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What Do They Learn When They Learn Legal Ethics?

CHRISTINE PARKER*

INTRODUCTION

In 1991 Carrie Menkel-Meadow argued that even when law teachers think they are teaching law, they cannot avoid teaching legal ethics as well. “By the very act of teaching, law teachers embody lawyering and the conduct of legal professionals” and give students implicit messages about appropriate lawyering.¹ What, then, do we teach when we do explicitly set out to teach legal ethics? Should we merely expect students to learn some rules and laws that apply to the conduct of legal practice? Can we really expect students to learn to be more ethical in a university course? Should we expect them to learn moral judgment? Perhaps we should be teaching them the skills of legal practice?

The depressing conclusion in much of the scholarly literature is that, even as we try to teach our students ethics, they often learn only to become even more cynical about the possibility of ethical practice.² They are doubtful that learning ethical rules will accomplish anything; they are disengaged from ethical theory and turned off by courses that seem to focus only on critique of the profession’s failures and problems that appear to be without solutions.

Some of the most thoughtful commentators on legal ethics and the skill of teaching legal ethics argue that the key to understanding and learning legal ethics involves a process of judgment. For example, in his work William Simon argues that good lawyering is associated with complex judgment.³ Legal ethics too, he argues,

should be recognised as a process of complex judgment in which different factors, especially the justice outcomes of particular courses of action, are weighed up in particular contexts before a decision is made about what is “ethical.”

[P]rofessional judgment . . . ought to play a larger role than it does in professional responsibility doctrine. The fundamental injunction of this doctrine ought to be one the ABA4 Code reserves for government lawyers – to “seek justice.” And while this general norm should be fleshed out in terms of more specific ones, the specific ones should take the form, not of black letter rules that obviate judgment, but of contextual standards that engage the lawyer’s capacities for complex reflection. For example, instead of the Code’s categorical confidentiality norm, we should have a norm that mandates that the lawyer keep confidentiality “except to the extent disclosure is necessary to avert substantial injustice.”⁵

Similarly, Luban and Milleman argue that

the deepest source of dissatisfaction in legal ethics courses arises from the absence in the classroom of the . . . human capacity . . . [of] judgment. Moral decision making requires more than identifying the appropriate principles and values, and it requires more than analyzing arguments. Being smart has little to do with it. Rather, moral decision making involves identifying which principle is most important given the particularities of the situation, and this capacity is precisely what we mean by judgment . . . reducing judgment to rules or formulas lands us in an infinite regress of rules.⁶

This paper uses student evaluations and reflective journals to assess what the students learned from our approach to the compulsory legal ethics subject taught at the University of New South Wales – Law, Lawyers, and Society – and to raise for discussion what it might be reasonable for us to expect students to learn.

The learning outcomes for the course Law, Lawyers, and Society were designed to cover a range of knowledge and skills that would be necessary for aspiring lawyers to exercise ethical judgment in legal practice. The aims were that students would:

- learn to identify the rules and norms that lawyers should apply in practice;
- judge what roles lawyers do play in society and the justice system, and what roles lawyers ought to play; and
- develop the skills necessary for ethical practice including skills for deliberating and negotiating with colleagues about ethical and social issues, effective client communication and other client care skills, and negotiation skills.

The examination was worth 70% or 50% of the total grade for the subject (depending on the assessment options chosen; see Appendix). It was designed to prompt students to put this range of knowledge and skills together by asking students to complete three tasks in relation to a long problem scenario. The students were asked to:

- (i) identify and discuss any issues of liability or ethical misconduct that may arise from the facts and come to a conclusion on what legal remedies or disciplinary action may be available by reference to case law, statute, and ethical codes and rules.
- (ii) identify any significant values relevant to the practice of law that may be under threat in the fact situation, or in your answer to Question (i). Identify and discuss the way that the structure and history of the legal profession or patterns in the way lawyers relate to clients and society may have given rise to the problems arising in the fact scenario.
- (iii) consider and come to a conclusion on any broader reforms to the profession, the legal system, or, a particular firm or practice of an individual that might be necessary to solve the problems you have identified in the medium to long term, or to prevent such problems arising in the future.

The intention was that in Question (i) the students would demonstrate knowledge and skills of application in relation to the content of the law of lawyering. In Questions (ii) and (iii) they would critically reflect on their rule-based analysis of the problem situation by reference to a broader set of analytical tools, skills, and experiences. In Question (ii) students would apply what they had learnt of the ethical theory and sociology of lawyering (ie “social ethics”) to the situation and to their advice. The students were encouraged to base their answers in this section on their personal beliefs, values, and experiences, if they wished. In Question (iii) students would be required to show an understanding of the skills that would be required of lawyers and law firms for ethical practice in the very specific context described in the problem scenario. They would also be required to propose and evaluate any reforms to the institutional arrangements governing the legal profession that might be necessary to prevent or correct the problems that had occurred in the scenario.

This paper discusses how we fared on each of the three learning

outcomes in turn. In each case there is both a hopeful and a disappointing story to be told: there are students who are cynical about learning ethical rules, and those who feel they can improve their ability to act ethically; those who learn how to critique the practice of lawyers within a broader context, and those who see only rules; those who connect skills and everyday practice with ethical issues, and those who still see them as disjointed. I will argue, based on the evidence, that it is reasonable to hope that our students might learn something about moral judgment and ethical behaviour in the practice of law from a course with some combination of the above three learning outcomes. However, we might be able to improve their learning outcomes by more explicitly teaching them a *reasoning* or *judgment process* that connects the application of rules about ethics, and a critical standpoint on rules and regulatory institutions, with personal values in the context of the skills required for the everyday practice of law. In other words, it is probably important for us to stop worrying so much about the content of what we teach in legal ethics courses — rules balanced against theory balanced against skills. Instead, we should focus some more attention on making explicit to our students the underlying assumptions, tools, and processes of thinking that we use, both in practice and in scholarship, to put life, theory, and rules together to make moral judgments about both specific individual practices and the practices of the whole profession.

This paper assesses what students say about what they have, in fact, learned in Law, Lawyers, and Society by reference to how we tried to achieve these learning outcomes. These included: a qualitative analysis of anonymous student evaluations filled out in the last class (107 evaluations were received from 167 enrolled students); reflective journals submitted for assessment by 114 students; and student evaluations of their experience at Kingsford Legal Centre (“KLC”) which were handed in on a separate sheet of paper with their compulsory interview report. In Appendix One I describe the course and its assessment in more detail.

THE LAW OF LAWYERING AND STUDENT CYNICISM

The first learning outcome of the Law, Lawyers, and Society course was for students to:

Learn to identify and use the rules and norms that lawyers should apply

in practice.

The intention was that students would gain a broader understanding of how formal law interacts with less formal norms including personal ethics, “grey law,” and co-regulation. Table One illustrates the breadth of rules and norms that could be covered. The aim was not that students would merely learn by rote various rules that apply to lawyers but develop a sense of the complexity and fragility of the institutions that attempt legally and ethically to regulate legal practice. This should prepare them better to critique and propose reforms to those institutions.

Table One: Rules and Norms Regulating Legal Practice and their Sources

Major Areas of Regulation of Legal Practice	Sources of Norms, Rules, and Decisions
<i>Licensing and Admission to Practice</i>	Supreme Court case law; Barristers and Solicitors Admission Board (BSAB) decisions and rulings; Legal Profession Act (LPA).
<i>Discipline</i>	Legal Profession Act; Professional Conduct & Practice Rules (PCPR); Bar Association and Law Society Councils’ decisions and rulings; Office of the Legal Services Commissioner; Legal Services Division of the Administrative Decisions Tribunal; Supreme Court of NSW.
<i>Consumer Issues</i>	Office of the Legal Services Commissioner; Legal Profession Act; Court costs assessment procedures; OLSC mediation; Trade Practices Act 1974 (CW).
<i>Contract</i>	Legal Profession Act; common law of contract and negligence.
<i>Negligence</i>	Common law; Legal Profession Act.
<i>Fiduciary Duties</i>	Common law principles of confidentiality and conflicts of interest; Legal Profession Act; Professional Conduct and Practice Rules; Law Society rules on trust accounts.
<i>Obligations to courts, regulators, police, and other government agencies</i>	Specific pieces of legislation eg Taxation Act; Australian Corporations Law; common law of evidence; Evidence Act; Rules of courts; Professional Conduct Rules.
<i>Competition Policy</i>	Trade Practices Act; National Competition Council.

Major Areas of Regulation of Legal Practice	Sources of Norms, Rules, and Decisions
<i>Other</i>	Anti-discrimination legislation; privacy legislation, etc

The second reason for learning the content of some of these rules and norms is to give students a framework for how one might define and resolve ethical issues, and identify good practice. Clearly, it is useful for potential lawyers to understand how the profession, courts, and other institutions of regulation currently define good practice in order to provide them with a framework for understanding what behaviour is likely to lead them into difficulties. This framework is also a useful starting point for guidance as to ethical issues and practices that they might not have thought about or been able to resolve for themselves, and as a basis for critique and reform.

There are a number of dangers with a rule-based approach to legal ethics, however. The evidence strongly suggests that, in general, legal education (and probably other forms of professional education also) breaks down student idealism and value commitments, and that this is particularly linked to the learning of rules and how to manipulate them. Studies of law students (mainly in the US) regularly show that many students entering law school have strong commitments to using law to achieve goals of justice, social change, and public interest but that their commitment to pursue these goals actively is dissipated by law school socialisation and the allure of corporate practice.⁷ For example, about a quarter of Granfield's sample of Harvard students said they entered law school to help people, seek social justice, or achieve social change.⁸ Yet during their education most students replaced a justice-oriented consciousness with a cynical, game-oriented consciousness.⁹ Stover found that the number of students expressing a preference for doing public interest law work after law school was halved between the first and final years (originally approximately one-third of his sample expressed such a preference).¹⁰

A focus on the law of lawyering in the legal ethics course does not address overwhelming student cynicism about the possibility of ethical practice in law. It may even exacerbate it.¹¹ Thus Granfield argues that

[legal ethics] courses are perceived as the “dog of the law school curriculum” in which students learn the rules without a foundation to challenge their premises and to explore their limitations . . . Ethics, like law itself, becomes mechanized and instrumentalized in a way that, according to the critical theorist Max Horkheimer, “takes on a kind of materiality and blindness” which undermines the development of any broader vision of social life. One reason for the low regard for ethics courses is that students correctly see that the lessons have little to do with the social contradiction lawyers confront in their daily practice . . . For the most part, the canons of ethical responsibility reinforce assumptions of individualism, competence, autonomy, and neutrality that law students experience in other courses. Ethical dilemmas are redefined in terms of occupational malfeasance such as conflicts of interest, impropriety, or courtroom conduct as opposed to larger normative questions regarding morality, power, or community . . . In this way, legal ethics, like legal education generally, co-opts students’ pre-law moral codes.¹²

Thomas Shaffer states even more bluntly that

[c]onstructing a course around the law is a recipe for idolatry. It is not interesting enough to be ethics. Some of it is in the same category as the manual you read to get a driver’s license.¹³

The evidence certainly suggests that it is safe to assume that most students come into the legal ethics course cynical about whether it can teach them anything about ethics or can connect with their personal values or behaviour. Many students commented in their reflective journals (either in more or less overtly cynical terms) that ethics was a matter of personal morality and it was hard to imagine how a university course could teach ethics (this was particularly true of their first journal entries at the beginning of the course). One student wrote:

Upon introduction to this subject, many students including myself mocked the idea of learning how to be a good lawyer and a good person. Many will continue doing so in the perception that instilling ethical concepts in law students is useless because many lawyers would eventually become unethical persons in the future anyway.

No matter how many rules and norms are put in place to monitor the ethical behaviour of lawyers, there will always be individuals whose personal values will cause them to ignore or violate these regulations. Although this course has given me a greatly improved appreciation for the attempts made by many parties to regulate potential unethical conduct, it has not changed my view that in general, ethics are a matter for the individual. Ultimately, the only thing that will be guaranteed to make a lawyer act ethically will be her or his personal values, because there are almost always methods for ignoring, exploiting, or breaking the rules that will not attract punishment.

As this last comment suggests, many law students come to the

legal ethics course already believing that all law subjects are about learning the rules and how to cleverly manipulate them. Even as their ethics teachers try to teach them something more, law students seem to focus on any element of substantive law offered in legal ethics class. (In other courses teachers also struggle with the same problem.) Even after experiencing the whole semester, many students continue to focus on the rules aspect of the course and remain cynical about the relevance of rules to ethics. Consider the following comments from the anonymous student evaluations about what the students had learnt from the course:

Tell the Law Society to take their rules and bury them, thus allowing for a more flexible and intellectual approach to ethical conduct by lawyers — these rules merely constrain thought.

A better understanding of the regulations involved in being a lawyer but no better understanding of the ethics or morals involved.

I was initially excited by the fact that I was to take a subject Law, Lawyers, and Society. However, the subject was not what I anticipated. I expected more focus on wider ethical issues not a course which essentially taught us how to bend the rules.

Some student used their reflective journals to write well-reasoned critiques of the rule-based approach to learning legal ethics:

I should confess at the outset of being immensely sceptical of this course . . . Legal dilemmas, such as how can I represent my client properly suspecting him/her to be criminal, fit squarely into a much bigger framework; the framework of ethics in general. Siphoning off law and legal dilemmas creates the illusion that the law is special and somehow different from everything else. This is clearly not the case . . . But will we have a fitful discussion of Mill's theory of utilitarianism, will the categorical imperative raise its head or indeed will even Peter Singer get a mention? . . . My suspicion is that we will be treated to some fairly tricky problems but will not be given the tools to handle or manipulate them in anything but a shallow, legal fashion. Why should I not take a case which I know my client will lose – well, not just because s32 of some Act says so.

My expectation was that this subject would involve discussions of ethical dilemmas inherent within the legal system, not unlike those I had previously studied in philosophy where there were never any answers, simply more questions . . . Thus, I was somewhat underwhelmed when the course began with interviewing techniques and lawyers' bills and costs.

As I will argue below, there is an unhelpful detachment from

the real world inherent in the view that the only legal ethics worth studying are the intellectually interesting dilemmas of philosophy rather than banalities of everyday practice.

A significant minority of the students apparently completely “turned off” from classes right from the beginning. Seventeen (ie approximately 10% of the total enrolment in the course) were prepared to write completely cynical responses in the anonymous student evaluations to the question, “What have you gained from this course?” Answers: “A warm, fuzzy feeling;” “A sore wrist;” “Another part of my law degree (I hope);” “Well the course was full of stuff we had to learn and I learned it.” Learning rules is unlikely to address this level of cynicism and may even exacerbate it.

Nevertheless, it seems that many more students did learn something from our teaching of the rules and law of lawyering. Many students felt that the rules taught them something about the types of dilemmas lawyers could face in practice, including things that they had not thought of before. Thirty-five students answered an evaluation question about what they had learned from the course by referring to a greater understanding of the ethical issues and dilemmas that lawyers faced:

I was unaware of how many situations were ethically unsound and how many predicaments a lawyer could actually be involved in.

An appreciation of the complexity of ethical problems a lawyer who is practising faces.

A better understanding of ethical issues that may affect lawyers, many of which I had been unaware of.

An understanding of the “actual” working of the legal profession and ethics and morals attached to law -> good to be on the other side and not simply cases.

Indeed the reflective journal entries show that a number of students changed in their scepticism to learning ethics and ethical rules. As they began to understand the complexity of real life decision-making they began to appreciate the guidance that the rules could offer:

Before taking this course I had a sceptical opinion about the study of ethical lawyering . . . I have thought that the ethical decision of a lawyer is the realm of his/her own moral decision. There is no room for objective standards in ethical decisions. Moreover, I have never imagined the difficulty of moral decision of lawyers. I thought that I

could make ethical decisions with my pre-existing knowledge of common sense, norms, religious beliefs, and ethical standard even in legal arena. However, after I took classes, I came to know the complexity of ethical dilemmas was beyond my imagination and knowledge. Without the study and learning of rules, norms, and values of legal ethics, it is impossible to make an ethical decision.

In conclusion, my perception of the role of ethics and its impact on the practice of law has progressed from the cynical standpoint that the law is there to be manipulated and ethical considerations are only that, considerations, to the view that ethics is fundamental to the practice of law and is embodied in its structure.

It seems likely that the students who did learn something from studying the rules of lawyering did so because we tried to teach the rules within a practical context. The rules were taught via discussion of the real-life practice of law. This included the use of newspapers clippings and case studies, as well as discussions of the law itself. Within this context, the evidence from the students suggests that the law of lawyering can provide a framework that increases student awareness of ethical dilemmas and practices, of the complexity of acting ethically in practice, and of the actual content of rules, ethics, and good practices and their application to practice.

For some students learning that there were rules governing the ethics of lawyers was, if not an inspiring or motivating experience (cf the KLC experience, below), at least somewhat reassuring:

In many respects the presence of these rules, and the nature of their content has largely restored my confidence in a legal system which I had gradually grown to view with a cynical and somewhat pessimistic attitude. The presence of strict rules regarding conflicts of interest, appropriate methods of charging for services rendered, and the many regulations protecting a member of the general public requiring legal assistance is very reassuring. Furthermore, the trend in recent years to work towards the further improvement of the legal system in assuring a high quality level of service and competency has gone a long way to reassuring my doubts of the integrity of the legal system.

My views about the ethical problems confronting lawyers has, upon reflection, changed quite a lot since the start of the course. The detailed rules that we have learnt, coupled with some disciplinary cases, have shown a greater amount of material to fall back on in a dilemma than I previously considered. Practitioners are not alone in making choices, there is considerable industry support in making the right choices.

The response of the students to the rules aspects of the course suggests two things. The *first* is that students will often be

inherently cynical about a legal ethics course that attempts to connect to personal values and to behaviour (because it is believed that a university course cannot impact on such things). Most students are also sceptical about an ethics course that focuses on rules (because rules do not connect with personal ethics and are just there to be manipulated). This leaves legal ethics teachers in a double bind, with nothing to teach that can motivate students to learn. However, *secondly*, the evidence also suggests that it is possible for many students to gain some moral guidance and awareness from learning the rules, if they are taught in a way that makes them relevant to practice.

The remaining two learning outcomes for Law, Lawyers, and Society attempted to give students a practical context for ethical rules and also a broader connection to values and social policy. Unfortunately, even when teachers do their best to try to teach the rules within this broader context (as we did in Law, Lawyers, and Society), many students seem to believe that if the course *includes* legal rules, then that is *all* the course is about. This suggests, as I will argue below, that legal ethics teachers (and probably other law teachers as well) need to learn how to be much more explicit about teaching the processes of analysis and reasoning that use rules and law as a resource but then go beyond them.

SOCIAL AND MORAL CONTEXT: VALUES, ETHICAL THEORY, AND THE SOCIOLOGY OF THE LEGAL PROFESSION

We sought to address the context for the law of lawyering in our second learning outcome. Students should learn to:

[j]udge what roles lawyers do play in society and the justice system, and what roles lawyers ought to play.

This learning outcome was intended to broaden the context for legal ethics to ethical theory and the sociology of the legal profession – social ethics – and to give students a standpoint for criticizing the current rules and their operation in practice.

The *sociological* element of the course examined the way in which individual lawyers and the legal profession interact with broader society. This included:

- relations between lawyers and clients including communication, status, and power;

- inequality of access to justice and the effects of lawyers' practices on the poor and powerless, and on the structure of society;
- the place of the legal profession in the economy, including competition versus monopoly in legal services;
- law firm structure including the particular social and ethical issues arising in large firm practice;
- issues of gender including the historical exclusion of women from the profession and continuing discrimination and harassment in the profession; and
- the adversarial system and opportunities for alternatives.

In *Law, Lawyers, and Society* we introduced students to *ethical* theories of lawyering by pointing out that underlying different ethical and social norms and legal rules are different values about the role that lawyers ought to play in society. The sources of values for legal practice include:

- stakeholders' expectations, needs, and desires (ie clients, courts, colleagues, the public);
- general social ethics including concepts of justice, equality, the rule of law, the adversarial system, and self-regulation; and
- personal integrity – the students' personal values and beliefs.
- In particular, the ethical theory of lawyering was approached through four values that were introduced in the first couple of classes and recapped in the revision class. These were based on the argument that I make in *Just Lawyers*.¹⁴ I argue that most of the norms and rules that govern legal practice (or that people argue should govern legal practice) are justified by reference to one or more of the following four values:
- *Advocacy*: An ideal of devoted service to clients in an adversarial legal system where citizens *need* advice and representation to enforce the rule of law.
- *Social Responsibility*: An ideal of fidelity to law and justice if the rule of law is not to be sabotaged by clients who will pay a lawyer to do anything.
- *Public Interest/Justice*: An ideal of willingness to defend people and causes who may need special help to attain justice regardless of self-interest.
- *Collegiality*: An ideal of courtesy, collegiality, professionalism, and mutual self-regulation amongst members of the profession.¹⁵

- Much of this material was covered by way of case studies, simulations, and interactive discussions. The most successful case study is of a simulation we developed based on the scenario of associates in a large US law firm. The firm (ie the students) must decide whether to represent a Swiss Bank because the bank wished to defend itself against claims that they should pay money that was deposited by Jews during World War II to Holocaust survivors and victims' families. In the revision class, students were asked to work out how the different rules and institutions that we had studied related to each of these four values. The learning outcome was to teach students to judge the existing regulation of the legal profession according to:
 - the extent to which the rules are consistent with the underlying values people think ought to guide legal practice in theory; and,
 - the extent to which those rules and institutions are effective at promoting or guiding compliance with those values in practice.

It seems from the student evaluations and their reflective journals that few students felt that they had learnt very much at all from this aspect of the course. We have already seen that a minority of the students who were more philosophically inclined – probably five to ten – felt that the course totally failed to deliver on this aspect. In retrospect, it would have been wise to offer a research essay option in the assessment package for those who wished to pursue philosophical issues. Few students commented positively on this aspect of the course either in the anonymous student evaluations or in their assessed reflective journals. Only about seven answered the question, “What have you gained from this course?” by referring to things they had learnt about lawyers’ role in society. This apparent failure to teach students much about the philosophy and sociology of legal ethics was probably due to three factors.

First, the dynamic of the classroom tended to push out this type of content. There was a perceived need from both the students and the teacher to make sure the material on the law of lawyering was covered, and this was done at the expense of other material when necessary. Indeed, no matter how hard the teachers tried to emphasise philosophical and sociological issues, the students generally always asked questions, did their readings, behaved

attentively and in a motivated fashion in class on the assumption that the law is more important than issues of social ethics. Even as the teacher tried to move on to broader issues of policy and theory, the students kept dragging the teacher back to technical questions of the application of certain rules, believing that this was more important for the examination.

Second, it seems likely that we often did not make it clear enough to the students how the philosophical and sociological aspects of the course related to the other aspects of the course, and most importantly, how they could use philosophical and sociological analysis in the examination – perhaps we did not make clear even how these aspects of the course were to be used in the examination at all. Some students enjoyed discussing complex and contextual case studies. Many, however, expressed frustration at case studies that did not seem to have correct answers. Some students felt they were not given an adequately rigorous or certain framework for this type of discussion. Although they might complain about the dryness of just learning the rules, neither did they appreciate the complexity, contextuality, and “fuzziness” of more values-based discussions. In their examination answers most students lacked critical understanding of how the current rules failed to reflect adequately or institutionalise values that might be applied to the legal profession. They had even more difficulty in suggesting ideas for how the rules might be improved.

Third, even when we teach social ethics rather than rules, we can still fall into the trap of teaching content that does not connect with students’ individual experiences or skills of ethical judgment. As we have seen, many law students are generally very cynical about the possibility that a legal ethics course can teach them new values, behaviours, or new methods of moral judgment. Students want more than rules, but they have little reason to engage with social ethics. Fortunately, it was the “skills” component introduced through KLC and its public interest law (social justice) perspective that did grab the students’ imaginations.

SKILLS FOR ETHICAL PRACTICE

The third learning outcome for Law, Lawyers, and Society was to

[d]evelop the skills necessary for ethical practice including skills for

deliberating and negotiating with colleagues about ethical and social issues, effective client communication and other client care skills, and negotiation skills.

The intention here was to give the students some concrete idea of the routine skills and practices that are fundamental to ethical practice. In the classroom we drew attention to the significance of various practice skills in preventing problems and some of the skills that lawyers often fail to practice well. These included:

- the role of good lawyer-client interview practice and communication;
- the role of preventive legal advice and client-centred advising;
- the use of negotiation skills for settling client's disputes;
- the development of the skills for negotiating with others in the firm/workplace over ethical and social issues; and
- information about how to prevent and handle complaints from clients and others.

The course aimed to make students aware that these skills are necessary. We also hoped to help students develop those skills or at least to identify personally which skills they might need to practise in the future. Therefore, the course included practical exercises for developing these skills and learning in practice how they relate to ethical and socially aware practice. Students were expected to take part in and write a report on a client interviewing session at the KLC, as well as participate in a number of simulation and role play activities in class. Staff from the KLC were involved in the classroom teaching of interviewing skills in preparation for the students' visit to the KLC.

This approach to teaching ethics contrasts strongly with the view expressed by a minority of students (quoted above) who stated that we ought to spend more time on the philosophical disentangling of ethical dilemmas that might affect lawyers and the legal profession. There is an intellectual arrogance inherent in the claim that the only interesting and worthwhile ethical issues to discuss are the exotic and intellectually challenging problems with which Philosophy deals. The underlying philosophy of Law, Lawyers, and Society was that it was *more* important to help potential lawyers to work "downwards" from the identification of ethical values, dilemmas, and ideals to the "grassroots" of everyday life, than it was for them to work "upwards" to the more theoretical fundamentals of moral theory (eg utilitarianism versus deontology

versus virtue ethics).

All students have to study some Philosophy in one of the compulsory theory courses in the Law Faculty. Legal ethics, on the other hand, is an applied ethics course. The fundamental lesson to be learned in Law, Lawyers, and Society is that most of the time being ethical involves a very routine and mundane practice because most often unethical practices occur in very banal and routine ways. Students find it difficult to understand that ethical problems frequently do not cause major personal crises but occur simply because lawyers do things that we could all easily do – forget to communicate well, do sloppy work, fail to explain adequately and document basic costs agreements, forget to check whether they might have a conflict of interest in a particular matter, do unthinkingly what everybody else does by way of litigation tactics, choose unreflectively to contribute to the injustice of the system by representing only certain clients (because that is where the good jobs are), and so on. Drawing students' attention to the everyday skills of ethical practice, and modeling it in a clinical setting, gives students some insight into the daily commitments to vigilance and positive action necessary to be a good lawyer. An understanding of the sociology of legal practice and of middle-level theory of potential normative values and policy for the legal system (eg the justifications for the adversarial system and the advocacy ideal; or for access to justice and public interest ideals) should be sufficient to help students judge the everyday practices that might be required for ethical lawyering.¹⁶

Beyond this, we hoped that students might not merely learn some commitment to ethical practice in a narrow sense but that we might nurture and/or maintain some commitment to the value of justice in lawyering. To this end, the students' experiences at the KLC and of the KLC lawyers in the classroom (in a class on interviewing and another on public interest lawyering) were intended to model how one might commit oneself to public interest practice either in a full-time or a part-time (*pro bono*) capacity. There is some evidence that this is a good strategy to adopt to overcome the otherwise inevitable increase in cynicism that students learn at law school. The studies of the impact of law school on student cynicism quoted above conclude that those students who were best able to preserve more idealistic conceptions of legal practice were those who had put their commitments into

practice. These studies found that many students came to law school with a commitment to practising law in a way that promoted social justice/public interest, but only those who had contact with a “public interest subculture” maintained that commitment. This occurred either: (1) through work experience/clinical legal education at legal services offices (the United States equivalent of community legal centres) or through joining the campus chapter of the radical lawyers’ group, the National Lawyers’ Guild; or (2) through pre-existing social justice commitments of students who enrolled in law school later in life and who had maintained their relations with groups outside the law school with the same concerns.¹⁷ This suggests that one of the most important things law schools could do to educate law students to be ethical and socially aware lawyers is to encourage “public interest subcultures” within the law school. As Stover concludes from his research:

In sum, contact with a public interest subculture appears to have insulated students from the influence of the dominant culture in several ways. First, the alternative professional communities communicated support for the norm of professional altruism. Second, they conveyed an image of public interest practice sharply at odds with the prevailing image of public interest ineptitude and marginality. Third, they provided altruistically oriented students with the assurance that they were not alone in their beliefs but belonged to a broader community of like-minded persons. Fourth, they provided students with role models. And fifth, in the case of the Lawyers Guild, contact with a political point of view that heightened their commitment to public interest goals.¹⁸

Clinical legal education in a community legal centre is an important way of giving students contact with, and commitment to, a public interest subculture. It has also been suggested that students’ first workplace experience will largely determine the values they express in practice. Therefore, students with clinical experience at law school with close contact with disadvantaged clients will enter practice with attitudes, energies, and techniques different from those whose first work experience is a private law firm.¹⁹

There is no doubt that the KLC component was the “number one hit” of the course. The experience with the KLC demonstrates that a small amount of skills/practical input can make a significant difference in boosting enthusiasm and idealism, especially in a course which often seems to be about what lawyers do wrong. In the reflective journals the student comments on the KLC (and, to a lesser extent, on the classroom session with “live” public interest

lawyers) were obviously fresher and more authentic than most of the other comments. Overwhelmingly, the students commented most positively in the anonymous student evaluations about the KLC experience (even though the questionnaire did not ask them specifically about the KLC). Scratch the surface of these cynical, world-weary law students with one client interview session, and we find that most of them regain some enthusiasm and idealism. They entered the KLC nervous – out of their comfort zone. They came out with a new sense of commitment to client contact, at least, and for some a better understanding of disadvantage and justice issues.

Most students commented on the fact that they enjoyed having a practical, skills-oriented approach to learning, and many commented that almost everything could be taught in the course that way. The following comments are from the student evaluations of their experience at KLC, which they were asked to submit on a separate sheet with their interview reports.

I would consider one session at KLC to be the equivalent of at least a month of theory. . . I think the whole Law, Lawyers, and Society subject could easily be condensed into several visits to KLC, combined with related discussions at the centre with tutors and/or lawyers.

I left KLC on an absolute high. It was nice, amongst all the readings and lectures to be able to regain focus and see what I was studying law for.

I found my interviewing session one of the most rewarding few hours of my legal education so far. It was great to have hands-on experience with the law, rather than the usual theoretical classes about the law itself, and to be able to help clients who are really desperate for legal advice. It confirmed my wish to be more involved in community legal work in the future.

I would have to regard the KLC experience as the single most motivating influence I have received this semester.

My interviewing session at the KLC has been, to date the highlight of my first year in Graduate law. I left KLC beaming because I knew I had taken a role in being the first point of contact with people who had problems and who were more than likely skeptical about the legal process.

A student wrote in a reflective journal:

The time spent at KLC was the single most effective means of conveying to the student that the rules and regulations that do, to be honest, look so dry on paper are so vital. It had seemed to me that such rules and regulations governing the conduct of lawyers were there to be used in an emergency. I imagined a notice attached to them declaring,

“in case of potential OLSC [Office of the Legal Services Commissioner – the NSW legal ombudsman] investigation break glass.” It wasn’t until I met my first client, took their (sic) personal details, and informed them that I had to go off and do a conflict of interest check, that the reality that these practices are everyday issues hit home. A student law clerk reassuring a client that what they say goes no further than this building is confidentiality and privilege demonstrated in the most mundane, but enlightening way. Realising that you are doing a good job because you are applying the interview skills learnt in class is similarly satisfying.

In the evaluations of the whole course, which were on a standard form that did not include a specific question about the KLC, about 28 students (approx 17% of the total) spontaneously wrote a comment praising the KLC and the skills aspect of the course and/or suggesting that there should be more of this in the course.

Even those who admitted to cynicism at the beginning were converted to the significance of hands-on learning:

Although I had a variety of reservations about the intrinsic value and late timing of the interview, these misgivings proved to be unfounded as the interview itself proved to be one of the most enjoyable and interesting aspects of Law, Lawyers, and Society.

Finally, a significant minority told stories about their experience at the KLC as a motivating experience. For some students we even succeeded in our objective of building motivation to become involved in public interest law practice in the future.

I actually felt quite inspired by the night. I don’t get inspired that easily.

I found the interviewing experience very useful for grounding the rest of the course in a day to day reality. I have interests in social justice issues. I found it useful to see the law being put to use within a basic social justice orientation. In that respect I found the experience very motivating and it has given me the enthusiasm to continue ploughing through casebooks. As a direct result of the Kingsford experience I have also made enquiries about voluntary work at other centres.

Students often commented that they wanted to do more at the KLC; however, the organization of more sessions at the KLC is a practical impossibility.²⁰ The objective was for the students to start to develop the skills of ethical practice, not to perfect those skills. Within this context, even just the one “taste” of clinical legal education seems to fulfill some useful learning outcomes.²¹ The KLC component to the course seemed to help re-build idealism, enthusiasm about good client service, and, perhaps, their ideas about the place of lawyers in justice more generally. Having students

interact with “real” clients and “real,” committed lawyers seems to “push past some of the modern barriers to moral discourse . . . (the) interpersonal tactics of evasion” and provides a window of opportunity for the study of ethics to engage with and change student thinking.²²

The linkages between the KLC experience and the rest of the course could still be improved, however. To the students, the other classroom sessions seemed arcane or negative in comparison with the KLC experience. Many seemed to see practical legal experience as an alternative to the other two learning outcomes of the course (rules and social ethics) – and one that they preferred.²³ Finally, the students’ enjoyment of the KLC was not necessarily related to our ultimate objectives of learning the “ethical” ideal of social justice commitment or of learning about ethics in practice. As the statements illustrate, some students saw these elements as an important part of the exercise, but many simply saw their experience at KLC as more fun because it was more practical and perhaps more relevant to what they might one day do as lawyers when compared with what is taught in law school. (In fact, of course, students are just as likely to spend weeks and months trawling through the corporations legislation or financial documentation as they are to be conducting preliminary interviews with interesting clients.)

CONCLUSION: TEACHING AND LEARNING PROCESSES OF ETHICAL REASONING

The task of answering the compulsory exam questions (described in the introduction to this paper and in the Appendix) was very ambitious. The perfect answer would require students to have mastered all three learning outcomes for the course described in this paper. Students also were expected to be able to synthesise these different types of knowledge in order to analyse and resolve a particular problem both at an individual and systemic level. The three questions were intended to reflect the type of reasoning process that we thought ethically and socially aware lawyers ought to use when considering their ethical responses to their own individual practices and when thinking about the organisation of the legal profession as a whole. The evidence above suggests that, while most students probably learnt something worthwhile from at

least one of the course's three learning outcomes, very few fully grasped how to connect the three types of knowledge together to apply them to particular situations or problems.

It seems that law students generally like to have a process of analysis, a tool that they can use to apply to answering examination questions. Good students are accustomed to using the tools of legal analysis in other subjects – the elements of an offence or a cause of action, basic rules of interpretation and extrapolation from cases and statute, and the like. Yet at the same time, ordinary legal analysis tools seem insufficient for any practical process of ethical reasoning. The students tend to believe that, ultimately, ethics depends on private values, beliefs, and behaviours that the students already bring with them. Students are not sure that anything we teach them in the classroom can really connect with this. A substantial group of students did not like our study of the professional conduct rules for this reason. At the same time, they found more “ethical” discussion of case studies and policy questions too fuzzy and inconclusive to prepare them for the examination. They liked the “skills” aspect of the course but do not necessarily see it as a complement to what is learnt in the classroom, nor as relevant to the assessment of the subject by examination and class presentation.

Below is a lengthy extract from the final reflective journal entry of one of the better performing students in the class. In his first journal entry this student was cynical about the course because of the difficulty of connecting rules with personal values and commitments. By the end of the course this student had worked out for himself that it is possible to develop a process of ethical reasoning that connects rules, skills, theory, and personal beliefs in a coherent way.

It is evident in my previous submissions that I strongly feel ethics are a personal issue and not something that can be influenced easily by outside considerations. In that sense, I was quite sceptical as to what a course like this set out to achieve . . . Whilst I still hold the belief that ethics are from within, I am now receptive to the idea that it is useful to establish some sort of framework for dealing with ethical problems. [My expectation was that we would be taught that] abstract dogmatic rules and norms [ie Solicitors' and Barristers' Rules] would have to be applied to find a solution to any given dilemma and values would only come into consideration where the rules and norms did not resolve the issue by themselves. This framework for solving ethical issues was, and still is, most unappealing to me. Fortunately, I no longer see the framework as such . . . [The student included a diagram here that showed personal beliefs impacting on the four values we discussed in

the course and also showed how those values affected all stages of a process that led from ethical problems to rules to norms to solutions.] . . . The values are the four key elements that the profession as a whole aspires to. Beliefs, on the other hand, are personal and will affect the way we interpret the profession's values. The values, in turn, affect how we view the ethical problem (ie is it or isn't it a problem?). And the values also . . . are largely the foundation for the rules and norms in place.

Thus, where I initially thought that abstract rules and norm [ie rules] would govern the way in which we had to deal with ethical problems, I now feel they have their origins in the professional values, which largely have their roots in the collective beliefs of members of the profession. This is of some comfort because I still do not believe that ethical dilemmas can be solved through the application of some abstract set of principles. But if the principles are derived from the beliefs of individuals and the values of the profession as a whole, then I feel more comfortable in using such a framework myself. I stress again that such a framework does not in itself reveal the right answer to a problem, but it does establish a "mental environment" for dealing with ethical dilemmas and finding the solution that feels right to us in the light of all relevant considerations.

This student could have done much more to develop the critical dimensions of his framework. Nevertheless, he has clearly developed an understanding of the potential that rules and institutions regulating the legal profession can be connected to important values and, ultimately, to people's personal beliefs, and that individuals can make judgments about how well they do this. He has also developed an understanding that rules and regulatory institutions can and should help lawyers to apply values and beliefs towards practical solutions to ethical issues, and that they can be judged on this basis too. This perspective should prepare him well both in evaluating the current ethical regulation of the legal profession and also in making judgments about ethical issues that he himself might face in practice.

In this case a conscientious student was able to use all the material provided for the course to work out for himself principles for an ethical reasoning process that we were implicitly trying to teach. The problem is that this student's thoughtful reflection on the subject was an exception.²⁴ Mostly we did not make this process explicit enough to students, and we cannot expect all students to be clever or committed enough to pick it up by themselves. We are in the business of teaching students how to think, not what to think. There is a challenge and a hope here – that students will be receptive to a thoughtful, useful model of an ethical judgment

process if we can develop it and make it examinable.

Luban and Milleman suggest that judgment is best learnt by the modeling and practice of the particularity of judgment and that this is best done within a clinical setting, and possibly through case studies and simulations.²⁵ They may well be correct in believing that this is the best way to *perfect* the art of judgment. The evidence from our Law, Lawyers, and Society course suggests that it is not enough in a very large compulsory course. In that context, modeling and practice can help kick-start some motivation and inspiration (as the popularity of the KLC component attests). But students who are not already attuned to the fact that there is a process of ethical judgment to be learnt are unlikely to learn it unless we explicitly give them some instruction on what they are supposed to do. In giving the students instructions as to the learning outcomes for the course and the way they would be expected to answer the examination problem, we intended to give them some idea of a process of ethical judgment. This was not enough. We needed to bring to the surface the tools required to connect (1) rules, (2) theories, values, and policy, and (3) everyday skills, practices, and beliefs in analysing and deciding how to act in particular situations. When we fail to address this question, we are in danger of unintentionally teaching many of our legal ethics class students nothing except greater cynicism — cynicism about the possibility that ethics could ever make a difference to the way most real lawyers think and practice, and cynicism about whether there could ever be a connection between the profession's practice of law and the social ideals of the practice of justice.

APPENDIX: LAW, LAWYERS, AND SOCIETY – SESSION ONE, 2000

Law, Lawyers, and Society, like most other University of New South Wales law subjects, is a one-semester course taught in 13 weeks of two by two-hour seminars to classes of thirty to fifty students. Unusually, the course also requires that every student attend one evening advice session at the Kingsford Legal Centre (the “KLC”). The KLC is the community legal centre operated by the Law Faculty for the purposes of clinical electives. Students must attend from approximately 4pm to 9:30pm for one evening, interview at least one client, and then listen to the lawyers' advice

on the client's problem. The course was assessed by means of a compulsory two page report on the KLC interview experience (10%), a compulsory 2½ hour exam consisting of two problem questions (70% or 50%), and either or both of a group class presentation (20%) and a reflective journal (20%). (See below for a description of the assessment tasks.) Most students take Law, Lawyers, and Society at stage 3 of their degrees, usually the fourth year for combined degree students. Full-time graduate students, who are undertaking an accelerated three year degree, take the subject in the first semester of first year. There were 167 students in four classes taught by two teachers in first semester, 2000.

Assessment Task	Instructions	Length	Percentage
Kingsford Legal Centre Report	The KLC Report is to be based on your client interview session at KLC. You will not be assessed on the basis of your answer to Question 4.	Not more than 2 pages long. Question 4 on a separate detachable page.	10%

Questions to be Answered in Report:

1. What are the main issues relating to effective communication to remember when interviewing clients? What ethical issues should you consider? (Give examples of how these might arise from your interviewing session at KLC.)
2. How do you think you could improve your interviewing skills? Give examples from your interviewing session at KLC.
3. Do you think all lawyers should be involved in law reform, policy, education or volunteer community legal centre work? Why or why not?
4. What did you think of your interviewing session? Did you learn something about interviewing? Was it relevant to what you had learnt in classes in Law, Lawyers, & Society?

Assessment Task	Instructions	Length	Percentage
Class Participation	<p>The class participation mark will be awarded on the following criteria:</p> <ul style="list-style-type: none"> • Quality of Contribution • Quality of Preparation for Class • Contribution to Group Climate • Attitude to Learning & the Subject 	NA	10%
Final Open Book Exam	<p>Each question will set out a scenario involving several issues of problematic behaviour by lawyers. You will be asked to complete three tasks in relation to EACH of the two questions you attempt:</p> <p><i>(i)</i> Identify and discuss any issues of liability or ethical misconduct that may arise from the facts and come to a conclusion on what legal remedies or disciplinary action may be available by reference to case law, statute, and ethical codes and rules.</p> <p><i>(ii)</i> Identify any significant values relevant to the practice of law that may be under threat in the fact situation, or in your answer to Question (i). Identify and discuss the way that the structure and history of the legal profession, or, patterns in the way lawyers relate to clients and society may have given rise to the problems arising in the fact scenario.</p> <p><i>(iii)</i> Consider and come to a conclusion on any broader reforms to the profession, the legal system, or, a particular firm or practice of an individual that might be necessary to solve the problems you have identified in the medium to long term, or to prevent such problems arising in the future.</p>	Two compulsory problem questions in two and a half hours.	50% or 70%

Assessment Task	Instructions	Length	Percentage
Seminar Presentation & Handout (Must be in groups of 2-4 people.)	<p>It IS acceptable (and desirable) to state your opinion in answer to questions, provided it is supported by evidence and you show an awareness of possible counter-arguments and differing opinions.</p> <p>Your group will be required to:</p> <p>(a) <i>Make up a fact scenario</i> which raises an ethical or legal problem relating to the topic your group has chosen. You should check your fact scenario with the teacher for that class <i>before</i> the class.</p> <p>(b) <i>Present your fact scenario and its solution to the class.</i> You can act out your scenario in a skit. You may wish to present and justify alternative resolutions to ethical dilemmas. The <i>ten minute time limit</i> will be strictly enforced.</p> <p>(c) <i>Prepare a class handout</i> setting out your fact scenario, the legal/ethical principles you have applied to its solution, and the solution.</p>	10 minutes for presentation and 2 pages for handout.	15% (You can choose between this option and the reflective journal, or do both.)
Reflective Journal	<p>The journal is a record, kept throughout the session, of your thoughts on how you view the relevance and importance of ethical issues confronting lawyers in practice. The journal is a personal document. There is no right or wrong way to keep it. Its usefulness will be in proportion to the extent to which it is your own record of your reflections on the subject and on what you have learnt. The journal shall consist of three parts, Parts A, B, and C:</p> <p><i>Part A</i></p> <p>Write a statement on what you think, at the outset of this course, are the legal and ethical dilemmas that may confront</p>	A – 1 page B – 2 pages C – 2-3 pages	15% (You can choose between this option and the reflective journal, or do both.)

Assessment Task	Instructions	Length	Percentage
	<p>lawyers and possible ways in which lawyers may resolve them. This statement should also discuss what you expect to gain from this course/what your expectations are for this course. This statement is to be based on your own experience, reading and beliefs <i>without reference to the Study Guide</i>. There are no right or wrong answers.</p> <p><i>Part B:</i></p> <p>Reflect on the impact, if any, on your original thoughts, of what you have learnt in classes, and include consideration of what skills are necessary to enable lawyers to conduct effective and ethical practices.</p> <p><i>Part C:</i></p> <p>This part involves an overall summing up of what you feel you have learnt from the course: how you now see the role of values, rules and norms that lawyers should apply for ethical decision- making and practice and whether they are necessary and, if so, why. This part is not meant to be an evaluation of the whole course but a reflection on how your perception of the way in which ethics impacts on the practice of law has, or has not, changed.</p>		

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- 1 C Menkel-Meadow, Can a Law Teacher Avoid Teaching Legal Ethics? (1991) 3 *J of Leg Educ* 3, at 3.
- 2 See L Lerman, Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals (1998) 39 *William & Mary Law Rev* 457; D Luban & M Milleman, Good Judgment: Ethics Teaching in Dark Times (1995) 9 *Georgetown J of Leg Ethics* 31.
- 3 W Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge Massachusetts: Harvard University Press, 1998).
- 4 The American Bar Association.
- 5 Simon, *supra* note 3, at 6.
- 6 Luban & Milleman, *supra* note 2, at 39.
- 7 S Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism (1997) 46 *The Am U L Rev* 1337, at 1405-1406; H Erlanger, C Epp, M Cahill & K Haines, Law Student Idealism and Job Choice: Some New Data on an Old Question (1996) 30 *Law & Society Rev* 851; A Goldsmith, Warning: Law School Can Endanger Your Health! (1995) 21 *Monash U Law Rev* 272; R Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (New York: Routledge, 1992); R Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (Urbana: University of Illinois Press, 1989).
- 8 Granfield, *supra* note 7, at 38.
- 9 Granfield, *supra* note 7, at 52.
- 10 Stover, *supra* note 7, at 12.
- 11 See R Burns, Teaching the Basic Ethics Class Through Simulation: The Northwestern Programme in Advocacy and Professionalism (1996) 58 *Law & Contemporary Problems* 37; R Granfield, The Politics of Decontextualized Knowledge: Bringing Context into Ethics Instruction in Law School in K Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) 299; Lerman, *supra* note 2.
- 12 Granfield, *supra* note 7, at 306-307.
- 13 Quoted by Lerman, *supra* note 2, at 465 (reporting on contributions at a legal ethics workshop).
- 14 C Parker, *Just Lawyers* (Oxford: Oxford University Press, 1999) at 86-106.
- 15 Parker, *supra* note 14.
- 16 Of course, in some law schools the compulsory legal ethics course doubles as the compulsory legal theory course. In that case, the balance of learning outcomes of the course should probably be quite different from those I describe here.
- 17 Stover, *supra* note 7, at 103-115.
- 18 Stover, *supra* note 7, at 109.
- 19 A Evans, Client Group Activism and Student Moral Development in Clinical Legal Education (1999) 10 *Leg Ed Rev* 179, at 182, 189.
- 20 Indeed it is already quite an organisational feat to arrange for 170 students to each take part in a client interview session per semester.
- 21 Common sense and educational theory both suggest that one cannot learn very much from one client interview session, two classroom sessions on interviewing skills, and one class on public interest law practice.
- 22 Shaffer quoted by Lerman, *supra* note 2, at 472 (reporting on contributions at a legal ethics teaching workshop).

- ²³ Granfield, *supra* note 7, at 306 has reported that surveys have shown that students regard ethics courses as inferior to those that teach legal skills.
- ²⁴ I spoke to the student about his reflective journal entry after the course was over, and he seemed surprised that I was impressed by it. He obviously believed he had simply written the sort of thing we expected without putting too much personality into it. Yet the fact was that it was rare to have a student who seemed to understand fully the learning outcomes for the course and how they connected to each other – regardless of whether he took them on board or not.
- ²⁵ Luban & Milleman, *supra* note 2, at 59.