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Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective

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"[T]he 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, which focus primarily (and uncritically) on bar disciplinary rules, constitute the functional equivalent of 'legal ethics without the ethics', and leave future practitioners without the foundations for reflective judgment. Although ethical issues arise in every subject, that would not be apparent from the core curriculum . . ."[1]

Introduction

Legal educators who engage in curriculum or subject design in legal ethics are confronted by many challenges.[2] One concerns the need to be clear about what is meant by "legal ethics" in the curriculum. What is it that we wish our students to learn, and what is the *quality* of learning we require, when we express a commitment to teaching "legal ethics"? This is a challenge at least because, within the relevant scholarship, there are competing views about the nature and purpose of legal ethics in legal education. A second but allied difficulty concerns the question of how to create a learning system that can support the kind and quality of learning that has been deemed important.

This article, in assuming that learning in legal ethics is a necessary part of law school education,[3] relies largely on aspects of the work of John Biggs[4] to show how educational

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[1] D. Rhode, "If Integrity is the Answer, What is the Question?" (2003) 72 *Fordham Law Review* 333, 340, commenting on American law school education.

[2] Ethics teaching in law school is challenging for many other reasons that may have little to do with the matters raised in this article; see, for example, D. Luban and M. Millemann, "Good Judgment: Ethics Teaching in Dark Times" (1995) 9 *Georgetown Journal of Legal Ethics* 31; Rhode, *ibid*; K. Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998), Part 2, and especially H. Arthurs, "Why Canadian Law Schools Don't Teach Legal Ethics" 105 and A. Goldsmith and G Powles, "Lawyers Behaving Badly. Where Now in Legal Education for Acting Responsibly?" 169; A. Evans, "Lawyers' Perceptions of their Values: An Empirical Assessment of Monash University Graduates in Law, 1980–1998" (2001) 12 *Legal Education Review* 209.

[3] It is acknowledged that this view is not universally shared. This article makes no attempt to explore the basis of this assumption. See, for example, J. Chapman, "Why Teach Legal Ethics to Undergraduates?" (2002) 5 *Legal Ethics* 68 and A. Boon, "Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus" (2002) 5 *Legal Ethics* 34.

[4] J. Biggs, *Teaching for Quality Learning at University* (Buckingham, Open University Press, 2003), especially chapters 2 and 3. For a summary of alternative theoretical perspectives on learning goals and their application in

theory can assist in highlighting and clarifying potential difficulties in the design and implementation of ethics learning systems in the legal curriculum. More specifically, Biggs's approach illustrates the importance of formulating ethics learning objectives with particular care and of ensuring that learning activities, including assessment tasks, are aligned with the chosen learning objectives.

I begin by outlining key aspects of Biggs's learning theory, and especially the concept of "constructive alignment". Aside from emphasising the central role of learning objectives in course design, an integral part of this model of teaching concerns the meaning of learning itself. Account is therefore also taken of conceptions of understanding and knowledge that are directly relevant to the design of learning systems. After identifying a number of different approaches to legal ethics in legal education, the article explores the levels of learning implicit, if not explicit, in these approaches. On the basis of the conclusions drawn from the latter analysis, the article then considers what aligned teaching in legal ethics might mean, using each of the three approaches to legal ethics as a continuing basis for discussion. Finally, an attempt is made to establish whether quality learning in legal ethics is a realistic possibility, given the constraints previously identified. It is argued that quality student learning in legal ethics is possible and worth striving for, but it is necessary to understand the limits of what might be learned—and to work to find more effective ways to encourage the quality of learning that seems important.

An Approach to Teaching in Higher Education

Biggs's approach to teaching in higher education, which will provide the basis for the discussion and analysis that follows, is located within the constructivist tradition.[5] Constructivism, which has its roots in cognitive psychology, tends to emphasise the idea that learners create (construct) knowledge through learning activities and their approaches to learning. It denies that knowledge is "imposed or transmitted by direct instruction".[6]

Biggs's theory stresses the importance of "constructive alignment" in teaching. Teaching will be most effective when there is alignment between "what we want, how we teach and how we assess". Essentially,

> "In aligned teaching, there is a maximum consistency throughout the system. The curriculum is stated in the form of clear objectives, which state the level of understanding required rather than simply a list of topics to be covered. Teaching methods are chosen that are likely to realize those objectives . . . [S]tudents . . . do the things that the objectives nominate. Finally, the assessment tasks address the objectives, so that [the teacher] . . . can test to see if the students have learned what the

the teaching of law courses, see M.H. Schwartz, "Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching" (2001) 38 *San Diego Law Review* 347.

[5] It is acknowledged that constructivist learning theory varies according to the nature of the scholarship and that not all constructivists agree on the details of Biggs's scholarship, including his emphasis on the importance of learning objectives. Learning theories more generally are commonly grouped under labels that reflect the orientation of the scholarship, such as behavioural, cognitive and constructivist traditions in education. A fourth reflects a phenomenographic framework. It is readily acknowledged that other learning theories might also provide a basis for the kind of inquiry contained in this article.

[6] Biggs, *supra* n. 4, 12–13.

objectives state they should be learning. All components of the system address the same agenda and support each other."[7]

Central to the design of an aligned system are learning objectives. These are specific and concrete statements[8] that signal both content topics *and* the level of learning required of the student.[9] (In this context, "intended learning outcomes" or simply "learning outcomes" are meant to convey the same meaning.)[10] They are usually to be found in course (or subject) outlines, or may be expressed as curriculum objectives in faculty documentation that specifies intended graduate outcomes. Technically, they are not the same as "aims", which signal more general educational goals.[11]

It is important to emphasise, in this conception of teaching, that a learning objective "not only refers to content topics but contains a *criterion* for the level of learning required".[12] In other words, in addition to a topic or area of learning, an objective necessarily signals an expectation of what *quality* of learning is required. For example, an objective could be "to *identify* the rules of legal professional responsibility". This example contains a content topic and signals a level of understanding—contained in the verb "to identify". Verbs in objectives therefore signify the "target activities that students need to perform",[13] which is important not least because "learning and understanding come from student activity".[14] The choice of verbs in objectives, thus conceived, is therefore very important.

A verb commonly used in objectives is "to understand". However, "understand" can mean different things. In the context of legal ethics, does it mean being able to recall and recite specific rules of professional responsibility (such as those proscribing conflicts of interest), or does it signify a more sophisticated understanding—such as a capacity to apply these rules in circumstances that apparently warrant their application? Could it even mean, in addition, the development of an ability to be reflective about and critical of the rules' scope and utility, which requires an even deeper level of understanding? What these distinctions suggest is that students might achieve quite different levels of understanding in the learning process, depending upon the quality of the learning environment. It is therefore no surprise that educational theorists have expended a great deal of effort in attempting to analyse and explain them in some detail.[15] It suffices for current purposes to mention, in simplified terms, conceptions of understanding and knowledge that together will facilitate the later discussion.

[7] Biggs, *supra* n. 4, 26.

[8] P. Ramsden, *Learning to Teach in Higher Education* (London, Routledge Farmer, 2003), 126, whose scholarship is allied with the phenomenographic tradition.

[9] Biggs, *supra* n. 4, 43, 44.

[10] It is not suggested that there are not other words and phrases that convey exactly the same meaning as that ascribed to "learning objective" in the sense used in this discussion. What is in focus here is any form of written communication, intended for the benefit of all participants in the teaching and learning system, which specifies in unambiguous terms what it is that students are expected to learn.

[11] Ramsden, *supra* n. 8, 126. Although much has been written about the differences between "aims" and "objectives"—and this scholarship has been criticised (eg *ibid,* 125)—the distinction is not particularly relevant to this article.

[12] Biggs, *supra* n. 4, 43.

[13] *Ibid,* 32.

[14] *Ibid,* 50.

[15] See, for example, F. Marton, G. Dall'alba and E. Beaty, "Conceptions of Learning" (1993) 20 *International Journal of Educational Research* 277.

The first "taxonomy" provides a framework to conceptualise various *levels of understanding*. The lowest level is labelled "prestructural" (showing "little evidence of relevant learning") and the highest is called "extended abstract" (involving "conceptualization at a higher level of abstraction" which "is applied to new and broader domains").[16] The incremental movement up the scale from the lowest form of understanding (which is undesirable, if not useless in the context of higher education) to the highest (which is highly desirable) can also be described as a movement from pre-quantitative through quantitative to qualitative levels of understanding. This movement also signifies ascending levels of cognitive complexity. Higher quantitative levels reflect increases in knowledge, while higher qualitative ones signal deeper understandings. Not surprisingly, verbs are key descriptors of these levels. For example, where quantitative knowledge is sufficient, verbs such as "identify", "list" and "describe" may be appropriate, even for more sophisticated forms of quantitative knowledge such as knowledge of theories, for example. At the qualitative levels, verbs such as "compare", "analyse", "relate" and "apply" signal deeper levels, while "theorise", "hypothesise", and "reflect" signal the deepest kinds of understanding.[17] Achievement of the highest levels of understanding is likely to mean that student perspectives, or "conceptions of phenomena",[18] will have been altered.

A second conceptual framework assists in classifying *kinds of knowledge*. At the lowest level, purely "declarative knowledge" involves "knowing about things" and is "independent of the experience of the learner". At the other end of the spectrum is "understanding of a higher order", which is "functioning knowledge". This means being able to exercise "active control over problems and decisions in the appropriate content domains".[19] Functioning knowledge is said to involve a sound grasp of declarative knowledge ("the academic knowledge base") together with both the skills ("procedural knowledge") *and* an understanding of the circumstances in which one deploys this combination of knowledge ("conditional knowledge").[20] Functioning knowledge depends upon high levels of qualitative understanding (as conceived in the previous taxonomy), and is related to the idea of "performative understanding". This means that students learn to *perform* their understandings, as opposed merely to being able to declare them verbally.[21] These distinctions in knowledge are important for educators who need to decide whether students need merely to be able to "know about" things, or be able to put them to "empowered use".[22]

In summary, therefore, this model of teaching (1) draws attention to the importance of being clear about what needs to be learned (both as to "content" and level of learning) and (2) stresses the need for alignment between learning objectives and student learning activities (which are generated through teaching), including assessment activities. An appreciation of potentially different levels of learning, indicated by the use of verbs in learning objectives, is

[16] Biggs, *supra* n. 4, 39–40.

[17] *Ibid*, 38–41 and 47–50. This arrangement of verbs in a hierarchy that reflects ascending levels of cognitive complexity is also functional to systems of grading in assessment, and is referred to as the "SOLO" taxonomy; see *ibid*, 29 and 50.

[18] *Ibid*, 36–7.

[19] *Ibid*, 45.

[20] *Ibid*, 42.

[21] In spite of the desirability of functioning knowledge, university curricula remain "overwhelmingly declarative, when really graduates are supposed to be educated so that they can interact thoughtfully with professional problems": *ibid*, 42.

[22] *Ibid*, 53.

aided by two classifications: the first conceptualises levels of understanding, the other kinds of knowledge. These two conceptions are closely connected. High-level functioning knowledge depends for its development upon the prior development of high-quality understandings.

What might this model mean for the design of legal ethics learning systems in law school education, and how might it be applied in this particular context? In the next section I focus on the difficulty of determining appropriate legal ethics learning objectives, given different approaches to legal ethics identified in the literature. In the following sections I explore, first, what levels of learning are implicated in the various approaches and, second, what it might mean to ensure alignment in legal ethics teaching and learning.

Learning Objectives in Legal Ethics

Being clear about what we mean our students to learn in "legal ethics" is complicated by the fact that there are competing, and sometimes strongly divergent, views about the nature, scope and purpose of legal ethics, both as a subject on its own and as a subject that is amenable to effective teaching and learning in legal education.[23] In order to try to demonstrate this difficulty, and to facilitate the later discussion, I propose to outline three rather different conceptions of legal ethics for legal education, simplified for current purposes.[24] This is not to say that there are not other conceptions of what legal ethics in a legal curriculum might entail,[25] or other ways of describing conceptions of lawyering.[26]

The first approach, in its most basic formulation, holds that knowledge of professional responsibility rules[27] is in itself a sufficient learning outcome for law students.[28] A slightly more sophisticated version requires some understanding of the circumstances in which these rules may apply.[29] (This approach, in both formulations, will be referred to as the "rules"

[23] See, for example, J. Webb, "Being a Lawyer/Being a Human Being" (2002) 5 *Legal Ethics* 130, which indicates the depth of dispute between virtue and duty ethics at the philosophical level and the extent to which this divide is manifest in contemporary conceptions of lawyering; Boon, *supra* n. 3, 45.

[24] These necessarily superficial accounts are offered as a basis for discussion about teaching and learning issues only. No attempt is made to explore their possible philosophical justifications, for which see, for example, Webb, *ibid.*

[25] For example, the argument that neither "duty" nor "virtue" approaches to the ethical role of the lawyer go far enough "to enable us to say what it 'really' means to be a lawyer"; see *ibid*, 130.

[26] C. Parker, "A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics" (2004) 30 *Monash University Law Review* 49.

[27] That is, the rules or principles that purport to circumscribe lawyers' "ethical" behaviours in relation to client care, conflict of interest, confidentiality and the like. In some jurisdictions these norms are articulated in a recognisable code, which may have been interpreted, augmented, or commented upon by the courts. In others, the main source of these principles may be case law, or legislation, but that does not exclude the likelihood of some form of code expressing "model rules". See, for example, Law Council of Australia, *Model Rules of Professional Conduct and Practice* (Law Council of Australia, 2002).

[28] The "rules" approach is clearly evident in Australian legal education: R. Johnstone and S. Vignaendra, "Learning Outcomes and Curriculum Development in Law", Higher Education Group, Department of Education, Science, and Training, Canberra, 2003, 165 and 118–23; while a version of this approach is reportedly commonplace in American law schools, where ethics courses still "focus primarily (and uncritically) on bar disciplinary rules": Rhode, *supra* n. 1, 340.

[29] For example, the Law Society for England and Wales requires that students (at the vocational stage of legal training) be able to "advise the client on matters of Professional Conduct and Ethics", suggesting perhaps—but not conclusively—that mere knowledge of the rules is insufficient: Legal Practice Board, "Written Standards Version 10", September 2004, 15.

approach.) This version of ethics is usually included in the curriculum to meet the basic "coverage" requirements mandated by the accrediting body or equivalent.[30] Its theoretical base is likely to be expressed (if at all) by reference to the traditional assumption that professional legal ethics amounts to a rule-based morality and that ethical decision-making in legal practice involves understanding and applying these rules of professional responsibility.

Typically, this approach involves a stand-alone "practice" subject that places emphasis on knowing about these rules (which express responsibilities to court, client and colleague[31]) and possibly includes other aspects of the "law of lawyering".[32] Usually, it means that little or no attention is paid to ethical issues elsewhere in curriculum. This single course approach is justified on the basis that it is better that students engage with these professional requirements in one hit or (more controversially) that ethical questions seldom arise in mainly doctrinal subjects elsewhere in the curriculum—but, if they do, it is not really convenient to deal with them in context. Thus, ethics is not seen as a faculty-wide concern or responsibility. Inevitably, this approach involves teaching (more) "black letter" rules and possibly their application in decided cases or in hypothetical scenarios. Its treatment is seen as relatively cheap in school budgetary terms (relative, that is, to an approach that encourages students to tackle "live" ethical issues in a clinical setting, for example[33]).

The second approach places primary emphasis on legal ethics as a skill.[34] (This will be referred to as the "skills" approach.) It assumes that vocational or professional training is a necessary part of university legal education. Holding that "competent, ethical practice requires more than just knowledge of the applicable rules and principles of professional responsibility",[35] it asserts the importance for lawyers of acquiring *skills* in (1) recognising and (2) resolving ethical dilemmas.[36] The approach thus focuses both on the rules of professional responsibility *and* upon their application in typical ethical dilemma situations. In one version it is recognised that these rules may have limitations in resolving some ethical dilemmas[37] (and in this respect has some common ground with formulations that typify the third approach, below).

Usually, this approach does not involve a commitment to curriculum-wide teaching and learning of ethics. Instead, clinical courses are seen to be an ideal setting in which students can be given the opportunity to confront and engage with typical ethical dilemmas thought to arise in legal practice. In the more vocationally-orientated formulation of this approach,

[30] In Australia, this is commonly referred to as the "Priestly" requirement, after the name of the chair of the committee responsible for declaring minimum requirements in university legal education. By way of further example, the Australian "Priestly" requirements concerning professional responsibility have recently been reproduced in the Supreme Court Rules No. 110, 2004 (Queensland) thus: "knowledge of the various pertinent rules concerning a practitioner's duty to the law, the Courts, clients and fellow practitioners".

[31] See, for example, G.E. Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (Sydney, Law Book Company, 2001).

[32] See, for example, American Bar Association, Standard 302(a)(5), which refers to instruction in "the history, goals, structure, values, rules, and responsibilities of the legal profession".

[33] This approach, depending on its purpose and methodology, would more appropriately be classified within either the second or third approach, below.

[34] What seems to be the most comprehensive formulation of the skills approach appeared in American Bar Association, *Legal Education and Professional Development—An Educational Continuum* (Task Force on Law Schools and the Profession, American Bar Association, 1992), 140 and 203–7.

[35] *Ibid*, 207.

[36] *Ibid*, 203–7.

[37] *Ibid*, para. 10.1(b)(vi).

"ethics" is seen in legal education as part of a suite of marketplace skills (alongside skills in interviewing, advocacy and legal research) that students must accumulate as they progress through their studies.[38]

The "judgment" approach, for want of a better label, is the most difficult to summarise because of its diverse scholarship. Indeed, it is probably best described as a collection of approaches that share some common ground. One common thread amongst most writers in this tradition is an orientation towards a virtue-based conception of ethical lawyering, in preference to the rule-based version expressed in the "rules" approach. Some of this scholarship, but not all, concerns itself directly with ethics in legal education,[39] as distinct from legal ethics as a discipline.[40] It is extremely critical, if not dismissive, of the "rules" approach. While the assumption in the first two approaches is that lawyers' professional responsibility rules are a complete, or near-complete, answer to the ethical challenges in legal practice, in the "judgment" approach the scope and utility of these rules is seriously questioned. It follows that this scholarship, in interrogating what it means to be an ethical lawyer, is also extremely critical of the "standard conception" position on legal ethics, which (amongst other things) seeks to absolve the lawyer from moral responsibility for decisions taken in the representative role.

In the "judgment" approach, much ethical decision-making is seen to be far more complex and challenging than the "rules" approach assumes. For example, it is thought that the potential normative content of ethical decision-making extends far beyond the rules of professional responsibility (although there is disagreement about just how far[41]). This approach highlights the importance and frequency of practitioners' discretionary decision-making, maintaining that the need to make choices, many of which involve ethical or moral questions, is inevitably if not routinely part of everyday legal practice.[42] Some scholars in this tradition regard it as essential that legal practitioners develop rather than inhibit their own sense of morality in order to become ethically astute, and others question whether lawyers' professional rules have much to do with ethics at all. Some advocate "moral activism" in the

[38] See, for example, S. Christensen and S. Kift, "Graduate Attributes and Legal Skills: Integration or Disintegration?" (2000) 11 *Legal Education Review* 207.

[39] Amongst the scholarship that directly or indirectly considers legal ethics in legal education are (in chronological order): Luban and Millemann, *supra* n. 2; D. Rhode, "Into the Valley of Ethics: Professional Responsibility and Educational Reform" (1995) 58 *Law and Contemporary Problems* 139; S.G. Kupfer, "Authentic Legal Practices" (1996) 10 *Georgetown Journal of Legal Ethics* 33; A Goldsmith, "Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers" (1996–7) 14 *Journal of Professional Legal Education* 1; Goldsmith and Powles, *supra* n. 2; W.H. Simon, "Ethical Discretion in Lawyering" (1998) 101 *Harvard Law Review* 1083; W.H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, MA, Harvard University Press, 1998); A. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto, Irwin Law, 1999); D.N. Frenkel, "On Trying to Teach Judgment" (2001) 12 *Legal Education Review* 19; C. Parker, "What Do they Learn when they Learn Legal Ethics?" (2001) 12 *Legal Education Review* 175; A. Boon, *supra* n. 3; J. Webb, *supra* n. 23; Rhode, *supra* n. 1; and A.M. Lerner, "Using Our Brains: What Cognitive Science and Social Psychology Teach Us about Teaching Law Students to Make Ethical, Professionally Responsible, Choices" (2004) 23 *Quinnipiac Law Review* 643. Some of this literature refers to, and to some extent criticises, an earlier piece by Anthony Kronman, "Living in the Law" (1987) 54 *University of Chicago Law Review* 835.

[40] See, for example, the five contributions in Economides, *supra* n. 2, at Part 1, and D. Luban, "Reason and Passion in Legal Ethics" (1999) 51 *Stanford Law Review* 873.

[41] Simon, *The Practice of Justice*, *supra* n. 39 and the critique in Luban, *ibid*, especially 888–93.

[42] For example, P. Schiltz, "Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney" (1998) 82 *Minnesota Law Review* 705, 713, 719; Hutchinson, *supra* n. 39, chapters 3 and 11.

lawyer's role, and argue that law students should be given an opportunity to develop this style of lawyering in clinical settings.

This approach advocates the need for a deep and critical understanding of the lawyer's role, an understanding that implicates if not requires an ongoing critique of the rules of lawyering. Ethical competence is connected with and develops from these deep understandings. It involves being constantly aware of one's role as a lawyer and the responsibilities this role carries. To be ethically astute, lawyers need to develop a capacity for constant and careful deliberation and reflection and need to be able to justify and take responsibility for the ethical choices that they make. Finally, scholars associated with this conception argue that ethical questions arise, unavoidably, in every subject in the legal curriculum, and maintain that a failure to acknowledge and act on this is a serious omission in legal education. Therefore, opportunities for students to learn about ethical judgment in the lawyer's role need to be embedded throughout their legal studies.

While these three approaches suggest differing areas of focus, it is also clear that they contemplate different kinds of understanding and knowledge. This variation is most evident as between the first and third approaches. The differences have implications for the quality of the learning environment needed to support them. These differences, and their possible implications, are the subject of the next two sections.

Levels of Learning in Legal Ethics

According to the approach to teaching and learning being relied upon in this article, teachers need to decide not only *what* they wish their students to learn, but also the level at which learning needs to take place. Ideally, these determinations should be clearly reflected in learning objectives. What levels of learning are implicit in each of these three approaches to legal ethics in legal education?

Assume, first, the "rules" approach, in which students are expected to acquire "knowledge" of seemingly important professional responsibility rules, and (perhaps) to develop some understanding of the factual circumstances in which these rules are thought to apply, by reference to decided or hypothetical cases.[43] In terms of learning objectives, the content area is predominantly about relevant rules and principles to be found in "codes" and case law, while the level of learning required is indicated by the key verbs implicit in such an approach. These would appear to be verbs such as "identify" and "describe" (rules or principles), "recognise" (situations in which the rules have application),[44] and "apply" (as in applying rules or principles to the facts deemed to be relevant).

If these observations are valid, it can be argued that the levels of learning required of students in this instance are quite modest by reference to the classifications referred to above. In the case of levels of understanding, the verbs "identify" and "describe" suggest learning of a mainly quantitative variety, although "recognise" and "apply" suggest higher levels of cognitive complexity. This amounts to a concentration on declarative knowledge, although

[43] A standard Australian text, which is an extremely comprehensive treatise on lawyers' professional responsibility rules, epitomises the knowledge base upon which the "rules" approach relies: see Dal Pont, *supra* n. 31.

[44] The ability "to recognise" might also be relevant to fact analysis if teaching and assessment included use of scenarios in which facts are in issue.

it might include a very limited form of "performative" knowledge to the extent that students learn to apply the rules (the knowledge base) in hypothetical circumstances in which they are thought to have application.

In the "skills" approach students must learn at least to recognise the circumstances in which typical ethical dilemmas arise and also learn to apply the professional responsibility rules to resolve them. On one interpretation this is similar to the "rules" approach in that it places primary emphasis upon the same content area, being professional responsibility rules. But, the very notion of an ethical dilemma suggests the need to wrestle with something rather more complex than merely the "issue" that presents itself for attention in the formalist methodology of the "rules" approach. Furthermore, in perhaps the most well known formulation of the "skills" approach, it is recognised that the "lawyer's personal sense of morality" has a role in, for example, questioning and seeking guidance "with regard to practices that are not addressed by existing rules".[45]

The levels of understanding in the "skills" approach to legal ethics are evident in the use of the following verbs: "be familiar", "recognise", "scrutinise", "resolve", "apply", "be alert", "diagnose" and "research".[46] The first three suggest quantitative levels of understanding, but at least "diagnose", "apply" and "resolve" are firmly located in the qualitative zone of the classification referred to above. In reference to the "kinds of knowledge" framework, this suggests a form of functioning knowledge: having a grasp of declarative knowledge (the rules of professional responsibility), the knowledge of how to apply the rules, and an understanding of the circumstances in which they are applied. Thus, this version of the "skills" approach seems to require competencies by which students are able to *perform* their understandings, rather than merely being able to declare them.

The "judgment" approach contemplates multiple learning outcomes. While the content area is "legal ethics", the conception of what this means and implies for legal practice is far broader and more critically informed than in the first two approaches. In this version of legal ethics, the declarative knowledge base of the first two approaches is included, but the levels of understanding go much further. Some of the key verbs implicit in the approach, which indicate the levels of understanding required, include verbs such as "to theorise" (about the lawyer's role); "to criticise" (what are thought to be faulty, conventional assumptions about both the utility of professional responsibility rules and the standard conception of legal ethics); "to reflect" (upon, for example, what it means to be a good lawyer and to make ethical decisions in the lawyer's role); and "to justify" (the ethical choices one makes, not only by reference to the rules of professional responsibility, but by reference to other norms including one's own morality).

Although these examples are merely indicative of the level of understanding implicit in the "judgment" approach, they suggest that in aggregate this approach contemplates sound and detailed understandings across the spectrum of understandings: at the quantitative phase (for example, about the meaning and possible criticisms of the standard conception of ethics and lawyers' professional responsibility rules), through to the full spectrum of qualitative levels of understanding. Some of these understandings ("to theorise" etc), which are located at the

[45] American Bar Association, *supra* n. 34, para. 10.1(b)(vi) and 204–5.
[46] *Ibid*, 203–7.

highest—that is, the "extended abstract"—level of the taxonomy referred to earlier[47], envisage the learner's perspectives being altered by this depth of learning.

As far as *kinds* of knowledge are concerned, versions of this approach place emphasis on the need for students to develop functioning knowledge in the exercise of ethical judgment. It is helpful to recall here that functioning knowledge, by definition, involves "active control over problems and decisions in the appropriate content domains",[48] and is arguably a hallmark of what it means to perform professionally.[49] However, this is functioning knowledge that relies on the achievement of high-level qualitative understandings, meaning that it is far richer, more complex and arguably more valuable (to the prospective lawyer) than that implicated in the "skills" approach. High level learning of this kind might even be seen to involve the development of moral character itself.[50]

Aligned Teaching in Legal Ethics

Constructive alignment requires that teaching and assessment "realise" the designated learning objectives. The key issue for teachers, therefore, is whether they are able to create the conditions that enable their students to learn what they want them to learn to the level expected.[51] Furthermore, if the principle of constructive alignment is to be given the weight it seems to demand, it also follows that the choice of learning objectives should be influenced if not determined by the availability of teaching and learning activities and assessment tasks that are capable of supporting the quality of learning envisaged within the objectives one chooses. In other words, if we are to establish a coherent teaching and learning system[52] in legal ethics, we should avoid stipulating levels of learning that are unattainable. For example, we ought not to frame objectives around the development of functioning knowledge when all we are capable of teaching and assessing is declarative knowledge.

In this section I attempt to identify the kinds of teaching and learning systems that are necessary to support the achievement of the levels of learning identified in each of the three approaches under discussion.

As a preface to this discussion, it is necessary to repeat the claims, made elsewhere, that traditional legal education is built upon conservative foundations.[53] Whatever else this implies for ethics teaching and learning,[54] it is certainly arguable that law school teaching has

[47] *Supra* n. 16.

[48] Biggs, *supra* n. 4, 42.

[49] *Ibid*, 38: "Predicting, diagnosing, explaining and solving non-textbook problems are what professionals have to do." This involves "interacting" with problems both "competently" *and* "thoughtfully".

[50] See Hutchinson, *supra* n. 39, 53.

[51] On the crucial question of whether law teachers have sufficient expertise or commitment to design and implement high quality ethics learning systems see, for example, M.J. LeBrun, "Enhancing Student Learning of Legal Ethics and Professional Responsibility in Australian Law Schools by Improving Our Teaching" (2001) 12 *Legal Education Review* 269, 278–9.

[52] Unfortunately, there are other parts of the "system" over which teachers may have no control, such as the "institutional climate" with its "rules and procedures", which are a given, and therefore have to be accommodated and worked around; Biggs, *supra* n. 4, 26.

[53] For example, see Economides, *supra* n. 2, xvii.

[54] Such as the difficulty of establishing sufficient faculty support for ethics teaching and learning, given that teachers are being asked to encourage their students to learn about "lawyering" in a way not traditionally included in legal education.

long exhibited a strong tendency towards teaching for declarative knowledge and quantitative rather than qualitative levels of understanding.[55] These kinds of traditions are evident in the culture,[56] the typical course learning objectives, and the usual learning activities and assessment tasks that characterise university legal education.[57] In their least attractive formulation, they include large classes, lecture-style delivery of information, encouragement of rote learning of principles and cases, and an emphasis on assessment for grades.[58] This "traditional model of legal education" is seen, at least in Australian legal education, to exhibit a number of dominant and undesirable characteristics. These include a teacher focus (where the teacher is perceived to be a transmitter of expertise), a concentration on "content knowledge" (particularly, rules drawn from case law), the conviction that law is an autonomous discipline, and a failure to ensure co-ordination between different parts of the curriculum.[59]

The "rules" approach to legal ethics, as described above, is located within the traditional model of legal education. Not only is the focus on (more) rules, but the methodology of problem solving in matters seen to raise ethical questions tends to mimic that in doctrinal areas (like contract and tort), in which students are encouraged to apply rules to established facts in order to find an acceptable answer. The learning environment that would support this level of learning is commonplace in law school. As they do in other mainly black letter courses, classroom or "lecture" based activities (with some tutorial sessions for more detailed discussion and feedback), reading of prescribed materials, mooting (possibly) and traditional, paper-based assessment items (assignment and examination) of the formative and summative varieties would collectively constitute the teaching and learning system necessary to enable students to achieve the required understandings.

At the core of the "skills" approach to ethics is the need to learn to be able to recognise and resolve the sorts of ethical dilemmas that arise in practice. What sorts of learning opportunities would teachers need to create to enable students (with differing learning styles and abilities) to develop these competencies? Recognising the existence of ethical dilemmas in legal practice is often difficult enough: they do not arise, as they do in law school, within carefully constructed stories in teaching and assessment materials (in which students *expect* to find aspects of the narrative that evoke a sense of quandary). Nor do practice conditions respect the need for quiet and careful deliberation that, ideally, is required in order to weigh competing considerations before making a sensible, defensible decision. Furthermore, making an ethical choice in a legal practice environment when normative guidance is scant or contradictory and the stakes are real (and high) is not part of the student's experience within the law class.

Keeping faith with the learning objectives implicit in the version of the "skills" approach to ethics outlined earlier therefore seems to require a far richer learning environment than this usual diet of readings, lectures, small groups and traditional assessment tasks can hope to offer. It is not surprising that it is often thought that this type of "skill" can only be learned

[55] With the possible exception of clinical legal education (see discussion below) this tendency remains the norm despite quite recent moves to locate some legal learning "in context", or to encourage interdisciplinary study, or even critical and theoretical insights into legal phenomena, processes, and doctrine.

[56] Boon, *supra* n. 3, 49–53, and Chapman, *supra* n. 3.

[57] M. Keyes and R. Johnstone, "Changing Legal Education: Rhetoric, Reality, and Prospects for the Future" (2004) 26 *Sydney Law Review* 537, 541.

[58] On the limitations of standard law school teaching in American law schools, see Lerner, *supra* n. 39, 681.

[59] Keyes and Johnstone, *supra* n. 57, 539–41.

beyond the confines of a learning environment that places primary emphasis on declarative knowledge and quantitative understanding. It is thought that the quality of learning required here can only be gained through practical experience—and the closest approximation to the real world of lawyering in law school is the legal clinic.

The scholarship on clinical education makes the claim that clinics give students the opportunity to perform their understandings in ways that classroom-based learning cannot emulate.[60] While it is beyond the scope of this paper to examine this claim, it is worth noting that the case for clinics as sites for deep, authentic learning experiences in legal ethics would always need to be demonstrated conclusively. Unfortunately, some of the literature that celebrates the contributions of particular clinics to "deep learning" in ethics provides little in the way of hard evidence to back the claims. (Perhaps this also highlights the difficulty of designing and implementing evaluation systems that provide credible and reliable data on student learning outcomes in "ethics", particularly at the highest levels of learning.)

Although legal clinics have become far more commonplace in Australian law schools, for example, they tend to restrict entry to relatively few students, and then only for limited periods in the curriculum. (How much clinical exposure is needed to develop in students the competencies that the "skills" approach really requires? To this we probably do not have a ready answer.)[61] It is also the case that legal clinics typically envisage numerous learning outcomes, meaning that exposure to ethical dilemmas together with opportunities to confront and grapple with them may constitute a small part of the student's clinical experience. And even if ethical dilemmas do frequently arise in clinical settings, high quality learning outcomes in ethics cannot be guaranteed; presumably, they are more likely to be achieved when the learning environment is crafted to ensure that students engage with these with the level of attention that they require. To some extent, this will depend upon the quality and quantity of supervision available. Finally, because clinics are seen to be expensive to run, as compared with traditional law courses, it is safe to assume that the learning opportunities they offer will continue to be rationed into the foreseeable future. For this reason alone there are doubts about the extent to which clinics can be relied upon to provide quality learning opportunities in legal education generally, and in the development of ethical competencies in particular.

As suggested earlier, the "judgment" approach to legal ethics suggests a variety of learning outcomes. Many of these are higher-order ones, as measured against the scale that classifies levels of understanding. For example, understandings that enable students to criticise, hypothesise and theorise about the lawyer's professional and ethical role are highly qualitative, and should also provide the foundations for the development of functioning forms of knowledge.[62] In theory at least, there is no reason why these qualitative levels of learning are not attainable in law school education, even within the constraints that often exist.[63] (This matter is discussed further in the next section.)

[60] Luban and Millemann, *supra* n. 2, 40; Kupfer, *supra* n. 39, 112; Boon, *supra* n. 3, 60–3; N. Gold, "Educating the Complete Lawyer: Clinical Legal Education for Every Lawyer", paper presented at the Third International Journal of Clinical Legal Education Conference, Melbourne, Australia, 13–25 July 2005, in which it was claimed that clinical legal education provided learning opportunities for the cultivation of "sentient, thoughtful, caring, principled, and skilful" lawyers.

[61] The McCrate Report recognised that, in relation to developing skills in recognising and resolving ethical dilemmas, "exposure in law school clinical programs or classrooms is necessarily very limited"; American Bar Association, *supra* n. 34, 332.

[62] Biggs, *supra* n. 4, 42.

[63] In relation to Australian legal education, see Keyes and Johnstone, *supra* n. 57, 554–6 and 559–61.

However, to the extent that the "judgment" approach envisages the development of "moral character and good judgment",[64] suggesting the development of functioning or "performative" knowledge at a sophisticated level, the prospects for creating a learning environment to support these levels of learning are far less clear. Learning activities that enable students to "realise" performative understandings of this kind would, presumably, need to lead students into a *series* of particular and authentic legal judgment learning experiences[65] that might be described in the following manner. Students would need to be faced with dilemmas that (a) actually confront their moral/ethical sensibilities in a way that excludes superficial responses as viable options and (b) require them to enter reflective and deliberative decision-making processes that (c) comprehensively draw upon substantial reservoirs of prior learning, insights and critical faculties in reaching a reasoned decision and (d) subsequently enable them to experience and evaluate the consequences of the decision that is ultimately made so that (e) they are better equipped to engage in this process when the next learning opportunity arises. Put this way, it is doubtful that the methodology of contemporary legal education (with the possible exception of the clinic) is able to produce and sustain the quality of learning environment that this level of commitment to performative understanding would entail.[66] This issue is considered further in the next, and final, section.

Aiming for Quality Learning in Legal Ethics

The aim of the article to this point has been to explore the teaching and learning implications of potentially different approaches to legal ethics, by reference to Biggs's model of constructive alignment. Through the use of this model it has been possible to find some answers to important questions about the design of legal ethics learning systems: what students might be expected to learn about; what levels of learning are involved; and what kinds of learning environments are needed to support the approaches taken. I now propose, in the light of the preceding analysis, to make some observations about whether, and to what extent, quality learning in legal ethics remains a realistic objective in law school education.

While the "rules" approach to legal ethics is certainly an option,[67] it has attracted substantial criticism within the relevant literature.[68] For example, there are reasons to reject the

[64] For example, Hutchinson, *supra* n. 39, 53.

[65] See, for example, Hutchinson, *supra* n. 39, 52–5 for a strong version of the argument that only "learning by immersion in practical situations" will enable students to develop moral character and good judgment.

[66] But see, for example, an account of attempts to teach "judgment" to a class of 100 students: D.N. Frenkel, "On trying to Teach Judgment" (2001) 12 *Legal Education Review* 19–45. Although there is some guidance in the literature on teaching and assessment practices that support different versions of the "judgment" approach, these are difficult to find. Few contributions appear to concern themselves explicitly with educational theory and insights. For an exception to this tendency, see Parker, *supra* n. 26. For a particularly strong claim that the legal clinic is the only site in which "legal ethics that incorporates . . . moral judgment" can be taught, see Luban and Millemann, *supra* n. 2, 40.

[67] With some variations, it happens to be the choice of many Australian and American law schools.

[68] For example, Rhode, *supra* n. 1, 33–43; Hutchinson, *supra* n. 39, chapter 2; Kupfer, *supra* n. 39; Webb, *supra* n. 23; Boon, *supra* n. 3, 58 on the limitations of studying lawyers' codes in isolation; 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, 308–14; and more recently, S.J. Levine, "Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation" (2004) 37 *Indiana Law Review* 21.

assumption that ethical decision-making by lawyers necessarily has a great deal to do with lawyers' rules and codes of responsibility,[69] although these are undoubtedly an important source of guidance (to the extent that they provide guidance). Arguably, lawyers inevitably make choices (often in private) over a multitude of questions concerning whom to represent, and how to represent their clients, and much choice-making extends far beyond the rules' apparent yet often uncertain compass.[70] Moreover, the reproduction of conventional, formalist and formulaic black letter techniques as a device to solve complex ethical issues is seen to be wholly inadequate, if not potentially dangerous, in a zone of individual decision-making that is often fraught and challenging. Put in the context of the learning theory referred to above, this approach to legal ethics typically involves a level of learning in the quantitative rather than qualitative zones of understanding and therefore appears, also from this perspective, to be of questionable educational value.

The "judgment" approach, by contrast, represents the most ambitious of the approaches identified. That is not to suggest that it is without its critics, who regard an orientation to virtue ethics rather than rules-based ones as dangerous territory for lawyers and their clients.[71] However, a considerable body of contemporary scholarship supports a far more extensive and critical orientation to ethics in lawyering and in legal education,[72] and for this reason alone legal educators cannot lightly dismiss the claims, insights, concerns and arguments contained within this scholarship.[73] The "skills" approach, in the formulation relied upon earlier, is similar to versions of the "judgment" approach in that it contemplates the development of functioning, in addition to declarative, knowledge. But the scope of its declarative knowledge base—that is, the emphasis largely on an understanding of the rules of professional responsibility—appears to be far more limited than that envisaged in the third approach.

Is it realistic to aim for quality learning in legal ethics, given the realities of the law school context? A number of observations can be made. Given the apparent limitations of a "rules" and "skills" approach to legal ethics, these observations assume a preference for learning outcomes connected with a more expansive approach to legal ethics in legal education. They also rely on, or are connected with, the approach to teaching and learning adopted for this article.

Perhaps a sensible way to begin to answer the question about whether it is possible to aim for high quality learning outcomes in ethics, given the realities of law school learning systems, is by reference to the distinction between declarative and functioning knowledge. This distinction provides a basis upon which to recognise what it is that we can, with sufficient attention and planning, comfortably encourage students to learn about in legal ethics and what is altogether more challenging.

Declarative knowledge is concerned with knowing about things. It includes propositional knowledge, that is, public knowledge that can be accessed and learned by students through a

[69] Simon, *The Practice of Justice*, *supra* n. 39, 3; Hutchinson, *supra* n. 39, 41.

[70] For example, Hutchinson, *supra* n. 39, 48; Schiltz, *supra* n. 42, 713, 719; and, generally, Luban and Millemann, *supra* n. 2. And see D. Wilkins, "Legal Realism for Lawyers" (1990) 104 *Harvard Law Review* 468, 469–70 on the view that these rules can be manipulated towards desired ends.

[71] For recent critiques see, for example, T. Dare, "Virtue Ethics and Legal Ethics" (1998) 28 *Victoria University of Wellington Law Review* 141; and Webb, *supra* n. 23, 134–6.

[72] See *supra* n. 39.

[73] There are, it must be noted, significant differences within this body of work; see, for example, Luban, *supra* n. 40 and Hutchinson, *supra* n. 39, especially chapters 2 and 3.

variety of activities.[74] However, this does not mean that it is necessarily quantitative knowledge, although much of it may be. Declarative knowledge can also include the deepest qualitative understandings, which result eventually in students being able to analyse, criticise, generalise, hypothesise and theorise.[75] Therefore, even if we are limited mainly to having students learn to declare their knowledge rather than, through experience, learning to perform it, this does not preclude the achievement of high quality understandings. As indicated earlier, understanding of this quality, concerning (for example) the lawyer's ethical role and responsibilities, can be supported within the typical learning systems within law schools—but only if they are designed carefully. This point is taken up again below.

Functioning knowledge, on the other hand, whose acquisition is conditional upon the prior development of understandings to qualitative levels, is "within the *experience* of the learner" and it enables the learner to perform these understandings while engaging with and resolving unique professional problems.[76] A well-developed functioning knowledge in ethical decision-making is, in addition to being dependent upon qualitative understandings in the declarative knowledge base, deeply personal and can, arguably, only be developed under learning conditions that replicate the actuality of ethical quandary in legal practice settings.[77] With the possible exception of the clinic, there are reasons to doubt that the learning systems of the typical law school are able to provide the opportunities to develop this kind of knowledge, rather than knowledge that is not truly performative.[78]

In summary, students *can* develop understandings about the ethical dimensions of lawyering first at quantitative levels, and subsequently develop these through to the highest qualitative understandings; but they cannot ordinarily be expected to develop high level competencies in ethical decision-making itself (the "performative" kind of knowledge)—unless, that is, they have opportunities to engage in learning activities that are likely to assist them in developing this kind of knowledge. However, because we cannot be absolutely sure about the limitations of the law school learning environment, we need to leave open the possibility that at least some students—given their unique abilities and learning styles—will begin to develop their "ethics" knowledge to performative (in addition to declarative) levels, despite any apparent limitations in the learning opportunities that they encounter. Whether or not learning outcomes such as these are plausible, what seems crucial, following Biggs's classifications and theory, is that the first responsibility that rests on legal educators is to create the conditions necessary to enable students to develop their "ethics" understandings to the highest levels of declarative knowledge. The latter, it will be recalled (again following Biggs) is a precondition for the development of functioning knowledge itself.

This leads to the question of how these qualitative understandings about the ethical dimensions of lawyering might be encouraged. In other words, by what means should students be encouraged to reach the understandings that involve the ability to analyse, reflect, criticise, justify and theorise about the lawyer's ethical role, after learning how to identify,

[74] Biggs, *supra* n. 4, 41.

[75] *Ibid*, 43.

[76] *Ibid*, 42; emphasis added.

[77] For example, Hutchinson, *supra* n. 39, 53–4.

[78] In the theory adopted by Biggs, a less well-developed form of knowledge involves the combination of declarative knowledge and "procedural" knowledge (having the skills to apply knowledge), but without "conditional knowledge" (having a fully developed sense of the circumstances in which to use procedural knowledge); Biggs, *supra* n. 4, 42.

describe, recognise and explain in relation to more traditional aspects and conceptions of ethical lawyering? The primary argument that follows concerns the need to design for incremental legal ethics learning across the legal curriculum.

A convincing case for the need to visit the ethical dimensions of lawyering throughout the legal curriculum, and not merely in a single course or subject, has previously been made in American legal education.[79] In spite of the difficulties associated with the implementation of "pervasive ethics" in that context,[80] the case for learning about ethics *throughout* the legal degree remains overwhelming. One or two courses in ethics, for the most part disconnected from the remainder of the curriculum, is simply inadequate if students are to achieve high quality learning outcomes in ethics; in other words, it is essential to ensure—in the view being taken here—that ethics learning remains alive throughout the student's studies.

However, the argument here is not only that ethics learning objectives should occupy multiple sites throughout the curriculum (because that is precisely where they belong), but that these sites of learning should be carefully designed to ensure that students are given the opportunity to build incrementally on their understandings as they progress through their studies. (Biggs's taxonomy of levels of understanding, referred to earlier,[81] provides one basis for modelling this approach.) This means that, initially, students should have opportunities to develop and increase their quantitative understandings of aspects of legal ethical issues and then, in stages, to build on and deepen their previous understandings through to the highest qualitative levels.[82] In other words, increasingly sophisticated levels of understanding in ethics should be planned for, so that students encounter deeper and richer learning opportunities as they progress through their degree programmes.

There are different ways in which this progression could be structured, but it would inevitably require a great deal of planning and attention across the entire curriculum. Undoubtedly, a proposal such as this would present a major challenge within the culture and practices of the typical law school. However, a possible construct to aid the goal of incremental learning in ethics is what may be called a "vertical subject".[83] The vertical subject is a continuing one that would progress *throughout* the programme in a carefully structured way. It would intersect with and reside within various courses in each semester or year of the programme. The levels of understanding contained in ethics learning objectives would

[79] D. Rhode, "Ethics by the Pervasive Method" (1992) 42 *Journal of Legal Education* 31.

[80] See, for example, the comments in Rhode, *supra* n. 1, 340; and D. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (Boston, MA, Little, Brown and Company, 1994), xxix, despite the merits of the "pervasive" approach being extensively argued: for example, Rhode, *supra* n. 79.

[81] Biggs, *supra* n. 4, 38–41.

[82] Following Biggs's approach to teaching and learning, there is a question about the utility of *unstructured* "ethics by the pervasive method" approaches; that is, an approach that fails to (1) specify ethics learning objectives with the clarity that they demand and (2) align teaching/learning and assessment tasks with the objectives. It has been pointed out that "all too often" the claim of pervasive ethics falls far short of what is really required, which—in these authors' view—requires careful preparation and dedicated classroom time: Luban and Milleman, *supra* n. 2, 39. It seems possible, therefore, that one reason why the pervasive approach to legal ethics has apparently not worked is because curriculum planners, in paying insufficient attention to educational theory, have assumed the achievement of student learning outcomes that were either not expressed clearly enough in learning objectives, or were not supported by the learning activities and assessment practices that such objectives require, or both.

[83] This label was developed during a series of curriculum review discussions in the Griffith Law School, Queensland, Australia, in 2004. The author of this article was a member of the committee. The collective contribution of the committee members in developing the notion of the vertical subject in the context of the Griffith Law Curriculum is acknowledged. See also Christensen and Kift, *supra* n. 38; Keyes and Johnstone, *supra* n. 57, 559.

increase in complexity from one host subject to the next. Points of co-existence with other subject areas would be determined by the extent to which practice in those substantive areas unavoidably implicated enquiries about both the role of the lawyer and ethical decision-making in particular. Moreover, in each site in which the vertical subject co-existed with the traditional subject area, ethics learning objectives, teaching and assessment within the host subject would need to be carefully aligned.[84]

Student performance in assessment tasks, together with subsequent evaluation of all aspects of students' experiences of the vertical subject, would reveal the extent to which the desired learning outcomes, at each stage of the vertical subject's intersection with the host subject, were actually being met. If not, adjustments would need to be made to increase the likelihood that students make the connections between the different levels of learning and to improve prospects for the incremental learning that is desired. In theory, this model will encourage students progressively to deepen their understandings from quantitative levels to the highest qualitative ones by the time they complete their legal studies, and provide them with the best possible foundations to develop their ethical competencies to functioning knowledge levels as they enter the vocational stages of their careers—whether these be in legal practice or elsewhere.

Conclusion

The argument for a "vertical subject" in legal ethics can be seen in a broader legal education context. Reference was made earlier to what has simply been described as the traditional model of legal education, which exhibits a number of tired and troubling characteristics.[85] The authors of a recent assessment of Australian legal education have examined the extent of change in the sector over the last few decades and have concluded that, despite the rhetoric, such changes that have occurred are not profound ones, and many problems associated with the traditional model have not been fundamentally addressed. There are, moreover, continuing impediments that effectively thwart the kind of transformation that is so clearly needed. These include the legal academy's (continuing) subservient relationship to legal practice and the profession, and the "general lack of awareness of or concern for the educational literature [and] its implications for teaching practices".[86] Despite this sometimes gloomy assessment, there are some reasons to be optimistic about the prospects for transcending the traditional model. Opportunities clearly exist for reform-minded teachers to devise and to experiment with fresh initiatives in law school teaching, especially if the particular institution recognises the need for innovation in legal education. But if legal curricula and teaching and learning strategies are to be "renovated" to the extent necessary, a number of issues will need to be addressed. These include the development of a truly student-focused approach to teaching, which requires a far greater commitment to the development of learning activities that

[84] This also means that, just as traditional subjects/courses have convenors, so should the vertical subject. One of the responsibilities of the vertical subject convenor would be to work collaboratively with "host" subject convenors to ensure that ethics learning objectives are appropriately formulated, that teaching and assessment are aligned, and that learning outcomes and students' experiences of learning in the vertical subject are effectively evaluated.

[85] *Supra*, text at n. 57.

[86] Keyes and Johnstone, *supra* n. 57, 554–5.

encourage quality learning, and recognising the merits of a co-ordinated approach to curriculum design, in the interests of incremental student learning opportunities in areas such as legal ethics.[87]

It seems to be implicit in most arguments for ethics learning in law school that the quality of legal education would be improved if students learned a great deal more than they currently do about the meaning, significance, frequency and potential complexity of ethical decision-making in the lawyer's role—together with the responsibility that this decision-making carries. Current scholarship on legal ethics in legal education suggests that there is also a steadily growing view that the legal academy has a special responsibility to do far more than it previously has to produce graduates who are better equipped to handle the considerable ethical challenges of contemporary practice. Yet, the place, scope, content and methodology of legal ethics in legal education remain far from settled, and there is evidence to suggest that the achievements in legal ethics learning among law schools that *do* teach in the area still leave much to be desired. Part of the challenge to encourage higher quality learning outcomes in legal ethics—assuming that such a goal remains a priority in the changing world of tertiary legal education—must surely involve much more attention to fundamental questions about whether, and how, we can hope to create the learning environment necessary to support the quality of learning deemed necessary. This means that learning theory must have a prominent role in providing the insights and direction that this ongoing project requires.

[87] *Ibid*, 558–61.