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# Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work

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## Introduction

What should law students learn from the ethics project in legal education? The traditional answer, at least in Australian legal education, has been that students must be taught “legal ethics”. Typically, this is seen as a body of role-specific rules about lawyers’ duties to clients and to the administration of justice. Often, these rules of professional responsibility are taught as part of a single course that bears a title such as “Legal Ethics”, “Lawyers and Ethics” or “The Legal Profession”.

This paper proposes a different answer. We suggest that students must be provided with opportunities to learn that lawyers’ work inevitably involves discretion and choice; that students must be encouraged to develop a thorough understanding of the practitioner’s enduring responsibility to make and to justify ethical choices in the course of legal practice; and that students must therefore be given opportunities to develop their abilities to make justifiable choices so that they are better equipped to meet the ethical challenges of legal practice. Although this answer is presented in the context of Australian legal education, we suggest that it may have broader relevance to the general question about how to approach the learning and teaching of legal ethics in law schools.

This answer seems to be unconventional. As far as we can tell, the legal ethics project in Australian legal education, and elsewhere, does *not* emphasise discretion and choice in the lawyer’s role.<sup>1</sup> Limited evidence suggests that much, but not all, Australian legal education is more likely to contain a message that is opposite to the one we recommend. The more likely message is that lawyers’ ethical decision making is principally about following the requirements set out in the law of lawyering, which itself is seen to be more-or-less categorical and

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<sup>1</sup> Though note, as a limited exception, R.I.L.S. Tur’s brief discussion of the potential of legal ethics rules—following M. Kadish and S. Kadish, *Discretion to Disobey* (Stanford, CA, Stanford University Press, 1973)—to perform a recourse role “by establishing conditions under which the agent may be justified in undertaking actions that depart from the primary role requirements. Recourse roles extend a liberty in handling role obligations.” See Tur’s review of Nicolson and Webb’s *Professional Legal Ethics* (2001) 4 *Legal Ethics* 66, 69. Cp also R.I.L.S. Tur, “Medical Confidentiality and Disclosure: Moral Conscience and Legal Constraints” (1998) 15 *Journal of Applied Philosophy* 15, 21–22.

comprehensive; and that ethical issues in lawyering that fall outside the perceived ambit of these laws are not worthy of much attention, if any, in legal studies.

There is another sense in which this answer is unconventional. The approach we recommend is based principally on social scientific studies of lawyers' work, rather than on normative accounts of lawyers' professional responsibility. We argue that this research suggests that legal practice frequently invites lawyers to make decisions about how they will do their work. This is because the lawyer's very role is permeated with opportunities for choice, despite the rules-rich environment in which lawyers practise. Lawyers' work, in other words, contains multiple discretionary zones in which choices are constantly invited. These opportunities to make choices, and the responsibilities that go with them, involve the core questions of lawyering. They concern questions about whom to represent and, more prolifically, about *how* to represent clients at each and every stage of the retainer. Much of the time they also involve issues of moral significance, meaning that they are directly relevant to ethical decision making in legal practice.

Our argument involves three parts. First, we note that current Australian practice in legal ethics teaching in many, but not all, law schools involves a "professional duties" approach to legal ethics learning. We also observe, from the evidence available, that Australian legal education has not yet demonstrated good student learning outcomes in legal ethics. Second, we revisit a well-established, but still somewhat controversial, proposition in the normative and theoretical literature on lawyers' professional responsibility which suggests that despite the abundance of rules that regulate lawyers' professional activities, lawyers inevitably possess some measure of discretion, and therefore some degree of moral autonomy, in the way that they discharge their duties. We then go on to explore this proposition through social scientific research on lawyers. On our reading, this literature makes a similar claim about the incidence and scope of discretion and choice in lawyers' actual practices. Third, and on the premise that lawyers *do* indeed have choices in the sense we describe, we argue that the legal ethics project in legal education should approach ethics learning from the position of professional discretion, and the responsibility that this carries, rather than from the position of professional rules. Our argument is that teaching that is designed to encourage students to come to terms with both the frequency and the situational complexity of ethical decision making, in the many discretionary spaces that inhabit the lawyer's role, may result in qualitatively better "ethics" learning outcomes than those so far demonstrated in Australian legal education.

Our suggestions regarding the legal ethics project in legal education are principally about content, that is, *what* we might expect students to learn from the ethics project in legal education. It is not our intention here to address the (equally challenging) question of *how* students might be encouraged into the quality of learning we are recommending. Given that this is a submission about content, it is possible that the learning outcomes it envisages can be planned for in various ways. While we believe that a curriculum-wide approach to learning and teaching in legal ethics is undoubtedly preferable in terms of the likely quality of student learning outcomes, the approach we suggest could also inform a stand-alone course in lawyers' professional responsibility, as well as ethical practice learning in the clinic.

## Legal Ethics in Australian Legal Education

As is the case in other jurisdictions, the Australian law of lawyering contains a more or less identifiable category of rules and standards often loosely referred to as “legal ethics”. These are also known as the laws, standards or rules of professional responsibility. They are said to regulate professional conduct, and amount to a “series of duties” owed by lawyers to the law, the courts, clients and the profession itself.<sup>2</sup> These duties originate in legislation, case law and in professional rules drafted by professional bodies.<sup>3</sup>

A common belief, both in Australia and elsewhere, is that lawyers need to understand these duties to practise well. A stronger version of this belief is that lawyers need *only* to understand these duties to practise well. Given assumptions such as these, it follows that a responsible legal education is one that “transmits” these “norms of behaviour” to law students, so that future practitioners are appropriately trained in the “specific cultural forms of legal practice”.<sup>4</sup> It is therefore also not surprising that the Australian body that has determined the content of the law school curriculum has deemed that these rules *must* be taught to law students.<sup>5</sup> More recently, the Australian Law Reform Commission appears to have endorsed this in stating that Australian legal education “should involve the development of . . . a deep appreciation of ethical standards and professional responsibility”.<sup>6</sup>

In one interpretation, this conception of legal ethics takes the laws of professional responsibility (hereafter “the rules”) to be “a system of bright-line rules”,<sup>7</sup> which provide a “robust” source of ethical authority<sup>8</sup> for practising lawyers. The basic premise of this conception is that, with some exceptions,<sup>9</sup> the lawyer’s role is effectively constrained by formal rules that can be “applied in a legalistic and categorical fashion”<sup>10</sup> to answer the ethical

<sup>2</sup> This phraseology appears in Australian Law Reform Commission, *Review of the Adversarial System of Litigation—Rethinking Legal Education and Training*, Issues Paper No 21 (1997), para 6.14. A standard Australian text on lawyers’ professional responsibility, which meticulously sets out these duties as well as other aspects of the Australian law on lawyering, is G.F. Dal Pont, *Lawyers’ Professional Responsibility* (Sydney, Lawbook Co, 2006).

<sup>3</sup> Dal Pont, *ibid*, 17, noting that the status of these rules is in transition in most Australian states and territories. The Law Council of Australia’s *Model Rules of Professional Conduct and Practice* (2002) is gradually becoming the common set of standards in most Australian jurisdictions.

<sup>4</sup> This is the phraseology used in Australian Law Reform Commission, *supra* n. 2, para 6.16.

<sup>5</sup> Consultative Committee of State and Territorial Law Admitting Authorities, *Uniform Admission Requirements: Discussion Paper and Recommendations* (1992). The Australian ‘Priestly’ requirements concerning professional responsibility have recently been reproduced in the Supreme Court (Legal Practitioner Admission) Rules 2004 (Qld), 32 thus: “knowledge of the various pertinent rules concerning a practitioner’s duty to the law, the Courts, clients and fellow practitioners”.

<sup>6</sup> Recommendation 2 in Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000), para 2.89, although neither the meaning nor the pedagogical implications of “deep appreciation” were explored in the report.

<sup>7</sup> D. Luban, “Reason and Passion in Legal Ethics” (1999) 51 *Stanford Law Review* 873, 876. In fact, the documents that contain ethical standards are, more often than not, called lawyers’ practice “rules”: Law Council of Australia, *supra* n. 3; Legal Profession (Barristers) Rule 2004 (Qld); American Bar Association, *Model Rules of Professional Conduct* (2002).

<sup>8</sup> R. Vischer, “Legal Advice as Moral Perspective”, Research Paper No 05-03, Legal Studies Research Paper Series, University of St Thomas School of Law (2005), 41.

<sup>9</sup> Except to the extent to which the rules of professional responsibility themselves admit discretion on the part of lawyers themselves. See, for example, Law Council of Australia, *supra* n. 3, rules 13.1 (on “forensic judgment”) and 13.2.

<sup>10</sup> D. Nicolson and J. Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999), 278.

dilemmas that lawyers might face.<sup>11</sup> A strong version of this conception is that lawyers' "obedience to formally laid down norms [is] the beginning and end of ethical obligation".<sup>12</sup>

Much recent scholarship criticises the premises inherent in the "bright line" conception of legal ethics, both in Australia and abroad.<sup>13</sup> For example, William Simon has argued that the emphasis on categorical and mechanical judgment is irreconcilable with powerful arguments elsewhere in jurisprudence, which insist that legal judgment is "characteristically contextual".<sup>14</sup> Likewise, David Luban has demonstrated that "rule application theory" is incapable of providing sufficient guidance for the serious task of making judgments in legal practice.<sup>15</sup> Others, including Alan Hutchinson, have argued that merely following the rules of professional responsibility is seldom straightforward, not least of all because rule interpretation itself is fraught with difficulty.<sup>16</sup> In Australia, Stephen Parker has suggested that "[m]erely cramming more codes into [students'] heads is something, but it is not as good as also sharpening up ethical sensitivity so that lawyers are alive to the issues".<sup>17</sup> And David Wilkins has claimed that lawyers themselves "inevitably exercise discretionary power over the substantive content of legal rules",<sup>18</sup> including the ones that are supposed to constrain them.<sup>19</sup> This means, for example, that it would be most unfortunate if an educational focus on the rules of professional responsibility amounted to training in how best to avoid the very practices that they were intended to regulate.<sup>20</sup>

The net effect of these and other criticisms is to question quite forcefully the assumption that the law of lawyering necessarily has a great deal to say about lawyers' ethical practices as

<sup>11</sup> Simon makes a similar point in referring to what he calls the dominant views on legal ethical decision-making, and the idea that a "rigid" rule of responsibility dictates a "particular response": W. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, MA, Harvard University Press, 1998), 9.

<sup>12</sup> Nicolson and Webb, *supra* n. 10, 278. An Australian variation of this perspective, in its application to legal education, acknowledges that law students might also study the relationship between these rules and "broader social ethics or morality", but that such an inquiry "generally remain[s] a secondary focus of ethical training": Australian Law Reform Commission, *supra* n. 2, para 6.16.

<sup>13</sup> Particularly in the United States and in Canada. Some of this criticism has also been evident in the work of a relatively small number of Australian authors such as Y. Ross, *Ethics in Law* (Sydney, LexisNexis Butterworths, 2005); C. Parker, "What do they Learn when they Learn Legal Ethics?" (2001) 12 *Legal Education Review* 175; C. Sampford and S. Blencowe, "Educating Lawyers to be Ethical Advisors" in K. Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998), 315; A. Goldsmith and G. Powles, "Lawyers Behaving Badly: Where Now in Legal Education for Acting Responsibly in Australia?" in K. Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998), 119; S. Parker, "Introduction" in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford, Clarendon Press, 1995), 1, 3; C. Sampford and C. Parker, "Legal Regulation, Ethical Standard-Setting, and Institutional Design" in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford, Clarendon Press, 1995), 11, 15. In the United Kingdom see, for example, Nicolson and Webb, *supra* n. 10, 278.

<sup>14</sup> Simon, *supra* n. 11, 3.

<sup>15</sup> D. Luban, "Epistemology and Moral Education" (1983) 33 *Journal of Legal Education* 636; D. Luban and M. Milleman, "Good Judgment: Ethics Teaching in Dark Times" (1995) 9 *Georgetown Journal of Legal Ethics* 31, 39–41.

<sup>16</sup> A. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto, Irwin Law, 1999), 42; Nicolson and Webb, *supra* n. 10, 111–16.

<sup>17</sup> S. Parker, *Cost of Legal Services and Litigation: Legal Education*, Discussion Paper No. 5, Australian Senate Standing Committee on Legal and Constitutional Affairs (1992), para 6.104.

<sup>18</sup> D. Wilkins, "Legal Realism for Lawyers" (1990) 104 *Harvard Law Review* 468, 469–70.

<sup>19</sup> *Ibid.*, 497.

<sup>20</sup> C. Menkel-Meadow, "Can a Law Teacher Avoid Teaching Legal Ethics?" (1991) 41 *Journal of Legal Education* 3, 9.

such.<sup>21</sup> At the very least, lawyers' ethical practice involves far more than mechanically following lawyers' rules. This poses something of a challenge for legal education. If "training" of law students in ethical competency cannot be achieved by "transmitting" to them the norms of professional behaviour,<sup>22</sup> what should they be learning instead of, or as well as, these rules?<sup>23</sup>

During the last decade or so a number of Australian writers have sought directly or indirectly to answer this question, although few have attempted to do so comprehensively.<sup>24</sup> Some, in expressing varying degrees of scepticism for the traditional idea that much can be achieved by getting students to learn merely about the rules of professional responsibility, have suggested that the ethics teaching goals need to be broadened<sup>25</sup> in various ways. For example, some have suggested that students need to learn the skill of how to identify, reflect on and resolve ethical dilemmas;<sup>26</sup> or that students must come to "appreciate that there is a moral content to law and practice";<sup>27</sup> or that students must appreciate the role of "values underlying the legal system" as well as lawyers' own personal values;<sup>28</sup> or that students must

<sup>21</sup> Again, there is now a substantial body of literature that explores this criticism in great detail. Some lawyers' codes acknowledge some of these shortcomings. See, for example, American Bar Association, *supra* n. 7, para 16 cited in M. Freedman, "In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct", Research Paper No 06-9, Hofstra University School of Law Legal Studies Research Paper Series (2006), 9. For Australian perspectives on the merits of this criticism see, for example, M. Robertson, "Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective" (2005) 8 *Legal Ethics* 222, 229; C. Parker, "A Critical Morality for Lawyers: Four Approaches for Lawyers" (2004) 30 *Monash University Law Review* 49, 53; Goldsmith and Powles, *supra* n. 13, 141–2.

<sup>22</sup> Australian Law Reform Commission, *supra* n. 2, para 6.16.

<sup>23</sup> Aspects of this question, from a perspective on learning theory, are considered in Robertson, *supra* n. 21.

<sup>24</sup> Properly speaking, some of this literature has addressed a different question or questions, such as "what shall we teach?" and "how shall we teach it?" See Dal Pont, *supra* n. 2; Robertson, *supra* n. 21; Goldsmith and Powles, *supra* n. 13; K. Tranter, "Ethical, ooh, Yeah Ethical is Yeah, What's Right Yeah: A Snapshot of First Year Law Student's Conception of Ethics" (2004) 7 *Legal Ethics* 86; D. Henriss-Anderson, "Teaching Legal Ethics to First Year Law Students" (2002) 13 *Legal Education Review* 45; M. Castles, "Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia" (2001) 12 *Legal Education Review* 81; B. Hamilton, "Getting Them Early: Teaching a Critical Perspective on Legal Ethics and Adversarialism on an Introductory LLB Unit at the Queensland University of Technology" (2001) 12 *Legal Education Review* 105; A. Zariski, "Teaching Legal Ethics Online: Pervasive or Evasive?" (2001) 12 *Legal Education Review* 131; C. Parker, *supra* n. 12; M. Le Brun, "Enhancing Student Learning of Legal Ethics and Professional Responsibility in Australian Law Schools by Improving Our Teaching" (2001) 12 *Legal Education Review* 269; M. Noone and J. Dickson, "Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers" (2001) 4 *Legal Ethics* 127; J. Giddings, "Teaching the Ethics of Criminal Law and Practice" (2001) 35 *Law Teacher* 161; S. Christensen and S. Kift, "Graduate Attributes and Legal Skills: Integration or Disintegration?" (2000) 11 *Legal Education Review* 206; F. Armer, "The Teaching of Ethics in Australian Law Schools" (1998) 16 *Journal of Professional Legal Education* 247; G. Powles, "Taking the Plunge: Integrating Legal Ethics in Australia" (1998) 33 *Law Teacher* 316; Sampford and Blencowe, *supra* n. 13; A. Goldsmith, "Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers" (1996) 14 *Journal of Professional Legal Education* 1; S. Parker and C. Sampford, *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford, Clarendon Press, 1996); S. Burns, "Teaching Legal Ethics" (1993) 4 *Legal Education Review* 141; Parker, *supra* n. 21 (although this article does not really address approaches to ethics in teaching).

<sup>25</sup> Goldsmith and Powles, *supra* n. 13, 141–4, which is one of the most thoughtful and comprehensive contributions to Australian literature on this topic.

<sup>26</sup> Christenson and Kift, *supra* n. 24; Giddings, *supra* n. 24; Hamilton, *supra* n. 24.

<sup>27</sup> Noone and Dickson, *supra* n. 24, 133; Ross, *supra* n. 13, 27–28; Sampford and Blencowe, *supra* n. 13, 335; Armer, *supra* n. 24, 253.

<sup>28</sup> As part of an attempt to encourage cognitive, affective and skill learning (Henriss-Anderson, *supra* n. 24, 49), which is one of the few contributions that directly addresses, and justifies, the question about the learning outcomes that educators desire for their students. Another that attempts to do so is Burns, *supra* n. 24. For an argument about the need for students "to critically evaluate" the practice of lawyering and to "decide for themselves what justifications are relevant" see Sampford and Parker, *supra* n. 13, 20.

develop an “ethical orientation” that includes “reflective engagement” on the broader social role of the lawyer;<sup>29</sup> or that students must “develop the ability to make ethical decisions in real life situations”;<sup>30</sup> or that students should be encouraged to examine the “sociology of everyday practices settings” and also the notion of “judgment” itself.<sup>31</sup>

What impact has this and other critical scholarship<sup>32</sup> had on approaches to ethics teaching in Australian legal education? The most recent “stocktake” of Australian legal education presents a slightly uncertain answer to this question. In summarising their findings regarding “the teaching of ethics”, the authors of the Australian Universities Teaching Committee (AUTC) commissioned report confirm that most law schools “include ethics in the LLB curriculum” in a variety of ways.<sup>33</sup> However, the report reveals little detail about the nature of the ethics learning outcomes that law schools *seek* to achieve, beyond suggesting that the rules of professional responsibility remain a primary focus,<sup>34</sup> and that some schools also explore values, moral aspects of ethics, ethical dilemmas, and social justice issues.<sup>35</sup>

One interpretation of these findings is that, taken as a whole, the performance of Australian law school education in the field of legal ethics until around 2003 was unspectacular at best. This appears to be consistent with previous research into the state of ethics teaching and learning in Australian legal education. For example, a few years before the AUTC Report, an independent reviewer gave a rather bleak assessment of performance in the area, predicting also that the future of teaching and learning in ethics “may prove disappointing”.<sup>36</sup> Amongst the concerns expressed, then, was evidence of a discernible lack of commitment and enthusiasm, on the part of law teachers, for student learning in ethics<sup>37</sup> and a lack of consensus about the very nature and future direction of the ethics project itself.<sup>38</sup>

What, then, of *actual* student learning outcomes in ethics in Australian law school education over the past decade? Although this seems to be an important question, it has seldom been asked, let alone answered.<sup>39</sup> No doubt part of the difficulty is being able to marshal

<sup>29</sup> Goldsmith, *supra* n. 24, 10.

<sup>30</sup> Castles, *supra* n. 24, 103.

<sup>31</sup> Goldsmith and Powles, *supra* n. 13, 143–4, in which the reference to the sociology of practice is taken from R. Gordon and W. Simon, “The Redemption of Professionalism?” in R. Nelson, D. Trubek and R. Solomon (eds), *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca, NY, Cornell University Press, 1992), 230, 238; on the goal of students learning about judgment see also C. Parker, *supra* n. 13, 177–8, 199.

<sup>32</sup> Much of the Australian writing in this area has been informed by scholarship elsewhere, and has explored questions similar to ones investigated by American, Canadian and British scholars in particular.

<sup>33</sup> R. Johnstone and S. Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee (AUTC)* (Canberra, ACT, Australian Universities Teaching Committee, 2003), 122. In most schools, ethics is “taught” in compulsory subjects, and some are “stand-alone” ones. In others, ethics is part of a larger subject. Some schools reported that ethics was included “at different parts of the curriculum”, but in others “there were no formal arrangements to ensure a co-ordinated approach to the teaching of legal ethics, and its infusion throughout the curriculum”.

<sup>34</sup> *Ibid.*, 165; the report notes criticism of this focus from some respondents in the “stock-take” process.

<sup>35</sup> *Ibid.*, 119–21.

<sup>36</sup> *I.e.* Brun, *supra* n. 24, 277.

<sup>37</sup> Apparently, many Australian legal academics *continue* to disregard the importance of the ethics project in legal education: Ross, *supra* n. 13, 26.

<sup>38</sup> *I.e.* Brun, *supra* n. 24, 276–9. Similar sentiments about the failings of Australian law schools in this area were recorded a few years before *I.e.* Brun’s assessment: Goldsmith and Powles, *supra* n. 13, 120.

<sup>39</sup> For example, the AUTC Report makes no reference to ethics learning outcomes as such, providing evidence mainly about the incidence of inclusion of ethics in law school curricula together with some details of claims about *how* ethics is taught, be it in single or multiple subjects: Johnstone and Vignaendra, *supra* n. 33, 118–23. But see the reference to the study below.

sufficiently reliable information about actual student learning outcomes, as distinct merely from claims that imply that students have learned as their teachers intended.<sup>40</sup> While a few teachers have published answers to this question by drawing on evaluations from their own students,<sup>41</sup> these isolated accounts say little or nothing about the quality of ethics learning outcomes across the sector as a whole. However, an ongoing empirical study of a sample of Australian law students provides some evidence about actual ethics learning outcomes. The most striking interim finding is that undergraduate legal ethics education has had a “neutral impact . . . on the values expressed by lawyers in their ethical decision making.”<sup>42</sup>

Given the insufficiency of reliable evidence, it is not possible to know exactly what Australian law students are learning from the ethics project in legal education.<sup>43</sup> It seems reasonable to assume, at least, that most law students<sup>44</sup> know something about the rules of professional responsibility by the time they graduate. But, beyond that, the nature and quality of ethics learning outcomes is, at best, uncertain. Based on all of this information, it seems quite reasonable to draw the conclusion that there is little room for complacency in the ethics project in Australian legal education, assuming that it continues to be an important one. Good student learning outcomes in legal ethics have yet to be demonstrated in Australian legal education.<sup>45</sup>

### What Lawyers Do: Empirical Accounts of Lawyer Behaviour

Reference was made earlier to the idea that legal ethical responsibility is essentially about the application of formal rules of lawyering to answer the ethical dilemmas that lawyers might face. This perspective, which may still be dominant in ethics teaching in Australian law schools, places great emphasis on the assumed functional importance of the rules of lawyering for ethical practice itself. But, from a somewhat different perspective, apparently controversial to rules theorists, the rules of lawyering alone are seen seldom to provide the direction needed for sound legal ethical practice. This position is exemplified by Hazard:

“From the choice-making viewpoint of the lawyer . . . the realm of professional ethics is not a rule-determined domain. Rather, it is a domain where the lawyer has pervasive marginal discretion guided by a few fundamental legal rules and constrained by circumstances of practice.”<sup>46</sup>

<sup>40</sup> A similar example is provided in the assessment carried out by Le Brun where the author gave the example of a law school claiming to have adopted the “pervasive method” of legal ethics teaching and learning, but noted that “there was no concrete evidence to support the statement”: Le Brun, *supra* n. 24, 279.

<sup>41</sup> For example, C. Parker, *supra* n. 13, which is a rare example of a genuine attempt to provide evidence of student learning outcomes in ethics. See also Noone and Dickson, *supra* n. 24; and Giddings, *supra* n. 24, 178.

<sup>42</sup> A. Evans and J. Palermo, “Zero Impact: Are Lawyers’ Values Affected by Law School?” (2005) 8 *Legal Ethics* 240, 264. An earlier pilot study by Evans came to a similar conclusion: see A. Evans, “Lawyers’ Perceptions of their Values: An Empirical Assessment of Monash University Graduates in Law, 1980–1998” (2001) 12 *Legal Education Review* 209, 265.

<sup>43</sup> For example, we are unable to refer to any evidence regarding the achievements of Practical Legal Training. “PLT” programmes are now the standard, postgraduate route to professional admission in Australian jurisdictions.

<sup>44</sup> But apparently not all: see Johnstone and Vignaendra, *supra* n. 33, 118.

<sup>45</sup> Rhode’s remarks about the “state of professional ethics instruction” in the United States are worth noting. There, despite considerably more attention being paid to the ethics project in legal education, ethics in many law schools is still “relegated” to a single, lowly subject that focuses uncritically on the rules of professional responsibility: see D. Rhode and D. Luban, *Legal Ethics* (New York, Foundation Press, 2004), 1031; and D. Rhode, “If Integrity is the Answer, What is the Question?” (2003) 72 *Purdum Law Review* 333.

<sup>46</sup> G. Hazard, Jr., “Ethical Opportunity in the Practice of Law” (1990) 27 *San Diego Law Review* 127, 128.



A large and growing social scientific scholarship on lawyers at work seems to make similar claims about the “discretionary” nature of lawyering within the contextual constraints that accompany different practice settings. In this section, we aim to explore the possibility that these studies of lawyers and clients provide an alternative *resource* for the study of legal ethics, and therefore suggest an alternative *approach* to ethics learning in law school education. The studies to which we will refer contain a claim about the nature of legal practice, a claim about the world as it is, rather than a claim based on prior principles. Typically, the work is inductive, based on evidence of actual lawyer behaviour, and as such it is open to social scientific investigation. So far, this literature has not received much attention in many well-known contributions on legal ethics.<sup>47</sup> Yet, as Granfield and Koenig have suggested, “Unfortunately, most critiques of legal ethics and legal ethics education are based on the author’s personal insights and observations rather than on systematic empirical research that focuses on how attorneys experience ethical issues within the context of their practice”.<sup>48</sup>

Social scientific studies of lawyers belong within the sociology of the professions, a field that emerged post-war, reflecting both the empirical turn in the social sciences and also political concern with the role and status of the professions.<sup>49</sup> In studying doctors, lawyers and academics, foundational researchers developed accounts of what these professionals did, emphasising the institutional and personal contexts of professional conduct.<sup>50</sup> In doing so, the early sociology of the professions problematised the notion of “professional autonomy”,<sup>51</sup> and considered professional action as neither reconcilable with bureaucratic rationalisation<sup>52</sup> nor comprehensible according to the norm-based, public service tradition of professionalism.<sup>53</sup> While claims that doctors, lawyers and academics are not amendable to bureaucracy seems quaint given the contemporary “corporate” structure of medical practice, large law firms and the market-sensitive university,<sup>54</sup> the challenge of the sociology of the professions was in the sources used. Instead of deductively trying to determine what professionals do from theoretical accounts of the supposed role of the professions, or assuming that professionals act according to a set of official norms, the sociology of the professions movement

<sup>47</sup> See, for example, Simon, *supra* n. 11. Simon refers to only two “sociological” pieces: Talcott Parsons’ foundational essay on lawyers from a functional sociological perspective (T. Parsons, “A Sociologist Looks at the Legal Profession” in *Essays in Sociological Theory* (New York, Free Press, 1954); and a study of police behaviour (M. Orfield, “Deterrence, Perjury, and the Heater Factor: An Empirical Study of the Exclusionary Rule in the Chicago Criminal Courts” (1992) 63 *University of Colorado Law Review* 75). The message seems to be that empirical studies of lawyers need not influence an account of legal ethics.

<sup>48</sup> R. Granfield and T. Koenig, “‘It’s Hard to be a Human Being and a Lawyer’: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice” (2003) 105 *West Virginia Law Review* 495. Similar calls have been made by Wilkins: D. Wilkins, “Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics” in A. Sarat, M. Minow and T. Rakoff (eds), *Everyday Practices and Troubling Cases* (Evanston, IL, Northwestern University Press, 1998), 68.

<sup>49</sup> See, for example, T. Roszak, *The Making of a Counter Culture: Reflections of the Technocratic Society and its Youthful Opposition* (Berkeley, CA, University of California Press, 1968).

<sup>50</sup> See, for example, J. Ben-David, “The Professional Role of Physician in Bureaucratized Medicine: A Study in Role Conflict” (1958) 11 *Human Relations* 255; M. Goss, “Influence and Authority among Physicians in an Outpatient Clinic” (1961) 26 *American Sociological Review* 39.

<sup>51</sup> See L. Wilson, *The Academic Man: A Study in the Sociology of a Profession* (New York, Octagon Press, 1942).

<sup>52</sup> R. Merton, *Social Theory and Social Structure* (New York, Free Press, 1968), 261–78.

<sup>53</sup> J. Carlin, *Lawyers’ Ethics: A Survey of the New York City Bar* (New York, Russell Sage Foundation, 1966), 6–7.

<sup>54</sup> On the bureaucratic nature of the current legal academy in Australia see N. James, “Power-Knowledge in Australian Legal Education: Corporatism’s Reign” (2004) 26 *Sydney Law Review* 587; M. Thornton, “The Idea of the University and the Contemporary Legal Academy” (2004) 26 *Sydney Law Review* 481.

gathered social scientific data to get a “clear understanding of prevailing work environments in and out of formal organizations”.<sup>55</sup>

Two of the earliest seminal studies of the legal profession, by O’Gorman and Carlin, were based on interviews with New York lawyers in 1957 and 1960 respectively.<sup>56</sup> In the late 1960s, Rosenthal extended his data-gathering to interviewing clients in a widely cited study on the relations between lawyers and clients.<sup>57</sup> In the 1980s, Sarat and Felstiner revisited themes in Rosenthal’s study. In addition to interviewing lawyers, Sarat and Felstiner also analysed transcripts of lawyer and client interviews.<sup>58</sup> Interviews and surveys have subsequently been the dominant data-gathering methods in the empirical studies of lawyers,<sup>59</sup> although there have also been some ethnographic studies based on the “participant observation” of lawyers (and law students) at work.<sup>60</sup>

In the last 50 years these studies have extended to other jurisdictions. However, despite the different methods and agendas of individual researchers, a core finding of these studies, as we read them, is that different lawyers who practise in the same areas of law nevertheless provide their services differently. This can be seen, for example, in Rosenthal’s study where clients going to similar law firms in the same practice area often experienced very different standards of lawyering.<sup>61</sup> In a similar vein, Mather, McEwen and Maiman report on how lawyers made decisions in situations of conflict. They show that two lawyers, again in similar practice circumstances, decided on different courses of action. One lawyer reported choosing between two courses of action: either refusing to represent both parties, or declaring which party would be represented. The other lawyer allowed the parties to determine who was to be represented.<sup>62</sup> What these and other empirical studies also demonstrate is that lawyers constantly make decisions as to how to deal with their clients, and how to service their needs, throughout the course of the lawyer-client relationship.

On the basis of these kinds of observations of differences in lawyers’ responses, it is possible to make an inductive point: that difference in lawyering come about because the role of the lawyer, for whatever reason, involves opportunities for individual practitioners to choose

<sup>55</sup> H. O’Gorman, *Lawyers and Matrimonial Cases: A Study of Informal Pressures in Private Professional Practice* (New York, Free Press, 1963), 3.

<sup>56</sup> *Ibid.*, 7; Carlin, *supra* n. 53, 9.

<sup>57</sup> D. Rosenthal, *Lawyer and Client: Who’s in Charge?* (New York, Russell Sage Foundation, 1974), 183.

<sup>58</sup> A. Sarat and W. Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (New York, Oxford University Press, 1995); W. Felstiner and A. Sarat, “Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Relations” (1992) 77 *Cornell Law Review* 1447; A. Sarat and W. Felstiner, “Law and Strategy in the Divorce Law Office” (1986) 20 *Law and Society Review* 93.

<sup>59</sup> One of the most recent studies by Mather, McEwen and Maiman followed O’Gorman in interviewing a sample of divorce lawyers identified from the court lists: J. Mather, C. McEwen and R. Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York, Oxford University Press, 2001), 195; L. Mather, R. Maiman and C. McEwen, “‘The Passenger Decides on the Destination and I Decide on the Route’: Are Divorce Lawyers ‘Expensive Cab Drivers?’” (1995) 9 *International Journal of Law and the Family* 286. Another common method has been content analysis of lawyers’ or court files: see, for example, R. Ingleby, *Solicitors and Divorce* (New York, Oxford University Press, 1992), 13–15; R. Hunter, A. Genovese, A. Chrzanowski and C. Morris, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (Sydney, Law and Justice Foundation of New South Wales, 2002); R. Hinds and E. Bradshaw, “Gender Bias in Lawyers’ Affidavits to the Family Court of Australia” (2005) 43 *Family Court Review* 445.

<sup>60</sup> J. Flood, “Doing Business: The Management of Uncertainty in Lawyers’ Work” (1991) 25 *Law and Society Review* 41; R. Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (New York, Routledge, 1992).

<sup>61</sup> Rosenthal, *supra* n. 57, 100–1.

<sup>62</sup> See, for example, the cases discussed in Mather *et al* (2001), *supra* n. 59, 46–47.

how to carry out their work.<sup>63</sup> Put simply, lawyers are constantly required to make decisions about matters that are central to their work, and some of these decisions involve elements of choice. For example, lawyers must decide which clients they will represent, how the clients' expectations will be acted upon or "managed", in what manner communications with clients and others will be handled, what steps in advancing the client's interests will be taken and when, under what circumstances the termination of the relationship will be chosen or recommended, and what fees will be charged, and why. It is necessary to emphasise that the terms "choice" and "choice making" are intended here as shorthand, descriptive terms<sup>64</sup> for an activity that may, at times, be constrained by a variety of influences.

The choice making in lawyering that is demonstrated in the social scientific literature would seem to be significant from the point of view of lawyers' ethical practices. Unless the kinds of choices—and decisions—that lawyers are shown routinely to make are morally insignificant, they are, properly speaking, matters of ethical significance.<sup>65</sup> They implicate the question of what it means to be a good lawyer in an ethical sense, as distinct from a good lawyer in a technical sense.

The question of how lawyers ought to make choices when faced with certain kinds of ethical dilemmas has long been the basis of the legal ethics project. Indeed, legal ethics has been concerned to offer normative solutions to particular moments of choice making. These moments have often involved questions and dilemmas concerning matters such as who to represent, conflicts of interest, and client privilege, while professional responsibility rules often seek to provide lawyers with guidance on how they ought to respond to these kinds of dilemmas.

However, the social scientific research suggests that, in addition to choice making that is recognised and regulated by norms of professional responsibility, lawyers are also continually faced with choices at the routine and even the mundane levels of legal practice.<sup>66</sup> Choice making, therefore, is pervasive and is not confined to textbook dilemmas. Indeed, as Blumberg pointed out, "much legal work is . . . simply a few words of advice, some preventative action, a telephone call, negotiations of some kind, a form filled out and filed, a hurried conference . . . a letter or opinion written, or a countless variety of . . . actions".<sup>67</sup> These sorts of activities also probably constitute much of what it means to practise law. They are what

<sup>63</sup> We have provided a more exhaustive account of the claim about lawyer-choice in M. Robertson and K. Tranter, "The Concept of Discretion and Choice in the Lawyer's Role, and its Possible Implications for Legal Education" (Paper presented at the Socio-Legal Research Centre Seminar Series, Gold Coast, Australia, 3 April 2006).

<sup>64</sup> We do not wish to muddy these descriptive terms with normative assessments of choice making in psychology or economics, for example, which might suggest that all choice making involves individual self-maximisation. There is evidence, both anecdotally and in the empirical literature, that some lawyers in some circumstances resolve choice moments according to this type of calculus; and there is also evidence to the contrary. Our concern at this point is the description, not the assessment. Similarly, what the evidence of lawyer choice making might contribute to the agency/structure debate in social theory, or contribute to the philosophical literature on the possibility/impossibility of free will, we defer to a later date.

<sup>65</sup> D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ, Princeton University Press, 1988), xviii.

<sup>66</sup> For a description of the kinds of services that lawyers perform, see R. Abel and P. Lewis, "Putting Law Back into the Sociology of Lawyers" in *Lawyers in Society: Comparative Theories* (Berkeley, CA, University of California Press, 1989), 487.

<sup>67</sup> A. Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession" (1967) 1 *Law and Society Review* 15, 25.

lawyers, regardless of their station, do most of the time,<sup>68</sup> while the way in which lawyers perform them indicates their style of practice.

The social scientific studies provide many instances of lawyer activity involving decision making that might be viewed as “routine”. Some of these have focused on lawyer–client relations.<sup>69</sup> They demonstrate that different lawyers often make very different choices concerning client participation. For example, Southworth, in her study of civil rights and poverty lawyers in Chicago, observed that the “lawyers’ views about the proper allocation of decisionmaking [*sic*] roles between lawyer and client vary substantially by the type of practice setting in which they work”.<sup>70</sup> Mather, McEwen and Maiman reported that the lawyer makes an assessment of the complexity of the divorce and the client’s ability to negotiate with their ex–partner as the basis for choosing how much “responsibility” the lawyer has in the matter.<sup>71</sup>

Many of these routine, and sometimes mundane, decisions come down to some very basic choices: whether the lawyer chooses to listen actively;<sup>72</sup> whether the lawyer chooses to return telephone calls promptly;<sup>73</sup> and the verbal and non-verbal messages that the lawyer communicates to a client.<sup>74</sup> A significant choice is which words a lawyer chooses to use. How a lawyer frames advice often affects how a client understands and acts on that advice. Rosenthal, Sarat and Felstiner, and Mather, McEwen and Maiman all report evidence of lawyers actively exploiting the framing of advice, and using rhetorical tools and strategies to manage clients and their expectations.<sup>75</sup> Uphoff and Wood found that among criminal defence attorneys across the United States there were significantly different choices concerning the level of client participation encouraged by attorneys.<sup>76</sup> Even William Simon, reflecting on the evidence of his own previous legal practice, has suggested that two lawyers who choose to communicate the same factual and legal material in different ways can provoke significantly different responses in the same client.<sup>77</sup>

Social scientific researchers have also observed that lawyers make different choices with regard to how to progress the client’s matter solely on the basis of the lawyer’s assumption

<sup>68</sup> Flood suggests that “corporate lawyers spend roughly 55 percent of their *chargeable* time in some form of talk with others . . . Those others are a mixture of other lawyers, clients, colleagues, and helpers”: Flood, *supra* n. 60, 48.

<sup>69</sup> Rosenthal, *supra* n. 57; B. Danet, K. Hoffman and N. Kermish, “Obstacles to the Study of Lawyer–Client Interaction: The Biography of a Failure” (1980) 14 *Law and Society Review* 905; Sarat and Felstiner (1995), *supra* n. 58.

<sup>70</sup> A. Southworth, “Lawyer–Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers’ Norms” (1996) 9 *Georgetown Journal of Legal Ethics* 1101, 1105. Similar findings were made by Robertson and Corbin in their limited study of Australian personal injury and family lawyers: M. Robertson and L. Corbin, “To Enable or to Relieve? Specialist Lawyers’ Perceptions of Client Involvement in Legal Service Delivery” (2005) 12 *International Journal of the Legal Profession* 121.

<sup>71</sup> Mather *et al* (2001), *supra* n. 59, 71.

<sup>72</sup> L. White, “Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs G” in M. Fineman and N. Sweet Thomadson (eds), *At the Boundaries of Law: Feminism and Legal Theory* (New York, Routledge, 1991), 40.

<sup>73</sup> Rosenthal, *supra* n. 57, 103.

<sup>74</sup> *Ibid.*, 101.

<sup>75</sup> *Ibid.* 109–10. Sarat and Felstiner (1995), *supra* n. 58, 37, 57; Mather *et al* (2001), *supra* n. 59, 95–98.

<sup>76</sup> R. Uphoff and P. Wood, “The Allocation of Decisionmaking between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney–Client Decisionmaking” (1998) 47 *University of Kansas Law Review* 1.

<sup>77</sup> W. Simon, “Lawyer Advice and Client Autonomy: Mrs. Jones’s Case” (1991) 50 *Maryland Law Review* 213, 216–17.

about the client's capacity to pay.<sup>78</sup> Similarly, there is evidence that lawyers often make different choices and pursue different courses of action depending on their relationship with the lawyer representing the opposing party.<sup>79</sup> Hunter, drawing upon empirical studies of divorce lawyers, concluded that the assembled evidence suggested that individual lawyers working in the same field and servicing similar clients often adopt different styles of advocacy, ranging from aggressively adversarial to conciliatory.<sup>80</sup>

The claim that lawyers have choices, derived from the social scientific studies of lawyers at work, needs to be distinguished from a normative assessment of the appropriateness or correctness of such choice making. Such assessments are not of concern here. However, this issue does lead to a question about whether the evidence suggests that lawyers have unconstrained discretion in the way that they exercise their choices. It is clear, however, that this is not the case. Instead, in spite of variations in findings, the studies have repeatedly found that the "context" of lawyering constrains, regulates and influences lawyer choice. Three elements of the context that merit mention here are the rules of professional responsibility, the professional practice context and the personality and values of the lawyer.

The first influence on lawyer choices involves the rules of professional practice. In common with the scepticism in parts of the legal ethics literature concerning the efficacy of rules to secure "ethical" outcomes, social scientific studies have found that professional responsibility rules frequently do not determine "correct" courses of action. On the contrary, they are often abstract and open to multiple interpretations and therefore require discretionary judgment by the lawyer.<sup>81</sup> To use Karl Llewellyn's words, "rules *guide*, but they do not *control*".<sup>82</sup> However, as Mather, McEwen and Maiman showed in their study of the no-conflict rule, while the rule did not provide clear guidance as to how lawyers should resolve the situation when both parties presented at the initial interview, all lawyers interviewed recognised the essence of the rule that to continue the interview in those circumstances would be wrong.<sup>83</sup> This suggests a more sophisticated account of the relationship between professional practice rules and lawyer conduct: that the rules highlight recognised areas of concern, close some avenues of choice, and signpost to lawyers the need for deliberation in the areas of discretion that persist.

The second contextual factor is the professional environment of the lawyer. Studies have repeatedly found that factors such as firm policies, "firm culture" and the lawyer's position within the hierarchy of the firm limit the range of choices available to him or her.<sup>84</sup> An example of this can be seen in relation to billing practices. Mather, McEwen and Maiman found that senior lawyers or sole practitioners enjoy "freedom" when it comes to adjusting their fees, while junior lawyers, subject to firm policy or work expectations, often do

<sup>78</sup> S. Macaulay, "Lawyers and Consumer Protection Laws" (1979) 14 *Law and Society Review* 115, 151–71; J. Carlin and J. Howard, "Legal Representation and Class Justice" (1965) 12 *UCLA Law Review* 381, 385; H. O'Gorman, *supra* n. 55; Rosenthal, *supra* n. 57, 107.

<sup>79</sup> Sarat and Felstiner (1995), *supra* n. 58, 103; Mather *et al* (2001), *supra* n. 59, 74, 128–30.

<sup>80</sup> R. Hunter, "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 *Journal of Law and Society* 156.

<sup>81</sup> Mather *et al* (2001), *supra* n. 59, 47.

<sup>82</sup> K. Llewellyn, *The Bramble Bush: On our Law and its Study* (Dobbs Ferry, NY, Ocean Publications, 1930), 180.

<sup>83</sup> Mather *et al* (2001), *supra* n. 59, 46, 71.

<sup>84</sup> For example, Southworth, *supra* n. 70 (on the diversity even within 'poverty' law practice in Chicago); Uphoff and Wood, *supra* n. 76 (on the more client-centred approach of public defenders in contrast to private members of the criminal bar).

not.<sup>85</sup> However, even junior lawyers in this situation are invested with some opportunities for choice: the researchers found that a junior lawyer still reduced a client's bill by "not record[ing] every phone call on her time sheet for billing".<sup>86</sup>

Another aspect of the constraining professional environment concerns the expectations and pressures from the lawyer's "community of practice".<sup>87</sup> Most lawyers wish to be seen in a good light by their peers.<sup>88</sup> Regardless of whether this is a genuine need for acceptance or a pragmatic decision based on maintaining relationships, what it discloses is that the community of practice influences lawyers' choice making.<sup>89</sup> However, this does not mean that a lawyer's community of practice somehow relieves the need for choice, or dictates the decision; the study merely demonstrates that the community of practice influences the choice that is made.

A third element that influences lawyers' choice making, as identified in the social scientific literature, has to do with the "person" and values of the lawyer concerned. Carlin found that demographic details, particularly social-economic status and race, determined a lawyer's type of practice and as such influenced the kind of decisions and choices that he or she made.<sup>90</sup> Sarat and Felstiner and Mather, McEwen and Maiman observed that gender had an impact on how individual lawyers practise,<sup>91</sup> although other studies have disputed the generality of their findings.<sup>92</sup> Empirical studies on law schools have suggested that some of the consistency among lawyers in how they respond to moments of choice comes from the shared values that lawyers acquire at law school.<sup>93</sup> Furthermore, Corbin has recently found that lawyers' decisions should be conceived as a complex mediation of personality types,

<sup>85</sup> Mather, McEwen and Maiman note the "freedom" that sole practitioners and senior partners had in making these choices: Mather *et al* (2001), *supra* n. 59, 137.

<sup>86</sup> *Ibid.*, 34.

<sup>87</sup> Mather, McEwen and Maiman define community of practice as having "many dimensions. It includes shared languages, knowledge and identities that together reinforce common understandings of the challenges of particular kinds of legal work. It involves internalized norms of conduct learned in life, in law school, and during socialization into practice. It includes pressures from peers to behave in particular ways in order to function effectively in a system of relationships" (*ibid.*, 178).

<sup>88</sup> Carlin, *supra* n. 53, 116–17.

<sup>89</sup> Mather *et al* (2001), *supra* n. 59, 175–87.

<sup>90</sup> Carlin, *supra* n. 53. This finding was mirrored by Heinz and Laumann's 1975 survey of Chicago lawyers: J. Heinz and E. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York, Russell Sage Foundation, 1982); J. Heinz, E. Laumann, R. Nelson and E. Michelson, "The Changing Character of Lawyers' Work: Chicago in 1975 and 1995" (1998) 32 *Law and Society Review* 751.

<sup>91</sup> There has been some support for this thesis from studies of divorce lawyers: Sarat and Felstiner (1995), *supra* n. 58, 103; Mather *et al* (2001), *supra* n. 59, 169–71.

<sup>92</sup> B. Bogoch, "Gendered Lawyering: Difference and Dominance in Lawyer-Client Interactions" (1997) 31 *Law and Society Review* 677. The claim that gender impacts on lawyering styles is controversial: see D. Jack and R. Jack, "Women Lawyers: Archetype and Alternatives" in C. Gilligan, J. Ward, J. McLean Taylor and B. Bardige (eds), *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* (Cambridge, MA, Harvard University Press, 1988), 263; C. Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 1 *Berkeley Women's Law Journal* 39; C. Menkel-Meadow, "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change" (1989) 14 *Law and Social Inquiry* 289, 296.

<sup>93</sup> Granfield, *supra* n. 60; M. Stewart, "Conflict and Connection at Sydney University Law School: Twelve Women Speak of our Legal Education" (1992) 18 *Melbourne University Law Review* 826; R. Stover, *Making it and Breaking it: The Fate of Public Interest Commitment During Law School* (Urbana, IL, University of Illinois Press, 1989); A. Schwartz, "Law, Lawyers and Law School: Perspectives from the First-Year Class" (1980) 30 *Journal of Legal Education* 437. Although there have been some dissenting voices with regard to the impact of law school on student values: Evans and Palermo, *supra* n. 42.

personal values and external pressures.<sup>94</sup> Common to all this research is the finding that, to some degree, the lawyer's personal values influence the quality of choice making.

A final point that warrants mention concerns the generality of the social scientific studies to which we have referred. Most of this research, but certainly not all of it,<sup>95</sup> has been conducted in the United States. Indeed, the sociology of the professions had its origins in the United States with the work of Talcott Parsons and Robert K. Merton.<sup>96</sup> We suggest, however, that even given jurisdictional and societal differences, the core research findings regarding the nature of attorneys' work are likely to be applicable to lawyers' work in other common law jurisdictions.

In summary, the social scientific research presents evidence of the fact that lawyering involves choice and that those choices are made within a context that includes rules, professional expectations, and personal values. These decisions are regularly made in what may be described as zones of discretion that are an inevitable feature of the lawyer's role. The matters that invite choice making are numerous and varied. They include the minutiae of practice, such as deciding which adjectives to use in a letter to the client's opponent,<sup>97</sup> through to the more celebrated instances of decision making, such as those generated by situations of conflict of interest. In terms of sheer volume—and perhaps significance—however, the routine, seemingly innocuous circumstances of choice making dominate much lawyering, and therefore define a lawyer's style of practice.<sup>98</sup> Furthermore, to the extent that the decisions that lawyers need to make are morally significant ones, this empirical literature can add a great deal to our understanding of the way in which lawyers exercise ethical choices. Viewed from this perspective, much of what constitutes legal practice is made up of a series of judgment calls<sup>99</sup> (assuming "judgment" in its ordinary sense of deciding sensibly). The lawyer, to underscore the point, therefore does not automatically perform the multiple acts of practice in accordance with a predetermined script. Legal practice always, and often, invites lawyers to make decisions as to how they will provide their services<sup>100</sup> even if, in the circumstances that happen to prevail, the opportunity for choice is constrained by those circumstances, or even if the opportunity to deliberate is passed over completely.

### The "Discretion, Choice and Justification" Approach to Legal Ethics Learning

These conclusions suggest the basis of an alternative approach to legal ethics learning. They suggest that learning about ethical responsibility ought to reflect the reality that much lawyering is inevitably carried out in zones of professional discretion, rather than being carried out by the application of categorical practice rules. In other words, the primary

<sup>94</sup> L. Corbin, "How 'Firm' are Lawyers' Perceptions of Professionalism?" (2005) 8 *Legal Ethics* 265, 272–4.

<sup>95</sup> For example, M. Cain, "The General Practice Lawyer and the Client" in R. Dingwall and P. Lewis (eds), *The Sociology of the Professions: Lawyers, Doctors and Others* (London, Macmillan, 1983), 106; Corbin, *supra* n. 94; Hunter, *supra* n. 80; Robertson and Corbin, *supra* n. 70.

<sup>96</sup> E. Freidson, "The Theory of the Professions: State of the Art" in R. Dingwall and P. Lewis (eds), *The Sociology of the Professions: Lawyers, Doctors and Others* (London, Macmillan, 1983), 19.

<sup>97</sup> See also, for example, P. Schiltz, "Making Ethical Lawyers" (2004) 45 *South Texas Law Review* 875, 877.

<sup>98</sup> See, for example, Hazard, *supra* n. 46, 138.

<sup>99</sup> Mather *et al* (2001), *supra* n. 59; Hutchinson, *supra* n. 16; Luban and Milleman, *supra* n. 15, Schiltz, *supra* n. 97.

<sup>100</sup> See also Hazard's claim along these lines: Hazard, *supra* n. 46, 129, 138.

emphasis in this approach should be on the responsibility to deliberate the everyday questions of lawyering in a domain that is only partly serviced by rules,<sup>101</sup> rather than on “knowing” the formal ingredients of the lawyer’s rule-based morality.

Students should therefore be provided with opportunities to learn that lawyers’ work inevitably involves discretion and choice,<sup>102</sup> that much decision making in the course of ordinary, everyday practice involves the making of morally significant choices, and that these choices are often situated in demanding contexts. However, because lawyers’ ethical decisions, like any other ethical decisions, always require justification,<sup>103</sup> students must also be encouraged to develop a thorough understanding of the practitioner’s enduring responsibility to justify ethical choices in the course of legal practice.<sup>104</sup> The goal, ultimately, must be that students begin to develop their ability to make justifiable choices, to the extent that law school learning activities can encourage this development to take place.

In this part of the paper we explore, somewhat tentatively, some of the possible advantages that this approach might have for ethics learning and teaching. At the outset, however, we recognise that learning theory should and can inform the ethics project in legal education.<sup>105</sup> This requires, for example, clarity about what students should learn,<sup>106</sup> and the creation of a learning environment that is most likely to allow most students to achieve these objectives. And, as far as possible, students should be encouraged into high quality learning outcomes, rather than low-level ones that merely involve the formulaic reproduction of knowledge.<sup>107</sup> (An approach to ethics in legal education that prioritises the “transmission”<sup>108</sup> of professional responsibility rules into the minds of students is surely of questionable value.)

The “discretion, choice and justification” approach to legal ethics learning provides a foundation for learning about the complexity and therefore the challenge of lawyers’ ethical responsibility. It provides a basis for, and encourages students into, a broad enquiry into the meaning of ethical lawyering. It aims to take learning far beyond knowledge of a set of legal rules that must be applied to resolve occasional professional dilemmas. It begins with the claim that professional legal services inevitably invite deliberation as to whom and how to represent, rather than with the claim that the rules of professional responsibility are likely to provide answers to all the ethical dilemmas that actually matter. It nevertheless accepts that

<sup>101</sup> *Ibid.*

<sup>102</sup> We noted earlier that this message is not reflected in conventional approaches to teaching and learning of legal ethical responsibility in Australian legal education. To the best of our knowledge, neither does it appear, *in these terms*, in the substantial American literature on legal ethics in legal education. See, for example, L. Lerman and P. Schrag, *Ethical Problems in the Practice of Law* (New York, Aspen, 2005).

<sup>103</sup> See, for example, P. Singer, *Practical Ethics* (New York, Cambridge University Press, 2nd edn, 1993), 10–12.

<sup>104</sup> We acknowledge that the call for justification is based upon sophisticated arguments both in moral philosophy and in the literature on legal ethics in particular. Here, we do no more than state and accept the proposition in the context of our argument. We note merely that the very office of lawyer attracts a particular kind of responsibility: lawyers’ roles are, in a sense, public ones, and this means that lawyers must be willing to account for the way in which they service their clients’ needs, before both the courts and other legal institutions. For an Australian account of the need for lawyers to be accountable, see Sampford and Parker, *supra* n. 13, 19–24; S. Parker, *supra* n. 13, 4. For other perspectives see, for example, Luban, *supra* n. 65.

<sup>105</sup> Robertson, *supra* n. 21.

<sup>106</sup> P. Ramsden, *Learning to Teach in Higher Education* (New York, RoutledgeFalmer, 2003), 125–6; J. Biggs, *Teaching for Quality Learning at University* (Buckingham, Open University Press, 2003), 34–55; Robertson, *supra* n. 21.

<sup>107</sup> Biggs, *ibid.*, 38–43, and M. Le Brun and R. Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Sydney, Lawbook Co, 1994), 160–4, referring to an adaptation of Bloom’s taxonomy; and see Robertson, *supra* n. 21, 234–5.

<sup>108</sup> Australian Law Reform Commission, *supra* n. 2.



the rules of lawyering are a crucial, but not an exclusive, resource in deliberation and choice making. The essential message, however, is that ethical legal practice is less about rules that have to be followed than about individual choices that need to be made.

This inquiry into lawyers' ethical responsibility acknowledges the multiple circumstances of ethical decision making. It draws attention to the under-studied, "routine and banal"<sup>109</sup> circumstances of ethical choice making, rather than only those that tend to dominate the discourse on lawyers' professional responsibility. As we suggested earlier, legal practice frequently invites lawyers to make decisions of moral significance, and certainly not only when issues like conflict of interest or confidentiality arise. Lawyers frequently need to make choices about seemingly "small" things, such as when and whether to return calls and emails, and what language to use in the many manifestations of their role as communicator.<sup>110</sup> Therefore, students will not only be encouraged to question the implication that the rules of lawyering somehow provide a comprehensive resource for ethical decision making. They will also be encouraged to question the implication that the circumstances of lawyering emphasised in the address of the professional rules appropriately reflect all the likely circumstances in which ethical decisions need frequently to be made. In this way, students might also come to appreciate the extent to which the "small" lawyering decisions, as opposed to the "big" ones, help to define the characteristics of the lawyer.

At the same time, this approach invites, if not requires, students to begin to get to grips with the situational factors that constrain lawyers' choices. Thus, for example, students can learn to recognise and evaluate the likely effects of firm and wider practice pressures, and the extent to which these might influence practice decisions. The social scientific literature on lawyers' work would provide an especially valuable resource for this, which suggests that parts of this literature need to be brought into the mainstream of ethics learning.

This approach also provides a framework for the examination of various other literatures that address questions of lawyers' ethical responsibility. These include the normative literature on lawyering, and especially the scholarship that examines the ethical justification for the lawyer's role (and role-differentiated behaviour), and the scholarship that contains the arguments about how lawyers *ought* to make choices in the course of lawyering.<sup>111</sup> Students should be encouraged to evaluate these sorts of arguments<sup>112</sup> in an effort to encourage the development of their own conceptions of what they believe should influence their choices as practitioners, within the discretionary zones that they encounter. Ideally, students should also be encouraged to explore, at introductory level, the moral, philosophical dimensions of legal ethical decision making.<sup>113</sup>

As we see it, the "discretion, choice and justification" approach brings the decision maker into focus. It acknowledges that there is a subjective element in lawyering, and that this element has a bearing on the choices that lawyers routinely make. Students should learn to appreciate that different lawyers deliberate differently and respond in justifiably different ways to similar sets of circumstances that require decisions. In a sense, then, this approach

<sup>109</sup> C. Parker, *supra* n. 13.

<sup>110</sup> Rhode and Luban, *supra* n. 45, 1.

<sup>111</sup> See, as one example, D. Luban (ed), *The Ethics of Lawyers* (Aldershot, Dartmouth, 1994).

<sup>112</sup> Such as the merits of "neutral partisanship" as opposed to "moral activism" in lawyering; see, for example, Simon, *supra* n. 11; and for a more recent contribution, S. Scheingold and A. Sarat, *Something to Believe in: Politics, Professionalism, and Cause Lawyering* (Stanford, CA, Stanford University Press, 2004).

<sup>113</sup> On the philosophy of ethics as it pertains to legal ethics see, for example, Nicolson and Webb, *supra* n. 10, ch 2.

personalises learning about the ethical: it encourages students to learn about their own abilities and frailties in responding to invitations to make ethical choices. It follows that this approach also provides opportunities for students to engage with their own moral perspectives, to interrogate their own moral positions, and to consider the role that these might have in making defensible decisions during the course of their legal work.<sup>114</sup>

As we have indicated, students should be called upon to provide *justifications* for the choices that they make, as and when they engage with learning activities and assessment tasks that call for decision making. In this way, students may begin to develop their abilities to make justifiable practice choices. The requirement for justification of choice is not intended as an invitation to offer the barest possible reason for a particular choice, or for self-serving justification,<sup>115</sup> but to demonstrate a thorough engagement with the matter calling for consideration together with a sound understanding of the nature of the lawyer's role.

Finally, we draw attention to the fact that the approach to legal ethics learning being suggested here is one that highlights the place of, and need for, ethical deliberation in the practice of law. It is clear from what has been said so far that ethical deliberation and decision making, in the discretionary zones of practice, is not merely a matter of learning how to apply the rules of lawyering. It follows that this approach to ethics learning suggests the need for strategies and resources to be developed that will aid and enhance learning activities in this area. These strategies and resources will need to take different forms, but their aim would be to provide students with opportunities to consider quite carefully the potential complexity and richness of different decision making contexts. One such resource, to aid the development of reflective engagement with ethical dilemmas, could take the form of a series of questions or prompts, as the following example shows. These particular questions assume a decision making context in which the rules of professional responsibility *may* have a bearing on the decision that needs to be made:<sup>116</sup>

- What issue must you decide?
- How do you interpret the facts that you think are relevant to the decision that must be made?
- Potentially, what options are available to you?
- Are there any formal sources of legal authority that provide guidance (for example, statutes or case law on lawyers' responsibilities, or formally recognised professional responsibility rules)? How would you interpret these? Are these actually determinative of the issue you identified?
- Are there any other sources of legal authority (such as rules or guidelines provided by professional bodies) that provide assistance? How would you interpret these?
- Are there any other sources of guidance, including personal moral ones, which you think are relevant here?

<sup>114</sup> It is worth noting that some recent literature on lawyers' ethical practices highlights the place and value of personal moral perspective in decision making. See, for example, Vischer, *supra* n. 8, 46, 54: there are "personal and professional benefits" in "integrating one's own moral claims with one's work"; and Hutchinson, *supra* n. 16, ch 11.

<sup>115</sup> Singer, *supra* n. 103.

<sup>116</sup> This approach was initially formulated in 2004 by Michael Robertson as part of the Griffith Law School's "Legal Professional Practice" course. It has undergone a number of revisions, and is still being developed. As we see it, a resource like this can be adapted to the various learning activities and learning contexts of the typical law school environment but it should not be viewed as a "formula" for decision making itself.

- Whose interests are potentially affected by the decision?
- How would you prioritise these interests, and why?
- What are the likely consequences of each of the options identified? How would you evaluate these consequences?
- Are there any other factors that you think you should take into account in these circumstances?
- Are there any situational influences or pressures that seem to make the decision more difficult?
- To what extent do you believe that these pressures should be taken into account? (Can they be ignored?)
- Given your responses to these questions, what decision would you make?
- How would you justify your decision? (Why exactly do you think this would be a good decision in the circumstances?)
- Do you have any misgivings about any aspect of the decision? Why?

This resource helps to illustrate key elements of the approach to the learning of legal ethics that we are suggesting: the need for thoughtful engagement with ethical questions, the possible relevance of different forms of moral reasoning (including recourse to guiding norms and the evaluation of consequences of actions), the relevance of personal values and morality in decision making, an acknowledgement of the force of variable contextual factors, the need for justification, and the need for subsequent reflection. In short, the principal aim of this approach is to draw the learner's attention to the demanding nature of ethical decision making in a legal practice setting, and to encourage careful deliberation in confronting the ethical challenges of ordinary practice.

## Conclusion

We began by asking what Australian law students should learn from the legal ethics project in legal education. The short version of the answer we have suggested is that students must appreciate that morally significant issues continually emerge during lawyers' work, and often at moments of situational complexity. Students ought therefore to be encouraged to engage with these issues from a position that not only acknowledges the uncertainty of legal practice, but also recognises the kind of responsibility that pervasive professional discretion demands. Our underlying purpose has been to take seriously the frequent criticisms of the traditional, rules-based approach to the teaching of "legal ethics", and to propose an alternative approach: one that recognises that ethical legal practice is less about rules that have to be followed than about professional choices that need to be made in the demanding and variable contexts of lawyering.

If there is a single claim that provides a platform for the arguments that we have made, it is the claim of the social scientific literature, as we interpret it, that legal practice *is* uncertain, and the attendant implication that lawyers must therefore choose how they will respond to the multiple choices that present themselves in ordinary lawyering. This need to make decisions in the discretionary zones of practice necessarily places significant moral responsibilities on lawyers—and, arguably, on legal educators too.