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LEGAL EDUCATION, LEGAL PRACTICE AND ETHICS

MARIA NICOLAE*

I INTRODUCTION

The law degree has increasingly become a generalist degree.¹ This is due to two principal factors. First, not all students who undertake and complete a law degree do so with a view to pursuing a legal career.² Although two thirds of law students seek admission post-graduation (either as barristers or solicitors), far fewer remain within the profession three to five years post admission.³ Nonetheless, by and large, these students continue to hold professional positions in other capacities – for example as accountants, directors of corporate entities, in the foreign diplomatic service, as politicians, or as advisors to government departments.⁴ Second, law programs market themselves to prospective students as not simply teaching students the law, but rather as equipping students with a number of transferrable skills that remain relevant and applicable post-graduation, irrespective of their chosen career or profession.

The direct consequence of this increased heterogeneity of the student cohort is that law schools have had to satisfy the requirements and demands of two groups with seemingly disparate educational needs, namely future legal practitioners and future non-legal practitioners. On the one hand, the student cohort intending to pursue a legal career increasingly calls for more practicality in the law curriculum so as to increase readiness for practice. In essence, this demand calls for a narrower coverage of subject matter focusing exclusively on the legal profession and the areas of law most likely to be encountered in practice, with the attendant lawyering skills needed. On the other hand, the section of the student cohort not intending to pursue a legal career would benefit more from, and therefore favour, a broadening of the coverage of subject matter so as to enable graduates to utilise the knowledge and practical skills acquired during the law degree in other professional circumstances.

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¹ Karina Murray, 'A Book-End Approach to Ethics: The Increasing Importance of Incorporating Ethics into the First Year Curriculum' in Leon Wolff and Maria Nicolae (eds), *The First Year Law Experience: A New Beginning* (Halstead Press, 2014) 71. See also Gareth Green's comments with respect to the flexibility of a law degree, available at Bond University, *1000th Canadian Law student joins Bond* (12 September 2014) <http://bond.edu.au/about-bond/news-and-events/news/BD3_031734>.

² Adrian Evans, *The Good Lawyer* (Cambridge University Press, 2014) 1.

³ Murray, above n 1, 71.

⁴ Evans, above n 2, 3.

As an example of this dichotomy, with respect to the area of ethics, future legal practitioners request a better understanding of the current rules regulating the legal profession, whereas future non-legal practitioners request a broader approach to the study of ethics so as to enable them to transfer the knowledge acquired within the legal context to other professional contexts.

Although the aim of a generalist degree appears to be in direct contradiction to a program which aims to produce 'practice ready' legal professionals, the contradiction is illusory only. This is so because most, if not all, professions share similar requirements with respect to the conduct of their members. For example, in Queensland, under the *Australian Solicitors Conduct Rules 2012* (Qld), at rule 4.1.1, a solicitor is required to act in the best interests of the client.⁵ Under the *Barristers' Conduct Rules 2011* (Qld), at rule 37, a barrister is required to promote the client's best interests. Similarly, directors of companies are required to act in the best interests of the company, as evidenced by s 181 of *Corporations Act 2001* (Cth). Additionally, the legal profession operates in a highly dynamic environment, where, more often than not, the specific laws taught over the duration of the degree may well be repealed or at the very least amended by the time law students gain admission to the profession.⁶ For the benefit of all law students, then, contemporary legal education ought to focus on teaching legal skills and principles, rather than primarily specific legal rules.

This article seeks to examine whether the current pedagogy of the law degree satisfies the needs and demands of either or both of the two principal student cohort groups, namely future legal practitioners and future non-legal practitioners, in the context of the teaching of legal ethics. To remedy what the current pedagogical model lacks in its methodology and/or content, the article proposes an alternative model for the teaching of ethics, and identifies the advantages of the proposed model.

II CURRENT MODEL

A *Method and Content*

For those students seeking admission to the legal profession post-graduation, the rules of admission require applicants to be both eligible and suitable.⁷ To be eligible, applicants must have attained the age of 18

⁵ The management and administration of the legal profession is a matter for each State and Territory. Nonetheless, the rules with respect to the legal profession and the duties of practitioners in other Australian States and Territories are similar to those in Queensland.

⁶ Not all areas of law are equally dynamic and subject to amendments/repeals. However, some areas are notoriously so, such as taxation law, corporations law, immigration law and environmental protection. For example, the *Corporations Act 2001* (Cth) has already been amended 27 times since its initial enactment. As a consequence, at least some of the rules learned by students during their law degree, which generally takes three to four years to complete, would have changed between their studies and admission to practice.

⁷ See for example, *Legal Profession Act 2007* (Qld) ss 30, 31.

years, completed approved academic qualifications (for example an LLB or JD degree), and undertaken practical legal training requirements.

To be awarded approved legal qualifications, as part of the LLB and JD programs, students must have studied the following subjects: administrative law, civil procedure, company law, contracts, criminal law and procedure, equity, *ethics and professional responsibility*, evidence, constitutional law, property and torts.⁸ With respect to methodology of teaching ethics and professional responsibility, the subject is traditionally taught as a stand-alone subject, usually towards the end of the law degree.⁹ With respect to the content of the subject itself, a brief perusal of the syllabi of various universities across Australia¹⁰ reveals that the majority of the tertiary institutions teach what would most appropriately be termed professional conduct, rather than the broader area of ethics or morality, as the focus of the subjects undertaken in this area appears to be primarily restricted to the regulation of the legal profession.¹¹

In addition to the requisite completion of a recognised law degree, prior to admission students must also complete practical legal training. The Queensland Law Society, for example, states that to comply with this requirement, the applicant must either complete a Practical Legal Training course or serve as a supervised trainee solicitor in a law firm.¹² Practical Legal Training courses are offered by a number of providers,

⁸ These areas of competency are known as the Priestly 11. They are named after L J Priestly, who chaired the Law Admissions Consultative Committee (LACC) in 1992 and determined the minimum academic study requirements for legal practice.

⁹ Murray, above n 1, 72. See also Gary Davis, 'A Catalogue of the Teaching of Legal Ethics, Professional Responsibility, etc in Australian Law Courses' (*Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment*, Item 4.1, Council of Australian Law Deans, 5 November 2008).

¹⁰ Specifically, the following subject outlines were perused: *Legal Profession* at University of Sydney; *Ethics, Law and Justice* at University of Technology Sydney; *Legal Ethics and Trusts Accounting* at James Cook University; *Legal Ethics and Professional Conduct* at Bond University; *Dispute Resolution and Ethics* at University of Adelaide; and *Legal Ethics* at Melbourne University. In selecting the particular tertiary institutions to be surveyed, the author aimed to look at a cross section of the Australian law schools, from most States and with varying domestic and international institutional rankings.

¹¹ University of Sydney, *2015 Unit of Study Descriptions – Bachelor of Laws* (25 August 2015)

<http://sydney.edu.au/law/cstudent/undergrad/docs_pdfs/Unit_Descriptions_2015_LL.B.pdf>; UTS, *Handbook 2015 – Subjects* (25 August 2015)

<<http://handbook.uts.edu.au/subjects/70103.html>>; James Cook University, *2015 Subject Lists* (25 August 2015)

<<https://secure.jcu.edu.au/app/studyfinder/index.cfm?subject=LA4038>>; Bond University, *Study Information* (25 August 2015) <<https://bond.edu.au/subject/laws11-320-legal-ethics-and-professional-conduct>>; University of Adelaide, *University Course Planner – 2015 Courses* (25 August 2015)

<<https://cp.adelaide.edu.au/courses/details.asp?year=2015&course=105020+1+3510+1>>; Melbourne University, *Handbook* (25 August 2015)

<<https://handbook.unimelb.edu.au/view/2015/LAWS50038#overviewId>>; Monash University, *Undergraduate Unit* (25 August 2015)

<<http://monash.edu/pubs/2015handbooks/units/LAW4309.html>>.

¹² Queensland Law Society, *Required Study and Training* (2014) <http://www.qls.com.au/For_the_profession/Your_legal_career/Studying_law/Required_study_training>.

including universities, and their duration ranges from twelve to fifteen weeks of structured lessons and modules, followed by another fifteen weeks in a law firm.¹³ In Queensland, similar to other Australian States,¹⁴ the duration of a supervised traineeship is one year.¹⁵

B Drawbacks

The current law school pedagogical model for teaching ethics and professional conduct is undesirable for a number of reasons. First, such an approach is unrealistic because ethical dilemmas and professional responsibility matters are pervasive within the practice of law, and generally do not arise separately from other areas of substantive law. Second, students may not fully grasp the importance of ethics and morality to their future professional careers. For example, as the subject is taught towards the end of the degree, students, particularly those who intend to pursue a legal career, may not appreciate that at least some aspects of their ethical and professional conduct, such as plagiarism, are not under scrutiny from the time of admission to the profession, but rather from the time of admission to law school.

Third, the amount of time dedicated to the study of ethical issues is very limited: generally just one semester. This is particularly detrimental to students who do not intend to pursue a legal career, because, unlike students who are required to undertake Practical Legal Training, they may not receive further education in this subject area. As mentioned above, the Practical Legal Training can be completed either by undertaking a traineeship with a firm (which lasts one year)¹⁶ or undertaking a course (which lasts approximately 30 weeks).¹⁷ As the Practical Legal Training option allows students to be admitted to the profession in almost half the time of a traineeship, there is little wonder that students increasingly choose this option. The choice of program may well have implications for the readiness and ability of law students to effectively resolve practical and ethical dilemmas that commonly arise in practice. This is not because one program is superior to the other, but because, as a matter of practicality, by virtue of its length and nature, the traineeship program allows students to be exposed to a larger number of circumstances arising

¹³ The College of Law, *Practical Legal Training Programs* (2012) <<http://www.collaw.edu.au/shop/practical-legal-training>>.

¹⁴ For example, *Legal Profession Uniform Admission Rules 2015* (NSW) r 6(2)(b); *Supreme Court (Admission) Rules 2004* (Qld) r 9G; *Legal Practitioners Education and Admission Council 2004* (SA) r 2.4(c); *Legal Profession Uniform Admission Rules 2015* (Vic) r 6(2)(b).

¹⁵ Queensland Law Society, *Traineeships* (2014) <http://www.qls.com.au/For_the_profession/Your_legal_career/Studying_law/Required_study_training/Traineeships>.

¹⁶ For example, *Legal Profession Uniform Admission Rules 2015* (NSW) r 6(2)(b); *Supreme Court (Admission) Rules 2004* (Qld) r 9G; *Legal Practitioners Education and Admission Council 2004* (SA) r 2.4(c); *Legal Profession Uniform Admission Rules 2015* (Vic) r 6(2)(b).

¹⁷ Practical Legal Training courses are provided by various accredited institutions. For example, College of Law offers a course that is 30 weeks in duration; Bond University offers a PLT course which is 27 weeks in duration; and QUT offers a Practical Legal Training course which is 24 weeks in duration.

in practice, and therefore has the potential to expose students to a larger and more varied number of ethical dilemmas. To overcome this potential shortcoming of the Practical Legal Training program, legal educators have increasingly advocated two measures: first, the inclusion of practical legal skills exercises, such as negotiations and moots, as a form of assessment in various substantive law subjects throughout the law degree, and, second, the addition of an ethical dimension to most, if not all, law assessments, whether written or otherwise.¹⁸ The case for augmenting the study of ethics in law schools was put forward as far back as 1999, when the Australian Law Reform Commission recommended ‘increasing the emphasis at university law schools on teaching legal ethics and professional responsibility’.¹⁹

Fourth, the content of most current law school ethics subjects focuses primarily on the rules and regulations governing the legal profession, rather than the ethical principles and morality underpinning them. For students not intending to pursue a legal career, the knowledge acquired in such a subject would be of somewhat limited use as it is law focused, rather than equipping students with transferable skills and enabling them to apply ethical principles to an alternative professional context. However, students intending to pursue a legal career are equally disadvantaged by the current model because conduct rules, although designed to provide guidance to new practitioners, are not the definitive source of ethical obligations.²⁰ The conduct rules, if studied in isolation, give students a false sense of security in relation to their conduct obligations in practice.²¹ This is so because (1) the conduct rules apply in addition to the principles established by the common law;²² and (2) all rules, irrespective of whether their origins are statutory or common law, cannot cover all possible dilemmas or scenarios that may arise in practice because they are established in response to past conduct and mischiefs.²³ Additionally, in the practice of law, the interpretation of certain rules do not just allow for

¹⁸ Suzanne Le Mire, ‘Fortification: Lacing Skills Development with Ethical Content’ in Leon Wolff and Maria Nicolae (eds), *The First-Year Law Experience: A New Beginning* (Halstead Press, 2014) 59. See also Deborah L Rhode, ‘Ethics by the Pervasive Method’ (1992) 42 *Journal of Legal Education* 31; Suzette Barnaby, ‘Legal Ethics for the Real World: A Model for Engaging First Year Law Students’ (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 1.

¹⁹ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, AGPS (1999) 11. For additional academic literature on the advantages of providing students with extensive opportunities to consider ethical dilemmas, see Carrie Menkel-Meadow, ‘Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts’ (2001) 48 *UCLA Law Review* 1305; Mike Robertson, ‘Providing Ethics Learning Opportunities Throughout the Legal Curriculum’ (2009) 12(1) *Legal Ethics* 59; Timothy L Hall, ‘Moral Character, the Practice of Law and Legal Education’ (1990) 60 *Mississippi Law Review* 511.

²⁰ Evans, above n 2, 55.

²¹ Ibid.

²² See for example, *Australian Solicitors Conduct Rules 2012* (Qld) r 2, *Solicitors Rules 2013* (NSW) r 2.

²³ Noela L’Estrange, Chief Executive Officer for the Queensland Law Society, in a letter to the profession accompanying the introduction of the *Australian Solicitors Conduct Rules 2012*, stated that ‘[t]he ASCR cannot cover all possible dilemmas or scenarios’. Queensland Law Society, *Regulations and Rules – Australian Solicitors Conduct Rules* (2014) <http://www.qls.com.au/Knowledge_centre/Legislation_rules>.

a moral component, they require it. For example, in seeking to ascertain the requirement that a director of a company must act in the best interests of the company, an ethical component is inescapable.²⁴

III PROPOSED MODEL

A Background

In the current tertiary education climate, the role of law schools has expanded and their aim is to produce not only *good* legal practitioners, but *good* professionals, *good* citizens and ultimately *good* human beings.²⁵ James posits – and his view is echoed by the industry – that *good* lawyers are ethical lawyers.²⁶

Building on James' suggestion that good lawyers are ethical lawyer, Evans, more specifically, states that the key virtues of good lawyers are wisdom and knowledge; courage; and justice.²⁷ Evans defines wisdom as 'perspective'²⁸, which synonymously to 'standpoint' refers to the position from which something is viewed.²⁹ The role and importance of 'perspective' in the teaching and learning of ethics and morality is evidenced by recent sociological behavioural research. One example of such research was presented in October 2013 by Paul Piff on TedTalk,³⁰ where he outlined the finding of an experiment that sought to ascertain the impact of money, or more generally financial wealth, on ethical or pro social behaviour.³¹ The experiment consisted of approximately 100 pairs playing a game of Monopoly. Unbeknownst to the participants, the game was manipulated such that one player, who was selected at random by the flip of a coin, was unfairly privileged throughout the game by having more money, more opportunity to move around the board and more

²⁴ Evans, above n 2, 67 citing Trevor C Farrow, 'The Good, the Right and the Lawyer' (2012) 15(1) *Legal Ethics* 163, 170.

²⁵ See for example, Michael Hunter Schwartz, Gerald F Hess and Sophie M Sparrow, *What the Best Law Teachers Do* (Harvard University Press, 2013) 114-115 citing Beth Enos explaining her teaching philosophy.

²⁶ Nick James, 'Teaching First-year Law Students to Think Like (Good) Lawyers' in Leon Wolff and Maria Nicolae (eds), *The First-Year Law Experience: A New Beginning* (Halstead Press, 2014) 32, 33. Additionally, the legal profession, via the Australian Law Reform Commission, has called for an increase in the study of ethics and professional conduct at university law schools: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (AGPS, 1999) 11.

²⁷ Evans, above n 2, 88 citing Christopher Peterson and Martin E P Seligman, *Character Strengths and Virtues: A Handbook and Classification* (Oxford University Press, 2004).

²⁸ *Ibid.*

²⁹ *Australian Concise Oxford Dictionary* (Oxford University Press, 4th ed, 2004) 1392.

³⁰ Paul Piff is Assistant Professor in the Department of Psychology and Social Behaviour at University of California, Irvine.

³¹ Paul Piff, 'Does Money Make You Mean?' (TedTalk, 2013) <http://www.ted.com/talks/paul_piff_does_money_make_you_mean>, cited in James Bernard Murphy, 'Free Market Morals' (2014) 26 (3-4) *Free Market Morals* 348, 358. See also Paul K Piff et al, 'Higher Social Class Predicts Increased Unethical Behavior' (2012) 109(11) *PNAS* 4086; Paul K Piff, 'Wealth and the Inflated Self: Class, Entitlement and Narcissism' (2014) 40(1) *Personality and Social Psychology Bulletin* 34.

access to resources. The study sought to ascertain how the experience of being a privileged player changed the way that player thought about himself/herself and regarded the other player (the poor player). The study found that the privileged players were more likely to be more inconsiderate of the poorer players' feelings and to attribute their success to their own skill and strategy rather than chance.³² The results of this experiment are consistent with other studies indicating that upper class (or privileged) individuals are more likely to behave more unethically 'in both naturalistic and laboratory settings', and are more likely to moralise greed and the pursuit of self-interest.³³

More generally, however, the findings of the experiment are illustrative of 'self-serving bias', a psychological tendency to interpret events and circumstances in a way that tends to favour the interpreter.³⁴ Within the context of legal practice – in part due to the adversarial nature of legal proceedings that require the advocate to present to the court facts and circumstances that favour their client's version of events – zealous advocacy, aided and fuelled by self-serving bias, is expected and praised.³⁵ However, Evans cautions that, although role morality may be useful in the context of criminal law (where the advocate represents and protects the rights of the client against an all-powerful State), in matters resting primarily in contractual or transactional relationships such as most commercial transactions, general morality (also known as virtue ethics, as opposed ethics of duty or role morality) is required because the participants in the transaction are more interdependent and the best outcome results from cooperation rather than strict competition.³⁶

The Monopoly game experiment evidenced the prevalence and the ease with which 'self-serving bias' affects participants. The authors also wished to ascertain whether ethical behaviour (in this case what Evans refers to as role morality), once learned, is static or can be relearned. More specifically, they wished to test whether the behaviour of the privileged players, which was seen to be self-serving and unethical, could be modified. To do so, at the conclusion of the experiment, the privileged players were shown a video with a different view point on wealth distribution, namely the experience of those members of society who suffer due to an unequal and unfair distribution of resources and wealth. Once the video was viewed and the players were shown the benefits of cooperation and the advantages of community, the opportunistic behaviour of the players became more congruent with pro social or ethical behaviour,³⁷ or what Evans called 'general morality'.

³² Ibid.

³³ Piff et al, 'Higher Social Class Predicts Increased Unethical Behavior', above n 31, 4088.

³⁴ Daniel Chandler and Rod Munday, *A Dictionary of Media and Communication* (Oxford University Press, 2011).

³⁵ Evans, above n 2, 7.

³⁶ Ibid 93.

³⁷ Piff, 'Does Money Make You Mean?', above n 31.

B Implementation

Any discussion about how to teach ethics or principles of general morality must, by necessity, consider first what constitutes ‘ethics’ and the more narrow concept of ‘professional ethics’, and second how such principles are learned. ‘Professional ethics’ are codes and guidelines that embody the application of principles of general morality and ethical conduct to the specific contexts of professional relationships.³⁸ ‘Ethics’ is the study not just of morality and moral systems but their incorporation and application to every day contexts and circumstances.³⁹

This article posits that human beings learn ethics and moral behaviour through experience. As Maharg noted ‘[i]t is, after all, not in the statement of qualities *per se* that ethical behaviour is tested, but in the clash and dissonance of one quality against another.’⁴⁰ Put simply, principles of ethics cannot be learned and internalised through theoretical study, but rather in the midst of the messiness, conflict and complexity of life itself.

The findings of the Monopoly game experiment indicate that perspective is not only a powerful tool in changing unethical or anti-social behaviour, but also an expedient one. This article proposes that the benefits of increased perspective demonstrated by the Monopoly game experiment could be transposed into the legal education context. The remainder of this article will explore possible methods for incorporating increased ethical perspective into legal education.

One option is to teach students ethical behaviour in more traditional ways, for example, through the use of literature or popular culture. Literature and its characters allow readers to insert themselves into the story, to become the characters they read about, ‘to insert [themselves] into another (albeit fictional) person’s mind and hear their thoughts’.⁴¹ The advantage of literature, whether fiction or nonfiction, is its ability to expose students to situations and circumstances they may not be able to experience themselves. For example, very few people could *experience* being stranded on a desert island as in *Robinson Crusoe*,⁴² or act as a criminal lawyer in the 1930s southern USA defending a black man accused of rape as in *To Kill a Mockingbird*,⁴³ or live through the Civil War in USA as in *Gone with the Wind*.⁴⁴ In essence, literature exposes students to the unique perspectives of a myriad of characters and in doing so, allows students to have a more well-rounded view of themselves and

³⁸ Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 2nd ed, 2005).

³⁹ Evans, above n 2, 62.

⁴⁰ Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (Ashgate, 2007) 116.

⁴¹ Ian Gallacher, ‘Thinking Like Nonlawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance’ (2011) 8 *JALWD* 109, 144. See also, Jill Hunter, ‘Killing a Mockingbird? Popular Culture, Imagination and Reflection’ in Leon Wolff and Maria Nicolae (eds), *The First-Year Law Experience: A New Beginning* (Halstead Press, 2014) 46.

⁴² Daniel Defoe, *Robinson Crusoe* (Easton Press, 1976).

⁴³ Harper Lee, *To Kill a Mockingbird* (Warner Books, 1960).

⁴⁴ Margaret Mitchell, *Gone with the Wind* (Macmillan , 1936)

the world around them. However, a study in America undertaken at the beginning of the new millennium indicated that less than half of the adult American population read literature.⁴⁵ It is noted that the decline in literary reading mirrors a decline in empathy found in American college students, with the contemporary student cohort scoring forty percent lower in empathy than their counterparts two to three decades ago.⁴⁶ Although the study was undertaken in the American context, its results are relevant to the Australian jurisdiction: a survey undertaken in 2005 indicated that the amount of time spent reading by the Australian population was similar to that of the US population. Specifically, the mean amount of time per week spent reading in the US was 5.7 hours and in Australia was 6.3 hours. (The highest mean was observed in India at 10.7 hours per week, and the lowest was observed in Korea at 3.1 hours per week.)⁴⁷

Ethical behaviour can also be taught using examples from popular culture. Movies and television are laden with examples of legal and courtroom dramas, e.g. *Damages*, *Ally McBeal*, *Law and Order*, *Suits*, *The Good Wife*, *Boston Legal*, *The Practice*, *JAG*, *The Firm* and *Harry's Law*, *Philadelphia*, *Erin Brockovich*, *The Verdict*, *A Few Good Men*, *Primal Fear*, *The Client*, *Dead Man Walking*, *Double Jeopardy* and *Judgement at Nuremberg*. The advantage of employing popular culture in the teaching of ethics is that students will be familiar with the characters and stories and will therefore be able to relate to them. The disadvantage in using popular culture examples rests in the stories' very setting. The great majority of popular TV series and movies are set in a foreign jurisdiction and, therefore, some of the matters espoused will not be applicable within the Australian jurisdiction. This is because, at the same time that morality underpins and forms conduct rules, the reverse is equally true. Even when set within the Australian jurisdiction – e.g. *Underbelly*, *Rake* and *Prisoner* – the motivation of the producers of these shows is increased ratings rather than education, so their value within the classroom is limited as they transmit an unrealistic, and even false, image of the legal profession and its key actors.

Another option, and this article suggests it is a better option, is to teach ethical behaviour using experiential learning methods, by exposing students to ethical dilemmas that commonly arise in the legal profession and allowing them the opportunity to resolve these dilemmas as part of a larger assessment piece. This assessment method is primarily based on the principle that assessment is part of learning. It is an opportunity for students to continue their learning as opposed to an opportunity to simply test and outline the knowledge already acquired. In its execution, this method provides students with an experience that is as close as possible to

⁴⁵ Gallacher, above n 21, 145.

⁴⁶ *Ibid.*

⁴⁷ NOP World, *NOP World Culture Score™ Index Examines Global Media Habits ... Uncovers Who's Turning In, Logging On and Hitting the Books* (15 June 2005) PR Newswire <<http://www.prnewswire.com/news-releases/nop-world-culture-scoretm-index-examines-global-media-habits-uncovers-whos-tuning-in-logging-on-and-hitting-the-books-54693752.html>>.

the traineeship experience: the perspective of the legal practitioner specifically, or of the professional more generally.

In their book, *What the Best Law Teachers Do*, Schwartz, Hess and Sparrow explain that one of the common practices among all twenty-six 'best' law teachers they studied was that they strove to provide students with connections between the subject material and their application in practice in order to make the experience as realistic as possible.⁴⁸ These law teachers were also more inclined to use active learning techniques, such as simulations, because students were shown to learn best when they are actively engaged in their own learning,⁴⁹ and when they regard the exercises as relevant to their learning and future careers.⁵⁰ As one of the teachers interviewed in *What the Best Law Teachers Do* explained: 'Students learn what they are motivated to learn ... And they're learning because they care deeply about something ... How [much] they learn is really connected to why they're learning.'⁵¹

Practical simulations can be incorporated into all substantive law subjects with varying degrees of complexity to facilitate student engagement and, ultimately, student learning. By way of example, in a subject such as *White Collar Crime* or *Corporate Law*, an assessment scenario could be created involving a dispute between the Australian Securities and Investment Commission ('ASIC') (the regulator), an errant director, shareholders and/or company creditors. Students would then be placed in groups of three to four students and asked to provide advice to their respective clients, or further represent the clients in various circumstances such as negotiations or preparation of court documents. In the course of bringing the legal matter to a conclusion, the groups would necessarily need to communicate and engage with the opposing side. It is this very interaction that would provide the opportunity for ethical dilemmas to arise and for students to seek to address them. In doing so, each group would attain the perspective of that particular stakeholder and primarily engage in what Evans describes as 'role morality.' To overcome this shortcoming and encourage the transition from role morality to general morality, at the end of the learning activity, the different groups would engage in a joint debriefing. During the debriefing session, students would discuss their respective experiences and provide each other with the perspective of their particular clients. This part of the learning exercise would provide students with the opportunity to view a complex legal problem from a variety of perspectives and obtain a better understanding of the role of law and its continual attempt to balance rights and liabilities of various stakeholders, with the subject co-ordinator providing structure and context to the experience.⁵² This would allow the students to outline and contextualise the lessons learned and their applicability to their future professional lives, while at the same time providing the subject co-ordinator the opportunity

⁴⁸ Schwartz, Hess and Sparrow, above n 25, 200.

⁴⁹ Ibid 211. See also Roy Stuckey et al, *Best Practice for Legal Education: A Vision and a Road Map* (Clinical Legal Education Association, 2007) 143.

⁵⁰ Ibid 194.

⁵¹ Ibid.

⁵² Ibid, 187.

to ensure that the issues arising from the scenario, whether legal or ethical, were appropriately resolved and/or understood.

The number of students per team may well vary with the overall number of students in the particular subject and the complexity of the scenario itself.⁵³ However, the teams should not be too large: the greater the number of students per team, the more unwieldy the team becomes, and, in a large team, it may be easier for some members to do less work by simply passing it on to the other members of the team.⁵⁴ Teams that are too small present a different challenge. One of the aims of the assessment exercise is to encourage students to work collaboratively, and for the experience to be rich in its lessons. Groups of only two students would lack the complexity of human interaction that normally exists in real life scenarios and that are more likely to give rise to personality conflicts and professional discontent. As such, larger groups would be better suited to present students with intra-group dynamics likely to give rise to conflict and to require the students to manage such practical considerations and further develop their interpersonal skills. Groups of three to four students have been found to be optimal for learning.⁵⁵ Groups of more than six students have been found not to positively contribute to student learning.⁵⁶

Although the scenario used as an example is in the context of corporate law, similar scenarios can be incorporated in other substantive law subjects. For example, in criminal law the parties may be the Crown, the defendant and the victim; in tort law the parties may be the plaintiff, the defendant and the insurance company or an industry body such as the Australian Medical Association; and in consumer law the parties may be the plaintiff, the defendant and the Australian Competition and Consumer Commission.

C Advantages

1 Students

The role of the law school and legal education is an expansive and pervasive one. According to Vines, in addition to producing good legal practitioners, it is well within the scope of law schools to develop resilient

⁵³ Sumangala P Rao, Heidi L Collins and Stephen E DiCarlo, 'Collaborative Testing Enhances Student Learning' (2002) 26(1) *Advances in Psychology Education* 37, 41. The authors suggest that for small cohorts, groups of two to three students would be most appropriate, while for large cohorts, groups of three to four students would be most beneficial to learning. Robyn M Gillies, *Cooperative Learning: Integrating Theory and Practice* (Sage Publications, 2007) 7 also indicated that the optimal size for learning was three to four students per group, with research finding that students in larger groups of between six and ten members performed no better than if the students were placed in no groups at all.

⁵⁴ Gillies, above n 53, 7.

⁵⁵ Rao, Collins and DiCarlo, above n 53, 41; B Dick et al, 'A Case Study of the "Offices" Project (Teacher-Less, Cooperative Learning Groups) at Griffith University: Implementing Educational Theory' (1993) 4 *Legal Education Review* 273, 293.

⁵⁶ Gillies, above n 53, 7; Dick et al, above n 55, 293.

practitioners.⁵⁷ Vines referred to the 2009 Brain & Mind Institute survey of over 700 law students, 900 solicitors and 700 barristers that showed that over 35% of law students, 30% solicitors and 20% barristers had levels of depression that were regarded as disabling. She also referred to additional literature that reveals no significant psychological differences between law students, who begin to experience depressive symptoms within six to twelve months of commencing their legal studies, and the general population. She concluded that this suggests that the law school environment itself contributes to the likelihood of depression and other mental illness.⁵⁸ Contributing factors include lack of social connectedness and lack of preparedness and practice in contending with ethical crises.⁵⁹

Similarly, Evans suggests that the general unhappiness and the depression experienced by members of the legal profession are connected to their commitment to role morality and a lack of understanding and implementation of general morality in practice.⁶⁰ Evans maintains that the exploration of ethical principles and their incorporation into practical contexts must start in law school and must be pervasively present in all aspects of legal pedagogy.⁶¹

The experiential assessment method proposed by this article is likely to effectively address these factors. Although law students have been shown to dislike group work,⁶² working in groups promotes social connectedness and contributes to the development of interpersonal skills, both of which are important in practice. More than 600 studies conducted over the past 100 years have consistently demonstrated that co-operative learning produces higher achievement, more positive relationships among students and more psychologically resilient individuals than competitive or individualistic learning models.⁶³ Professional careers, whether in law or other disciplines, require practitioners to interact with other individuals ranging from clients to other practitioners and management executives, and this, in turn, calls for advanced interpersonal skills, as the object of interaction will vary with the individual subject to it.

Those students who choose to attend law school for reasons that are intrinsic, rather than extrinsic to them, are more likely to do so because of a desire to fight for justice and to help others.⁶⁴ These are the students most likely to be affected by ethical dilemmas. In providing students with practical, realistic exercises where they are faced with circumstances giving rise to such dilemmas, students are given the opportunity to

⁵⁷ Prue Vines, 'Working towards the Resilient Lawyer: Early Law School Strategies' in Leon Wolff and Maria Nicolae (eds), *The First-Year Law Experience: A New Beginning* (Halstead Press, 2014) 83, 83.

⁵⁸ Ibid 84.

⁵⁹ Ibid 89.

⁶⁰ Evans, above n 2, 87.

⁶¹ Ibid 207.

⁶² Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3, 21.

⁶³ Stuckey et al, above n 49, 119-120.

⁶⁴ Vines, above n 57, 92.

develop skills to manage such circumstances.⁶⁵ Practice in managing such circumstances increases student resilience.

2 Academic Staff and the Legal Profession

The primary advantages of the experiential assessment model to the academic staff arise from its flexibility, realism and promotion of a deep approach to learning. By its very design, this assessment model requires students to consider multiple, at times competing, factors in answering the assessment question. For example, in regards to the ASIC example, the decision to pursue a matter against an errant director depends not only on the alleged act, the subject of the proposed proceedings, but also on the strength of the evidence, the costs of proceedings and the prospects of success. The learning of ethics, or more precisely the experience of the interaction between morality and legal practice, is facilitated by the very clash and dissonance between the obligations of the different parties to the matter and the outcomes sought by each.⁶⁶

Effective legal practitioners must be more than just consumers of legal knowledge, they must play an active role in assessing and developing the current legal infrastructure.⁶⁷ In truth, the same can be said of all citizens in a representative, democratic system. The assessment scenario can be structured to accommodate and encourage such considerations, and to promote students' critical thinking.

Finally, the implementation of experiential approaches to assessment in most, if not all, law subjects has significant advantages for the legal profession itself: practitioners entering the profession are more likely to be well-rounded, with a better understanding of the realities of practice, the methodologies of dispute resolution, and ethical and professional conduct.

IV CONCLUSION

The role of the law school is an expansive one, due in part to the heterogeneity of the student cohort in terms of both background and career goals. Increasingly, the role of the law school is to produce, not only good legal practitioners, but also ethical and resilient ones who are consummate professionals.

This article posits that the current pedagogy of ethics in most Australian universities is inadequate – in relation to both method and content – in addressing the needs of those students who seek to pursue a future legal career and those who wish to utilise their law degree in other professional contexts. This article has proposed that ethical and professional considerations are best learned using experiential learning exercises that are complex and realistic. This is because ethical behaviour is learned and understood, not in the statement of principles themselves, but in the experience of the clash and dissonance of one principle pitted

⁶⁵ Ibid.

⁶⁶ Maharg, above n 40, 116.

⁶⁷ Schwartz, Hess and Sparrow, above n 25, 288-289.

against another. Participation in assessment exercises such as those proposed by this article, where students work as part of a team, provide students with the opportunity to view a legal dispute from the perspective of the legal practitioner, the client, the opposing side and the legal institutions entrusted with the production and administration of legal rules and infrastructure. It is in the opportunity to observe and experience the different perspectives themselves that ethical and professional conduct is learned.

One of the key benefits of the pedagogical methodology outlined in this article is its ability to teach students to identify not only the legal professional rules of conduct, but also the ethical and moral considerations underpinning and supporting the current regulatory framework. This benefits not only future legal practitioners, but all future professionals.