

Providing Ethics Learning Opportunities Throughout the Legal Curriculum

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INTRODUCTION

This article assumes at the outset that law schools have a responsibility to provide law students with opportunities to engage meaningfully with questions of lawyers' ethical responsibilities throughout their legal studies. The justifications for this position are many and varied,¹ and include this statement in the recent Carnegie Foundation report on legal education in the United States:

When faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice. This message shapes students' habits of mind, with important long-term effects on how they approach their work. Conversely, when faculty discuss ethical-social issues routinely in courses, clinics, and other settings, they sensitize students to the moral dimensions of legal cases.²

The purpose of this article is to revisit what has often been referred to as 'pervasive ethics' within the scholarship on teaching legal ethics in law school. The article proposes a model that makes it possible to provide law students with legal ethics learning opportunities throughout the legal curriculum. The key to this approach involves an underlying

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- 1 See, for example, the references in the next section to the work of Deborah Rhode. For a more recent attempt to summarise some of the arguments for a 'pervasive' approach to ethics teaching and learning, see Roy Stuckey *et al*, *Best Practices for Legal Education: A Vision and a Roadmap* (Clinical Legal Education Association, South Carolina 2007) 102–3.
- 2 William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Carnegie Foundation for the Advancement of Teaching, Jossey-Bass, 2007) 140. A similar point has previously been made by Deborah Rhode; see for example, her *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2000) 201. See also Carrie Menkel-Meadow, 'Can a Law Teacher Avoid Teaching Legal Ethics?' (1991) 41 *Journal of Legal Education* 3.

commitment to carefully co-ordinated 'whole-of-curriculum' design in learning and teaching, which requires planning of both the curriculum itself and selected courses within it. The approach also recognises that many law courses (sometimes also described as 'subjects'³) inevitably lend themselves to ethics learning opportunities, which ought to be harnessed appropriately. The implementation of this model, or a variant of it, may lead to a more coherent and effective approach to learning and teaching in lawyers' ethical responsibility than is presently the case in Australia—and perhaps elsewhere too. It is nevertheless acknowledged that the case for 'pervasive ethics' remains controversial, although the arguments for and against such an approach are not canvassed in any detail within the article.

The first part of the article considers the main features of a 'whole-of-curriculum' approach to learning and teaching in legal ethical responsibility and also identifies a number of core design principles to aid in the planning of this approach. Central to this is the idea of a curriculum-wide and over-arching subject in legal ethics, which 'intersects' with regular courses to produce ethics-oriented learning activities within those courses. The second part of the paper proposes a set of curriculum-wide ethics learning objectives that might serve as a basis for 'whole-of-curriculum' planning. These objectives are based upon one perspective of what students might be expected to learn in order to meet graduate outcomes in the area of ethical responsibility, and are merely stated for the purpose of this article rather than discussed at any length. The main aim of the third section is to illustrate, through the aid of a table, how multiple core and elective courses within the regular curriculum might be included in this 'whole-of-curriculum' approach to legal ethics. In the fourth and final section, the nature and meaning of an 'ethics learning activity' is briefly discussed, as well as aspects of the all-important matter of assessment of student learning in ethics.

A 'WHOLE-OF-CURRICULUM' APPROACH TO LEARNING AND TEACHING IN LEGAL ETHICAL RESPONSIBILITY

Arguments for ethics learning and teaching across the law school curriculum are often associated with the work of Deborah Rhode.⁴ Rhode's substantial contribution to the area commonly known as 'pervasive ethics' drew timely attention to 'the professional responsibility of educators'⁵ to take seriously the possibilities of student learning in legal ethics. According to Rhode, the efforts of educators to 'sharpen' students' 'abilities to recognize and resolve professional dilemmas in the classroom' might help students to develop the sorts of skills they would need as practitioners during their professional careers.⁶ In

³ For the sake of consistency, the word 'course' rather than 'subject' will be used below.

⁴ For example, Deborah L Rhode, 'Ethics by the Pervasive Method' (1992) 42 *Journal of Legal Education* 31; and Deborah L Rhode, 'Into the Valley of Ethics: Professional Responsibility and Educational Reform' (1995) 58 *Law and Contemporary Problems* 137.

⁵ Rhode 'Pervasive Ethics', *ibid*, 32.

⁶ *Ibid*, 43.

pointing to the limitations of a single, separate course in legal ethics instruction, Rhode argued for an 'integrated', across-the-curriculum approach that placed sufficient emphasis on 'the range and importance of the moral dimensions of legal professional practice'. In her view, the 'primary rationale' for such an approach was precisely that ethical or professional responsibility issues inevitably 'arise throughout the curriculum ... in all substantive areas',⁷ and that to ignore these issues as they arose within these different substantive areas would effectively 'marginalise' their potential importance for daily legal practice.⁸ In recognising the challenges⁹ in implementing what she also referred to as 'ethics by the continuing method',¹⁰ Rhode nevertheless thought that 'a well-constructed curriculum' could increase students' capacities to recognise ethical issues, to 'enhance skills in ethical analysis, and build awareness of the structural conditions and regulatory failures that contribute to problems in professional life'.¹¹

An assessment of the extent to which these arguments for a pervasive approach to ethics in law school have taken hold in America,¹² where they were most strongly articulated in the 1990s, is beyond the scope of this article. Suffice to point out, however, that there is some recent US evidence of the successful implementation of pervasive ethics strategies in some law schools, together with continuing efforts to implement these.¹³ However, not all commentators are convinced of the overall success of this approach within the United States itself.¹⁴ But in the context of this article, it is especially noteworthy that some very strong calls for the fuller implementation of a pervasive or similar approach to ethics learning have recently been repeated.¹⁵

In Australia, where the teaching of some aspects of professional responsibility within law school curricula is mandated by accrediting authorities (as it is in the United States), the idea of pervasive ethics attracted some enthusiasm in the 1990s.¹⁶ But this initial interest does not appear to have translated into the kind of programs that Rhode and others

⁷ *Ibid.*, 50.

⁸ *Ibid.*, 32.

⁹ *Ibid.*, 43–50.

¹⁰ *Ibid.*, 53.

¹¹ *Ibid.*, 32.

¹² For just two of many examples of reports of experiments with the pervasive approach, see Carrie Menkel-Meadow and Richard H Sander, 'The "Infusion" Method at UCLA: Teaching Ethics Pervasively' (1995) 58 *Law and Contemporary Problems* 129; Thomas L Shaffer, 'Using the Pervasive Method of Teaching Legal Ethics in a Property Course' (2002) 46 *St Louis University Law Journal* 655.

¹³ Sullivan *et al* (n 2) 132, 151–61.

¹⁴ Stuckey *et al* (n 1) 102; Rhode herself, writing with David Luban in 2004, suggested that the 'failure of law schools to institutionalize ethical discussion throughout the law school curricula [*sic*] itself raises ethical issues'. Deborah L Rhode and David Luban, *Legal Ethics* (Foundation Press, 4th edn 2004) 1031; and see also Rhode (n 2) 201, in which the author refers to the ongoing 'minimalist' approach to legal ethics in legal education in the United States. See also Deborah L Rhode and Geoffrey C Hazard, Jr, *Professional Responsibility and Regulation* (Foundation Press, 2nd edn 2007) 235 and Sullivan *et al* (n 2) 13.

¹⁵ For example, Sullivan *et al* (n 2) 149, 151, 154 and 160; and Stuckey *et al* (n 1) 100.

¹⁶ For example, Guy Powles, 'Taking the Plunge: Integrating Legal Ethics in Australia' (1998) 33 *The Law Teacher* 315; and Archie Zariski, 'Teaching Legal Ethics Online: Pervasive or Evasive' (2001) 12 *Legal Education Review* 131.

envisaged.¹⁷ Nevertheless, the possibility of a curriculum-wide approach to legal ethics learning and teaching in Australia did not recede entirely, owing in part to the emergence of a new literature on graduate attributes and skills in the law curriculum. For example, in 2000, Sharon Christensen and Sally Kift drew on national and international perspectives and developments (including the MacCrate Report in the United States)¹⁸ to argue that the legal curriculum must provide law students with a learning environment that would allow them 'to develop both the generic and specific legal professional and ethical skills and attributes they will need to practise as reflective practitioners in changing and challenging work environments'.¹⁹

Christensen and Kift advocated 'an integrated and incremental approach' to the development of these skills and attributes,²⁰ 'through a process of explicit instruction, practice, feedback and final assessment across the whole of the degree'. As an aid to this proposal, they offered a novel conceptual device, which was that each of the graduate skills thought necessary for inclusion 'needs to be developed as an integrated package *horizontally* across the particular year of the degree and then *vertically* through the remainder of the course [ie, curriculum]'.²¹ Similarly, and more recently, Roy Stuckey and others in the United States have stated the following 'principle' as part of best practice in legal education: the 'program of instruction [must be] organised to provide students coordinated educational experiences that progressively lead them to develop the knowledge, skills, and values required for their first professional jobs'.²² One of the central aims of this outcomes-focused approach, therefore, is to avoid the practice whereby student learning in these important areas is artificially, unhelpfully and unnecessarily confined to limited parts of the curriculum.

The likelihood that students will learn, incrementally, in key competency areas as they progress through the curriculum has always been taken for granted in areas such as legal research, analysis and writing. What is significantly different about the scheme of incremental learning envisaged by these authors is that student learning ought not to be left to chance. Rather, students' opportunities for learning about and developing skills or competencies in especially important areas, like ethical responsibility, should be provided on multiple occasions in different courses that lend themselves to learning activities in those particular

¹⁷ The most reliable and most recent sector-wide report in 2003 suggests strongly that the 'pervasive ethics' approach, or a variant of it, has not taken hold in Australia; see Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee (AUTC)* (Australian Universities Teaching Committee, Canberra ACT, 2003) 118–23. It seems unlikely that much has changed in the years since this report. See also the comments in Michael Robertson and Kieran Tranter, 'Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work' (2006) 9 *Legal Ethics* 211.

¹⁸ American Bar Association, *Legal Education and Professional Development—An Educational Continuum* (American Bar Association, Task Force on Law Schools and the Profession, 1992), also referred to as the 'MacCrate Report'.

¹⁹ Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11 *Legal Education Review* 208, 213–14.

²⁰ *Ibid.*

²¹ *Ibid.*, 221 (emphasis in original).

²² Stuckey *et al* (n 1) 94.

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areas. The overall aim is thus to ensure as far as possible that students develop their abilities to achieve the quality of learning contemplated by the stated graduate outcomes. Learning opportunities in legal ethics, or in other ‘graduate attribute’ areas, should therefore *designedly* pervade the curriculum, and these successive learning opportunities should also encourage students to ‘deepen’ their learning *incrementally* as they progress through their studies.²³ It follows that the resulting learning and assessment activities should progressively require higher levels of student engagement and standards of performance in assessment activities.

In practical terms, a ‘whole-of-curriculum’ approach to learning and teaching in legal ethical responsibility could assume many different forms.²⁴ One particular model, which was developed at Griffith Law School in Australia during and after a lengthy process of curriculum review, can be distilled into the following design principles:²⁵

- 1 The nature and quality of student learning in legal ethics learning should initially be expressed as a curriculum goal or as an intended graduate outcome, and this goal should also be expressed in terms of curriculum-wide ethics learning objectives. (A discussion of the formulation of these objectives appears in the next section.)
- 2 The vehicle in which students’ learning opportunities in legal ethics are carried and expressed may be conceived as an identifiable, supplementary subject (a ‘vertical subject’,²⁶ to use this label) that spans the entire curriculum. A ‘vertical subject’ is ancillary to the regular courses in the curriculum—courses like contract, torts and equity etc—and it runs throughout the curriculum from students’ first semester through to the last. It aims to encourage student learning in ethics at multiple stages of the student’s experience *within* the regular courses.
- 3 Curriculum planners should identify traditional, core courses²⁷ that are most likely to provide opportunities for the kinds of learning envisaged by the curriculum-wide learning objectives. Different courses are likely to provide different opportunities. The ethics vertical subject will, in a sense, intersect with each of the courses chosen as sites for ethics learning. The resulting learning activities and assessment will always occur within these particular courses. (An illustration of this model is provided below.)²⁸

²³ Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26 *Sydney Law Review* 537, 559.

²⁴ Christensen and Kift themselves provide details of such an approach in respect of ‘graduate attributes and legal skills’ generally; see Christensen and Kift (n 19).

²⁵ These principles are adapted from Griffith University, Griffith Law School, ‘Report of the Curriculum Review Committee’ (2005). The author of this article was a member of the Committee which compiled the Report. Other members of the Committee, all of Griffith Law School, were Richard Johnstone, Jeff Giddings, Sandra Berns, Jan McDonald, Mary Keyes, Lillian Corbin, Afshin A-Khavari and Shaun McVeigh. External members of the Committee were Justice Margaret McMurdo, President of the Queensland Court of Appeal, and Sally Kift, School of Law, Queensland University of Technology.

²⁶ Following the terminology of Christensen and Kift (n 19) 221.

²⁷ In one variation of this model, elective courses might also be included in this planning. This possibility is referred to below.

²⁸ In the section ‘Locating Legal Ethics Learning Opportunities within Multiple Courses’, below.

- 4 An overall convenor of the ethics vertical subject should be appointed to co-ordinate the implementation of the subject across the curriculum. This should include the development of a vertical subject outline, which sets out the overall curriculum learning objectives in ethics and identifies all the courses that will contain aspects of the ethics vertical subject.
- 5 The vertical subject convenor should collaborate with the convenor of each course that hosts aspects of the ethics vertical subject. Together these convenors will implement the ethics vertical subject in that course.
- 6 Implementation of the ethics vertical subject in each chosen course should initially involve the formulation of suitable course-specific ethics learning objectives (which are aligned with the curriculum objectives), followed by the design of course-specific ethics learning activities to support those objectives.
- 7 Implementation of the ethics vertical subject in each chosen course should also involve the development of a set of resources to aid student learning. Typically, these will consist of selected print and online resources.
- 8 Wherever possible, each course should include formative and summative assessment items²⁹ to encourage and to assess ethics learning. These assessment items should be designed (a) to provide students with opportunities to learn from feedback on their own performances and (b) to measure, for grading purposes, the kind of learning envisaged in the particular course's ethics learning objectives.
- 9 Ideally, ethics learning *progresses* throughout the curriculum: successive learning activities within the vertical subject, as implemented within core courses, should provide students with opportunities to build on and deepen their learning in the area as they proceed from one semester to the next.
- 10 A final-year legal practice course should be retained within the curriculum.³⁰ This could serve as a 'capstone' for the ethics vertical subject. As far as possible, ethics learning from the earlier courses should be revisited in comprehensive learning and assessment activities within this specialist final-year course.
- 11 Students' achievements in ethics-related assessment items across the curriculum might also be reported separately as an overall final grade for the ethics vertical subject itself, on completion of the degree.
- 12 All students enrolled in the degree program should be encouraged to appreciate the idea, purpose and operation of the ethics vertical subject as a whole, so that (a) they

²⁹ A 'formative' assessment activity, in the sense used here, involves the giving of feedback in the interests of improving student learning, whereas 'summative' assessment is used mainly to grade students' work. Formative assessment is often informal and spontaneous, such as when teachers comment constructively on the performances of students in classroom discussions. Some forms of assessment can simultaneously be formative and summative.

³⁰ See also Rhode 'Pervasive Ethics' (n 4) on the proposal to ensure that a specialist professional practice course is retained.

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understand the significance attached to ethics learning in the curriculum and (b) they can respond to the ethics learning opportunities that they encounter in a sustained and co-ordinated way. Appropriate measures must be taken to include full details of the vertical subject in all law school program material.

- 13 The implementation of this curriculum-wide approach should subsequently be evaluated at various stages, using a range of evaluative measures.

Implementation of the first of these design principles—setting curriculum-wide ethics learning objectives—provides a crucially important foundation for the fuller implementation of this particular model of ‘across-the-curriculum’ teaching and learning in legal ethics. Without these broad objectives, the formulation of course-specific learning objectives and learning activities will likely lack the direction and coherence necessary for the school to achieve the educational goals it has set for itself.³¹ A set of possible curriculum-wide ethics learning objectives is discussed and proposed in the next section, after which an illustration of this curriculum-wide model, based upon these objectives, is also provided.

THE FORMULATION OF CURRICULUM-WIDE ETHICS LEARNING OBJECTIVES

Assuming that one of the goals of legal education is to produce ethically engaged graduates, it becomes necessary to articulate the kinds of learning outcomes that this commitment envisages.³² Inevitably, the setting of these curriculum-wide desired ethics learning outcomes (or, overall ‘objectives’) is not a straightforward exercise, unless these outcomes are stated only very briefly, in terms such as ‘graduates will be ethically competent.’³³ However, the particular curriculum-wide approach to legal ethics being suggested in this article requires a fuller, more revealing, statement of these objectives. The principal reason for this concerns the need to be able to identify which courses in the curriculum more readily lend themselves to particular aspects of student learning in relation to legal ethical responsibility, such as questions about lawyers’ roles, the formal laws of professional responsibility, or students’ own experiences in responding to ethical challenges. It will be suggested, below, that some courses are better sites of potential learning for some of these areas of legal ethics learning than others, and that it is helpful if not necessary to take these differences into account in designing a ‘whole-of-curriculum’ approach. An important additional point is that, as difficult as it might be for curriculum planners to reach a shared understanding of the goals of ethics teaching and learning,³⁴ this is an essential first step if a concerted effort is to be

³¹ See for example, Stuckey *et al* (n 1) 40–50.

³² Stuckey *et al* (n 1) 42–45.

³³ See for example samples of these statements in Stuckey *et al* (n 1) 50–54, at 52 and also at 54 where the authors’ preferred statement (from the Law Society of England and Wales) makes only brief mention of qualities and attributes relevant to ethical responsibility, viz ‘appropriate behaviour and integrity’ and ‘recognize and resolve ethical dilemmas’.

³⁴ See for example Stuckey *et al* (n 1) 49.

made to provide ethics learning opportunities throughout the curriculum. Without the shared vision, it will be difficult to plan both the nature and details of the ethics learning activities that need to be implemented at multiple points in the curriculum.

The well-known MacCrate Report in the United States provides one possible foundation for a more comprehensive statement of curriculum-wide objectives in legal ethics. For example, under the general heading of 'Recognizing and Resolving Ethical Dilemmas' the statement contemplates that 'a lawyer' should be 'familiar' with (1) 'the Nature and Sources of Ethical Standards'; (2) 'the Means by Which Ethical Standards are Enforced'; and (3) 'the Processes for Recognizing and Resolving Ethical Dilemmas'.³⁵ In another contribution in this area in 2002, Andrew Boon favoured 'a broad rather than a narrow ethics education' in England and Wales, observing that outcomes for a 'professional ethics curriculum' would 'not be assisted by the study of codes alone'. He expressed the possible outcomes as (1) 'To Underpin the Ideological Components of Professionalism'; (2) 'To Reinforce Resistance to Practice Cultures'; (3) 'To Inculcate Habits of Ethical Problem Solving'; and (4) 'To Strengthen Professionalism'.³⁶ One of his conclusions was that an effective legal curriculum 'must inculcate an understanding of the ideals, social role and importance of lawyers as well as the ethical rules they observe. It should also make a more conscious attempt to foster the virtues required in legal practice'.³⁷

In Australia, as elsewhere,³⁸ the main focus in compulsory courses on lawyers' professional and ethical responsibilities has most often been on the content of the formal law of lawyering.³⁹ This means that the predominant course learning objectives have been directed to knowledge of professional legal duties as they appear in statutes, the general law, and in professional codes of responsibility.⁴⁰ And, as elsewhere, this approach is often thought to suffer from serious limitations.⁴¹

But in a recent statement, the Council of Australian Law Deans has endorsed a seemingly broader conception of ethics teaching and learning in recommending a focus not only on 'the principles of ethical conduct and the role and responsibility of lawyers' but also on the 'internalisation of the values that underpin the principles of ethical conduct and professional

³⁵ MacCrate (n 18) 203–6.

³⁶ Andrew Boon, 'Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus' (2002) 5 *Legal Ethics* 54–56.

³⁷ Boon (n 36) 66.

³⁸ For example, Sullivan *et al* (n 2) ch 4; Rhode and Hazard (n 14) 235; and Donald Nicholson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999) 66–70 for an appraisal of conditions in England and Wales.

³⁹ Johnstone and Vignaendra (n 17) 118–23. This focus is also evident in a number of Australian textbooks on lawyers' professional responsibilities; but for an exception see Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) ch 1.

⁴⁰ However, there are some notable contributions to the Australian literature on how legal education might better approach teaching and learning lawyers' ethical responsibilities. See, as examples, Andrew A Goldsmith, 'Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers' (1996–7) 14 *Journal of Professional Legal Education* 1; Parker and Evans (n 39); and Liz Curran, Judith Dickson and Mary Anne Noone, 'Pushing the Boundaries or Preserving the Status Quo?' (2005) 8 *International Journal of Clinical Legal Education* 104.

⁴¹ For example, Sullivan *et al* (n 2) 148–9, 151.

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responsibility'. Although neither is expressed as a learning outcome as such, but rather an aspect of 'curriculum content', they nevertheless reveal something about the kinds of learning outcomes that the Council might have in mind.⁴² But in spite of these and other observations about what it is that Australian law students should learn,⁴³ a clear, comprehensive and practicable statement on desirable and achievable graduate ethics outcomes that can serve as a foundation for curriculum and course design remains elusive in the published Australian literature.

The fundamental if not obvious question for legal educators who are committed to improving the efforts of legal education in the area of ethical responsibility is, simply, 'what do we want our students to learn?'. A far more comprehensive and potentially valuable answer to this question can be found in the recent Carnegie report on legal education,⁴⁴ which endorses a pedagogy that goes far 'beyond the law of lawyering to a deeper consideration of lawyers' roles'.⁴⁵ For example, according to authors William Sullivan and others,

If they are to fully grasp the nature of their responsibilities as attorneys, students must achieve a deep understanding of the multiple dimensions of their roles and the arguments for alternative conceptions of the way that meaning should play out in practice. Achieving a firm grasp of these intellectual issues and their implications for legal practice is a challenge but, as challenging as it is, it is not sufficient. Law school graduates who enter legal practice also need the capacity to recognize the ethical questions their cases raise, even when those questions are obscured by other issues and therefore not particularly salient. They need wise judgement when values conflict, as well as the integrity to keep self-interest from clouding their judgement.⁴⁶

This and other appraisals of what legal education should attempt to offer students of law in the realm of ethical responsibility⁴⁷ suggest the importance of at least two different but interdependent kinds of learning. At the possible expense of oversimplification, the first concerns the question of what intending lawyers *need to know* about the ethical nature and dimensions of the lawyer's role, while the second concerns questions about what it is that lawyers *need to be able to do* when they are faced with and make ethical decisions. These two levels are interdependent at least in the obvious sense that the kinds of decisions that lawyers need to be able to make in the course of ethical practice should be informed by broader

⁴² Council of Australian Law Deans, 'Standards for Australian Law Schools' (Sydney, 2008).

⁴³ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC, Report No 89, Sydney, 2000) para 2.89.

⁴⁴ Sullivan *et al* (n 2) generally chs 3 and 4.

⁴⁵ Sullivan *et al* (n 2) 151.

⁴⁶ Sullivan *et al* (n 2) 46.

⁴⁷ The literature in this area is vast and growing, if not bewildering. Some contributions are referred in this article, such as Rhode (n 4), Sullivan *et al* (n 2), Boon (n 36), Goldsmith (n 40) and Robertson and Tranter (n 17); see also Kim Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Hart Publishing, 1998), particularly Part 2 'Introducing Legal Ethics into the Curriculum'. A useful overview of arguments and considerations in this area can also be found in Ian Johnstone and Patricia Treuthart, 'Doing the Right Thing: An Overview of Teaching Professional Responsibility' (1991) 41 *Journal of Legal Education* 75.

understandings of the ethical and legal dimensions of their particular role within the legal institutions of the society that empowers them.

The 'need to know' level is mainly concerned with reaching a thorough but critical understanding of (1) the nature and limits of the lawyer's peculiar role within a legally-organised society, (2) the justificatory theories about lawyers' work, (3) the nature of the normative environment in which lawyers practise, and (4) whether the formal rules of lawyers' roles provide sufficient decision-making resources for lawyers to meet their ethical responsibilities fully. All of this, to use a different language, is about developing a critical understanding of the notion of legal 'professionalism' and why it must be taken seriously by those aspiring to the lawyer's office. The 'need to be able to do' level, on the other hand, concerns the ethics of the individual lawyer's actual judgments and choices in the 'lived reality'⁴⁸ of legal practice. 'Choices' here are taken to mean the morally significant decisions or 'judgments', that all lawyers must make when faced with ethical dilemmas, and which must be made in order to discharge the unavoidable ethical responsibilities of lawyering.⁴⁹ This is the 'ethical decision-making' or 'practice' level of ethics learning, which inevitably is as much about the individual decision-maker as it is about the context, norms and values of legal practice.

These few observations, if valid, suggest five possible curriculum-wide learning objectives for legal ethics, and can be stated as follows:

Graduate law students will be able to demonstrate:

- 1 a critical understanding of the social purposes and limitations of the lawyer's role within legally organised society and its legal institutions, and the reasons why lawyers have a responsibility to develop an ethical practice that reflects these purposes and recognises these limitations;
- 2 a critical understanding of the justifications for the lawyer's office and its methodology, including justifications based on the nature of the wider social and political system of which lawyers are part, the adversary system in which lawyers practise, and the nature of the political and legal rights of the clients whom they represent;
- 3 a thorough understanding of (1) the formal, legal standards and responsibilities of the lawyer's role, including those derived from the law on lawyering (as reflected in legislation and in the case-law) and from lawyers' professional rules and (2) the contexts in which these standards and responsibilities are likely to apply;
- 4 a critical engagement with the question of whether and to what extent the legal duties and powers that regulate lawyers' work provide sufficient legal and moral resources for ethical legal practice, and consequently whether and to what extent lawyers must be willing to exercise and take responsibility for some degree of moral autonomy in their ethical decision-making;

⁴⁸ Noel Preston, *Understanding Ethics* (Federation Press, 2nd edn 2001) 70.

⁴⁹ Robertson and Tranter (n 17).

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- 5 a developing ability (1) to recognise situations in which ethical issues are likely to arise in a variety of legal practice settings, (2) to recognise the situational complexities that challenge ethical conduct, and (3) to engage thoroughly with and to make ethically justifiable decisions when faced with these situations.

LOCATING LEGAL ETHICS LEARNING OPPORTUNITIES
WITHIN MULTIPLE COURSES

Following the steps suggested in the design principles suggested earlier,⁵⁰ curriculum planners should next identify which courses are most likely to provide opportunities for the kinds of learning envisaged within the curriculum-wide learning objectives. The latter objectives, from the previous section, can be abbreviated as (1) ‘purposes and limits of lawyer’s role’; (2) ‘justifications for lawyers’ work’; (3) ‘the law on lawyering’; (4) ‘moral responsibility in legal practice’; and (5) ‘ethical decision-making in legal practice’. As noted earlier, different courses are likely to provide different learning opportunities in respect of each of these five objectives.

The table below contains an illustration of this whole-of-curriculum approach to the teaching and learning of lawyers’ ethical responsibility. Its purpose is to demonstrate that ethics learning opportunities already reside in multiple courses; that some courses are better suited than others to certain aspects of ethics learning; and that with careful planning the variable ethics learning opportunities provided by these courses can complement one another in assisting students to develop better overall understandings of the challenge of ethical practice. In attempting to make all of these possibilities transparent, the table also provides a basis for an ethics teaching and learning framework that students (and teachers) can see and follow. Not least of all, it reinforces the idea that legal ethics learning should not, and need not, be artificially confined to one or two courses in the curriculum and that the entire legal curriculum can be viewed as a large, continuous and co-ordinated experience in legal ethics learning and teaching.

By way of explanation, the first column contains a list of possible courses that provide ethics learning opportunities. These are the courses that would be included within the ethics vertical subject. The column begins with early-degree courses and ends with later ones, including clinic and elective courses. Obviously, the sequencing of these kinds of courses will vary from one curriculum to another. It is also important to point out that there is no reason why other courses should not be chosen as sites for planned ethics learning. The choice of courses will depend upon curriculum planners’ determinations of which courses most readily lend themselves to the inclusion of ethics learning activities as part of the learning in those courses.

⁵⁰ See above, under ‘A “Whole-of-Curriculum” Approach to Learning and Teaching in Legal Ethical Responsibility.’

The next five columns reflect the five curriculum-wide ethics learning objectives already identified, in their abbreviated format. The numerical value contained in each of the table's cells in these five columns is intended only as a preliminary indication of the potential learning 'value' within that area for the course concerned. In the table, numerical value '1' signifies modest learning opportunities; '2' signifies good learning opportunities; and '3' signifies excellent learning opportunities. The intention here is partly to reflect the likelihood that some courses provide more valuable learning opportunities than others, under each of the five ethics learning areas reflected in the five central columns. For example, the introductory course in legal theory probably provides more valuable opportunities to examine the theoretical justifications for lawyers' work than courses in civil or criminal procedure. Likewise, the latter two courses probably provide better learning opportunities in the law on lawyering than courses on legal theory. However, the actual learning value in each instance will depend very much upon the design and implementation of suitable learning activities (discussed below). The additional potential benefit of this detail is to indicate the expected level of student engagement with each aspect of ethics learning in each course. In a slightly different form of presentation (which is not included here) it would also be possible to reflect the anticipated increase in quality of learning opportunity from the earliest courses to the later ones, in an effort to demonstrate the potential for incremental learning,⁵¹ the idea of which was noted in item 9 of the design principles suggested for this approach.⁵²

The final column contains some particular examples of course-specific content that could form the basis of ethics learning objectives and activities in the course concerned. Again, it is worth emphasising that these few examples are included for illustration only, and could be substituted, supplemented or developed in far more detail.

The subsequent implementation of the ethics vertical subject in each of these courses should first involve the formulation of suitable course-specific learning objectives, which should be aligned with the curriculum-wide ethics learning objectives. Preferably, these would supplement rather than replace existing course objectives. Next, the course and vertical subject convenors should also collaborate in the design and implementation of course-specific ethics learning activities to support those objectives in each course. These activities, which are the activities that invite student engagement in order to further their learning in the area of ethical responsibility, might either be added to existing course activities (such as when an ethics component is added to an existing assignment item) or be implemented as an entirely new activity (such as when specific issues of ethical responsibility pertinent to that particular course are raised and considered in planned tutorial or seminar discussions).

⁵¹ Reflecting also, for example, the progression from 'declarative' to 'functioning' knowledge, as contemplated in John Biggs, *Teaching for Quality Learning at University* (Open University Press, 2nd edn 2003) 42.

⁵² See above, under 'A "Whole-of-Curriculum" Approach to Learning and Teaching in Legal Ethical Responsibility'.

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A Curriculum-wide Approach to Legal Ethics Learning and Teaching

Potential courses to include	Purposes & limits of lawyer's role	Justifications for lawyers' work	Law on lawyering	Moral responsibility in legal practice	Ethical decision-making in practice	Examples of possible aspects of content focus in course concerned
Foundation course on law & justice	1	2	1	1	1	Lawyers' representation work; ethical decisions about whom to represent; lawyer-client conflict issues
Contract	2	2	1	1	1	Intro to agency contract; lawyers' ethical dilemmas in contract disputes
Intro Legal Theory	3	3		1		Theories of lawyers' role in liberal democracy with rule of law and adversary system
Equity	2		3	1	1	Lawyers' fiduciary duties of confidentiality and avoidance of conflict of interest
Civil Procedure	2	1	3	1	2	Court vs client duties; avoiding spurious litigation; ethics in discovery of documents
Criminal Procedure	2	2	3	2	2	Defence and prosecution lawyers' decision-making in criminal trial proceedings
Evidence	3	2	3	2	2	Client legal privilege; integrity of evidence; use and misuse of examination and cross-examination
Jurisprudence	3	3		2	1	Theories of prudence and character; concepts of judgment in lawyers' work
Legal Practice	3	2	3	2	2	[Entire 'capstone' course on lawyers' legal duties and moral responsibilities]
Legal Clinic	2	2	3	3	3	[Direct contact with clients and client files, working under supervision]

ETHICS LEARNING AND ASSESSMENT ACTIVITIES

To summarise thus far: a curriculum-wide approach to ethics learning requires not only a conceptual understanding of what is intended by legal ethics learning, which should be expressed in clear learning outcomes at both curriculum and course level, but also careful curriculum and course design to ensure that students encounter real and substantial opportunities to learn about lawyers' ethical responsibilities to the extent envisaged by the learning outcomes themselves. These opportunities must be available to students as they progress through the regular curriculum; that is, within the context of their learning within the standard areas of legal study.⁵³

The term 'ethics learning activity'⁵⁴ is merely a label for an activity in which students participate, which is created or facilitated by teachers, and which encourages if not sometimes requires students to carefully consider the ethical dimensions of legal work and the professional responsibilities in meeting them. In short, an ethics learning activity draws students into a contemplation of the meaning of ethical legal practice.

Most, if not all, learning activities take place within settings that are teacher directed, peer directed, or self directed.⁵⁵ These include settings both inside and beyond the classroom. Common examples are lectures, interactive presentations, tutorials, seminars and peer-group meetings, together with a variety of self directed learning experiences.⁵⁶ All of these have a place within the typical law school curriculum, although the quality of learning associated with each of them varies considerably.⁵⁷ The specific student learning activities present within these traditional settings⁵⁸ include listening, reading, researching, note-taking, analysing, reasoning, essay and other forms of writing, discussion, debate, hypothetical and other kinds of problem solving, mooted, negotiating, simulating⁵⁹ and reflecting. Some or all of these activities may also be evident in formative and summative assessment tasks, which are themselves learning activities of a particular kind. As stated earlier, and under the model proposed here, convenors of both the 'host' course and the ethics vertical subject should work collaboratively to design and implement the course-based activities of learning and assessment that involve one or more of the five broad learning objectives identified above.

⁵³ Educational theorists point out that this planning should first recognise the importance of a suitable student 'learning environment', which is one that is supportive of students, recognises their autonomy, and encourages their engagement in the activities of learning. See for example, Stuckey *et al* (n 1) 110–29; and Biggs (n 51) 74–75 on the characteristics of a rich teaching and learning context.

⁵⁴ See for example Biggs (n 51) 79–98 on the concept of learner activity. The language used by Stuckey *et al* (n 1) 132—'methods of instruction'—is similar to the idea of an 'ethics learning activity' but for various reasons emphasis on 'learning activity' and therefore on student 'learning' seems preferable to an emphasis on the idea of 'instruction'.

⁵⁵ Biggs (n 51) 81–97.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, ch 5.

⁵⁸ Settings that are not traditional include the clinic and work integrated environments. See further below.

⁵⁹ Stuckey *et al* (n 1) 179.

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In respect of each of the first four learning objectives, the resources and strategies needed to encourage the kind of learning that they mostly envisage—essentially, conceptual knowledge and understanding—are readily available to and routinely used by teachers within the ordinary curriculum of the typical law school. For example, learning in and teaching about lawyers' roles and formal responsibilities are well within the capabilities of the typical law school.

However, the fifth objective ('ethical decision-making in practice') invites particular comment. A vitally important question for legal education is whether non-clinical courses are capable of providing opportunities for the quality of learning needed to develop ethical decision-making abilities. Clinic courses, which involve a 'pedagogical shift'⁶⁰ to work integrated and experiential learning, potentially play a key role in encouraging students into a deeper appreciation of ethical practice.⁶¹ In these work integrated contexts, students working under supervision benefit from the 'experience of lived responsibility'⁶² through contact with real clients and real cases. In so doing they have to deal with 'relatively unstructured'⁶³ or spontaneous⁶⁴ situations, which leads them to experience the actuality of ethical decision-making.⁶⁵ These random, unexpected⁶⁶ and real encounters with issues of moral complexity, in which defensible ethical decisions must be made, will probably help take students beyond 'declarative' capabilities into the zone of 'functioning' knowledge, to use Biggs' terminology.⁶⁷ Or, to paraphrase Schon, students who must engage with real ethical dilemmas in clinics are far more likely to begin to develop the reflective habits that define the expert problem solver—in this instance the expert who learns to respond reflectively to the unique, contextual dilemmas of practice that contain complex moral dimensions.⁶⁸

Many scholars take the view that learning opportunities such as these cannot be reproduced outside the clinic; that in non-clinical courses all engagement with ethical questions and issues is necessarily 'managed in a distant or purely intellectual fashion'.⁶⁹ However, the absence of live issues and live clients does not preclude the encouragement of students into a contemplation of the ethical dimensions of legal work,⁷⁰ even if these

⁶⁰ Sullivan *et al* (n 2) 121.

⁶¹ See Curran, Dickson and Noone (n 40).

⁶² Sullivan *et al* (n 2) 121.

⁶³ Taken from the section on 'Learning Outcomes' in Course Outline for *Refugee Law and Policy Clinic*, Griffith University, 2007, convened by Jeff Giddings.

⁶⁴ S Rice with G Coss, *A Guide to Implementing Clinical Teaching Methods in the Law School Curriculum* (Centre for Legal Education, Sydney, 1996) 21.

⁶⁵ David Luban and Michael Milleman, 'Good Judgment: Ethics Teaching in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31, 40. However, it seems obvious that clinic supervisors need to develop strategies to ensure that students who encounter these unique opportunities within the clinic program actually derive the benefits that they provide; see, for example, Curran, Dickson and Noone (n 40).

⁶⁶ Rice and Coss (n 64) 21.

⁶⁷ Biggs (n 51) 42–43.

⁶⁸ DA Schon, *Educating the Reflective Practitioner* (Jossey-Bass, 1987) 6–7.

⁶⁹ Rice and Coss (n 64) 23.

⁷⁰ Rhode 'Pervasive Ethics' (n 4) 43.

encounters are somewhat detached. In other words, even though the situational context⁷¹ of real ethical decision-making is absent from these ethics learning activities, students can still be encouraged to anticipate what it *might* be like in a particular situation of moral complexity, and to reflect on the kinds of considerations that they *might* prioritise (or not), were they required to state a preference and to justify a choice of action. Ethics learning activities in the traditional curriculum can therefore be *about* the idea of ethical deliberation, even if they cannot get students to *do* ethical deliberation. In these circumstances, the teacher's main goal would be to create the best conditions possible for thorough student engagement with questions of ethical practice, and also to require the articulation of thoughtful 'justifications' for the 'decisions' or 'choices' that they make.⁷² The point to be emphasised here is that it seems extreme to maintain that such learning activities have little or no pedagogical value whatsoever, and it follows that they should therefore be encouraged rather than avoided.⁷³ Nevertheless, students who avail themselves of the opportunities for ethics learning in both traditional *and* work integrated courses are more likely to achieve high quality learning outcomes in this area.⁷⁴ This in turn also suggests the importance of ensuring that clinicians and teachers in the traditional curriculum work to similar curriculum-wide ethics learning outcomes.

Learning theorists point out that students are likely to regard assessment, rather than learning objectives, as the real measure of what is really important in the curriculum.⁷⁵ For this reason at least, it follows that assessment of learning in legal ethics must 'align' squarely with the curriculum and course learning objectives.⁷⁶ Furthermore, while it is true that strategies to measure the quality of student engagement with the very meaning of ethical legal practice require closer attention in legal education,⁷⁷ it is simply not the case that assessment in this area is not possible.⁷⁸ The predominant overall ability to be assessed in this area is the capacity to demonstrate *genuine, thorough and thoughtful engagement* with questions of moral complexity within the lawyer's world. This requires demonstration of a high level of student performance, well beyond the lower-order 'quantitative' phase of learning (which involves competencies such as 'identify' and 'describe') and into the 'qualitative' zone,⁷⁹ which involves abilities such as 'analyse', 'deliberate', 'critique', 'apply',

71 On the significance of this see, for example, David Luban, 'Epistemology and Moral Education' (1983) 33 *Journal of Legal Education* 636, 638–41.

72 Robertson and Tranter (n 17) 211.

73 See also Rhode 'Into the Valley of Ethics' (n 4) 141, where the author states that giving clinics (which are expensive to run) a 'monopoly on professional responsibility instruction would further marginalise its significance in the eyes of many faculty and students'.

74 A similar claim is made by Luban and Milleman (n 65) 41.

75 Derek Rowntree, *Assessing Students: How Shall We Know Them?* (RoutledgeFalmer, 2004) 1; Paul Ramsden, *Learning to Teach in Higher Education* (RoutledgeFalmer, 2nd edn 2003) ch 10.

76 Biggs (n 51) ch 8 and also 25–27 on 'constructive' alignment.

77 See Sullivan *et al* (n 2) 176–80; and Johnstone and Vignaendra (n 17) 118–23.

78 Sullivan *et al* (n 2) 176, on 'assessing ethical-social development'.

79 Biggs (n 51) 48.

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‘reflect’ and ‘theorise’.⁸⁰ But whether formative or summative, ethics learning needs to be assessed according to robust and defensible criteria.⁸¹

Each of the five suggested curriculum-wide ethics learning objectives implies a subset of assessment criteria. For example, learning objective (3), which calls for a thorough understanding of the formal, legal responsibilities of the lawyer’s role, together with the circumstances of their application, suggests criteria similar to those used in many courses that assess students’ understandings of core areas of law and how the relevant legal principles are appropriately interpreted and applied in different circumstances.

In taking the five learning objectives together, the key areas of learning that these outcomes emphasise are revealed in phrases such as ‘thorough understanding’, ‘critical understanding’, ‘recognition’ (of situational complexity) and ‘critical engagement’. It follows that assessment criteria should be designed to measure, as far as possible, students’ performances of the kind of learning quality envisaged within these sorts of competencies. For example, the threshold criteria for some, but not all, assessment items could take the following form: has the student (1) demonstrated a thorough appreciation of the existence, nature and extent of the ethical dimensions of the situation, task or problem (contained within the assessment item)?; (2) demonstrated a thorough appreciation of the nature of the lawyer’s role and responsibilities in these circumstances?; (3) been able to demonstrate careful and thoughtful consideration of how the particular issues might be addressed within the prevailing context?; and (4) been able to provide adequate justifications for the answers, responses or decisions reached or given? These kinds of criteria could provide a foundation for multiple ‘ethics’ assessment items, both formative and summative, across the curriculum. They could also be deployed increasingly rigorously in different assessment items as students progress through the curriculum, which would reflect the principle of progressive improvement in learning in this area.⁸²

CONCLUSION

The main object of this article has been to suggest a way in which the law curriculum can be designed to improve law students’ ethics learning opportunities and outcomes in the area of professional ethical responsibility. It seems necessary to make the observation that in many ways the ‘model’ being suggested here amounts to a rather modest set of proposals. It is modest at least in the sense that the multiple learning opportunities envisaged, through the design of course-specific learning activities of various kinds, do not require adjustments to

⁸⁰ According to Ramsden, ‘[u]niversity teachers do not ultimately judge students on the amount of knowledge in their possession but on their self critical awareness of what they do not know and their readiness to find out more’. Ramsden (n 75) 25.

⁸¹ A preference for criterion-referenced, rather than norm-referenced, assessment is assumed here; see Biggs (n 51) ch 8.

⁸² See above, under ‘A “Whole-of-Curriculum” Approach to Learning and Teaching in Legal Ethical Responsibility’.

the basic structure of the curriculum. Rather, they require targeted adjustments to the content and structure of individual courses, in accordance with an overall plan. However, even these adjustments would not necessarily involve major revisions at course level. Some might even say, therefore, that this particular proposal does not go far enough.

Yet, even with considerable teacher support, it is probably true that this model, or one similar to it, would be extremely difficult to implement in many law schools. Some of the reasons for this are already well known.⁸³ While a discussion of the customary challenges that ethics teachers face in this area⁸⁴ was beyond the scope of this article, it should be acknowledged in conclusion that curriculum planners could expect to face faculty scepticism and resistance on various grounds. Student apathy, resistance, or even sometimes hostility might also be encountered. There is no point in understating the significance of these sorts of difficulties. Some are not easily overcome, such as the fact that many teachers do not feel competent or comfortable leading their students, within their own courses, into the type of engagement with ethical questions being suggested here. Likewise, there is no point in underestimating the difficulty of even reaching a shared understanding of the goals of ethics teaching and learning in the curriculum, which is an essential first step in the process outlined above. If there is any prospect of addressing these difficulties, however, it probably lies initially with faculty leadership. Without faculty leaders genuinely committed to the goal of a curriculum-wide legal ethics education for intending legal practitioners, none of what is envisaged in this article will be remotely possible.

⁸³ See for example Rhode 'Pervasive Ethics' (n 4) 51–53 and Rhode 'Into the Valley of Ethics' (n 4) 148–51.

⁸⁴ See for example Johnstone and Treuhart (n 47) 88–89; Bradley Wendel, 'Teaching Ethics in an Atmosphere of Skepticism and Relativism' (2002) 36 *University of San Francisco Law Review* 711.