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Whose Ethics?

The Benchmark Problem in Legal Ethics Research

Elizabeth Chambliss

A recent survey of workplace culture in 15 Australian law firms found “strong differences” between junior and senior lawyers’ perceptions of ethics support within their firms and perceptions of their own capacity to raise ethical issues (Parker and Aitken 2011, 402). Among junior lawyers, only 44% said that they are always “able to raise ethical issues in confidence,” compared to 75% of senior lawyers (441). Junior lawyers were also less likely to know where to turn for ethical advice, and to report that their ethical concerns are given consideration in the firm. Among junior lawyers, less than 40% said that their ethical concerns are always given consideration, compared to nearly 80% of senior lawyers (441).

David Chambers also found significant differences between junior and senior lawyers in his analysis of data from the University of Michigan Law School alumni survey (Mather and Levin, chapter 1). Among law graduates surveyed five years after graduation, only 51% agreed that “the lawyers with whom I deal . . . are highly ethical,” compared to 63% of those surveyed 35 or 45 years after graduation. This finding was generally consistent across practice specialties.

How should we interpret such differences between junior and senior lawyers? One theory holds that junior lawyers are more reliable informants—that their perceptions are not yet corrupted by self-interest and the demands of practice and therefore will tend to be closer to universal or ordinary morality. This is the predominant theory in the academic literature on large law

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firms, which tends to portray large law firms as being in perpetual moral decline (Chambliss 2010) and to portray new associates as sheep to the slaughter. Patrick Schiltz (1999) has described professional socialization in large law firms as the process of “becoming unethical” (915). To some extent, this corruption narrative informs all critical legal ethics research.

An alternative theory holds that junior lawyers are inexperienced and/or naïve and therefore may be unreliable informants about professional matters. This theory views professional socialization as the process of acquiring knowledge and ethical judgment in complex situations. Junior lawyers, by definition, have not had time to acquire such knowledge and therefore are in no position to assess law firm management practices or senior lawyers’ work. Perhaps not surprisingly, this is the dominant theory among large firm partners and managers (Chambliss 2006).

These two theories of lawyer socialization are not necessarily incompatible. Research on lawyers provides examples of both “ethical fading” (Tenbrunsel and Messick 2004), whereby lawyers gradually lose sight of ordinary morality (Regan 2004; Schiltz 1999), and “ethical learning,” whereby lawyers gradually acquire specialized ethical expertise (Chambliss and Wilkins 2002a). Moreover, lawyers may experience both ethical fading and ethical learning at different stages of their careers, in different practice contexts, and with respect to different issues in their work.

The challenge, however, is defining the benchmark for theoretical analysis. Should lawyers’ ethical standards and conduct be compared to ordinary (lay) morality? To the formal rules of legal ethics? Or to the prevailing professional norms within a specialized area of practice (which may or may not be consistent with the formal rules)? The definition of the normative benchmark itself has theoretical implications and is not always explicit in legal ethics research.

This chapter examines the use of benchmarks in legal ethics research and shows how different benchmarks may produce competing—but partial—theoretical claims. It argues, specifically, that the literature is biased toward critical accounts of “ethical fading” that are based on unspecified and/or internally inconsistent benchmarks. The goal of the chapter is to promote a more consistent specification of benchmarks in order to build a more holistic theory of lawyer socialization. A clearer definition of the normative baseline for analysis would allow more focused comparisons between junior and senior lawyers, as well as between different types of lawyers, and between lawyers and the members of other occupational groups.

The Corruption Narrative: Ethical Fading

Perhaps the most compelling corruption narrative in the legal ethics literature is Patrick Schiltz's (1999) provocative and widely read critique of large law firm practice. According to Schiltz, large law firms systematically socialize young lawyers to lie, cheat, and steal, while at the same time modeling a variety of strategies for rationalizing such conduct. His detailed phenomenology of corruption and rationalization is worth quoting at length:

Unethical lawyers do not start out being unethical; they start out just like you—as perfectly decent young men or women who have every intention of practicing law ethically. They do not become unethical overnight; they become unethical just as you will (if you become unethical)—a little bit at a time. And they do not become unethical by shredding incriminating documents or bribing jurors; they become unethical just as you are likely to—by cutting a corner here, by stretching the truth a bit there.

Let me tell you how you will start acting unethically: It will start with your time sheets. One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of work for the client for "free." In this way, you will be "borrowing," not "stealing."

And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. . . .

And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ten minutes, every three hour research project will go down with an extra quarter hour or so. You will continue to rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won't take you much more than three or four years—you will be stealing from your clients almost every day, and you won't even notice it.

You know what? You will also likely become a liar. A deadline will come up one day, and, for reasons that are entirely your fault, you will not be able

to meet it. So you will call your senior partner or your client and make up a white lie for why you missed the deadline. . . . And then you will be reading through a big box of your client's documents—a box that has not been opened in twenty years—and you will find a document that would hurt your client's case, but that no one except you knows exists, and you will simply “forget” to produce it in response to your opponent's discovery requests.

Do you see what will happen? After a couple years of this, you won't even notice that you are lying and cheating and stealing every day that you practice law. None of these things will seem like a big deal in itself—an extra fifteen minutes added to a time sheet here, a little white lie to cover a missed deadline there. But, after a while, your entire frame of reference will change. . . . (916–918)

Schiltz's portrayal vividly illustrates the process of ethical fading, whereby one learns to “behave self-interestedly while, at the same time, falsely believing that one's moral principles were upheld” (Tenbrunsel and Messick 2004, 223). One of the principal enablers of this type of self-deception is the “slippery slope of decision making,” whereby repeated exposure to ethical dilemmas in a series of small decisions leads to progressively unethical conduct (228–229). As Schiltz (1999, 916) argues, young lawyers “do not become unethical overnight” but rather “a little bit at a time.” Ethical fading also is facilitated by language euphemisms (Tenbrunsel and Messick 2004, 227), such as “borrowing” versus “stealing” and “forgetting” versus “withholding” documents (Schiltz 1999, 917–918). As Schiltz observes, “after a couple years” of relabeling such decisions, “you won't even notice that . . . your entire frame of reference” has changed (918).

Ethical fading is a powerful framework for thinking about lawyers' ethical socialization and for explaining the difference between junior and senior lawyers' perceptions. The empirical literature offers numerous examples of dubious practices that are taken for granted within specialized “communities of practice” (Mather, McEwen, and Maiman 2001) such as those explored in this volume: for instance, corporate litigators who learn to withhold potentially relevant documents in deposition defense (Kirkland, chapter 8; Suchman 1998, 867); prosecutors who learn to hold onto exculpatory material until right before trial (Yaroshefsky and Green, chapter 13); real estate lawyers who learn to “go get a cup of coffee” when cash passes under the table (Levin 2004, 364); and personal injury lawyers who “accept every case with significant damages, serve a complaint, and wait for the check” (Abel 2008, 96). This phenomenon

is not limited to law. Ann Tenbrunsel and David Messick (2004) illustrate their theory of ethical fading with examples of corporate misconduct. They argue that the psychological tendencies that lead to ethical fading “are constant and pervasive in individuals’ lives” (225).

As applied to *legal* ethics, however, ethical fading has a benchmark problem. Unlike some other specialized groups that succumb to ethical fading or “groupthink” (Janis 1972), lawyers are required to adhere to norms that depart from ordinary morality and therefore may justify (and/or rationalize) their conduct in terms of positive professional norms. For instance, lawyers are required to keep client confidences even when doing so imposes high costs on third parties and societal interests (Liptak 2008). Litigators are expected to be zealous advocates of the client’s interests even when a neutral observer might view the client’s cause as unjust (Freedman 1975). Lawyers are expected to counsel their clients to withhold apologies (Cohen 1999), serve up scapegoats (Duggin 2008), and protect the client’s own private interests even when public and other private interests may suffer. These professional norms complicate the definition of “ethics” in legal ethics research. Who decides whether a practice is dubious or unethical? That is, who defines the normative benchmark from which ethical fading is measured?

In some contexts, it may seem obvious. For instance, Schiltz (1999, 917) focuses on fraudulent billing, missing deadlines “for reasons that are entirely your fault,” and secretly withholding an obviously relevant document in discovery. Most lawyers and laypersons would agree that these are examples of dubious or unethical conduct. Indeed, the power of Schiltz’s portrayal depends on this universal appeal.

But what about less obvious questions? The relevance of documents in discovery, for instance, is a notoriously complex question. Experienced litigators define the ethics of discovery practice primarily in terms of being civil to opponents and “sending honest signals” about gray areas and strategic decisions to withhold (Kirkland 2005, 722). Academics and other nonlitigators may find this troubling and interpret it as evidence of ethical fading or some other process of moral corruption (Kirkland 2005; Suchman 1998). But this interpretation devalues litigators’ experience and specialized expertise. Litigators are taught to balance the requirements of an adversary system with the truth-seeking functions of the adversary process. Thus, litigators may use a different benchmark for normative assessment than nonlitigators. This difference complicates the theoretical analysis of ethical fading. Whose benchmark should be used to distinguish between (undesirable) ethical fading and (desirable) ethical learning?

Of course, all research on norms and culture confronts this problem to some extent. Anthropologists have long debated the relative merits of “etic” approaches, in which theoretical and normative benchmarks are defined by the researcher, and “emic” approaches designed to understand and describe the natives’ point of view (Martin 2002, 36–37). But the problem is compounded when the group under study has a specialized normative code—especially insofar as the code is inaccessible to nonspecialists. Moreover, the code itself is not a solution to the problem of benchmarks because experienced lawyers may debate the merits and application of particular rules. Thus, the specialization of legal ethics—both as a body of positive law and as a subject of debate among lawyers—makes the choice of benchmarks especially thorny in legal ethics research.

The Specialization Narrative: Ethical Learning

Lawyers tend to view the process of ethical socialization as the process of acquiring specialized knowledge and judgment in complex situations. Legal ethical learning typically begins in law school with the formal study of the American Bar Association (ABA) Model Rules of Professional Conduct and preparation for the Multistate Professional Responsibility Exam, a national examination that is required for bar admission in every state (Levin 1997). Yet while the Model Rules tend to be the focus of students’ initial exposure, the actual rules of professional conduct vary substantially from state to state and are increasingly enmeshed in a web of other state, federal, and international sources of professional regulation (Chambliss 2001). Moreover, even these increasingly complex rules provide inadequate guidance for the many legal risks and moral dilemmas that lawyers and law practice organizations confront (Bernstein 2009; Chambliss 2000; Levin 1997).

Legal ethical learning continues, therefore, within particular practice contexts, both formally, through continuing legal ethics education requirements and in-house training programs within practice organizations such as large law firms (Chambliss and Wilkins 2002a) and prosecutors’ offices (Yaroshefsky 2010); and informally, though “advice networks” (Levin 2004) and specialized communities of practice (Mather, McEwen, and Maiman 2001). Thus, legal ethical learning has both doctrinal and experiential components.

Both of these components may be relatively inaccessible to laypeople and junior lawyers (Raymond 2005) and even to experienced lawyers who do not specialize in legal ethics as a substantive field (Chambliss 2006). Large law

firms increasingly employ full-time general counsel and other ethics and risk management specialists to answer lawyers' day-to-day questions and keep abreast of changes in professional regulation (Chambliss and Wilkins 2002a; Chambliss 2006; Davis 2008). Midsized law firms, too, are increasingly investing in specialized ethics and risk management personnel (Chambliss 2009). Likewise, many public practice organizations, such as prosecutors' offices and legal services organizations, have created specialized ethics resources and compliance infrastructure to address the various complex and recurring issues that they confront.

Thus, within many practice contexts, nonspecialists—such as junior lawyers and even law-trained researchers—will have less doctrinal and/or experiential expertise than the lawyers they observe. Arguably, therefore, these nonspecialists are not fully equipped to judge the technical—or normative—quality of the work.

Large firm partners, for instance, tend to view new associates as unreliable informants about most professional matters (Chambliss 2006). According to partners, many so-called ethical issues raised by associates are actually the result of misunderstandings or lack of expertise. In the words of one law firm general counsel:

Associates can be naïve. You get a breathless phone call, “The partner is asking me to back date documents!” And it turns out this is a closed corporation, five guys who have been working together for months, it’s a start up, and now they need a current board ratification of prior decisions, perfectly legal. No one is defrauding anyone. (1546)

Large firm partners also tend to be skeptical of legal academics, whom they view as overly critical of the ethics of large firm practice. As one in-house ethics specialist remarked:

People in firms are reluctant to talk to academics because they tend to view academics as ideological. There is this idea that lawyers are always trying to cut corners. But lawyers call me all the time with questions. Once the firm began providing this service, and lawyers knew there was someone there who had an answer—lawyers are big rules followers. (Chambliss 2006, 1565)

Such skepticism about the judgment of junior lawyers and other nonspecialists is not limited to large firm partners, but rather is characteristic of experienced lawyers in many practice specialties. Divorce lawyers, legal services lawyers, prosecutors, patent lawyers: As this volume illustrates, different types

of lawyers face very different practice environments and tend to operate within distinct and sometimes insular communities of practice. Each of these groups has its own set of professional values and concerns, and develops specialized norms of practice that go beyond—and, in some cases, depart from—the formal rules. Thus, not only do lawyers, as a group, have a specialized ethical code, but experienced lawyers tend to have their own specialized views on the code, backed up by claims of even-more-specialized technical and normative expertise.

Nonspecialists, naturally, may be skeptical of specialists' normative claims. Indeed, the central theoretical debate within the sociology of professions is the extent to which professional claims to authority are justified by specialized expertise. Functional theory holds that professional authority—including ethical self-regulation—is justified by the asymmetry of expertise between professionals and nonprofessionals (Parsons 1994). “Professional” ethics, in other words, both presumes and requires specialized expertise. As Talcott Parsons (1994) has written:

Among the . . . basic characteristics [of the professions] is a level of special technical competence that must be acquired through formal training and that necessitates special mechanisms of social control in relation to the recipients of services because of the “competence gap” which makes it unlikely that the “layman” can properly evaluate the quality of such services or the credentials of those who offer them. (679)

Critics of functionalism question the scope and validity of professional expertise (Collins 1979), including claims about the public purpose and effectiveness of professional ethics codes. Critics view professional ethics codes primarily as a means of legitimating professional monopoly and staving off external regulation (Abel 1989; Caplow 1954). According to Richard Abel (1989), for instance:

The suspicion that professional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation is strengthened by the inadequacy of enforcement mechanisms. . . . Surveys repeatedly show that lawyers are ignorant of many rules and fail to internalize those that they do know. . . . More disturbing, most lawyers never even perceive moral dilemmas in their practice. (143)

These competing narratives provide a rich framework for empirical ethics research, including research about the sources and mechanisms of ethical fading and other undesirable outcomes of lawyer socialization. The increasing

specialization of lawyers and legal ethics as a substantive field does not mean that “nonspecialists”—such as students, junior lawyers, and academic researchers—must abandon critical analysis of legal ethics doctrine or lawyers’ ethics in practice. Grounding such critiques, however, requires a rigorous separation between empirical and normative claims. This separation, in turn, requires the systematic specification of normative benchmarks in research.

Implications for Understanding Lawyers’ Ethics in Practice

One implication of this analysis for students and legal ethics scholars is the need to pay close attention to the ways researchers define “ethics.” Some research focuses on the development of ethics policies, committees, and other “ethical infrastructure” (Chambliss and Wilkins 2002b; Schneyer 1998) and lawyers’ use of such infrastructure (Chambliss and Wilkins 2002a; Davis 2008), whereas other research focuses on lawyers’ ethical values and consciousness (Alfieri 2006; Kirkland 2005; Suchman 1998). These two sets of variables, though related in potentially significant ways, nevertheless may operate according to very different dynamics and have different implications for theoretical and normative analysis.

For instance, this chapter opened with two examples of differences between junior and senior lawyers’ perceptions of “ethics,” as if the two examples suggested a single, normative theme. Yet the first example focused primarily on junior lawyers’ access to structural (ethical and supervisory) supports within firms, rather than their ethical values. As Christine Parker and Lyn Aitken (2011, 430) explain, such findings are open to competing interpretations and may primarily reflect junior lawyers’ place within the organizational hierarchy. Research on business organizations has found that lower-level employees generally have more negative perceptions of organizational ethical culture than senior employees and managers (Treviño 2005; Treviño, Weaver, and Brown 2008)—particularly lower-level employees who are dissatisfied with their jobs (Key 1999, 222). Junior lawyers also may be unaware of the existence or operation of ethical infrastructure due to their short tenure in the firm (Parker and Aitken 2011, 426–427). Parker and Aitken defined junior lawyers as lawyers with one to three years of experience (417). Thus, differences between junior and senior lawyers’ perceptions of and access to ethical supports within firms do not necessarily suggest differences in their underlying values or changes in lawyers’ values over time. Instead, such differences may stem primarily from their structural positions in the firm.

The second example, likewise, did not focus directly on lawyers' values, but rather on lawyers' perceptions of other lawyers' ethicality. The Michigan data were drawn from a question about whether "the lawyers with whom I deal (other than those in my own office) are highly ethical in their conduct," in which the term "ethical" was left undefined. Here, too, the differences between junior and senior lawyers are open to competing interpretations. One interpretation, as implied by the initial pairing of the two examples, is that lawyer socialization involves a shift from one set of ethical values and commitments (for instance, those most consistent with universal or ordinary morality) to another set of (arguably narrower and distorted or corrupted) commitments. Another interpretation, however, consistent with the structural explanation offered above for the Australian results, is that junior lawyers are more likely to have negative perceptions of senior lawyers' ethics—or of senior lawyers, generally—than senior lawyers themselves. Such perceptions are typical not only of junior employees but of people in general. One of the most consistent findings in the business ethics literature is that most people view themselves as more ethical than other people (Ford and Richardson 1994, 219). This tendency may be most pronounced when evaluating people outside one's own group (such as people outside one's own office or hierarchical status) (Regan 2007).

Thus, while the two opening examples may be theoretically related, in suggesting an undesirable shift in lawyers' ethical values over time, neither is based on the direct measurement of lawyers' values (or changes over time). Moreover, both sets of findings may be explained by variables that are unrelated to lawyers' ethical values but rather stem from more general organizational or psychological factors, such as respondents' hierarchical positions or the dynamics of group identification. This is not to say that such findings are unimportant for lawyers and law practice organizations, but rather that closer analysis is required to ground theoretical and normative claims.

A second implication of the benchmark problem and foregoing analysis is that researchers must pay closer attention to what lawyers mean when *they* talk about "ethics." As a threshold matter, this means distinguishing between lawyers' references to legal ethics—in particular, the formal rules of legal ethics—and lawyers' references to broader, universal ethics and values.

Lawyers in practice tend to use the term "ethics" to refer to the formal rules of legal ethics (Chambliss 2010; Suchman 1998) or a specific regulated issue that is particularly salient in their practice. For instance, large firm partners tend to use the term "ethics" to refer to conflicts of interest, which in large firm practice is a central and highly technical issue (Chambliss and Wilkins 2002a,

567). Corporate litigators may use the term “ethics” to refer to the acceptable level of aggressiveness in discovery (Suchman 1998, 854). Divorce lawyers may use the term “ethics” to refer to their obligation to protect children’s interests in accord with the guidelines for matrimonial lawyers (Mather and McEwen, chapter 4).

Moreover, lawyers themselves tend to distinguish between these regulated or doctrinal issues and broader, universal questions of ethics and values. For instance, Michael Kelly (1994, 2007) began his ethnographic research on lawyers by looking for ethical issues and problems that he could use to enrich classroom teaching in the required law school course on legal ethics. He found, however, that he quickly “had to abandon this approach” (1994, 229) because “the lawyers I interviewed were largely disinterested in the kinds of ethical issues I was addressing with my students” (2007, 9). Instead, the lawyers he interviewed were concerned with “their lives in practice” (9) or what Kelly called “meaning-of-life ethics” (13). He noted, “Lawyers worry about their group practice, its direction, its future, and its quality. . . . There is a lot of talk about friendship, about the value of a working life spent with (at least some) colleagues whom one admires, respects, and enjoys. . . . Talk about values is common” (9–10).

Likewise, Mark Suchman (1998, 843) found that the litigators he interviewed “repeatedly distinguished between ethics (meaning the letter and, to a limited extent, the spirit of the professional rules) and morals (meaning substantive issues of right and wrong).” He reported: “A large-firm associate captured this sense of the distance between ‘ethics’ and ‘right and wrong’ by noting that ‘most of the issues that we’re talking about here aren’t issues of ultimate justice or even specific justice. They are questions of following the rules so that the cases will come out, and the right information will be presented, and ultimately, justice will be served.’”

Lawyers also may distinguish between regulated issues with broad normative implications, such as billing fraud, and those with primarily tactical and/or risk management implications, such as the rules of discovery and large law firm conflicts of interest (Chambliss 2005, 2006). In the words of one law firm general counsel:

We take risks all the time and we know what they are. God knows the courts get them confused. Able lawyers come in and say, “There’s a conflict of interest, what could be worse?” Thirty to forty percent of malpractice claims have in them a conflict of interest, although it is often hard to connect the conflict with any actual harm. But the jury goes to town. What you and I

would consider a risk issue, not a moral issue, gets treated by the courts and juries as indistinct from the drug addict lawyer who stole money from his client trust accounts. It is something that really frosts me. . . . There are lots of foaming-at-the-mouth moralists in the field. (Chambliss 2006, 1566)

Of course, the way lawyers talk about ethics and the distinctions they draw between doctrinal, tactical, and normative issues may be highly theoretically significant. The theory of ethical fading is precisely about the ways in which ethical issues become drained of normative content over time, for instance, through cognitive narrowing, repetition, and self-deception (Tenbrunsel and Messick 2004). This theory suggests that the specialization of lawyers—and legal ethics as a substantive field—may tend to crowd out or inhibit more universal moral awareness and engagement among lawyers (Alfieri 2006; Raymond 2005).

For instance, Alfieri (2006) has argued that the increased focus on “risk management” in large law firms has diminished lawyers’ appreciation of the moral choices they face and undermined “classical norms of . . . fraternity and community” (1926). Raymond (2005), too, has argued that the “professionalization of ethics” in large law firms has led lawyers to view ethics as “just another area of specialization” (159) and “runs the risk of . . . taking ethical issues out mainstream discourse” (160). Richard Moorhead (2010, 227) has referred to this as the “paradox of specialization.” As he notes, “Specialization is capable of giving rise to benefits (in terms of improved quality) and detriments (reduced access, increased cost, and an inability to see problems beyond one’s own specialty . . .).”

But while lawyer specialization may encourage ethical fading, not every example of specialized ethics necessarily represents ethical fading. Grounding the theory of ethical fading—and, by implication, ethical learning—requires attention to different sources of “ethics,” as well as to lawyers in different settings and stages of their careers. Only through systematic descriptions of lawyers’ ethics in practice can empirical ethics research provide the foundation for theoretical and normative critique.

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