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Legal Ethics in the Modern Law School: Lessons from America

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Legal Ethics in the Modern Law School: Lessons from America

Table of contents	
Introduction – what can we learn about legal ethics from <i>Suits</i>?	3
How should we define ‘legal ethics’ in law school?	4
The traditional mode of legal ethics classes – Canada and Australian experiences	7
Student reflections – how conventional ethics teaching fails us	14
Developments in the United States – as close to best practice as we can get?	17
(a) A challenge to ethics teaching: making ethics a learning priority (1990s)	17
(b) The Carnegie Report recommendations: a merging of theory and practice.....	19
(c) Stanford Law School.....	21
(d) Washington and Lee School of Law (W&L).....	22
(e) Yale Law School.....	23
Analysis of the U.S. innovations in ethics teaching	24
Conclusion – where to from here for Mike Ross?	26
BIBLIOGRAPHY	28
Legislation and Model Codes	28
Secondary sources – Books	28
Secondary sources – Academic articles	28
Secondary sources – academic and professional reports and presentations.....	30
Secondary sources – miscellaneous	31

Introduction – what can we learn about legal ethics from *Suits*?

In the television program *Suits*, Michael Ross is a precocious young lawyer who is, in reality, a lawyer-pretender. Gifted with a superlative intellect, Mike accidentally meets Harvey, a junior partner in a Manhattan law firm, who hires him as a junior associate, knowing that he has never been to law school. In setting this story, the writers of *Suits* crashed through the last barrier in lawyer-crime TV shows.¹ We did not question whether the lawyers in *The Practice*, *Ally McBeal*, *Law and Order* or even *Boston Legal* were in fact ‘lawyers’ in a technical sense, or what their law school experience meant for their practice. The fact that *Suits* opens with a frank acknowledgement that you can be a lawyer without any training perhaps tells us something about public confidence in lawyers, but also something about what we think it takes to be an ethical lawyer.

My question in this paper is what can we learn from *Suits* about legal ethics and law school? Where and how should ethics be taught to junior lawyers? Did the fictional Mike Ross really miss an integral piece of his legal training by not attending ethics classes? In considering these questions, I critique the majority of law school approaches to ethics education in Canada and Australia and I argue for the widespread introduction of the more ambitious legal education models implemented in the United States in law schools such as Yale, Stanford and Washington and Lee where a blend of clinical legal education and reflective coursework better prepares the new generation of lawyers for practice.

¹ I have a specific definition of ‘lawyer crime shows’ here, that relates to dramas or dramadies where the focus of the action is on the application of the law and the conduct of lawyers. I note, though, that a similar origin story frames the popular comedy show *Community*, where the protagonist is a lawyer who has been practicing for 10 years without a law degree and is then forced to apply to Community College to complete his undergraduate requirements before attending an accredited law school. This seems to be an issue that is of greater interest to television audiences than in previous decades.

How should we define ‘legal ethics’ in law school?

In most common law jurisdictions and certainly in Canada and the United States, all accredited law schools must offer courses and training in legal ethics. In Canada, this is a recent requirement: section B.2 of the National Requirement sets a uniform ‘ethics and professionalism’ competency which encompasses ‘an understanding of the ethical requirements for the practice of law in Canada’.²

In the United States, ethics instruction in accredited law schools has been an American Bar Association (ABA) requirement since 1974, following the Watergate scandal, which “provided the primary impetus for ethics instruction” in American law schools.³ The ABA Standard requires that

A law school shall establish learning outcomes that shall, at a minimum, include competency in...

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.⁴

Many scholars argue that the term ‘professional responsibility’ is more appropriate than ‘legal ethics’, as law students must also develop a sense of legal professionalism that “go beyond a

² Federation of Law Societies of Canada, National Requirement, available online: <http://flsc.ca/national-initiatives/canadian-law-school-programs/>

³ Deborah L. Rhode, “Ethics by the Pervasive Method”, 42 (1992) J. Legal Educ. 31 at 39. See also: Laurel S. Terry, “A Survey of Legal Ethics Education in Law Schools” Chap. 5 in S.K. Majumdar, H.S. Pitkow, L. P. Bird and E.W. Miller eds. *Ethics in Academia* (Penn. Academy of Science 1999) at 61 – 62.

⁴ The American Bar Association, *2014-2015 Standards and Rules of Procedure for Approval of Law Schools*, Standard 302(c) and 302(d). Available online:

http://www.americanbar.org/groups/legal_education/resources/standards.html: The ABA *Model Rules of Professional Conduct* (1983) provides the basis of ethical instruction and bar exam testing of professional responsibility competence in 49 of 50 states in the United States. Available online: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

mere compliance with the applicable ethical rules.”⁵ There has therefore been much academic discussion of the degree to which students should study the morality of law in ethics courses,⁶ where to place the line between the study of law’s morality and legal ethics,⁷ and the inclusion of broader philosophical concepts of ethics and morality in the law classroom.⁸

I talk generally in this paper about ‘legal ethics’ as a standard of professionalism for lawyers that goes beyond, but encompasses, code requirements. A narrow focus on specific ‘code requirements’ for ethics in one jurisdiction could limit the transferability of ideas for teaching ethics, and for that reason we should focus on what we genuinely share in terms of a definition of ethics rather than differences.⁹ There is much commonality between common law jurisdictions, stemming from the shared history of the legal profession as self-regulating and intrinsically connected to the public interest.¹⁰ “Lawyers’ privilege rests on a bargain between society and the legal profession. Society permits lawyers to regulate themselves in exchange for the

⁵ David F. Chavkin, “Experience is the only teacher: bringing practice to the teaching of ethics”, Chap. 4 in Michael Robertson, Lillian Corbin, Kieran Tranter and Francesca Bartlett, eds., *The Ethics Project in Legal Education* (Abingdon: Oxon, Routledge, 2011) at 67, fn 1.

⁶ Lee Modjeska, “On Teaching Morality to Law Students”, 41 (1991) *J. Legal Educ.* 71 – 75 at 72.

⁷ David Luban, “Rediscovering Fuller’s Legal Ethics”, 11 (1997 – 1998) *Geo. J. Legal Ethics*, 801.

⁸ Ted Schneyer, “Moral Philosophy’s Standard Misconception of Legal Ethics”, (1984) *Wis. L. Rev.* 1529.

⁹ For example, in Australia, lawyers are required to put their duty to the court above any conflicting duty to the client: the Law Council of Australia’s *Model Rules of Professional Conduct and Practice* (2002) and the *Australian Solicitor Conduct Rules* (2011), section 3.1. This does not reflect the balance of ethical obligations in the United States, but is closer to the balance of obligations in ethical codes in Canada, although in this jurisdiction, “the two duties [to the client and to the court] are given equal prominence which may make ethical choices in advocacy more difficult for Canadian advocates.” Gavin MacKenzie, “The ethics of advocacy”, *The Advocates’ Society Journal* (September, 2008), at 26 See also: The Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Part IV, Robert Bell and Caroline Abella, “A Lawyer’s Duty to the Court”, paper presented to the Advocates Society, Symposium on Professionalism and Civility, 8 February 2012. Online: <http://www.advocates.ca/new/advocacy-and-practice/institute-for-civility-and-professionalism/symposium-on-professionalism.html>

¹⁰ Theodore Schneyer, “Professionalism as Politics: The Making of a Modern Legal Ethics Code”, Chapt. Three in Robert L. Nelson, David M. Trubek and Rayman L. Solomon eds., *Lawyers’ Ideals/Lawyers Practices, Transformations in the American Legal Profession*, (Ithaca: New York, Cornell University Press, 1992) at 99.

profession's guarantee that lawyers will be ethical, competent, and place the public's interest above their own self-interest."¹¹

The Preamble to the American Bar Association's *Model Rules of Professional Conduct* is therefore a good starting point for ethics teaching in general: 'a lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.'¹² However, I prefer the more general definition of the ethical lawyer proposed by Carrie J. Menkel-Meadow:

"The ethical lawyer is professionally competent – or likely to become so – and cares about the quality of her work and the quality of her relationships with the people she interacts with, whether clients, colleagues, opponents, judges or employees... the good lawyer is loyal and faithful to her client but also thinks about how the tools of her craft are being put to use; it matters what interests and whom she serves."¹³

Menkel-Meadow's definition of the ethical lawyer is useful for this discussion because it encompasses some the shared elements of ethics in legal practice rather than a focus on specific codes, while also referencing these 'hard requirements' by including 'professional competence'. It also allows for the development of ethics and ethical practice from law school to a seasoned practitioner, and reflects on a concept of 'internal ethics' - difficult to define, and constantly moveable, which I consider reflects our profession's commitment to the values of professionalism and public justice.

¹¹ Russell G. Pearce, "Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School", 29 (1998) *Loy. U. Chi. L. J.* 719 at 721.

¹² *Supra* n. 4 at 29.

¹³ Carrie J. Menkel-Meadow, "Can a Law Teacher Avoid Teaching Legal Ethics?" 41 (1991) *J. Legal Educ.* 3 – 10 at 5.

The traditional mode of legal ethics classes – Canada and Australian experiences

One particularly dispiriting historical view describes ethics classes as “the dog of the law school—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds.”¹⁴ This reflected the pervading view of law students in the USA since 1975, and even continuing into this century. The results of the USA-wide *Law School Survey of Student Engagement* in 2010 showed that only half of students surveyed felt their law schools prepared them well to deal with ethics dilemmas that may arise in law practice,¹⁵ and this was directly connected to a lack of real-life experience at law school.¹⁶

The historic problem of how to teach legal ethics is shared by faculty members and scholars across jurisdictions:

[H]ow do you overcome the disengagement or hostility of cynical students who think the class is a bunch of hooley? How can a teacher avoid being regarded as a touchy-feely Pollyanna? How is one supposed to teach an increasingly voluminous and complex body of law without becoming a doctrinal spoon-feeding machine? How might one teach about lawyer misconduct and its disastrous consequences without demoralizing law students just about to join the profession?¹⁷

In Canada and Australia, teaching legal ethics in law school has been a relatively long term project, but it is only of relatively recent academic interest. Cotter notes that, in 1985 in Canada, only two schools had a compulsory legal ethics course. These were the University of Manitoba

¹⁴ Dale C. Moss, “Out of Balance: Why Can’t Law Schools Teach Ethics?” *Student Law*, Oct. (1991) at 18 – 19.

¹⁵ Richard Acello, “Street Smarts: Law Schools explore benefits of teaching ethics in a clinical setting”, (2011) *ABA Journal*, 26 at 26.

¹⁶ Further, an earlier U.S. survey in 2004 reported that “students rate ethics education near the bottom in evaluating how useful law school experiences were in their transition to real-life practice.” R. Dinovitzer et al. *After the JD: First Results of a National Study of Legal Careers*, for the National Association for Law Placement Foundation for Law Career Research and Education and American Bar Association, (Washington: DC, 2004), p. 81.

¹⁷ Lisa G. Lerman, “Teaching Ethics In and Outside of Law Schools: What Works and What Doesn’t”, (2007) *The Professional Lawyer*, 57 – 66 at 57.

and University of Alberta. By 2005, only four Canadian schools offered a compulsory ethics course: Manitoba, Alberta, Dalhousie and the University of Western Ontario (Western).¹⁸

In terms of Canadian scholarship on teaching ethics, Lorne Sossin, then Dean of University of Toronto Law School wrote in 2007 that there are traditionally five accepted ways of teaching ethics in the Canadian law school:

1. The "integrated" or "pervasive" method, where there is no dedicated ethics course, but rather ethical issues are integrated throughout the curriculum's offerings;
2. the clinical method, whereby all students have some exposure to the real-world issues of working with clients through the clinical setting;
3. the combined method, where legal ethics and professionalism is integrated into another course, such as legal research and writing or civil litigation;
4. the dedicated course method, either mandatory or elective; and
5. not at all, on the assumption that the bar admission course will contain an ethics component.¹⁹

In Australia, ethics teaching for the L.L.B. degree is limited to one mandatory 'Ethics' course, taught in virtually the same format in all Australian universities.²⁰ This uniformity reflects a larger trend of Australian law schools to teach law through "legal positivism alone, ignoring critical thinking, ethical engagement and moral considerations regarding the merits of the law."²¹

I agree with Joshua Krook that this move to limit conceptual and moral questioning in legal

¹⁸ Brent Cotter (Dean, College of Law, University of Saskatchewan), "Legal Ethics Instruction in Canadian Law Schools: Laying the Foundation for Lifelong Learning in Professionalism", (draft paper version) presentation to the Chief Justice of Ontario's Advisory Committee on Professionalism, Symposium on Lifelong Learning in Professionalism, University of Toronto, February 20, 2009, at 3.

¹⁹ Lorne Sossin, "Can ethics be taught?" 26 (2007) *The Lawyers Weekly* at 5.

²⁰ Students at Sydney University have been so disillusioned with the one-class ethics teaching format that they have created the Critical Legal Students Network. Joshua Krook, a founding member, argues that the point of the The Network is to go beyond discussions of 'what is the law?' to ask 'why is law the way it is?' Although still in its infancy, the group has been expanding over time and has received attention from students outside of Sydney Law School. Joshua Krook, "What Law Students Need To Know About Legal Ethics Won't Be Taught To Them In Law School", *The New Intrigue*, 15 August 2014, online: <http://newintrigue.com/2014/08/15/what-law-students-need-to-know-about-legal-ethics-wont-be-taught-to-them-in-law-school/>

²¹ Margaret Thornton, "The Law School, the Market and the New Knowledge Economy" (2008) 17 *Legal Education Review* 1; Tamara Walsh, "Putting Justice Back into Legal Education" (2008) 17 *Legal Education Review* 119.

education in Australia is a likely consequence of the introduction of the “Priestly Eleven”, a set of compulsory law subjects established by national committee in 1992, which promotes objective study of rules over critical analysis. Krook comments:

Aside from Ethics itself, a diminutive subject where students are taught the “rules” of legal ethics instead of the philosophy of what makes them ‘ethical’, most of the “Priestly Eleven” focus on the learning and application of case law and legislation to facts; ethical behaviour and critique is sidelined.”²²

Adam Dodek has commented that Canadian legal ethics “has existed for decades, at least since there were Canadian lawyers, and perhaps earlier. However, for the most part, the academy has simply ignored it. It was, in short, a subject in search of scholarship.”²³ However, since 2005, the Canadian legal academy has shown far greater interest in the teaching of ethics. To this end, Dodek discusses the output and position of the New Legal Ethics Scholars.²⁴ However, Dodek’s focus is upon academic output and criticism in the area of ethics, far more than the modes of legal education for teaching ethics effectively. In my view, it is clear that emerging scholarly interest in ethics *teaching* in Canada has generally not extended to the nuanced analysis of legal ethics, legal practice and evolving pedagogical techniques that has become the norm in the United States.²⁵

The lag in pedagogical development between the United States and Canada is demonstrated by a quick review of the ethics instruction currently being taught in Canadian law schools. Despite the

²² Krook, *supra* n. 20.

²³ Adam M. Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last* (2008), 46 Osgoode Hall L.J. 1, 32 at 32.

²⁴ *Ibid*, at 36 – 38.

²⁵ I discuss developments in the United States further at heading 5, below.

acknowledged interest in teaching ethics in Canadian law schools over the last 10 years,²⁶ and the introduction of the National Requirement in 2014,²⁷ my research indicated that a majority of Canadian law schools still teach ethics courses in the conventional seminar format (and some classes are still taught in large lecture modes, with no associated seminar), with conventional modes of assessment such as a 100% final exam, long factum or research papers. For example: McGill University,²⁸ the University of Victoria,²⁹ the University of Toronto,³⁰ University of

²⁶ For example: Woolley and Bagg, "Ethics Teaching in Law School" (2007), Can. Legal Educ. Ann. Rev. 85; Devlin, Downie and Lane, "Taking Responsibility: Mandatory Legal Ethics in Canadian Law Schools" (2007), 65 Advocate 671; Dodek, *supra* n. 23.

²⁷ With all Law Schools to comply with the National Requirement by 2015. The National Requirement implements the recommendations of the Task Force on the Canadian Common Law Degree for the Federation of Law Societies of Canada, *Final Report*, (October 2009).

²⁸ McGill University Faculty of Law, "Ethics and Advocacy" (3 units, 2L). First term of this course focuses on concepts in legal ethics, regulation of the legal profession, professionalism, and discipline. Assessment: Short Quiz, and in-term assignments written and oral, with factum drafted in second term.

²⁹ University of Victoria, "Legal Ethics and Professionalism" (1.5 units). Examines the ethical dimensions of the practice of law in Canada. Covers knowledge and skills needed to identify and address ethical dilemmas arising in a legal context. Traditional lecture style sessions covering regulation of the legal profession, in class presentations and discussions based on ethical problems. Evaluation: Exam: 40%, in class presentation: 50% (written outline + 20 minute in class presentation). Course description online:

http://law.uwo.ca/academic_programs/legal_ethics/index.html

³⁰ University of Toronto Law School has two ethics courses, one intensive (2 credits) and one 3L semester course (3 credits). Legal Ethics and Lawyer Regulation Intensive: examines topics such as the lawyer-client relationship, confidentiality, conflicts of interest, the duty of loyalty and ethics in advocacy, counselling and negotiations. The focus is on Ontario law and the Rules of Professional Conduct. Method: lecture format with time devoted to analysis of case studies. Assessment: 24-hour take-home exam (100%). Legal Ethics: introduces students to legal ethics. The foundations of ethical reasoning, the Rules of Professional Conduct, and the principles and values which underlie legal ethics are examined. Evaluation: 3-hour open book examination (100%). Course descriptions online: http://www.law.utoronto.ca/academic-programs/jd-program/program-requirements#upper_year

Alberta,³¹ Dalhousie University Schulich School of Law,³² Queen's University³³, the University of Manitoba,³⁴ Osgoode Hall Law School³⁵ and the University of New Brunswick³⁶ all have ethics courses that follow the conventional course method, although they vary depending on whether the course is a first year or later year requirement, or a year-long course or an intensive at the beginning of term.

³¹ University of Alberta Law School, "Professional Responsibility", (3 credits) (3L). Objectives: to explore the practice of law in Canada, and the ethical obligations and responsibilities of lawyers to the profession and to the public. Students think critically about ethical issues faced by members of the legal profession, and articulate their own ethical framework for making choices that respond to these ethical issues. Students identify and respond to conflicts of interest, understand the extent and limits of the confidentiality obligation and duties owed by lawyers. Evaluation: research paper worth 75%, remaining 25% made up of class participation and attendance. Course description online: <http://lawschool.ualberta.ca/student-resources/courses-registration-resources/registration-and-courses/upper-year-compulsory-courses>

³² Dalhousie University, Schulich School of Law, "The Legal Profession and Professional Responsibility" (3 units, 3L). Objectives: to examine aspects of the nature and organization of the legal profession, including its history and evolution, the legal and ethical responsibilities of lawyers and the influences of the adversary system on the pursuit of justice. Covers ethical rules which affect lawyers and also the wider public protection issues. Method: lectures and discussions involving the whole class (1 hour per week) and by small group discussions (1 hour per week). Evaluation: 100% exam. Class description online: <http://www.dal.ca/faculty/law/programs/id-admissions/required-courses-bar-admission.html>

³³ Queen's University, "Legal Ethics and Professionalism": (3 units, 3L). Course deals with variety of ethical issues that confront those engaged in the profession. Areas covered include relevant legislation, caselaw, and rules of professional conduct. Specific subject matter covered: circumstances giving rise to ethical problems; fiduciary relationship between lawyer and client; conflicts of interest; the administration of justice; lawyers' duties relating to confidentiality, privilege, and disclosure; professionalism and civility; the importance of diversity; and the public interest in the administration of justice.

³⁴ University of Manitoba, "Legal Profession and Professional Responsibility" (3 credits, 3L). Course will introduce students to the ethical, legal and regulatory framework within which lawyers operate. Teaching Method: Erratic. Lecture, class discussion, video and "whatever gets us through the night." Assessment: Pass/Fail based on mandatory attendance and completion of written assignments.

³⁵ Osgoode Hall Law School, "Legal Values: Legal Ethics" (3 credits, 3L). Course is designed to provide students with the opportunity to think imaginatively about issues in legal ethics as well as to help students understand the basic ethical and professional context in which those issues arise today. Course introduces students to ethics and professional responsibility in the legal profession. Our focus, through readings, in-class problem-based discussions and exercises, will be both conceptual and practical. The course is also designed to provide students with an opportunity to focus on identifying an ethical or professional issue and presenting the issue both in a team-based class setting and through a research paper.

³⁶ University of New Brunswick Law School, "Professional Conduct", (3 credits, later year). "Study of standards of behaviour for lawyers in private practice and other situations, based on professional codes of ethics, Law Society Act and pertinent regulations. Includes consideration of negligence issues and discussion of professional sexual misconduct."

Queen's University has this year advertised a new 'law firm sponsored' ethics course to start in 2015 which will involve legal practitioners engaging in classes with students. However, close review of the planned course indicates that this will not include experiential learning, but rather will involve legal practitioners in seminar discussions and lectures in the law school environment.³⁷

Similarly, the University of Saskatchewan advertises its clinical program CLASSIC program, where students are enrolled in an intensive law clinical program in a full term, 15 credit program which develops 'reflective lawyering skills',³⁸ but there is no link between this experiential learning model and the mandatory 3L ethics seminar, which again relies on set case and model code readings, in-class discussions of ethical issues, a seminar format and a review of set reading materials.³⁹

The University of Calgary and Western University have more ambitious ethics programs, although it unclear whether these link experiential learning with classroom reflection and theory. In 2015, the University of Calgary will roll out the Calgary Curriculum, which aims to create greater opportunities for merger between practical experience, experiential learning and the theory of law: "embrace the concept of performance-based learning, using real-life situations

³⁷ Queen's University, "Upper-year law students will...learn from legal experts in the field thanks to the support from Canadian law firm McCarthy Tétrault...all second-year law students will be required to take a course in legal ethics and professionalism. The new mandatory course, to be offered in both fall and winter terms, is part of a broader initiative that will help place Queen's on the forefront of research and teaching in this important field." Course information online: <http://law.queensu.ca/news/mccarthyGift>

³⁸ The University of Saskatchewan law school blurb notes that "a key feature of professional practice is the ability of practitioners to "learn from experience" in the indeterminate zones of actual practice (The Reflective Practitioner: How Professionals Think in Action (1983) New York: Basic Books). The clinical law seminar permits students to become what Schon calls "reflective practitioners" through weekly "case rounds" dialogues (Susan Bryant and Elliott S. Milstein, "Rounds: A "Signature Pedagogy" for Clinical Education?" (2007-8) 14 Clinical L Rev 195)."

³⁹ University of Saskatchewan, Legal Ethics and Professionalism (3 credits, 3L), course description online: http://www.usask.ca/programs/course.php?csubj_code=LAW&cnum=421

(actual or simulated) to deepen your learning of legal principles and to translate that learning into practical concepts and applications.”⁴⁰ The curriculum information page indicates that, core required courses in later years, including Ethical Lawyering (3 credits) will be “taught through performance-based evaluation.”⁴¹

Western Law was an early leader in Canadian Legal Ethics education. The new first-year Legal Ethics course (coursework based) is designed and delivered by the Goodmans LLP Faculty Fellows in Legal Ethics, Randal Graham and Stephen Pitel. The Western Legal Ethics site states that “every first year student at Western Law has the opportunity to explore and discuss many complex ethical questions facing lawyers, business leaders, regulators and government actors.”⁴² Western’s Faculty of Law also offers Canada’s first oral advocacy competition devoted to legal ethics: the Lenczner Slaght Advocacy Competition in Legal Ethics and Professionalism.⁴³

The newest law school to receive accreditation, the Lora Baskin Faculty of Law at Lakehead University, offers a more practical law school alternative to other law schools.⁴⁴ Lakehead is the first law school in Canada to have an integrated practice curriculum whereby students do not need to article and will be eligible for licensing in Ontario immediately after graduation.

However, the only ethics course is ‘Professional Responsibility’ a mandatory first year course (3 units), offered in a conventional format. In a university where practical skills and in-house legal

⁴⁰ Calgary Curriculum description, online: <http://law.ucalgary.ca/calgarycurriculum>

⁴¹ *Ibid.* At present, this is the only information available about the ethics course in the new curriculum. ‘Performance based evaluation’ does seem like a promising description of experiential based learning.

⁴² Legal Ethics at Western University, course description online: http://law.uwo.ca/academic_programs/legal_ethics/index.html

⁴³ *Ibid.*

⁴⁴ Lora Baskin School of Law, program information online: <https://www.lakeheadu.ca/academics/departments/law/why-study-law>

training is offered to all students, it is disappointing that the form of ethics teaching is not more oriented to practice.

Student reflections – how conventional ethics teaching fails us

In preparation for this paper, I interviewed several McGill law students about their experiences with ethics classes in law school, either in Canada or in other common law jurisdictions.⁴⁵ I asked students to describe how well their ethics course had prepared them to deal with ethical issues in legal practice or, in the case of law students who had not practiced, how prepared they felt to deal with ethical issues. Across the board, student responses were resoundingly negative. Students reported that ethics teaching was stilted and the problems presented in class exercises were unrealistic or difficult to relate to. Whether or not they had practiced since taking their ethics course, each student felt concerned about legal ethics and had a desire ‘to be an ethical lawyer’ but did not think that their experiences in legal ethics at law school had properly equipped them for practice. The mode of teaching ethics: in a classroom, with simulated ‘client-lawyer’ exercises and reflection readings, directly contributed to the feeling of disconnect with ethics and real practice.

These concerns echo Chavkin’s comment that, too often the teaching of ethics in the law school classroom “proceeds as a disjointed journey through a series of ethics rules without context.”⁴⁶

⁴⁵ I interviewed six students about this topic in March 2015: two second-year McGill law students who had taken the Ethics course in 2013-2014, two McGill law graduate who took Ethics at McGill three or four years ago and who are now D.C.L. candidates at McGill, and two graduate students who received their law degree from universities in the United Kingdom and then completed an L.L.M. in Canada or the United States. All students asked to remain anonymous for the purposes of this paper.

⁴⁶ Chavkin, *supra* n. 5 at 55.

This means that, in practice, insufficient use is made of exercises that give context, and ethics classes run the risk of degenerating into “a series of war stories told to the younger generation.”⁴⁷

After seven years of legal practice, I am now experienced enough to understand just how poorly I was prepared for ethical issues in practice, having taken one ethics course that was designed and assessed in very similar ways to the conventional course model taught in a majority of Canadian law schools.⁴⁸ Research demonstrates that the course is still taught virtually unchanged,⁴⁹ with the same set text (although a later edition).⁵⁰ As for most students, this was the total of my exposure to ethics in law school. My reflections about the course echoed that of the McGill students I interviewed: I left with an understanding that ethical issues could be a significant aspect of my legal practice, but I had very little confidence in my ability to resolve these issues.

Let me present a short selection of the ethical issues that I then encountered in my first three years of practice:

1. A refugee applicant contacted me by phone and asked for legal advice about her immigration status.⁵¹ She confided that her husband was very violent and did not want her talking to a lawyer. I then had to ring her back the next day and could only get through to her answering machine.

⁴⁷ Chavkin, *supra* n. 5 at 54.

⁴⁸ Australian National University (ANU), Lawyers, Justice and Ethics (3 units, 1L). Small class seminar, assigned case readings and textbook, mode of assessment: long paper and in-class participation.

⁴⁹ See: ANU Course offerings for 2015, Lawyers, Justice and Ethics, <http://programsandcourses.anu.edu.au/2015/course/LAWS1202>

⁵⁰ Simon Rice, *Selected materials on lawyers, justice & ethics*, 2nd edition, (Pyrmont, NSW: Thomson Reuters (Professional) Australia/Lawbook Co., 2014).

⁵¹ I was a legal officer working at the Australian Department of Immigration and Citizenship, with responsibility for answering legal queries for clients who had ongoing refugee applications before Australian courts.

2. A senior government instructor in an employment law matter told me that she could obtain security-classified medical files for a plaintiff and show them to me ‘over a drink’ if I could not find sufficient discovery evidence for my litigation strategy recommending we proceed to trial.⁵²
3. A client with severe schizophrenia had to give me instructions in a secure wing of a mental health facility. His doctor refused to leave the room while I was trying to prepare him for an administrative hearing, and told the client that ‘it’s still confidential even though I stay in here with you. Your lawyer will agree with me.’⁵³

These experiences demonstrate that I was expected to deal with ethical issues at an early stage of my career like many young lawyers, yet was I doing so in a professional, rather than learning environment: the trapeze without a safety net. Had I had the opportunity to ‘test’ my knowledge of ethical standards and concept of professionalism in a clinic environment, and combine those practical experiences with opportunities for reflection and support from teachers, I would have approached these ethical issues with more confidence and ability. Given the fields in which I practiced, this would almost certainly have improved the experience of some vulnerable and disadvantaged clients.

⁵² Here, I was working for a national law firm with an Australian Government Department as my client.

⁵³ This occurred while I was a lawyer working in the Equality Law and Human Rights practice area of Victoria Legal Aid. It was my second day working on mental health cases.

Developments in the United States – as close to best practice as we can get?

(a) A challenge to ethics teaching: making ethics a learning priority (1990s)

It is telling that the United States scholarship from the 1990s had already found that the dedicated course method for teaching ethics did not meet student or professional needs for ethical training, and educational scholarship had already begun to propose the need for a conscious pedagogical link between theory learning and experiential learning in law school teaching of ethics.

In 1998, Russell Pearce concluded that ethics teaching in law school had to change permanently. Ethics, he argued, is the most important subject any student will take in law school, not least because it is one of the only subjects that every law student will use in practice.⁵⁴ Yet, despite this, ethics in most law schools was relegated to second class status because (a) there was no requirement that it be a mandatory first year subject, (b) it was often taught by junior faculty or consultant practitioners and (c) because the pedagogical techniques suited for many substantive law classes do not match ethics material.⁵⁵

Pearce proposed a teaching model for a revised ethics program that included a mandatory first year, three-credit course, a later ‘advanced’ ethics course (which could be experiential) and the adoption of Rhode’s proposed ‘pervasive teaching’ model of ethics.⁵⁶ The three credit designation was significant because this indicates the significance of the course: students will understand that “legal ethics is the most important course” they will take in law school and will

⁵⁴ Pearce, *supra* n. 11 at 735 – 736.

⁵⁵ *Ibid.*

⁵⁶ Pearce, *supra* n. 11 at 736 – 738; Rhode, *supra* n. 3.

stop students seeing ethics as the ‘dog’ of the curriculum.⁵⁷ The later year advanced course would then prepare students for the issues they will encounter in practice and properly engage them in hands-on ethical issues.⁵⁸ The pervasive teaching element would enable faculty to weave ethical considerations and practice issues throughout other courses.⁵⁹

As early as 1995, more than 10 years before the 2007 Carnegie Report into Legal Education recommended greater integration of practice and theory in legal education,⁶⁰ David Luban pioneered the first integrated model of theory and practice in ethics education at the University of Maryland that combined a traditional classroom course in ethics with a clinical course. In this model, “teachers and students [could] continually use practice to criticize ethics theory and ethics theory to inform practice.”⁶¹

The University of Maryland ethics program remains; although it has now been substantially amended to include a “roving professor” pilot project under which two experienced legal ethics professors develop and teach ethics materials upon request by other faculty members. Through this program, simulation exercises are developed for contracts, torts, and legislation courses, for example, involving ethics issues arising in negotiation, contract drafting and client counseling situations.⁶²

⁵⁷ *Ibid* at 737. See also: Stephen McBundy, “Ethics Education in the First Year: An Experiment”, 58 (1995) *Law & Contemp. Probs.* 19, at 30.

⁵⁸ Pearce, *ibid*.

⁵⁹ *Ibid*, at 738.

⁶⁰ W.M. Sullivan, A. Colby, J.W. Wegner, L. Bond and L.S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching (Washington: DC, 2007) (2007 Carnegie Report).

⁶¹ David Luban and M. Millemann, “Good Judgement: Ethics Teaching in Dark Times”, 31 (1995) 64.

⁶² Online course information: <http://www.law.umaryland.edu/programs/initiatives/moser/curriculum.html>

(b) The Carnegie Report recommendations: a merging of theory and practice

The early 1990s models of merging theory and practice in ethics discussed above anticipated the findings of the 2007 Carnegie Report into legal education.⁶³ The 2007 Carnegie Report separated legal education into three ‘apprenticeships’: cognitive, formative and practical. The authors found that experiential learning was an important element of legal education that would enable students to develop “the natural concomitant of most lawyers’ activity: experience with clients.”⁶⁴ The Report concluded that the changing needs of the modern legal profession created a perfect opportunity for law schools to unite the two sides of legal knowledge: formal knowledge and the experience of practice.⁶⁵ However, the Report concluded that the standard approach to legal education in the United States neglected real-world preparation to practice:

Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice... Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner.⁶⁶

In March 2009, the Legal Education Analysis and Reform Network (LEARN) of law schools announced a program of action to ‘maintain and enhance the momentum for law schools across the country to create a wider array of learning environments’ including simulations and clinical work and to further integrate the teaching of substantive knowledge, legal skills and professional values.⁶⁷ In 2013, as a response to recommendations of greater experiential learning and

⁶³ 2007 Carnegie Report, supra n. at 56 – 57.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at 160.

⁶⁶ *Ibid.*, at 14.

⁶⁷ 10 law schools who made up the LEARN Consortium were the City University of New York, Georgetown, Harvard, Indiana University, New York University, Southwestern, Stanford, University of Dayton, University of New Mexico and Vanderbilt. See also: R. Stuckey et al. *Best Practices for Legal Education: A Vision and a Road Map*, Clinical Legal Education Association (Washington, DC: 2007).

criticism of the failure of law schools to prepare students for practice, the American Bar Association presented a report reviewing challenges for American legal education.⁶⁸ This report concluded that greater experiential teaching and greater diversity in teaching methods in law school was critically well-regarded and necessary, but this change had considerable resource implications for law schools that also had to be carefully balanced against student fees.⁶⁹

What is clear from these developments in the United States over the last fifteen years is that experiential learning has become increasingly recognised as the most effective technique for teaching legal ethics, and to be even more effective when combined with dedicated in-class reflection and seminar opportunities than simulation exercises could ever be.⁷⁰ Further, these developments recognise and answer increasing student demand for better teaching of ethics in practice situations. The experiences of clinical education and integrated ethics training across U.S. law schools is greatly varied, and unfortunately I cannot go into the details of every ethics teaching program here.⁷¹ However, I discuss below three different approaches for teaching legal

⁶⁸ Dean Mary Lu Bilek, Diane Camper et al. *Twenty Years after the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academic, Bar and Judiciary*, (March 2013).

⁶⁹ “The primary obstacle to requiring a clinical experience for every student is cost; for clinical programs to be successful, the student:faculty ratio must be low, generally in the range of 8 students per faculty member...Most legal educators agree that there is no substitute for a learning experience in which a student is “in role” as a lawyer...but there is a danger that cost pressures will inhibit creative thinking about this kind of learning.” *Ibid*, at 10.

⁷⁰ Chavkin notes that, although there are now a range of textbooks suggesting simulations and exercises that can be integrated into class discussions to provide context for professional responsibility issues: “as good as these textbooks are, they still suffer from the limitations of simulations. Students know that simulations are an exercise or game, and they do not invest themselves the same way they would in real life.” *Supra* n. 5 at 56. See also: S. Hartwell, “Moral development, ethical conduct, and clinical education”, 35 (1990) N.Y.L.S. Law Rev. 131.

⁷¹ Other programs not discussed here include the City University of New York and the University of New Mexico’s required clinic program (mandatory before graduation): P.A. Joy, “The Ethics of Law School Clinic Students as Student Lawyers” 45 (2003 – 2004) South Texas L.R. at 822. Further, Moliterno discusses the important experiment at the William and Mary Law School since 1988 “in which legal ethics, legal writing and a number of lawyer skills are integrated”, J.E. Moliterno, “Teaching legal ethics in a programme of comprehensive skills development”, 15 (1990), *Journal of the Legal Profession*, 145.

ethics that I consider meet Pearce’s criteria for ‘making ethics the most important subject’ in law school, and set the bar for experiential teaching of ethics.

(c) Stanford Law School

In 2006, Dean Larry Kramer announced that the third year curriculum would be transformed into a three-dimensional program that “combines the study of other disciplines with team-oriented, problem-solving techniques and expanded clinical training that enables students to represent clients and litigate cases before they graduate.”⁷² Since 2006, Stanford has developed the program whereby students take only a clinic during a particular term – with no competing exams or classes, and then reflect on the learnings from that clinic experience in the following term.

Clark Cunningham and Charlotte Alexander note that the Stanford clinic model deals effectively with traditional critiques of clinic education – that students are forced into a ‘sink or swim’ learning environment without adequate pedagogical direction – by creating a parallel course on ethics and professional responsibility that is exclusively for students enrolled in clinics.⁷³ The professor presents a real ethical issue that has arisen in a clinic environment, and students must then effectively act as the collective ethics committee. Students work through ethical issues, apply applicable ethical rules and come to an actual decision about how to proceed. Because of the large number of clinics,⁷⁴ the course exposes students to a broad range of ethical questions

⁷² Stanford Law School, “A “3D” JD: Stanford Law School Announces New Model for Legal Education”, November 28, 2006, online: <https://www.law.stanford.edu/news/pr/a-3d-jd-stanford-law-school-announces-new-model-for-legal-education>

⁷³ Clark D. Cunningham and Charlotte Alexander, “Developing Professional Judgement: Law School Innovations in Response to the Carnegie Foundation’s Critique of American Legal Education” Chapt. 5 in Robertson et al. supra n. 5 at 90.

⁷⁴ There are eleven clinics offered at Stanford Law School, across a wide range of practice areas: Community Law Clinic, Criminal Defense Clinic, Criminal Prosecution Clinic, Environmental Law Clinic, Immigrants' Rights Clinic, International Human Rights and Conflict Resolution Clinic, Juelsgaard Intellectual Property and Innovation Clinic, Organizations and Transactions Clinic, Religious Liberty Clinic, Social Security Disability Pro Bono Project, Supreme Court Litigation Clinic, Youth and Education Law Project: <https://www.law.stanford.edu/clinics>

that they can review when they are not limited by the “haphazard nature of clinical practice” and provides structured guidance for students “as they reason to a moral conclusion”.⁷⁵

The Stanford clinic and class model for ethics training is in addition to three other traditional course offerings that deal with professional responsibility,⁷⁶ an experimental course on ethics in the legal academy⁷⁷ and a specialised legal ethics course for foreign graduate students, which all Stanford L.L.M students must take.⁷⁸

(d) Washington and Lee School of Law (W&L)

Cunningham and Alexander describe the W&L third year program as the “most ambitious education innovation that has been implemented in the United States since the publication of the Carnegie Report”.⁷⁹ In March 2008, W&L transformed the third year of law school into a “creative blend of intellectually rigorous study of legal theory and doctrine.”⁸⁰ The New Third Year consists of two 12 week semesters of 14 credit hours each. Each semester begins with 2

⁷⁵ Cunningham and Alexander, *supra* n. 73 at 90.

⁷⁶ Stanford Law School, “Legal Ethics: A survey of the major legal and ethical issues presented in the practice of law”. We examine the concept of the lawyer endorsed by the rules of professional responsibility and assess the relationship between this concept and the personal, political, and economic constraints of law practice. Emphasis will be given to the rules of professional responsibility and their elaboration in case law, but we will study modern practice from a range of interdisciplinary perspectives throughout the course. Elements used in grading: Attendance, class participation, short papers and final exam. Online course information: <http://www.law.stanford.edu/courses/legal-ethics-0>

⁷⁷ Stanford Law School, “Conflicts, Ethics, and the Academy”: This experimental course looks at conflicts of interest and ethical issues as they arise within academic work. The participants will be drawn from schools and departments across the University in the hope that they will offer different examples of, and perspectives on, the issues we discuss. <https://www.law.stanford.edu/courses/conflicts-ethics-and-the-academy>

⁷⁸ Stanford Law School, “Professional Responsibility”: This course introduces students to the goals, rules and responsibilities of the American legal profession. The course will address many of the most commonly recurring issues that arise, such as confidentiality, conflicts of interest, candor to the courts and others... In addition, we delve into some more personal ethical issues that reflect on why students have chosen law as a profession and how lawyers compose careers that promote or frustrate those goals. Students will be responsible for submitting a reflection paper (three-to-five pages each) after each week of the course. Each memo will be due by the Friday of the following week. This course is offered to foreign graduate students. Limited to LL.Ms, J.S.Ms and exchange students. Required for LL.Ms.

⁷⁹ Cunningham and Alexander, *supra* n. 73 at 94.

⁸⁰ *Ibid.*

credit course that takes up the whole 2 weeks (graduated, modular learning) where students are immersed in practice-intensive training. The remaining 10 weeks is divided between two 5 credit experiential courses: students may enrol in practicums, clinics or externships and one credit for a professionalism program that extends over both semesters.

The W&L School of Law writes that the third year “allows students to explore topics more deeply and engage in the most professionally relevant work of their law school careers. It affords them the unique opportunity to cultivate the skills essential for professional success while working closely with permanent faculty as well as practicing attorneys on a diverse range of legal topics, encountering the law as they will as practitioners: through their client's problems.”⁸¹

W&L has created a number of more intensive clinic experiences, with a variety of options depending on a student's subject interest. Cunningham and Alexander note that, by including the faculty monitored professionalism program throughout the year, the faculty has embedded “ethical issues in realistic and complex fact patterns, set in a variety of subject-matter courses” which enable students to develop “sophisticated ethical sensitivity”.⁸² Enthusiasm for the New Third Year program is high: in 2011, applications to the law school were up by 33%, an increase that Dean Rodney Smolla attributed solely to the new third year curriculum.⁸³

(e) Yale Law School

In 2011, Professor Lawrence J. Fox started the Ethics Bureau and Lawyering Ethics Clinic at Yale Law School. Fox is also the past chair of the ABA Standing Committee on Ethics and Professional Responsibility. Students participating in the Bureau provide advice to lawyers on

⁸¹ Washington and Lee School of Law, online information: <http://law2.wlu.edu/thirdyear/>

⁸² Cunningham and Alexander, *supra* n. 73 at 94.

⁸³ *Ibid* at 95.

various ethical issues from a range of practicing areas. Students in the Bureau draft amicus briefs in cases involving professional responsibility; help people with ineffective assistance of counsel claims; and offer ethics advice to non-profit organizations. A weekly class on professional responsibility is also part of the bureau, taught by Professor Fox.⁸⁴

As part of the Lawyering Ethics Clinic, students represent complainants in Connecticut's attorney grievance system. The Clinic offers 3 units of credit to students who work on the disciplinary process against lawyers charged with violating ethical obligations to clients or other interested persons. The stated goals of the program are "to help students understand the current disciplinary process in Connecticut, and to think about how legal education should engage with the ethical issues facing lawyers."⁸⁵

Under faculty supervision, students work with the Connecticut Office of Disciplinary Counsel, the body charged with prosecuting claims of lawyer misconduct, and are assigned to handle specific grievance cases. Students are trained to interview witnesses, collect documentary evidence, research legal issues, draft pre-trial briefs, and examine witnesses and present closing arguments at the disciplinary hearing. Students may also be involved in negotiating disciplinary sanctions with the grieved lawyer.

Analysis of the U.S. innovations in ethics teaching

The value of the Stanford, W&L and Yale approaches to teaching ethics is that they integrate different pedagogical techniques to address deep student learning needs. Through the clinic or bureau environments, students can develop formative and practical skills for communicating ethical rules to clients and identifying ethical issues. At the same time, giving students an

⁸⁴ Yale Law School, Online course information: <http://www.law.yale.edu/academics/ethicsbureau.htm>

⁸⁵ Yale Law School, Online course information: <http://www.law.yale.edu/academics/TheLawyeringEthicsClinic.htm>

opportunity to reflect on their learnings with the support of faculty and share with other students who have also experienced ethical issues, is vital. This allows them to develop a full appreciation and memory of the ethical principles at play and reflect on *their* ethics and morals as a lawyer.

As Chavkin and other scholars have noted, [o]nce real-life clients are brought into the equation, the opportunities for cognitive, practical and formative development are virtually unlimited.”⁸⁶ In other words, when we do experiential learning properly in ethics courses, we can engage all facets of ‘the apprenticeships of law’. Lisa Lerman, in her insightful piece about teaching ethics in a traditional classroom, comments that role play can be effective in teaching ethics, but warns that there is always the risk that role-plays will ‘result in confusion or boredom’ rather than clarification.⁸⁷ Lerman recommends that role play be limited to the ‘fishbowl’ method where the instructor and students perform a short role-play and then this is followed by reflection and discussion.⁸⁸

With respect, in my experience, even this type of role play is of limited use in learning ethics and responsibility. Looking across a room at your professor or your colleague is a very different environment to sitting across a mediation table from your opponent or in a hospital waiting room with a terminally ill client. If clinic experiences can be made available to law students in a supervised context, surely this is more valuable than simulated learning? One of the students whom I interviewed for this paper commented:

No-one would expect a doctor to practice open heart surgery using only simulated role play. Yet, to some of our future clients, we sort of do have their lives in our hands. I’d like to know what to do when I get there.⁸⁹

⁸⁶ Chavkin, *supra* n. 5 at 54.

⁸⁷ Lerman, *supra* n. 17 at 65.

⁸⁸ *Ibid.*

⁸⁹ Interview 2#, 21 March 2015, McGill L.L.M. graduate, D.C.L. candidate.

Lastly, ethical issues like two of the examples I gave from my experience, are often emotional and distressing for lawyer and client. In conventional ethics courses, it is difficult to work in open discussions about the mental health and wellbeing impacts of ethical dilemmas: and to have students appreciate coping mechanisms for these. By comparison, teaching students how to appropriately share and learn from ethical dilemmas is an important aspect of the classroom environments in Stanford, Yale and W&L (as part of an experiential learning program). Thus, these types of programs do more to protect and promote lawyer health: a significant issue for the legal profession across jurisdictions.⁹⁰

Conclusion – where to from here for Mike Ross?

I opened this discussion by talking about *Suits* and the image of the young lawyer finding his way. I have argued that, in terms of the conventional ethics experience, Mike hasn't missed much by not going to law school. My investigations and reflections demonstrate that, for many law students in Canada and Australia, learning ethics on the job will be the norm as a matter of necessity. For those of us like Mike Ross, we rely on professional mentors to guide us and support us as we develop as ethical lawyers. Whether or not Harvey Spektor would be an effective ethical mentor is a question for another paper, but he is definitely shouldering a burden for his junior associate.

However, had Mike attended a U.S. law school that had taken innovative steps to developing a theory and practice ethics program, he would have had a real opportunity to develop as an ethical lawyer. This is exactly what a modern law school should do for law students. The scholarship on

⁹⁰ For example, in relation to law students and the increasing mental health crisis, see: Hannah DeJong, "Law and Happiness Part 1: Finding Balance in Law School", Blog Post, Winkler Institute for Dispute Resolution, 17 February 2015, online: <http://winklerinstitute.ca/law-happiness-part-1-finding-balance-law-school/>

student engagement with ethics courses and best practice teaching models demonstrate that learning by doing and reflecting critically on practical experience are the most effective ways of teaching professional responsibilities, and while this might be a significant resources commitment, it is a change the profession needs law schools to make. Harvey Spektor would definitely take a risk on that deal.

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