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# Lawyers and the New Institutionalism


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## ARTICLE

# LAWYERS AND THE NEW INSTITUTIONALISM

PAUL R. TREMBLAY & JUDITH A. MCMORROW\*

**Abstract:** Drawing on the sociological theory of new institutionalism, this essay explores the ethical behavior and decision-making of lawyers by reference to the organizational context in which lawyers work. As the new institutionalism predicts, lawyers develop powerful assimilated informal norms, practices, habits, and customs that sometimes complement and other times supplant formal substantive law on professional conduct. Structural choices in practice settings influence the creation of these informal norms. The challenge for the legal profession, and particularly academics who teach legal ethics, is how to prepare law students and lawyers better to recognize and analyze the norms in their practice setting and to encourage management choices within practice settings that more likely provide norms that enhance rather than degrade ethical decision-making.

## INTRODUCTION

In this Essay, we seek to understand the ethical behavior and sentiments of lawyers by reference to the organizational context in which the lawyers work. Legal ethics scholars have explored with great thoughtfulness how lawyers and law students respond to ethical instruction according to their maturity and the stage of their moral development.<sup>1</sup> Our hope is to

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1. See, e.g., Anne Colby & William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 U. ST. THOMAS L.J. 404 (2008); Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470 (2008); Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011); Neil Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)*, 20 ABA PROF. LAW., no. 4 (2011) at 3; Verna E. Monson & Neil W. Hamilton, *Entering Law Students' Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEGAL PROF. 385 (2011).

contextualize those observations by recognizing the importance of organizational and institutional settings to lawyers' professional identity.

We begin with the premise that the professional identity of lawyers and the values those lawyers embrace *matter*, and matter deeply. At the same time, that professional identity and those values are constantly being shaped and formed, at both a conscious and unconscious level, by the norms that arise from practice settings, the surrounding culture, and the structural systems in which the lawyers work. This observation is hardly an original one, of course,<sup>2</sup> but the relationship between the informal norms arising within professional contexts and the law of lawyering generated by professional regulators and common law courts deserves more scrutiny than it has received in the literature thus far. In particular, the insights from the critical sociological perspective known as the "new institutionalism" warrant more particular application to the lives and professional identity development of lawyers.

Our Essay proceeds as follows. We begin with an introduction to and brief canvass of the new institutionalism theories. The new institutionalists have examined how organizations develop assimilated, powerful informal norms to which their members conform. We note the connection between those sociological ideas and emerging theories of jurisprudence regarding informal norms as complements to, and sometimes substitutions for, formal substantive law. We then report on empirical findings about ethical practices, habits, and customs in various legal settings, involving both "elite" practices and those deemed less than elite, showing the prevalence and influence of the types of informal norms predicted by the new institutionalist theories. We then examine, in preliminary fashion for purposes of this Essay and this Symposium, how the profession ought to respond to the reality and persistence of informal norms, many of which conflict with the traditional understandings of the law of lawyering. We address both the question of how the profession, and especially the academy, ought to prepare new lawyers to confront those norms and the separate inquiry about whether certain organizational structures, within law firms and otherwise in legal workplaces, might either overcome the power of informal norms or encourage the development of fairer or more just norms.

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2. A host of writers before us have explored the significance of context and culture to the establishment of professionalism and to the achievement of ethical practice. In addition to the sources cited later in this Essay at notes 38–76, see, for example, RICHARD P. NIELSEN, *THE POLITICS OF ETHICS: METHODS FOR ACTING, LEARNING, AND SOMETIMES FIGHTING WITH OTHERS IN ADDRESSING ETHICS PROBLEMS IN ORGANIZATIONAL LIFE* (1996) (addressing organizational theory and ethics beyond law practice); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 246 (1998) (exploring the proposition that "the quality and probity of a lawyer's work may depend crucially on the 'ethical infrastructure' or internal controls her workplace deploys").

## THE NEW INSTITUTIONALISM

We situate our observations within a school of organizational sociology known as the “new institutionalism.” The “new institutionalism” theme represents a wide-ranging conception within sociology, political science, law and economics, and legal theory.<sup>3</sup> Within organizational studies, its prominence owes much to a pioneering set of essays in 1991 edited by Walter W. Powell and Paul J. DiMaggio.<sup>4</sup> The new institutionalists respond to and critique conventional “rational actor,” instrumentalist explanations of organizational activity.<sup>5</sup> In a fashion similar to the law and society movement’s recognition of the significance of “law-in-action” in contrast to “law-on-the-books,”<sup>6</sup> the new institutionalism seeks to show that organizations are (in the language only sociologists can love) a combination of “symbolic systems which have nonobservable, absolute, transrational referents and observable social relations which concretize them.”<sup>7</sup> In language lawyers might better understand, the new institutionalist insight is that organizations develop deep, strong commitments, norms, and perspectives to which their constituents adhere, often unknowingly.

Sociologists Mark Suchman and Lauren Edelman describe the development within organizational sociology in its critique of “the rational and material aspects of organizational life [which] downplayed the significance of cultural factors, such as values, beliefs, symbols, rituals and the like.”<sup>8</sup> The earlier critiques of the rational actor model, known as “The Old Institutionalism,”<sup>9</sup> began to understand the significance of the “normative” aspects of organizational life. The Old Institutionalism discovered that organizations engaged in moral socialization as much as they followed resource-maximization strategies. Organizational constituents internalized value commitments prevalent within the organization’s operations, usually as a pragmatic response to conflict and political strife.<sup>10</sup> These “institutionalized

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3. A Westlaw search for the term “new institutionalism” within its Journals and Law Reviews database turns up 672 references (search performed on Sept. 12, 2011).

4. See THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991) [hereinafter THE NEW INSTITUTIONALISM].

5. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 905 (1996).

6. *Id.*

7. Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in THE NEW INSTITUTIONALISM, *supra* note 4, at 232, 249; see also Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2289–90 (2010) (applying the concept to law firms).

8. Suchman & Edelman, *supra* note 5, at 909.

9. Paul J. DiMaggio & Walter W. Powell, *Introduction*, in THE NEW INSTITUTIONALISM, *supra* note 4, at 1, 11–15.

10. See Philip Selznick, *Foundations of the Theory of Organizations*, 13 AM. SOC. REV. 25, 30 (1948) (used by DiMaggio and Powell as a paradigmatic example of the Old Institutionalism).

value commitments could serve as important symbolic resources in intraorganizational disputes.”<sup>11</sup>

The New Institutionalism advances the insights of the Old Institutionalists. Of particular importance to our thesis is the strain within the new institutionalism known as “Cognitive Institutionalism.” In the words of Suchman and Edelman, “this perspective stresses the ways in which cultural scripts and typologies construct—or ‘constitute’—human behavior at a pre-conscious, taken-for-granted level.”<sup>12</sup> The “taken-for-granted” idea is critical here. “Rather than reflecting strategic choice, action here reflects unquestioned cognitive definitions of ‘the way things are’ and ‘the way things are to be done.’”<sup>13</sup> The cognitive new institutionalists do not understand organizations to use norms instrumentally or pragmatically. Instead, through a process the sociologists call “institutional isomorphism,”<sup>14</sup> an organization socially constructs a normative reality for its constituents, a reality which becomes internalized, assimilated, and “taken-for-granted” at a pre-conscious and reflexive level. Constituents do not so much choose intentionally whether to adhere or not to the norms of the environment in which they work or act as simply fail to see alternative possibilities.<sup>15</sup>

The new institutionalism theories may assist us to understand better the actions of law students and lawyers facing what we understand to be complex ethical choices. Its description of organizational commitments and internalized values echoes the themes emerging from the recent scholarship within legal theory about the role of “norms,” as opposed to “law,” in regulating behavior.<sup>16</sup> Those scholars have promoted the idea that a social norm, understood as “a behavioral rule supported by a pattern of informal sanctions,”<sup>17</sup> can affect behavior as powerfully as does formal substantive law. If norms indeed influence conduct in that way, the critical questions for the scholars are how the legal system might take advantage of them as a supplement to the usual command-and-control formulation of substantive law sanctions, and how to influence the norms so that they generate more acceptable behaviors.<sup>18</sup> While some of those scholars claim that norms typi-

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11. Suchman & Edelman, *supra* note 5, at 910.

12. *Id.*

13. *Id.* (citing W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493, 496 (1987)).

14. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in THE NEW INSTITUTIONALISM, *supra* note 4, at 63, 66–68.

15. See Suchman & Edelman, *supra* note 5, at 910 (“[T]his perspective stresses the ways in which cultural scripts and typologies construct—or ‘constitute’—human behavior at a pre-conscious, taken-for-granted level.”).

16. See generally Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996).

17. Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 608 (2004).

18. *Id.* at 610–12.

cally emerge from self-interested, rational-actor incentives,<sup>19</sup> more recent and reflective scholarship situates the discussion within a new institutionalist perspective, arguing that norms emerge from assimilative forces within collective group processes. As one observer notes,

A group-based theory of norms . . . suggests that norms can arise as a result of an individual's self-categorization as a member of a particular group. This categorization, in turn, leads the individual to identify and assimilate the group prototype (or norm). Assimilation results in a process of depersonalization, whereby individual behavior is replaced by group-guided behavior.<sup>20</sup>

According to this thinking, "the social identity theory places the group within the individual instead of the individual within the group."<sup>21</sup>

The assimilated group norms are separate from the "law-on-the-books," the substantive rules we understand as prevailing, binding law, and the stuff which law schools tend to teach. Institutional norms have a tentative relationship to substantive law.<sup>22</sup> They surely do not replicate prevailing law (indeed, if that were so observers would have difficulty distinguishing norms at all), but norms are not necessarily contrary to legal principles either. Commentators note that some norms emerge from the pronouncements and commitments found within substantive law,<sup>23</sup> but most commentators understand institutional norms as developing independent from the law.<sup>24</sup>

#### NORMS AS AN INFLUENCE UPON PROFESSIONALISM AND ETHICAL PRACTICE

If the insights of new institutionalism are correct, then the practices of lawyers ought to reflect the taken-for-granted, assimilated norms of the institutions in which lawyers work. We ought to observe some institutional settings in which lawyers' behaviors, and their language about their behaviors,<sup>25</sup> diverge from the law-on-the-books, although (because of the consti-

19. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339–42 (1997).

20. Geisinger, *supra* note 17, at 632 (citing Michael A. Hogg, Deborah J. Terry & Katherine M. White, *A Tale of Two Theories: A Critical Comparison of Identity Theory with Social Identity Theory*, 58 SOC. PSYCHOL. Q. 255, 259–61 (1995)).

21. *Id.*

22. See Edward L. Rubin, *Images of Organizations and Consequences of Regulation*, 6 THEORETICAL INQUIRIES L. 347, 384 (2005).

23. See Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 Hous. L. REV. 309, 359–60 (2004).

24. *Id.*; see also Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 813 (2000).

25. Because of the taken-for-granted, constitutive nature of collective norms, the actors do not consciously follow the norms in a deliberate fashion after weighing the costs and benefits of doing so. The new institutionalism understands the norm development as "unquestioned cognitive definitions of 'the way things are' and 'the way things are to be done,'" as noted above. Suchman & Edelman, *supra* note 5, at 911.

tutive nature of the norms) not necessarily in a rebellious, law-breaking way. In fact, the limited empirical work available on lawyer's ethical practices appears to support the new institutionalism thesis. According to the observers, lawyers in all practice settings frequently ignore the legal ethics training they received in law schools, relying instead on more fluid and contextual sources of guidance for their actions.<sup>26</sup>

In the field of legal ethics, the law-on-the-books is relatively clear and accessible. The American Bar Association's Model Rules of Professional Conduct<sup>27</sup> are not only richly nuanced,<sup>28</sup> but they are nearly universally adopted as the substantive law of lawyering in the fifty states.<sup>29</sup> They provide relatively clear guidance to lawyers about what they must, may, or may not do in situations of ethical conflict.<sup>30</sup> The substantive law governing conflicts of interest and malpractice may each be more fully developed

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26. It is fair to assert that the law taught in legal ethics or professional responsibility courses in law schools (and putting aside, for the moment, that taught within law school live-client clinical programs) is paradigmatically law-on-the-books. Indeed, it is literally so. *See, e.g.*, Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 555–57 (1991) (noting the different development of ethical responsibility in clinical courses compared to classroom ethics courses); James R.P. Ogloff et al., *More Than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 184–87 (2000) (same).

27. MODEL RULES OF PROF'L CONDUCT (2009).

28. The ABA first promulgated Model Rules in 1983. In the ensuing twenty-nine years, the ABA, academics, and bar leaders have debated, amended, and (usually) improved each rule and added more sophistication to the comments accompanying the rules. Some commentators, however, see that nuance as "impermeability" and "density," leading newer lawyers to assume that only a specialist can appreciate the substance of the doctrine. *See* Margaret Raymond, *The Professionalization of Ethics*, 33 FORDHAM URB. L.J. 153, 163–65 (2005).

29. Almost every state in the nation has adopted some version of the Model Rules as its substantive law governing the conduct of lawyers. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE §1-4(a), at 23 (2010).

30. It is quite true, of course, that the Model Rules leave a wide swath of activity to the considered, discretionary judgments of the lawyers themselves. *See, e.g.*, Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 494–98 (describing discretionary ethics). That aspect of legal ethics is less of a concern for us here, however, as a moment's reflection will show. The most worrisome complaints about contemporary lawyers' and law firms' approach to legal ethics is not that they exercise their discretionary judgments in a wrongheaded way; indeed, given the discretionary nature of the judgments, it is hard to discern whether lawyers have erred in the exercise of that discretion. The larger worry, instead, seems to be that lawyers pay too little attention to, or misunderstand, or openly flout, the standards the profession expects them to honor. In that setting, the conflict between the law-on-the-books and law-in-action has particular relevance.

through common law than through the Model Rules,<sup>31</sup> but that common law is also relatively clear and accessible.<sup>32</sup>

Repeatedly, though, experience and empirical research shows a persistent disconnect, at least in certain circles or practice settings, between the pronouncements of courts and the profession and the behaviors and beliefs of practicing lawyers. We review some of that evidence here, to invite the inquiry about the relative power of norms versus the profession's publicly binding legal standards.

Consider, for example, the duty of confidentiality. Model Rule 1.6, applicable in most jurisdictions, states that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”<sup>33</sup> The rule is staggeringly broad, and lawyers across different practice settings routinely violate the letter of the rule, most often by discussing with strangers the identity of the lawyers' clients.<sup>34</sup> Students who have even passing experience in legal settings understand that more conversation about cases and matters occurs than the rule seemingly allows. While the students may be able to apply accurately the letter of the rule in an exam setting, their actual conduct is more likely to be in harmony with what lawyers do. The Restatement of the Law Governing Lawyers articulates a narrower standard that is more consistent with practice—that the lawyer must not disclose client information to others “if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has

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31. While the Model Rules do address conflicts of interests quite expressly, see MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.9, the true doctrine governing conflicts emerges from the extensive common law on the subject. *See, e.g.*, 30 JUDITH A. McMORROW & DANIEL R. COQUILLETTE, MOORE'S FEDERAL PRACTICE § 808 (3d ed. 2011) (discussing conflicts of interest in federal court practice). The Model Rules do not address malpractice except obliquely, see MODEL RULES OF PROF'L CONDUCT R. 1.3 (“Competence”), and, indeed, courts do not uniformly permit reference to the rules to establish a standard of care for malpractice purposes. *See* 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 1.8, at 41 (2000) (noting that in some jurisdictions “the ethics rules are a consideration for the court or the trier of fact, though the controlling principles are derived from the common law”).

32. While the case law on conflicts and malpractice is extensive, it is seemingly no more complex than any area of substantive law. *But see* Raymond, *supra* note 28, at 157 (noting that the reliance on ethics specialists in law firms may indicate that the field is not accessible to generalists).

33. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

34. While the identity of a lawyer's client is typically not *privileged*, see *Vingelli v. United States*, 992 F.2d 449, 452 (2d Cir. 1993), client identity is nevertheless plainly “information relating to the representation,” and therefore subject to the coverage of Rule 1.6. *See* Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489, 506–08 (2006) (noting the challenges of conducting conflict checks involving law firm lateral hires because of that rule); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009) (agreeing that Rule 1.6 applies to client identity).



instructed the lawyer not to use or disclose such information.”<sup>35</sup> In its published standard, the Restatement actually “restates” the professional norm and not the actual legal rule.<sup>36</sup>

Considerable empirical study shows similar prominence of norms over (or accompanying) rules. Professor Leslie Levin has produced a powerful report of lawyers’ less-than-rigorous approach to legal ethics matters (and by rigor we refer to careful compliance with publicly binding standards) in her empirical research into the protocols of small firm and solo practitioners in New York City.<sup>37</sup> Levin assessed, through interviews and questionnaires, the practices of those lawyers, with special attention to their commitments to professional responsibility standards. Her research resulted in the following conclusion: “[T]he ethical decision-making of solo and small firm lawyers is influenced by their communities of practice and especially their early practice communities. [The research] also notes that formal bar rules play a relatively small role in their conscious, day-to-day decision-making.”<sup>38</sup> Levin’s report shows much rational-actor behavior, to be sure. Her lawyers tended to agree that “the tremendous pressure to bring in clients, along with the cash flow, are the biggest challenges of working in a solo or small firm practice.”<sup>39</sup> The evidence that many of the lawyers she surveyed skirted the profession’s standards cannot, of course, be unrelated to that aim of maximizing income and surviving in a very competitive market. But her evidence shows a more nuanced relationship with the law-on-the-books among these lawyers. The lawyers, according to Levin, “simply did not think very much about legal ethics or . . . they did not consider the issues they confronted in moral or ethical terms.”<sup>40</sup> Several lawyers “appeared to be so acculturated to certain practices they did not consider the ethical issues implicated by those practices.”<sup>41</sup> Some of the issues which the lawyers did not consider to have ethical implications were quite flatly problematic from a conventional law of lawyering perspective.<sup>42</sup>

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35. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (2000). The Restatement notes that “what constitutes a reasonable prospect of adverse effect on a material client interest depends on the circumstances.” *Id.*, § 60 cmt. *c(i)*.

36. The Restatement’s explanation of its summary of the scope of the duty of confidentiality is relatively transparent on that point. Comment *c(i)* explains the standard as follows: “[U]se or disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client or prospective client. *Although the lawyer codes do not express this limitation, such is the accepted interpretation.*” *Id.* (emphasis added).

37. Levin, *supra* note 23, at 337–59.

38. *Id.* at 318.

39. *Id.* at 323.

40. *Id.* at 336.

41. *Id.*

42. Levin’s report discusses several common arrangements where ethical issues are often overlooked. *See, e.g., id.* at 346 (forming office sharing agreements without precautionary measures for confidentiality or conflicts of interests); *id.* at 348 (engaging other lawyers in an “of counsel” relationship without considering the conflicts implications of those lawyers’ other prac-

Levin learned that the lawyers she encountered “rarely consulted bar codes when deciding how to handle ethical issues.”<sup>43</sup> Lawyers relied, instead, on their associates or others in practice in their community for guidance. If the lawyers thought about the profession’s formal standards at all, they tended to conclude that the standards did not appreciate, or were not relevant to, the felt realities of the day-to-day lawyering experience.<sup>44</sup>

Levin’s research is not atypical. Lynn Mather and her colleagues’ 2001 study of divorce lawyers, most of whom practiced in small firms, showed a similar reliance on informal, consensus-driven standards of practice instead of formal legal ethics rules.<sup>45</sup> A 1997 American Bar Foundation survey of Texas personal injury lawyers reported the prominence of community-based norms guiding the practitioners’ choices.<sup>46</sup> Darryl Brown has explored the role of informal norms within the criminal justice field, noting both their prominence and their persistence.<sup>47</sup> Recognizing that the norms within these practice communities reflect imperfectly (at best) the constitutional and procedural standards of criminal law, Brown demonstrates how certain of such norms assist the practitioners to achieve a more effectively just result while others (most notably those emerging from attorney or judge self-interest) sacrifice important rights of the client parties (including, at times, the prosecution).<sup>48</sup> More important for our purposes, though, is Brown’s report on the pervasiveness and the doggedness of informal norms within the community courts where these lawyers practice.

Consistent with Professor Levin’s findings, Brown observes that “social organization and, in particular, community norms are almost always more important influences on individual conduct than formal rules.”<sup>49</sup> As one vivid example of that insight, Brown reports on a case study showing that in some local communities lawyers and judges routinely have *ex parte* communication about matters before the court.<sup>50</sup> In one such community, a

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tics); *id.* at 351–53 (noticing the absence of any formal conflict checking schemes within small law firms); *id.* at 355–57 (noting escrow accounting practices that do not comply with the New York state rules governing client trust accounts).

43. Levin, *supra* note 23, at 368. She reports that “[v]ery few lawyers ever looked at the New York Code to resolve ethical issues they encountered in practice,” and most had last consulted the authorities when they were in law school. *Id.* at 368–69.

44. *Id.* at 370.

45. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001).

46. Stephen Daniels & Joanne Martin, “*That’s 95% of the Game, Just Getting the Case*”: *Markets, Norms and How Texas Plaintiffs’ Lawyers Get Clients* 5, 26 (Am. Bar Found., Working Paper No. 9722, 1997).

47. Brown, *supra* note 24, at 804–05.

48. *Id.* at 813–15.

49. *Id.* at 802.

50. *Id.* at 810 (citing ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE* 156 (1992)). Other commentators on the prevalence of informal norms have alluded to this same story from the Fleming study. See, e.g., W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 573 (2001).

local lawyer who was new to the practice setting filed a motion to disqualify the judge after such legally impermissible and unauthorized communication, and, as a result, *the lawyer* (not the judge) endured much approbation from his peers for his breach of the deep, shared etiquette within that community.<sup>51</sup>

A recent popular novel offers a colorful example of the development of the kind of informal norm described by Brown in the criminal justice community. In Jonathan Franzen's *Freedom*, a lawyer describes his professional allegiances to his adolescent daughter Patty, who has just observed her father in a trial where he defended a man accused of assault in a bar fight and who will write a high school paper about her observations:

On the train ride home, Patty asked her dad whose side he was on.

"Ha, good question," he answered. "You have to understand, my client is a liar. The victim is a liar. And the bar owner is a liar. They're all liars. Of course, my client is entitled to a vigorous defense. But you have to try to serve justice, too. Sometimes the P.A. [the prosecutor] and the judge and I are working together as much as the P.A. is working with the victim or I'm working with the defendant. You've heard of our adversarial system of justice?"

"Yes."

"Well. Sometimes the P.A. and the judge and I all have the same adversary. We try to sort out the facts and avoid a miscarriage. Although don't, uh. Don't put that in your paper."<sup>52</sup>

One might infer from the above reports and stories that the reliance on informal norms rather than formal substantive law and rules is a characteristic of the more gritty, less-lucrative small firm and small town practices at the "bottom" of the "professional pyramid,"<sup>53</sup> but not so for the "Biglaw" community at the top of that pyramid. That inference would be mistaken, as the new institutionalism would suggest. Recent empirical research into elite law firm practice shows a similar prominence of strong informal norms along with, or ahead of, adherence to the law-on-the-books. Mark Suchman, a new institutionalist commentator whose work we encountered above,<sup>54</sup> oversaw a survey of elite, large-firm corporate litigators, along with the in-house counsel who served as their clients, and the high-powered plaintiffs' lawyers who served as their adversaries.<sup>55</sup> His report appeared within a symposium addressing a project entitled *Ethics: Beyond the Rules*,<sup>56</sup> evi-

51. Brown, *supra* note 24, at 810. In the lawyer's words, he received "all kinds of flack" for filing the motion. FLEMMING ET AL., *supra* note 50, at 156.

52. JONATHAN FRANZEN, *FREEDOM* 32 (2010).

53. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 *FORDHAM L. REV.* 837, 838 (1998) (characterizing the hierarchical structure of the law firm world).

54. See, e.g., Suchman & Edelman, *supra* note 5.

55. Suchman, *supra* note 53, at 838-42.

56. See Lawrence J. Fox et al., *Historical Preface*, 67 *FORDHAM L. REV.* 691 (1998).

dencing an interest in the role of law-in-action within the arena of professional ethics. Other researchers have also reported on the ethical practices of large law firms<sup>57</sup> and of in-house counsel.<sup>58</sup> The results of these reports and studies are consistent with the descriptions above.

Suchman's survey of "the most prestigious and well-heeled component of the contemporary American bar"<sup>59</sup> demonstrated large firm lawyers' "taken-for-granted cognitive assumption" about what Suchman calls "the logic of ethical pragmatism."<sup>60</sup> That logic did not ignore the substantive law as much as the studies described above seem to indicate but instead interpreted the available rules to fit the needs of the practice setting. "[I]nformants . . . often assumed that the 'real' meaning of ethical rules was consistent with pragmatic concerns, even when the letter of the rules was not."<sup>61</sup> The lawyers' use and understanding of the ethical mandates was very much influenced by the culture of their practice and their socialization within the practice. The "villains" tended to come from other segments of the bar<sup>62</sup> or from the client organizations.<sup>63</sup> Suchman discovered that lateral hires, who tended not to share the firm's culture, were perceived as "under-socialized"<sup>64</sup> and were "harshly criticized," presumably because of their having assimilated norms from a different setting.<sup>65</sup>

The research on large firms also shows that, as Elizabeth Chambliss reports, "firms' formal policies and procedures may have a minimal impact on lawyers' day-to-day conduct, especially if formal policies and procedures are inconsistent with informal (cultural) expectations."<sup>66</sup> Chambliss does not assert that firm policies are irrelevant; her point, instead, is that how firm lawyers act is more important than what firms say about how their lawyers ought to act.<sup>67</sup>

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57. See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002); Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119 (2005).

58. See Hugh P. Gunz & Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241 (2002).

59. Suchman, *supra* note 53, at 838.

60. *Id.* at 846. Recall the centrality of the "taken-for-granted" cognitive effects of institutional norms discussed above in the context of the new institutionalism. See *supra* text accompanying notes 12–15.

61. Suchman, *supra* note 53, at 844. Suchman adds that "ethical pragmatism translates into a 'gaming' of the formal rules." *Id.* at 852. This report echoes the conclusion reported by Leslie Levin in her study of small firm lawyers, that those lawyers found that the formal rules did not apply fairly or effectively to their practices. See Levin, *supra* note 23, at 388–89.

62. Suchman, *supra* note 53, at 841.

63. *Id.* at 848.

64. *Id.* at 855.

65. *Id.* at 864.

66. Chambliss, *supra* note 57, at 144.

67. *Id.* at 145.

The power of organizational culture helps account for the increasingly-studied phenomenon known in the social science literature as “ethical fading.”<sup>68</sup> Ethical fading (which some call “moral wiggle room”<sup>69</sup>) describes the cognitive tendency of individuals to conflate acting ethically with acting in a self-interested way.<sup>70</sup> Cognitive scientists have observed that the human brain functions to perceive actions as presumptively moral, especially when the actions serve an end desired by the individual.<sup>71</sup> Many observers, particularly those concerned about corporate mismanagement as well as the role of lawyers in assisting corporate mismanagement, have relied upon ethical fading as a helpful explanation of otherwise puzzling less-than-ethical behavior.<sup>72</sup>

The notion of ethical fading exists comfortably with the theories of the new institutionalism, although it is true that the new institutionalists report cultural norms less directly explained by organizational self-interest.<sup>73</sup> Organizational culture, once assimilated, serves as the “default” orientation toward which the “fading” tends. Actors presumptively treat choices supportive of organizational culture as moral, leading to what some observers have termed “ethical blindness.”<sup>74</sup>

The new institutionalism, however, does not suggest that the norm creation will inevitably erode ethical decision-making. We can theorize that isomorphism is likely to give greater weight to institutional interests and is more likely to lead to ethical fading than to ethical sharpening. But Daryl

68. This phrase originated in a 2004 article by two sociologists. See Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 Soc. JUST. RES. 223, 224 (2004).

69. See Donald C. Langevoort, *Psychological Perspectives on the Fiduciary Business*, 91 B.U. L. REV. 995, 1002 (2011) (citing Jason Dana et al., *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67, 69 (2007) (discussing “moral wiggle-room” and “ethical fading”).

70. Langevoort, *supra* note 69, at 1002–03.

71. See Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 Soc. JUST. RES. 171, 172 (2004) (“Moral reasoners consistently conclude that self-interested outcomes are not only desirable but morally justifiable, meaning that two people with differing self-interests arrive at very different ethical conclusions. Such self-interested ethics often do not *feel* subjective, and are therefore perceived to be relatively objective.”).

72. See, e.g., Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 470 (2007); Langevoort, *supra* note 69, at 1002; Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 20 n.16 (2009); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065, 1081 (2010) (“Organizations tend to coalesce around particular ends, and unsurprisingly in the business world the most important goal is making money—or maximizing shareholder value, to put it somewhat more sympathetically.”).

73. See Suchman & Edelman, *supra* note 5, at 905.

74. See *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 386 n.5 (8th Cir. 1979) (describing attorneys’ “ethical blindness” in not recognizing a disqualifying conflict of interest); Kath Hall, *Why Good Intentions Are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 210, 216 (Kieran Tranter et al. eds., 2010) (explaining that “lawyers’ conception of their role is fundamental to their willingness to rationalize ethical misconduct”).

Brown's description above indicates that norms might assist the practitioners to achieve a more effectively just result.<sup>75</sup>

We may conclude, therefore, that in all segments of practice, at either end of the "professional pyramid," the authority of informal taken-for-granted norms is as powerful as, and likely more influential than, the formal rules of the profession or the formal, articulated standards of the firm. That conclusion is what the new institutionalism would predict. The question for legal ethicists and educators is how that reality affects their work with lawyers and with law students.

#### STRUCTURES AND INSTITUTIONS

New institutionalism predicts, accurately we believe, that the formal rules and structures within a practice setting may have minimal impact on behavior if the cultural norms are inconsistent with those rules or structures. In those circumstances the cultural norms are likely to trump. But this does not mean rules and internal structures are irrelevant. The idea that "structure matters" has emerged in a variety of contexts in modern legal literature. Corporate law has been dominated by a behavioral analysis, which focuses on how structures and incentives shape conduct.<sup>76</sup> In international law the "constructivist" scholars explore "the role that culture, institutions and norms play in shaping identity and influencing behavior."<sup>77</sup> Combating corruption requires not just exhortations to be better people but structural changes to reshape incentives.<sup>78</sup> Employment discrimination literature has explored how the organizational structures in which workers are employed heavily influence work cultures that allow or discourage discriminatory conduct.<sup>79</sup>

Legal ethics scholarship has explored this topic as well. Lawyers overwhelmingly function in organizations in which the lawyer often "is not an independent moral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact."<sup>80</sup> Pressures for productivity, to be a team player, to accept all assignments, and to stay

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75. See *supra* text accompanying notes 47–51.

76. See, e.g., Lucian A. Bebchuck & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549, 1552 (2010); Rakesh Khurana & Katharina Pick, *The Social Nature of Boards*, 70 BROOK. L. REV. 1259, 1260 (2005) (critiquing "dominating focus on individual director incentives in governance scholarship").

77. Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 20–21 (2000).

78. Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L.J. ONLINE 125, 136 (2010).

79. See, e.g., Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 625–26 (2005).

80. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 590 (1985); see also RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) (analyzing changes in American legal profession).

focused on the precise task at hand inevitably shape young lawyers.<sup>81</sup> Ted Schneyer explored the importance of “ethical infrastructure” in law firms, and many wonderful empiricists have been slowly building our understanding of the relationship between structural choices in delivery systems and ethical decision-making.<sup>82</sup> Some of this work expressly addresses how to improve decision-making through mechanisms such as providing in-house ethics advisors and related specialists who will keep questions of legal ethics on the forefront of the firm conversation.<sup>83</sup> Structural choices that affect the practice-setting culture are even harder to study and address. We focus in particular on some examples where structure supports or impedes the development of the unstated norms that are predicted by the new institutionalism discussion above.

The Enron collapse was a painful case study of how an institution with a fine sounding Code of Conduct of Business Affairs could create an internal culture of significant wrongdoing, sustained by equally significant ethical blindness.<sup>84</sup> The corporate culture at Enron “prized aggressive behavior, put a premium on risk, and ‘valued appealing lies over inconvenient truths.’”<sup>85</sup> Different units had teams that allowed for isolation of responsibility within the unit and little external analysis and review.<sup>86</sup> Lawyers were embedded within the units, leaving the corporate legal department “decentralized, fragmented and multi-layered.”<sup>87</sup>

This organizational structure created a situation in which lawyers could easily develop stronger connection with the team’s goals with relatively little oversight by the general counsel’s office. The effect was to blunt the independent judgment that we see as the hallmark of the legal profession. It is no coincidence that one lawyer who flagged the questionable conduct was Jordan Mintz, who transferred into the Global Finance

81. Rhode, *supra* note 80, at 631–38.

82. See Schneyer, *supra* note 2, at 252–54; Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991); see also Chambliss & Wilkins, *supra* note 57, at 691–95; *infra* note 84.

83. Chambliss & Wilkins, *supra* note 57, at 704; Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 GEO. J. LEGAL ETHICS 63, 68–69 (2009); Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 809 (2009); Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 704–05 (2011); Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 593 (2011).

84. See, e.g., Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 265 (2005); Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2129–30 (2003).

85. Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 18 (2002).

86. Lisa H. Nicholson, *Sarbox 307’s Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559, 600 (2004).

87. *Id.*

Group on the twentieth floor.<sup>88</sup> Activity that had become routine to the business personnel and lawyers in that unit leapt out as highly questionable to Mintz, new to that unit's culture. He would seek outside counsel advice, deliberately eschewing Vinson & Elkins, the firm that had been providing the requisite legal counsel advice to allow the questionable entities.<sup>89</sup> Although Mintz would later settle a securities violation claim brought against him by the SEC, he sought to address the underlying problem.<sup>90</sup>

Cultural norms in Enron appeared to have reshaped at least some lawyers' identities. Once the team goal was identified, a lawyer's inability to figure out how to achieve the goal was prima facie evidence that he or she was not a clever lawyer.<sup>91</sup> Corporate compensation structures further supported this culture, putting corporate profits as the dominant variable for compensation.<sup>92</sup> A "rank and yank" performance review system meant employees were subject to constant reevaluation.<sup>93</sup> Outside counsel Vinson & Elkins had strong financial dependence on Enron's work, with \$36 million to \$42 million billed per year between 1999–2001, and some of their lawyers invested in Enron.<sup>94</sup> Movement of lawyers to in-house positions, a common phenomenon throughout legal practice, was particularly common between Vinson & Elkins and Enron, with approximately twenty Vinson & Elkins attorneys moving to in-house positions at the company.<sup>95</sup> This interdependence aligned Vinson & Elkins more closely with the internal culture of Enron and blunted its ability to offer independent professional judgment.

The Sarbanes-Oxley Act represented a legal effort to address some of the structural flaws that allowed such misconduct to thrive for so long.<sup>96</sup> As has been well-documented, lawyers were swept on the margins into the structural changes imposed by Sarbanes-Oxley, including clarified obligations on reporting up the corporate ladder.<sup>97</sup> Commentators have proposed

88. *Id.* at 602–03; see generally WILLIAM C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. (2002) (providing a detailed summary of the investigation into the Enron Corporation scandal).

89. Rhode & Paton, *supra* note 85, at 18–20; Dan Feldstein, *Skilling Says He Did No Wrong: Lawyer Told Not to Stick Neck Out*, HOUS. CHRON., Feb. 8, 2002, at A.

90. SEC v. Jordan H. Mintz et al., SEC Release No. 2925, 95 SEC Docket 186 (Jan. 26, 2009) (reporting settlement of civil action).

91. Cf. Milton C. Regan, Jr., *Teaching Enron*, 74 *FORDHAM L. REV.* 1139, 1146–47 (2005) (describing institutional culture response to questions).

92. Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 *BUFF. L. REV.* 1067, 1133 (2007).

93. Regan, *supra* note 91, at 1147.

94. *Id.* at 1155; Whelan, *supra* note 92, at 1090.

95. Whelan, *supra* note 92, at 1090.

96. See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 *VILL. L. REV.* 1097, 1108 (2003).

97. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (2006). After the SEC dropped proposed "reporting out" requirements by lawyers, the remaining changes that flowed from Sarbanes-Oxley were not radical. See Joan MacCleod Heminway, *Enron's Tangled Web: Complex Relationships; Unanswered Questions*, 71 *U. CIN. L. REV.* 1167, 1183 (2003).



improvements, including management changes in the organization of in-house, legal departments and reconceptualizing the role of the corporate counsel.<sup>98</sup> These structural suggestions are designed to reduce the chance that cultural norms—the inevitable consequence predicted by new institutionalism—will erode ethical decision-making.

Professor Laura Dickinson provides another fascinating example of the new institutionalist insights into legal practice culture in her exploration of military lawyers on the battlefield.<sup>99</sup> A reader's initial reaction might be to recall the highly contested torture memos and the scandal at Abu Ghraib. Both of these events were initiated primarily from outside the military by the civilian leadership and in a context where expanded private contractors were functioning on the ground without the military structure to shore up the commitment to legal values.<sup>100</sup> Professor Dickinson's empirical work provides credible evidence that lawyers can make a difference in both culture and law compliance. Military lawyers in the Judge Advocate General (JAG) Corps receive intensive training on the law of war and human rights and have internalized these norms.<sup>101</sup> JAG lawyers are embedded with combat troops, "have a strong role both in training troops and commanders," and consult with commanders on the use of force.<sup>102</sup> The lawyers also have the ability to impose criminal and administrative sanctions for violations.<sup>103</sup> Her study concludes that lawyers can play an effective role in inculcating values and affecting behavior.<sup>104</sup>

According to Dickinson's analysis, as compliance agents, the lawyers are likely to be most effective if:

- (1) these agents are integrated with other, operational employees;
- (2) they have a strong understanding of, and sense of commitment to, the rules and values being enforced; (3) they are operating with an independent hierarchy; and (4) they can confer benefits or impose penalties on employees based on compliance.<sup>105</sup>

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98. See, e.g., Heminway, *supra* note 97, at 1181; see also Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1207–16 (2003); Judith A. McMorro & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U. L. REV. 275, 304–06 (2011).

99. See Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L. L. 1 (2010).

100. *Id.* at 12. In addition, some of the most vigorous challenges to human rights violations came from military lawyers. *Id.* at 14 ("Thus, throughout the period 2002–2006, we see a military legal culture fighting back against efforts by political appointees to weaken or muddy the U.S. commitment to the law of war.").

101. *Id.* at 10–11.

102. *Id.* at 6, 10–11.

103. *Id.* at 6.

104. *Id.* at 8 ("Furthermore, from the organizational theory literature we can begin to tease out those structural elements that will help ensure that compliance agents within an organization—such as lawyers—are actually effective at inculcating values and affecting the behavior of operational employees.").

105. Dickinson, *supra* note 99, at 8.

Embedding lawyers within the unit in this military context offered significant advantages to promoting adherence to the rule of law as compared with Enron. The salient difference appears to be the absence of a strong functional independent hierarchy among the Enron lawyers (a structural difference) coupled with an erosion of the independent professional judgment standard that the Enron lawyers initially had but became co-opted by the corporate culture (the isomorphism predicted by the new institutionalism).

These two examples are not meant to offer a comprehensive examination of the structural factors that support or undermine the development of a legal culture and shape ethical behavior. They do demonstrate a point which may be non-controversial: structures and systems can have a strong influence on institutional cultures, which can shore up or erode the professional identity of lawyers.

#### THE PROFESSION'S RESPONSE TO THE LAW-IN-ACTION NORMS

The question we now confront is how the profession accounts for the new institutionalist insights and observations. In this section we offer some preliminary suggestions and proposals for investigation.

Consider the role of the educators. As we noted above, legal ethics teachers tend, almost by definition, to teach law students the law-on-the-books. Our mission is to prepare students for practice by exploring with them the intricacies of the substantive law of lawyering, including the Model Rules, and, of course, testing them on that material. A crude understanding of that mission would look like this (and think of the Multistate Professional Responsibility Examination (MPRE) in the same light): When law students join the profession, regardless of which part of the profession they join, there exists a doctrine of important, relevant, and enforceable law which they must understand and know how to implement and follow. Not to prepare these future lawyers for those expectations and binding obligations would be educational malpractice.

But we now see that when the students join practice, the important, relevant, and enforceable "law" may not really be what we think it should be but instead rests with the taken-for-granted norms of the institutions where the lawyers will work. It turns out that we may be teaching our students the "wrong," or at least incomplete, ideas.

Consider, for instance, the lawyer whose story Roy Flemming and his colleagues described, who encountered a discrepancy between the rules as written and the rules as practiced regarding *ex parte* contacts between lawyers and judges.<sup>106</sup> This young lawyer was familiar with the rule forbidding *ex parte* conduct with judges.<sup>107</sup> The rule allows for no exceptions relevant to his story. The lawyer then encountered a judge who spoke with lawyers

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106. See FLEMMING ET AL., *supra* note 50 and accompanying text.

107. See MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2009).

freely about ongoing matters before him, outside of the presence of the other party's lawyer. Understanding the rule, and observing its violation (and perhaps recognizing the implications of Rule 8.3 as well),<sup>108</sup> the lawyer filed a motion to disqualify the judge. That response, as the lawyer quickly discovered, was quite inappropriate, according to the accepted norms of practice in his community. The lawyer acted improperly in treating the literal violation of the rule as a substantive violation of the ethical standards—or so his colleagues concluded.

In a classroom, this would be a relatively “easy” case example. The judge was wrong, the lawyer was right, and the disqualification motion should have been allowed.<sup>109</sup> Given the new institutionalist insights, though, in fairness to lawyers whose practices might include a community like the one just described, should the teachers treat the story differently? The alternatives available to the teacher seem to include some combination of the following approaches:

- Teach the law-on-the-books as the lessons students must learn, and develop virtue and courage in lawyers, better to resist community standards that differ from the law;
- Accept that law-on-the-books is a theoretical model at best, educate students about the norms they will encounter in practice, and train students to recognize and honor good institutional norms while resisting bad ones;<sup>110</sup> or
- Teach community norms along with the rules as an equally legitimate source of authority.

A consideration of this list of approaches shows that the first and the third alternatives are not plausible responses to the institutionalist insights. Some version of the middle option seems to be the only sensible choice for educators. The underlying question emerging from these choices is how much credit one should grant to informal norms compared to the formal rules of the profession. The first choice grants the norms no credit at all; the third treats norms as equally respectable as the formal rules. Neither track educates future lawyers adequately about their professional role responsibilities.

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108. Model Rule 8.3 requires lawyers to report certain misbehaviors of other lawyers to disciplinary authorities. See MODEL RULES OF PROF'L CONDUCT R. 8.3. While Flemming does not tell us that the lawyer in question filed a disciplinary complaint against the judge, the teachings of Rule 8.3 would nudge the lawyer to take some action.

109. Indeed, according to the substantive law of lawyering, the lawyer's failure to file the disqualification motion ought to be considered malpractice. While the standard of care for lawyers has some connection to local practice, “[t]he professional community whose practices and standards are relevant in applying this duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction (typically, a state).” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. *b.* (2000).

110. This is the approach followed by Darryl Brown. See generally Brown, *supra* note 24, at 819–34 (discussing various social norms that lawyers encounter in practice).

The first strategy is a plausible one and perhaps a common understanding within legal ethics education and training. Legal educators must honor the law-on-the-books in their teaching, and, of course, no response to the institutionalist insights would suggest a devaluing of the formal rules of the profession. Indeed, viewed from the perspective of institutionalist theory, the organizational culture of law schools quite likely accepts on a taken-for-granted basis that the professional rules are the norms of the lawyering world. One might readily envision a law professor communicating the following message to his class:

The rules are clear that lawyers must comply with X when representing clients, for the principled reasons we have just covered in this class. We know of many stories, though, where lawyers in fact fail to honor that rule, and engage in non-X, and the pressures within the firm for engaging in non-X seem to be quite powerful. Good lawyers—lawyers with strong moral fiber and character, like you, or like what we expect you will become—will resist those firm and peer pressures. Doing so might call for some sacrifice and risk on your part, but as we understand the world from our more objective and unbiased perspective here in class, we see that honoring X is right, and engaging in non-X is wrong.

That lesson effectively captures the first approach listed above. The professor privileges the law-on-the-books categorically over the law-in-action. Conceptually, it is entirely sensible. Pragmatically—and dare we say ethically?—it falls short. It is a good thing for educators to preview for law students the fact that the world will be less pristine than the classroom. It may not be a good thing entirely for the educators to reject the possibility of goodness emerging from the law-in-action, from the informal norms of the profession. It may not be a good thing both because the informal norms *will be the reality* when the students join a practice setting and because those norms might, in fact, be fairer or more just than the formal rules within that practice setting.

If the first option listed above is not satisfactory, the response cannot be the third choice in the list, where educators accept the informal practice norms as valid accompaniments to the formal rules and teach each side by side. The third option is incoherent and it is ethically suspect. It is incoherent for a teacher to treat X and non-X as equally valid propositions unless she adds a “depending on the context” qualifier, which is the essence of the second alternative on the list. It is ethically suspect to accept the validity of informal norms categorically because, as we know, some (and perhaps most) informal practice norms are simply a manifestation of bad lawyering.<sup>111</sup>

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111. Consider, for example, some of the examples described by Leslie Levin in her report on the practices of small firm lawyers in New York. See Levin, *supra* note 23, at 337–59. Levin describes office-suite sharing without any consideration of client confidences or conflicts of inter-

The middle option, then, appears to represent the more palatable avenue for addressing the power of norms within future practice settings. That approach includes a deep respect (and default acceptance) of the formal rules but acknowledges at the same time not only that practice norms will often depart from the formal rules but also that *in some circumstances* such departures might not be a terrible thing.

Consider, though, the challenges inherent in this pedagogical mission. Informal norms are only interesting when they represent non-X—that is, when they reflect a lawyering practice inconsistent with, and sometimes directly contrary to, the letter of the formal rules on the books. In the Roy Flemming story introduced above,<sup>112</sup> the lawyer’s community accepted as proper *ex parte* conversations between a judge and a lawyer representing a client with a matter before the judge even if the conversation concerned the matter itself.<sup>113</sup> A teacher respecting the validity of informal community norms would not only preview for law students such a conflict between law and norms but would communicate the propriety (depending on the circumstances) of the law-breaking norms. That posture is difficult for a classroom teacher, although perhaps somewhat attractive if understood as a set of thought experiments. The posture is perhaps impossible, though, for a clinical teacher supervising law students in actual practice settings.<sup>114</sup>

Consider another instance of an informal norm differing from law-on-the-books, one perhaps more plausible or common than the vivid Roy Flemming story encountered above. Model Rule 1.8(e) unambiguously prohibits a lawyer from offering financial assistance to a client “in connection with pending or contemplated litigation” except to advance litigation ex-

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est and law firms arranging “of counsel” status with outside lawyers without screening for conflicts of the associated lawyers with the clients of the law firm. *Id.* at 346–53.

112. See *supra* text accompanying notes 50–51.

113. We infer that the lawyer in the Flemming story discovered substantive conversations about the matters on the judge’s docket, for otherwise the conversations between the judge and the lawyers would not be problematic.

114. As one example of this tension, consider an argument presented by members of the Boston Bar Association (including one of us) in 1997 opposing Massachusetts’s adoption of Model Rule 8.3, the so-called “snitch rule” requiring lawyers to report certain misconduct of other lawyers to the local disciplinary authorities. The writers identified the following worry from the rule’s adoption (following from the assumption by the writers that the rule would not be honored by most practicing lawyers in the state, and the reality on non-reporting therefore serving as a “norm” as understood in this essay):

There’s another concern here as well. Some law offices cannot ignore such a plain rule, even if the rest of the state (and country) does. Take law school clinical programs, for instance. Those programs teach students law practice and legal ethics, with a particular emphasis on the latter. Frequently, law students encounter questionable lawyering by opposing counsel. Can we expect a law professor in such a setting to sit with a student, review the plain language of Rule 8.3 and counsel that student to ignore it? We would assume not. But if not, then clinical students and professors, alone in this legal community, will follow Rule 8.3, within a culture that continues to view “snitching” as troubling.

James R. DeGiacomo et al., *No One Benefits from a ‘Snitch’ Rule*, MASS. LAW. WKLY., May 12, 1997, <http://masslawyersweekly.com/1997/05/12/no-one-benefits-from-a-snitch-rule/>.

penses (and, for indigent clients only, without expectation of repayment).<sup>115</sup> In their legal ethics casebook, Professors Lisa Lerman and Philip Shrag present a hypothetical problem for students to consider in which a lawyer's indigent client desperately needs help with rent, food, and a cell phone to maintain contact during some ongoing litigation.<sup>116</sup> As a "legal" matter, the lawyer simply may not offer the client money for rent or food; the cell phone question is more ambiguous given the fairest interpretation of the rule.<sup>117</sup>

Rule 1.8(e) has been the subject of considerable criticism in the professional literature.<sup>118</sup> One may easily imagine that in some "rebellious" poverty law practices the prevailing and accepted norm would be to ignore the literal reading of the rule in favor of a response to client distress which is more compassionate and caring.<sup>119</sup> That norm might gather strength from the obvious reality that a violation of the rule would seldom, if ever, be discovered and seldom, if ever, be punished. One may also easily imagine that in such settings the informal norm's force derives not from a need to compete unfairly for clients<sup>120</sup> (which seems to be the underlying

115. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2009). We thank the participants at the symposium for suggesting this topic as an example of the power of informal norms. For a discussion of the application of Rule 1.8(e) as a matter of exercising professional discretion, see Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 253–58 (2011).

116. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 533–34 (2d ed. 2008).

117. See LISA G. LERMAN & PHILIP G. SCHRAG, *TEACHER'S MANUAL TO ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 284–86 (2d ed. 2008).

118. See Danielle Z. Cohen, Note, *Advancing Funds, Advancing Justice: Adopting the Louisiana Approach*, 19 GEO. J. LEGAL ETHICS 613, 619–21 (2006); Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1118 (1994); Jack P. Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 ST. MARY'S L.J. 795, 810–12 (2003). But see David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 248–49 (2001) (noting that despite a few jurisdictions allowing lawyers to give financial assistance to clients, the Commission did not revise Rule 1.8(e)).

119. In Katherine Kruse's discussion of Rule 1.8(e), she imagines a setting where the applicability of the rule's provisions is a matter of good faith ambiguity and doubt, leaving no clear answer from the text of the rule itself. Kruse then uses that example in an insightful way to demonstrate how a lawyer's exercise of professional discretionary judgment must be informed by legal and moral theories. See Kruse, *supra* note 115, at 253–58. In our example, by contrast, we imagine that the applicability of the rule is rather clear, but the prevailing norm fails to respect the rule's teaching.

120. Poverty lawyers do not need to compete for clients. The shortage of available free lawyers and the massive legal need among low-income populations leave poverty lawyers with an overwhelming struggle to manage demand. For a review of the challenges of providing adequate legal services to poor communities, see, for example, Raymond H. Brescia, Robin Golden & Robert A. Solomon, *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831 (1998); Matthew Diller, *Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 673 (1998); Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369 (1998); Sahl, *supra* note 118, at 818.

justification for the rule)<sup>121</sup> but from an unwillingness to ignore human suffering.

If such a practice norm does exist in some legal communities, law students and lawyers ought to understand its presence, its power, and its implications. We observe here, though, a difference within the law school community between a classroom teacher and clinical faculty member. The classroom teacher might, with his students, imagine situations where following the informal norm might be a more just action than complying with Rule 1.8(e) and those in which following the rule better achieves that end. His students might graduate understanding the contextual and circumstantial reasons for that difference. The clinical teacher, by contrast, has a more limited capacity to critique the rule. It is hard (although perhaps not impossible) to imagine a clinical faculty member supporting her students' offering money to their client for rent and food or doing so herself with the students' knowledge.<sup>122</sup> If she does critique the rule and teach the contextual power of the norm, she nevertheless faces constraints in how she honors her teaching in practice.

In either setting, the mission would be to teach a form of reflective judgment, which virtually all commentators about ethics instruction in law school consider a central and critical objective. Darryl Brown's writing about the power and prevalence of norms begins to explicate the process involved in such an endeavor.<sup>123</sup> Relying upon the work of William Simon,<sup>124</sup> Brown constructs a model of "ethical discretion" by which lawyers might begin to distinguish good informal norms from unacceptable informal norms. Brown's arena of inquiry is the criminal defense and prosecution bars. Noting the profound resource constraints under which community-court-level prosecutors and defense attorneys practice, Brown reports the development of norms which respond to that scarcity in ways which at times are fully principled and laudable.<sup>125</sup> Lawyers eschew available procedures (say, pretrial motions, formal discovery requests, and sometimes even jury trials) if, in the lawyers' judgments, the cases do not warrant the activ-

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121. See *Attorney Grievance Comm'n v. Kandel*, 563 A.2d 387, 390 (Md. 1989) ("Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys."); see also Sahl, *supra* note 118, at 813; Cohen, *supra* note 118, at 614–15.

122. Cf. Kruse, *supra* note 115, at 253–54 (also addressing a clinical supervision context, but with facts which offer two equally plausible readings of the rule's intent).

123. See Brown, *supra* note 24, at 803.

124. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Ethical Discretion*].

125. Brown, *supra* note 24, at 813–14; see also Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 815–16 (2004).

ity in order to achieve a just or fair outcome.<sup>126</sup> Brown reflects on that practice in this way:

If the work group's consensus is normatively acceptable—driven by good faith merits assessment rather than by the desire to avoid work or to chill attorney zeal—then this norm teaches good judgment. [The attorney] learns, in effect, to make trade offs (as legal rules do at a broader policy level) between fairness and efficiency.<sup>127</sup>

William Simon has long advocated for lawyers to accept the moral responsibility to forgo technically “legal” strategies in order to avoid achievement of a substantively unjust (or *unlawful*, if one credits the underlying purposes of the available law) result.<sup>128</sup> Simon's view of this lawyer responsibility rests at an individual level, with each lawyer deciding on a case-by-case basis whether to exercise that discretion.<sup>129</sup> His theory is contextual as to substance but not as to practice setting.<sup>130</sup>

Brown acknowledges expressly that some of the informal norms developed in the criminal justice community he studied are not at all “normatively acceptable.”<sup>131</sup> Many such norms, and many resulting short-cuts and deals between the prosecutors and defense counsel, serve only the lawyers' or the judges' needs for manageable dockets without an attendant benefit to justice or fairness.<sup>132</sup> Brown concludes that lawyers share moral responsibility for those norms and should resist them.<sup>133</sup>

Brown and Simon help us now understand how we might put into practice the second approach in our above list. Legal ethics teachers and scholars ought to offer some limited credence to the development of informal norms, even those which cannot be reconciled with the formal rules of the profession. Law students and lawyers then will need to respond to the juxtaposition of law-on-the-books and law-in-action by a process of reflective judgment, accepting some norms as justifiable and others as not when

126. Brown, *supra* note 24, at 814. One of the more troubling qualities of such norms is that lawyers tend to make such judgments without the informed consent of their clients (who would, presumably, frequently urge a more aggressive and inefficient strategy). Brown critiques the norms' disconnect with prevailing ideas of client-centered counseling. *Id.* at 839–42 (relying on DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991)).

127. Brown, *supra* note 24, at 834.

128. Simon, *Ethical Discretion*, *supra* note 124, at 1083; *see also* Kruse, *supra* note 115, at 263–64 (discussing Simon's thesis).

129. Simon, *Ethical Discretion*, *supra* note 124, at 1090–91.

130. *Id.* at 1097–98.

131. Brown, *supra* note 24, at 834–35.

132. Brown distinguishes among the following “motivating causes” of the practice norms—resources, self-dealing, and ideology. *Id.* at 835. The first of those three might serve as a legitimate basis on which to craft enforceable practice norms. The latter two, in Brown's assessment, are not legitimate reasons to depart from the substantive rules. *Id.*

133. *See id.* at 863–65. Brown has advanced his arguments about how defense counsel might ethically respond to the scarcity problem in later publications, again with reliance on Simon's discretionary justice theories. *See, e.g.*, Brown, *supra* note 125, 842–46.



understood in context. Teaching that process of reflective judgment is what law school might begin to accomplish.

Neil Hamilton and Verna Monson, among many other scholars,<sup>134</sup> have written extensively on the process of developing judgment as part of a lawyer's professional identity.<sup>135</sup> Their insights help us to understand the response of thoughtful lawyers to institutionally-driven norms. Two things seem apparent once we account for the moral development ideas presented by Hamilton and Monson. First, lawyers who have achieved a more intentional and mature understanding of their professional role will be better at the exercise of the kinds of reflective, contextual judgments we have just encountered.<sup>136</sup> Those lawyers should be more adept at making the hard, complex decisions needed in the face of powerful norms. Indeed, the theories of moral development reported by Hamilton and Monson, and explored by others,<sup>137</sup> including the application of the work of Lawrence Kohlberg<sup>138</sup> and Carol Gilligan,<sup>139</sup> conclude that a predominate focus on rules is, generally, a manifestation of less moral sophistication than attention to context and to relationships.<sup>140</sup> Those theories would suggest a greater attention to, and respect for, the value of norms-driven practice.

Second, at the same time and on a more guarded note, we cannot elide the "taken-for-granted" quality of institutional norms and the constitutive quality of the organizational understandings.<sup>141</sup> Reflective practitioners must *recognize* the dilemmas in order to grapple with them, and the new institutionalism describes a form of blindness to nuance created by the orga-

134. See, e.g., Melissa L. Breger, Gina M. Calabrese & Theresa A. Hughes, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries and Judges*, 55 S.C. L. REV. 303 (2003); Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005); Kruse, *supra* note 115; Eleanor W. Myers, "Simple Truths" About Moral Education, 45 AM. U. L. REV. 823 (1996).

135. See sources cited *supra* notes 1, 134.

136. Hamilton & Monson, *supra* note 1, 148, 149.

137. See, e.g., Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 507–08 (2009) (reviewing Kohlberg's stages as applied to law students); Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115, 118–21 (2004) (describing the differences between conventional morality and postconventional morality, located beyond Kohlberg's Stage Four); Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 506–12 (1995) [hereinafter Hartwell, *Promoting Moral Development*] (discussing Kohlberg's theory of moral development); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 194–95 (1991) (exploring the differences in the moral development between male and female law students); Carrie Menkel-Meadow, *What's Gender Got to Do with It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 275–79 (1996) (reviewing JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993)).

138. LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984).

139. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

140. See Hartwell, *Promoting Moral Development*, *supra* note 136, at 506–12; Menkel-Meadow, *supra* note 136, at 292–93.

141. See *supra* text accompanying notes 12–15.

nizational powers. Teaching students about the existence of blind spots in ethical decision-making is like alerting student drivers to blind spots while driving. As organizational studies professor Dennis J. Moberg describes, the existence of these blind spots allows us “to develop alternative interpretive and action strategies. Put differently, blind spots constitute manageable deficiencies in agency.”<sup>142</sup> While not as simple as glancing over one’s shoulder before changing lanes, the habits of reflection on norms-driven practice at least advances the quality of the decision-making.

It is perhaps wishful thinking that the pedagogical goals of professional responsibility should include not just the complex development of a reflective practitioner noted above but also the ability to reflect on how institutional structures play a role in shaping institutional norms. But introducing structural issues into law school is useful for two reasons. First, students already look for certain structural attributes in their work setting as clues to the institutional norms. The level of associate supervision and the presence of meaningful pro bono activities that link the legal setting to larger social goals often are proxies used by law students to assess institutional culture. Perhaps our next task is to help students expand that list. If a student will be working at a larger firm, will there be an ethics advisor available to younger lawyers and training on professional responsibility in the practice area in which the young lawyer will practice? Is there a clear place to address ethical issues that arise? What other attributes should young lawyers look for in a mid-size firm, small firm, government practice, or legal services office?

It is worth alerting students to these structural attributes of organizations for a second reason. Many of our students will end up in leadership positions. As Professor Rhode describes, such leaders need values, personal and interpersonal skills, vision, and technical competence.<sup>143</sup> They also need the ability to see how systems affect behavior. We can set the seeds, at least, for that endeavor.

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142. See Dennis J. Moberg, *Ethics Blind Spots in Organizations: How Systematic Errors in Person Perception Undermine Moral Agency*, 27 *ORGANIZATIONAL STUD.* 413, 414 (2006) (analyzing “people perception” as one form of blindness, in which people frame others in terms of competence and moral character, including tendency of subordinates to focus on morality traits of supervisors, and supervisors to focus on competency traits of subordinates, creating blind spots).

143. Deborah L. Rhode, *What Lawyers Lack: Leadership*, 9 *U. ST. THOMAS L.J.* 471, 474 (2011).