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Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia

MARGARET CASTLES*

INTRODUCTION

Having practised law in a variety of contexts for many years, I decided to turn to teaching somewhat later in life than is common in Australia. This decision was prompted partly by dissatisfaction with the practice of law, particularly the values that had begun to permeate what is seen as successful legal practice. My interest in legal ethics is fuelled by a desire to help students appreciate the personal and social value of legal practice and the role that ethical professional conduct and social responsibility have in that equation. I am still grappling with the connection between my experiences and observations in practice and delivering the sum total of that learning in an academic context.¹ Whilst the outcome, producing ethical lawyers, is clear, the challenges in achieving this goal, particularly in an institutional learning environment, are ever increasing.

In this article I argue that the process of learning legal ethics should take place during the undergraduate period of study in a way that exposes students to the real as well as to the theoretical dimensions of legal ethics. I draw on my experience as a teacher of the subjects Civil Procedure for Resolving Disputes and Clinical Legal Education to illustrate the points that I make about the importance of marrying theory and practice.

In this article I make no apology for discussing the learning of legal ethics in the context of students who are going on to become practitioners. Preliminary findings of a recent Australian study²

suggest that 58% of 1997 graduates surveyed nationally were working in the private legal profession, with approximately 23% of the remainder doing work with some legal content in the public or private sectors.³ It is imperative that the students who embark on practice careers are equipped to practice ethically. And, whilst law graduates will not all become legal practitioners, they will all be lawyers, and many will work in areas that call upon their legal expertise. Issues of power, superior knowledge, and capacity to inform and influence others will arise in many such contexts, and the principles of ethical behaviour as applied to practitioners will be no less important.

PAST PRACTICE IN LEGAL ETHICS TEACHING AND THE CHANGING DYNAMICS OF THE LEGAL PROFESSION

Approaches to teaching legal ethics have varied considerably over the years in Australia. Inquiries undertaken by the Law Council of Australia in 1998 indicated that the majority of law schools at that time dedicated course time to legal ethics, most as discreet subjects, some by integration in a substantive law context.⁴

In its inquiry into legal education and training, the Australian Law Reform Commission concluded that, whilst some law schools include formal ethics subjects in their curriculum, ethics is more commonly taught as part of pre-admission practical legal training.⁵

This accords with the experience of many of practitioners today – myself included. Legal ethics was taught at the end of the law degree. It was often a non-examinable subject taught by a practitioner who outlined the rules and applied them anecdotally.⁶ Their teaching often focused on trust accounting; it tended to emphasise the importance of financial accountability.

In more recent years, this approach has been overtaken by post-academy/pre-admission training courses that cover professional ethics and conduct, often in more detail than in the academy.⁷ Practical legal training courses, usually offered by State Law Societies, direct students to consider the fundamental rules of conduct expected of them in legal practice. As is discussed further, rules of conduct do not necessarily expose students to consideration of underlying ethical norms.

Legal ethics can be broken into two components,

philosophy/theory and the practice of legal ethics. The evolution of the timing and place of ethics teaching, at least in Australia, has tended to shift focus to the second part of the equation, the *practice* of legal ethics. Students who come to law school with previous studies in Philosophy or Politics or who elect to study Jurisprudence as part of their law degree programme may well develop an understanding of the reason for the existence of legal ethics in our society. However, those who do not engage in study in these areas tend to avoid exposure to the philosophical aspects of legal ethics.⁸ This is not to suggest a complete absence of such exposure, however. Most, if not all, law schools in Australia now offer foundation subjects in law that include an introduction to legal ethics. These are, of necessity, elementary in nature; they are offered early in the LLB degree when students may lack the overview of law, process, and equity that will develop in later years. Aspects of legal ethics also arise in most subjects in the law curriculum.⁹ However, if the reinforcement of the underlying philosophy of legal ethics is haphazard, and the focus on practical problem solving comes at a late stage in the student's course of study and is not clearly related to any underlying philosophy, the resulting perception is likely to be that legal ethics are little more than a gloss on the substantive law – to be learned along with trust accounting, interviewing, and file maintenance if one wishes to survive in the legal profession. In reality, many ethical issues are very complex and value laden. Informed resolution of such conflicts requires understanding of the underlying philosophical justification for the existence of ethical norms to ensure that the interests and values embedded in the issue are given their proper weight in any resolution.

Leaders of the profession, as well as leading theorists and educators, lament the diminution of ethical conduct in the practice of law and point to increasing incidences of unethical behaviour that have an impact, not only on the participants, but on public perception of the legal community.¹⁰ It is hardly surprising that each of these sectors of the legal community has emphasised the importance of incorporating ethics effectively as an integral part of the law degree.¹¹

THE IMPACT OF THE CHANGING DYNAMICS OF LEGAL PRACTICE ON TEACHING LEGAL ETHICS

What has happened in recent years to bring about this concern? Is it an issue that has always been with us but which is only now receiving attention in Australia?

One answer to these questions lies in the significant changes that have confronted the legal profession in recent years. Legal practice in the 21st century is and will likely continue to be very different from legal practice in the last half of the 20th century. When I started legal practice in the early 1980s in Australia, the dynamics of the legal profession bore little relationship to its current state. The early 1980s saw the final days of the “gentlemanly profession” of the law – where clients habitually consulted the same firm of practitioners for all of their legal problems over most of their personal and business lives, where litigation was a standard and expected means of resolving disputes, where lawyers were more or less accepted (certainly within the profession if not outside it) as knowing what was best for their clients. Then, as now, lawyers came in all temperaments and philosophies; they tended to operate according to their own imperatives, focusing on legal solutions for legal problems, often with little regard for the wider needs and interests of their clients. Whether this was a source of contention or not, this state of affairs was largely tolerated and but for the incursion of changes outside the profession may have continued to be so.

Initially gradually, then fuelled by increased consumer awareness and economic imperatives of the late 1980s,¹² legal practice and the institutions of legal practice have changed dramatically, and a range of pressures and changing ideals have created a very different environment in which the legal profession must operate. Ideas of client service, specialisation, commercialisation, and the ever-present need to meet rising costs and track billable hours have become vitally important in many sectors of the legal profession. Nationalisation and internationalisation, corporatisation, and multi-disciplinary practice all of their very nature raise questions of lawyer loyalty. Is it owed to the corporation? To the court? Some of these changes are seen as valuable,¹³ others are criticised as demanding that the practice of law be primarily concerned with business imperatives.¹⁴ Adverse

public perception of lawyers¹⁵ has coincided with increasing discontent within the profession as practitioners find that the pressures of practice do not meet their expectations of a satisfying professional career.¹⁶ The need to meet billing targets, to maintain effective relations with market-aware clients, to compete for existing or new business, and (for newly established practitioners at least) to compete for limited job and promotion opportunities all place greater pressure on lawyers to facilitate results that maintain client commitment to the firm, irrespective of the moral, ethical, or social consequences. Shrinking markets also play a part in this equation, with more clients seeking alternative means (including using alternative dispute resolution procedures, in-house counsel, and self-help) to achieve their legal goals, often prompted by an inability to afford the high price of legal solutions.

This is not to suggest that all of these factors have caused a shift in practice or that the “old days” were populated by committed ethical practitioners who did not bend the rules. This is simply not the case. If anecdotal evidence were the only indicator, one might assume that legal ethics has always been a problem.

Perhaps the distinguishing factor is the way that this concern is being expressed. Both at Commonwealth and State level in Australia moves to expand regulation of the profession to include greater government and community representation¹⁷ have been met with mixed responses within the profession.¹⁸ These developments reflect the perception that law is not accessible enough and, by implication, that lawyers are not ethical enough; thus, the profession needs a degree of outside scrutiny to monitor the conduct of lawyers. The Australian Law Reform Commission has recently published its Discussion Paper Number 62. The Paper examines the Federal adversarial system. It states that lawyers’ ethics are a fundamental part of the equation in ensuring fairness and equity in the legal system, and it advocates that increased attention be given to ethics both in education and subsequently.¹⁹

Such initiatives do not indicate a sudden decline in ethical conduct. They are more likely, in my opinion, a response to the perception of gradually declining accessibility and accountability of lawyers. They reflect the expectations of a more consumer-oriented community. They reflect confidence that proposals that would once have been considered an unacceptable intrusion into the self-monitoring status of the profession would now find

political and community support.

Whatever the reasons for the increasing concern about legal ethics in recent years, the fact that they are persistent and widespread indicates a problem that requires ongoing attention.

CAN LEGAL ETHICS BE TAUGHT IN THE SAME WAY THAT OTHER LAW SUBJECTS ARE TAUGHT?

The answer to this question varies. A range of initiatives designed to address the perceived need for different approaches to teaching ethics in the academy have been developed. They range from the re-introduction of legal ethics as a compulsory subject through to the integration of legal ethical issues in simulated case studies, with any number of permutations in between. These initiatives, in addition to the coverage that legal ethics also achieves in introductory or foundation subjects and in other subjects where various aspects of ethical theory and outcome are touched upon, have refocused academic attention on the methods of teaching legal ethics to potential practitioners. Yet, despite the level of attention that ethics teaching has received in recent years,²⁰ the issue remains vexing.

One difficulty arises from the very environment within which legal ethics is taught. By this I mean that students tend to view, indeed are trained to view, legal principles and rules as principles to be applied or distinguished with the legitimate aim of meeting their clients' best interests by the accepted process of testing the applicability of relevant legal principle and precedent.²¹ Thus, the rules of legal ethics tend to be turned over and examined individually in reference to particular case studies with a view to testing if it is indeed possible to assert or distinguish compliance with a particular rule in a particular case;²² this stands in contrast to the idea that ethics should be viewed as a pervasive set of values that underpin the practice of the law.²³ Even where the problem set is to find the "right" answer on given facts, rather than obtain the outcome that a party seeks, the tendency is to approach the problem as an intellectual exercise. Conversely, the practice of law, certainly in a litigation environment, has tended to focus on process and technicality, rather than a broad application of underlying principle. This is, in no small part, the natural culmination of the sorts of issues discussed earlier – the competitive win at all costs

maneuverings that are common in major commercial and civil litigious matters.

Such problem-solving techniques are practised in the academy in close relation to the theory and philosophy of underlying legal principles. In a later practice context, the temporal distance between the academy and the office and the other pressures implicit in the practice of the law produce a different environment and context that may well have different results.

This change in context illustrates how different from other legal subjects legal ethics can be. If one takes, for example, a contract dispute, there is usually fairly clear guidance as to the effect of the applicable law on a particular problem. The most baffling aspect may involve analysing the facts to draw out an applicable legal solution. The reality is that in most cases, whilst there may be opposing views or arguments, the law on either side is often quite clear. Even where it is not, there are logical arguments, often supported by precedent, that can be applied to the issue. Ultimately, the issue can be determined by a disinterested third party (the judge) by application of technical legal principles and precedent to the given fact situation.

Ethical issues, on the other hand, are not so simply resolved. It is usually not a case of two differing and opposing arguments that can be tested against fact and precedent. Rather, the legal ethical issues that arise commonly have various potential answers, depending on the individual moralities, values, and interests at stake.

One of the primary reasons for the promulgation of codes of ethics is to avoid the subjectivisation of decision-making, at least as far as the legal advisor is concerned. By all means, let clients grapple with moral, political, and other outcomes and their own consciences. For the lawyer, the existence of ethical rules is intended to provide guidance to what is inevitably a multi-faceted problem. And this is where the problem begins to arise. The idea that written ethical rules, whether derived from codes of conduct or case law, can easily solve complex value-laden decisions with multiple potential consequences simply does not bear scrutiny. This approach typifies the problem-solving method of teaching that is adopted *in a general sense*, and it, undoubtedly, develops students' abilities to recognise and apply rules to cases. It does not necessarily help the student make an ethical decision, however.

This approach also underestimates the capacity of published codes of legal ethics to provide a black and white answer to a multi-faceted problem.²⁴

My argument is that whilst the learning of doctrine and theory is more or less facilitated by a principles-problem-solving approach, the teaching and learning of ethics is not. One can learn to apply principle to fact in this model, but one cannot learn to “do” legal ethics in the same way. Ethical practice does not rest solely upon one’s ability to identify and understand applicable rules of law and apply them in the context of the facts presented (which reflects the approach to the development of technical expertise that is adopted in many law subjects). Effective learning of legal ethics does not simply require the student to know and understand the norms that underlie the rules and the reasons for them but to be able to make decisions on a daily basis that intuitively embody those norms. This requires a different set of skills from that which is useful in identifying, for example, relevant contract principles or different defences that are available to an accused client. The practice and understanding of ethics is invariably something that arises alongside other legal issues, not in isolation. Students are habitually invited to examine legal doctrine in the light of given fact situations in a way that does not invite consideration of the consequences of a legal outcome. This, of course, is a necessary part of developing the technical knowledge and skill of a lawyer.

Whilst legal ethics issues can be treated in precisely the same manner, in my view, in so doing ethics is presented as an intellectual exercise without real consequences. A theoretical application of legal ethical theory and rules often precludes consequences from the equation, usually because we are either not presented with the consequences or are not close enough to the problem, or committed enough to the client, to be interested in the consequences. The sorts of issues, outcomes, and considerations that create the environment of an ethical problem are seldom in the foreground. Yet in a legal practice setting the implications and consequences of ethical decisions are very often important considerations in our decision-making process, whether or not we want them to be.

This begs the question, however, which is, “Is there any wholly effective way of teaching legal ethics in a traditional law school environment?” I think the answer must be, “Yes, resources

permitting.” Realistically, resources may not be available for the sort of integrated approach to the teaching of legal ethics that is provided at, for example, the College of William and Mary in the USA;²⁵ however, current thinking makes it clear that ethics must be considered in the academy in some form or other.

All these issues in my view dictate the teaching of legal ethics in a different way – not as a stand-alone subject nor as a final gloss on the other technical skills and academic values learned in the academy but as an integral part of the learning of law as a social phenomenon. There is nothing new in the suggestion that legal ethics be taught pervasively or by integration. Law faculties, particularly in the USA, have been doing this in various forms for many years.²⁶ Integration of legal ethics in the curriculum could range from ensuring that ethical issues are raised in a structured manner in many subjects in the curriculum to focused examination in various contexts in skills or similar subjects. Paterson argues strongly for the initial study of ethics in philosophy, followed by practical or simulated experience. Faculties offering clinical legal education to students have the ability to explore theories of ethics and then consider their application in real situations; however, such programmes are offered to only a small number of students in Australia and cannot meet the needs of the student body as a whole.

Practicalities, not least being funding constraints, dictate that the teaching of legal ethics in the academy in Australia will inevitably occur at least partly in a classroom context. To be effective, in my opinion, legal ethics must be taught in a manner so that students are presented with the opportunity to confront the many facets of ethical decision-making.

OBSERVATIONS ABOUT STUDENT PERCEPTIONS

Another notable difference between teaching ethics and other subjects are the preconceptions about legal ethics and lawyering that many students hold. In my experience, it is not uncommon for students to exhibit sound understanding of the theories of ethics and to apply them more or less appropriately to a given practical situation but then state confidently that, “It doesn’t happen that way in practice.” This is a profoundly perturbing situation.

In order to evaluate this view that students bring with them to the classroom, we must consider its source. There are a number.

The popular media – film and television – often portray legal ethical issues, commonly in criminal practice, and they also portray unethical behaviour. Instances of unethical behaviour by lawyers are usually not glorified,²⁷ in my opinion. Those occasions where unethical behaviour is presented in a positive light are usually instances of the ends justifying the means, for example in the defense of the powerless against the establishment.²⁸ What messages do these depictions give students? One would expect a positive view of the values attributed to behaving ethically. Yet, in my experience, the common view of students is that ethical conduct is the exception rather than the rule.

A second area where perspectives on ethics may well be learned is by osmosis from a society that tends to distrust lawyers.

Related societal influences are the increasing ethos of competitiveness and self-advancement and the value that is attributed to financial success in Australian society. Interestingly, whilst society values these achievements, their adoption by the legal profession is one of the main reasons for public distrust and professional concern; this, perhaps, reflects a societal expectation that the professions should not, after all, descend into the market place in this way.

A more compelling source, in my experience, is students who have had some employment experience – in practice, in a clerkship, in work experience, or in para-legal work. In my experience, many of these students express the view that in “real life,” legal practice is not ethical. This is an observation that I find interesting because my own extensive experience in litigation practice in Australia suggests that most (but not all) lawyers do endeavour to behave ethically and place considerable value on legal ethics and professional conduct; those engaging in sharp practice, or frankly unethical behaviour, are the exception.

One reason for this perception by students may well be that their experience in practice is primarily with practitioners who are trying to get a job done and who are not focused on explaining the ethical dimensions of issues that arise to the students. Thus, what may seem to a student to be unethical conduct may be nothing of the sort; however, the nature of the relationship between student and employer may not be such as to encourage student inquiry on the ethical nature of the matter at hand.

Another likely cause is that ethical issues are often very

complex and require a deal of thought, whether conscious or intuitive, on the part of the practitioner. If this process is not drawn to the student's attention (which it is less likely to be given the nature of the relationship), then it will never be teased out for the student's benefit.²⁹ Students overhear all manner of interactions and observe conduct in an environment in which many decisions will not be fully explained and some may be misinterpreted. Students often "learn" by observation without reflection that legal ethics are not important, even though the contrary is the case. This sort of experience is very different from the experience that students obtain in structured experiential programmes, such as in clinical legal education courses where students are required to identify and explore ethics issues in depth with practitioners and within the academy.³⁰

The logical outcome of my argument is that students must be exposed to some form of interpreted clinical experience to put the practicing of legal ethics in context. Yet, as has already been discussed, this is not a viable option for many law schools in Australia.

THE "STUDENT PRACTITIONER"

This brings me to an issue that reaches beyond the academy. Many law students, upon graduation, embark on a career in legal practice. It seems generally accepted that there is doubt whether these practitioners have a sufficient grounding in legal ethics to be able to engage in day-to-day ethical decision-making. Technically, this inability makes them potentially "unethical lawyers." How many of these graduates simply lack the capacity to identify and deal with ethical issues, which usually call for immediacy of response? And where do they eventually learn legal ethics?

In keeping with the idea that education is a continuum, I would suggest that the newly admitted practitioner occupies a position part way between that of student in the academy and that of the professional. This person I shall refer to as the "student practitioner." Although the student practitioner has the rights of a fully-fledged practitioner,³¹ in reality he or she is embarking on a steep learning curve where all the practical skills and issues that confront the new graduate must be learned and applied. The student practitioner should be of no less concern to society in terms of

learning to practice ethically than the law student. Indeed, in many ways, the student practitioner should be of greater concern, as he or she is in a position to do positive damage.

Anecdotal evidence suggests that much learning of legal ethics comes from mentors, supervisors, and colleagues – and from experience. In my experience as a practitioner, the process of learning by experience is a dangerous one – many ethical issues arise suddenly, for example in court or in conference with a client or another practitioner and must be dealt with immediately. Too often practitioners learn legal ethics when they realise after the event that they faced an ethical issue and failed to deal with it or dealt with it inadequately.

One likely cause of the difficulty of acting ethically in a practical context is that legal ethics are usually taught in anything but a day-to-day context. Overwhelmingly, in my opinion, legal ethics are taught by reference to what I describe as “big issue ethics” – the guilty client, the breach of confidence to protect the innocent, and so on. Few practitioners or students would fail to detect the legal ethical issue in these sorts of circumstances. Yet the reality of legal ethics, in my experience, is that the vast majority of ethical issues are not obvious and can pass unaddressed or, worse, unnoticed. This occurs not as a consequence of vice or deviousness on the part of the practitioner but simply because the issue has not been recognised, or being recognised has not been dealt with capably. This again suggests that exposing students to day-to-day ethical issues as a common phenomenon in legal practice – and ensuring that they have the resources to deal with them – goes some way to addressing the hit and miss approach to learning that is often the result of unsupervised learning on the job.³²

A further issue that surrounds the student practitioner is that, unlike a law student whose ideas and understanding will ultimately be tested in the course of subject assessment, ethical decisions and actions are almost always made in private. The maker of unethical decisions is often in a good position to conceal or cloud the decision made, and the nature of the lawyer-client relationship means that often the decision-maker is not accountable. Unlike substantive legal issues where law may be argued but is not solely in the control of the decision-maker, ethical decisions very often are only monitored by the conscience and understanding of the person making them. The realisation that seemingly unethical

decisions can be made (often in all innocence) without immediate consequence may lead to the conclusion that such omissions are not important. This lesson, if learned at a critical stage in the learning curve of the student practitioner, is likely to stick.

The (often skeletal) codifications of legal ethics that professional bodies issue provide different levels of guidance to the student practitioner who seeks assistance. The South Australian Professional Conduct Rules, for example, are relatively simple statements of expectations on the key areas of conduct. They do not easily disclose (nor indeed, exhaustively reflect) the underlying values.³³ This is not intended as a criticism – in reality, codifications of this type cannot be seen as exhaustive of the expectations of legal practitioners, nor do they reiterate the philosophy behind them. Rather, such codes should be seen as the public articulation of matters that are expected to be inculcated in practitioners at a deep level.³⁴ In many cases, though, these codes do not help the student or junior practitioner reach an intrinsic understanding of the reason why we have legal ethics and an appreciation of the value of legal ethics to society and to the legal profession.

OBSERVATIONS OF STUDENTS “PRACTISING” LEGAL ETHICS

Students need to understand not only that the legal system and the body of law involve the constant balancing of interests; they also need to understand that how they behave and the very role that they may play in society are influential in the balancing process. Seen in this way, legal ethics becomes not simply a body of rules superimposed over the technical practice of the law but a fundamental feature of a legal system that regulates the interests of the community in a day-to-day context.

To illustrate my argument, consider the example of the guilty client. This issue invariably provokes a range of responses from students, from the technical balancing of the competing obligations that this problem presents, through moralistic or emotionally-based responses, to the prospect of facilitating the acquittal of the person in any way. The severity and nature of the offence is a factor in determining the response in many cases. In many respects, examples such as these are easier to handle because of the sharply

focused moral standpoints and the values implicit in the problem. However, when examples that raise similar fundamental principles are presented to students in less structured clinical scenarios,³⁵ their approach differs markedly.

To illustrate my point further I will discuss my work as a teacher of legal ethics in the subject Procedures for Settling Civil Disputes over the last three years.³⁶ As part of the course, students are presented with a complex legal ethical issue that is embedded in an apparently straightforward negotiation exercise. It involves a party who reveals to his solicitors, shortly prior to a negotiation, details of a pre-existing medical condition (Alzheimer's disease) that will, in all likelihood, significantly affect the likely degree of contributory negligence by the plaintiff and any damages awarded. The defendants also present their advisors with information that may significantly weaken their case; an employee, whose role in the transaction with the plaintiff was critical, was, in all likelihood, drunk at the time of making certain representations to the plaintiff and had subsequently been fired. In both instances, there is evidence available that is not amenable to the normal discovery or information exchange processes so admission by the legal representatives is the only way that either party is likely to obtain the relevant information from the other.

The students had been working on this case for several weeks. They had interviewed the "clients," pleaded the case, attended to discovery, and witnessed the development of the case from its commencement through to the point of negotiation. Although students did not "act" for the same party throughout the programme,³⁷ they nonetheless developed a cumulative understanding of the case in much the same way as they might have experienced in a practice environment. Despite playing different roles in the different exercises, many students went beyond an intellectualisation of the issues and developed clear partiality to one party or the other.

Testing of ethical responses was not left to chance. Students were prompted to make direct inquiries of each other on these issues. The direct inquiry could give rise to various responses, ranging from an honest description of the condition/circumstances in issue, through the full range of prevarication, avoidance, evasion, and denial. Responses, with few exceptions, were avoidance or evasion of the question, followed in reflective analysis by a

pragmatic justification of the position on various grounds, many based on an “ends justifies the means” approach.

When prompted to justify their response in light of ethical norms, students compartmentalised and then intellectualised the issue, breaking it down into the various obligations owed as legal practitioners, explaining why on each level not revealing the information was acceptable from an ethical perspective. The approach that they adopted was exactly the approach that they adopted in other subjects – they felt that they were invited to identify the issue and then find a way to avoid or assert its application in their client’s situation. Their approach indicated to me that these students – who had accurately and intuitively applied the ethical principles to other problems in a previous weeks – had difficulty making the same connections when given a problem in a context that more closely imitated real life.

The problem certainly highlighted the dilemma that faces practitioners when loyalty to a client and a commitment to candour in negotiations and the interests of justice clash. However, it also highlighted the fact that when faced with this clash of interests, many students intuitively chose the approach that served their client’s best interest with little reference to the other obligations. Many students were also guided by the fact that their main focus was to settle the case (as it was in both clients’ interests to do so) and that evasion of the direct question was “not relevant” to the resolution of the matter in a short time frame. Indeed some of them seemed to hesitate before realising that an ethical issue had been posed at all.

Student response to the problem set were important as it is not dissimilar to the type of issue that student practitioners will face when they commence practice. In my opinion, the ability to identify and respond to the issue appropriately will largely be informed by what they bring with them to practice and refined by what they learn there.

Similar observations arise in the context of teaching the subject Clinical Legal Education. In this subject, students must also grapple with day-to-day ethical issues in a real environment, followed by classroom evaluation. Students seem readily equipped to reach legal ethical decisions when problems that are presented in the classroom are assessed against the various rules of ethics. Whilst there is lively discussion about the implications of the decisions

advocated, and particularly about moral versus legally ethical outcomes, students seem uniformly committed to decision-making that reflects the underlying reason for ethical rules. Yet when students begin to encounter “real life” ethical dilemmas, they struggle to apply these underlying issues when grappling with the immediate interests, commitments, and needs of the participants. Often, they are able to reach a conclusion because they get assistance from their supervisors and get insight when the issue is discussed in class.

In both of the examples that I have discussed, it is not the *failure to identify an issue or to understand the method of resolution* but the *very relevance of ethics to the outcome* that is resisted by the students. The actual, as opposed to theoretical, balancing of interests can leave students wondering what is the point of legal ethics when faced with their clients’ and the other practitioners’ immediate needs and interests.

This problem opens up a further dimension in the theory/practice distinction. Ethical issues very commonly present themselves in a context that requires an immediate response. Whereas the majority of students are likely to be able to identify basic rules of contract, tort, criminal law or procedure “on the run,” ethical issues are seldom so clear-cut that they invite a simple black and white answer. The student practitioner is often focused on the substantive task of the moment, whether that be advocating in court, researching the law, negotiating a settlement, or advising a client. The ethical issues that can arise in these contexts are seldom obvious, yet very frequently they require a response or decision that must take into account a fine balancing process of interests, rights, and roles. It is these daily decisions, which themselves can take up an hour or two of group discussion in a seminar, that must be made on the spot. It is this type of scenario that may lead to learning by making mistakes – and it is very common indeed for members of the profession to have their own anecdotes about failures in ethical judgment in their early days in practice. Thankfully, it would appear from my experience that the great majority of these failures are insignificant. But there is always the potential for real damage to the individuals involved, and, in the long term, there is the potential that these episodes could diminish the value that the student practitioner learns to place on legal ethics.

These experiences illustrate that, whilst many of my students

did have a sufficient grounding in philosophical ethical issues to understand their application in a “sanitised” problem scenario, they had significant difficulties in resolving these issues on their own when they arose in a practical setting; the students needed considerable reflection on, and discussion about, the issues to reach any conclusions. Their reactions went deeper than simply failing to recognise the significance of the issue. They demonstrated a tendency to characterise the ethical aspects as irrelevant in the context of the problem and the immediate needs of the participants. Their focus was on short-term case-specific outcomes, rather than long-term general implications.

Simply telling students that legal ethics are important in the broad scheme of things appears to have no significant effect when learning is applied in practice. If the student practitioner understands and accepts theory and the value of theory in resolving legal ethics problems but then finds theory is not important in practice, then the value of theory is supplanted by the lesson learned by the student practitioner on the job.

To overcome this problem, student practitioners must enter the work place prepared to identify and appropriately deal with ethical problems – both big and small. They must have this ability already instilled in them. My argument is that this process of instillation must occur during the undergraduate period of study in a way that exposes students to the real as well as to the theoretical dimensions of legal ethics.

In the end, my experience indicates that no amount of philosophical understanding or problem-solving ability is sufficient to dissuade a student who is convinced of the supremacy of, for example, the interests of the individual over the community that breaching confidentiality in favour of saving lives is the right decision. What we, as teachers of legal ethics, must aim to do is to ensure that that our students understand the reasons why ethical rules require a particular response in a given situation. If a student has the understanding and the capacity to analyse the problem with reference to relevant values, then the student has the capacity to make an ethical decision. Whether he or she chooses to do so is another matter, but that is beyond the responsibility of the academy.³⁸ Our role in teaching legal ethics is to equip our students with the capacity to understand the theory in the context of practical problems so that they can analyse the latter and apply the

former in an ethically acceptable way. The students may choose not to, but ultimately that is not for lack of capability.

The difference between the scenario that I depict and the current state of affairs is the real risk that our current graduating students are not in a position to make an informed judgment based on ethical values. They are far more likely to view such a scenario on a surface level – making the decision that they think they will be able to justify in the narrow circumstances of the case without understanding how that decision has broader consequences for them, for the profession, for the legal system, and for the community.

At one level my argument is little more than a repetition of calls for the integration of legal ethics throughout the law school curriculum. Yet that is not precisely what I am arguing. Whether ethics is taught integrally or alone, the scope of learning in my view must incorporate significant opportunities to develop the theory in practical settings. Ideally, of course, such setting would be in a law office with dedicated supervision. In reality, this is not an option for all law schools in Australia. Alternatives that expose students to the exigencies of ethical practice in a way that enables them to identify what makes them want to diminish the importance of ethics in a simulation scenario provides one effective teaching/learning solution. It recognises that knowing is not enough, that knowing how to do it is also necessary, and that reaching this point is a personal journey for each student.

CONCLUSION

Ultimately it is not my intention to propose a solution to the problem of how best to teach legal ethics. Experience in practice and in observing students in academia suggests to me that learning legal ethics requires a combination of environments and that it is not sufficient to cover most but not all of those options in the academy, leaving the remainder to chance and experience.

In any number of other subjects, say Contract or Tort, the delivery of theory would mark the end of the academy's obligation – ideas of drafting a contract or pleading a tort would not be considered a necessary part of an academic education as it is more suitably covered in pre-admission training. However, I would suggest that legal ethics is not a conceptual area that can be divided

neatly into “skills” and “theory.” Legal ethics are a fundamental part of legal practice; they are one of the reasons advanced as a justification of the lawyers’ monopoly over the provision of legal services. Legal ethics embody values that govern all legal practitioners. They maintain equality between participants in the legal system and maintain the integrity of the system itself. Therefore, the practice of legal ethics, the ability to make ethical decisions in real life situations, is a matter that is essential to the process of learning what legal ethics are and why they exist.

To this end I advocate the teaching of legal ethics in a manner that draws on real life experiences. Obviously, clinical legal education programs, closely supervised and focused on legal ethics as a central part of course content, are well suited to this task. They are not, however, available to the majority of students in Australia. Conversely, simply exposing students to legal practice, without focused guidance and supervision, does not meet the requirement, as it can have no, or at worse adverse, effect.

Involving students with simulated case studies that ask them to identify with the interests at stake and to confront their tendency to identify too closely with those interests at the expense of ethically acceptable decision-making is one way of achieving this goal. At the very least, it has the effect of sensitising students to the existence and complexity of ethical issues and alerting them to the full range of consequences that might flow from their decisions.

Unlike many other issues that will arise in legal practice, ethical issues arise unannounced and must often be resolved immediately, with no time to turn to textbooks, cases, or colleagues for advice. For this reason if no other, we should ensure that students are well equipped to engage in the process of ethical decision making at an early stage. Equally importantly, we must be sure that students understand that legal ethics are as intrinsically important to the day-to-day practice of the law as the theory and doctrine that make up the law.

There is disagreement within the academic community at this time in the face of increasing pressure to include skills and practical training in the undergraduate degree. Like many teachers involved in skills and clinical teaching, I firmly believe that an element of clinical learning, whether it be called skills or otherwise, plays an important part in helping students understand the role of legal doctrine and theory in its social context. Nowhere is this context

more important than in the area of legal ethics. The sorts of pressures that the legal profession faces at this time are a threat not only to the way we have traditionally practised law but to the very credibility of the legal profession. Finding effective means of addressing the perceived deficiencies in teaching and practising legal ethics will be an important factor in meeting this challenge.

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- 1 Ideas of professional ethics and professional conduct are often merged in the practice of the law, whereas, strictly speaking, they are separate issues. Legal ethics looks to the philosophical foundations of the operation of law in society. Professional conduct focuses on the day-to day-behaviour of legal practitioners. Is there a difference? In many respects, I would argue that there is not. The expectations of professional conduct emanate from underlying ethical norms. Professional conduct can be seen as the end product of a continuum that starts with (or without) an understanding of ethical norms and manifests itself in a manner of behaving.
- 2 M Karras & C Roper, *The Career Destinations of Australian Law Graduates* (Newcastle: Centre for Legal Education, 2000).
- 3 No survey of student intentions or employment circumstances is comprehensive. With a response rate of less than 50%, results such as those of Karras and Roper must be viewed with caution due to the risk of self-selection of survey respondents weighting statistical outcomes. Karras & Roper, *supra* note 2.
- 4 Law Council of Australia submission to the Australian Law Reform Commission on Issues Paper Number 21, July 1998.
- 5 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training: Issues Paper 21* (Canberra: AGPS, 1997) 54.
- 6 Interestingly, the most notable memory that I and many of my colleagues have of legal ethics classes is the number of students who did not attend the compulsory lectures and the corresponding number who signed the attendance role on their behalf.
- 7 Practical Legal Training programmes expose students to legal ethics issues, although these tend to have a practical rather than a philosophical focus.
- 8 Paterson argues strongly for the teaching of legal ethics as philosophy before any application of ethical principles in practice. A Paterson, *Legal Ethics in the Curriculum* in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995).
- 9 Menkel-Meadow argues that, as law teachers, we cannot avoid teaching legal ethics and canvassing values both in content and in conduct. C Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?* (1991) 41 *J of Leg Educ* 3. This does not, however, appear to equate to formal or structured learning of legal ethics principles.
- 10 Justice Kirby of the Australian High Court addresses some of these concerns. M Kirby, *Legal Professional Ethics in Times of Change* (1996) 14 *Australian Bar Rev* 170. See also D Dawson, *The Legal Services Market* (1996) 5 *J of Judicial Administration* 147, at 149; A Goldsmith, *Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers* (1996) 14 *J of Prof Leg Educ* 1; F Armer, *The Teaching of Legal Ethics in Australian Law Schools* (1998) 16 *J of Prof Leg Educ* 247, at 249-250.
- 11 The most influential articulation of this view is contained in the report of the

Pearce Committee. D Pearce, E Campbell & D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: AGPS, 1987). This Report clearly underlines the importance of entrenching legal ethics in the educational process. Such emphasis is repeated in what are known as the Priestley Eleven – an articulation of the elementally important areas to be in the legal education continuum, including professional conduct, determined by a consultative committee of admitting authorities from around Australia, chaired by Justice L J Priestley. See *Report of the Consultative Committee of State and Territory Law Admitting Authorities* (Sydney: Centre for Legal Education, 1992).

- 12 Much of the impetus for this consumer awareness is reflected in institutional and legislative changes that entrench the rights of consumers of private and Government services to demand accountability – reflected in legislation such as the *Trade Practices Act 1974* (Cth), fair trading legislation of the various States, the State and Federal Freedom of Information legislation, and the creation of a plethora of State and Federal Ombudsman offices. The tendency to shop around for legal advice and legal advisors has also become more commonplace, particularly in the case of large corporate organisations courted by law firms who recognise the value of corporate business.
- 13 For example, few would deny that meeting clients' needs and involving them meaningfully in the legal process is a desired approach in legal practice for philosophical as well as marketing reasons.
- 14 For example Galanter and Palay extensively discuss the business-oriented imperatives of large law firms today and the focus on billable hours and the ability of firms to attract new business as the primary indicators of professional achievement, which are undertaken at the expense of more traditional views of professionalism in legal practice. M Galanter & T Palay, *The Transformation of the Big Law Firm* in N Trubek, R Nelson & R Solomon (eds) *Lawyers Ideals/Lawyers' Practices: Transformation of the American Legal Profession* (New York: Cornell University Press, 1992). Justice Kirby *supra* note 10 makes similar comments about the Australian legal market.
- 15 In a 1993 survey in the United States public perception of the credibility and honesty rated lawyers well down the list of occupations surveyed, better than only stockbrokers and politicians. GA Henster, Vox Populi: The Public Perception of Lawyers: ABA Poll (1993) 79 *American Bar Association J* 60, at 61. Perceptions are similar in Australia, see D Weisbrot, *Australian Lawyers* (Melbourne: Longman Cheshire, 1990) at 18.
- 16 This sense of dissatisfaction seems to be widespread. Anthony Kronman records the malaise that seems to permeate the practicing legal profession in the United States. He concludes that the practice of the law has lost its direction; many find the realities of legal practice too different from the ideals of the value of legal practice that may have been nurtured at law school. A Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass: Belknap/Harvard, 1995). Although there has not been extensive work on the satisfaction and self-perception of lawyers in Australia, a recent Victorian study suggests the beginnings of a similar level of dissatisfaction. See Victoria Law Foundation, *Facing the Future: Gender, Employment, and Best Practice Issues for Law Firms, Volume 1, The Job Satisfaction Study, Final Report* (Melbourne: Victoria Law Foundation, 1995).
- 17 Both the New South Wales and the Victorian Governments have established bodies comprising legal, community, political, and lay appointees to monitor professional conduct. The Australian Competition and Consumer Commission in its *Study of the Professions – Legal, Final Report* (Canberra: AGPS, 1994) has made similar recommendations.
- 18 Anecdotal evidence suggests that the initial responses to such initiatives by the profession are negative. However, at a deeper level it is acknowledged, again largely anecdotally, that there is value in a profession that is not highly regarded being seen to be more responsive to genuine community concern. In many of the

- Australian states, disciplinary bodies that include lay members seem to be accepted and to function effectively.
- ¹⁹ In chapter 6 of its paper reviewing the adversarial system of litigation, the Commission advocates increased focus in legal education on the ethical responsibility of lawyers in the adversarial system both at tertiary and post-graduation level. It emphasises the view that the day-to-day ethical conduct of participants in the system is the final and most compelling means of ensuring that the system as a whole works effectively in the public interest. Although this paper focuses on the adversarial system, rather than legal ethics *per se*, it clearly articulates the view that legal ethics in a day-to-day context in areas such as alternative dispute resolution and communication (particularly with clients) can have a significant impact on the broader interests of the justice system. See Australian Law Reform Commission, *Discussion Paper 62: Review of the Adversarial System of Litigation* (Canberra: AGPS, 1999) chapter 5.
- ²⁰ The proliferation of articles dealing with legal ethics teaching in both legal education and other journals attests to the concern and activity in this area. See for example: J Dzienkowski, Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas (1995) 58 *Law & Contemporary Problems* 213; B Green, Less Is More: Teaching Legal Ethics in Context (1998) 39 *Wm & Mary Law Rev* no 2, 357; L Lerman, Teaching Moral Perception and Moral Judgment in Legal Ethics Course: A Dialogue About Goals (1998) 39 *Wm & Mary Law Rev* no 2, 457; D Luban & M Millemann, Good Judgment: Ethics Teaching in Dark Times (1995) 9 *Georgetown J of Leg Ethics* 31; A Goldsmith, *supra* note 10; F Armer, *supra*, note 10.
- ²¹ No criticism of this practice, which is the essence of being a lawyer, is intended. Our legal system depends upon the ability of citizens to have their rights and obligations determined by reference to *applicable* law, which, in turn, is achieved by the legally trained mind testing the applicability of principle and precedent to the client's circumstances. However, where professional values, rather than legal principle, are the issue, this practice may not be appropriate.
- ²² This tendency is discussed by Menkel-Meadow, *supra* note 9, at 9.
- ²³ One might well argue that there is no difference between carefully distinguishing principles of Contract Law or Criminal Law from the facts of a particular case and distinguishing or justifying ethical rules for a particular instance of conduct. In either case, the broader question, "Is this conduct (or contract or criminal act) consistent with the spirit of the underlying legal philosophy?" may lead to an answer contrary to the technical application of rule and precedent. Rightly or not, it is argued here that in the context of legal ethics, the implications of ethical practice are so overarching that the broader question should be the *first* question, and a negative answer should obviate the need to test the matter further.
- ²⁴ To illustrate: Rule 9.13 of the *Professional Conduct Rules* of the Law Society of South Australia directs that practitioners shall keep their clients informed of all significant matters relevant to their case with emphasis on the likely costs. This provision provides no guidance to the practitioner as to the degree of autonomy that should be afforded the client, or the extent to which the lawyer should influence the client's decision-making. Similarly, the rules prohibit acting for a client when there is a conflict of interest (Rule 9.4). They do not, however, assist in determining the ethical implications where the conflict is between one's own moral perceptions and the apparent perceptions of the client. These sorts of directions are intended to be a general statement of principle. They are not of great use when determining the interests and norms embedded in a real life problem.
- ²⁵ The legal skills programme at the College of William and Mary comprises two years of simulated practice during which students manage four clients and become intimately acquainted with their case. Students are repeatedly exposed to ethical and professional issues in the context of the day-to-day management of their clients' affairs. Many, but not all, of the ethical issues are structured, and all

- are the subject of analysis and discussion as part of the course. The program is outlined in detail in JE Moliterno & JM Levy, *Ethics of the Lawyer's Work* (St Paul: West Group, 1993) and the accompanying manual for teachers. See also JE Moliterno, Professional Preparedness: A Comparative Study of Law Graduates Perceived Readiness for Professional Ethics Issues (1995) 58 *Law & Contemporary Problems* 259. Griffith University also runs an "Offices" program for all law students where exposure to professional and ethical issues, amongst other things, is achieved in a teacher-less environment that more closely simulates the context in which ethical issues will arise. M Le Brun, Law at Griffith University: The First Year of Study (1992) 1 *Griffith Law Rev* 15; R Dick, L Godden, K Healy & MJ Le Brun with G Airo-Farulla & D Lamb, Implementing Educational Theory: A Case Study of the "Offices" Project (Teacher-less Groups) at Griffith University (1993) 4 *Leg Educ Rev* 173.
- ²⁶ See for example D Rhode, Ethics by the Pervasive Method (1992) 42 *J of Leg Educ* 1, 3. Rhode explores in depth the issues implicit in integrating legal ethics teaching in the curriculum.
- ²⁷ For examples, see the films *The Letter* and *Primal Fear*.
- ²⁸ For examples, see the films *Class Action* and *The Philadelphians*.
- ²⁹ To illustrate: Lamb in her study of 17 practitioners of varying experience and in different work contexts reports that junior lawyers in large firms may not be exposed to legal ethics problems at all because their supervising partners make all the ethical decisions. Thus, they may be developing technical legal experience that will qualify them to work more and more independently, but they are not developing an appreciation of ethical issues. D Lamb, Ethical Dilemmas: What Australian Lawyers Say about Them in S Parker & C Sampford *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford: Clarendon Press, 1995).
- ³⁰ This analysis and reflection on legal ethics issues can be mirrored in programs such as that offered at the College of William and Mary, *supra* note 25. Where the experience is real rather than simulated, the requisite reflection and analysis may occur in plenary practice groups or in group discussions in academy-based seminars.
- ³¹ Although notionally admitted to practice, there are provisions in all Australian jurisdictions except Victoria that stipulate that an individual be employed under the supervision of a more senior practitioner for a period ranging from one (Qld, ACT, WA), two (SA, NSW), or three (Tas) years before an unrestricted practicing certificate is available. In Victoria, a practitioner is eligible for an unrestricted practicing certificate after completion of practical legal training or one year of articles. See: the *Queensland Law Society Act* 1995 and Rules; the *Legal Profession Act* 1987 (NSW) and Ruling of the Council of NSW Law Society, 1 January 1994; the *Legal Practitioners Act* 1981 (SA); the *Legal Profession Act* 1993 (Tas); the *Legal Practice Act* 1996 (Vic); the *Legal Practitioners Act* 1893 (WA); and the *Legal Practitioners Act* 1970 (ACT).
- ³² The significance of this cannot be underestimated. As Lamb reports, *supra* note 29, at least 80 ethical problems were encountered. The implications of getting even 20% of these wrong are concerning.
- ³³ See *supra*, note 24.
- ³⁴ Some jurisdictions, notably New South Wales and Western Australia, have developed codes of ethics or conduct that contain considerably more detail and are annotated to provide more practical guidance. See for example: the *Professional Conduct Rules*, Western Australia; and the *Solicitor's Professional Conduct and Practice Rules*, New South Wales. The Law Council of Australia has also produced, as part of its blueprint for the profession, a model code that outlines the conduct implications underlying ethical expectations in greater detail. See Law Council of Australia, *Model Rules of Professional Conduct and Practice*, 1996.
- ³⁵ Here I refer to scenarios in which the focus is on dealing with a particular practical aspect of a client's case with an ethical issue embedded in the problem

- presented but not highlighted as the point of the exercise.
- ³⁶ Procedures for Settling Civil Disputes is a one semester elective subject, open for enrolment to students in their final years of study. It is a prerequisite for admission to practical legal training and to the Bar in South Australia. The course covers alternative dispute resolution, the dynamics and ethics of the adversarial legal system, the role of lawyers and lawyers' interrelationship with clients, the rules of Civil Procedure, civil justice reform, and litigation ethics.
- ³⁷ The intended learning outcomes for the course included exposing students to the phenomenon of adversarial practice to enable them to identify its features and become aware of its shortcomings and advantages. Students were deliberately exposed to both sides of a case with a view to entrenching the value of dispassion and objectivity in the litigation process.
- ³⁸ This is not to suggest that we should not address it. Whilst it is often thought that students' moral frameworks are set by the time they reach law school, there are some indications that this is not so and that moral positions are developed and adopted by students during their tertiary education. Menkel-Meadow, *supra* note 9, at 46 indicates that whilst the jury is still out on this issue, there is at least some evidence that "significant changes occur during early adulthood in individuals' basic strategies for dealing with moral issues." Certainly, many law teachers will recall instances of students becoming highly morally committed to law reform issues or morally opposed to denials of rights or justice when those issues arose in the course of their studies. Whether this is a refinement of existing ideals, or a development of a new moral perspective, is not clear.