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‘To act is to be committed, and to be committed is to be in danger’:[1] the vulnerability of the young lawyer in ethical crisis

This paper takes as its starting point the phenomenon of young lawyers in ethical crisis. The teaching of ethics in the classroom and the ethos and environment of the law firm have created dissonance: knowing what it is right to do but being unable to do it. In examining this phenomenon, we develop the idea of *commitment* as a source of duty, loyalty, and courage that enables someone to accept and overcome reluctance to act ethically. Our conceptual framework combines two models: Fineman’s radical view that vulnerability is universal, but ameliorated by the assets available to the individual, and Rest’s four component model that provides a taxonomy of precursors for ethical action and resilience. We consider how the structures and the relationships between law schools, regulators and law firms, acting in combination, support or degrade ethical resilience and development of a commitment to ethical action. We close by considering how changes to the structure planned by one regulator in England and Wales depletes the assets available to the young lawyer and thereby the profession.

Keywords: professional ethics, vulnerability, Martha Fineman, James Rest, legal education, legal profession

Introduction

It is fundamental that lawyers should act ethically, such that a higher moral standard than honesty is demanded of them.[2] This duty is reinforced in codes of conduct, curricula and competence statements. However, particularly for young lawyers, translating knowledge of such precepts into ethical action in the face of pressure from clients or colleagues requires resilience. There is a considerable canon of literature in both the UK and the USA identifying the challenges of, and deficiencies, in, adequately educating students for ethical

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[1] James Baldwin, ‘My Dungeon Shook’, *The Fire Next Time* (Penguin Books 1990) loc 160. The authors would like to thank Professor Tom Lewis, and the anonymous reviewers, for their insightful comments on drafts of this paper.

[2] *Wingate and another v Solicitors Regulation Authority*, [2018] EWCA Civ 366; [2018] 1 WLR 3969, per Rupert Jackson LJ, [121] ‘the word “integrity” in a professional code of conduct means something more than mere honesty. It involves adherence to the ethical standards of one's own profession’.

behaviour in future legal practice and persuading them (and their instructors) of the value of such education.[3] As a means of institutional support education can render lawyers docile and dispirited[4] in a model whose hidden curriculum can emphasise commercialism[5] and reinforce existing and possibly toxic hierarchies.[6] In the workplace, in the face of ethical challenge presented by members of the hierarchy, or by clients, the teaching we provided in the classroom and the environment of the law firm can combine to create dissonance: *knowing* what it is right to do but being unable to *do* it. As teachers ourselves we have experienced the occasional panicked phone call from former students faced with ethical issues that they cannot resolve. This experience of being the last resort demonstrates the gaps that already exist in the educational continuum. We argue that changing regulatory and workplace environments in England and Wales are now further eroding institutional support for ethical action in legal practice. This is obviously not the intention of government, society, nor the vast majority of legal firms. Yet a failure to fully and realistically engage with factors that corrode and undermine ethical action by young lawyers is having this undesired and dangerous effect. It is dangerous to the rule of law, to the stability of legal firms and ultimately of the legal professions. In order to understand how this unintended consequence is being generated we develop a concept of

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[3] For example Ronald M Pipkin, 'Law School Instruction in Professional Responsibility: A Curricular Paradox' (1979) 4 American Bar Foundation Research Journal 247; Roger Cramton and Susan Koniak, 'Rule, Story, and Commitment in the Teaching of Legal Ethics' (1996) 38 William & Mary Law Review 145; Julian Webb, 'Conduct, Ethics and Experience in Vocational Legal Education' in Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart 1998); Donald Nicolson and Julian Webb, 'Taking Lawyers' Ethics Seriously' (1999) 6 International Journal of the Legal Profession 109; Julian Webb, 'Teaching Ethics to the Legal Profession: Is There a Better Way?' (2000) 3 Legal Ethics 128; Kim Economides and Justine Rogers, 'Preparatory Ethics Training for Future Solicitors' (Law Society of England and Wales 2009) <https://ore.exeter.ac.uk/repository/bitstream/handle/10036/64973/TLS%20Ethics%20Report.pdf?sequence=1&isAllowed=y> accessed 1 April 2022. The concept of commitment used in the latter is not identical with our use of the word. A variety of resources and approaches in a range of jurisdictions can be found at International Forum on Teaching Legal Ethics and Professionalism, 'International Forum on Teaching Legal Ethics and Professionalism' (*International Forum on Teaching Legal Ethics and Professionalism*, No date) <http://www.teachinglegalethics.org/> accessed 1 April 2022.

[4] Sharon Dolovich, 'Making Docile Lawyers: An Essay on the Pacification of Law...' (1998) 111 Harvard Law Review 2027.; Robert Granfield, *Making Elite Lawyers* (Law Book Co of Australasia 1992).

[5] See discussion and sources cited in Donald Nicolson, 'Calling, Character and Clinical Legal Education: Inculcating a Love for Justice from Cradle to Grave' in Fiona Westwood and Karen Barton (eds), *The Calling of Law: the pivotal role of vocational legal education* (Ashgate 2014), p 65.

[6] Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 Journal of Legal Education 591; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System - A Critical Edition (Critical America Series): 56* (Critical ed edition, NYU Press 2004).

commitment in the ethical sphere of action.

We develop commitment as a source of duty, loyalty, and courage.[7] Commitment enables someone to accept and overcome any reluctance to act derived from negative personal consequences in doing so.[8] A lawyer *committed* to ethical behaviour treats the (regulatory) ethical imperative over other motivations or interests,[9] fully accepting the inherent personal risks: knowing what it is right to do *and being able to do it*. Action, as indicated in our title, is critical to our concept, as it is to the articulation of the ethical competence for solicitors in England and Wales.[10]

In articulating this concept and investigating the extent to which the structures of pre-qualification professional legal education for solicitors in England and Wales, facilitate commitment, we combine two conceptual models. In common with some others,[11] we use

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[7] Rebecca Ashton, 'Professional Courage: What Does It Mean for Practitioner Psychologists?' (2017) 3 Educational Psychology Research and Practice 2.

[8] We recognise that attempts have been made to use the word as a term of art in sociology, psychology and philosophy, albeit with no consensus definition.

[9] We do not consider potential conflicts that arise when professional ethics and other sources of ethical imperative are in contradiction. For one such discussion see William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press 1998).

[10] '*Act* honestly and with integrity, in accordance with legal and regulatory requirements and the SRA Standards and Regulations, including

- Recognising ethical issues and exercising effective judgment in addressing them.
- Understanding and applying the ethical concepts which govern their role and behaviour as a lawyer.
- Identifying the relevant SRA principles and rules of professional conduct and *following them*.
- *Resisting pressure to condone, ignore or commit unethical behaviour*.
- Respecting diversity and *acting* fairly and inclusively.' (our italics), Solicitors Regulation Authority, 'Statement of Solicitor Competence' (*Solicitors Regulation Authority*, 25 November 2019) <https://www.sra.org.uk/solicitors/resources/cpd/competence-statement/> accessed 1 April 2022.

[11] For recent examples in law, see, in the USA: Muriel J Bebeau, 'The Defining Issues Test and the Four Component Model: Contributions to Professional Education' (2002) 31 Journal of Moral Education 271; Neil Hamilton, 'Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity' (2008) 5 University of St. Thomas Law Journal 470; Clark D Cunningham, '"How Can We Give up Our Child?" A Practice-based Approach to Teaching Legal Ethics' (2008) 42 The Law Teacher 312; Clark D Cunningham and Charlotte Alexander, 'Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation's Critique of American Legal Education' in Michael Robertson and others (eds), *The Ethics Project in Legal Education* (Routledge 2011); Neil W Hamilton and Verna E Monson, 'Ethical Professional (Trans)Formation: Themes from Interviews about Professionalism with Exemplary Lawyers' (2012) 52 Santa Clara Law Review 921; Neil Hamilton, Verna Monson and Jerome Organ, 'Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer' (2014) 10 University of St. Thomas Law Journal 11 (discussing the

Rest's model of moral development as an initial framework. This identifies four 'components' that must be present for self-conscious ethical action by an individual. They must i) see the ethical aspect of the situation they are in; ii) understand what the ethical response is in this situation; iii) care enough to wish to act ethically; and iv) be able to find some effective way to act ethically (despite potential opposition or risk).[12]

Our second model is Fineman's concept of vulnerability. This presents a radical perspective on the individual because it rejects the rational autonomous individual as the default assumption. She sees all humans as essentially vulnerable due to their embodied state (we are subject to infancy, illness, disability, decline and mortality) and their embedded state (we cannot function independent of social structures and are therefore vulnerable to their loss, inadequacy or malignancy). She terms this universal vulnerability and extends it to human institutions as well as the people who constitute them.

We are differentially equipped to deal with our own vulnerability. Some of us have money, safe drinking water, and are safe from physical attacks. Some of us have no money, contaminated water and are subject to physical attacks from our neighbours or military forces. Hence whilst vulnerability is universal, its manifestation is 'particular, varied and unique on the individual level'.[13] Features of the world that enable us to avoid or survive harm Fineman calls resilience assets.[14] These include money and shelter (physical assets), education and health (human assets), access to clean water and air (ecological or environmental assets), trade unions and families (social assets), and belief in the meaningfulness of our actions (existential assets). Commitment is a feature of existential assets, supplied for lawyers by the professional code of ethics they have internalised.

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relationship between the influential Carnegie report and Rest's model at fn 34); Milton C Regan Jr and Nancy L Sachs, 'Ain't Misbehaving: Ethical Pitfalls and Rest's Model of Moral Judgment' (2016) 51 New England Law Review 53.

In the UK and Ireland: Julian Webb, n 3; Graham Ferris, 'Values Ethics and Legal Ethics: The QLD and LETR Recommendations 6, 7, 10, and 11' (2014) 48 The Law Teacher 20; Donald Nicolson, n 5 above; Freda Grealy, 'Experiential Training for Real-Life Professional Impact: The Formation of Professional Identity in Trainee Solicitors through a Discrete Intervention Course on Ethics and Lawyering Skills' (2018) 52 The Law Teacher 295.

[12] These four components are implicit in the competence statement. See Solicitors Regulation Authority n 10 above.

[13] Martha Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing Limited 2013), p 21.

[14] There is a potential alignment here with Bourdieu's concepts of 'capital': cultural, social and economic: Pierre Bourdieu, 'The Forms of Capital' in J Richardson (ed), Richard Nice (tr), *Handbook of Theory and Research of the Sociology of Education* (Greenwood Publishing Group 1986).

Commitment is both strongly related to Rest's components 3 and 4 and itself an asset, albeit one that assuages vulnerability of one kind (sense of meaningfulness or identity) and creates vulnerability of another (acting in a manner that causes a risk of harm to the self, or failing to act and losing a sense of identity). It involves, for the young lawyer at least, conscious choice and it involves following through on that choice. Consequently, our approach is to build on Fineman's concept of vulnerability as a universal condition so as to consider how *all* the structures of professional education (law schools, regulators, law firms) acting in combination, support or degrade resilience.

When we refer to the 'law school' in this article, we mean those courses that are designed as preparation for legal professional practice. In England and Wales, this means the Legal Practice Course (LPC) and bar training courses, amongst others. Other courses, including those in our jurisdiction at the undergraduate stage[15] do not share the focus on how ethical issues arise, and are dealt with, in practice. It is a key context of our argument that as the mandatory LPC for intending solicitors is replaced with an examination-only model (Solicitors Qualification Examination ('SQE'),[16] such that preparatory courses, as in the USA, will be left to a heterogenous and exam-focused market. We close by considering how this move depletes the assets available to the young lawyer and thereby the profession.

The inevitability of vulnerability in the new lawyer

Approaching ethical action from the perspective of vulnerability provides us with two useful insights. First, it removes the erroneous assumption that individual characteristics exclusively determine (un)ethical action. Our freedom of action is dependent on individual characteristics produced by our life histories and current conditions, which may be positive, neutral or negative as far as taking ethical action is concerned. Our particular state of vulnerability is determined by our assets. Our analysis needs to move beyond

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[15] See Andrew Boon, 'Legal Ethics at the Initial Stage: A Model Curriculum' (Law Society of England and Wales 2010). There is considerable latitude in how ethical issues are addressed in this course: Quality Assurance Agency, 'Subject Benchmark Statement: Law' (Quality Assurance Agency, November 2019) <https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/subject-benchmark-statement-law.pdf?sfvrsn=b939c881_16> accessed 1 April 2022, para 1.4.

[16] Solicitors Regulation Authority, 'Solicitors Qualifying Examination (SQE)' (*Solicitors Regulation Authority*, September 2021) <https://www.sra.org.uk/sqe/> accessed 1 April 2022.

individual blame towards a systemic analysis of structures and agents that identifies how those assets act to confer resilience on individuals.

Consequently, Fineman invites us to focus on the way in which the state and the market impact upon institutional vulnerabilities. The state and its institutions (the legal regulators) which govern the activities of law firms, and to some extent law schools, potentially 'play an important role in lessening, ameliorating, and compensating for vulnerability'[17] in the context of ethical decision-making. Vulnerability theory does not try to restrict the regulators, but to hold them to account. It recognises that they are not omnipotent or omniscient but demands that they both recognise their own vulnerability and act to respond to it and that of the actors for whom they have responsibility.

The professional ethical codes on which the regulators rely as assets are necessarily normative:[18] creativity in determining personal ethical standards is not wanted.[19] This applies to outcomes-focused regulatory systems,[20] as well as traditional codes. There is, however, a problem of passivity around young lawyers which exacerbates their vulnerability and to which we will return: young lawyers are expected (in a hierarchical structure) to be submissive to their seniors but (by their regulator) to be active in confessing their own

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[17] Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism article 2, p 13.

[18] Necessary, perhaps, but not sufficient: Donald Nicolson, 'Making Lawyers Moral? Ethical Codes and Moral Character' [2005] Legal Studies 601.

[19] For the example of dental students who felt they 'should be able to develop their own values' see Muriel J Bebeau and Verna E Monson, 'Professional Identity Formation and Transformation across the Life Span' in Anne McKee and Michael Eraut (eds), *Learning Trajectories, Innovation and Identity for Professional Development* (Springer 2013). For a more dramatic (fictional) exposition of the issue, see Woody Allen, 'If the Impressionists Had Been Dentists', *Complete Prose* (reprint, Picador 1998).

[20] This approach to regulation prescribes what is to be achieved by way of professional standard, based on core ethical principles, rather than dictating detailed rules to be followed (which may not be suitable for all forms of practice). For discussion of this development and of some alternative regulatory approaches, see Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 International Journal of the Legal Profession 195. Regulatory models that check the internal auditing mechanisms of institutions tend to generate an auditable product that satisfies the regulator but does not necessarily either support or even accurately record the state of ethical conduct. actually present, see Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1999); Jerry Z Muller, *The Tyranny of Metrics* (Princeton University Press 2018). In moving from prescription of the content and delivery of the LPC (input), to an examination only SQE (outcome), the SRA is applying this form of regulation to the pre-qualification stage and therefore to law schools and others who might deliver preparatory courses.

errors,[21] and unethical conduct and that of their senior colleagues.[22] Thus, there are assumptions of rectitude in authority structures and a failure to recognise the effect of incoherent or malignant work cultures in law firms.[23]

Originally Fineman adopted Kirby's four sources of (assets for) resilience,[24] but later extended this to a fifth: existential. [25] The addition is significant in our context, because it emphasises 'systems of belief'.[26] An internalised professional ethics code and professional identity can operate as a system of belief, as can the culture of an employing organisation (which could also be said to confer physical, human, and social resources). Acting on that code, however, creates a further category of vulnerability because, in the context of the choice to take ethical or unethical action, it places the individual at risk and potentially in conflict with some organisational cultures. The concept of ethical commitment that we align with Rest's model of action generates a separate existential asset from the professional code, although it acts to reinforce it, particularly in the face of tensions with workplace conditions.

The young lawyer's fundamental vulnerability is particularly exposed when they leave law school and enter the workplace, especially that of the Anglo-Welsh solicitor, where the prequalification framework is (currently) sequential, so that virtually all formal classroom education must be completed before entry into the workplace.[27] Here they are exposed to a variety of new pressures, from

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[21] For example, Solicitors Regulation Authority, 'Statement of Solicitor Competence' n 10, A3.

[22] Solicitors Regulation Authority, 'SRA Code of Conduct for Solicitors, RELs and RFLs' (*Solicitors Regulation Authority*, 25 November 2019) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 1 April 2022, 7.7.

[23] In other words, there is no sensitivity in the discourse to the problem of unethical obedience to authority. See: Herbert C Kelman and V Lee Hamilton, *Crimes of Obedience: Towards a social psychology of authority and responsibility* (Yale University Press 1989).

[24] Peadar Kirby, *Vulnerability and Violence: The impact of globalisation* (Pluto Press 2006). The initial four are physical, human, social and ecological/environmental.

[25] Martha Fineman, n17 pp 22-23.

[26] Martha Fineman, ibid p 23.

[27] The alternative is that work and classroom exposure operate in parallel, with the young lawyer attending classes on a part time basis whilst working.

clients in private practice[28] or in-house;[29] from workload;[30] from billing targets[31] from ethical challenges[32] and from a 'toxic' work environment.[33] The professional and regulatory structure within which they find themselves assumes that they are autonomous, unconflicted moral actors who are able to translate classroom coverage of professional ethics into action in the workplace and who can be disciplined in the same way that their seniors are disciplined if they fail to do so (irrespective of any repercussions from their employers).[34] Their ethical autonomy is assumed (a given, not something needing to be constructed or supported), as is the necessary resilience (as an internalised characteristic not needing external support) to maintain this autonomy. If the individual falls short of this

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[28] Christopher J Whelan and Neta Ziv, 'Privatizing Professionalism: Client Control of Lawyers' Ethics' (2011) 80 Fordham Law Review 2577; Ronit Dinovitzer, Hugh P Gunz and Sally P Gunz, 'Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice' (2014) 51 American Business Law Journal 661. The nature of such challenges differs according to practice context. See, for example, comments on students intending to go into business law in Richard Moorhead and others, 'The Ethical Identity of Law Students' (2016) 23 International Journal of the Legal Profession 235.

[29] Pam Jenoff, 'Going Native: Incentive, Identity and the Inherent Ethical Problem of In-House Counsel' (2011) 114 West Virginia Law Review 725.

[30] See Thomas Connelly, '"Zombie" Corporate Lawyer Avoids Being Struck off for Dishonesty after Being Left "Physically and Emotionally Drained" by Workload' (*Legal Cheek*, 6 February 2018) <https://www.legalcheek.com/2018/02/zombie-corporate-lawyer-avoids-being-struck-off-for-dishonesty-after-being-left-physically-and-emotionally-drained-by-workload/> accessed 1 April 2022; John Hyde, '"Overwhelmed" Junior Struck off after Concealing Court Orders' [2020] *Law Gazette* <https://www.lawgazette.co.uk/news/overwhelmed-junior-struck-off-after-concealing-court-orders/5105198.article> accessed 1 April 2022.

[31] John Hyde, 'Solicitor Who Endured "abominable" Working Conditions Is Struck off by High Court' [2018] *Law Gazette* <https://www.lawgazette.co.uk/news/solicitor-who-endured-abominable-working-conditions-is-struck-off-by-high-court/5068281.article> accessed 31 March 2021.

[32] Debra Cassens Weiss, 'Fired BigLaw Associate Claims Firm Violated Implied Ban on Firing People Who Raise Ethics Concerns' [2017] *ABA Journal* <http://www.abajournal.com/news/article/fired_biglaw_associate_claims_firm_violated_implied_ban_on_firing_people_wh/> accessed 1 April 2022; John Hyde, 'SDT Bars Whistleblower despite "horrendous" Work Environment' *Law Gazette* (28 January 2019) <https://www.lawgazette.co.uk/news/sdt-bars-whistleblower-despite-horrendous-work-environment/5069054.article> accessed 1 April 2022.

[33] Max Walters, 'Juniors Demand Answers from SRA on Protection from "Toxic" Work Environments' *Law Gazette* (13 February 2019) <https://www.lawgazette.co.uk/juniors-demand-answers-from-sra-on-protection-from-toxic-work-environments/5069264.article> accessed 1 April 2022.

[34] Carol M Rice, 'The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers' (1997) 32 Wake Forest Law Review 887; John Hyde, 'Junior Lawyers "Lose Confidence" in SRA after Matthews Prosecution' *Law Gazette* (11 May 2020) <https://www.lawgazette.co.uk/news/junior-lawyers-lose-confidence-in-sra-after-matthews-prosecution/5104230.article> accessed 1 April 2022.

requirement then she[35] is, on this analysis, justly punished for she has failed to exercise her autonomy ethically: 'They encourage you to give them information then hang you out to dry...'[36]

However, there is a parallel damaging story, that at first sight appears to play to the vulnerability agenda: that for the new lawyer merely to identify the issue, and escalate it, is to act appropriately and ethically,[37] because an appropriate and ethical response by the senior lawyer can be guaranteed.[38] The institutional pressures that in real life support or undermine ethical resilience are presumed away. The source of resilience is, in this argument, safely embedded not only in the *existential* assets of the code, but also in the hierarchical and power structures of the profession as a powerful *social* and *existential* asset for resilience. That myth is, consciously or not, embedded into law school courses that, as we shall see, cover only those of Rest's components based on knowledge and understanding of the code of conduct.

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[35] The prominent cases in England and Wales are all women: Solicitors Regulation Authority, 'Emily Jane Scott - 558810' (*Solicitors Regulation Authority*, 6 November 2017) <https://www.sra.org.uk/consumers/solicitor-check/558810/> accessed 1 April 2022; *Solicitors Regulation Authority v James* [2018] EWHC 3058 (Admin), [2018] 4 WLR 163; Solicitors Regulation Authority, 'Claire Louise Matthews - 609787' (*Solicitors Regulation Authority*, 20 December 2019) <https://www.sra.org.uk/consumers/solicitor-check/609787/> accessed 1 April 2022. The case against Claire Matthews, which was remitted to be reheard by the Solicitors' Disciplinary Tribunal, was withdrawn by the SRA, restoring her to the Roll. <https://www.lawgazette.co.uk/news/struck-off-junior-matthews-free-to-practise-after-two-year-ordeal/5112178.article>' accessed 22 April 2022. The withdrawal of this case was preceded by an inquiry into workplace culture within SRA regulated law firms, see Solicitors Regulation Authority 'Workplace Culture Thematic Review', (*Solicitors Regulation Authority*, 8 February 2022) <https://www.sra.org.uk/sra/research-publications/workplace-culture-thematic-review/> accessed 22 April 2022. The review included contributions from over 200 solicitors into workplace culture. This has been followed by a consultation on a change to the SRA Standards and Regulations to include positive duties on solicitors, and their firms, to refrain from bullying, harassment, or discrimination and to challenge behaviour, individually and institutionally, that does not meet the required standard: Solicitors Regulation Authority, Rule Changes on Health and Wellbeing at Work (*Solicitors Regulation Authority*, 4 March 2022) <https://www.sra.org.uk/sra/consultations/consultation-listing/health-wellbeing-profession/ > accessed 22 April 2022. Taken together, these developments are indicative of a sharper focus on the necessity of a supportive working culture within law firms.

[36] Steve Bird, 'Lawyer Whistleblower Struck off despite Revealing Misconduct' *The Telegraph* (2 February 2019) <https://www.telegraph.co.uk/news/2019/02/02/lawyer-whistleblower-struck-despite-revealing-misconduct/> accessed 1 April 2022.

[37] Catherine Gage O'Grady, 'Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate Contributed Article' (2006) 30 Law & Psychology Review 23, 48.

This narrative has been addressed, at least in part, by a new approach to regulation of solicitors in England and Wales by the regulator (SRA) and the bifurcation of its Standards and Regulations 2019[39] (STARS) into a Code for Solicitors[40] and a Code for Firms.[41] The division of ethical labour between the lawyer and the infrastructure could be said to highlight a vulnerability risk within the law firm structure. The individual has a duty to diagnose, justify and execute an appropriate decision. This approach aligns with the majority of codes and guidance notes for professions. The specific duty of the firm, however, to demonstrate an open and accountable compliance structure, is new. The manager must, in addition, 'create and maintain the right culture and environment',[42] one which, we argue, involves addressing the inherent vulnerability that we have identified in its junior staff in particular.

The bifurcation of activity inherent in the STARS could exacerbate, on a structural level, the potential conflict, and inherent vulnerability, between employee and firm in the event of is regulatory action. The firm will be keen to demonstrate the openness of its culture. Conversely, the individual solicitor may find it necessary to deconstruct the culture of upward escalation in the management structure to mount a defence to a breach of the STARS. This tension between individual and firm is useful to the regulator because it keeps both individual and firm honest; both have an interest in openness. It does, however, increase the risks for the junior lawyer. It is critical to both the firm and the individual to demonstrate the honest and genuine belief at the heart of any conduct related decision-making process. Yet the point at which a junior solicitor raises undue pressure (from seniors or others) as a quasi-defence, they also, at the same time, negate another defence: that an honest and genuine belief on a question of professional judgement does not normally

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[39] Solicitors Regulation Authority, 'SRA Standards and Regulations' (*Solicitors Regulation Authority*, 25 November 2019) <https://www.sra.org.uk/solicitors/standards-regulations/> accessed 1 April 2022. The SRA STARS constitute a regulatory framework based upon a set of core principles, rules on professional standards and business management, supplemented by guidance notes and an enforcement strategy. It has elements of outcomes focused regulation but is closer to a traditional code. See Solicitors Regulation Authority, n 22. There are few examples of enforcement action under STARs at present.

[40] Solicitors Regulation Authority,, n 22.

[41] Solicitors Regulation Authority, 'SRA Code of Conduct for Firms' (*Solicitors Regulation Authority*, 25 November 2019) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/> accessed 1 April 2022.

[42] Ibid, introduction. See also the proposed change to the codes of conduct to promote ethical obligations to challenge inappropriate behaviours, Solicitors Regulation Authority, n 35.

trigger enforcement action. The corollary, however, is also true. A failure honestly and genuinely to address an issue may, in itself be evidence of a breach.[43]

The pressure on the new lawyer is, therefore, considerable in the context of just one code. Moreover, the sharp edge of ethical action, reporting serious concerns, is, in the context of this particular code, complex. The new lawyer, with very limited prior experience, has very little context on which to base a decision. There is, however, at least an attempt within the SRA Code for Firms to shield individuals from 'detrimental treatment' when making or proposing to make a report.[44] Yet the new lawyer still must decide whether there is a serious concern to be reported, which has both subjective (the person reporting believes) and objective elements (the belief was reasonable in the circumstances, given the information and the evidence available).[45] This determination is, potentially, perilous for the new lawyer as they struggle to reconcile professional duties and business reality. It is not surprising, even given a code that is, arguably, an improvement on previous iterations, that there remains a need for support from another person, within the organisation or outside it.

'The effects of unaddressed vulnerability

Personal repercussions can be overwhelming for the young lawyer trying to implement what they learned at law school (Rest's third and fourth components). Repercussions might arise merely from questioning a colleague: [46]

> 'Whenever I questioned what they were asking me to do Mr Platt would say I could be replaced easily and there were hundreds of law graduates desperate for training contracts. I was trying to leave, but was told by recruitment companies that not completing my training at De Vita Platt could be frowned upon by other employers. I was between

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[43] See *Connelly v The Law Society* [2007] EWCA 1175. The 'Connolly defence' does not assist the junior lawyer under pressure. The statement that 'my senior made me do this' means that it is not possible to demonstrate a genuine and honest belief in their own decision and action. The defence has yet to be tested under the STARS.

[44] Solicitors Regulation Authority, n 41 rules 3.11 and 3.12.

[45] Ibid, rules 3.9 and 3.10.

[46] Jonathon Bray, 'A Culture of Fear?' (Legal Futures, 12 April 2017) <https://www.legalfutures.co.uk/blog/a-culture-of-fear> accessed 1 April 2022.

a rock and a hard place.'[47]

Here the existential resource of the code clearly conflicts with negative social and professional conditions, undermining the resilience needed for action.

Clearly some use external sources of ethical support: peers, colleagues perceived as moral exemplars (possibly outside the formal hierarchies of the firm), helplines provided by regulators. Such discussion itself is helpful: 'Reasoned discussion by people we like/trust can influence our own moral outlook'.[48] The young lawyer may need to seek confirmation that the lawyer's understanding of the code and its application to a situation they are facing is correct.[49] They might need a sense check when conscious of their own 'ethical fading'; colleagues have been dismissive or they are uncertain about the integrity of their firm's culture ('No, that isn't normal practice'). They might want to evaluate alternative courses of action;[50] including how to articulate a problem in a way that will secure (appropriate) action and reduce personal repercussions.[51] They might want reassurance about action to which they are already committed, but with significant repercussions ('Yes, you do have to report that'). However, one final opportunity for external support from a tutor, the SRA's Professional Skills Course (PSC), and in particular, the Client Care and Professional Standards module which provides an opportunity to discuss ethical issues in a safe space, is to be phased out with the advent of the SQE.

Fineman, in universal vulnerability, provides us with a more realistic assumption than the universal autonomy envisaged by the codes for thinking about lawyers and the social structures they inhabit. It also identifies the conditions, such as deficits in Rest's components, or toxic cultures, that generate particular risks and robust categories for those institutional conditions that can support resilience. Fineman's categories of assets are not mutually exclusive and the young lawyer might be forced to rely upon different assets. When investigating ethical resilience from the perspective of the individual ethically committed young lawyer, we first need to be able to

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47 Steve Bird, n 36.

48 Vivien Holmes, '"Giving Voice to Values": Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice' (2015) 18 Legal Ethics 115, 118.

49 Rest's components 1 and 2.

50 Rest's component 3.

51 Rest's component 4.

parse the different cognitive and affective processes which the different assets, including the default asset of the former tutor, support in order better to understand who supplies what, and where the conflicts and deficiencies are.

Second, resilience assets are not morally weighted. Some of the young lawyers who do not seek help in ethical crisis, sadly, will have become too ethically numbed to recognise the issues, or have chosen the social resource of acceptance within an unethical work culture above the existential resource of the code of conduct. An asset could just as well confer unethical as ethical resilience. Both provide closure or, in the term we have adopted, represent *ethical commitment*. *Ethical resilience* is, then, the term we adopt to describe our bias towards the light.

Pressure points for ethical resilience: sensitivity and judgment

If Fineman provides an analysis of forces that constitute the ethical agent, then Rest's four component model provides the factors that support ethical action. Rest's model is biased towards ethical action, but also allows us to unpack ethical behaviour to identify the pressure points requiring resilience resources. Its four cognitive/affective components outlined above, related not necessarily in a linear fashion, are necessary precursors to the taking of moral (in our context, ethical) action. The model is not, however, developmental. It tells us what must be present at the time of ethical action, rather than how to ensure that those components are present: for that we revert to Fineman. In our context, those components entail:[52]

(1) Moral sensitivity (the ability to identify that a situation engages ethical considerations). If a professional ethical obligation is an 'ought', Bebeau and Thoma characterise this as to 'see the ought'.[53]

(2) Moral judgment (the ability to evaluate alternative courses of action in response to that situation as more or less ethically justified: to 'understand the ought').

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[52] Muriel J Bebeau, James R Rest and Darcia Narvaez, 'Beyond the Promise: A Perspective on Research in Moral Education' (1999) 28(4) Educational Researcher 18, p 22.

[53] Muriel J Bebeau and Stephen J Thoma, 'Moral Motivation in Different Professions' in Karin Heinrichs, Fritz K Oser and Terence Lovat (eds), *Handbook of Moral Motivation: Theories, Models, Applications* (Sense Publishers 2013) p 475.

(3) Moral motivation (in choosing an alternative, prioritising ethical values above others such as personal success, personal protection, loyalty to the firm: 'seeing the self as responsible to "do the ought"'). It is here that the "honest and genuine belief" required by the code is engaged.

(4) Moral character ('having the strength of your convictions, having courage, persisting, overcoming distractions and obstacles, having implementing skills'[54]). Or more generically, being resilient, with the 'will and the competence to "do the ought"' as determined by the code. [55]

Other approaches in the field[56] have focused to a greater extent on individuals' innate or educable characteristics. Although Thoma and Berbeau linked Rest's third component to the personal characteristics concepts of control (a belief that outcomes are achievable) and competence (the ability to achieve outcomes) it is the generalisability of Rest's model that has particular resonance for us.[57] It also highlights universal vulnerability:

'Each of us … are [*sic*] able to miss the moral problem, fail to effectively reason about how the moral problem ought to be solved, fail to maintain a focus on the moral solution in the face of other considerations and fail to effectively follow through.'[58]

It is clearly in the regulator's interests that professionals cannot claim that they did not know of, or did not understand, their professional code. The obligation to know and understand, underpinning components 1 and 2, will therefore, normally translate into curricula delivered by educational providers.

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54 Muriel J Bebeau, James R Rest and Darcia Narvaez, n 52, p 22.

55 See example in Vivien Holmes, n 48 above.

56 Stephen J Thoma and Muriel J Bebeau, 'Moral Motivation and the Four Component Model' in Karin Heinrichs, Fritz K Oser and Terence Lovat (eds), Handbook of Moral Motivation: Theories, Models, Applications (Sense Publishers 2013), p 52.

57 Ibid p 51.

58 Ibid p 52.

Some students working in clinics may experience ethical issues in real world scenarios[59] but as we have indicated, the norm for aspiring Anglo-Welsh solicitors is for classroom learning to be completed before entry into the workplace. The regulator, insofar as it stipulates or permits a sequential system, thereby deprives young lawyers of a formally recognised space for reflection, debrief and questioning with a tutor who understands practice in parallel with the early encounters with the workplace. The opportunity to offer an asset supporting components 3 and 4 is, therefore, missed, leaving recourse to colleagues and helplines to be *ad hoc*, secretive, crisis driven and delayed.

Prior to the SQE, the postgraduate LPC for aspiring solicitors required students to 'understand' both codes.[60] The undergraduate and professional curriculum combined may, but need not, have, considered lawyers faced with extraordinary dilemmas[61] or where lawyers had broken the code for a higher moral good.[62] This education, as well as the code itself, are assets facilitating ethical

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[59] The clinic is often seen as a more authentic method of enabling ethical behaviour, by contrast with the problems of the code-based classroom course. See, for examples: Lawrence K Hellman, 'The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization' (1990) 4 Georgetown Journal of Legal Ethics 537; Neil Hamilton, n 11; Julian Webb, 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England' (1996) 30 The Law Teacher 270; Catherine Gage O'Grady, 'Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer' (1997) 4 Clinical Law Review 485; Janine Griffiths-Baker, 'Ethical Education through the Student Law Clinic' (2002) 5 Legal Ethics 24; Nigel Duncan, 'Ethical Practice and Clinical Legal Education' (2005) 7 International Journal of Clinical Legal Education 7; Donald Nicolson, n 5; JoNel Newman and Donald Nicholson, 'A Tale of Two Clinics: Similarities and Differences in Evidence of the Clinic Effect on the Development of Law Students' Ethical and Altruistic Professional Identities' (2016) 35 Buffalo Public Interest Law Journal 1; JoNel Newman and others, 'Theatre and Revolution in Clinical Legal Education' (2019) 26 Clinical Law Review 465; Anil Balan, 'Investigating the Feasibility of Using Student Reflective Journals to Understand How Clinical Legal Education Can Develop the Ethical Competence of Law Students' (2020) 54 The Law Teacher 116; Anil Balan, 'Using Interpretive Phenomenological Analysis (IPA) to Understand the Development of Legal Ethical Competence through Reflection in a Clinical Learning Environment' (2021) 55 The Law Teacher 467.

[60] Corresponding with the compulsory teaching of ethics in the US ABA accredited law school: Solicitors Regulation Authority, 'Legal Practice Course Outcomes 2019' (Solicitors Regulation Authority 2019) < https://www.sra.org.uk/globalassets/documents/students/lpc/lpc-outcomes-2019.pdf?version=4a5c48 > accessed 1 April 2022, p 7.

[61] For example, David Luban, 'Lawfare and Legal Ethics in Guantánamo' (2008) 60 Stanford Law Review 1981 or the Lake Pleasant Bodies case.

[62] See for example William H Simon, 'Virtuous Lying: A Critique of Quasi-Categorical Moralism' (1999) 12 Georgetown Journal of Legal Ethics 433' Stuart A Scheingold and Austin Sarat, *Something to Believe In: Politics, professionalism, and cause lawyering* (Stanford University Press 2004).

resilience.[63] As we shall see, however, they address only the first two of Rest's components. It is assumed by regulators and perhaps by the profession that knowing the codes corresponds automatically with wishing to comply with them.[64] The educational paradigm assumes that the working environment in which this learning to be applied is positive or at least neutral. We know, however, that working conditions can be negative, undermining any ethical resilience provided by the assets conferred by law school.

In a sequential system, it is likely that the law school tests understanding by having students apply the code to hypothetical scenarios. The focus is on components 1 and 2,[65] encouraging, but not guaranteeing, that students can identify ethical issues and evaluate, objectively, what an ethical lawyer should do.[66] Some curricula will silo professional ethics into a stand-alone course; others treat it pervasively[67] and others, as does the LPC at present, treat it as both 'separate and pervasive'[68] in different parts of the course. The SQE, it might be noted, treats professional conduct as entirely pervasive, such that it can appear in any assessment in any field of law.[69]

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[63] Laws and ethical codes are an important part of the institutional support for ethical resilience, see Lynn Stout, *Cultivating Conscience: How Good Laws Make Good People* (Princeton University Press 2010). It is the whole social structure that facilitates ethical action or aggravates ethical vulnerability.

[64] See SRA n 60, p 7: 'students should be able to identify *and act in accordance with* the core duties of professional conduct and professional ethics' [our italics]. That codes themselves are insufficient is also argued in Donald Nicolson n 18.

[65] Moral sensitivity and moral judgment. See Robby Marcum, 'Tracing It Back: Law School and Legal Misconduct Student Note' (2014) 39 Journal of the Legal Profession 273. On the LPC, as Webb points out, this tends to result in a 'heavily rule-based or "black-letter"' approach to professional ethics' above, n 4, p 129.

[66] Muriel J Bebeau, n 11, p 284.

[67]This has been a further longstanding source of debate in the literature. Advantages and disadvantages of the different approaches in the Anglo-Welsh undergraduate degree are discussed in Boon, n 15, pp 32ff and in Maxine Evers and Lesley Townsley, 'The Importance of Ethics in the Law Curriculum: Essential or Incidental?' (2017) 51 The Law Teacher 17, concluding at p 21 that a pervasive approach is to be preferred. The consensus as to the purpose of the US JD has, perhaps, enabled that jurisdiction to emphasise the centrality of ethics to that purpose through a pervasive approach: Deborah L Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Little Brown & Co 1994); Russell G Pearce, 'Legal Ethics Must Be the Heart of the Law School Curriculum Symposium: Recommitting to Teaching Legal Ethics- Shaping Our Teaching in a Changing World' (2002) 26 Journal of the Legal Profession 159.

[68] Julian Webb, n 3, p 290.

[69] The Bar Standards Board, has held to the view that a self-standing assessment is desirable (even if other elements are pervasive): Derek Wood, 'Bar Standards Board Review Of The Bar Vocational Course Report Of The Working Group' (Bar Standards Board 2008) <https://www.barstandardsboard.org.uk/uploads/assets/aba3e9cc-a368-48d3-a74a8f64db13278e/bvcreportfinalwithannexesasonwebsite.pdf> accessed 1 April 2022, at paras 101-103. In the current model of bar training, there are pervasive elements, but, unlike the SQE, there are also self-standing ethics assessments during the course and in the workplace: Bar Standards Board, 'Bar Training: Curriculum and Assessment

Such different emphases and sequential delivery do not enhance the outcome, and whilst law school clearly offers resilience assets which are necessary, they are not sufficient in themselves.

Writing in the US context, Cunningham and Alexander were able to map Rest's components 1-3 [70] to the desiderata for 'professional judgement' to be delivered in law schools identified by the Carnegie report.[71] It is our experience, as indicated earlier, that law schools prepare students for an ethically supportive workplace environment, in which supportive and ethical colleagues will support young lawyers in developing components 3 and 4.[72] Where, as in our own and the majority of jurisdictions, the pre-qualification structure includes a period of mandatory pre-qualification work experience, law schools are enabled in doing so (otherwise what is that mandatory work experience for?). Thus, it is assumed that young lawyers will sufficiently internalise professional ethics and develop ethical resilience either through academic education and training (because components 3 and 4 proceed automatically once 1 and 2 have been instilled or workplace socialisation (where components 3 and 4 are developed).

Component 2 (moral judgment) is elided – by law schools, by young lawyers and by firms - with component 3 (moral motivation) to create an assumption that knowing what an ethical lawyer would do leads inevitably to taking on personal responsibility to be an ethical lawyer as expected by the STARS. Such an assumption is misplaced, but plays into the narrative that escalation to a senior is enough: Bebeau and Thoma's dental students agreed that misconduct should be reported but not that it was their responsibility to do so.[73]

There are phenomena in the workplace that can depress even 1 and 2. The distribution of the different elements of legal professional education between the academy and the workplace permits the young lawyer to succumb to a problematic narrative in the unhappy relationship between the two. This amounts to a criticism of (all) law school activity as inauthentic, especially when delivered sequentially. Clearly there are limitations on classroom activity, some of which are discussed above. It is, necessarily, introductory. It

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Strategy' (Bar Standards Board 2021) <https://www.barstandardsboard.org.uk/uploads/assets/482b158c-0000-4a93-9db34a4944c31499/Curriculum-and-Assessment-Strategy-August-2021.pdf> accessed 1 April 2022, pp 22-23 and 25.

70 Moral sensitivity, moral judgment and moral motivation.

71 Clark D Cunningham and Charlotte Alexander, n 11 p 82.

72 Moral motivation and moral character. This optimism has not been borne out empirically: Emma Oakley and Steven Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' (2019) 46 Journal of Law and Society 83.

73 Muriel J Bebeau and Stephen J Thoma, n 53 p 480.

may reward pessimism in a way that is reinforced in professional legal education[74] but is not attractive to practitioners.[75] It can, unless teachers are practitioners, become out of date. But the discourse that once one has entered the workplace what was previously learned becomes irrelevant or wrong, is potentially powerful.

Other factors related to power differentials in the workplace may also depress the ability to recognise and evaluate ethical situations, particularly where a pre-qualification period in the workplace is required. Ethical issues can be ignored, consciously or unconsciously in the face of fears of disapproval, shame or the withholding of qualification and under workload pressure.[76] Lack of confidence can lead to an assumption that if no one else has mentioned the issue, it cannot really be a problem[77] and its more introverted cousin, rationalisation.[78] The least resilient, or the most susceptible to a professional identity that aligns very closely with the culture of the employing organisation, [79] can be subject to 'ethical fading'[80] where, incrementally, unethical behaviour is normalised and the ethical sensitivity of the classroom becomes ethical numbness in the workplace.[81] These, however, will not be the young lawyers who contact anyone for help.

Pressure points for ethical resilience: commitment and action

The third of Rest's components is the least concretely articulated,[82] but is strongly related to professional identity and vital to commitment. Unless they are already so numbed that their ability to detect and evaluate ethical issues is already depressed, the young

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74 Jason M Satterfield, John Monahan and Martin EP Seligman, 'Law School Performance Predicted by Explanatory Style' (1997) 15 Behavioral Sciences & the Law 95.

75 Catherine Gage O'Grady n 37.

76 Catherine Gage O'Grady, 'Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective' (2014) 15 Nevada Law Journal pp 671, 680, 686.

77 Ibid p 682.

78 Ibid p 685.

79 Catherine Gage O'Grady n 37, p 49.

80 Catherine Gage O'Gradyn 76, p 682.

81 Christine Parker and others, 'The Ethical Infrastructure Of Legal Practice In Larger Law Firms: Values, Policy And Behaviour' (2008) 31 UNSW Law Journal 158; Catherine Gage O'Grady, n 76, p 681.

82 Stephen J Thoma and Muriel J Bebeau, n 56, p 51.

lawyer has a choice, which involves a weighting of priorities:

> 'Even when individuals generally accept the profession's responsibilities as applying to the self, other values may pre-empt the moral value, resulting in a failure of professional moral motivation and commitment. This moral motivation, as Rest conceptualised it, is linked to professional identity through the understanding of the self's and the profession's responsibility to society.'[83]

Here we return to the concept of 'commitment'. Bebeau and Thoma extrapolate the definition of Rest's third component as "moral motivation and commitment"[84] but they use the word to describe a sophisticated and evolved professional identity which has achieved 'the integration of the professional responsibilities with the self'.[85] Such a 'moral exemplar', they argue, no longer needs to make a choice, or to consider whether to take responsibility, even if there are adverse consequences, because component 3 (moral motivation) has become tacit, and is integrated into their own identity[86] as a supreme level of ethical resilience.[87] Such professionals must, however, be rare if this concept is not to undermine Rest's insight that all are potentially vulnerable to ethical failure. The character of that vulnerability is subject to re-exposure in the face of new professional roles; threats to legal business; personal and financial crisis; new areas of practice; changes to professional codes, and the unexpected.[88]

Bebeau and Thoma's concept of commitment is, therefore linked only to component 3 and an expertise where conscious choices are replaced by tacit intuition. They acknowledge that such a commitment does not preclude, in component 4 (moral character), failing to act ethically:

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83 Muriel J Bebeau and Stephen J Thoma e n 53, p 495.

84 Ibid p 476.

85 Ibid p 482.

86 Ibid, p 483.

87 Anne Colby and William Damon, Some Do Care: Contemporary lives of moral commitment (Free Press 1994); Neil W Hamilton and Verna E Monson, n 11. The exemplars had human, social and physical assets as well as existential assets that supported their moral commitments.

88 See the striking off of a solicitor of good record for an inexplicable attempted theft: John Hyde, 'Solicitor Struck off for Dubai Mobile Phones Theft' Law Society Gazette (31 July 2019) <https://www.lawgazette.co.uk/news/solicitor-struck-off-for-dubai-mobile-phones-theft/5071191.article> accessed 1 April 2022.

> ‘If … professionalism is understood as the individual’s underlying commitment to the values of the profession … then moral motivation and professionalism would be linked – even if the individual failed to consistently pursue the moral value’.[89]

Our own approach to commitment links both components 3 and 4 and emphasises action, both ethical and unethical. To commit is to *act* in pursuit of the values one is committed to in life. It operates at a more raw, and more painful level than for Bebeau and Thoma’s exemplars.[90] We see, for the young lawyer who has yet to reach that standard, and may never do so, commitment as a choice that is engaged at every interaction with the professional code.

Ethical commitments are not always conscious, as powerful ethical commitments arise from socialisation.[91] However, our concept is of the type Baldwin identified, driven by awareness but resisted by fear and history:

> ‘They are, …, still trapped in a history which they do not understand and, until they understand it, they cannot be released from it. They have had to believe …, that black men are inferior to white men. Many of them know better, but, …, people find it very difficult to act on what they know. To act is to be committed, and to be committed is to be in danger. … the danger, in the minds of most white Americans, is the loss of their identity.’[92]

The resistance from history, from inherited world views, is ubiquitous including the physical sciences. As Max Plank observed: ‘A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents

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89 Muriel J Bebeau and Stephen J Thoma,, n 53.

90 Neil W Hamilton and Verna E Monson, n11.

91 This was a major insight of those communitarian commentators who criticised liberal theory with its autonomous agents who chose their values rather than agents who were constituted by their values. See: Alasdair MacIntyre, *After Virtue: a study in moral theory* (Duckworth 1985); Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1998). Most rescuers are not motivated by ethical theory but by what is ‘obviously’ right conduct: Samuel P Oliner and Pearl M Oliner, *Altruistic Personality: Rescuers of Jews in Nazi Europe* (Simon and Schuster 2002). In the case of a professional code there is a higher likelihood of a conscious decision playing a significant role, together with professional socialisation.

92 James Baldwin, n 1.

eventually die, and a new generation grows up that is familiar with it'.[93] Ethical education leading to ethical commitment is transformative:[94] it is active and not passive.

Being transformative, commitment may be threatening to prior meanings and difficult because it destabilises knowledge and values. However, it can also be a source of meaning and strength, and in our context involves commitment to a professional community.[95] Thus, it can support ethical resilience and constitute both an individual and a social asset. One joins a professional and a traditional community which has found meaning in adherence to professional ethics. Indeed, legal ethics are bound up with the rule of law and belief in dispute resolution through reason rather than force. These represent institutional support for ethical resilience in legal practice.

So, we are all vulnerable and all human institutions are vulnerable, but our resources differ. Neophyte lawyers can be impoverished in assets and therefore especially vulnerable to pressures that might lead to conscious or unconscious unethical practice. A commitment to professional ethics is an asset that reduces this vulnerability. Our last step in this argument is that this very source of resilience engenders a new vulnerability. Once committed to legal ethics, as a part of one's identity, one can no longer be involved in unethical conduct even if it would be low risk and high reward. One is affected by ethical breaches, one is hurt independently of formal sanctions, it undermines one's sense of worth.

Thus, vulnerability is not an aspect of the human condition that can be overcome through assets that enable resilience, it is an existential given that varies in its form but is always present. One can be very much better off with existential, social or physical assets, and one can be considerably more resilient as a result. But vulnerability remains, and the responsive state needs to constantly re-adjust its responses as vulnerabilities shift – the field is inherently dynamic. Commitment has effects that can be both positive and negative for the individual and society.

To summarise, a new lawyer is vulnerable: to loss of ethical orientation and to ethical numbing; to ethical failures that threaten the new status due to disciplinary mechanisms; to a sense of alienation if one assumes others lawyers have committed to the ethics of the

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[93] Max Planck, *Scientific Autobiography and Other Papers* (Frank Gaynor tr, Greenwood Press Publishers 1968) pp 33-34.

[94] Jack Mezirow, 'An Overview of Transformative Learning' in Knud Illeris, *Contemporary Theories of Transformative Learning* (Routledge 2008); Neil W Hamilton and Verna E Monson, n 11.

[95] Neil W Hamilton and Verna E Monson, ibid; Anne Colby and William Damon, n 87.

profession; to internal conflicts between pre-law ethics and law ethics.[96] It is in part to deal with these vulnerabilities that one commits to legal ethics, allowing the codes to supply an existential asset – as one feels one's effort and time at work is aligned with values one believes in. However, in addressing this vulnerability, it must be acknowledged that new and important new vulnerabilities arise: to failing to live up to the internalised ethics; to attacks upon the values of the profession; to a sense of loss when others violate ethical standards; to conflicts between ethics demands of others that enable unethical behaviour or mere lip-service to codes; between the firm's espoused and its actual ethical culture.

Commitment is inherently linked to action because there is here no non-action – one must either commit or not. Such a commitment is to a particular stance, ethical or not, and to a decision that has emphasized particular values, ethical or not.[97] This entails consequences in development or reinforcement of one's understanding of the role of a professional[98] and alignment with a particular identity. Failing to raise an issue (through fear or inarticulacy); keeping quiet when a senior lawyer dismisses the problem is still action. Inaction is action because it means involvement in an unethical practice, norm or identity: this involves a loss of self and a risk of professional discipline – it changes who you are. Similarly, complying with another's request to take unethical action also demands commitment, because it demands action that is one side, or the other, of a divide.[99] As does failing to confess a mistake (though fear) or taking unethical remedial action to cover up a mistake.[100] There are obvious dangers in either choice, each of which is defining for the individual and each of which demand courage.[101]

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[96] Emma Oakley and Steven Vaughan n 72.

[97] Values are not capable of simple aggregation and as one set of values come in, other values can be crowded out, see: Bruno S Frey, *Not Just for the Money An Economic Theory of Personal Motivation* (Edward Elgar Publishing 1997); Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin 2012).

[98] Muriel J Bebeau and Stephen J Thoma n 53 p55.

[99] Herbert C Kelman and V Lee Hamilton, n 23.

[100] Neil Rose, 'Solicitor "Embarrassed by Wasted Costs Order" Faked Invoice to Cover up Payment' (Legal Futures, 28 November 2016) <https://www.legalfutures.co.uk/latest-news/solicitor-embarrassed-wasted-costs-order-faked-invoice-cover-payment> accessed 1 April 2022; Jonathon Bray, above n 46; *Solicitors Regulation Authority v James* n 35.

[101] Timothy W Floyd, 'Moral Vision, Moral Courage and the Formation of the Lawyer's Professional Identity' (2009) 28 Mississippi College Law Review 339.

As we have indicated above, however, education in components 3 and 4 is frequently allocated by the regulator to the very workplace which may facilitate unethical action. The regulator has allocated these, in the main, to commercial organisations where 'task consciousness' has precedence, at least sometimes, over 'learning consciousness'[102] and supervision as work management can take precedence over mentoring.[103] To organisations and to senior lawyers who are themselves under financial pressure, [104] pressure from clients[105] and other professionals and pressure to survive. Such pressure is, as we have seen, also exerted from within in terms of the wish to succeed,[106] the desire to please seniors[107] and the organisation's attitude to the confession of weakness.[108] There are two significant problems here.

First, as indicated above, there are workplaces, supportive and nurturing in the main, which route ethical decision-making even in components 1 and 2 away from the young lawyer despite the expectations of the regulators' competence statements.[109] Such an approach reinforces the narrative of the cossetted junior identified above, shown to be an impeding factor in taking ethical action,[110] that the young lawyer is 'only an employee'[111] without the authority, or the right, to speak out. The concept of 'ethical judgment' in Rest's sense is etiolated and pushed back into component 1: the only judgment to be made and the only action to be taken is to escalate, despite also the STARS' emphasis on individual responsibility. This is damaging educationally; but is also damaging for the organisation: younger

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102 Alan Rogers, *What Is the Difference? A New Critique of Adult Learning and Teaching* (NIACE 2003).

103 Irwin D Miller, 'Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties' (1999) 70 Notre Dame Law Review 259.

104 Catherine Gage O'Grady, n 76, pp 695, 687.

105 Ibid, p 694.

106 Ibid, p 685.

107 Andrew M Perlman, 'Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology' (2007) 36 Hofstra Law Review 451. Catherine Gage O'Grady, 'Wrongful Obedience and the Professional Practice of Law' (2013) 19 Journal of Law, Business & Ethics 9; Vivien Holmes, n 48, p 123.

108 Catherine Gage O'Grady, 'A Behavioral Approach to Lawyer Mistake and Apology' (2016) 51 New England Law Review 7.

109 For example, Solicitors Regulation Authority n 10; Bar Standards Board, 'The Professional Statement for Barristers' <https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf> accessed 1 April 2022.

110 Sharon Nodie Oja and Patricia J Craig, 'Moral Motivation and the Role of the Internship in Professional Preparation' in Karin Heinrichs, Fritz K Oser and Terence Lovat (eds), Handbook of Moral Motivation: Theories, Models, Applications (Sense Publishers 2013) p590.

111 Catherine Gage O'Grady , n 76, p682.

lawyers may in fact have clearer ethical vision than their seniors. At the level of Rest's first two components, then, they may as O'Grady suggests, be more powerless, but more ethical, than their seniors.[112]

An example of the effects of numbing in obscuring ethical issues might be found in the law governing waiver of legal professional privilege in the context of a joint retainer between insurer and insured in professional negligence actions and the potential conflicts of interest that can arise.[113] It is usual practice in such claims for one firm of solicitors to be jointly retained by both insured and insurer, usually through a specific clause in the insurance policy. Consequently, there is an express or implied common privilege between insured and insurer. Normally, once insurance cover is confirmed the potential for conflict as to coverage is negated. Yet problems can emerge when this framework obscures the duty owed to the transient insured rather than the larger and more visible insurer. In one case, a joint case conference moved from a discussion of the defence to questions about whether the insured was entitled to an indemnity, a situation described as 'manifestly unfair' by the court.[114] Objectively, possibly to a young lawyer new to the situation and, therefore, obliged to research the point, the conflict of interest in the lawyer betraying the insured to the insurer's interests, was fairly obvious. However, in practice, it was not, at least to the parties' lawyer, who should not have questioned the insured so as to justify the insurer's withdrawal from defence of the action. However, the lawyer might well consider the insurer with whom there was a longstanding relationship, involving much work, to be the client rather than the transient insured. This relationship obscured the ethical issue for the seasoned lawyer: that the insured was entitled to separate representation when the potential conflict arose.

The second significant issue is to do with the workplace, the law firm, itself as a site for social learning in what it is to be a practitioner, amongst practitioners and in the context of practice.[115] To describe any workplace as a 'community of practice', however, runs the risk of sanitising some of the toxic environments we have described. Some law firms will, like the meatcutters in Lave and

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112 Ibid, p 694.

113 See *Brown v Guardian Royal Exchange* [1994] 2 Lloyd's Reports 328 and *TSB v Robert Irving & Burns* [1999] Lloyd's Reports IR 528.

114 See Morritt LJ in *Robert Irving* at [20].

115 Different pressure may operate when young lawyers can enter sole practice at the outset, or in the very early parts, of their career. Hostile colleagues may not be present as adverse influences, but neither are supportive colleagues (outside formal or informal incubators and mentoring schemes). Given the strong attachment of the legal professions in England and Wales to mandatory pre-qualification work-experience as a pre-eminent location for authentic learning of practice and regulatory restrictions on the point at which sole practice is possible, we do not delve into the pressures on sole practitioners in this paper.

Wenger's example,[116] operate entirely as commercial organisations,[117] without concern for the development of juniors. But even when there is a community of practice, there remains a question over its ends. The community of practice is inward-looking, emphasising assimilation with group norms, but says nothing about the nature of those norms. Fagin's gang constituted a nurturing and effective community of practice, but not one that society as a whole would wish to encourage. Similarly, a law firm, as we have seen, capable of being a community of unethical practice.[118]

Current formal legal education provides an opportunity for learning and commitment by young people hoping to enter the legal professions. This supports ethical resilience, but generally does so only in respect of Rest's components 1 and 2 and so is an incomplete asset. It does, however, provide a trusted other to call when a junior lawyer faces ethical challenge engaging components 3 and 4. However, this asset is threatened from reforms of legal education being rolled out by the SRA that will abandon the comparatively homogenous[119] LPC in favour of a variety of bar preparation courses, many, perhaps most of which will teach to the content and approach of the test. That test, as is recognised by the SRA in their use of Miller's pyramid,[120] can go no further that expecting candidates to 'show how' they would act in an ideal practice environment. There is no encouragement or expectation on a course provider, teaching to this test, to help students consider how they would react in a toxic environment.[121] Firm culture or lawyer mental health has not mitigated disciplinary sanctions for young lawyers thus far, although this stance may be changing in the light of the egregious cases we

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116 Jean Lave and Etienne Wenger, *Situated learning: Legitimate peripheral participation* (Cambridge University Press 1991). Here the manager "put apprentices where they can work for him most efficiently ,… Because … apprentices are so occupied with profit-making tasks, [they] rarely learn many tasks…" (p 78).

117 Richard Moorhead, 'Corporate Lawyers: Values, Institutional Logics and Ethics' (CEPLER 2015) 07/2015 <http://epapers.bham.ac.uk/1984/1/cepler_working_paper_7_2015.pdf> accessed 1 April 2022; Richard Moorhead and others, 'Designing Ethics Indicators for Legal Services Provision' (Legal Services Board 2012) < https://www.legalservicesboard.org.uk/wp-content/media/designing_ethics_indicators_for_legal_services_provision_lsb_report_sep_2012.pdf > accessed 1 April 2022; Richard Moorhead and Steven Vaughan, 'Legal Risk: Definition, Management and Ethics' < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594228 > accessed 1 April 2022.

118 Irving L Janis and Leon Mann, Decision Making: A psychological analysis of conflict, choice and commitment (The Free Press 1977).

119 Solicitors Regulation Authority, n 16.

120 George E Miller, 'The Assessment of Clinical Skills/Competence/Performance' (1990) 65 Academic Medicine S63.

121 This despite the requirement of the competence statement that a newly qualified solicitor be capable of 'Resisting pressure to condone, ignore or commit unethical behaviour', Solicitors Regulation Authority, n 10.

have cited. In recent months, the SRA has acknowledged the risks of failing to protect and support colleagues by providing guidance to support wellbeing in the workplace and consulting on a proposal to make changes to the code of conduct to address elements of toxicity in the workplace.[122] Our fear is that these interventions may be insufficient to ameliorate factors that operate to undermine the assets that support ethical resilience for solicitors. It is not sufficient to insist that solicitors 'should be' autonomous and resilient, as the STARS assume, or supportive, as the new guidance suggests, because the reality is that they are vulnerable and what resilience they have is precarious.

Conclusion and contribution to theory

We conclude with the regulator, which has overall control over the legal workplace, legal ethics and, to some extent, the format and outcomes of legal education. It is, ultimately responsible for the way in which the elements of pre-qualification education combine to provide ethical resilience. The primary source is the code, although this might be too specific, or too vague.[123] Unwarranted ambiguity does not assist the young lawyer trying first to make a decision and second to persuade a hostile senior of the merits of that decision.[124] The outcomes focused regulation of the STARS positively reinforces ethical action, but lacks the simple, behaviourist stimulus that is comparatively straightforward to teach in a classroom setting. Competence statements, particularly if they are not assessed in the workplace, can be easy to subvert. A competence endorsing the ability to confess mistakes can be very simply overwhelmed by a competitive, aggressive culture; and as we have seen, in a sequential model, it is very easy for the firm to override and denigrate what was once securely learned in the classroom. Indeed, the SRA's new arrangements will enable both elements of the SQE to be taken, and passed, before a candidate enters the workplace at all, which, we suggest, facilitates this. A competence about making and acting on ethical judgments can be, well-meaningly, subverted if the only judgement to be made is to escalate.

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[122] Solicitors Regulation Authority, 'Workplace Environment: risks of failing to protect and support colleagues' (*Solicitors Regulation Authority*, 7 February 2022) <https://www.sra.org.uk/solicitors/guidance/workplace-environment/> assessed 22 April 2022.

[123] Donald Nicolson n 18.

[124] Robert Granfield and Thomas Koenig, 'It's Hard to Be a Human Being and a Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice' (2002) 105 West Virginia Law Review 495.

In principle, however, the various structures should, as Fineman suggests, operate in a responsive manner to support resilience. The law school operationalises the regulator's curriculum, supports students and sends them to the law firm with at least a grasp of Rest's components 1 and 2. The firm endorses the regulatory endeavour, complies with the code and facilitates young lawyers in Rest's components 3 and 4. The regulator in its turn supports both.

Whilst it is possible to act ethically without commitment, it is, we suggest, not truly possible to be an ethical lawyer, without it. Regulators, as proxy for the state and for society, promulgate codes that define ethical *action* and may seek to articulate principles of professional virtue or identity. Where codes are ambiguous or - as is increasingly common with outcomes-focused regulation[125] - place the burden of defining ethicality on the individual, it is implicit that the regulator expects ethical *commitment* just as it does when the codes are clear but right action is inhibited by negative conditions. The SRA's proposal to adjust its code of conduct to address wellbeing, and to include a positive obligation not just to treat colleagues fairly and with respect but to challenge behaviour that does not meet this standard is a laudable call to commitment, but the extent to which this action could be negated by context remains to be seen.[126]

Our argument is that, in fact, the failings in each of the structural actors compound as the new lawyer proceeds through the sequential system and that this is demonstrated at the commitment stage. The law school assumes that the new lawyer will enter a supportive, ethical practice where confession of mistakes is welcomed (1 and 2). The working environment exists in a fragmented market where competition (internal and external[127]) is prioritised and there is pressure on ethical motivation and character (3 and 4).

If educational assets are weakened by, for example, abandonment of the LPC, and professional identity is weakened, and firms place impossible demands upon young lawyers we will have a malign degradation of resilience. Commitment is not assessable by examination, and regulators can only realistically aim to enforce compliance.[128] We risk not merely a non-responsive, but an actively destructive, state and an erosion of the rule of law, which in turn would degrade assets for ethical resilience.

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125 Laurel Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80 Fordham Law Review 2661, p 2682.

126 Solicitors Regulation Authority, n35.

127 Donald C Langevoort, 'Lawyers, Impression Management, and the Fear of Failure' (2016) 51 New England Law Review 75.

128 Graham Ferris, n 11.

Our contribution to theory in this context is, therefore, the focus on commitment as a response to vulnerability, emphasising the inherent connection of professional ethics with action that is related to and defines the individual. It is the point at which the young lawyer's vulnerability is exposed, but the most variable and compromised in terms of resilience asset. That said, some academics do reverse-engineer Rest's components 3 and 4 back into the formal curriculum,[129] whether or not as an explicit response to attenuation of ethical resources in the workplace, by simulating the ethical, supportive workplace that cannot be guaranteed,[130] covering behavioural ethics,[131] or through techniques such as Gentile's *Giving Voice to Values.*[132] It is our contention that, in the SQE-environment, those academics and law schools who can find space in their curriculum to do so throw to their former students a life jacket of ethical commitment and the resilience to counter whatever dangers a future professional tide may bring.

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[129] For a model both based on Rest and in a distinctly vocational context, see Freda Grealy, above n 11.

[130] See Janine Griffiths-Baker, n 59,; Nigel Duncan, n 59; Clark D Cunningham and Charlotte Alexander, n 11.

[131] Tigran W Eldred, 'Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility' (2016) Michigan State Law Review 757.

[132] Mary C Gentile, Giving Voice to Values: How to Speak Your Mind When You Know What's Right (Yale University Press 2012); Vivien Holmes, above n 48; Carolyn Plump, *Giving Voice to Values in the Legal Profession: Effective Advocacy with Integrity* (1 edition, Routledge 2018), Anneka Ferguson, 'Creating Practice Ready, Well and Professional Law Graduates' (2017) 8 Journal of Learning Design 22. For further discussion of Gentile's work in the context of legal education, see Graham Ferris, *Uses of Values in Legal Education* (Intersentia 2014), chapter 9.