RENEWING A FOCUS ON ETHICS IN LEGAL EDUCATION?

Michael Robertson

Introduction

In his background paper to the conference, Jack Goldring asks why it is that Governments are trying to reduce the role of law and lawyers in society. Assuming that the premise is correct, part of the answer to this rather difficult question may well have something to do with the way in which lawyers are perceived within the broader community. Indeed, as some of the earlier sessions in this conference have indicated, at least some lawyers are perceived by parts of the community, at least some of the time, to be socially dysfunctional. This is based, it would appear, on the perception that many lawyers apparently choose to represent the interests of unpopular clients rather than those thought to be more worthy recipients of legal services; and also that they represent them in ways thought contrary to community interests. As to which clients are regarded as unpopular, and by whom, this will vary, but reservations about lawyers’ roles in advancing unpopular causes will persist.

Questions for lawyers about which clients to represent, and in what manner to represent them, go right to the heart of what we loosely refer to as “legal ethics”. Making decisions about the “who” and the “how” inevitably involve ethical considerations. Some of these decisions may well be constrained by the rules of legal professional responsibility. These rules are commonly described by reference to well known duties such as those requiring that the practitioner’s highest responsibility is to the court, protecting the integrity of evidence, avoiding conflict of interest, and maintaining privilege, to name but a few. But much ethical decision-making in the legal professional role, it can be argued, is not constrained by clear, comprehensive and unambiguous rules, which means that there is far more to being an ethical lawyer than being able to identify and apply the rules of professional responsibility.

The premise underlying this short presentation is that being an ethical lawyer involves much more than being familiar with the rules of professional responsibility, and that ethical decision-making is critical to good lawyering, although it is immediately conceded that both “ethical decision-making” and “good lawyering” are challenging concepts. I will offer, below, some perspectives on the meaning of the former (at least from a student learning perspective) but only by implication the latter. The main argument of this paper is simply that ethical decision-making (and therefore good lawyering) must become a far greater part of the project of legal education than is presently the case; and that if there is any prospect of making this a reality, we need to set our student learning objectives in “ethics” much more clearly and ambitiously than we have hitherto been willing to do.

1 BA, LLB, LLM, PhD, Grad Cert Higher Ed; Associate Professor, Griffith Law School.
2 Extreme examples of effective but unpopular lawyering are not difficult to find, such as in cases involving the tobacco industry and other segments of corporate Australia. Other examples, from a “law and order” perspective, include representation of illegal immigrants and others deemed unworthy of full access to the court system.
Before turning to this argument, and given the theme of this conference, it is relevant to make a few observations about lawyers and social change. Whether “good lawyering” necessarily contributes to, or results in, social change is difficult to determine. While there is some empirical evidence to suggest that zealous advocacy (performed strictly within the ethical rules, presumably) sometimes brings about welcome social changes (for some), there is probably also ample evidence to show that the opposite is often true: that being a good, ethical lawyer may contribute to solid and lasting defences of the status quo. We need therefore to acknowledge that lawyers being lawyers might just as easily frustrate social change if it is in their clients’ interests to do so. Such is the price we pay for partisan, zealous advocacy, with its attendant absolution from moral responsibility. And even where lawyers’ work does bring about change, it is surely not necessarily true that this is inevitably the result of good lawyering. Might not bad lawyers also achieve good social change outcomes? We might conclude, therefore, that behaving “ethically” – in the sense of being a partisan and effective representative who is not expected to judge the client’s cause – may have very little, or nothing, to do with being an advocate for and agent of social change. But it surely has everything to do with being a good lawyer.

“Ethics” in legal education

It is fair to say that “ethics” learning does not generally have an impressive track record in legal education. In Australia, the recent AUTC Report provides an account of law schools’ commitments to ethics learning that is best described as patchy. It is obvious that some law schools take their responsibilities in this area far more seriously than others, but overall there is no sustained or coherent emphasis on student learning in ethics. The immediate reason may not be that difficult to find. As a matter of fact, the Priestly requirements on ethics seem meagre and, taken at face value, they are quite easily discharged. A single subject on professional responsibility, which includes “coverage” of rules such as those to which I have already referred, easily suffices.

In the United States, where a commitment to ethics learning arose in the wake of Watergate, one might expect to find a far richer and more impressive record of ethics learning achievement in law school education. However, in an assessment late last year, a prominent scholar in the area observed that

the current state of professional ethics instruction leaves much to be desired. In most law schools it is relegated to a single required course that ranks low on the academic pecking order. Many of these courses…constitute the functional equivalent of ‘legal ethics without the ethics’, and leave future practitioners without the foundations for reflective judgment.

4 This is often referred to as the “standard conception” of legal ethics. See, for example, W. Simon (1978) “The Ideology of the Adversary System: Procedural Justice and Professional Ethics” Wisconsin LR 29.
6 The requirements are stated in terms of knowledge of professional responsibility rules.
7 D. Rhode (2003) “If Integrity is the Answer, What is the Question?” 72 Fordham Law Review 333 at 340.
Before making some suggestions about a renewed focus on ethics in legal education, it will be helpful to outline a conceptual framework of what “ethics” in legal education might mean. At the expense of some over-simplification, it is possible to identify three more or less distinct approaches in answer to the question “what should law students be encouraged to learn about in legal ethics in the law curriculum”? These three approaches are summarised below. The first approach is the narrowest, the second broader (incorporating the first), and the third (which contains the core elements of the first two) is the broadest.

**The ‘knowledge of professional rules’ approach**
- The minimalist option
- Expresses, meets ‘Priestley’ requirement
- Typically involves a stand-alone ‘practice’ subject
- Limited or no attention to ethical issues elsewhere in curriculum
- Emphasis on professional responsibility rules (to court, client and colleague)
- Involves teaching (more ‘black letter’) rules and their application
- Ethics is not seen as a faculty-wide concern or responsibility
- Relatively cheap in school budgetary terms
- But is it ‘Ethics without the ethics’?
- Typifies approach in US and Australian law schools?

**The ‘ethical dilemma’ approach**
- Most comprehensively articulated in McCrate Report in the United States
- ‘competent, ethical practice requires more than just knowledge of the applicable rules and principles of professional responsibility’ (McCrate)
- Emphasis on acquiring skills in (1) recognising and (2) resolving ethical dilemmas
- Mainly, involves application of lawyers’ responsibility rules to meet professional standards
- Emphasis on lawyers’ unique connection with ethical behaviour
- Not necessarily a curriculum-wide approach
- Clinical courses are seen to be ideally suited to provide students with opportunities to confront and engage with ethical dilemmas
- While emphasis placed on professional responsibility rules, recognises that they may have limitations in resolving ethical dilemmas

**The ‘judgment’ approach**
- The broadest conception
- Highlights importance of practitioners’ discretionary role
- The need to make choices, many of which raise ethical or moral questions, is inevitably part of legal practice (or allied areas of professional activity)

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8 A phrase used by Deborah Rhode in a number of articles that draw attention to the shortcomings of teaching about professional responsibility rules alone. One of the shortcomings is that ethics learning is seen as an exercise in getting to know about the content and scope of professional responsibility rules, as if these provide clear and comprehensive guidance on the ethical issues faced by lawyers. See for example, D. Rhode (1995) ‘Into the Valley of Ethics: Professional Responsibility and Educational Reform’ 58 Law and Contemporary Problems 139.

This approach also emphasises the process of decision-making when faced with quandaries.

Students need to develop competencies in the exercise of ethical judgment (a learning objective that is not presently stressed in legal education).

But it is should not be the aim of legal educators to teach students ‘right’ from ‘wrong’.

Lawyers’ professional responsibility rules are important, but they are an incomplete guide to ethical decision-making.

Legal ethics and personal morality are not mutually exclusive.

Practitioners need to develop, not inhibit, their own sense of morality.

Ethical questions arise in every subject, and a failure to acknowledge this is an omission.

Talking and learning about ethical judgment needs to be embedded as broadly as possible across the curriculum.

A renewed focus?

A renewed focus on ethics in legal education in Australian law schools should embrace the third conception outlined above. What this requires is that students must be encouraged to learn that discretion is an inevitable and regular feature of the practitioner’s role, and learn to develop a deeper appreciation of the practitioner’s responsibility to make difficult ethical choices in a variety of situations. It also means that students must learn to develop a capacity to exercise careful judgment when called upon to do so, and that reflective deliberation and justification for choices is itself a key professional attribute (perhaps, the lawyers’ “super skill”?). While it is not possible, here, to explore the implications of this in much detail, I will offer some observations and attempt an initial, although limited, justification for the argument.

First, a few comments about what might be better avoided if we are to be serious about developing students’ capacities for ethical decision-making. The first conception outlined above, which might be referred to as the Priestly approach, is inadequate for the many reasons that have already been comprehensively demonstrated in the literature. One reason is that it tends to preserve if not reinforce the common mindset that ethics learning can be confined to a single subject in the curriculum, thereby denying the relevance of ethical decision-making in other parts of the curriculum. Such an approach also tends to portray “ethics” merely as knowledge of professional responsibility rules that can be learned and applied like other “black-letter” principles, as if they provide complete or sufficient guidance for the would-be ethical practitioner – which they do not.

The second approach outlined above involves a substantial shift in emphasis, positing “ethics” as some kind of skill involving both the recognition of and ability to resolve ethical dilemmas that are likely to arise in practice. Although this approach appropriately focuses on the decision-maker’s response in moments of ethical quandary (and therefore opens the door to a more sustained exploration of what it means to exercise sound judgment as a practitioner) the weaker version tends to

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10 See for example A. Hutchinson (1999) Legal Ethics and Professional Responsibility, Irwin Law, especially chapters 3, 4 and 11, for a more detailed account of the kind of approach being advocated here.


12 This might also be described as a shift from purely declarative to “functioning” knowledge; J. Biggs Teaching for Quality Learning at University SRHE and Open University Press at 40-42.
emphasise ethics as some kind of technical, marketplace competency that can be taught and learned alongside other skills like legal research, analysis, advocacy and interviewing. Although ethical decision-making does denote a competency of sorts, it surely involves profoundly more than an “attribute” that can be effectively mastered as part of a “skills programme”. Perhaps the point to be made here is that a narrow, skills approach to ethics learning, which is allocated a limited place in a crowded skills program, runs the risk of understating and undervaluing what is arguably the most important subject in the curriculum.

What seems to be missing in Australian legal education, judging by the findings of the AUTC Report, is a commonly understood and clearly articulated set of curriculum-wide ethics learning objectives that attempt to take students beyond both the narrow focus of the Priestly requirements and the restricting (but growing?) emphasis on ethics as a marketplace skill.

The third conception outlined above is referred to as the “judgment” approach. At its core is an acceptance of the view that lawyers are constantly required to make choices in the work that they do for their clients and that much decision-making inevitably calls for consideration of ethical standards – and not merely those expressed in professional responsibility rules. Therefore, to express it in another way, this conception rests upon a claim about the incidence of practitioner discretion that is susceptible to empirical inquiry. At the core of the third conception is also a belief that the incidence of practitioner discretion, together with its implications for good lawyering, should be examined and learned about in law school education. Presently, legal education, at least in Australia, tends not to articulate “judgment” in the practitioner’s role as a prime learning objective.

The tradition of contemporary legal education has not been, for whatever reason, to focus on practitioner discretion, despite a common preoccupation with the discretionary activities of other officials of the law, and judges in particular. As Luban and Millemann have noted, legal academia has a “passionate interest in The Law and in judges” yet it is “surprisingly uninterested in lawyers [themselves]…”. They go on to suggest that “this skewed interest reflects a fundamental misunderstanding of the legal system, because the overwhelming preponderance of legally significant decisions are made by lawyers, not judges, legislators or theorists; and the overwhelming preponderance of lawyer decisions will never be reviewed or even perceived by any other official.”

These decisions have everything to do with the essential questions referred to above, such as whom to represent, under what circumstances, and how represent each client – every step along the way, in relation to every court, opponent, and colleague over a lifetime of legal practice. Substantial discretion, it has been suggested, results from

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14 On the view that ethics is the most important component of the law degree, see J Moliterno (2001) “Experience and Legal Ethics Teaching” 12 Legal Education Review 3 at 9.
15 It is accepted that there are exceptions to this tendency. See, for example, C. Parker (2001) ‘What Do They Learn When They Learn Legal Ethics?’ 12 Legal Education Review 175. The claim is one about a failing in legal education generally.
the “indeterminacy” of lawyer’s roles and the fact that legal practice is constituted out of “many small judgments”.\textsuperscript{17} Much of this discretionary activity can be described as the art or practice of making sensible choices, or simply the art of good judgment.\textsuperscript{18} Weighing competing considerations in routine, mundane spaces, and less frequently in not very commonplace situations, and exercising judgment on all these matters, is inevitably part of the life of a practitioner.\textsuperscript{19} Yet we tend to convey the sense, quite wrongly, that “ethical” decision-making properly speaking is not something that is routinely faced by legal practitioners,\textsuperscript{20} and therefore it does not really warrant more than limited (and frequently discrete) study in the curriculum.

The argument is that we need to talk more in the curriculum about the fact that lawyers have choices, that discretionary activity is routine but constrained by infinitely variable circumstances, and that professional rules are an inadequate guide to the resolution of ethical dilemmas. We need to encourage our students to learn that lawyers need constantly to make judgment calls that often involve personal choices, which means that the role of personal values in the professional role need to be emphasised rather than suppressed.

How might all this be expressed as desirable learning outcomes in a curriculum committed to the judgment approach? Here are some possibilities, ambitious as they are:

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By the time they graduate, law students will \\
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\item have developed an understanding of the inevitable need for practitioners to exercise discretion in their professional roles, together with an understanding of the situational constraints that may have a bearing on ethical decision-making;
\item be able to recognise their consequent responsibility to exercise careful judgment in all situations calling for deliberation and choice, in the interests of their clients, the administration of justice, the community, and themselves;
\item have developed their abilities to exercise careful deliberation and sound judgment in their professional roles;
\item have learned to recognise and to evaluate the potential consequences of their ethical decision-making, whether these consequences be to themselves, clients, courts, colleagues, or the wider community;
\item have developed an appreciation for the need to be able to justify choices that are consistent with the norms and values of the lawyer’s role, social justice values, and with their own personal values;
\item have developed a theoretical perspective on (1) the notion of professional responsibility in contemporary society and on (2) the nature and meaning of judgment in the lawyer’s role.
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\textsuperscript{20} See, for example, C. Parker (2001) “What Do They Learn When They Learn Legal Ethics?” 12 \textit{Legal Education Review} 175 at 191: in this account of teaching and learning in a specific course, students learn 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”.

It goes without saying that subject learning objectives need to fit with the curriculum ones, and teaching methods and assessment need to be in alignment with the learning outcomes designed in each subject.

A possible operational model for these desired learning outcomes is to conceive of ethics learning as part of a “vertical subject” throughout the curriculum.21 In other words, whereas subjects ordinarily span a semester, or a full year in some cases, they are confined to a single year within the program, which may itself span three or five years depending on the degree structure. The vertical subject progresses throughout the program in a carefully structured way. It intersects with, or resides within, various subjects in each year of the program. What this conception allows, amongst other things, is the formulation of ethics learning objectives that are developed incrementally throughout the degree. Points of intersection with core subject areas are determined by the relevance of, for example, professional responsibility rules to the subject area concerned.

No doubt there are many challenges implicit in both the substance and method of this approach. Some are entirely predictable.22 But, in conclusion, remarks might be made about just one aspect of what is being advocated. It concerns the need for a willingness to explore other disciplines and literatures as part of a commitment to having students learn about a broader conception of ethical responsibility. As has recently been argued, legal education has tended to exhibit a casual indifference to the learning of other disciplines, even when much is to be gained from interdisciplinary study. In the context of learning about ethics, it is important to recognise that integrity dilemmas are just as much part of other professions, which are also “forced to use moral reasoning and judgment to resolve ethical issues”. To ignore valuable and relevant insights from other disciplines that might assist in developing our understandings of ethical reasoning in the legal professional role amounts, it is argued, to a “disservice” to our students.23

A similar point concerns the relevance, to our understanding of the extent of choice in lawyering, of a literature closer to home, so as to speak. Given that “thirty years” has symbolic significance for this conference, it seems apposite to point out that exactly thirty years’ ago Douglas Rosenthal published a now-famous book about clients and lawyers.24 It was an empirical study that can be seen to have marked the beginning of a very substantial empirical and sociological literature on the work of lawyers and their relationships with clients, courts, colleagues, and the community. And what, one might ask, has this to do with ethics? The short answer is that a significant underlying theme of much of this literature concerns the inevitably of decision-making by lawyers in matters involving choices about clients, together with the manner in which they might be represented, in a variety of practice settings.25 If ever we needed

21 This is the approach currently being considered in the Griffith Law School. I wish to acknowledge the input of colleagues, such as Professor Richard Johnstone, in developing this notion as part of curriculum review at Griffith.
22 Such as resistance from students and possibly reluctant staff too.
convincing that lawyering is not merely about technical legal knowledge together with competencies in certain skills, but is also routinely about making all sorts of choices that often require consideration of what is justifiable or not according to ethical considerations, this literature makes such a case.