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How Bad Is It out There: Teaching and Learning about the State of the Legal Profession in North Carolina

John M. Conley

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HOW BAD IS IT OUT THERE?: TEACHING AND
LEARNING ABOUT THE STATE OF THE LEGAL
PROFESSION IN NORTH CAROLINA

JOHN M. CONLEY*

This Article reports on an interview-based approach to teaching professional responsibility which, Conley argues, has offered both significant pedagogical advantages and an unexpected opportunity to study the state of the legal profession. Part I analyzes the longstanding problems associated with teaching professional responsibility and describes the new course, called "The Law Firm." Part II reviews the empirical literature on the state of the profession, which includes surveys, ethnographies, and numerous first-person accounts. In Part III, Conley describes the development of The Law Firm as an opportunity to study the profession, and discusses the major themes that have emerged over nine years as he and his students have interviewed lawyers from almost every branch of law practice. The principal issues have included the effects of changing economics, the structure and governance of law firms, diversity in the profession, and the balance—or lack thereof—between work and lawyers' personal lives. In the conclusion, Conley reflects on The Law Firm as a teaching model of broader applicability.

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INTRODUCTION

In 1995, my now-retired colleague Paul Haskell and I had a conversation about our law school's narrow approach to teaching professionalism. As just about every other law school in the country had been doing since Watergate, the University of North Carolina at Chapel Hill (UNC) offered professional responsibility courses that focused almost entirely on the American Bar Association's Model Rules of Professional Conduct.¹ We probably were (and still are) among the leaders in providing training in specific legal skills such as negotiation, trial advocacy, and client counseling. Haskell pointed out, however, and I quickly agreed, that we were teaching our students virtually nothing about what lawyers actually do on a day-to-day, hour-by-hour basis. Our students were graduating without ever having been led to consider such questions as how various kinds of practice groups work, how legal careers evolve, how lawyers' professional and personal lives interact, how lawyers feel about their profession, and what they believe are their most difficult moral and ethical challenges.

After conducting a nonscientific survey of a number of other law

1. MODEL RULES OF PROF'L CONDUCT (2003). See generally Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139 (Summer/Autumn 1995) (commenting on the state of professional responsibility teaching at that time).

schools and speaking with several prominent scholars of the legal profession, we concluded that no other school seemed to be addressing these questions in a systematic way either. Most offered the same sorts of professional responsibility courses that UNC did, together with varying levels of skills training, while a few also had business-oriented courses in law practice management. Haskell and I immediately, if intuitively, concluded that this was a significant gap in the curriculum, and we decided to design a course in an effort to close it. In an admittedly crass marketing ploy, we named our embryonic course "The Law Firm."²

Haskell and I came to the project with very different backgrounds. After many years of specialization in property and trusts and estates, he had more recently been focusing on the legal profession. In addition to teaching a rules-based professional responsibility course, he had been writing about the intersection of legal ethics and morality. In a book entitled *Why Lawyers Behave as They Do*,³ Haskell undertakes to explain to a general audience how and why the ethical responsibilities of lawyers sometimes appear to be at odds with widely held moral principles.

I am an anthropologist. Consequently, when I thought about how to teach the course we were discussing, I thought immediately of anthropology's traditional research method, ethnography. Made famous by popularizing anthropologists such as Margaret Mead, ethnography is "participant observation": in simplest terms, going to the place to be studied, "living with the natives," sharing their way of life, and observing their customs and rituals, all in an effort to see the world through their eyes.⁴ The way that a particular group of people sees and makes sense out of the world is its culture. In the contemporary view, culture is a bundle of shared conceptual resources that members of a group draw on to interpret reality and shape their daily lives.⁵ Anthropology has spent the last hundred years documenting and analyzing the distinctive features of cultures all around the world, examining those things that are widely shared as well as those cultural elements that serve to distinguish particular societies from others.⁶

2. At that time, "L.A. Law" had just ended its long run as television's hottest legal drama, and the movie version of John Grisham's novel, "The Firm" (1993), was still being talked about.

3. PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* (1998).

4. See CONRAD PHILLIP KOTTAK, *CULTURAL ANTHROPOLOGY* 11, 20, 34-40 (8th ed. 2000) [hereinafter KOTTAK].

5. See *id.* at 4; WILLIAM M. O'BARR & JOHN M. CONLEY, *FORTUNE & FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING* 5 (1992) [hereinafter *FORTUNE & FOLLY*]; John M. Conley & William M. O'Bar, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 *LAW & CONTEMP. PROBS.* 5, 9-10 (Summer 1997).

6. See generally KOTTAK, *supra* note 4, at 40-41 ("The Evolution of Ethnography"). For an introductory book that captures the breadth of ethnography nicely, see ABRAHAM ROSMAN &

For much of the history of the discipline, Western anthropologists have focused their attention on so-called traditional societies⁷ in the non-Western parts of the world. Accordingly, anthropology's most-read books include such titles as Mead's famous analysis of adolescence in the South Pacific, *Coming of Age in Samoa*⁸; Bronislaw Malinowski's *Argonauts of the Western Pacific*,⁹ which described the epic open-ocean canoe voyages of the people of Melanesia; and E.E. Evans-Pritchard's *The Nuer*,¹⁰ an account of life in a tribe of Sudanese pastoralists. As part of a multifaceted turn toward introspection, however, the current generation of anthropologists has devoted much more attention to the ethnographic study of their own societies.¹¹

As an anthropologist who entered graduate school in the early 1970s, I have participated in these trends. Although I spent time in Africa and the Caribbean in the '70s, the subjects of my major ethnographic projects have been lawyers and witnesses in American criminal trials,¹² lay people trying to navigate the small claims court system in this country,¹³ and institutional investment organizations.¹⁴ These experiences had long since persuaded me that the cultural perspective and the ethnographic method are as powerful in North Carolina or New York as in New Guinea.

All of this prompted me to suggest to Haskell that we approach the

PAULA G. RUBEL, *THE TAPESTRY OF CULTURE: AN INTRODUCTION TO CULTURAL ANTHROPOLOGY* (6th ed. 1998).

7. To an anthropologist, "traditional" implies a relatively small society, whose members know each other on a face-to-face basis, and which is at a premodern stage of technical and economic development. See generally RAYMOND SCUPIN, *CULTURAL ANTHROPOLOGY* 285-86 (4th ed. 2000) (discussing concepts of premodernism and traditionalism).

8. MARGARET MEAD, *COMING OF AGE IN SAMOA* (1928).

9. BRONISLAW MALINOWSKI, *ARGONAUTS OF THE WESTERN PACIFIC* (1922).

10. E.E. EVANS-PRITCHARD, *THE NUER* (1940).

11. See KOTTAK, *supra* note 4, at 40-41, 51-54. The trends toward introspection and the examination of one's own culture are epitomized by the title that one of the most famous twentieth-century anthropologists gave to a 1990s textbook: PAUL BOHANNAN, *WE, THE ALIEN: AN INTRODUCTION TO CULTURAL ANTHROPOLOGY* (1992). Parallel developments have included a major reevaluation of anthropology's perceived wisdom and a dramatic increase in the numbers of professional anthropologists who are members of societies previously studied by Westerners. For leading examples of these respective developments, see JAMES CLIFFORD & GEORGE E. MARCUS, *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (1986); and GANANATH OBEYESEKERE, *THE APOTHEOSIS OF CAPTAIN COOK: EUROPEAN MYTHMAKING IN THE PACIFIC* (1992).

12. See, e.g., John M. Conley et al., *The Power of Language: A Multi-Disciplinary Study of Language in the Courtroom*, 1978 DUKE L.J. 1375 (1978) (providing an ethnographic and experimental study of the use of language in the courtroom).

13. See, e.g., JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 12 (1990) (examining the discourse of non-lawyers and consumers of the law in legal settings).

14. See generally FORTUNE & FOLLY, *supra* note 5, for an example of an ethnographic study of institutional investment organizations.

everyday realities of law practice as an anthropological problem. That is, we should approach the organizations in which lawyers practice as social groups with distinctive cultures, just as earlier anthropologists had approached people living in African villages or on Pacific islands. As those anthropologists had done, we should use the ethnographic method to discern how these contemporary “natives” view the world and order their societies.¹⁵ Our students would be our collaborators in this project. Obviously, we could not send out a class of students to live among practicing lawyers, but we could bring the lawyers to us. We therefore decided to organize the course around one particular element of the anthropological method, the ethnographic interview.¹⁶ In the course of their field projects, anthropologists have always devoted a significant amount of time to lengthy, qualitative interviews of a diverse group of members of the society they are studying.¹⁷ Working from a general and flexible topic outline, anthropologists prompt their interlocutors (traditionally called “informants”) to set the specific agenda, moving from topic to topic as they see fit, giving various topics such emphasis as they may choose, and commenting freely on their cultural outlook and practices.¹⁸ The theory of the ethnographic interview is that, in addition to the substantive information that may be provided, the informant’s selection of some topics, avoidance of others, and relative emphasis on particular subjects are themselves an invaluable form of data.¹⁹ To enhance the value of these data even further, in recent years many anthropologists (including me) have engaged in highly detailed linguistic analyses of the precise ways in which informants choose to express themselves.²⁰

Haskell and I therefore decided that the centerpiece of the course would be lengthy, in-class ethnographic interviews with a substantial number of lawyer-informants chosen to represent the wide range of settings in which lawyers practice. Our hope—more than amply fulfilled—was that we would begin the questioning in each interview and the students would join in as they became more comfortable with the method. The interviews would be supplemented by post-interview analyses of what we had heard

15. See, e.g., *id.* at 4–8 (applying the ethnographic interview method to contemporary business organizations).

16. See SCUPIN, *supra* note 7, at 135–36 (discussing ethnographic interview techniques).

17. See *id.*

18. See *id.*

19. See FORTUNE & FOLLY, *supra* note 5, at 7–8.

20. See, e.g., CONLEY & O’BARR, *supra* note 13, at 34–39 (discussing the method of linguistic analysis of narratives told by small claims court litigants); SUSAN F. HIRSCH, PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT 63 (1998) (examining the use of language by women in Islamic courts in Africa).

and such reading as was available. In 1996, the prospective reading list was very short, but very good. It consisted of two books: *Lives of Lawyers: Journeys in the Organizations of Practice*, an insightful and elegantly written ethnographic study of five practice organizations by then-Georgetown law professor Michael J. Kelly²¹; and *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys*, a comparable study by the sociologist Carroll Seron that focuses on the lives of practitioners in the New York metropolitan area.²²

We began teaching the course in the spring of 1996, and we (or I, since Haskell's retirement in 1998) have taught it each year since, twice at Duke Law School and otherwise at UNC. The course now satisfies the professional responsibility requirement at both schools. To my knowledge, it is still one of a few courses of its nature taught at any law school.²³ Over nine iterations, we have interviewed thirty-two lawyers for a total of more than 150 hours. They include solo criminal and civil practitioners; members of small, medium, and large private firms; state and federal government lawyers; legal aid lawyers and public defenders; in-house counsel; university counsel; lawyers from non-profit organizations; prosecutors; and judges. All but seven of these lawyers have been in practice in North Carolina for at least part of their careers, and about half have been alumni of UNC or Duke. Judging from teaching evaluations and informal conversations, many students have found it to be something of a revelation.²⁴ While most students in the class will have had some summer or part-time work experience, this course has been their only opportunity to gain a detailed comparative perspective on the breadth of their chosen profession. In particular, many students who thought they were committed to a particular career track (Duke students headed for large private firms, for example) have expressed appreciation for having their eyes opened to

21. MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATION OF PRACTICE* 18–21 (1994).

22. CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* (1996). These books and the rest of the relevant literature are discussed more fully in Part II *infra*.

23. A 2004 sampling of online law school catalogs has not turned up anything that is directly comparable. About one-fifth of law schools appear to offer a course with a title such as “The Legal Profession”; these are typically described as rules-based courses supplemented by a consideration of practical ethics problems and the role of the profession in society. UNC is now one of many schools that offer “externships” (placements in law practices, most often with non-profit entities) for academic credit, and these usually include sessions in which a faculty member leads the students through a reflection on their experiences. See SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, 2003–04 RECORD. I did have a phone call in 2003 from a Stanford adjunct professor who said that he was developing a course similar to The Law Firm, but a course such as he described does not appear in Stanford’s online catalog.

24. See *infra* Part I.B.

the range of things that lawyers can do.

During the past two years, I have had several occasions to discuss this course at academic conferences and continuing legal education programs, and these experiences have prompted two realizations. First, Paul Haskell and I believe that we have developed a novel and valuable approach to teaching students about the legal profession. In addition to providing information about the realities of law practice, our approach can inculcate in students a mode of analysis that may aid their professional socialization and improve their ability to cope with the twists and turns of a career in a constantly changing profession. The course may also add to the repertoire of solutions to the seemingly never-ending problem of how to teach professional responsibility.²⁵ The PR course has had a troubled history ever since it was mandated in the wake of Watergate.²⁶ I was a member of the first class at Duke Law School that was required to take it. We resented the fact that it was mandated; our resentment increased as we came to see it as a shallow, almost trivial response to the ethical enormities of Watergate. Since those early days, law faculties have been creative in their efforts to add depth and color to didactic instruction in the ABA Model Rules of Professional Conduct.²⁷ Even now, however, most of the professional responsibility teachers I know report that it is difficult to get law students engaged in anything that goes beyond preparation for the Multistate Professional Responsibility Exam (MPRE).²⁸ The literature on the subject (reviewed in Part I.A) tends to confirm this generally dour view.

The second realization has been that the cumulative learning from these nine years of in-class interviews also comprises a valuable body of research. There are several recent surveys of the profession from various

25. See Elizabeth Chambliss, *Professional Responsibility: Lawyers, a Case Study*, 69 FORDHAM L. REV. 817, 819–22 (2000) (analyzing the flaws in the current teaching of professional responsibility); KELLY, *supra* note 21 at 223–26 (outlining the drawbacks of the “problem method” of teaching professional responsibility).

26. See KELLY, *supra* note 21 at 223; Rhode, *supra* note 1, at 148–151.

27. This school, for example, offers Professional Responsibility: Ethics for Litigators, which is being taught for the first time in the spring of 2004 by Professor Kenneth Broun. Last year’s catalog listed “Professional Responsibility: A Narrative Approach,” which, according to its description, uses “lawyer narrative, short stories, novels, oral histories, and autobiography” to examine ethical norms. SCHOOL OF LAW, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, 2002–03 RECORD. The Duke online catalog for this year lists “Ethics in Action,” in which the students sit as a mock professional responsibility committee. *Duke University School of Law Curriculum*, at <http://www.law.duke.edu/curriculum/coursesFrame.html> (last visited Feb. 17, 2004) (on file with the North Carolina Law Review). Stanford offers “Ethics in Practice,” a course in which students must do and report on two hours per week of pro bono work in a nonprofit or governmental agency. *Stanford Law School Courses*, at <http://www.law.stanford.edu/courses/> (last visited Apr. 7, 2004) (on file with the North Carolina Law Review).

28. This multiple-choice ethics test is required for admission to the bar in almost all states. See Chambliss, *supra* note 25, at 819 n. 9.

locales and a few interview-based studies, but the range and depth of our qualitative sample is unusual: over 150 hours of conversations with thirty-two lawyers chosen to represent the breadth of the profession.²⁹ In particular, our interview corpus is a unique window into the state of the profession in North Carolina, an ethnographic complement to a growing body of survey research. The single most significant theme that emerges from these interviews may be that things are not that bad: despite reports of epidemic disaffection, lawyers continue to meet and overcome daunting challenges in a remarkable array of practice settings. Moreover, for reasons of geography, demography, and culture, this state's lawyers may have been spared some of the worst problems experienced by their counterparts elsewhere.

This Article will address both the pedagogical and research aspects of The Law Firm in an effort to make three major points. First, in Part I, I will make the pedagogical argument that the ethnographic approach taken in this course is a significant innovation in teaching professionalism and professional responsibility. I will attempt to show how the ethnographic approach permits students to discern the nature of professionalism and professional responsibility while avoiding the stigma of the traditional professional responsibility course; allowing students to learn, as it were, in spite of themselves. Second, in Parts II and III, I will review the current literature on the state of the legal profession and then describe and analyze what I have learned in the classroom interviews. Given the informants on whom we have drawn, this learning focuses on the legal profession in North Carolina. I will, however, identify and comment on those respects in which the state of the profession in North Carolina appears to differ materially from what is going on elsewhere in the country. Finally, in the Conclusion, I will attempt to answer the question I posed in the title—"How Bad Is It?"—and then make the pedagogical argument that this course merges teaching and research in a novel and useful way. Many students think that professors do research at the expense of teaching; some professors think just the opposite. In this course, I have been able to do both, and I will ask whether this sort of merger might be more broadly applicable.

I. THE LAW FIRM AS A WAY TO TEACH PROFESSIONAL RESPONSIBILITY

A. *Traditional Approaches*

When asked to describe the traditional, rules-centered professional

29. See *infra* Part III.

responsibility course, my faculty colleagues tend to use such words and phrases as “difficult,” “troubled,” and “hard to teach.” In an especially thoughtful recent article on the teaching of professional responsibility, Elizabeth Chambliss, former Research Director of Harvard’s Program on the Legal Profession, concludes that “the traditional course on professional responsibility tends to be boring and unpopular with both students and faculty.”³⁰ Other law teachers have been even more blunt, characterizing professional responsibility as “an unloved orphan of legal education,” a subject that is “unteachable,” and “the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts, and generally disregarded by the faculty at large.”³¹ Nothing I have ever heard from colleagues and students at UNC would cause me to challenge these assessments.

The reasons for this state of affairs are manifold. Some date back to the birth of the mandatory professional responsibility course in the immediate aftermath of Watergate. As I mentioned, I was a member of the first Duke law class (1977) that was required to take the professional responsibility course.³² We students found it immensely flawed, both in concept and execution. On a conceptual level, we sensed—and sensed that the faculty sensed—that the imposition of the course was a superficial and ill-thought-out effort at public relations damage control by the legal profession after Watergate. Above all, it struck us as absurd to think that Richard Nixon, John Mitchell, John Dean, and the other administration lawyers had behaved as they did because of an incomplete understanding of the ABA Model Code of Professional Responsibility (the predecessor of the current Rules).³³ The faculty presented us with a hastily constructed, two-hour pass/fail lecture course on the code, from which we inferred that the faculty agreed that this was an utterly incommensurate response to what was on the public’s mind. For many whose professional memories go back more than twenty-five years, the traditional professional responsibility course has never lost this taint.

Many see the Enron scandal as this generation’s version of Watergate, a public catastrophe that cast the legal profession into further disrepute. Although accountants bore the brunt of the adverse publicity, lawyers were

30. Chambliss, *supra* note 25, at 821. Another interesting and wide-ranging discussion of the problems of teaching professional responsibility can be found in Symposium, *1997 W.M. Keck Foundation Forum on the Teaching of Legal Ethics*, 39 WM. & MARY L. REV. 283 (1998).

31. Chambliss, *supra* note 25, at 821 n. 19.

32. See *supra* notes 26–27 and accompanying text.

33. MODEL CODE OF PROF’L RESPONSIBILITY (1969) (replaced by the first version of the Model Rules in 1983).

criticized on at least two scores.³⁴ Some noted that the lawyers had driven the getaway car, by drafting the documents and writing the opinion letters that facilitated the company's financial legerdemain.³⁵ Others made the more subtle point that lawyers had collaborated in bringing about changes "that destabilized our contemporary corporate governance system."³⁶ As was the case after Watergate, legal "reforms" came quickly after Enron. Some focused directly on the conduct of lawyers. The most important of these, Section 307 of the Sarbanes-Oxley Act of 2002,³⁷ was "[p]atched together in a frenetic frenzy of legislation."³⁸ It directed the Securities and Exchange Commission ("SEC") to promulgate a rule requiring lawyers with knowledge of material wrongdoing to report it up the corporate ladder, all the way to the board of directors if necessary.³⁹ The SEC complied by adopting its "Part 205" rules in early 2003.⁴⁰ On a parallel track, the ABA sought to promote similar ends by amending the Model Rules of Professional Conduct to encourage reporting up the ladder and to permit disclosure of confidences when necessary to prevent wrongdoing.⁴¹

Despite the fact that Watergate and Enron both damaged the reputation of the legal profession, their respective effects on the teaching of

34. See Karl A. Groskaufmanis, *Climbing "Up the Ladder": Corporate Counsel and the SEC's Reporting Requirement for Lawyers*, 89 CORNELL L. REV. 511, 512 (2004) (noting that the role of lawyers came under scrutiny after initial focus on other "gatekeepers" such as accountants). This article appears in a symposium that provides a comprehensive analysis of Enron and its legal consequences. Symposium, *Enron and the Future of U.S. Corporate Law and Policy*, 89 CORNELL L. REV. 269 (2004).

35. See, e.g., Mike France, *What About the Lawyers?*, BUS. WK., Dec. 23, 2002, at 58.

36. John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 271 (2004).

37. Pub. L. No. 107-204, § 307, 116 Stat. 784 (2002) (codified at 15 U.S.C.A. § 7245(1) (2003)).

38. Groskaufmanis, *supra* note 34, at 514.

39. 15 U.S.C.A. § 7245(1).

40. Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205 (2003). For analysis of the SEC rules, see Groskaufmanis, *supra* note 34, at 515-20.

41. Rule 1.6, Confidentiality of Information, has been amended to permit (but not require) a lawyer to disclose confidential information to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, where the client has used or is using the lawyer's services to further the scheme; or to prevent, mitigate, or rectify substantial injury under similar circumstances. MODEL RULES OF PROF'L CONDUCT, R. 1.6 (as amended Aug. 2003). Rule 1.13, Organization as Client, now states that the presumptive course of action for a lawyer faced with the possibility of corporate wrongdoing is to refer the matter up the corporate ladder. *Id.* at R. 1.13(b). The same rule also permits the disclosure of confidential information "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the corporation," regardless of whether Rule 1.6 would permit the disclosure. *Id.* at R. 1.13 (c)(2). These rule changes are the result of the work of the ABA Presidential Task Force on Corporate Responsibility, all of which is available at <http://www.abanet.org/buslaw/corporateresponsibility/home.html> (last visited Feb. 17, 2004) (on file with the North Carolina Law Review).

professional responsibility have been markedly different. Watergate's impact was revolutionary, as it brought the modern professional responsibility course into existence. Enron, for all the professional angst, political posturing, and legislative action it has spurred, has simply added another interesting topic to that course. As far as the reputation of lawyers is concerned, I believe that, in Enron as in Watergate, the failings that have most distressed the public are rooted much more in the moral shortcomings of individual wrongdoers than in inattention to the Rules of Professional Conduct.⁴²

Chambliss advances several other reasons for the troubled status of the traditional professional responsibility course. First, she argues, the conventional approach "assumes the centrality of professional discipline," whereas most lawyers "would agree that professional discipline is only marginally relevant to lawyers' day-to-day conduct in the management of professional organizations."⁴³ Specifically, the overwhelming majority of disciplinary actions are brought against the diminishing population of solo practitioners, and almost all of those proceedings result in perfunctory dismissal of the complaint.⁴⁴ As a practical matter, she contends, the large numbers of lawyers who work in medium-sized and large firms are immune from professional discipline.⁴⁵

Chambliss next argues that the traditional course's "overwhelming focus on conflicts and confidentiality" produces "a distorted empirical picture of the profession."⁴⁶ A student may thus emerge from a traditional course thinking that professional responsibility consists largely of mulling over the confidentiality of client communications and wrestling with conflicts of interest in a large-firm environment. The more probable reality is that most lawyers go years without ever worrying about the confidentiality of a client communication. While conflicts are a regular feature of life in the largest firms, and occasionally arise for small firms and solo practitioners who are asked to be "lawyer for the situation,"⁴⁷ they are typically resolved in straightforward fashion. The rules-based approach

42. For an analysis of public disaffection with the legal profession, see Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 285-89 (1998). In my judgment, people should not need law school ethics courses to teach them not to lie, not to cover up crimes, or not to cook corporate books. The perpetrators of these acts could have identified them as wrong by consulting the Ten Commandments or simply asking, "Would my mother approve of what I'm doing?"

43. Chambliss, *supra* note 25, at 819.

44. *Id.*

45. *Id.* at 820.

46. *Id.*

47. For example, a lawyer might be asked to represent the buyer and seller of a house or a husband and wife planning an "amicable" divorce.

thus ignores entirely what our course's informants tell us over and over is the biggest challenge to their professionalism: finding a way to do high-quality and fairly priced work in the face of daunting personal and economic pressure.⁴⁸

Chambliss's third criticism is that, whereas in most law school courses the faculty encourages the development of a broad analytic framework that can be applied to a wide range of situations, the traditional professional responsibility course "tends toward particularistic analysis: a particular profession, a particular problem, and the application of a particular rule."⁴⁹ Relatedly, Chambliss argues, the Model Rules of Professional Conduct themselves, and thus the traditional rules-based course, focus "on lawyers' individual conduct and make the lawyer-as-individual the primary unit of analysis."⁵⁰ This bias, of course, is at odds with the social nature of modern law practice. Most lawyers practice within organizations,⁵¹ and even the remaining soloists report that they often participate in and rely upon informal networks and relationships.⁵² A further consequence of this individualistic bias is to diminish or ignore "the stewardship of the profession and its institutions and organizations" as a component of professional responsibility.⁵³

Although every aspect of Chambliss's critique has considerable merit, it should not be read as an argument against the mandatory study of the Rules of Professional Conduct. While a study of the rules is demonstrably insufficient to the development of a meaningfully holistic concept of professionalism, it is clearly necessary. The instances of lawyer misconduct that are most appalling to the public may be driven by such fundamental vices as greed and dishonesty, but lawyers do face ethical dilemmas that cannot be resolved by reference to everyday morality. This is the core argument of Haskell's book, *Why Lawyers Behave As They Do*.⁵⁴ Writing for a lay audience, he points out that, for good reasons, professional ethics may sometimes permit or even *require* things that most non-lawyers might view as immoral.⁵⁵ Examples include discrediting a truthful witness, assisting a client in using a statute of limitations to avoid a just obligation, and working vigorously for the acquittal of a "guilty"

48. The generalizations in this paragraph are derived from interviews in The Law Firm. See *infra* Section III.

49. Chambliss, *supra* note 25, at 821.

50. *Id.* at 821-22.

51. *Id.* at 820 n.14.

52. See *infra* Part III.A.4.

53. Chambliss, *supra* note 25, at 822.

54. HASKELL, *supra* note 3.

55. *Id.* at 1.

criminal defendant.⁵⁶ Conversely, professional ethics also prohibits a number of things that most lay people would regard as perfectly moral. For example, it is not morally self-evident that a lawyer should decline to help the buyer and seller of a house to save time and money by serving as counsel for both parties to this ostensibly non-adversarial transaction. The fully informed legal professional needs to understand when and why the norms of professional responsibility deviate from their everyday moral counterparts, and to be able to explain such deviations to clients and the larger public. Only the close study of the Rules of Professional Conduct can provide such capabilities.

The essence of Chambliss's critique—and the point of The Law Firm—is thus not the dispensability of the rules-centered approach, but its insufficiency. Specifically, the rules require context. They are but a part of what it means to be a legal professional. Chambliss's personal solution to the teaching dilemma is a "sociological approach" that "makes the empirical study of the professional a central feature of the course."⁵⁷ Thinking independently along parallel lines, Haskell and I came to a similar conclusion when we undertook the initial design of The Law Firm. At least implicitly, the central question in the rules-centered course is, "What kinds of conduct can bring about professional discipline?" The law firm course is organized, explicitly, around a broader range of questions:

How do lawyers practice in different kinds of professional settings?

What kinds of challenges and temptations—ethical, personal, and economic—do they face?

What resources, including but not limited to rules, do they draw on in responding to such challenges and temptations?

What are the implications of these answers for the organizations in which most lawyers practice, and for the profession itself?

The operating premise of The Law Firm has been that this broader and more realistic focus could simultaneously create a more meaningful understanding of the legal profession and alleviate some of the disaffection historically felt by both teachers and students of professional responsibility. As the teacher, I can confirm that, far from being disaffected, I am thoroughly engaged; to the extent that teaching evaluations and informal

56. See *id.* at 1–18 (analyzing the behavior of lawyers when confronted with a variety of such situations).

57. Chambliss, *supra* note 25, at 822. By "empirical study," Chambliss appears to mean study of the empirical literature as opposed to empirical research.

student comments are reliable, the students seem to be as well.

B. The Structure of The Law Firm

In its current configuration, The Law Firm satisfies the professional responsibility requirement at both Duke and the University of North Carolina. I make the point to the students at the outset that this is *not* designed as a preparation course for the MPRE and that those seeking such a course should go elsewhere. Nonetheless, during the first two weeks, I guide the students through a reading of the ABA's Model Rules of Professional Conduct. (In the spring of 2004, at UNC, I have decided to use the actual North Carolina Revised Rules of Professional Conduct instead.⁵⁸)

I cover the rules for three reasons. First, my expectation is that virtually all UNC and Duke students, regardless of their choice of professional responsibility course, will take an MPRE preparation course. Nonetheless, I feel a professional obligation to ensure that all of our graduating students have been exposed to a noncommercial, academic commentary on the rules. Second, I want to have an opportunity to comment on particular areas that are currently the subject of debate and change. In the post-Enron spring of 2004, for example, the "hot" topics are the ABA's revisions to Rules 1.6 and 1.13, which deal, respectively, with disclosure of confidential communications where necessary to prevent crime or fraud and with the duties of a lawyer representing an organization such as a corporation.⁵⁹ Third—and most important from my perspective—I want to provide context and background for the interviews and discussions that will follow. While, as I have just emphasized, the rules are not the central feature of the course, it is necessary to evaluate particular dilemmas in light of the rules. I therefore think it essential for students to be familiar with their structure and principles and to be able to refer to them with some facility.

I next digress briefly to explain and to justify the use of the ethnographic approach. I begin by posing the general question of how one might plausibly study complex social behavior such as law practice. I

58. I decided to do this for two reasons. First, a significant majority of our graduates go into practice in North Carolina. Second, the North Carolina rules and official comments are available on the internet, so the students can get them free and I can project them in class. North Carolina Revised Rules of Prof'l Conduct (2003), *available at* http://www.ncbar.com/rules/rul_sup_rev.asp (last visited Aug. 9, 2004) (on file with the North Carolina Law Review). The ABA refuses to post its Model Rules on the internet; when I inquired about this policy, I got the (to me) specious explanation that its purpose is to ensure that the rules are never used out of context.

59. *See supra* note 41 and accompanying text.

review the strengths of survey research and other aggregating, statistical approaches, but point out that their purpose is to smooth over the very kinds of variation that might be of greatest interest to a person seeking to understand what it is like to be a lawyer.⁶⁰ I then develop the concept of culture as a set of shared resources for responding to the challenges of daily life. Drawing on my experience as an anthropologist, I argue that one can profitably think about professional cultures at multiple levels: a loose, often fractionated culture of the profession as a whole; and the more coherent cultures of individual practice organizations. I encourage my students to begin thinking about such questions as how shared beliefs and practices are initiated and maintained in professional organizations; how culture exerts influence at the level of the individual; and how dominant beliefs and practices can be challenged, subverted, and ultimately superseded.

I usually conclude this section of the course by describing the history and practice of ethnography, drawing both on personal experience and the broader record of anthropology. I raise and attempt to deal with the argument that ethnography amounts to little more than the collection of anecdotes. I begin by acknowledging that a qualitative, opportunistic technique like ethnography can never make statistically defensible statements to the effect that "most people do this" or "most people think that."⁶¹ But that is not the purpose of ethnography. Ethnography seeks to identify the range of variation in human behavior, not the frequency of particular variants. Put somewhat differently, ethnography seeks to frame and refine the questions that survey researchers will ultimately ask.⁶² It does so by encouraging research subjects to identify and to elaborate on the things that are important to them.

In an ethnographic interview, I explain to the students, the researcher begins with very open-ended questions about what the subject does on a day-to-day basis and why, what is important, and what is especially challenging or difficult. In an avowedly interpretive analysis of the interviews, the ethnographer pays particular attention to what issues the subject identifies and the specific language in which the issues are discussed.⁶³ In my previous study of investment organizations, for

60. See, e.g., KOTTAK, *supra* note 4, at 49–54 (comparing quantitative and ethnographic methods).

61. See *id.*

62. See *id.* at 52 (presenting a general discussion of relationship between ethnography and quantitative research); WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* 51–53 (1982) (arguing for a complementary qualitative-quantitative approach in study of legal language).

63. See KOTTAK, *supra* note 4, at 34–36 (explaining that researchers must pay attention to hundreds of details of daily life); ELIZABETH CHISERI-STRATER & BONNIE STONE SUNSTEIN,

example, interview subjects repeatedly disclaimed any economic justification for their particular investment strategies, emphasized that they sold “relationships” to their clients, and discussed the challenges and satisfactions of their jobs in terms of sports metaphors.⁶⁴

But that said, what value can such narratives have? First, the fact that a member of a cultural group analyzes and interprets the world in a particular way is itself important. It does not, of course, permit one to generalize about what other members are thinking or doing. By the same token, however, aggregate data about a group as a whole do not allow one to say anything about any particular individual. By contrast, ethnography creates a set of firm data points grounded in actual members of the group. Unlike any aggregate method, ethnography permits a researcher to say, “This is what a set of real people actually report about their thoughts and actions.” Second, ethnography supports a limited but significant kind of generalization. If members of a cultural group repeatedly identify similar issues and discuss them in similar terms, then that constitutes a cultural theme.⁶⁵ It cannot be stated in terms of percentages, but it does take on a certain intellectual reality. If nothing else, ethnographic results constitute a far better basis for designing quantitative investigations than the presuppositions of the researchers. To use the example of my investment research once again, it never would have occurred to us to ask in a survey if investment professionals thought that they were selling primarily non-economic services.⁶⁶

Finally, the ethnographic method provides unparalleled depth. However well designed, a survey can provide no more than a glimpse of a subject’s reaction (which may or may not be ingenuous) to a carefully framed question. As I sat at my computer on January 2, 2004 writing the initial draft of this Section, I saw that Howard Dean enjoyed about forty percent support in polls of likely New Hampshire primary voters.⁶⁷ An ethnographic study of Dean enthusiasts in New Hampshire would not have revealed that fact. On the other hand, an ethnographer would have known a great deal about how and why a limited number of actual Dean supporters came to their positions, what they did to act out their beliefs, and what might cause those beliefs to be subverted. That is, an ethnographer would

FIELD WORKING: READING AND WRITING RESEARCH 169–70, 216–17 (1997) (stating that listening to the details of language provides further insight into the dynamics of a culture).

64. FORTUNE & FOLLY, *supra* note 5, at 147–57.

65. See, e.g., *id.* at 227–28 (discovering cultural themes in investment organizations).

66. See *id.* at 85–94 (discussing impact on investment decisions of such non-economic factors as avoiding responsibility and maintaining personal relationships).

67. See MSNBC, *Demo Derby: Dean Stays in the Lead Despite Comments* (Jan. 1, 2004), <http://www.msnbc.msn.com/id/3855919/> (last visited Aug. 27, 2004) (on file with the North Carolina Law Review).

have known little about how particular beliefs and practices were distributed, but a great deal about some of the beliefs and practices that comprised the data points along that distribution. (An ethnographic study might also have helped me to figure out why, as I sat again at my computer editing this Section on February 10, 2004, Dean had dropped off the political radar screen.) This depth of knowledge makes the ethnographic method particularly well suited to the study of something as subtle as legal professionalism.

We then go immediately to the ethnographic section of the course. During the next eight to nine weeks of the semester, we take up various types of practice in roughly the following order: large private firms, small-firm and solo private practices, medium-sized and specialized “boutique” private firms, in-house counsel, public service work (including legal aid), practice with nonprofit organizations, government service, prosecutors, and judges. For the past several years, the final interview has been an effort to address some of what I characterize as the legal profession’s “social issues,” including gender equity, racial diversification, and the problems of balancing professional demands with personal and family life.⁶⁸ We were joined in 2004, as we have been for the past three years, by a UNC alumna who is a member of a Boston Bar Association task force that has issued a series of comprehensive reports on the latter issue, together with one of her partners in a Boston-based national firm.⁶⁹

The final two weeks of the course are devoted to graded work. At the beginning of the semester, students are assigned the task of finding a practicing lawyer anywhere in the country and interviewing him or her for about an hour. The objective is to elicit the lawyer’s personal perspective on the pluses and minuses of a particular legal career and the state and probable future of the legal profession. I allow the interviews to be done in person or by telephone and I assist students who are unable to find subjects. Each student is then required to write a short paper summarizing and analyzing the contents of the interview. During the final two weeks of the course, each student (or as many as can be reached, if the class is large) is required to present a five-minute summary of the major themes of his or her paper and to respond to questions and comments. In the final one or

68. It might be more accurate to characterize this as an effort at synthesis, as these issues are present in varying degrees in almost all of the interviews.

69. BOSTON BAR ASS’N, Task Force On Professional Challenges and Family Needs, *Facing the Grail: Confronting the Cost of Work-Family Imbalance* (Sept. 1, 1999); BOSTON BAR ASS’N, Task Force on Work-Life Balance Implementation Plan, *An Implementation Plan for Addressing Work-Life Issues in the Legal Profession* (Sept. 11, 2000). See Boston Bar Association Publications, available at <http://www.bostonbar.org/pub/index.htm> (on file with the North Carolina Law Review).

two hours of class time, I present a summary of what I have learned from the semester's interviews. There is then a broad-ranging essay exam; recent exams have asked students to design and justify a governance system for a large private law firm; to explain the evolving relationship between in-house and outside corporate counsel and to predict its future; to take and justify a position on mandatory pro bono work; to comment on the kinds of practice that are appropriate for publicly-funded legal services organizations; and to evaluate the response of the profession to the increasing participation of women. I grade the exam answers much like papers, with primary emphasis on critical analysis, originality of thought, ability to make effective use of class interview data and written sources, and clarity of expression.

As I mentioned above, the reading centers on two books, Michael Kelly's *Lives of Lawyers* and Carroll Seron's *The Business of Practicing Law*.⁷⁰ Both are now somewhat dated (Kelly's book was published in 1994 and Seron's in 1996), but the qualitative analysis in both books continues to hold up well against our interview data. I discuss these books in detail in Part II.B below. I also include several shorter readings that change from year to year; in 2004, Patrick J. Schiltz's controversial 1999 article, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*,⁷¹ and Michael Kelly's response, *Thinking about the Business of Practicing Law*,⁷² as well as two much-discussed reports by the Boston Bar Association, *Facing the Grail: Confronting the Cost of Work-Family Imbalance*, and *An Implementation Plan for Addressing Work-Life Issues in the Legal Profession*.⁷³

The success of The Law Firm as a means of teaching professional responsibility is ultimately a judgment to be made by many years of alumni. Nonetheless, such evidence as I have accumulated to date is almost uniformly encouraging. First, in light of the difficulties so extensively reported by teachers of traditional rules-based courses, it is probably worth saying that I enjoy and learn from teaching the course. The classroom atmosphere is, from the teacher's point of view, excellent. The students show up, a substantial number volunteer, and those whom I conscript almost always respond with effort and good humor. Substantively, their comments indicate that they have done the reading and

70. See *supra* notes 21–22 and accompanying text.

71. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (portraying lawyers in private practice as overworked, unhappy, and often unethical).

72. Michael J. Kelly, *Thinking About the Business of Practicing Law*, 52 VAND. L. REV. 985 (1999) (providing a critique of the Schiltz article).

73. See *supra* note 69.

thought about the issues under discussion. After the first couple of weeks, the students participate actively and confidently (on occasion, even aggressively) in the questioning of interview subjects.

The teaching evaluations comprise a second body of evidence. From the inception of the course, they have been strongly and almost uniformly positive. Most of the criticism over the years has dealt with my penchant for delving too deeply into research methods and sociological theories about professionalism. In the early years of the course, students reported enjoying the personal and philosophical contrast between Haskell and me and our occasional vigorous disagreements on substantive matters; those sources of entertainment are now absent, regrettably. Nonetheless, students in recent years have reported that they have found the course's idiosyncratic approach to be refreshing and stimulating, that they have been fascinated by the interviews, and that they have come away with a unique perspective on daily life across the spectrum of the legal profession. Comments from the 2003 edition included the following:

"Practical application of the material to everyday life and insider's perspective."

"A good course to take before leaving law school to practice."

"Candid guests willing to field basically *all* questions."

I have come to take both the positives and negatives in student evaluations with a grain of salt. In my experience, they sometimes reflect more the reaction to a particular day's class or a brief encounter with the professor than a considered evaluation of the course. Still, I take some comfort from the fact that several years of evaluations have been consistent with students' in-class demeanor and my own assessment of the class dynamics.

A third issue in assessing the course is whether the students have learned enough to justify its professional responsibility credit. They do receive an introduction to the Rules of Professional Conduct, and they are able to enter into reasonably well-informed discussions of a number of ethical hypotheticals that I pose throughout the course. In addition, the interviews routinely include questions of ethics and professional responsibility, as when I ask an in-house corporate counsel, "Among all the people you deal with in the company on a day-to-day basis, whom do you treat as a client?" Many (but certainly not all) of the students' papers deal explicitly with professional ethics, at a level that is quite high by the standards of my other courses at the two schools where I have taught The Law Firm. The final examinations typically evoke considerable discussion

of professionalism and ethics, but rarely at the level of individual rules.

Overall, I have little basis for any claims about the level of my students' specific mastery of the rules, or for making any comparisons to what is achieved in the traditional two-hour courses. I have considerably more confidence in what they learn about the profession and the meaning of legal professionalism in a variety of contexts. The content and quality of the students' participation in our interviews, their papers, and their examinations give me great confidence that, with respect to these issues, they are learning at least as much as I am. The most important themes from this learning are the subject of Part III.

II. THE EMPIRICAL LITERATURE ON THE STATE OF THE PROFESSION

The Law Firm course interviews are carried out against the background of a considerable empirical literature on the state of the legal profession. I characterize this literature as empirical in the classical sense of being based on observation or experience,⁷⁴ but it varies greatly in depth and quality. Its message is inconsistent. Several rhetorical points are repeatedly made. The legal profession has descended from a golden age. The satisfaction, self-esteem, and prestige of lawyers, which used to be quite high, are at an all-time low and are probably getting worse. Moreover, while there is variation by type of practice, lawyers' disaffection is widespread. But the statistics that underlie many of these reports tend to be markedly more positive, leaving the reader to wonder whether the professional glass is half-empty or half-full.

A. *Early Research*

A useful starting point might be a volume published in 1954 by the University of Chicago Press: *The American Lawyer: A Summary of the Survey of the Legal Profession*, by Albert Blaustein and Charles Porter.⁷⁵ Commissioned in 1944 by the ABA, the survey comprised 175 separate reports compiled over seven years under the direction of the legendary Boston lawyer Reginald Heber Smith.⁷⁶ In answer to the question, "Who is the American lawyer?" Blaustein and Porter reported:

He is generally well known in his community, partly because of his leadership in politics and worth-while communal activities, partly because of his constant service to those in need. . . . Yet he is

74. See Warren Newton, *Rationalism and Empiricism in Modern Medicine*, 64 LAW & CONTEMP. PROBS. 299, 299 (Autumn 2001) (defining empiricism).

75. ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION* (1954).

76. *Id.* at v-xi.

surprisingly unpopular. . . .

His standards are high; and it must be said to his great credit that the standards are self-imposed. Not only must he meet the rigid character and educational barriers set by his brethren for admission to the trade but, once a member of the profession, he is required to conform to their—and his—rigorous code of principles and practice.

He is a good citizen. While his income places him squarely within the great American middle class, he seldom finds himself in the financial straits which beset other members of that class.⁷⁷

Seventy-nine percent of American lawyers were reported to be in private practice and sixty-eight percent in solo practice.⁷⁸ Fewer than ten percent of all lawyers were described as “salaried.”⁷⁹ While American lawyers might seldom have found themselves in financial straits, they were losing ground to the other professions: “In 1929, lawyer net incomes exceeded those of doctors and dentists. By 1951 the physicians had far outstripped the members of the bar, and the dentists were rapidly catching up.”⁸⁰ In that year, the average lawyer’s annual net income was \$8,730 versus \$13,432 for physicians and \$7,820 for dentists.⁸¹

Perhaps the strongest exception to *The American Lawyer’s* generally positive news about the legal profession came in a four-page section entitled “Women as Members of the Bar.”⁸² The survey reported that only two and one half percent of the country’s more than 200,000 lawyers were “Portias.”⁸³ This handful of women faced daunting barriers. Despite the fact that women had educational records equal to or better than their male peers, the survey reported that “[t]he majority of large law offices still refuse (short of war) to interview them for jobs Women must work twice as hard as men for half the pay.”⁸⁴ The outlook was bleak even for those who got past the hiring discrimination: “[T]he dimness of the general employment picture is accompanied by the stultifying nature of the work

77. *Id.* at 1.

78. *Id.* at 8.

79. *Id.*

80. *Id.* at 14.

81. *Id.* at 15 tbl.4.

82. *Id.* at 29–32.

83. *Id.* at 29. As late as the 1960s women lawyers were often referred to as “Portias,” after the female protagonist in Shakespeare’s *The Merchant of Venice*. In fact, the nation’s first law school dedicated to the education of women, founded in Boston in 1908, was called Portia Law School. It became coeducational in 1938 and changed its name in 1969 to New England School of Law. See *The History of NESL*, at <http://www.nesl.edu/about/history.cfm> (last visited April 24, 2004) (on file with the North Carolina Law Review).

84. BLAUSTEIN & PORTER, *supra* note 75, at 29.

the average woman performs in the law office. . . . [S]uch openings as there are often call for the additional skill of stenography."⁸⁵ Women who managed to get entry-level positions in large law firms were typically excluded from serious consideration for partnership, leading to the recommendation that women seek employment in government, legal aid, probate and tax practice, "or in some professional capacity for either trust or insurance companies."⁸⁶ The survey's consultant on women in law was graphic in her summary of what women were up against:

Women have their best chance with the government . . . where there is no client contact except at arm's length with worried citizens, where there is a tradition of civil service as opposed to the somewhat authoritarian structure in the law office, where real recognition is given for intellectual achievement and where there is not too much call, through the mass of the government pyramid, for imagination or daring. Not that women lack these qualities, but in normal practice they are rarely encouraged to show them.⁸⁷

Finally, the survey presented a somewhat mixed report on a problem that is now viewed with great concern: the negative public perception of the legal profession.⁸⁸ Public complaints were broken down into a number of categories, including the length and complexity of legal proceedings, the cost of legal representation (with a recognition that many people were wholly unable to afford a lawyer), and a general dissatisfaction with having to go through a high-priced intermediary to obtain justice.⁸⁹ But the report largely dismissed all of these complaints with a cheery glibness. The charge that rich people can buy justice was "nonsense"; there was "little to be said concerning the charge that lawyers are tools of big business"; it was not possible to "justify the complaint that lawyers have too much power."⁹⁰ With respect to the high cost of representation, "[s]olutions are found in the establishment of legal aid offices, lawyer-referral services, and other plans."⁹¹

No comparable subsequent analysis has been as upbeat. Specifically, a number of social scientists soon began to identify and study some of the trends that are currently of greatest concern to the profession. In 1964, for example, the sociologist Erwin Smigel published *The Wall Street Lawyer*,⁹²

85. *Id.* at 31.

86. *Id.*

87. *Id.* at 32.

88. *Id.* at 32-40.

89. *Id.*

90. *Id.* at 36.

91. *Id.* at 35.

92. ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?*

a study of large New York corporate firms that was based on the interpretive analysis of ethnographic interviews. Smigel focused on the “trend toward bigness,” which was already producing “mammoth” firms of more than one hundred lawyers.⁹³ Although most of his informants believed that such firms had “reached or passed their optimum size,” he predicted continued growth in cities throughout the country.⁹⁴ He further predicted that all firms, even those that did not grow, would become more specialized and more bureaucratic; as a result of the managerial demands on partners, firms would be organized and governed more like businesses and “less in the tradition of the profession.”⁹⁵

In 1975, law professor John Heinz and sociologist Edward Laumann conducted a landmark study of the Chicago bar based on structured, quantitatively analyzed interviews⁹⁶ with more than 700 lawyers.⁹⁷ They observed a “great divide . . . between the kinds of law practices that serve primarily corporate clients and those that serve primarily individual persons or small businesses.”⁹⁸ They described the bar as being divided into “two separate professions” that differed in prestige and social background and whose members had little personal contact with each other.⁹⁹ Ironically, in their judgment, the more prestigious of these “hemispheres,” the one whose members represented corporate clients rather than individuals, enjoyed less independence. Heinz and Laumann found that “corporate clients to a large degree dictate the nature of the work done,” whereas lawyers representing individuals “dominate their clients in the decisions that are made about the work.”¹⁰⁰

(1964).

93. *Id.* at 350.

94. *Id.* at 350–51.

95. *Id.* at 351.

96. Traditionally, ethnographers have interpreted their interviews qualitatively. Other social scientists use interviews in more controlled ways. As in the Heinz and Lauman study, the questions are scripted and the answers “coded,” meaning that particular elements of the responses are sought, identified, counted up, and analyzed statistically. See KOTTAK, *supra* note 4, at 34–38, 49–51.

97. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (rev. ed. 1994). The 769 lawyers interviewed were “overwhelmingly white and male.” *Id.* at 6.

98. *Id.* at 91.

99. *Id.* at 171.

100. *Id.* In a replication of the Chicago study in 1995, Heinz, Laumann, and two other colleagues found that the structure of the profession had become more complex. See John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998). They found that the two hemispheres they had observed in 1975 had endured, and had become even more distinct and clearly separated. *Id.* at 772–73. At the same time, the growth in specialization had caused the bar to be differentiated into even smaller clusters. *Id.*

In the 1980s, another sociologist, Eve Spangler, investigated the accelerating trend of lawyers working as salaried employees rather than independent professionals. Her study, published in 1986 as *Lawyers for Hire: Salaried Professionals at Work*,¹⁰¹ was based on structured interviews¹⁰² with lawyer-employees in large private law firms, corporations, government agencies, and legal services offices. One of her most striking findings was that these lawyers, either oblivious to or ignoring the realities of their situations, did not think of themselves as employees:

With the exception of poverty lawyers, however, few attorneys seem concerned about the intrinsic difficulties of being employees. They show little inclination to act in keeping with their common interests and experiences as staff people. Indeed, focused as most of them are on the content of their work rather than its organization, they fail to perceive their commonalities.¹⁰³

Ultimately, she concluded, “[t]he fate of staff attorneys seems to move somewhat closer to the fate of everyman, that of relatively powerless individuals being absorbed by very powerful organizations.”¹⁰⁴

B. Legal Memoirs

Alongside this social science literature, there has existed the genre of the personal legal memoir. Typically, lawyers of great distinction and prestige (or at least great enough to get them a book contract) reflect on the changes in the profession over their long careers. These books can be more or less empirical, depending on the specificity of the author’s recollections and the use of other sources of information. The better ones are in themselves a kind of ethnographic data, documenting one informant’s experience-based assessment of the profession. An example is Michael Trotter’s *Profit and the Practice of Law: What’s Happened to the Legal Profession*.¹⁰⁵ Drawing on his personal experience as an Atlanta lawyer and a broad range of quantitative data, Trotter chronicles the evolution of private-firm practice over the course of his professional lifetime from 1960 to 1995. He focuses on many of the issues that have been the subject of

101. EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* (1986).

102. In the study reported in this book, Spangler employed a hybrid method. She used scripted interviews but analyzed them in a qualitative, interpretive way. *Id.* at x–xii.

103. *Id.* at 177.

104. *Id.* at 195. For a general discussion of the implications of this trend, see Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543 (2004); RICHARD L. ABEL, *AMERICAN LAWYERS*, 166–211 (1989).

105. MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT’S HAPPENED TO THE LEGAL PROFESSION* (1997).

social science research, including the growth in law firm size; the changing economics of law practice, especially the tyranny of billable hours over lawyers' lives¹⁰⁶; and the consequent difficulty of balancing personal and professional lives.¹⁰⁷

Regrettably, Trotter's book is the exception rather than the rule. Most of the personal memoir genre is far more editorial than empirical. An example is Sol Linowitz's *The Betrayed Profession*, in which a lawyer best known as President Carter's Panama Canal treaty negotiator laments, in pontifical terms, the decline of the legal profession from a mythical golden age.¹⁰⁸ In a similar vein, in his book *The Lost Lawyer*, Yale law dean Anthony Kronman bemoans "the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers."¹⁰⁹

C. Recent Ethnographic Studies

The 1990s saw the proliferation of empirical studies of the state of the legal profession. A number have been ethnographic and interpretive, whereas others have used surveys and scripted interviews to generate quantitative data. Foremost among the ethnographic works is Michael Kelly's *Lives of Lawyers: Journeys in the Organizations of Practice*.¹¹⁰ Kelly, who holds both a law degree and a Ph.D. in history, is a long-time law school dean who then became a university administrator.

Lives of Lawyers is a book of stories (or narratives, as many social scientists would call them), and stories about stories (meta-narratives, in the jargon of social science). Interestingly, Kelly was initially driven to collect stories by the difficulties of teaching professional responsibility in the 1970s.¹¹¹ He began with the circumscribed objective of studying practice organizations to generate ethical problems for teaching.¹¹² As he puts it, however, "I soon had to abandon this approach when, in my first story [of the law department of a government agency], I found myself drawn to write about a law-practice organization that seemed to have its own logic or story rather than the ethical problems for which I was looking."¹¹³ What ensued was a lengthy, open-ended, interview-based

106. This issue is discussed at length in Parts III.A.3 and III.B.5 *infra*. See Schiltz, *supra* note 71, at 899–900 (explaining how billable hour demands dominate lawyers' professional lives).

107. See TROTTER, *supra* note 105, at 81–100.

108. SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

109. ANTHONY T. KRONMAN, *THE LOST LAWYER* 2 (1993).

110. KELLY, *supra* note 21.

111. *Id.* at 223–27.

112. *Id.* at 223–24.

113. *Id.* at 229.

investigation of five practice organizations: a large, recently merged private firm;¹¹⁴ a medium-sized “quality of life” private firm¹¹⁵; a corporate in-house counsel department;¹¹⁶ the law department of a public agency;¹¹⁷ and a small partnership of “cause” lawyers who focus on criminal defense and civil rights work.¹¹⁸ Rather than the distance and perspective that quantitative data can provide, Kelly sought the reality of “the day-in, day-out struggle to build a life in the profession that resolves the competing demands of economic stability and values of collegueship, craftsmanship, and professional statesmanship.”¹¹⁹ Lawyers in the various organizations told him stories, which he collected and distilled into his own story of each organization.¹²⁰

Kelly then asked whether these stories could somehow be assembled into an overarching “story of the profession,”¹²¹ with particular emphasis on accounting for the changes that others had been documenting since the 1960s. He finds that “two different reactions or stories, one accepting, one critical, have emerged as explanations of these changes.”¹²² The first is an “upbeat, even breathless and celebratory, version of the story”; it “originates from the new legal journalism” exemplified by Stephen Brill’s *American Lawyer*.¹²³ This narrative, redolent of social Darwinism, revels in “the transformation of American law practice and the emergence of top-tier firms, great leaders, brash young lawyers who are magnets for business, and the general excitement of it all.”¹²⁴ In contrast is “a story told with some emotion about a decline in values, the triumph of greed, the transformation of law from a public good to a marketplace commodity, and a ‘profession’ degenerating into a mere ‘business.’”¹²⁵

Kelly ultimately concludes that these and other master narratives are unduly simplistic. At a very high level of abstraction, he sees evidence of such trends as stratification, bureaucratization, and increasing economic pressure.¹²⁶ But, as usually happens in ethnography, the variation that Kelly observed became far more interesting to him than the consistencies. For example, in testing the theory that loss of autonomy is destructive of

114. *Id.* at ch. 2.

115. *Id.* at ch. 3.

116. *Id.* at ch. 4.

117. *Id.* at ch. 5.

118. *Id.* at ch. 6.

119. *Id.* at 19.

120. *Id.* at 228–35.

121. *Id.* at 195.

122. *Id.* at 2.

123. *Id.*

124. *Id.* at 3.

125. *Id.*

126. *Id.* at 1–2.

professionalism, he found that “the reality of autonomy may be strongest in [the corporate legal department that he studied], in which the lawyers are literally the employees of the client they serve.”¹²⁷ He saw in that department the highest expression of such “professional” values and behaviors as collegiality, the client’s respect for the independent judgment of the lawyer, and the lawyer’s readiness to provide far-reaching counsel that goes well beyond legal technicalities. In a parallel confounding of conventional wisdom, he found that his mid-sized, small-city “lifestyle” firm had evolved a business model far superior to those of its more aggressive and self-consciously “businesslike” competitors.¹²⁸

In one sense, Kelly might be viewed as discovering incoherence, that the generalizing power of means and medians is illusory. He himself seems to acknowledge this when he states: “One conclusion I draw from reflecting on these stories is the idea of a legal profession grows less and less coherent. . . .”¹²⁹ But so to characterize Kelly’s work would be an injustice—an injustice that I can begin to rectify by finishing his sentence: “as the organizations of practice become stronger and develop their unique identities in the face of competing professional ideals and competitive market forces.”¹³⁰ To put it more fairly, what he has discovered is that coherence is local, that organizational principles at the local level have more explanatory power than the grand, deterministic generalization. Kelly, in other words, has discovered the significance of culture.

As Kelly puts it, “[t]he premise of this book is that the culture or the house norms of the agency, department, or firm play a dominant role in the way a lawyer practices.”¹³¹ More specifically:

[T]he organization profoundly affects the lives of lawyers: from styles of dealing with clients to relationships with colleagues and co-workers; from the choice of legal work itself to connections with civic and community life; from the social status of the practice to the sense of professionalism; from lawyers’ incomes to feelings of satisfaction and fulfillment in a career.¹³²

Because “practice organizations now by and large constitute the legal profession(s),” Kelly concludes, “no coherent account of professionalism, legal ethics, or the contemporary legal profession is possible without understanding the workings of practice organizations.”¹³³ The “culture or

127. *Id.* at 196.

128. *Id.* at 73–77, 197.

129. *Id.* at 218.

130. *Id.*

131. *Id.* at 18.

132. *Id.*

133. *Id.*

house norms" of a particular practice organization involve "an identity, a character, and value that affects the distinctive outlook, habits, and other commitments of organizational life."¹³⁴

An obvious question to ask of Kelly's data is where the "culture or house norms" of a particular organization come from. An answer emerges over and over again from his case studies. The cultural character of a particular organization depends largely on the character, values, and habits of its individual members in interaction with economic and other external pressures. Moreover, not all members contribute equally. Founders are particularly important, particularly in relatively small organizations that are only a generation or so old.¹³⁵ Subsequent additions to the organization who emerge to exert situational leadership may also contribute to culture formation in ways that are individualistic and highly variable.¹³⁶ Although Kelly might be read as claiming that organizational culture exerts a deterministic effect on the behavior of its members, the clear implication of his case studies is that the influence works both ways: culture does shape the norms, values, and behavior of individuals, but there are circumstances in which individuals can reshape culture.¹³⁷

A final point concerns Kelly's handling of the concept of culture. Until the 1960s, anthropology tended to view culture as a "thing," a "superorganic" entity that mysteriously directs the lives of its members.¹³⁸ The current understanding is far less deterministic. It holds that culture is a set of interpretive resources shared, more or less, by the current members of a group and transmitted to new members.¹³⁹ This perspective accommodates simultaneously two manifest if somewhat contradictory truths: that cultural norms are real and powerful and that such norms are continually resisted, subverted, and changed. Although Kelly's treatment of culture is considerably subtler than anthropology's early-twentieth-century approach, he stops short of characterizing it as a flexible bundle of resources. Arcane debates about cultural theory have little place in a professional responsibility course. Nonetheless, I do think it important to

134. *Id.* at 216.

135. See, for example, Kelly's story of the founder of the firm of "Mahoney, Bourne, and Thiemes." *Id.* at 53-57. Even after his sudden death, and the succession of a new leader with a very different personality and style, the founder's values continued to animate the firm. *Id.* at 53-55.

136. The Mahoney firm also illustrates this phenomenon. *Id.* at 55-57.

137. For further discussion of this issue in the context of the in class interviews, see *infra* Part III.B.4.

138. The classic statement of this outlook is Alfred Kroeber, *The Superorganic*, 19 AM. ANTHROPOLOGIST 163 (1917).

139. For a discussion of the current perspective see Conley & O'Barr, *supra* note 5, at 9-10 and sources cited therein.

remind students that the idea is far more complex than the current "corporate culture" craze would suggest.

A second significant ethnographic study of the profession from the 1990s is *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* by Carroll Seron,¹⁴⁰ a sociologist at the City University of New York. Like Kelly's *Lives of Lawyers*, this book is based on interviews. Here, however, the interviews were structured and ninety minutes in length.¹⁴¹ As the title suggests, Seron limited herself to solo and small-firm lawyers who deal with individual clients.¹⁴² In addition, the 102 interviews were all conducted in New York City and the surrounding metropolitan area.¹⁴³ Significantly, whereas Kelly, like most ethnographers, used an "opportunity sample" (he talked to people who would talk to him), Seron employed random sampling techniques.¹⁴⁴

Although Seron used statistical techniques to analyze her interviews, *The Business of Practicing Law* is also a book of stories. The stories are organized around themes rather than organizations, however; the chapters bear such titles as "Negotiating Time," "Getting Clients," and "Serving Clients and Consumers."¹⁴⁵ Whereas Kelly provides a comprehensive portrait of five different practice organizations, the effect of reading Seron's book is to listen in on a group of lawyers having a series of roundtable discussions about the principal issues in their professional and personal lives.

Seron's focus is less on the culture of organizations than on individuals dealing with the demands of being a practicing lawyer. She does not depict the small offices in which her lawyer-informants work as cultural entities, nor does the word *culture* even appear in the index. Instead, her emphasis is on such "structural" factors as economic forces, including the changing needs and demands of clients and the tensions of managing both a law practice and a family.¹⁴⁶ While she notes that certain

140. SERON, *supra* note 22.

141. *Id.* at 155.

142. Earlier academic writing on solo and small-firm practice includes JEROME E. CARLIN, *LAWYERS ON THEIR OWN* (1994); JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966); JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* (1967); DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* (1990). Two excellent recent pieces are Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 *FORDHAM L. REV.* 847 (2001), and Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 *HOUS. L. REV.* 309 (2004).

143. SERON, *supra* note 22, at 155.

144. *Id.*

145. *Id.* at 31, 48, 106.

146. *Id.* at 143.

core ideas about professionalism are widely shared,¹⁴⁷ she emphasizes the individual response to structural pressures.

Not surprisingly, the lawyers she studied find it hard to respond to those pressures. While many derive satisfaction from at least some of their work and from a sense of professionalism, most are, above all, small business people striving for a slice of an ever more competitive pie. Seron's lawyer-informants, in other words, do not appear to have the luxury of thinking about professional culture. Clients are also consumers, and legal services are products that must be delivered efficiently. Moreover, in common with all small business people, when work simply has to be done, these lawyers have to do it themselves.¹⁴⁸ It is equally unsurprising that all of these pressures are most acutely felt by women lawyers, the vast majority of whom report having principal or sole responsibility for the management of their households.¹⁴⁹

A more recent (2001) entrant into the legal ethnographic literature is *Divorce Lawyers at Work: Varieties of Professionalism and Practice* by political scientists Lynn M. Mather and Richard J. Maiman and sociologist Craig A. McEwen.¹⁵⁰ The book is based on 163 interviews with divorce lawyers in Maine and New Hampshire in 1990 and 1991.¹⁵¹ It is something of a blend of the Kelly and Seron studies in both its approach and its findings. With respect to the former, the authors present narrative accounts of the experiences of particular lawyers (under such headings as "George Elder: Old-time Practitioner" and "Andrea Wright: Feminist Divorce Specialist"¹⁵²) but then organize the bulk of their analysis around such themes as "Maintaining Control over Clients," "Serving Clients while Protecting the Bottom Line," and "Constructing Professional Meaning and Identity in the Practice of Divorce Law."¹⁵³ With respect to findings, Mather and her colleagues share some of Seron's focus on the influence of structural factors on individual lawyers. At the same time, however, they analyze "communities of practice"¹⁵⁴ (including "communities of divorce

147. *Id.* at 1-18.

148. They also face marketing challenges that differ significantly from those confronted by large-firm lawyers. *See id.* at 86-105.

149. *Id.* at 33-39.

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

151. *Id.* at 196. Long delays between data collection and publication are a recurrent problem in ethnography. The cause in most cases is the extraordinarily (and unexpectedly, to people who have not done it before) labor-intensive process of combing through and analyzing hundreds of pages of interview notes and transcripts.

152. *Id.* at 18-25.

153. *Id.* at 87, 133, 157.

154. *Id.* at 41.

lawyers”¹⁵⁵ and the legal community more generally¹⁵⁶) as quasi-cultural entities.

Although it is not their objective to describe the state of the profession, Mather, McEwen and Maiman have a great deal to say about the current understanding of “professionalism” and that concept’s influence in the daily lives of lawyers. They begin their book with a question about individual lawyers, asking how they “think about and actually make” the decisions that constitute their daily practices.¹⁵⁷ At the end, they posit three possible explanations. One sees lawyer decisionmaking dominated by the “organized profession—its educational processes, formal organizations, and rules of conduct.”¹⁵⁸ A second explanation is, in Seron’s terms, structural—seeing practice decisions “as shaped by the economic forces acting on lawyers, with firm profits or client pockets controlling the choices that attorneys make in their work.”¹⁵⁹ The third explanation emphasizes “lawyers’ individual values and identities in making day-to-day decisions.”¹⁶⁰ These values are shaped not by the top-down dictates of the organized profession but by “[c]ollegial norms and conceptions of roles”¹⁶¹ that emanate in informal ways from the multiple “communities of practice” in which individual lawyers participate.¹⁶² As political scientists and sociologists, the authors do not routinely use the term “culture.” Nonetheless, these communities of practice are clearly presented as cultural entities. As in Kelly’s analysis, culture plays a critical role in determining the nature and character of legal practice; although the relevant cultural entity is not the individual practice organization, it is once again culture at a localized level. As much as I like the book and respect the work of its authors, I have not used it in *The Law Firm* because of its focus on a specific area of practice that relatively few students are likely to enter.

D. Recent Survey Research

The past dozen or so years have also seen the publication of numerous surveys of practicing lawyers, some asking broad questions and others focusing on specific issues. In 1990–91, the North Carolina Bar Association (NCBA) surveyed all 11,810 licensed attorneys in this state, of whom 2,570 returned the questionnaires.¹⁶³ Eighty-one percent said that

155. *Id.* at 47.

156. *Id.* at 42.

157. *Id.* at 4.

158. *Id.* at 175.

159. *Id.*

160. *Id.*

161. *Id.* at 176.

162. *Id.* at 175.

163. N.C. BAR ASS’N, REPORT OF THE QUALITY OF LIFE TASK FORCE AND

they were at least “mostly satisfied” with their lives. The least satisfied were unmarried lawyers, junior and senior associates in private practice, and those working more than 250 hours per month.¹⁶⁴ The eighty-one percent satisfaction level was deemed “disappointing when viewed relative to higher survey figures for other professionals.”¹⁶⁵ Somewhat at odds with the overall level of satisfaction, only fifty-four percent wanted to remain in law practice for the rest of their careers, and only sixty percent wanted their children to enter the profession.¹⁶⁶ Eight to twelve percent reported “symptoms of serious psychological or physical ill health,” while about one-quarter reported one or more of a variety of symptoms of psychological distress or stress-related disease.¹⁶⁷ What the NCBA characterized as “a disturbing 43%” thought that the demands of their work did not allow them enough time for a satisfying outside life.¹⁶⁸ In a follow-up analysis, an NCBA task force identified numerous factors thought to contribute to attorney satisfaction or dissatisfaction. In the former category were intellectual challenge, camaraderie, financial security, and autonomy; the negatives included lack of time, the “tyranny of the timesheet,” the erosion of professionalism and collegiality, and the loss of public esteem.¹⁶⁹

The 1990–91 North Carolina survey was updated in 2002–03 under the leadership of F. Leary Davis, professor and former dean at Campbell University School of Law. Although the full results have not yet been published, preliminary data¹⁷⁰ suggest modest improvement. The percentage of lawyers who are satisfied or very satisfied with their jobs has remained constant at seventy-five percent, but only thirteen percent were dissatisfied or very dissatisfied with their jobs, down from over eighteen percent in 1990–91.¹⁷¹ North Carolina lawyers also reported being happy fifty-nine percent of the time, versus fifty-two percent of the time in the

RECOMMENDATIONS 4 (June 20, 1991).

164. *Id.*

165. *Id.* at 1.

166. *Id.* at 4.

167. *Id.*

168. *Id.*

169. *Id.* at 8–13.

170. This survey, a random sample of 1,000 lawyers, was conducted jointly by the Chief Justice’s Commission on Professionalism and LAWLEAD/NIELLP, with the support of the North Carolina Bar Association Foundation. The preliminary results are presented in a set of continuing legal education manuscripts that Professor Davis has graciously made available to me. These include Leary Davis, *Results of the Quality of Life Survey, 2003 and Comparisons with the 1990 Quality of Life Survey* [hereinafter *Results*]; Leary Davis, *Things Are Getting Better for Lawyers, But . . .* [hereinafter *Things Are Getting Better*]; Leary Davis, *What We Learned from the State of the Profession Survey, 2003* [hereinafter *What We Learned*]; and a PowerPoint presentation entitled, “The 2002–03 State of the Profession–Quality of Life Survey” [hereinafter *The 2002–03 State of the Profession*] (all on file with the North Carolina Law Review).

171. *Results*, *supra* note 170, at II-3.

earlier survey.¹⁷² One in five lawyers reported having had “suicidal ideation,” but the number who thought about taking their own lives at least once a month declined from 11.2 percent to 4.6 percent of the sample.¹⁷³ Other measures of physical and mental health showed mixed results.¹⁷⁴ On the gender front, the percentage of women who reported personally experiencing sexual harassment dropped from forty-two percent to twenty-four percent, and the percentage of those who experienced sexual discrimination dropped from seventy percent to thirty-four percent.¹⁷⁵ Even in the more recent survey, however, a majority of female lawyers agreed that racist and sexist attitudes prevent minorities and women from achieving leadership positions in their firms, versus about one-fifth of men.¹⁷⁶ Moreover, women are less well compensated, less likely to be married, eleven times more likely to be primarily responsible for the care of young children, and slightly less satisfied than men with practice and life as a whole.¹⁷⁷

In a recent conversation, Davis theorized that these small but consistent improvements in the attitude of North Carolina lawyers may derive from a combination of recent quality of life initiatives¹⁷⁸ and an improving economic situation.¹⁷⁹ In current dollars, the average and median for lawyer compensation in 1989 were both in the range of \$72,000–87,000; in 2002 the average was \$115,000 and the median \$92,000.¹⁸⁰ In explaining the increased income, Davis notes that expansion of the supply of lawyers has leveled off while demand continues to grow with the population and the economy. He concludes that lawyers may soon have sufficient economic breathing room “to invent a better future for ourselves, the legal profession, our clients, and society generally.”¹⁸¹

172. *Id.*

173. *Things are Getting Better*, *supra* note 170, at 1.

174. *Id.* at 1–2.

175. *Id.* at 2.

176. *Id.* at 2–3.

177. *Id.* at 3.

178. These initiatives include a number of Lawyer Assistance Programs developed by the North Carolina Bar. See *What We Learned*, *supra* note 170, at 3–5.

179. “The 2002–03 State of the Profession,” *supra* note 170.

180. *What We Learned*, *supra* note 170, at 1.

181. This quote is taken from Davis’s PowerPoint presentation, “The 2002–03 State of the Profession–Quality of Life Survey,” *supra* note 170. According to a recent newspaper article that cites Davis as its source, North Carolina has only one lawyer per 502 residents, versus a national ratio of one per 268 residents. Somewhat ironically, the subject of the article is Elon University’s plan to open a new law school in Greensboro. See Jane Stancill, *State Ripe for New Law School*, NEWS & OBSERVER (Raleigh, N.C.), May 13, 2004, at 1A, 4A. A recent study of the California bar suggests a similarly positive trend in that state. See *Better Job Market for Attorneys*, CAL. BAR J., June 2004, at 1 (reporting that the longtime oversupply of lawyers in California has ended).

In another recent state-specific survey, Susan Saab Fortney surveyed 1,000 associates in private firms in Texas in 1999–2000.¹⁸² As in the North Carolina surveys, there were inconsistencies between the general and specific responses. Seventy-nine percent of the responding associates were either very or somewhat satisfied with their work, and fifty-three percent described morale among associates at their firms as good or excellent.¹⁸³ At the same time, however, thirty-nine percent of the respondents were interested in changing jobs in the next two years and more than one-fifth of those were interested in a nonlegal job.¹⁸⁴ Similarly, twenty-six percent wished that they had selected a profession other than law.¹⁸⁵ Fortney attributes much of the dissatisfaction to the need to meet billable hour quotas.¹⁸⁶ Sixty-six percent of the respondents reported that “billable-hour pressure had taken a toll on their personal lives,” with about one-fifth reporting more frequent illness.¹⁸⁷ Just over half agreed at some level with the statement, “I feel stressed and fatigued most of the time.”¹⁸⁸ As might be expected, the frequency of such reports rose in tandem with billable hour requirements.¹⁸⁹ Despite these problems, fifty percent of the respondents said that they would be unwilling to make less money in exchange for working less, while another quarter were willing to make less to work less only if they could be sure that it would not affect their treatment or advancement at their firm.¹⁹⁰

Fortney’s findings led her to a number of recommendations for law firm managers. Under the heading of “Firm Economics and Culture,” she proposes an emphasis on quality and ethical behavior over quantity of work, the creation of incentives for older lawyers to serve as mentors and supervisors, and the development of alternative partnership tracks and other work options.¹⁹¹ She also advocates a change in billing practices to avoid “the traps of billable hour practice,” including the use of more open-ended “value billing.”¹⁹² As I shall discuss below in Part III, the realistic

182. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UNIV. MO. K.C. L. REV. 239, 243 (2000).

183. *Id.* at 267.

184. *Id.* at 268.

185. *Id.*

186. *Id.* at 263.

187. *Id.* at 271.

188. *Id.* at 273.

189. *Id.* at 265.

190. *Id.* at 261 tbl.3.

191. *Id.* at 292–96.

192. *Id.* at 296. Although Fortney does not define the term, value billing usually refers to a system in which a firm uses billable hours as only one of many considerations in arriving at the value of its services. In my experience, this does not differ materially from the older concept of

likelihood of reforms such as these has been a topic of discussion in our classroom interviews.¹⁹³

Finally, John Heinz and two new colleagues have mined their 1995 study of the Chicago bar¹⁹⁴ for evidence of lawyers' levels of satisfaction with their careers.¹⁹⁵ Contrary to the "widespread perception that 'a crisis of morale' afflicts the legal profession," they report that eighty-four percent of Chicago lawyers were either satisfied or very satisfied, ten percent were neutral, and fewer than seven percent were dissatisfied or very dissatisfied.¹⁹⁶ They analyzed the data by gender, race, and income, finding that gender and race have insignificant independent effects on satisfaction, whereas "[t]he strongest and most consistent effect on lawyers' overall job satisfaction . . . is produced by the lawyers' income levels."¹⁹⁷ Gender and race are not irrelevant to satisfaction, however, since "[w]omen and minority lawyers (blacks, especially) make significantly less money than do white males."¹⁹⁸

There is also a considerable medical and psychological literature, much of it based on surveys, about the mental and physical health of lawyers and law students. Almost without exception, the news is bad. Summarizing this literature, Ruth McKinney, the Director of the Writing and Learning Resources Center at UNC (who is educated as both a counselor and a lawyer,) concludes that "[i]t is no secret that law school is a breeding ground for depression, anxiety, and other stress-related illnesses."¹⁹⁹ She highlights one claim that "up to 40 percent of law students may experience depression or other symptoms as a *result of the law school experience*."²⁰⁰ Some of the studies she reviews purport to show

"premium billing," in which the firm finds reasons (superior work, exceptional challenge, efficiency, etc.) to add on to its hourly fees. For an argument in favor of value billing that attempts to address likely client concerns, see JAMES A. GALLOWAY & MARK A. ROBERTSON, WINNING ALTERNATIVES TO THE BILLABLE HOUR 147-64 (2002). This book is a publication of the ABA's Law Practice Management Section.

193. Fortney cites a number of other state-of-the-profession surveys in her article. See, e.g., ABA YOUNG LAWYERS DIV., THE STATE OF THE LEGAL PROFESSION 1990 (1991); NAT'L ASS'N OF LAW PLACEMENT FOUND. FOR RES. & EDUC., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION (1998).

194. HEINZ & LAUMANN, *supra* note 97.

195. John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735 (1999).

196. *Id.* at 735-36.

197. *Id.* at 757.

198. *Id.*

199. Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 LEGAL WRITING 229, 229 (2002).

200. *Id.* (quoting Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 670 (1994)) (emphasis in original).

that students enter law school with psychological profiles similar to those of their peers in other graduate and professional programs, but suffer disproportionate psychological damage during their legal education.²⁰¹ According to the same literature, things get no better after graduation. Numerous often-cited studies report that lawyers suffer from depression, alcoholism, drug abuse, suicidal thoughts, and related physical problems significantly more frequently than other American professionals or the population as a whole.²⁰²

These psychological and medical studies find their way into legal literature, where they become the basis for a relentlessly bleak picture of lawyers' mental and physical health. This research has perhaps been used most aggressively in Patrick Schiltz's luridly titled article, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*,²⁰³ which was the focal point of a 1999 *Vanderbilt Law Review* symposium entitled *Attorney Well-being in Large Firms: Choices Facing Young Lawyers*.²⁰⁴ Schiltz relies on the medical and psychological literature to make a number of dramatic assertions, including:

"Lawyers seem to be among the most depressed people in America."²⁰⁵

"Depression is not the only emotional impairment that seems to be more prevalent among lawyers than among the general population."²⁰⁶

201. *Id.* at 230-32 & nn.9-10. See, e.g., G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 225-28; Kenneth M. Sheldon & Lawrence S. Krieger, *Does Legal Education Undermine Law Students? Documenting Negative Changes in Motivation, Values, and Well-Being* (n.d.) (unpublished manuscript on file with the North Carolina Law Review). As an alternative to the theory that the law school experience causes the relative unhappiness of law students, it is possible that law students differ from most other graduate and professional students in the depth of their motivation. For example, I have never met a medical student who did not want to be a doctor or a nursing student who did not want to be a nurse. Each year, however, I meet dozens of law students who came because they could not find a job, or their parents told them it would be a good thing to do, or they had a vague idea that a law degree might come in handy in another career. If my experience is generally valid, should we be surprised that many law students react negatively to their law school experience?

202. See McKinney, *supra* note 199, at 230 n.6; Fortney, *supra* note 182, at 272-73 & nn.203-08.

203. Schiltz, *supra* note 71.

204. 52 VAND. L. REV. 871 (1999).

205. Schiltz, *supra* note 71, at 874.

206. *Id.* at 876.

"Lawyers appear to be prodigious drinkers."²⁰⁷

"Lawyers reportedly think about committing suicide and commit suicide far more often than do non-lawyers."²⁰⁸

In the words of the Russian playwright Maxim Gorky, "Life for many lawyers is 'slavery,' " as "job dissatisfaction among lawyers is widespread, profound and growing worse."²⁰⁹

Switching to the autobiographical mode, Schiltz validates these generalizations by drawing on his own experience and observations as a large-firm lawyer, and then offers law students and young lawyers prescriptions for survival.

Schiltz's article brought sharp rejoinders from other participants in the symposium. Mary McLaughlin describes herself as "the arch villain of Professor Schiltz's article—not just a partner at a big firm, but the Hiring Partner."²¹⁰ Largely on the basis of her own experience, she dismisses Schiltz's portrayal of big firms as a caricature. Her intensely personal—and thus not particularly credible—rebuttal is epitomized by her comment on Schiltz's disparagement of the career opportunities provided by big firms: "I have not done a scientific study but I am sure that the largest number of job opportunities are with big firms."²¹¹

Juxtaposed, Schiltz's article and McLaughlin's rejoinder capture a problem that is prevalent in law review writing generally and especially problematic in the state-of-the-profession literature: the uncritical acceptance or rejection of scientific findings. Schiltz himself reflects one extreme: if it's "scientific" and published, it must be both valid and relevant.²¹² Reading Schiltz's characterization of the mental health of lawyers and his supporting footnotes, one infers that all "studies" are created equal; all are equally rigorous, and all provide an equivalent basis for generalization. At the other extreme is McLaughlin, whose essay implies that an author's recollection and interpretation of her own personal experience provide an adequate basis for dismissing such studies.

207. *Id.*

208. *Id.* at 879.

209. *Id.* at 881.

210. Mary A. McLaughlin, *Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice*, 52 VAND. L. REV. 1003 (1999).

211. *Id.* at 1007.

212. For an illustration of how this problem can plague even a more measured response to the "scientific" literature, see Rhode, *supra* note 42, at 297. One might make an ironic comparison to the far more stringent standards for the admission of scientific evidence in the federal courts. Those standards require the trial court to make an independent determination of whether the proffered evidence satisfies the criteria of the scientific method. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

Perhaps tellingly, the Vanderbilt symposium assigned the task of assessing Schiltz's evidence not to a legal professional but to a then-graduate student in sociology, Kathleen Hull. Hull states the problem as follows: "The studies cited by Schiltz range from trade journal surveys to more serious scholarly enterprises, and the significance we attach to their findings should be in direct proportion to the validity and reliability of the research techniques employed."²¹³ After reviewing the methods employed in the principal studies relied on by Schiltz and introducing several others as counterpoints, she concludes that "there is virtually no solid evidence produced by methodologically sound research to support the claim that lawyers are deeply unhappy in their work or that they are growing more unhappy over time. Further, large-firm lawyers do not appear to be more unhappy in their work than other lawyers."²¹⁴

It is not my purpose here to write a treatise on quantitative research methods, nor to referee the dispute between Schiltz and Hull. My own opinion is that, although Schiltz makes some sound points about the overall trend of the psychological findings in a rebuttal piece at the end of the Vanderbilt symposium,²¹⁵ Hull gets much the better of the argument. I find in the medical and psychological research cause for concern, but no compelling case, that we lawyers are worse off than other professionals or, indeed, the population at large in terms of our mental health. I also see the uncertainties in the quantitative research as an opportunity for ethnography to play its traditional complementary role.²¹⁶ While ethnography cannot prove or disprove the validity of any quantitative study, it can reveal what a range of individual lawyers see, hear, and think about their mental health and that of their fellows. These insights are valuable in their own right. Additionally, specific ethnographic reports may be helpful in evaluating whether survey researchers have asked the right questions, and in helping them to do a better job of that in the future.

E. Summary

The literature just reviewed both reflects and helps to create a widespread perception that the legal profession is in crisis. One could well conclude that the profession is under siege, suffering from bad economic fundamentals, dysfunctional personnel practices, and a membership that is,

213. Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971, 971 (1999). Hull was one of Heinz's collaborators in the 1995 Chicago bar survey discussed *supra* note 97.

214. Hull, *supra* note 213, at 983.

215. Patrick J. Schiltz, *Provoking Introspection: A Reply to Galanter & Palay*, Hull, Kelly, Lesnick, McLaughlin, Pepper, and Traynor, 52 VAND. L. REV. 1033 (1999).

216. See *supra* notes 62-66 and accompanying text.

in varying degrees, greedy, unethical, and psychologically disturbed. This crisis is a recurrent theme in legal journalism; the *ABA Journal*, for example, has in recent years run stories under such breathless headlines as “Cash-and-Carry Associates,”²¹⁷ “Law at the Crossroads,”²¹⁸ “Dangerous Dedication,”²¹⁹ and, in January 2004, “Today, It’s Tougher to Become—and Be—a Law Firm Partner.”²²⁰ The general media have been echoing these themes for some time.²²¹

But how bad is it? The surveys, especially the more rigorous ones, raise concerns but do not seem to portend impending catastrophe. The *éminence grise* literature suggests that everything is going to hell, if it is not already there. That, however, is the nature of such literature, going back at least as far as Cicero’s anguished cry of “*O tempora, O mores*.”²²² Has there ever been a grand old man or woman who wrote a book about how the next generation is making things better?²²³ The medical and psychological literature is indeed ominous, although there is reason to question whether we lawyers know how to read and use it.

A final point that should be emphasized is that it is difficult to read the two major ethnographic works, the Kelly and Seron books, and draw the inference that the legal profession is in life-threatening crisis. In contrast to what the other literatures may suggest, crisis is not a core element of the narratives that Kelly and Seron heard from individual lawyers. To be sure, these stories have strong elements of personal and financial stress, of frustration, and of occasional failure. But they are also, and more prominently, stories of perseverance, adaptation, and great (if only occasional) satisfaction.

How is one to account for this discrepancy? It is easy to dismiss ethnographic accounts as mere anecdotes, collections of stories that are unrepresentative, if not cherry-picked—in other words, as unscientific. But such dismissal is too easy; it is facile. If ethnography can be fairly said to lack breadth, then quantitative research can be equally fairly criticized as lacking depth. Seron’s book is based on the stories of 1,000 real lawyers, and Kelly’s on multiple voices from five real practice organizations.

217. Debra Baker, *Cash-and-Carry Associates*, A.B.A. J., May 1999, at 40.

218. Terry Carter, *Law at the Crossroads*, A.B.A. J., Jan. 2002, at 29.

219. Laura Gatland, *Dangerous Dedication*, A.B.A. J., Dec. 1997, at 28.

220. Martha Neil, *Brave New World of Partnership: Today, It’s Tougher to Become—and Be—a Law Firm Partner*, A.B.A. J., Jan. 2004, at 31.

221. See, e.g., Richard B. Schmitt, *From Cash to Travel, New Lures for Burned-out Lawyers*, WALL ST. J., Feb. 2, 1999, at B1; Maura Dolan, *Miserable with the Legal Life*, L.A. TIMES, June 27, 1995, at A1.

222. M. Tullius Cicero, *In Catilinam*, I, 1 [O the times, O the customs!].

223. For compilations of complaints about the decline of the legal profession that go back a century or more, see Heinz et al., *supra* note 195, at 735 n.3.

When, over the course of a free-ranging discussion, real people like these do or do not emphasize particular themes, common sense dictates that these trends should be taken seriously.

III. THE IN-CLASS INTERVIEWS

In this Part, I will endeavor to add further depth, and even a bit more breadth, to the existing literature on the state of the profession by summarizing the major themes that have emerged over nine years of interviews in *The Law Firm*. The interviews provide a window on the daily lives, hopes, and concerns of lawyers from a variety of practice settings. Because of the demographics of the interview subjects, the focus is primarily on North Carolina.

At the end of the 2004 spring semester, I have completed over one hundred interviews in *The Law Firm*. Thirty-two lawyers have accounted for these interviews. Among the private sector lawyers have been civil and criminal practitioners; solo practitioners; lawyers from firms ranging from two members to more than a thousand; members of specialized “boutique” firms; corporate in-house counsel; and one counsel for a trade organization. On the public side, we have had public defenders; legal services lawyers; state and federal prosecutors; judges; lawyers at various levels of the state and federal executive branches, from the state attorney general’s staff to the Office of White House Counsel; lawyers employed by public interest and nonprofit organizations; university counsel; and legal academics. At least eleven of the thirty-two have practiced in more than one of these categories. Eleven of the thirty-two are women, six are African-American and the remainder Caucasian.

Eighteen of the thirty-two have been interviewed on two or more occasions. This recycling of informants has lent a temporal dimension to the project and has also enhanced its depth, since new topics invariably emerge in repeat interviews. Nonetheless, if *The Law Firm* had initially been designed as a research project, I probably would have opted for a larger sample of one-time informants. However, the primary purpose of the interviews was (and still is) pedagogical. For that reason, I have opted to return to lawyers whose careers are likely to be of interest to a substantial number of students, and who tell their stories candidly and effectively. About two-thirds of the thirty-two are lawyers that Paul Haskell or I have known in some other context; the remainder are people who were recommended by others or whom I came upon quite by accident.

The obvious consequence of this approach is that I cannot make any strong claims for the representativeness of this sample. It is certainly not random, nor is it “scientific” in any meaningful sense, despite my efforts to

cover a wide range of practice organizations. One group that is obviously underrepresented is lawyers who are failing for whatever reason. Not all of our informants have been equally successful, whether measured by achievement of personal goals, income, or perceived status. But with one exception (a struggling solo practitioner who subsequently went to business school), all have remained in the profession and have no present plans to leave it.

Although these interviews cannot serve as the basis for any quantitative assertions along the lines of "most lawyers think that . . ." they do represent over 150 hours of in-depth conversations with people practicing law in a wide variety of settings. Whatever the distribution of attitudes and experiences may be, these lawyers represent real points along it. Moreover, they are all members of multiple legal communities: their own organizations, the communities of lawyers—usually more than one—with and against whom they customarily practice, and their geographic legal communities. Thus, their stories about what is going on in the legal world, however anecdotal, deserve to be taken seriously.

In reviewing my notes and recollections of these interviews, several major themes have emerged repeatedly. I cannot make claims about how many lawyers are concerned about these issues or what percentages respond in what particular ways. In the tradition of anthropology, however, I can assert unequivocally that these are issues that a substantial number of real people have raised and discussed in depth on multiple occasions. To an anthropologist, this is a meaningful approximation of truth.

A. *Analyzing the Diversity of Practice Settings*²²⁴

In the six Sections that follow I discuss what our informants have said about a series of issues related to particular practice settings. I begin by commenting on the remarkable range of things that practicing lawyers do, which leads to the question of whether law can be meaningfully regulated as a single profession. I then analyze the state of big-firm economics as reflected in our informants' narratives. This subject is important in its own right as well as for the collateral effect that large-firm behavior may have on other branches of the profession. I then consider what we have heard about the threatened extinction of the medium-sized firm, the state of

224. What is reported in the remainder of Part III is all based on statements made by informants interviewed in The Law Firm. Although I have never promised anonymity to these informants, all of whom spoke freely in the classroom, I believe it would be inconsistent with the spirit of the interviews to name the sources in print. Where it seems relevant to an understanding of the point being made, I have described the speaker's status in general terms. I have provided citations to secondary sources in instances where I have found useful material that may shed additional light on the points made by the informants.

small-firm practice, the question of whether civilized "lifestyle" firms really exist, and the remarkable evolution of in-house corporate counsel.

1. The Illusion of *The* Legal Profession

The meaning of "profession" has been debated by sociologists for more than a hundred years.²²⁵ All of the various approaches share the minimal idea that a profession is an occupation or calling whose practitioners must have extensive training and specialized expertise; this requirement permits current members to control entry. Some theorists have treated professions as economic cartels, "distinguished by the strategies of social closure they use to enhance their market chances."²²⁶ Others have taken a more positive view, stressing that professionals assume a duty to their clients that transcends economic self-interest; the client, in other words, is more than a mere customer.²²⁷ The studies of the legal profession that I reviewed in Part II do not provide a precise and consistent definition of the term.²²⁸ Implicit in all, however, is a definition that includes five principal elements: a profession is (1) an occupation or calling (2) that requires extensive training and specialized knowledge, (3) to whose members the government delegates control over entry and (4) the right and obligation of self-discipline, and (5) which espouses at least the ideal of a public duty that transcends economics.

There are some self-evident respects in which it makes sense to call the law a single profession. All of us went to law school, where we took essentially the same first-year courses probably taught in essentially the same way. Most of us probably also had similar second-year experiences, sitting in large classrooms for such fundamental courses as business associations, evidence, and sales. We all took a bar exam that tested, however ineffectively, our basic competence in a number of core subjects. Almost all of us are subject to the same Rules of Professional Conduct (with some minor state-by-state variation), although not all of the rules are equally relevant to all kinds of practice.²²⁹ From a more subjective perspective, most members of the profession probably think that it means something to be "a lawyer," regardless of the particular work that they may do. It is also apparent that the public thinks of us as a unified profession.

225. For an excellent account of this debate, see ABEL, *supra* note 104, at 14–39.

226. *Id.* at 15.

227. *Id.* at 16.

228. Kelly devotes several pages to collecting definitions of the words profession, professional, and professionalism, KELLY, *supra* note 21, at 5–10; while Seron devotes her first chapter to lawyers' conceptions of professionalism versus commercialism. SERON, *supra* note 22, at 1–18.

229. JAMES A. MOLITERNO, CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS 26 (2003) (noting that all states but one have adopted ethics rules based on the ABA model).

Lawyer jokes, to my knowledge, are not broken down by practice area.²³⁰ When one of us displeases the public, whether by stealing a client's money, abetting a swindle, or winning a class action fee that is perceived to be unjust, we are all blamed.²³¹

Despite these unifying elements, one of the strongest reactions that students have to The Law Firm is surprise at the remarkable range of things that are done by people holding themselves out as lawyers. Over the course of a single semester, my students have been exposed to an in-house counsel who functions as an advisor to her company's president on high-level public policy issues; a lawyer performing every conceivable task while working for a nonprofit community organization; an appellate judge; an advisor and lobbyist for one of the country's most powerful trade associations; a litigator and managing partner in a large private law firm; a successful plaintiff's lawyer in practice with two partners and an associate; an elected prosecutor; and a solo practitioner struggling to piece together a living out of court-appointed criminal work, speeding tickets, and the occasional real estate closing.²³² All of these people believe that they are "practicing law," but the diversity of their day-to-day activities is stunning.

This sprawling functional diversity of the legal profession is an obvious fact. As the students' reactions suggest, however, it may be one of those self-evident truths that is unappreciated until we are made to confront it. When we do think about it, it raises some compelling questions about *the* legal profession.

First, does it make any sense to generalize, or even to attempt to generalize, about "the state of the profession"? Can the elected prosecutor and the corporate lobbyist, or the struggling soloist and the managing partner of a national firm, ever be thought of as being in the same "state"? Does the relative satisfaction of one imply anything at all about the likely attitude of the other? Does the economic situation of one bear any relationship to the prospects of the other? And how much overlap, if any, is there likely to be in the sets of ethical problems that the two confront?

A related question is how much sense it makes to try to regulate *the* profession as a unified entity. The American Bar Association and the state

230. For a serious analysis of lawyer jokes, see Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998) (examining patterns of public trust in lawyers using public opinion surveys and presentation of lawyers in jokes, political discourse, and the popular media).

231. See Rhode, *supra* note 42, at 285–89 (reviewing public complaints against the legal profession); Alex Beam, *Greed on Trial*, THE ATLANTIC, June 2004, at 96 (attacking lawyers' fees in tobacco litigation).

232. To add to the mix even further, in the spring of 2004, a UNC student reported on an interview with a lawyer who had established a successful appellate practice by "blogging" about pending cases over the internet.

bars that adopt its Model Rules continue to endorse this vision, of course. Thus, alleged misconduct in the corporate and securities bar led to changes in Rules 1.6 (Confidentiality) and 1.13 (Representing an Organization) that apply to all lawyers.²³³ However, the more I am reminded of the variegated nature of the profession, the more I come to suspect that it may ultimately require rules that are tailored to particular kinds of practices.

2. Big-Firm Economics as Rhetoric and Fact

While large firms are but one segment of the legal community, the way that they conduct their business may have a ripple effect that is felt throughout the profession. A partner in a statewide firm captured the point nicely. She observed that until the last few years, the pace of practice in her city had been somewhat more sedate than in Charlotte, a difference that could be tolerated within a multi-city firm. Now, however, she believes that banking practice in Charlotte has reached levels of onerousness and profitability that are unprecedented for this state. Consequently, she reported, big-firm banking lawyers are demanding increases in compensation that are equally unprecedented (and that apparently go beyond simply eating more of what they kill).²³⁴ To meet these demands, her firm now requires more work from all its lawyers, even in the formerly sleepy provincial offices. The implication is that in the end, lawyers in all kinds of firms must work harder to compete. When big firms sneeze, in other words, the whole profession catches cold.

A number of informants from large firms in North Carolina and elsewhere have paraphrased then-candidate Bill Clinton's 1992 reminder to himself ("It's the economy, stupid") to capture what they believe is the single most important issue facing their segment of the legal profession. Some of the most significant recent trends in big-firm practice are explained in terms of economic determinism.²³⁵ The growth in firm size; the merger of large firms into even larger multinational entities;²³⁶ the growing and sometimes extreme specialization in individual lawyers' practices;²³⁷ the threatened extinction of the medium-sized, single-city

233. See *supra* note 41 and accompanying text.

234. In an eat-what-you-kill system, partners' incomes are tied directly to the business that they bring into the firm.

235. See, e.g., Rhode, *supra* note 42, at 298 (discussing consequences of increased competition); S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645 (1990) (arguing that market forces have moved law firms toward a corporate model); Irving R. Kaufman, *Broken Contracts*, N.Y. TIMES, DEC. 17, 1990, at A17 (Second Circuit judge observing that "the largest law firms have acquired the characteristics of the corporations they have represented").

236. See TROTTER, *supra* note 105, at 46-50.

237. See *id.* at 50-51.

firm;²³⁸ the ever-widening base of the associate-partner pyramid in large firms, coupled with the ever-lengthening odds of making partner;²³⁹ the demise of some prominent large firms;²⁴⁰ the increasing pressure to bill hours felt by both partners and associates;²⁴¹ frequent job-switching by lawyers at all levels;²⁴² and a decline in client loyalty²⁴³ are all ascribed to an economic climate that grows ever-harsher and more competitive.

My students and I have been told plausible economic stories to account for each of these trends. Large-firm lawyers have told us, for example, that nationwide and even international mergers are essential to maintaining the biggest and most lucrative corporate clients. Such clients, the story goes, demand a nationwide physical presence and huge manpower reserves to meet crises. Associates will comprise most of that manpower. Because the work the associates will do is, in the words of many big-firm lawyers, “complex” and “sophisticated,” the firms must hire the “best” associates, which is usually translated to mean students with the best grades at the most prestigious schools. Because these students know that their big-firm lives will be nasty, brutish, and short, the firms have to pay them exorbitant salaries. If the partners are to maintain their incomes at the levels they want, everyone must bill more hours, and everyone’s billing rates go up, unless and until they are limited by those biggest and best clients. As a result, hourly rates are mind-boggling: as one big-firm

238. See Martha Neil, *Caught in the Middle*, A.B.A. J., July 2003, at 37. A case in point is Boston’s 130-lawyer Hill & Barlow, which was founded in 1895, produced three Massachusetts governors (including 1988 Democratic presidential nominee Michael Dukakis), and dissolved on December 7, 2002 after numerous partners defected for greener economic pastures. For accounts of the firm’s demise, see Maggie Mulvihill, *At the Bar: Lawyers Lead Firm into a Dead End*, BOSTON HERALD, Dec. 24, 2002, at Finance 22; *A Bad Sign of the Times*, CONN. L. TRIB., Dec. 30, 2002, at 23.

239. See Neil, *supra* note 220, at 33–34; MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 62–66 (1991). These trends have become more difficult to track because of the proliferation of categories of non-partner lawyers. These include non-equity partners, contract lawyers, and staff attorneys. See Crain, *supra* note 104, at 573–74. The trend toward a higher associate-to-partner ratio is usually called “leveraging.” By paying associates less than they bill them at, partners “leverage” their labor. Nationally, and across firms of all sizes, the *associate-to-partner* ratio has come down from its peak in the late 1980s and now stands at .70; it is .98 in firms of more than 150 lawyers. See ALTMAN WEIL, INC., *THE 2003 SURVEY OF LAW FIRM ECONOMICS* 253, 258 (2003). However, the ratio of *lawyers who are not equity partners* to equity partners is currently 2.14 in firms of more than 150. See *id.* at 262.

240. The most highly publicized recent collapse is probably that of Brobeck, Phleger & Harrison, a 518-lawyer San Francisco firm that dissolved and sought bankruptcy protection in January 2003. See Brenda Sandburg, *Brobeck Falls*, THE RECORDER (San Francisco), Jan. 31, 2003, at 1, available at LEXIS, News Library.

241. See Fortney, *supra* note 182, at 241–42.

242. Trotter, *supra* note 105, at 43, 86.

243. See TROTTER, *supra* note 105, at 45; Rhode, *supra* note 42, at 298–99.

partner put it, "I can't believe the hourly rate *I have to charge*."²⁴⁴

The big-firm narratives are also peppered with references to "synergy" and "economies of scale." Growth through merger is said to be a good thing because lawyers in the larger, merged entity will be able to interact synergistically, meaning that the combined output will be greater than the sum of its parts. When big-firm lawyers are questioned, the only concrete example of synergy that any has offered is to point out that when you have a question about an area of law in which you do not practice yourself, you can almost always get an answer inside the firm. The references to economies of scale are similarly vague. The principle is obvious when, for example, two airlines can share a single maintenance facility for less than the cost of maintaining two separate ones. Large-firm lawyers cite centralized billing and purchasing operations, but do not believe that these economies have significant effects on their bottom lines.

Despite the certainty and enthusiasm with which it is typically told, there are reasons at every level to doubt this big-firm narrative of rational response to economic determinism. First, even in our admittedly small interview sample, different people have looked at the same set of economic "facts" and drawn radically different inferences. Among the large firms that have been represented by our informants, several have pursued both intrastate and national mergers because their clients purportedly have demanded it. But the outcomes of these mergers have been a mixed bag, and about half of them have failed. The reasons cited for the failures have often involved the word "culture." Merging firms have been described as having had such different professional cultures that the gap could not be closed. The cultural differences cited have typically involved such things as willingness to work long hours, collegiality, style of relating to clients, and a number of things captured by the word "aggressiveness," including the approach to litigation and an enthusiasm for sending and collecting very large bills. The hoped-for synergies apparently disappear when people cannot work together and the economies of scale do not seem to be enough to force people to put aside their cultural differences.

We have interviewed people whose firms were involved in failed mergers and acquisitions before, during, and after. These lawyers have survived in one way or another. In one case, the core firms have resumed practicing much as they did before the merger; in another, the informant's original firm has entered into another merger; and in another, the informant and a few of his colleagues walked out on what he perceived as a disaster in the making and joined an unrelated firm.

244. Of course, he only *has to charge* that rate if he *has to make* as much money as he's making.

What our informants have said, and what their firms have done, causes me to question whether economics is a rationale or a rationalization for big-firm growth and mergers. The statistical evidence is clear that big firms are getting bigger.²⁴⁵ There may be economic reasons why this makes sense. One in-house counsel at a large company has told us that she really does prefer to do one-stop shopping at a firm that can serve any of her company's needs anywhere in the world—but such companies surely must be few and far between. Conversely, other in-house counsel (and, in fact, the same counsel on another occasion) have told us that they look for the most efficient (in terms of competence and cost) solution to individual legal problems. In addition, what is perhaps the best-known economic explanation for the exponential growth of large firms attributes it not to external demands but to the pyramid-sales nature of their business, with owners leveraging the time of their employees.²⁴⁶

No big-firm lawyer we have interviewed has ever been able to give an economic explanation for growth and merger activity that went any deeper than the mere recitation of such formulas as “the clients demand it,” “we have no choice,” and the previously mentioned synergy and economies of scale.²⁴⁷ Some claim to have worked with consultants, but this does not appear to have improved the depth of their understanding. Quite to the contrary, informants uniformly acknowledge that there are sound reasons to believe that their growth strategies are likely to fail. As is discussed at greater length in Section III.B.4, all believe that law firms have distinct cultures. Even if their work may be more or less the same, different firms approach it in different ways, use widely varying systems of governance and compensation, and have, for lack of a better term, widely divergent “atmospheres.” When pressed, big-firm lawyers uniformly agree that firm cultures are extremely difficult to blend. In practice, they acknowledge, the more likely outcome of a merger is that one predecessor firm will “win” and the other will “lose,” with its members forced to choose between

245. See, e.g., TROTTER, *supra* note 105, at 46–50 (focusing on Atlanta firms). This growth is being seen in North Carolina, as well, with the Winston-Salem based firm of Womble Carlyle having reached number ninety (by revenue) on the *American Lawyer* list of the top 200 U.S. firms. See AMERICAN LAWYER MEDIA, GUIDE TO LEARNING U.S. LAW FIRMS (2003), at A11. The firm has about 450 lawyers in nine offices from Washington, D.C. to Atlanta. See *About Us* at <http://www.wcsr.com/FSL5CS/About%20us/about%20us284.asp> (last visited May 14, 2004) (on file with the North Carolina Law Review).

246. GALANTER & PALAY, *supra* note 239, at 104–08.

247. Interestingly, the most profitable firm—by a wide margin—on *American Lawyer*'s list of the top 200 firms in the country is New York's Wachtell, Lipton, Rosen, & Katz, which has only about 150 lawyers and a one-to-one partner-to-associate ratio. See AMERICAN LAWYER MEDIA, *supra* note 245, at A8–A11 (estimating Wachtell's per-equity-partner profit at more than \$3 million per year); Wachtell, Lipton, Rosen, and Katz, at <http://www.wachtell.com/index.cfm> (last visited May 14, 2004) (on file with the North Carolina Law Review).

changing their ways and leaving. This is hardly a formula for synergy.

Our informants also believe that these ensuing cultural conflicts can make a material difference in their relationships with clients. There are a great many lawyers who can handle even very complex transactions competently. Better mousetraps are rare in the world of legal services. In the big-firm world, price competition is (according to the in-house counsel we have interviewed) fairly minimal. Instead, firms compete to instill in clients confidence in their judgment and dedication. A firm's standing with large and presumably astute clients can be undercut when the talk of synergy barely disguises a reality of intrafirm backstabbing.

No one we have interviewed has been able to make a specific and persuasive case for synergy and economies of scale in a business where revenue depends upon individuals selling time. Several theories have been advanced without great conviction. For example, it has been pointed out that in a larger firm, it is more likely that someone else will have already drafted the paperwork for any given type of transaction. However, while this will make it easier for the lawyer who does it next, it is not clear how this benefits the firm financially. Lawyers acknowledge that rebilling time already billed to a previous client would be unethical.²⁴⁸ It has also been suggested that it might be possible to capture some additional profit by billing subsequent clients on a fee-for-service basis that reflects more than the time actually spent. This is reported to be rare, however, and the usual outcome is that the subsequent client using the first client's documents is billed for less time. The lawyer doing the work has saved some time, but must now find another client to sell it to.²⁴⁹

Lawyers also talk about more "cross-marketing" opportunities within a larger firm. For example, lawyer A, who is doing a client's securities work, attempts to persuade that client to take its environmental work away from the current environmental counsel and give it to A's partner, B. At some point, the theory goes, a "tipping effect" occurs, and all of the client's legal work flows into the firm. The same lawyers acknowledge, however, that cross-marketing is slow and difficult in practice. It thus creates a chicken-and-egg problem. Does the firm merge in order to set itself up for cross-marketing opportunities? If it does, it may find itself with massive

248. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (stating that "[t]he practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Model Rules"); Fortney, *supra* note 182, at 258-60 (finding that double billing was prevalent in survey of Texas associates).

249. For a discussion and analysis of this dilemma, see Stephen W. Jones and Melissa Beard Glover, *The Attack on Traditional Billing Practices*, 20 U. ARK. LITTLE ROCK L. REV. 293, 299-300 (1998).

excess capacity, at least in the short term. On the other hand, how does it compete for more of the client's business unless it already has the capacity? Economies of scale are even more elusive. As computing becomes more distributed, and the hardware ever smaller, there is little potential for savings through centralization in that area. On the personnel front, the ratio of support staff to lawyers does seem to diminish as the firm grows larger, but there is great variation according to the nature of the practice.²⁵⁰

The purpose of this discussion is not to prove that any of these economic arguments are right or wrong. It is, rather, to suggest that the lawyers who are making them are doing so on the basis of incomplete understanding. My own belief, based on these interviews as well as my personal experience with the practice, is that large-firm lawyers are using the language of economics as a rationalization for what is in reality herd behavior and the pursuit of status. In other words, everyone else seems to believe that bigger is better and more lucrative, so our firm had better get on the bandwagon! Moreover, among big-firm lawyers, it is those in the very biggest firms who get written up in *The American Lawyer* and are otherwise celebrated as "players."²⁵¹ I suspect that wholesale merging and metastatic growth will prove adaptive for a handful of firms—that is, there are enough large corporations interested in one-stop shopping to support a limited supply of international megafirms, and such firms will indeed prosper. For the vast majority, however, rapid expansion will prove dysfunctional; the fortunate ones will end up essentially back where they started. Since expansion is now "the game," everyone wants to play it, and everyone seems to be able to put a patina of economics over behavior whose motivations are fundamentally noneconomic.²⁵²

3. Is the Midsized Firm a Dinosaur?

As has just been seen, large-firm lawyers justify the pursuit of growth with a number of arguments. But there is also a powerful negative motivation at work: the widespread belief that the medium-sized general practice firm (defined in most cities as 50–200 lawyers) is headed for extinction.²⁵³ The usual explanation is that these firms are too small to satisfy the needs of large corporate clients but too big and expensive to represent individuals and small- to medium-sized businesses. This view predicts a legal landscape with a large gap between the biggest and the smallest firms. To fail to grow is thus to doom oneself to falling into this

250. See ALTMAN WEIL, *supra* note 239, at 264–65.

251. See KELLY, *supra* note 21, at 2–3 (discussing the influence of *The American Lawyer*).

252. For an analysis of similar behavior in the investment world, see O'BARR & CONLEY, *supra* note 5, at 74–94.

253. For a discussion of this belief, see sources cited *supra* note 238.

clientless void.

Our interviews cast doubt on this story, at least insofar as it pertains to North Carolina. Our state may be particularly hospitable to medium-sized firms, with an evenly distributed population,²⁵⁴ numerous small and mid-sized cities, and a diversified economy that is not dependent on a few major corporations.²⁵⁵ Two prominent firms whose members we have interviewed flatly contradict the dinosaur story. One sought mergers and then drew back substantially; the core firm survives in a form that resembles the preexpansion entity. The other has simply refused to accept the need for rapid expansion. Instead, it continues to add only a few lawyers a year. With the exception of its merger with a small firm in a nearby city more than ten years ago, it has resisted the temptation to expand beyond its original office. This firm has also rejected the trend toward leveraging.²⁵⁶ The vast majority of its associates make partner, and the partner-to-associate ratio approximates one-to-one. The firm's members report that its economic health is good. The bulk of the firm's business consists of small- to medium-sized regional companies that become clients early in their history and stay with the firm as they grow. This is supplemented by occasional engagements for larger companies, particularly regional litigation. The threat of being dumped by irreplaceable companies that outgrow the firm has not materialized.

Once again, my purpose is not to prove or disprove a particular economic assertion. It is, rather, to point out in another context that the economic rhetoric of law practice is often at odds with the reality. Some firms have accepted the rhetoric of medium-sized firm extinction, tried the alternative, and then returned (apparently successfully) to their original model. At least one firm we have studied in detail has rejected the story from the outset. Like the dinosaurs before the asteroid impact, these lawyers may well be doomed, but they are for the moment contented and well-fed.

254. North Carolina, despite having more than eight million people, has only one city (Charlotte) with a population greater than 500,000 (and barely; 581,000 as of 2002). Instead the state has a plethora of small- to medium-sized cities spaced evenly from Asheville in the west to Wilmington on the coast. See *Encyclopedia, North Carolina's Three Regions*, at <http://statelibrary.dcr.state.nc.us/NC/GEO/GEO.HTM#Region> (last visited May 14, 2004) (on file with the North Carolina Law Review).

255. According to statistics compiled by the North Carolina Secretary of State's office, manufacturing accounts for just one-quarter of the gross state product. Ten different industries each contributed more than \$9.9 billion to the gross state product in 2000. They include finance, insurance, and real estate at \$54.9 billion; retail at \$24.1 billion; health services at 13.2 billion; tobacco products at \$10.6 billion; and agriculture and fisheries at \$9.9 billion. See *NC Economy*, at <http://www.secretary.state.nc.us/kidspg/econ.htm> (last visited May 14, 2004) (on file with the North Carolina Law Review).

256. See *supra* note 239 and accompanying text.

4. Small-Firm Idylls

Lawyers who work in larger firms tend to have clear-cut ideas about the lives of those in small and solo practices. Initially, they recognize that one cannot generalize about the economics of small practices. Big-firm lawyers regularly tell us that the “real money” in the legal profession is made by the relative handful of small-firm and solo practitioners who, by a combination of skill and luck, attract and successfully resolve lucrative personal injury cases. North Carolina Senator John Edwards is regularly cited as the archetype of the successful plaintiff’s lawyer. Larger-firm lawyers often admit that, while they envy the income, they are too risk-averse to try to practice on the Edwards model.

The small-firm lawyers who do not reap a personal injury bonanza are seen as dwelling in a kind of muted bucolic splendor. Their big-firm peers envision them living a relatively low-stress existence in smaller towns and cities, making a decent living while working at a genteel pace.²⁵⁷ When asked why they themselves do not leave the rat race and pursue this seemingly attractive alternative, the big-firm lawyers usually contrast their own “sophisticated” and “challenging” work with the more mundane and presumably boring matters handled by the country mice.²⁵⁸

The reality is reported to be considerably more complex by those who are actually engaged in solo and small-firm practice. We have not interviewed any of the personal injury lawyers who, in the words of one big-firm lawyer, “make more money than God.” Those we have interviewed are spread out along a spectrum of personal and economic satisfaction. One of our lawyers left a large firm twenty-five years ago in order to join a small litigation firm. His objective was to learn how to practice on his own and then try it. He did, leaving the established firm with two colleagues, and has practiced litigation ever since in a group of two to five lawyers. His emerging reputation and the contacts he had made in the small firm—both clients and lawyers—helped him to get business

257. Both hours billed and compensation do increase with firm size. See ALTMAN WEIL, *supra* note 239, at 147, 189.

258. This stereotype is not new, nor is the belief—not expressed by any of our informants—that solo practitioners are ethical bottom-feeders. In an early sociological study of solo practitioners in large metropolitan areas, Jerome Carlin characterized them as having unsophisticated practices and lower ethical standards than lawyers in larger firms. JEROME E. CARLIN, *LAWYERS ON THEIR OWN* 17 (1962) (solo practitioners are “a lower class of the metropolitan bar”); JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 22–23 (1966) (stating that small-firm lawyers and solo practitioners are the “lowest stratum” of the bar). The most recent study of the problem is less concerned with characterizing the ethical standards of solo and small-firm lawyers than with explaining their ethical decisionmaking processes. See Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, *supra* note 142.

initially; he achieved good results in some of his early cases, and the process has continued to repeat itself. Like the lawyer of the big-firm myth, he makes what he regards as an adequate income, although it never ceases to be a case-to-case existence. Unlike the mythical model, however, this lawyer handles cases that he finds intellectually and personally challenging, and he pays the price for that by working at least as many hours as his big-firm counterparts. His greatest satisfactions, unknown to most big-firm lawyers, are being able to pick his own cases, not being answerable to a bureaucracy, and hearing expressions of gratitude from individuals he has helped through life crises.

Other small-firm lawyers whom we have interviewed have attempted to build a practice on this model but have been less successful. One, practicing alone in a medium-sized town and seeking the benefits of autonomy, independence, and a reasonable pace of life, could not find a way to attract business and gave up law entirely. Another was, at our last contact, subsisting on court-appointed criminal work, struggling to attract civil cases, and unsure whether his practice would survive. Still another had achieved economic stability and an appealing small-town life but gave it up to seek a more intellectually stimulating practice and a richer cultural life in a big city.

The dominant theme in our interviews has been that one should not judge solo and small-firm practice by the standard of a successful lawyer in mid-career. Establishing a small practice is very hard, requiring a broad set of legal skills, perseverance, good business sense, and, perhaps above all, a willingness to fail. Once established, such practices are fragile. Regardless of how successful a lawyer is, the next case can never be taken for granted. You are your own source of business—there are no synergies, real or imagined. Practicing alone or in a very small firm has its own kind of relentlessness. If you do not do something, it generally does not get done. Competition is such that things cannot be left undone very often. Finally, these practices can be lonely in a professional sense. We heard many times that, however congenial the office staff may be, practitioners feel a strong and regular need to talk things over with another lawyer. This need can sometimes be satisfied by a single partner or even a lawyer with whom one shares office space.²⁵⁹ Nonetheless, it is never as easy as it is for the big-firm lawyer who has a dozen colleagues on his or her hallway.

Although the small-firm goal is difficult to realize, many lawyers continue to pursue it and believe that the model has a long-term future. Indeed, no lawyer whom we interviewed thinks that our society will

259. This phenomenon is also reported in the literature. See Levin, *Preliminary Reflections*, *supra* note 142, at 873–74.

outgrow the need for small-practice lawyers to assist individuals and small businesses in everyday matters. As with midsized firms, North Carolina, with its fairly even population distribution and numerous small and medium-sized cities, may be a particularly hospitable setting for such practices. Each year, several students report that hearing from those who succeeded, as well as those who did not, has confirmed their desire to try their luck as small-time legal entrepreneurs.

5. Is There Any Such Thing as a Lifestyle Firm?

In *Lives of Lawyers*, Michael Kelly portrays what is often called a “lifestyle” law firm: a small- to midsized firm whose members limit themselves to a merely comfortable income in exchange for the privileges of working relatively reasonable hours, turning away clients whose businesses or positions are offensive, and basing hiring decisions on the likelihood of a prospect’s fit with the firm’s collaborative culture.²⁶⁰ To many readers, including most of my students, Kelly’s description seems too good to be true. In fact, yearly informal surveys suggest that students do not believe in lifestyle firms. They suspect that firms that advertise themselves as such are either misrepresenting the work environment or using a lifestyle story to cover serious economic weakness. Most students, in other words, do not believe that you can have it all.

Two of the firms whose members we have interviewed on multiple occasions present themselves as lifestyle firms, one avowedly and the other in a more qualified way. The former is a relatively small North Carolina firm that is organized around the principle of “progressive” litigation, which usually means the representation of nonprofits, selected governmental entities, and individuals injured by corporations and institutions. They describe their workload as manageable (except when the non-negotiable demands of judges supervene), their compensation as satisfactory but not exorbitant, their atmosphere as collegial, and their governance as cooperative rather than hierarchical. Many students have questioned whether the work demands are really as humane as claimed, while a few (more so at Duke than at UNC) have been skeptical about the economic sustainability of a model that imposes an ideological screen on cases. Even those who accept the firm’s self-characterization realize that it is an exceedingly rare commodity.

The second firm, also located in North Carolina, is considerably larger and has a general business clientele. In interviews over the years, several of its lawyers have acknowledged that they make significantly less than those in larger firms in large cities and somewhat less than their peers in

260. KELLY, *supra* note 21, at 53–83.

North Carolina firms that have opted for multi-city expansion and mergers with regional and national firms.²⁶¹ By accepting the economic consequences of slow and careful growth, they say, the firm can limit its hiring to those who are committed to preserving a cooperative work environment and a governance system based on consensus and consultation. The firm's lawyers claim to like and enjoy working with their clients almost without exception, but they impose no ideological screen and are more than willing to represent the occasional "villain."²⁶² With respect to their hours, they believe that they have more manageable lives than most of their business law peers, although they admit that "the exceptions" (frantic preparation for a big case or a big business deal) are not infrequent.

Students have expressed skepticism about this firm's lifestyle narrative on several grounds. First, few believe that the working hours really are reasonable; most suspect that the exceptions consume the rule. Second, some make the judgment that to be truly "different," a firm would need an organizing principle more fundamental than a preference for nice, balanced people. A few of the blunter students have argued that a firm whose practice consists largely of greasing the skids of commerce without making moral judgments is unlikely to have a serious commitment to things other than its bottom line. Finally, a number of students have evinced a generalized skepticism about the quality-of-life commitment of any firm that emphasizes law school status and grades in its hiring, as this firm does.

On balance, I have come to share the students' hardheaded realism. We have seen no evidence that there is any way for lawyers to make a decent income, let alone an extravagant one, without working very hard.²⁶³ Control over one's life is difficult under any circumstances. Even those lawyers who attempt to limit themselves to the simplest small-town matters must spend many nights and weekends meeting with clients or doing things in an effort to get new ones. Once a lawyer chooses to get involved in litigation above the criminal misdemeanor level, or in complicated business transactions, a rubicon has been crossed; one must jump when the judge or client says so. It may be possible to make some compromises at the margins, turning down some additional business (especially if it is labor- or travel-intensive) in exchange for a bit more personal freedom. But even this limited self-discipline is difficult, as it evokes a fundamental insecurity

261. For statistical validation of these insights, see ALTMAN WEIL, *supra* note 239, at 161-250.

262. A typical villain for this firm would be a company alleged to have polluted or an antitrust defendant.

263. For a detailed statistical analysis of this proposition, see ALTMAN WEIL, *supra* note 239, at sections III & IV.

shared by all lawyers we have interviewed (and, in fact, by every lawyer I have ever known): the fear that that next client may never come. While there is abundant statistical evidence that people in the largest firms work the most hours,²⁶⁴ the qualitative evidence from our interviews suggests that virtually all lawyers who maintain stable and sustainable practices work very hard to do so. I side with the students who believe that the rhetoric of the lifestyle firm is just that.

6. The Growing Allure of In-House Corporate Work

Every iteration of the course has featured at least one interview with an in-house counsel from a large corporation with a substantial North Carolina presence. Informants have ranged from the head of the legal department to a relatively junior staffer. For nine years, the message has been consistent. A generation ago, the stereotype of the in-house counsel was a lawyer who had failed in private practice and was relegated to doing routine, repetitive corporate work, while everything interesting was farmed out to private law firms. The current picture represents an almost total reversal.²⁶⁵ Now, we are told, cost-control concerns dictate that as much work as possible be done in-house. Corporate counsel see themselves as fully capable of handling anything other than litigation (which they now manage much more closely than in the past) and the very large transactions that require the short-term application of extraordinary resources.²⁶⁶ Significantly, in-house counsel also perceive a dramatic shift in the power relationships they have with their outside lawyers.²⁶⁷ Twenty-five years ago, a corporate counsel might have seen himself or herself as dependent on a single outside law firm that the company had relied on for years. Now, in-house counsel believe that they call the shots, using outside lawyers on an as-needed basis, forcing firms to compete for individual pieces of business, and taking an assertive role in monitoring fees.

Because they are now doing much more, in-house counsel tell us, their staffs have more and better lawyers than a generation ago. They believe themselves to be every bit as able as their outside counterparts and describe their in-house career path as a matter of choice rather than relegation. They typically ascribe their choice to quality-of-life concerns, although not in the

264. *Id.* at 147–48.

265. For accounts of this change as it was occurring, see SPANGLER, *supra* note 101, at 70–106; Abram Chayes & Antonia Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277–93 (1985).

266. See TROTTER, *supra* note 105, at 76–77. See also *The Du Pont Legal Model*, at <http://www.dupontlegalmodel.com/files/home.asp> (last visited Aug. 10, 2004) (on file with the North Carolina Law Review).

267. See TROTTER, *supra* note 105, at 45.

simple sense of hours worked. On the contrary, they believe that they work at least as many hours as their private-firm counterparts. Rather, they talk of the benefits of having a single client. On the professional side, this reduces the need to perform triage among the conflicting, nonnegotiable demands of multiple clients, with some getting your best work, some getting work that is just good enough, and some getting ignored. (The in-house counsel acknowledge that people within a single company can create similar conflicts, but they say that these can usually be resolved by reference to the corporate hierarchy.) This, they believe, leads to a more rational and, consequently, less stressful day-to-day work environment. On the personal side, periods of peak work tend to be more predictable than in law firms. Although unexpected crises can and do occur, the in-house counsel knows what is going on inside the company and can anticipate many problems. In a private law firm, by contrast, the lawyer rarely hears from the client until the crisis is at hand.²⁶⁸

Students in the course tend to be particularly upbeat after an interview with a corporate in-house counsel. The reason is twofold. First, the work sounds interesting, reasonably remunerative, and not entirely inconsistent with having a personal life. Second, and perhaps more important, we are regularly told that these jobs are not limited to the top of the class at the top law schools. Many in-house counsel do have such credentials; they worked at a top corporate firm and then went in-house with one of the firm's clients.²⁶⁹ This used to happen frequently when a lawyer was passed over for partnership; now, the move is more often voluntary.²⁷⁰ But the in-house counsel we hear from also emphasize that corporations are far more interested in discrete knowledge and tangible skills than resumes. They want to get value from day one. Unlike a large law firm, they are unwilling to train the smart generalist. Consequently, people with relatively modest law school credentials but meaningful real-world experience can be competitive for a first-rate in-house position if their particular skills happen to be in demand. According to large numbers of students, this is a refreshing antidote to the usual law school career message, which they perceive to be that your fate is sealed as soon as the first-year grades come out.²⁷¹

268. This account is generally consistent with Kelly's case study of "Corporate and Professional Life at Standish Development Company." See KELLY, *supra* note 21, at 85-115.

269. See SPANGLER, *supra* note 101, at 80.

270. See Chayes & Chayes, *supra* note 265, at 277.

271. For an interesting study of law students' perceptions of the job market, see David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1216-45 (2001).

B. *Issues of Law and Life*

In the five Sections that follow I report our informants' comments on a series of fundamental questions that affect the entire profession. The first of these pertains to the common allegation that the law school experience strips aspiring lawyers of their concern for the public good. I next consider the state of diversity in the profession, contrasting ideals and reality; the remarkable variety of law firm governance practices; and the meaning of "culture" in the context of law practice. Finally, I summarize what we have learned in the course about the ultimate question of whether lawyers can have both professional success and satisfying personal lives.

1. What Happens to Law Students' Public Service Ideals?

Law professors regularly lament that a significant proportion of students come to law school with public service ambitions and that these ambitions evaporate before they graduate. There are two dominant (and not inconsistent) narratives that account for this development. The first blames it on law school. The adherents of this theory argue that the private-sector orientation of law faculties, the big-firm focus of placement offices, and the teaching style of most law professors, with its emphasis on value-neutral analysis, discourage and ultimately destroy the public-spiritedness of entering law students.²⁷² The second narrative stresses economics: the debt burden assumed by large numbers of law students, particularly those in private schools, simply forecloses relatively low-paying public sector work.²⁷³

Our interviews suggest a third possibility: that students retain their motivation, but become discouraged by the difficulty of getting such jobs and what they learn about the jobs themselves. Most of the public-sector and public-interest lawyers whom we have interviewed have told the students that getting their job involved persistence, risk-taking in the form of turning down other opportunities, and a large element of being in the right place at the right time. The clear message is that public-interest jobs that pay a living wage are few and far between, with the supply far exceeding student demand. These same lawyers tell a story of work that is as difficult as it is rewarding. Successes on behalf of needy clients can bring levels of satisfaction probably never seen in business practices, but

272. See McKinney, *supra* note 199, at 230–32; Sheldon & Krieger, *supra* note 201, at 3–4 (both reviewing the relevant literature).

273. This concern manifests itself in debt-forgiveness programs which allow students who perform public service work to receive loan repayment assistance. For a description of Duke's program, which is typical of those at many private schools, see *Tuition and Financial Assistance*, at <http://www.law.duke.edu/admis/financialaid.html> (last visited Aug. 10, 2004) (on file with the North Carolina Law Review).

adverse outcomes can create great personal pain for the client in which the lawyer is likely to share. Moreover, beyond low pay, an onerous workload must often be borne with inadequate resources, not enough help, and the looming possibility of one's employer losing its funding. These are jobs that invite burnout.

If these stories are at all consistent with what students learn in their individual job searches, then we should not be surprised that they appear to "lose interest" in public-interest work. The UNC School of Law has a longstanding public-interest orientation, and in recent years there has been a greater institutional commitment to helping students find jobs.²⁷⁴ If, however, students are finding that public-interest work is very hard to find and equally hard to do, then it may be unfair to condemn either them or their law schools when they follow paths of less resistance.

2. Stories of Diversity

In almost every interview over the years, I have raised the question of how effectively the lawyer's organization has dealt with issues of racial and gender equity. The discussions have been wide-ranging, and I will mention only some of the major themes here. First, everyone claims sensitivity to these issues and a concern for the diversification for their organizations. I do not report this cynically, as I have no reason not to take these people at their word. Perhaps I am naïve, but my experience as a practitioner, law professor, and social scientist has always told me that lawyers are by and large a fair-minded group.

Much more difficult discussions ensue when I ask the follow-up question of how effective they have been in turning their sensitivity into reality. No one has been particularly satisfied.²⁷⁵ Among the smaller firms, the stories highlight the law of small numbers and the nature of voluntary associations. The former point is that, in an organization that has only a few members and uses non-discriminatory hiring practices, the probability of a minority group being represented is always small.²⁷⁶ The latter point

274. These programs are described at *Commitment to Public Service*, at <http://www.law.unc.edu/PASStudents/PASStudentsPage.aspx?ID=55&Q=4> (last visited Aug. 10, 2004) (on file with the North Carolina Law Review).

275. For statistical data on minorities in the profession, see Eric H. Holder, Jr., *The Importance of Diversity in the Legal Profession*, 23 CARDOZO L. REV. 2241, 2245-47 (2002); ELIZABETH CHAMBLISS, MILES TO GO 2000: THE PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 1-18 (2000).

276. Assume that a small firm hires one law school graduate every three years. If it hires randomly (as by picking graduates' names out a hat), in any given year it has a ten percent probability of hiring a member of a minority group that comprises ten percent of the law school population. It would not be surprising if the firm went many years without hiring a single minority graduate.

emphasizes the intensely personal nature of the relationship among people in small organizations. Whether they are marrying, socializing, or forming small professional groups, people tend to associate with those who are like them. By this account, the fact that the legal landscape of North Carolina small firms features “black” and “white” firms, and now “women’s” firms as well, is both inevitable and benign.²⁷⁷

As a social scientist, I cannot challenge any of these generalizations. As a student of the legal profession, I can ask whether these generalizations should be challenged. That is, should the diversification of the profession at the small-firm level take place within, as well as between, organizations? If one believes that the organizations that provide legal services should be representative of the public they serve, then do individual lawyers have a professional responsibility to fight against the law of small numbers and make a conscious effort to associate with people who are not like themselves? These are complex questions that I would be presumptuous to try to answer, but I am persuaded that they are important questions that need to be discussed within the profession.

The accounts given by large-firm lawyers follow a highly predictable pattern.²⁷⁸ With respect to racial diversity, we hear: (a) that the firm is committed to diversification; (b) that the firm has not been nearly as successful as it would like; and (c) that the problem is proving intractable. Here again, I have no basis for doubting the subjective good faith of the informants on point (a), nor am I aware of any evidence that they are being self-deprecating on point (b). The difficulties begin at point (c).

The almost-invariable story begins with the proposition that the firm has had and will maintain very high initial screening standards. This means that anyone the firm interviews must have very good law school grades, with just how good being determined by the selectivity of the school. (As one out-of-state lawyer told me, his firm will interview any interested student from Harvard but only those in the top twenty percent of the class at UNC.) Only at the interview stage are subjective assessments made. This screening policy is necessary to ensure that everyone they hire “can do the work,” which, of course, is “complex and sophisticated.” The unfortunate result of this is both predictable and unavoidable. If African Americans comprise, say, ten percent of the student body at a particular

277. These points have been made by course informants. Although it is consistent with my own observations, I am unable to validate it statistically.

278. For data on minority representation in large firms, see Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41, 51–57 (2000). Clients, especially large companies, are also exerting increasing pressure on firms to diversify. See Lily Henning, *Law Firms are Recognizing that Diversity is About Business: Just Ask Their Clients*, LEGAL TIMES, March 17, 2003, at 1.

school, then only a couple of African-American students are likely to be at the top of the class and thereby eligible for big-firm interviews. Since all of the elite large firms will be competing for these same few students, no single firm is likely to hire many African American students, and some will hire none at all.²⁷⁹

The obvious follow-up question is whether the initial screening criterion makes sense. Here, our big-firm informants regularly acknowledge that the grades/law school prestige test is both over- and underinclusive. It is overinclusive in that it yields intellectually capable people who lack the commitment to “do the work” or the personal characteristics to fit in with the firm culture. It is underinclusive in that it almost certainly excludes an unknown number of people who have everything needed to do the work and succeed in the firm but have fallen a little bit short on their law school exams. Despite these admissions, big-firm lawyers defend the initial screening criterion on the grounds that since they cannot interview and assess every single applicant, they must rely on the only uniformly available piece of information they have for evaluating intellectual ability—law school grades. Finally, they claim that experience confirms that law school academic performance really is a reliable predictor of ability to do big-firm work, especially in the absence of an alternative variable.

It would be very easy for a social scientist to dismantle this seat-of-the-pants validation of law school grades as a predictor; however, it is hard to respond to the large firms when they ask, “What else should we do?” According to our informants, large firms have begun to pursue a number of strategies to expand their eligibility pool beyond those who pass the law school grade test. A simple but expensive expedient is to visit more law schools, especially those with more minority representation. Expanded summer clerkship programs for first-year students are also viewed as making a contribution. First-year offers are made when only a couple of first-semester grades are available, so the application of the traditional screening test makes less sense. Correlatively, firms are more tolerant of risk and failure in their first-year programs.²⁸⁰ Consequently, first-year

279. The available data are consistent with this account: minority representation in elite large firms is low, and there is considerable variation. Chambliss and Uggen, *supra* note 278, at 47.

280. According to large-firm recruiters with whom I have discussed the issue, their life is easiest when second-year summer associates succeed and fill almost every available permanent slot. A second-year student who fails to earn a permanent offer may have to be replaced by a student who did not clerk with the firm, which is a risky proposition. Consequently, these recruiters are much less willing to take risks with second-year than first-year students. They also believe that a refusal to make a permanent offer to a second-year student generates considerably more ill will at the student's school than the refusal to offer a first-year student a second summer clerkship.

hiring relies far more on subjective factors. Some of these factors, although ostensibly race-neutral, may work to expand the minority pool: recommendations from law school faculty known to firm lawyers, accomplishments before law school and outside the law school classroom, and connection with the firm's city. (It is acknowledged that other subjective factors can work against diversity: for example, being a family member or friend of a firm lawyer, the child of a client, or a member of an influential local family.) In addition, race itself may be used as a subjective factor.

We do not receive an especially hopeful message about the inclusion of minorities in large law firms in the near future. Even if entirely successful, the approaches being taken are unlikely to yield more than a few lawyers at most firms. If one takes seriously the arguments about the necessity of "critical mass" and members of underrepresented minorities in positions of authority, even these projected numbers do not look a great deal better than zero.²⁸¹ Student reactions are mixed. I have never heard a student describe a big-firm lawyer as a racist. Nonetheless, since large numbers of students are already aggrieved about the law school grade screen, they are not hesitant to attack the racial impact of its application.

3. The Infinite Variety of Law Firm Governance

When interviewing lawyers from private firms, I have routinely asked questions about how the firm is governed. The variety is remarkable, so much so that it is difficult even to delineate models. Perhaps the one generalization that holds up is that in the very smallest firms, those with no more than three or four partners, major business decisions (including those about compensation) tend to be collaborative, with each partner having at least a *de facto* veto. When there is a division of opinion, anything at all can happen: the members can compromise, the minority can acquiesce and live with the results, or the firm can break up. Lawyers from larger firms have given accounts of governance systems ranging from virtual dictatorships to pure Athenian democracies. Interestingly, it appears from the accounts that any of the systems can either work or fail, depending on the circumstances. In other words, lawyers do not appear to believe there is a "right" way to govern a law firm, and this diversity of belief seems to have some justification.

Dictatorships are rare and come in two varieties. The despotic sort

281. It has been argued that if a minority group is to become a permanent presence at a firm, there must be more than a token number of its members, and some of them must accede to positions of authority. This thesis is described and tested in Chambliss & Uggen, *supra* note 278, at 62-63.

comes about when a solo practice grows into a larger organization and the founder tries to retain total control. As was the case with Roman emperors, the survival of such a dictatorship seems to depend on "bread and circuses."²⁸² If the work and the pay are good and the environment is not unduly oppressive, lawyers may tolerate their lack of rights indefinitely; if their professional lot (particularly the financial component) starts to look unfair, they will revolt or leave. The other species of dictatorship is the benign, *de facto* one. Here, members of the firm concede decisionmaking authority to a highly trusted colleague. He or she may be a founder who has enjoyed paramount influence from the beginning or a more recent addition who has come to command great respect. Whereas the despot exercises power, the *de facto* dictator relies on authority. He or she consults, seeks consensus, and may even put decisions to a vote, in which case the members of the firm usually conclude that it is most efficient and least disruptive to accede to the autocrat's recommendations.²⁸³

Other larger firms practice various forms of direct and representative democracy. In the former case, major business and professional decisions, always including annual compensation, are put to a vote of the partners;²⁸⁴ some firms operate on a one-member, one-vote basis, while others use weighted voting, with some members being more equal than others. In the representative situation, committees are empowered to make major decisions. They collect data and consult in various ways, and the broader membership of the firm may have some right of review.

Approaches to compensation vary both within and across governance structures. Regardless of who makes the compensation decision, a major question is whether the criteria are quantitative or qualitative. At the quantitative extreme are rigid mathematical formulas that can factor in how

282. The reference is to the public spectacles at which the emperors provided food and entertainment for the masses (in Latin, "*panem et circenses*"). *Bartlett's* attributes the phrase to the first- and second-century Roman satirist Juvenal. JOHN BARTLETT, FAMILIAR QUOTATIONS 122:15 (Emily Monson Beck ed., 15th ed. 1980).

283. Kelly's case studies provide examples of variations on the theory of dictatorship. See KELLY, *supra* note 21, at 45 (describing the "oligarchy exercised with democracy" practiced by the two leaders of the large "McKinnon" firm); *id.* at 53-60 (describing the founder and successor as benevolent dictators in the mid-sized "Mahoney" firm).

284. I use the word "partners" to refer both to full members of a legal partnership (as opposed to "non-equity" and other second-class partners, see *supra* note 239) and to voting shareholders in a law firm organized as a professional corporation or association. As described by our informants, the realities of governance do not seem to depend on the legal formalities of organization. Consistent with this observation, a recent empirical study of New York City firms finds that neither number of lawyers nor number of offices is a statistically significant predictor of organizational form. The study's authors theorize that in choosing the form in which they do business, firms may simply be responding to choices made by competitors. See Scott Baker & Kimberly Krawiec, *The Economics of Limited Liability: An Empirical Study of New York Law Firms*, U. ILL. L. REV. (forthcoming) (manuscript on file with the North Carolina Law Review).

many hours the partner works, how much collected revenue those hours have generated, and how much income can be attributed to clients that the partner finds or manages. At the other end of the spectrum are systems where a committee consults with all members of the firm, develops a holistic assessment of each partner's financial and nonfinancial contributions to the firm, and then translates that assessment into revenue shares.

These governance and compensation models are well known to lawyers who practice in the private sector. They are a revelation to students whose knowledge of law firms has been acquired as recruiting targets and pampered summer associates. Although I was amply familiar with the various models, I was surprised to learn how little consensus there appears to be. Virtually every point on the continuum is the subject of an enthusiastic narrative. When confronted with the practical question of governance, firms with very similar practices and resumes try to solve it in radically different ways. Any of the approaches seems capable of either success or failure; none seems inherently favored by Adam Smith's unseen hand. As I will discuss in the next Section, the reasons for the individual choices, and for their respective successes and failures, appear to be grounded more in culture than in economics.

4. Is Law Firm Culture Real?

As I suggested in the introduction, "culture" may now be one of the most overused words in American business, and the legal business is no exception.²⁸⁵ Every sort of idiosyncrasy and individual difference is described as "cultural." I used to wonder whether "culture" in the more rigorous anthropological sense—shared beliefs and practices that influence the way that members of a group interpret and respond to reality—can be meaningfully applied to business organizations. An earlier ethnographic study of investment organizations convinced me that the answer to this question is unequivocally affirmative.²⁸⁶ As I have conducted and reflected on years of interviews in The Law Firm, I have asked the same question about the organizations in which lawyers practice. Once again, the answer is yes.

Consider the example of compensation systems. On occasion, we have conducted back-to-back interviews with lawyers from large firms that are comparable in all structural respects. One gives a strong argument for his or her firm's computerized "eat-what-you-kill" compensation formula. The second advocates, with equal vigor, for his or her firm's collaborative,

285. See *supra* notes 139–40 and accompanying text.

286. O'BARR & CONLEY, *supra* note 5, *passim*.

holistic, and highly judgmental process. Both point to retention figures as evidence that their respective systems work. It is tempting to write these presentations off as extensions of the sometimes shameless self-promotion that firms engage in during the recruiting process. But as the interviews develop, it is always clear that there is more going on. When they are pressed to elaborate, it becomes clear that the two informants are expressing fundamentally different views of professional reality. Neither, in other words, can see the world working in any other way. To an anthropologist, their accounts are evocative of an Amazonian Indian explaining the necessity of following the village headman,²⁸⁷ or an East African pastoralist extolling the virtues of cattle as a measure of personal worth.²⁸⁸ They are all examples of cultural difference, and they lend credence to Michael Kelly's argument that such differences are as real across legal organizations as they are between societies.²⁸⁹

Several large-firm lawyers have mentioned what one of them called "the rule of 100." It refers to the belief that a qualitative cultural shift occurs almost invariably when a firm grows beyond about 100 lawyers. Below that number, everybody can know everybody else reasonably well. Consequently, governance based on consultation, collaboration, and consensus-building has a chance to work. Beyond that number, many of our informants believe, a shift to more impersonal, numbers-based decisionmaking model is all but inevitable. Perhaps tellingly, only one of 100+ lawyer firms represented in our interviews clings to the more personal governance style. Lawyers from competing firms have expressed strong doubts about the sustainability of the model, and even the firm's own members acknowledge that it will be difficult to maintain indefinitely. They believe that they can do it, however, through a combination of relatively restrained growth; avoidance of mergers, acquisitions, and excessive lateral hires; and very careful personal screening of entry-level lawyers. It is a fascinating experiment-in-progress that I monitor closely from year to year.

The most difficult questions about firm culture include where cultural differences come from, how they are inculcated and transmitted, and whether and how they can be challenged and changed. More than a hundred years of anthropological literature provides abundant evidence that all of these questions are exceedingly difficult to answer. Once it got beyond the seductive idea of the "primitive" culture locked in a timeless

287. See KOTAK, *supra* note 4, at 217.

288. See MARVIN HARRIS, *CULTURE, PEOPLE, NATURE: AN INTRODUCTION TO GENERAL ANTHROPOLOGY* 235 (7th ed. 1997) (observing that in East African pastoral societies, "cattle are a standard of value that can be used for measuring the value of a wife").

289. See *supra* notes 129–39 and accompanying text.

past, anthropology began to realize that cultures are not closed systems inhabited by individuals who think and act in lockstep adherence to their values. Rather, almost all cultures are accepting and rejecting outside influences almost all of the time, and most individuals within a particular culture are usually engaged in some level of resistance to at least some of its values.²⁹⁰ Moreover, the issues of how cultural belief sets coalesce and precisely how they are transmitted to individuals remain contested.²⁹¹

Nonetheless, law firm cultures do appear to exhibit some major tendencies. First, founder effect is extremely important. In stable and prosperous firms of any size where the founders remain active, their values and the practices that derive from those values tend to remain ascendant, regardless of whether the founders occupy positions of overt authority. If those values are particularly strong, they can outlive the founders themselves. The departure of the founders can be followed by what I think of as a “mythological” transitional phase, in which the founders are remembered, talked of, and thought of as powerful influences, and the beliefs and practices they inculcated continue to be reinforced.²⁹² The mythological phase has no predetermined end, but can go on indefinitely so long as the culture remains sufficiently adaptive to attract new adherents and inspire each generation of lawyers to pass it on to the next. At some point, however, the powerful myth can degenerate into empty legend, or the founders can become merely names attached to nothing at all. When that happens, the firm’s cultural direction is up for grabs, with factions of existing lawyers and even potential merger or acquisition partners all competing for dominance. Sometimes this leads to the emergence of an entirely new culture, and sometimes to unresolved incoherence and dissolution.

Lawyers whom we have interviewed recognize that once the values and practices handed down from the founders have been repudiated, it is difficult to establish a consensus around a replacement. The most likely outcome, many of them believe, is a new culture based solely on economic power. The partners who control the biggest clients and do the most lucrative work demand that they be given control and a preponderant share of the compensation, and others acquiesce in order to keep them and their resources in the fold. We have heard of no instances in which a qualitative collaborative system has been overthrown and then has made a comeback.

290. See KOTTAK, *supra* note 4, at 422–24.

291. See generally CAROL R. EMBER & MELVIN EMBER, *CULTURAL ANTHROPOLOGY* 265–66 (7th ed. 1993) (discussing the relationship between culture and individual psychology).

292. A colleague and I observed a similar phenomenon in the investment world. We described it under the heading “corporate creation myths.” O’BARR & CONLEY, *supra* note 5, at 77–85.

Every lawyer with whom we have discussed the question recognizes the cultural threats posed by mergers. Even big-firm lawyers, once they are made to get past the recruiting-brochure rhetoric about synergy and “fit,” readily admit that mergers usually result in one of a number of unattractive cultural outcomes. Where the merging firms are of more or less equal size and power, a probable outcome is ongoing competition and conflict—as in the case of the Boston firm where I once worked.²⁹³ Lawyers may go into mergers believing that two firms have highly similar cultures, but they tend to learn quickly that in cultural matters, small differences can prove irreconcilable. Where a larger firm is acquiring a smaller entity, it is generally acknowledged that the latter must inevitably yield on every point of cultural difference. The only kind of acquisition for which our informants have made a strong cultural case is the situation where a well-established department or practice group leaves one firm and joins another. There, it is believed, the acquired group can be left alone to maintain its own culture so long as it generates a satisfactory revenue stream and client development opportunities for the acquiring firm.

Our interviews have confirmed two things in the strongest possible way. First, law firm culture is a real phenomenon and not merely a business consultant’s buzzword. Second, cultural differences among law firms have important practical consequences. Different cultural environments can create radically different work experiences for the lawyers in a firm. Indeed, culture can influence, if not determine, whether a firm succeeds or fails. When cultures are combined in a merger or acquisition, the potential for conflict and even chaos is greatly increased. It is apparent from our interviews that lawyers understand the concept of organizational culture and are attuned to its practical significance. They also understand that culture is likely to have even greater practical effects in a business like law where the “product” is something as elusive as relationships and a reputation for sound judgment. It is therefore surprising to me that so many firms put aside all of this knowledge to accept and then

293. I joined the firm of Gaston Snow & Ely Bartlett in 1977. At that time, the firm was the product of a recent merger between two old Boston firms, Gaston, Snow, Motley & Holt, and Ely, Bartlett, Brown & Proctor. The former was usually described as more conservative and traditional, with strong ties to the trust funds that had strangled Boston’s private economy for most of the twentieth century. The latter was viewed as more aggressive, political, and litigation-oriented. By the time I left in 1983, the firm had yet to arrive at a post-merger culture. Instead, partners from the two constituent firms continued to compete for money and influence, plot, and even disparage each other to clients. These conflicts were exacerbated by a series of disastrous mergers, first with small firms in Palo Alto, California and Coral Gables, Florida, and then with a New York securities boutique. When its largest client and principal lender called in its debt in 1991, the firm dissolved and filed for bankruptcy protection. For an excellent account of the debacle, see John H. Kennedy, *Death of a Law Firm*, BOSTON GLOBE, Nov. 10, 1991, at A37.

repeat ill-formed and thinly supported arguments about the economic necessity to grow and merge.

5. Can Lawyers Have Lives?

The single question in which students express the greatest interest concerns the possibility of combining a successful legal career with a satisfactory personal and family life. The answers that they receive are not comforting. Most of our informants rate this as the single biggest challenge facing the profession. Some of them admit to constant tension between the personal and professional, with the latter usually prevailing. Others claim success in managing the conflict. Even here, however, follow-up questioning reveals details that, in the minds of the students, do not quite add up. Recently, for example, a lawyer described long days, work on a majority of weekends, and travel on an almost weekly basis, and then characterized her work-family balance as healthy. When we discussed the interview in a subsequent class, the students' attitudes ranged from skeptical to derisive. This case is not atypical. In another interview, a large-firm lawyer told us that she had just come back from an exotic and enviable tropical vacation. When we inquired further, however, she said that she got to take a vacation only every other year.

The problem seems intractable.²⁹⁴ As noted in Section III.A.5 above, all successful lawyers whom we have interviewed work extremely hard, in both qualitative and quantitative terms. Those lawyers fortunate enough to have a portfolio of strong plaintiffs' contingency cases may be able to work in bursts, building in some downtime between major cases. There may also be lawyers billing on a fee-per-transaction basis who have captured major efficiencies and reduced their hours to workable levels.²⁹⁵ In-house counsel work used to be a refuge for those seeking manageable hours, but we are told that companies are now demanding far more work of *all* their employees, including their lawyers. For those who live in the world of billable hours, the situation gets worse, with no relief in sight.²⁹⁶

294. This view is consistent with the literature, as illustrated by the Boston Bar Association reports discussed *supra* note 69 and accompanying text.

295. In all but one of our class interviews, however, such efficiencies have remained in the realm of hopeful theory. The sole exception is a non-litigating patent lawyer in a small boutique firm, who reports that he and his partners have mastered fee-for-service patent prosecution to the extent of achieving both civilized hours and more than satisfactory income. In 2004, a student reported an interview with an estate planner in a small North Carolina firm who seemed to have accomplished the same thing.

296. For statistics on this issue, see ALTMAN WEIL, *supra* note 239, at 139–60. Despite some year-to-year fluctuation, the trend in billable hours has been steadily upward. One especially telling measure is that between 1984 and 2002, a national sample of partners with twenty-five to twenty-nine years of experience increased their hours by more than 200—more than five forty-hour weeks! See *id.* at 151–53. Five-year associates added the equivalent of two-plus weeks to

The question that students repeatedly ask our informants is whether anything can and will be done. One glib but not inaccurate response is, "Welcome to the global economy, kids!" Others tout the prospects of "value billing." As previously noted, however, value billing seems to boil down to charging clients more money for less labor.²⁹⁷ Given the increased cost-consciousness of companies across the economy and the greater level of scrutiny to which in-house counsel subject legal bills, I do not share the enthusiasm of these advocates.

A number of informants from across the professional spectrum have laid the blame for the law-family dilemma at the feet of greedy partners in large firms.²⁹⁸ The argument is that these individuals, by demanding incomes beyond the dreams of avarice, create shockwaves that propagate through the profession. To satisfy their income demands, the narrative goes, these big-firm partners work inhuman hours themselves and demand that their associates match or exceed them. In order to attract people who will work such hours, the big firms must pay them exorbitant salaries, which creates even more pressure for billable hours, which pushes the whole system into an unbreakable feedback loop. This has two related effects elsewhere in the profession. First, lawyers' general expectations about income are inflated. Given the resistance of clients to price increases, the only way to meet those expectations is to work even harder. Second, there is a specific effect on the expectations of those being recruited to perform salaried labor at the bottom of the pyramid. If law students entering 500-lawyer New York firms are being paid \$150,000, then law students being recruited by 100-member firms in Charlotte, North Carolina, Jacksonville, Florida, or Nashville, Tennessee, will expect \$100,000—and so on down to the fifteen-member firm in Springfield, Massachusetts or Wilmington, North Carolina.²⁹⁹ Every level (at least of the billable-hour branch of the profession) develops its own self-reinforcing cycle. The proponents of this argument conclude that if those at the top of

their workload over the same period. *See also* TROTTER, *supra* note 105, at 81–85 (presenting an account of increases in billable hours and its effect on personal life).

297. *See supra* notes 192–93 and accompanying text.

298. Recall the account by the lawyer from the multi-city North Carolina firm of the effect of the financial demands of her Charlotte banking partners. *See supra* notes 233–35 and accompanying text. The greed theme was also especially prominent in the accounts of the demise of Boston's Hill & Barlow and Gaston Snow & Ely Bartlett, my old firm. *See supra* note 293 and accompanying text. *See also* KELLY, *supra* note 21, at 3 ("the triumph of greed").

299. One of Kelly's informants blamed the whole inflationary cycle on the Wall Street firm of Cravath, Swaine, and Moore and its then-extravagant 1986 salary increases. He charged that the Cravath lawyers "have jerked the profession on a chain." *See* KELLY, *supra* note 21, at 25. For an account of the more recent salary shockwave that originated in Silicon Valley in 1999, see Bruce M. Price, *How Green Was My Valley? An Examination of Tournament Theory as a Governance Mechanism in Silicon Valley Law Firms*, 37 L. & Soc. Rev. 731, 756–60 (2003).

the financial food chain earned an income that was merely exceptional, a reverse effect would be felt throughout the profession, this time to the betterment of all.³⁰⁰ They also advise students not to hold their collective breath.

A point that I make repeatedly is that the relative handful of law students who are being recruited by the highest-paying firms have a great deal of power. If they were to bargain with the firms and trade money for time, the dysfunctional feedback loops might be broken. The students who do not believe that they are among the big-firm elect are generally very enthusiastic about my argument.

The target audience resists on a number of grounds, however. Most say that they are going to big firms in the first place because this is the most “conservative” option. Being uncertain of where they want to end up ultimately, they want to preserve as many options as possible, and believe that a big-firm experience is the best way to do that. They further believe that opening a quality-of-life dialogue with a prospective employer would mark them as “wimps,” resulting in rejection by the biggest and best option-preserving firms and relegation to a lower tier. Many also say that one simply could not rely on a time-for-money deal with a big firm. If you made such a deal, they say with much conviction, you would simply end up doing the same amount of work for less money—so why bother getting into it in the first place? Finally, many say that they need the money to pay their law school debts (particularly when I teach the course at Duke), and a smaller number forthrightly admit that they *want* the money. Whatever package of reasons is advanced, I come away from the discussion concluding that there is no prospect in the foreseeable future of a revolt by the students whom the big firms believe are most desirable.³⁰¹

Overall, I am pessimistic about any moderation of lawyers’ workloads. (The astute reader will note that I am in academics.) Everyone in the private sector is under tremendous pressure to work harder. Lawyers are no exception. There are also factors peculiar to the legal profession that may make the pressure on lawyers even worse. None of the optimistic scenarios that I have heard in our interviews seems plausible. The legal profession will continue to be peopled by individuals who are willing to work extremely hard. These people will continue to face a daunting challenge as they attempt to reconcile personal and professional demands.

A final observation concerns the disproportionate impact that these

300. See Rhode, *supra* note 42, at 308 (stating that lawyers would be well advised to “just say no to greed”).

301. This outlook is consistent with a survey of Texas associates, who expressed reluctance to trade money and advancement for time. Fortney, *supra* note 182, at 260–61. Qualitative support is found in Rhode, *supra* note 42, at 308–09.

pressures may have on women. Lawyer after lawyer has told us that the time demands are greatest during the very years when women would like to have children and spend the most time with them.³⁰² In a particularly riveting story we heard this spring, a litigator in a national firm who is the mother of three young children said that, because of a trial, she had had only two days off (*days*, not weekdays) during the last several months of 2003.³⁰³ A couple of women have volunteered that their careers have been manageable only because of their decision not to have children.³⁰⁴ A fortunate few report that a happy combination of an enlightened husband with a more flexible job and exceptional childcare helpers has enabled them to meet their family obligations without sacrificing their careers. For most, though, both in our interviews and in the literature, the conflict is intractable and something must give way.

Many large firms now offer extended partnership tracks and part-time work with, they claim, no impairment of long-term career prospects. Smaller firms have also moved in this direction, although it is harder to do this when there are only a few lawyers left to pick up the work. (One single, childless woman working in a small firm expressed resentment about having to do extra work for the benefit of women who had made different personal choices.) Some women, however, are skeptical about these promises.³⁰⁵ They also point out that even if the firm does carry through on its promises, the woman who takes advantage of the program loses a great deal of income that can never be recaptured.³⁰⁶

The long-term effects of women entering the legal profession in proportionate numbers have long intrigued social theorists. Some, following in the so-called social feminist tradition, have predicted that the legal profession would be humanized, becoming less confrontational and more respectful of personal life as women brought their distinct experiences and values to bear.³⁰⁷ Others have predicted that, rather than

302. Similar complaints are widely reported in the literature. See, e.g., Rhode, *supra* note 42, at 300–02.

303. The details of the story included hiring a relay of nannies, one of whom the lawyer had felt compelled to fire mid-trial, which was particularly disruptive.

304. In the most recent of these episodes, a large-firm litigator said, unprompted, at the end of the interview, “In the interests of full disclosure I should tell you that I can do all this because having children isn’t a priority for me.”

305. Some of the men we have interviewed have been at least as skeptical of “daddy track” opportunities.

306. These concerns have been substantiated by a large-scale study of women in Ontario law firms. See JOHN HAGAN & FIONA KAY, *GENDER IN PRACTICE: A STUDY OF LAWYERS’ LIVES* 97–115 (1995).

307. See Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, 3 RICHARD L. ABEL & PHILIP S.C. LEWIS, *LAWYERS IN SOCIETY* 196–98 (1989).

the law being feminized, women entering the profession would be legalized.³⁰⁸ Women choosing law, this prediction goes, would tend to be those who already shared its traditional values and were willing to make the sacrifices that it requires; even those who came with different values would quickly adapt in order to survive and prosper. To my knowledge, social science has not ruled on the outcome, and my experience in The Law Firm does not permit me to do so, either. I can report, however, that to those women who confront these issues as a matter of practice rather than theory, the problem of reconciling the personal and the professional is extraordinarily difficult. Almost without exception, the people whom we have interviewed find the problem to be as difficult as ever and can foresee no simple or comprehensive solution. As one of our informants put it, "You just can't be in two places at the same time." This may be the single greatest problem facing the profession.

CONCLUSION

I conclude with some thoughts about what The Law Firm has taught me about the legal profession, the teaching of professional responsibility, and legal education more generally. Paul Haskell and I began this course nine years ago as an effort to inform students about the realities of life in the legal profession. Over time, it has provided a wealth of substantive information about its subject. Much of this information can be summarized as a response to the question, "How bad is it?"

The interviews from nine years of teaching The Law Firm do not support the notion of a profession in life-threatening crisis. We have heard multiple narratives of economic pressure and insecurity, of excessive if not oppressive workloads, and above all of the sometimes insurmountable challenges of balancing personal and professional life. But in the end, these have been (with one exception) stories of coping, not of despair and abandonment. The tellers have viewed their problems as challenges to be dealt with, not reasons to quit. All have judged their respective legal careers to be worth the ongoing struggle, particularly when compared to the fates of those in other lines of work. This last point gets repeated emphasis: we lawyers may have a lot to complain about, but it is far less than most other people.

As I have acknowledged throughout this Article, there are reasons to doubt this relatively optimistic assessment. First, my sample of informants is not random or otherwise scientific, even though I have always sought a broad cross-section of the profession. Second, I have chosen to interview lawyers, not failed former lawyers. And third, I have tried to select

308. *See id.* at 197–98.

intelligent, self-analytical lawyers who can communicate effectively with the students. These are probably not the kinds of lawyers who are likely to fail. Nonetheless, as I have argued earlier, there is reason to take seriously the ethnographic findings that have emerged from The Law Firm.³⁰⁹ Over the course of more than 150 hours spread out over nine years, lawyers from every walk of legal life have told us that the profession is confronting serious problems, and that some of these problems have no apparent solution, but that the benefits the profession confers make it worthwhile to keep trying. Flawed as it may be, I am convinced that this is a significant reflection of reality.

Despite its value as a research project, the primary purpose of The Law Firm has remained—and will remain—pedagogical. Although I am certainly the most biased of sources, I believe that it has succeeded as a teaching innovation. Every piece of evidence I have suggests that students have been as engaged as I have in the process of studying the legal profession through the ethnographic narratives of its members.

I am less certain about whether I am teaching “professional responsibility.” If the MPRE were given on the last day of class, I fear my students might not do as well as those in traditional rules-based courses. I can attest, however, that students in The Law Firm manifest an impressive understanding of what it means—for better and for worse—to be a lawyer, and of the major ethical, professional, and personal challenges they are likely to confront after law school. They have also thought and talked about the possible responses to those challenges. My generation of lawyers has thus far been unsuccessful in resolving such problems as personal-professional balance and the public’s disaffection with the legal profession. It may be that these problems are truly insoluble. A more optimistic view, however, is that students who have been made to confront these issues in law school will have better prospects for dealing with them down the road.

The course has also had another benefit that I did not anticipate at the outset. Throughout my twenty-one years of teaching, students and alumni in practice have complained about what they see as a conflict between teaching and research. As the complaint is often expressed, professors want to do research, and this comes at the expense of teaching. I usually respond by asking them to name some of the best teachers in the school. When they do, I point out that most of the people they have named are also among our most productive scholars. I provide a top-ten list of our faculty’s best scholars, and they invariably agree that those on the list are all excellent teachers. I then argue that the people who are most committed to producing knowledge are likely to be the most effective in disseminating

309. See *supra* notes 64–68 and accompanying text.

it. After all this, my interlocutors still walk away unconvinced, muttering again about the conflict between teaching and research.

The Law Firm has turned out to be demonstrative evidence of my point about the false conflict. Before the students' eyes, I simultaneously learn and teach. I hear things, I discuss them with the students, and then I try—and often struggle—to synthesize my accumulating knowledge. The students must do the same. Rather than feeding them information, I am guiding them through an ongoing research project. This is learning on the hoof. I am at once teacher and researcher, which requires them to be students and researchers. My hope is that when I talk to them five years from now they may have a more positive view of the compatibility of teaching and scholarship.

A final and related question is whether this style of teaching has a place elsewhere in the law school curriculum. Law schools have become more like graduate schools over the past generation as faculty members have been required to write more and have turned their scholarship in interdisciplinary directions. In the last few years, at least half the faculty candidates we have interviewed had or were completing a Ph.D. in a non-legal field.

But several major distinctions remain between legal and graduate education. First, we do not expect our incoming students to have any knowledge of law. Consequently, we spend all of the first year and a good part of the second trying to impart basic doctrinal literacy. By contrast, a graduate program in, say, history, would assume that its entering students had the equivalent of an undergraduate major and could move directly to more advanced study.

Second, students enter Ph.D. programs in the hope of turning into their professors. As a result, it makes sense for them to devote much of their graduate education to participating in faculty research, whether as seminar participants, research assistants, or, ultimately, collaborators. By contrast, few law students aspire to become us. Instead, the vast majority of our students will have careers practicing in the real world. While we may tell them about our research and employ some of them to assist us, our basic objective is to train future lawyers, not writers of books and articles about the law. Given this, the graduate school model of learning by doing research has had a limited place in legal education.

In light of these fundamental differences, how widely applicable is the learning-through-research approach I have taken in The Law Firm? It is hard to imagine teaching a first-year course (civil procedure, in my case) in this way. If nothing else, it is just too inefficient; in the first year there is so much doctrine and so little time. The same may be true of such upper-class “bar” courses as business associations and evidence. At the other end of

the curriculum, the model will certainly fit many seminars and other small, specialized courses. If the objective is to acquire depth rather than breadth, what better way to do that than through participation in primary research? In *The Law Firm*, the specific research method has been ethnography; elsewhere it might be economic modeling, delving into historical archives, or the traditional analysis of cases. Based on my experience with *The Law Firm*, I would go so far as to argue that the presumptive seminar/small course model should be student participation in the production of knowledge.

A number of courses will fall into an intermediate status. Take an example from my teaching portfolio: intellectual property. This course combines the transmission of basic doctrine with the consideration of evolving issues—for example, the patenting of proteins or the copyright protection of databases. A teacher might well carve out units of the course in which the students would be required to participate, however briefly, in the production of knowledge. This is easier said than done, however. Although I teach unresolved areas of intellectual property law by discussing my own research, I have thus far been unsuccessful in creating specific vehicles for student participation.

I conclude this Article by thanking Paul Haskell for asking the fundamental question that led to the creation of *The Law Firm*. As a result of his insight, I have spent nine years teaching by learning, and learning by teaching. I have learned about the legal profession and, fittingly, about teaching itself. I hope that my students will continue to share my enthusiasm for the endeavor.