sociology, University of Denver.

** Chair, Department of Sociology and Professor of Law, Policy and Society Ph.D program, Northeastern University. Funding for this research was generously provided by the Program on the Legal Profession at Harvard University Law School and the W. M. Keck Foundation. The authors would like to acknowledge Deborah Rhode and David Wilkins for their contributions to this paper.

1 Telephone Interview with (Gloria Waters), Harvard Law School class of 1989 (Apr. 1993). All respondent names cited in this article have been changed to conceal their identity. All interviews are on file with Robert Granfield.

2 Gloria explained that:

> When [the disabled woman] walked into the room, she and I were the only women in the room. All the other lawyers and experts were male. She just immediately felt that she and I were on the same side because we were both women. Well, [because she didn't understand the situation] she just spilled her guts. She told me that she and her employer had cooperated together to disconnect the safety features. You could not make your quota with the safety system in place. The outcome of the case was that the woman didn't get anything. The whole thing made me sick. I felt – and this is not the attitude of a lawyer but the attitude of a human being – that we should have just given her the money [that the company paid the law firm] and told her to go home. It's hard to be a human being and a lawyer![3]

Had Gloria failed to convey the woman's confession to her client, the pressing company, she would have been in violation of the rules of professional responsibility by failing to uphold the principle of zealous advocacy. Gloria's personal morality, which would have led her to protect the injured woman at her client's expense, conflicted with the ethical principles of zealous advocacy that she had learned in law school.

Unlike law school hypotheticals, real world legal cases involve human pain and suffering. Gloria's deep personal conflict with this case arose because she perceived its contextual elements: a low-wage, minority woman with a fourth grade education working in a sweatshop. This was not simply a technical matter of products liability to Gloria, but was rather a situation that involved social inequality and power differentials. If the woman had refused to remove the safety device, she would probably have been fired for being too slow.

Although extreme, Gloria's anguish over being both a good "human being and a lawyer" is not a rare occurrence.[4] Remaining a moral human being while simultaneously upholding the ethical obligations associated with the legal

---

> [t]he case was brought by an elderly black woman with a fourth grade education. She worked in one of those laundries on a "cuff and collar" press. These machines heat up to 350 degrees. The operators of the machines, many of who are poor and black, put the wet shirt in the machine, press a button and the top of the machine lowers and presses it. Then she presses another button and it releases. Our firm was hired by the manufacturer to show that the manufacturer had made a safe machine and that it wasn't our client's fault the plaintiff's hands had gotten caught. My role in the deposition was to trip the woman up.

Id.

3 *Id.*

4 *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (describing the conflict between professional ethics and personal morality).

profession produces conflicts that most lawyers experience. This article addresses how young lawyers negotiate and manage ethical dilemmas and the implications that their adjustments to these troubling situations have for law school ethics instruction.

Part II begins by reviewing the various critiques of legal ethics education in American law schools. While the literature in this field is insightful, it often lacks an empirical basis. Part III presents interview data that explores the relationship between ethical instruction in the law school classroom and the moral conflicts that lawyers experience at the beginning of their legal careers. Forty young attorneys employed in a variety of settings, including large law firms, public interest groups, in-house counsels, and government were included in this study. We explore how these young lawyers reconcile the canons of professional responsibility that they learned in law school with their own personal moral codes. In short, this article examines the ways that young lawyers manage their humanity in the face of careers filled with moral dilemmas. In Parts III and IV, the article concludes with a discussion of how legal ethics education could benefit from the gathering of additional empirical data on ethical decision-making.[5]

II. THE DEBATE OVER ETHICAL INSTRUCTION IN LAW SCHOOL

Lawyers are frequently criticized for a variety of ethical lapses such as being greedy, dishonest, overly litigious and more concerned with winning than promoting justice.[6] Some assert that recent trends in legal practice expose

---

[5] Law school ethics courses are given under a variety of titles. As James Moliterno notes:

> Courses taught in the popular, single-semester, free-standing format have primarily been three: "legal ethics" (thought to exclude treatment of some non-ethics legal topics such as malpractice and thought by some to connote an sense of moralizing, also referred to regularly as an oxymoron); "legal profession" (thought to be a dodge of broader ethics issues, limiting talk of ethics to the grand traditions of the profession and its history); and "professional responsibility" (connoting to some an excessive reliance on study of the *Model Code of Professional Responsibility* (1980) or the *Model Rules of Professional Conduct* (1989)).

James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 83 n.1 (1991).

Traditional approaches to teaching legal ethics pay attention to such issues as rules governing conflict of interest, the lawyer's obligation to uphold confidentiality, the pros and cons of zealous advocacy, and the attorney-client privilege. There are several limitations to simply teaching the rules of professional responsibility. Such approaches do not generally explore the day-to-day conduct and issues of management across the range of professional organizations including large law firms, government practices, sole practitioners, in-house counsel, etc.. Such approaches are generally at odds with the reality of modern law practice. *See generally* Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817 (2000) (citing traditional approaches to teaching legal ethics).

[6] W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Real-*

young attorneys to increasingly complex ethical dilemmas that need to be countered through more effective ethical training.[7] The American Bar Association's Report on the Commission on Professionalism, for example, has argued that the bar's growing commercialism tempts lawyers to put profit before ethical principles, undermines professional controls, and reduces the identification of young attorneys with established ethical norms.[8] The Commission accused lawyers of becoming subservient to business interests and of pursuing profit at the expense of the traditional ideals of independence and public spiritedness.[9] The bar was urged to enact reforms that would lead attorneys to aspire toward the pursuit of professional community and public service rather than material gain.[10] Enron and other recent scandals are focusing additional attention on the question of whether corporate lawyers have sufficient independence and ethical grounding to protect the public interest against corrupt business executives.[11]

Several scholars argue that law schools must assume the burden of ethics education because today's large bureaucratic law firms do not provide the close working relationship with mentors and other colleagues that had formerly allowed young lawyers to observe ethical decision-making first-hand.[12] With the breakdown of the strong nexus between lawyers and the local communities they serve, the traditional ethical norms and obligations binding lawyers to the public interest are said to have weakened. Mary Ann Glendon observes that:

> today's lawyers wander in an increasingly impersonal, bureaucratized legal world, where neither honesty-based nor loyalty-

---

ity, and the Professional Reform Initiative, 53 S.C. L. REV. 527, 528 (2002) (reporting that "[s]urvey after survey of public opinion shows lawyers gradually slipping below politicians and journalists, and even approaching car salesmen and advertising executive levels in the public's esteem").

7 *See* Subha Dhanaraj, Comment, *Making Lawyers Good People: Possibility or Pipe Dream?*, 28 FORDHAM URB. L.J. 2037, 2068 (2001) (noting that neither professional ethics codes nor legal education promote moral growth in law students).

8 *See generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000) (discussing ABA report and other criticisms of legal ethics).

9 *Id.* at 14.

10 *See generally* Sol M. Linowitz, *Regaining Respect for the Legal Profession: Some Suggestions*, 60 N.Y. ST. B.J. 8 (1988) (proposing reforms to raise attorneys' image in the public's perception).

11 *See* Patti Waldmeir, *A Failure to Squeal: Lawyers Do Not Have to Police Their Clients But the Enron Affair Shows That They May Have Forgotten a Subtler Public Duty*, FINANCIAL TIMES, Jan. 24, 2002, at 11 (asking whether "competition [has] eroded ethical standards beyond the power of the ABA to repair").

12 For an in-depth empirical study of lawyers in large corporate law firms, see ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988). *See also* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHNS L. REV. 85 (1994).

> based systems seem to be operating. The families, communities, neighborhoods, and schools that once served as seedbeds and anchors for personal and professional virtues are themselves in considerable disarray . . . . New recruits to today's [legal] profession often have no solid base of old world, old Wasp, or any other culture to fall back on – and no coherent professional culture to embrace.[13]

This alleged deterioration of the spirit of professionalism has led to calls for a re-professionalization in order to reclaim the lost *gemeinschaft*[14] of the golden age of the legal community.[15]

Law schools are often criticized for failing to put sufficient effort into integrating ethical lessons into the overall curriculum.[16] Critics charge that law

---

[13] MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING THE AMERICAN SOCIETY 83 (1994)

[14] The concept of *gemeinschaft* was first articulated by the German sociologist Ferdinand Tonnies who set out to chronicle the social characteristics of industrial society. FERDINAND TONNIES, GEMEINSCHAFT UND GESELLSCHAFT [COMMUNITY AND SOCIETY] (1963; orig. 1887). Tonnies used the term *gemeinschaft* to refer to a type of social organization in which people are bound closely together by kinship and tradition. His formulation is similar to the concept of mechanical solidarity that was developed by French sociologist Emile Durkheim who proposed individuals living in small societies without a complex division of labor tended to a develop strong social bonds with each other. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893) (arguing that social bonds were the basis of the solidarity of traditionally based societies); *see also* JOHN MACIONIS, SOCIOLOGY (1996) (discussing the parallels between the concepts of Tonnies and Durkheim).

[15] For a general discussion of the perceived loss of community in the contemporary legal profession, see Eliot Freidson, *Professionalism Reborn, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION 215 (Robert L. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS/LAWYERS' PRACTICES] (calling for a renewal of professionalism within the bar); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism, in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 15, at 230 (investigating reasons for taking the professional ideal seriously). The notion that there was once a golden age of ethical lawyering, however, may be illusionary. The ethical standards of attorneys have been criticized throughout American history.

> Lawyers helped deliver the nation, but hostility to them was deep-rooted. They were pettifoggers who'd argue any case regardless of its merits. By the 1830's, lawyers gave order to the country – as local leaders, as interpreters of the Constitution – but with a system of justice that was said to betray morality because of its reliance on technicalities. In 1870 the New York City bar was set up to reform the practices of lawyers and restore their honor after a run of scandals. Lawyers of that era bribed legislators, manipulated judges and imperiled the law's legitimacy. In this century, Prohibition-era lawyers were blamed for bootlegging. Depression-era lawyers were accused of abandoning all but the wealthy. After World War II, the American Bar Association was chastised for leading the witch-hunts against Communists.

See L. Caplin, *Who Ya Gonna Call? 1-800-sueme*, NEWSWEEK, Mar. 20, 1996, at 36.

[16] *See* Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. &

school ethical training is undermined by isolating the moral message into a single, devalued course.[17] Surveys have shown that students regard ethics courses as inferior to those that teach legal skills.[18] Ronald Pipkin found that students perceive "legal ethics courses as requiring less time, as substantially easier, as less well taught and as a less valuable use of class time than their other course work."[19]

In her survey of casebooks outside of the field of professional responsibility conducted nearly a decade ago, Deborah Rhode found that only 1.4 percent of total pages were devoted to the subject of ethics.[20] She has now updated this statistic in her most recent survey, finding that while there is movement in the right direction, still only 2.5 percent of total pages deal with professional responsibility issues, attesting to the fact that "legal ethics in the core curriculum tends to be superficial or ad hoc . . . ."[21] Many of these references involved simply reprinting the relevant rules, rather than any exploration of moral issues. Colin Croft similarly complains that:

> By "fencing off" [law school ethical] discourse with a limited credit, delayed enrollment course, providing precious little time for extending discussions beyond the uninspiring rules of the Model Code and Model Rules, legal education effectively insulates discussions of legal professional standards from the rest of the law school curriculum.[22]

MARY L. REV. 409, 409 (1998) (suggesting that the existence of more than thirty guides for the teaching of professional responsibility indicates dissatisfaction of way the course is currently taught).

[17] *See* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 732-735 (1994) [hereinafter Rhode, *Institutionalizing Ethics*] (critiquing legal ethics for being "ghettoized" into one professional responsibility course); *see also* James R. Elkins, *Ethics: Professionalism, Craft and Failure*, 73 KENT. L. J. 937, 965 (1984) [hereinafter Elkins, *Professionalism, Craft and Failure*] (supporting the teaching of an "ethic of craftsmanship" over an arrogant "ethics of professionalism"); Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention,* 65 IND. L.J. 445, 458 (1990) (calling for modifying the "system radically by either abandoning zealous advocacy or seriously modifying its structure; [reforming] the rules modestly to further clarify the lawyer's responsibility; . . . or better educate lawyers about the current rules and their responsibilities under those rules . . . .") (footnotes omitted).

[18] Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 40-42 (1992) [hereinafter Rhode, *Pervasive Method*].

[19] Ronald Pipkin, *Law School Instruction in Professional Responsibility: A Circular Paradox*, 2 AM. B. FOUND. RES. J. 247, 258 (1979).

[20] Rhode, *Pervasive Method*, *supra* note 18, at 41.

[21] Deborah Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158, 165 (2001).

[22] Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1339 n.482 (1992) (citing Walter H. Bennett, Jr.,

Other critics charge that law schools fail to successfully teach ethical behavior because they have a hidden curriculum that replaces the cultivation of "practical wisdom" with an amoral emphasis on winning at all costs.[23] Law school teaches students to become tough-minded, hyper-rational, and insensitive to issues beyond the interests of their client – a perspective that undermines ethical decision-making. Judge Harry Edwards charges that, "while the schools are moving toward pure theory, the firms are moving towards pure commerce, and the middle ground – ethical practice – has been deserted by both."[24] He calls for the integration of professional values and practical skills in legal education.

An overly formalistic approach to teaching professional responsibility can actually undermine the student's ethical impulses and broader concerns for social justice.[25] If the focus of legal analysis is on abstract jurisprudential principles, largely ignoring the social context, the code of ethics may be viewed as an unrealistic set of ideals rather than a guide to real world behavior.[26] As Paul Haines notes, "The proliferation of rules decreases moral sensitivity and development, reduces flexibility, and discourages critical thinking. In effect, the lawyer enters a 'simplified moral world' and becomes an 'unreflective rule follower.'"[27]

Critical theorists maintain that the rules of professional conduct will not restore morality to the legal profession because the code itself is largely a self-

---

Making Moral Lawyers: A Modest Proposal, 36 CATH. U. L. REV. 45, 51 (1986)).

[23] Perhaps of the most turgid critiques of the failure of law schools to educate graduates to deal with complex legal realities is ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 165-70 (1993) (citing the "decline" of law school instruction for failing to promote the character traits of deliberative wisdom and public-spiritedness that is associated with the "lawyer-statesman"). *See also* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1651 n.85 (2002) (citing the need for legal education to encourage integrity among law students).

[24] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (discussing the tensions between the duty of zealous advocacy and maintaining integrity).

[25] *See* Deborah L. Rhode, *Professionalism in Professional Schools*, 27 FLA. ST. U. L. REV. 193 (1999) [hereinafter Rhode, *Professionalism*] (arguing that too often legal coursework seems largely a matter of technical craft, divorced from the broader concerns of social justice that led many students to law schools).

[26] For discussions of decontextualization in legal education, see ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992) [hereinafter GRANFIELD, MAKING ELITE LAWYERS] (arguing that law students experience a transformation of ideals in law school); Robert Granfield, *Lawyers and Power: Reproduction and Resistance in the Legal Profession*, 30 LAW & SOC'Y REV. 205 (1996) (reviewing several empirical studies of the legal profession); Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, 4 S. CAL. REV. L. & WOMEN'S STUD. 53 (1994) (examining the decontextualized pedagogy within law school).

[27] Haines, *supra* note 17, at 46.

interested smoke screen designed to legitimize the legal profession's relative freedom from outside control.[28] For example, Criton Constantinides argues that:

> [e]thics codes are excellent public relations tools which the professional group can point to when supporting its status, autonomy and practices. . . . [A] professional ethics code that outlines the profession's obligations to the public represents a vital component in an exchange between the professional group and society. The group promises to monitor the profession to insure a high standard of service and protect the public in exchange for the right to be free from external intervention.[29]

Ethical codes are frequently invoked by professional groups to extend and defend their status when the profession's prestige is uncertain or under attack.[30] As in medicine, the legal profession's increasing concern with the ethical practices of lawyers has been attributed to the law's waning cultural authority in society.[31] In the wake of the Watergate scandal, the American Bar Association ("ABA") made ethical instruction mandatory for law school accreditation.[32] As Phillip Kissam notes:

> The special problem with the lawyers in and out of the Nixon Administration who participated in Watergate was their apparent inability to distinguish between private interests and the public interest, that is, to perceive the public morality or legality

---

[28] The conflict perspective of the sociology of professions argues that professions engage in a collective struggle to gain and extend market control of the services they deliver. Professions represent collective mobility projects that seek to establish monopolies through processes of social closure that are designed to restrict access of low status groups to the profession. *See generally* MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM (1977) (arguing that professions are self-interested groups seeking to enhance their collective status); CHARLES DERBER ET AL., POWER IN THE HIGHEST DEGREE (1992) (arguing that professions constitute a new elite within advanced society). For a discussion of professional power as it pertains to the legal profession, see RICHARD ABEL, AMERICAN LAWYERS (1989) (examining the power of the legal profession to establish monopoly control over the services it provides).

[29] Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1340 (1991).

[30] *See* Andrew Abbott, *Professional Ethics*, 88 AM. J. SOC. 855 (1982) (arguing that ethical codes are used to raise the prestige of a profession).

[31] *See* ROBERT ZUSSMAN, INTENSIVE CARE: MEDICAL ETHICS AND THE MEDICAL PROFESSION (1992) (describing the ethical challenges faced by medical professionals). For a similar discussion of the ethical crisis in law, see generally GLENDON, *supra* note 13.

[32] *See generally* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981) (discussing the history of ethics instruction in legal education).

> that lawyers are thought to serve as interpreters (and enforcers) of the law.[33]

To remedy this perceived crisis in ethical standards within the legal profession, instruction in "the history, goals, structure, and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility" was deemed necessary.[34] As public anger over the misdeeds of accountants and bankers in Enron, WorldCom, Adelphia and other major bankruptcies turns to the role played by corporate lawyers in these debacles, demands for strengthened training in legal ethics are almost inevitable.[35]

The codes of professional conduct has been criticized for absolving lawyers for "morally indefensible" activities when they are performed in the interests of their clients. David Luban, for example, observes that the standard conception of "non-accountability" within the *Model Rules of Professional Responsibility* undermines social justice by encouraging lawyers to be zealous advocates for clients with immoral, but not illegal, interests.[36] This "higher immorality" is mandated by the canons of professional responsibility.[37] From this perspective, the seeds of the problem lie in the biases of the code itself, in contrast to the traditional viewpoint that argues for closer adherence to the rules of professional responsibility.

---

[33] Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 283 (1986) (discussing the abandonment of ethical values in law school).

[34] Moliterno, *supra* note 5, at 87 n.24. Some have argued that requiring these courses has not accomplished much to improve the profession. As James Elkins states:

> We have mandated the teaching of legal ethics and made it another subject in the law school curriculum. But in doing so, we still do not adequately explore what ethics means to lawyers, how ethics works in the day-to-day life of particular lawyers, or what obstacles we confront in our efforts to make ethics a central concern in legal education. The unexamined premise, now widely accepted, is that legal ethics is a subject to be taught and learned by those who set out to be lawyers. We hold, at the same time, quite stubbornly, the intuitive notion that students have already acquired their moral and ethical sensibilities before they arrive at the law school. Consequently, we teach ethics, denying that ethics can be taught.

James R. Elkins, *Lawyer Ethics: A Pedagogical Mosaic*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 196 (2000) [hereinafter Elkins, *Lawyer Ethics*].

[35] *See* Vanessa Blackburn, *After Enron, Ethics Now at the Forefront*, BELLINGHAM BUS. J., May 1, 2002 at B6 (suggesting that "some serious ethical questions about the behavior of the lawyers and accountants" are being raised).

[36] DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 148-74 (1988) (suggesting that the ideological principle of "non-accountability" in which lawyers are not the conscience of the clients they serve, protects the legal profession from moral culpability).

[37] C. WRIGHT MILLS, THE POWER ELITE 343-61 (1956) (defining the "higher immorality" to be the actions of the "power elite" when they use political, economic and ideological power to place their self-interested activities above the law).

If, as these scholars suggest, the ethical code is a mask to disguise the self-interested activities of legal professionals, then calls for increased professionalism and ethics instruction may not improve behavior. As James Elkins writes:

> In the ideology of professionalism, more is better. If the profession is in trouble because individual lawyers provide inadequate services, misrepresent the clients, or abuse their responsibility through incompetence and negligence, then the cure is greater professionalism. If the profession is in trouble because it promotes the interest of the individual, pays too little attention to the community and society, and ignores the harm that individuals are willing to perpetrate in pursuit of their own self-interest, then the cure is greater professionalism.[38]

The recent string of corporate bankruptcies has led to increased criticism of the ABA's ethical code:

> [Q]uestions about the performance of Enron's attorneys leading up to the firm's collapse are prompting new calls for lawyers to blow the whistle on a client before financial harm is done to others—in much the same way lawyers are expected to speak up to prevent bodily injury or death.[39]

III. THE EMPIRICAL RESEARCH

The foregoing review of the literature suggests that the field of legal ethics is in a state of turmoil and that solutions to this problem are the subject of intense debate. Unfortunately, most critiques of legal ethics and legal ethics education are based on the author's personal insights and observations rather than on systematic empirical research that focuses on how attorneys experience ethical issues within the context of their practice.[40] Designing effective professional responsibility instruction is extremely difficult since rules regarding ethi-

---

[38] Elkins, *Lawyer Ethics*, *supra* note 34, at 939.

[39] Lisa Girion, *Calls for Lawyers to Blow the Whistle*, L.A. TIMES, Mar. 24, 2002, Part 3, at 1 (discussing attempts by lawyers to convince the American Bar Association to alter the ethical code by requiring attorneys to protect the public from financial misdeeds of their clients); *see also* Wilson Chu & Barrett R. Howell, *Deal-Maker or Deal-Killer?: Ethical Dilemmas . . . and More*, 6 THE M&A LAWYER 10, 12 (2002) ("Model Rule 1.6 provides that lawyers are prohibited from revealing confidential client information to outsiders except when we reasonably believe that disclosure of the information is necessary to prevent imminent death or substantial bodily harm.").

[40] For a notable exception to this, which presents empirical data on gender differences in ethical reasoning among lawyers, see RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF MEN AND WOMEN LAWYERS (1989).

cal behavior do not always provide sufficient guidance. Codes of ethics have typically ignored the social context in which professional decisions are made.[41]

Professionals are often situated in complex, real world occupational contexts that remain messy despite the rule systems designed to eliminate ambiguity.[42] Variations in the institutional contexts of the workplace produce profound effects on professional lives.[43] "One size fits all" regulations may not be of much use to lawyers working in different organizational contexts, serving different types of clients, and attempting to accomplish different ends. Thus, attention to the context of work is important in understanding and teaching the principles of ethical decision-making by professionals.

In most cases, empirical research examining the effectiveness of legal ethics instruction has been restricted to paper and pencil assessments of changed values or studying whether graduates of ethics classes respond more "ethically" to a classroom exercise.[44] In contrast, we will examine the complex interactions between the ethical lessons learned at law school (both in and out of the classroom) and the real world ethical dilemmas they face in practice as young attorneys through in-depth interviews. This part examines the ways in which young lawyers in a variety of organizational settings construct and resolve their ethical dilemmas.

Our study is designed to inform the continuing debate among teachers of professional responsibility courses regarding ways to prepare students for the ethical issues that they will confront as practitioners. These discussions, and the curriculum changes they have fostered, offer promising new ways of exploring questions of ethics, values and professional responsibility in the classroom.[45] Better pedagogical methods can be developed with a more sophisticated understanding of how workplace experiences shape professional behavior. In the words of Eleanor Myers:

---

[41] *See generally* Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37 (2001) (arguing that neither the rules governing lawyers' behavior nor philosophical ethics should be studied in isolation).

[42] *See* ZYGMUNT BAUMAN, POSTMODERN ETHICS (1993) (discussing the difficulties of establishing ethical standards in the post-modern world).

[43] *See* ELIOT FREIDSON, PROFESSIONAL POWERS (1986) (discussing the importance of analyzing professions from a sociological perspective).

[44] Many studies of ethics in law and legal education have been conducted through the use of quantitative analysis, typically employing statistical modeling of responses on surveys given to a large sample. *See* Pipkin, *supra* note 19 (employing empirical research to argue that instruction in professional responsibility fails needs improvement); *see also* Jerome E. Carlin, *What Law Schools Can Do About Professional Responsibility*, 4 CONN. L. REV. 459 (1971); Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978).

[45] *See generally American Association of Law Schools Symposium: Bringing Values and Perspectives Back into the Law School Classroom: Practical Ideas for Teachers*, 4 S. CAL. REV. OF LAW & WOMEN'S STUD. 1 (1994) (discussing various perspectives on the place of values in legal education); *see also* Bryant Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL ED. 469 (1993).

> If our educational efforts are to make a contribution to the revival of professionalism, our teaching should be informed by an appreciation for the dominant role that the culture and values of the workplace have on the way that lawyers behave professionally.[46]

Our concern here is to explore the context of professional practice in order to provide insight into the complex issues surrounding ethical behavior and decision-making in legal practice.[47]

A. Methods

Recent socio-legal scholarship has emphasized the importance of studying the relationship between ideology and behavior in legal settings through narratives.[48] In the words of Robert Nelson and David Trubek:

> This trend within legal studies is properly seen as part of a larger movement within the social sciences and the humanities to analyze how individual and institutional actors construct systems of meaning that take on the appearance of external reality. . . .[49]

As Patricia Ewick and Susan Silbey note, "Narratives are likely to bear the marks of existing social inequities, disparities of power, and ideological effects."[50] The visions of practice lawyers develop and construct within their occupational contexts have critical consequences for practitioners as well as the clients they serve.[51]

---

[46] Eleanor Myers, *"Simple Truths" About Moral Education*, 45 AM. U. L. REV. 823, 824-25 (1996) (discussing the importance for understanding the impact of the workplace on lawyer behavior).

[47] *Cf.* David B. Wilkins, *Everyday Practice is the Troubling Case*, *in* CONFRONTING CONTEXT IN LEGAL ETHICS IN EVERYDAY PRACTICE AND TROUBLE CASES (Austin Sarat et al eds. 1998) (calling for a sociological exploration into the impact of institutional context on legal practice and ethics).

[48] The collection of narratives, or life stories, has a long tradition in socio-legal studies. *See generally* Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000) (discussing the use of narratives in law school courses); David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 L. AND SOC'Y REV. 785 (1993) (discussing the power of narratives in understanding parental resistance to disabled classifications of their children).

[49] LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 15, at 4.

[50] Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. AND SOC'Y REV. 197, 222 (1995) (analyzing variations in legal consciousness).

[51] *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS

Data for this paper was collected as part of a longitudinal study of the professional lives of elite lawyers.[52] Forty Harvard Law School graduates who had taken part in an earlier study of law school socialization were selected for in-depth interviews.[53] Cases were chosen through a stratified sub-sample drawn from the original sample of 103 graduates in order to ensure representation in a wide variety of professional settings.[54] After respondents had been identified and located, extensive telephone interviews were conducted to determine whether the ethical guidance that respondents received in law school had proven valuable to them after several years of practice and to examine what moral conflicts, if any, they are experiencing in their legal careers.[55] While this sample is limited in that it includes only graduates of this elite law school, it nonetheless offers insight into the larger issue of ethics in practice. Because there is a paucity of data on this subject, any information on the ethical experiences of lawyers is useful.[56]

The sample possesses gender and racial diversity. Almost one-half of the forty interviewees are women and nearly one-quarter are minorities. At the time of the interviews, the average length of time since these lawyers graduated

---

(1988) (discussing how lawyers' vision of law and practice constructs clients); AUSTIN SARAT & WILLIAM L. F. FESTINGER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN LEGAL PROCESS (1995) (discussing a qualitative study of lawyer-client interactions).

52 *See generally* GRANFIELD, MAKING ELITE LAWYERS, *supra* note 26 (describing an empirical study of law students).

53 These graduates were located through the assistance of the alumni office at Harvard Law School.

54 The original study of law school socialization was conducted by the lead author in the late 1980s. Most of those participating in this follow-up study graduated from law school during that period. The research was predominantly an ethnographic examination of the experiences students have in law school, as well as an analysis of their occupational decisions. For that study, anonymous surveys were also used to collect quantitative data. The 103 original in-depth interviews, along with extensive field notes from observation and less structured interviews, were conducted with students during their law school years. These students were selected on the basis to which they represented distinct student orientations and perspectives, particularly with regards to their future occupational positions within the legal profession. The subjects that were selected for this study were chosen to represent different workplace settings. First, subjects were stratified by occupational setting including large law firms, public interest practice, government, and other sites of legal work. Subjects were then randomly selected from each category.

55 There have been significant changes in the teaching of legal ethics at Harvard Law School and elsewhere since these lawyers graduated in the late 1980s. Many ethics courses now include context-based content. However, there continues to be a paucity of classroom material that is drawn from empirical experiences. Only a few casebooks currently include context-based content. *See generally* Rhode, *Pervasive Method*, *supra* note 18. We hope that our investigation will contribute to the efforts of legal ethics teachers in their ongoing curricular reforms and improvements.

56 Extensive theoretical and experiential literature discusses the ethical problems faced by attorneys but there is very little empirical research on the actual ethical dilemmas encountered by young lawyers and how these problems are resolved.

from law school was four years. No respondent refused to be interviewed, and many expressed considerable interest in the results since they had previously participated in the law school study. In-depth, tape-recorded interviews lasting approximately two hours were conducted with all forty respondents, demonstrating their willingness to explore complex issues. Questions focused on the respondent's career path, work-related pressures, experiences with discrimination, the extent of respondent's preparation for legal work, and ethical dilemmas. A semi-structured format was used in order to elicit open-ended narratives.

B. Relevance of Ethical Instruction in Professional Practice

Respondents in this study almost uniformly felt that their ethics training in law school had done little to prepare them for the issues they now confront as practicing attorneys. Only three of the forty respondents characterized their ethics course as valuable preparation for their legal careers. The vast majority reported that their ethics course had merely provided them with formalistic instruction about the rules of professional responsibility, not with the tools necessary to resolve moral dilemmas. As one large law firm attorney explained:

> I don't think ethics classes did much at all. My ethics class was really a study of the model rules and the model codes. It was about conflicts of interest and that kind of thing but it didn't teach you at all about the kinds of issues that really come up . . . . I don't think it really trains you to know what to do or to feel strongly one way or the other.[57]

For many, the focus on formal ethics rules was insufficient since it typically severed cases from the social, political, and organizational contexts in which they are embedded. It was ethical issues ignored by the code of professional conduct that these young attorneys found most troubling. One attorney, who worked for a prestigious Washington-based law firm, explained the shortcomings of his professional responsibility course:

> As the profession defines ethical problems, there's no ethical problem with representing the tobacco institute (which I regularly did). The kind of slimy ethics thing that I didn't run into is what they talk about in law school.[58]

This young attorney was strongly opposed to defending cigarette manufacturers. He solved his moral quandary by arranging a transfer to a division that he found less ethically questionable. He explained, "It took me about 8 months to work

---

[57] Telephone Interview with (Ron Gant), Harvard Law School class of 1988 (Mar. 1993).

[58] Telephone Interview with (Michael Preston), Harvard Law School class of 1989 (Mar. 1993).

my way out of this assignment. The way I did it was by playing squash with this one partner and telling him I was interested in [his area of practice]. I saw [that] as a way out."[59] However, until the respondent was permanently reassigned to this partner, he continued his tobacco work, forcing him to bear considerable personal discomfort. This respondent described himself as a "water-walker" in the firm, and credited his popularity with allowing him to negotiate his way into a different area of practice.

Similarly, another attorney reported that she was not prepared for the social and political realities of institutional practice in a leading New York law firm. She had not realized "the amount of commitment that I was expected to give to my clients," even the ones that she had moral doubts about such as the "large industrial cases, like tobacco litigation."[60] The young attorney complained of being disenchanted and "questioned the meaningfulness of all this."[61] She felt that law school should have provided her with a better understanding of the social environment of elite legal practice:

> [Legal ethics courses] should cover stuff like the glass ceiling, bureaucracy and hierarchy in the law firm. I think students really need to be given the opportunity to discuss practice issues and [courses should] bring in people to present these issues. I remember when I was in law school I didn't know anything about being a lawyer or about real ethical issues that come up.[62]

This finding echoes David Wilkins' charge that:

> The traditional model [of teaching legal ethics] pays relatively scant attention to distinctions in the tasks lawyers perform (i.e., litigation versus *ex ante* counseling), the subject areas in which they practice (i.e., criminal versus civil), the clients they represent (i.e., individuals versus corporations), or the setting in which they work (solo practice versus firms or other institutions).[63]

While there are curriculum efforts being conducted to overcome these problems, traditional professional responsibility courses generally have not prepared students for the kinds of institutionalized injustices and pressures these respondents face because, as Moliterno points out:

---

59 *Id.*

60 Telephone Interview with (Lisa Lyman), Harvard Law School class of 1988 (Apr. 1993).

61 *Id.*

62 *Id.*

63 Wilkins, *supra* note 47, at 71-72.

> [t]he lawyer's life is not a series of dilemmas that present themselves by way of short vignettes. Presenting the ethics course as such a series of problems misleads the student into thinking that ethics are a set of rules for resolving a finite list of the problems that lawyers face.[64]

In the absence of these real world contexts, ethics cases presented to students in law school are frequently too nebulous to provide much guidance.

Large law firms were not the only work setting to produce ethical trouble spots. Respondents working as public defenders reported that, although the rules of professional responsibility are theoretically universal, the code actually offers little guidance in resolving the unique problems they confronted.[65] One legal services attorney complained that neither the ethical code nor her law school training assisted her in dealing with moral quandaries such as "how to treat clients" or determining if a client is "competent to form an attorney-client relationship."[66] She was troubled by the question of whether a defense attorney has any responsibility to protect the community against violent offenders or to intervene in the lives of clients. For example, when defending a drug dealer who was being evicted from his apartment, this lawyer faced a moral issue that had not been explored during her legal education:

---

64 Molitemo, *supra* note 5, at 107-08.

65 Theodore Schneyer argues that differences in ethical views regarding practices such as *pro bono* can be traced to the structural differences in the workplace, clientele, and the political environment. For example, contingency fees, advertising, and class action litigation are frequently denounced as unethical by the defense bar but seen as vital by plaintiff's attorneys. *See generally* Theodore Schneyer, *Professionalism as Bar Politics: The Making of the Modern Rules of Professional Conduct*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 15, at 95. Plaintiff's lawyers, in contrast, attack the morality of opposing counsel by accusing them of being "corporate ambulance chasers" and of using their greater resources to stymie deserving plaintiffs. Defense lawyers stand accused of "poisoning the jury well" by orchestrating campaigns to convince the public that there is a litigation crisis which damages American competitiveness. *See* Ross E. Cheit, *Corporate Ambulance Chasers: The Charmed Life of Business Litigation*, 11 STUD. L. POL. & SOC'Y 119 (1991). Fordham Law School has attempted to deal with differentiated ethical issues faced by different parts of the bar by offering four different professionalism courses: Professional Responsibility; Ethics in Public Interest Law; Professional Responsibility in Corporate, Business, and International Transactions; and Ethics in Criminal Advocacy. *See* James L. Oakes, *Commentary on Judge Edwards' "Growing Disjunction Between Legal Education and the Legal Profession"*, 91 MICH. L. REV. 2163 (1993). This is consistent with Wilkins, who argues:

> the divergent realities of practicing lawyers preclude the formation of [a unified normative] culture . . . [l]awyers who represent large corporations are different from those who represent individuals. Plaintiffs' lawyers are different from defendants' lawyers. Lawyers in large cities are different from lawyers in small towns. Lawyers who litigate are different from lawyers who primarily negotiate or provide office counseling.

David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 487-88 (1990).

66 Telephone Interview with (Rebecca Stout), Harvard Law School class of 1988 (Apr. 1993).

> No one in the community wants this person in the apartment anymore. It gets pretty heated because you get feedback from the community, and I often agree with them. People who sell drugs are bad for a community. No one tells you in the ethics class what to do in such cases. What is your duty to the client as it relates to the community? The model is totally based on the lawyer and the client, and you put the client first. There's not a lot of room in the Model Code for the person who's also thinking about the community.[67]

While the traditional ethical approach to such cases emphasizes that "[n]eutrality requires a lawyer to practice without regard to her personal views concerning either a client's character or the moral status of his objectives,"[68] this respondent was disturbed by the lack of concern for the community.[69] She found little in the code of professional responsibility that would encourage her to consider a "host of factors other than the client's own narrow self-interest . . . ."[70]

Another legal services respondent raised similar issues:

> The kinds of ethical problems that come up for me are questions about how to treat clients or problems with opposing counsel. Like how invasive do you get in a client's life to find out what's going on, how much you help them solve only the problems they bring to you and how much you have an obligation to get into their face and identify a problem they don't want to admit to. This could be everything from a woman being battered to the person being an alcoholic. Courses on ethics are pretty silent on these things.[71]

She concluded her comments by recommending to "never become a public interest lawyer [because], you don't sleep well!" This respondent's observations speak directly to the point made by legal ethicist Bruce Green, who noted that "ethical codes give no guidance as to whether the duty of 'zealous representation' requires an attorney to engage in conduct approaching the line of criminal-

---

67 *Id.*

68 Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1534.

69 *See* GLENDON, *supra* note 13 (arguing that lawyers no longer participate in a common professional community).

70 Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 887 (1996) (discussing the characteristics of virtuous lawyers).

71 Telephone Interview with (Cynthia Post), Harvard Law School class of 1989 (Apr. 1993).

ity, whether an attorney must refrain from such conduct, or whether an attorney has discretion to choose his course of conduct."[72]

In general, respondents reported that their legal ethics courses failed to provide relevant information to assist them in understanding the social context that produces ethical dilemmas. Likewise, respondents found that ethics courses lacked both adequate guidance about the social impact of legal activities and useful advice for evaluating their obligations to clients and non-clients. Thus, it is hardly surprising that when asked how they resolve ethical dilemmas, almost all respondents reported that they "mostly fly by the seat of [their] pants."[73]

C. *Managing Ethical Uncertainty*

Attorneys, as professionals, are granted freedom from being judged by the normative standards of common morality that is applied to the general public.[74] Dilemmas often arise when the ethical code of their profession clashes with the moral principles that the individual, as a private citizen, may endorse. A narrow focus on the ethical rules can be used to keep from having to face the larger moral questions implicit within an act.[75] Many of our respondents reported obeying the professional code of legal ethics even if it meant violating their personal moral codes. The ethical qualms that respondents experienced were commonly viewed as symptoms of a personal weakness that should not be allowed to interfere with their professional duties.

Several respondents denied experiencing ethical difficulties, even though they had been involved in situations that "bothered them personally."[76] For example, one respondent explained that although she had not experienced any ethical problems, it made her "feel bad at times" that she was taking away health care benefits from workers or "throwing them out of work."[77] The point made by this respondent echoes Fred Zacharias, who complains that:

---

72 Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N. C. L. REV. 687, 689 (1991).

73 Telephone Interview with (Mitch Friendly) Harvard Law School class of 1988 (Mar. 1993).

74 *See* LUBAN, *supra* note 36 (examining the traditional role morality of lawyers).

75 *See* Jonathan M. Freiman, *Steps Toward a Pedagogy of Improvisation in Legal Ethics*, 31 J. MARSHALL L. REV. 1279, 1285-86 (1998) (arguing that current ethics teaching methods in law school causes the student to manipulate "the ethical code as she would manipulate the law; she does not ruminate on it as she would ruminate on a moral decision"); *see also* Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995) (maintaining that experiential education has greater impact than teaching abstract principles).

76 Telephone Interview with (Brenda Boswell), Harvard Law School class of 1989 (Apr. 1993).

77 *Id.*

> the codes do not tell lawyers how to reconcile conflicts between their personal sense of ethics and the rules. . . . They do not establish that moral individuals should be willing to participate in the role-differentiated system. Nor do the codes speak to the issue of how participating lawyers should act, as moral individuals, when they believe the system is flawed.[78]

The role morality espoused by the code of professional ethics desensitizes many young lawyers to the moral dilemmas posed by the contradictions they experience.[79] As Joseph Allegretti observes, "[T]he standard complaint about lawyers is that they are too disposed to substitute role morality for ordinary morality. They do things that ordinary morality condemns, yet defend their actions on the grounds that their role as a zealous advocate justifies or even demands such actions."[80] By focusing on the technical correctness of their work, such attorneys overcome their moral doubts. They hold to the letter of the code, believing that technical compliance absolves them of any blame.[81] Moral ambiguity is dealt with by substituting rules of professional ethics for personal codes of morality. William Sullivan refers to this as a conflict between the ethics of rules and the ethics of character.[82]

---

[78] Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 228 (1993) (discussing the use of "role morality" to deal with moral qualms).

[79] *See* Robert Granfield & Thomas Koenig, *The Fate of Elite Idealism: Accommodation and Ideological Work at Harvard Law School*, 39 SOCIAL PROBLEMS 315 (1992) (documenting the undermining of idealism by legal education); CHARLES DERBER, PROFESSIONALS AS WORKERS: MENTAL LABOR IN ADVANCED CAPITALISM (1982) (discussing ideological neutralization among professionals); ROBERT JACKELL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988) (examining the organizational basis for ethical conflicts within corporate culture).

[80] Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 CREIGHTON L. REV. 1, 16 (1993). The concept of role morality, as distinct from a common morality, suggests that professionals engage in practices that are considered legitimate because of the expressed virtues of the occupational role. For instance, the standard deontological assumption within the legal profession is that lawyers have a duty or obligation to be a zealous advocate for their client. Even when acting in the interests of a client, the lawyer, in the occupational role as lawyer, is not necessarily culpable for the clients' actions. The lawyer may not agree with his/her client and may possess different values, but the role morality of a lawyer allows him/her to carry out the functions of lawyering without feeling as though he/she has adopted the same values as the client. *See generally* LUBAN, *supra* note 36 (arguing the difference between role morality and common morality).

[81] *Cf.* JEFFERY M. SCHEVITZ, THE WEAPONSMAKERS: PERSONAL AND PROFESSIONAL CRISIS DURING THE VIETNAM WAR (1979) (arguing that engineers resolve moral conflicts in their work by focusing on the technical aspects of their job); *see also* HANNA ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (showing that a focus on technical aspects of the job can blind participants to moral issues as large as organizing Nazi Germany's systematic extermination of six million Jews).

[82] WILLIAM SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 191-218 (1995) (arguing that the civic orientation of professionalism has been

Most of our respondents strategically use role differentiation and role morality to resolve their ethical dilemmas. One explained that, "whenever I feel uncomfortable about a case, I just make sure that everything I do is ethical and on the up-and-up."[83] As long as their behavior breaks none of the canons of professional responsibility, respondents are absolved of guilt. One respondent dislikes representing toxic polluters, but following the principle of zealous advocacy, he reports that; "I just close my eyes and do it."[84]

Communitarians criticize the norm of zealous advocacy for its focus on individual rights even at the expense of community well-being. Mary Ann Glendon argues that:

> our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead towards consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without expecting the corresponding civic and personal obligations.[85]

Our respondents echo this concern. In the words of one young African-American attorney who was experiencing the pressures of an associate seeking to be promoted to partner:

> We represented a client in a plant closing case that was opposed by the community. That one made me think a lot because I grew up in [a poor community] which used to have a heavy manufacturing base and everyone worked in the mills. I watched the plants close and watched the parents of friends get laid off and watched the community go down hill from there. I recognize that was very possible in this case. While I'm representing the company, I recognize the community's interests also. Intellectually, though, it's easy to see that the basis for the community's lawsuit has no merit . . . . I guess what I ended up doing was concentrating on the legal issues because that was really all that I had control over.[86]

---

eclipsed by a more technical vision of ethical responsibility).

83 Telephone Interview with (Frank Painter), Harvard Law School class of 1989 (Mar. 1993).

84 Telephone Interview with (Richard Flemming), Harvard Law School class of 1988 (Mar. 1993).

85 GLENDON, *supra* note 13, at 14.

86 Telephone Interview with (Ronald Garry), Harvard Law School class of 1989 (Apr. 1993).

Although he is conflicted over his participation in plant closings, this young attorney is reluctant to explore alternative strategies with his client. He is approaching partnership in the firm and does not wish to jeopardize his career by giving the wrong message about his commitment to the firm's goals.

As an African-American from a working class background, this respondent felt that his ability to generate clients for the firm is limited. As he explained, "as an African-American, I don't have the old friends from growing up [who would seek out corporate legal counsel]. I can't tap into an old boy network."[87] He felt that because he had little contact with "upper-level management that make the company decisions"; he had no freedom to refuse to obey instructions that were legal but ethically troubling.[88]

Another large law firm attorney finds that her personal acceptance of the ideology of advocacy helps to reduce ethical ambivalence.[89] This long time champion of tenant's rights found herself assigned to defend developers and landlords. She explained that:

> I wanted to be involved in developing affordable housing. I really believe in subsidized housing. But as a lawyer, I work for a firm that represents towns. I'm representing a town that is trying to do everything it can to stop subsidized housing. You owe a duty of representation. I went out and looked at the site and could see why they had a lot of concerns about the project. However, I think I'd rather be on the other side.[90]

The established ethical principles of the legal profession obligated this lawyer to advocate a position with which she disagreed. Redefining the issue as a fair fight between two equal parties, rather than the exploitation of an impoverished community neutralized cognitive dissonance.[91]

Several respondents reported resolving their moral reservations by viewing litigation as a self-contained contest and ignoring the social consequences of their actions. Many of these respondents learned to define law as a game during law school.[92] As John Mixon and Gordon Otto charge, law schools

---

87 *Id.*

88 *Id.*

89 Telephone Interview with (Sharon Elder), Harvard Law School class of 1988 (Mar. 1993).

90 *Id.*

91 *See* Richard Wassertrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS Q. 1 (1975) (examining role morality as a traditional justification for lawyer behavior). On the general topic of cognitive dissonance, see LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (finding that people strive for internal consistency between their personal beliefs and their behavior; belief systems may be changed to remove the psychological pain that comes from seeing oneself as acting immorally).

92 *See* GRANFIELD, MAKING ELITE LAWYERS, *supra* note 26, at 61-65.

"implicitly sanction questionable behavior by emphasizing constantly the total relativity of legal and ethical conduct."[93] One large firm associate explained:

> I buy into the game metaphor, it's very important to me. It helps me define my role. When I construct arguments with my boss, I never say that I'm not going to make that argument because it's not fair or because I don't believe in it. The only question I ask is it good enough to make in terms of its success.[94]

Another respondent doesn't worry about his personal morality because, "it is only rich organizations who are fighting over these issues. Everything that I do is pretty neutral."[95]

Ironically, the extreme examples of malfeasance that had been presented in their professional responsibility classes are occasionally used to minimize the moral ambiguities in the respondent's current practice. One respondent excused his ethically questionable actions by saying that, "I wouldn't have worked on the Pinto case. The cases I work on aren't nearly as bad."[96] Another respondent justified defending a client who had bilked the government out of an enormous sum on the grounds that, "at least I'm not hurting people."[97] These examples of ideological work[98] illustrate Rhode's warning that:

> the danger in diluting the ethical content of ethical codes is that they will nonetheless pass for ethics. New entrants are socialized to the lowest common denominator of conduct that a highly self-interested group will tolerate. . . . Standards pitched at a more demanding level can reinforce the lawyer who would prefer the ethical course but is reluctant to appear sanctimonious.[99]

Several of our respondents reported that they had engaged in questionable practices out of a desire to be a team player. It is natural that a group of individuals working long hours together in an attempt to win a case become

---

93 John Mixon & Gordon Otto, *Continuous Quality Improvement, Law, and Legal Education*, 43 EMORY L. J. 393, 463 (1994).

94 Telephone Interview with (Frank Painter), *supra* note 83.

95 Telephone Interview with (Brenda Boswell), *supra* note 76.

96 Telephone Interview with (Michael Preston), *supra* note 58.

97 Telephone Interview with (Gerry Schultz), Harvard Law School class of 1989 (Mar. 1993).

98 *See generally* Granfield & Koenig, *supra* note 79 (discussing ideological work in law schools).

99 Rhode, *Institutionalizing Ethics*, *supra* note 17, at 730.

close friends, but in these emotional bonds lie potential moral pitfalls. The team's activities become by definition moral, or at least justifiable, because of the low ethical standards attributed to the opposition. Many respondents assured us that no one with whom they worked closely had suspect ethical principles, but they believed that other attorneys could not be trusted. The unethical tactics of opposing lawyers were seen as placing the respondents' team at a tactical disadvantage that had to be countered by, as one respondent explained, "bending the rules."[100]

Some respondents acknowledged that partisan loyalty to the team had occasionally blinded them to the moral implications of their own conduct. An African-American female told us that she had avoided recognizing the social impact of drafting documents which resulted in foreclosure against large numbers of minority homeowners by thinking of her actions as "neutral."[101] She was merely "pushing paper," not throwing people out of their homes.[102] A strong sense of teamwork and group loyalty prevented her from seeing the case as anything other than a contest in which her cleverness was valued. Now that she has left the firm, she marvels that she did not recognize the harm she helped inflict upon the poor:

> I didn't think about the imbalance of power at the firm. It was mostly one person with money against another person with money. Even when it started getting involved with bank stuff, I didn't see an imbalance of power. But now, being on the other side, I see what that meant. I was assisting banks who didn't want to comply with community reinvestment laws.[103]

Emotional loyalty to the litigation team often extends to developing an enthusiasm for the client's cause. Like Robert Nelson, we found that lawyers minimize ethical dilemmas by identifying with their clients.[104] One respondent reported that she had previously sympathized with injured plaintiffs, but now, as a medical malpractice defense attorney she realizes that frequently "doctors and medical products manufacturers are victims of frivolous lawsuits."[105] Similarly, another lawyer has come to recognize that the large insurance companies he represents are morally correct because, "I feel that people who have been pollut-

---

100 Telephone Interview with (Jonathon Morris), Harvard Law School class of 1989 (Apr. 1993).

101 Telephone Interview with (Brenda Boswell), *supra* note 76.

102 *Id.*

103 *Id.*

104 NELSON, *supra* note 12, at 231-243.

105 Telephone Interview with (Robin Furst), Harvard Law School class of 1987 (Mar. 1993).

ing are trying to get out of their responsibility for it and want to bring insurance companies down with them."[106]

It was quite common for respondents to identify with clients for whom they previously had felt antipathy. One large law firm attorney illustrates this method of resolving ethical ambiguity:

> We had a case where a company wanted to develop a hazardous waste incinerator in a poor area. What we did was perfectly legal. We bought the land from the owners. We told them we were developing an industrial park, which was semi-true. But, this case went against my general convictions about environmental issues, particularly putting something like this in a poor area where people can't or won't resist. But I convinced myself that there's always another side. By the time I was done, I thought our client was closer to the right side of things than the townspeople. The stuff has to go somewhere. I tended to accept what the client was saying about all the precautions they would take.[107]

Strain is reduced by coming to believe that you and your team, and by extension your client, are in the right. However, the most effective technique is sometimes to simply ignore ethical implications altogether. In the words of one typical respondent, "I used to care about how the things I did as a lawyer affected people, but I don't find myself asking these questions anymore." [108]

Organizational pressures also led respondents to compromise their ethical standards. Respondents in our sample had experienced moral dilemmas resulting from the concealment of sensitive documents, from deceptions perpetuated by their clients, and from the necessity of representing clients of questionable character. Most went along with the misbehavior without protest for fear of damaging their careers. Minority respondents were particularly likely to feel the need to compromise their ethical principles in order to protect their jobs. One African-American attorney at a large law firm representing industrial polluters complained that he possessed little opportunity to convince clients to behave in a more socially responsible fashion because:

> I'm very frightened of getting fired so I never pushed the envelope. I've been here for three years and each year they give me the lowest evaluation and salary. I don't say much about the cases or what I think should be done. I also tell other black

---

106 Telephone Interview with (Ralph Sampson), Harvard Law School class of 1988 (Mar. 1993).

107 Telephone Interview with (Richard Flemming), *supra* note 84.

108 Telephone Interview with (Robert Smart), Harvard Law School class of 1989 (Apr. 1993).

> lawyers not to complain for the same reason I didn't complain.[109]

Another minority respondent argued that moral compromise was justified because it permitted him to perform some progressive *pro bono* work.[110] He admitted that the dream of championing social reform from the corporate law offices had proved largely illusionary.[111] Organizational pressures to make partner discourages spending much time in uncompensated practice. For most respondents, *pro bono* was no longer connected to societal reform as much as it offered ways to bring the firm new clients, good publicity or to do favors for current clients.[112] Respondents were concerned that their careers would be damaged if they became involved in *pro bono* cases that disturbed conservative partners or the firm's establishment clients.

IV. BRINGING CONTEXT INTO LEGAL ETHICS INSTRUCTION

The data presented in this study of young lawyers indicates that most have internalized the ethical ideology of the legal profession. They define themselves as highly moral and view their legal practice as socially neutral. These attorneys attribute lower ethical standards to the opposition. They tend to believe that ethical dilemmas arise principally in fields like criminal law and have many ready-made rationales for ignoring the "higher immorality" that is involved in some elite legal work.[113] For most respondents, the practice of law has become largely devoid of moral questions, although the tactics employed and the actions of clients are sometimes personally troubling.

Cases are reduced to their technical merits and ethics to obeying the professional standards of conduct. Even where issues of power and inequality clearly enter into cases, the zealous advocacy principle relieves these attorneys of moral responsibility. Still, these young attorneys wish that their legal education had done more to prepare them for the social and moral complexities that they experience. In general, our findings suggest the need for a more comprehensive, contextualized approach to legal ethics education.[114]

---

109 Telephone Interview with (David Dennison), Harvard Law School class of 1989 (Mar. 1993).

110 Telephone Interview with (Ronald Garry), *supra* note 86.

111 *Id.*

112 Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689, 1693-94 (2002) (describing the ways that law firms use *pro bono* work to advance their self-interest).

113 MILLS, *supra* note 37, at 343-61.

114 David Richards, for instance, argues that "we need to fundamentally rethink the propriety of the academic division of labor that isolates the serious study of history, political philosophy, economics, anthropology, or interpretation into separate departments, and segregates their discourses

The ethical training these respondents received during law school did not provide sufficient guidance for the intricate social issues presented by legal practice. We agree with Croft's call for a legal ethics course that would "impart three overriding skills: (1) an ability to recognize the ethical considerations generated in various legal practice scenarios; (2) an ability to analyze such scenarios within a conceptual framework of ethical, jurisprudential, as well as legal, considerations; and (3) a 'capacity for and willingness to engage in reflective judgment.'"[115] Our interviews suggest that the ethical instruction these respondents received in law school failed to fully accomplish these objectives.[116]

Legal ethics, as it is traditionally taught, obscures power relations and organizational dynamics by its frequent failure to consider the social context of legal practice. The ethical instruction provided by law schools needs to be strengthened by focusing on contextual pressures such as growing commercialism. In the words of Judge Edwards,

> If law firms continue on their current course , law schools must work all the harder to create "ethical graduates." Such graduates will at least attempt to resist the institutional pressures and practice law that serves the public interest. The J.D. who . . . knows nothing of professional responsibility will succumb all the more readily to the pervasive materialism of the law firms.[117]

Too many courses in legal ethics ignore the humanistic issues that arise during legal practice by focusing solely on decontexualized rules of professional responsibility. As Elkins points out:

> A fundamental tenet of professionalism is that an individual's failure to adhere to the highest standards or to adequately take into account the social and philosophical dimensions of his or

---

from the study of law in a professional school." David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School*, 45 STAN. L. REV. 1955, 1978 (1993). Such an integration of material could provide more of a foundation for the study of contextualized ethics. It should be noted that several law professors, recognizing the value of these disciplines, have begun to utilize this material in their legal ethics classes. *See id.*

115 Croft, *supra* note 22, at 1341.

116 *See* Elkins, *Professionalism, Craft and Failure*, *supra* note 17, at 199 (advocating contextualized ethics training to "get beyond the law of lawyering and ethics imagined as ethical legalism").

117 Edwards, *supra* note 24, at 73.

> her professional work is personal and idiosyncratic to that individual.[118]

The limitations of legal ethics courses as traditionally constituted help to explain why so many of our respondents report that their ethics training was not relevant to their current legal careers.

Our respondents' law school professional responsibility courses stressed regulation and occupational malfeasance such as conflicts of interest, impropriety, or courtroom misconduct.[119] According to our respondents, broader questions regarding morality, power, social context, team loyalty, or community responsibilities were rarely, if ever, explored. Such topics are often considered to be outside the purview of professional responsibility courses. However, these are the very issues that were most salient among our respondents. Ironically, these may not be the interests that law students have while they are in law school and preparing for the bar. As Robert Gordon has observed, "The minute that a teacher launches a discussion of theory, policy, ethics, or social context that is not immediately and closely tied to resolving a case situation, most of the students tune out and put down their pens."[120] There are numerous obstacles that law professors face when they attempt to teach ethics from a contextualized perspective. Large class sizes that limit opportunities for innovative but time consuming projects, lowered number of course credits that can potentially lead to student hostility over the ratio of work to credit hours, tenure demands on full-time faculty who are often not encouraged to teach or write in the area, and the fact that most law schools offer only a basic course in ethics all serve to undermine innovative strategies for teaching legal ethics in a more contextualized fashion.[121]

The young attorneys in this study felt that they would have benefited from more law school explorations of real world and public interest contexts, from more comparisons with alternative ethical frameworks, and from hearing from practicing lawyers about the problems they face.[122] Because of the enormous complexity of ethical issues when embedded in their societal contexts, a single course will not be able to fill such a broad mandate. Ethical issues need

---

118 Elkins, *Professionalism, Craft and Failure*, *supra* note 17, at 939.

119 *See generally* Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659 (2002) (arguing that law school ethics classes too often merely instruct law students on the formal rules of the legal profession).

120 Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground"*, 91 MICH. L. REV. 2075, 2108 n.81 (1993).

121 *See generally* Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM & MARY L. REV. 357 (1998) [hereinafter Green, *Teaching Legal Ethics*].

122 *See* Richard Abel, *Choosing, Nurturing, Training, and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563 (2002) (arguing that law schools must do everything possible to encourage public interest experiences during law school).

to be integrated into the whole curriculum in a pervasive manner rather than ghettoized into a single professional responsibility course.[123] A contextual perspective to legal ethics as distinguished from a survey course in ethics recognizes that any one legal ethics course needs to concentrate on a limited number of contexts, rather than across the full spectrum of legal practice.[124] Therefore, honoring a contextualized perspective to ethics instruction demands that there be several specialized courses that address ethics across a range of profession practice areas.[125]

V. CONCLUSIONS

Neophyte lawyers generally come into direct contact with the messy world of legal practice complete with clients, corporate entities, other miscellaneous interested communities, families, governmental regulations and regulators, colleagues and partners, opposing counsel, and a host of other assorted players, without the conceptual tools necessary to design their own moral compass.[126] By presenting cases as abstract, decontextualized encounters with faceless clients, law school does a poor job of preparing its graduates for the moral ambiguities that they will encounter. In the words of Austin Sarat, law students "have learned little about encountering people in situations of stress and fashioning solutions to their problems in ways that are responsive to the human as well as legal dimensions of the problems."[127] Upon graduation, the typical law school student has had negligible client contact, having learned law in the absence of actual human beings. Therefore, for many young lawyers, initial practice experiences may be bewildering and emotionally overwhelming.

Most of the attorneys we interviewed had absorbed the ethical code of their workplace – a set of values that allowed them to make the compromises necessary to be professionally successful while viewing oneself as a moral individual. The most obvious failures of law school ethics education are the students who are incapable of performing the ideological work necessary to continue in the profession while maintaining self-respect.[128]

---

123 *See* Rhode, *Pervasive Method*, *supra* note 18, at 40-42.

124 *See* Green, *Teaching Legal Ethics*, *supra* note 121, at 359.

125 *Id.*

126 *See* Joshua P. Davis, *Teaching Values – The Center for Applied Legal Ethics*, 36 U.S.F. L. REV. 593 (2002) (arguing that law professors attempt to inspire their students to act ethically and morally).

127 Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 43 (1991).

128 *See* Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1560 (2002) (suggesting that law schools need to "make more sustained efforts to enlist and equip students to pursue social justice and to lead professional reform").

Gloria left the law because of deep moral doubts about her ability to do good work while maintaining her personal integrity. She felt extremely guilty about exploiting the trust of a naïve female litigant who did not understand that Gloria owed her loyalty to the opposing side. The code of professional ethics, of course, required Gloria to use any confidences for the benefit of the corporation she represented. These are the kinds of real world ethical issues that legal education should not ignore. As Rhode notes, "Practitioners must begin to perceive ethical dilemmas not as aberrant, episodic events, but rather as the inevitable consequences of bureaucratic pressures, adversarial frameworks, and social inequalities."[129]

Law professors around the country are attempting to find new ways to teach contextualized ethics in order to better prepare students like Gloria for these real world conflicts.[130] Our findings underscore the importance of this approach.[131] The issues that troubled our respondents and the management strategies they used to deal with these issues should be a major focus of law school instruction in ethics.[132] While it is unclear whether any course or instruction could have prevented Gloria's disaffection with the legal profession, examination of issues such as the one she faced will help expose law students to the real world conflicts and dilemmas that young lawyers will encounter.[133]

Further research into the social context of legal practice as it relates to ethical decision-making is greatly needed. This study of ethics in practice is limited by the fact that all the lawyers interviewed had previously attended an elite law school. A larger, more representative sample of attorneys would provide additional insight into the moral mazes of legal practice. Such data will help in the designing of more effective professional responsibility instruction

---

129 Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 651 (1985).

130 *See* Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 187-88 (2001) (calling on "reflective" law schools that would provide scholarship aimed at engaging professors, students, lawyers, lawmakers and other audiences in reflective, critical and ethical thought about the kinds of law that would best promote the life chances of individuals).

131 *Cf.* Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996) (suggesting that expanded clinical programs in law school are necessary to provide contextualized learning opportunities).

132 Understanding ethics from the perspective of one's job would be consistent with this point. *See* Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829 (2001) (arguing that legal ethics courses should examine the extent to which career choices offer many attorneys their primary source of discretion and how that reality affects ethics theory).

133 *See* Rhode, *Professionalism*, *supra* note 25, at 195 (responding to the charge that "students either have it or they don't, and postgraduate training is an empty proposition."); *see also* Dolovich, *supra* note 23 (arguing that calls for moral renewal issued by the bar will not bring about the ethical change that appears to be sorely lacking in the American legal profession).

and will, perhaps, contribute to a process of re-professionalization in the wake of the current wave of corporate financial scandals.[134]

[134] The Securities and Exchange Commission has recently proposed new rules that would force corporate lawyers to blow the whistle on breaches of securities law they may find while on the job. These new rules have been put out for public comment and a decision is expected by January 2003. *See* Reuters, *SEC Proposes Rule for Corporate Lawyers* (Nov. 6, 2002), *available at* http://news.findlaw.com/news/s/20021106/financialseclawyersdc.html.