

Legal Ethics Education: Seeking—and Creating—a Stronger Community of Practice

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ABSTRACT

This Article uses Community of Practice (“CoP”) frameworks and insights to examine legal ethics, a vital but challenging part of legal education and practice. CoP is a template to explain how the knowledge we learn is inseparable from the social situations in which it is “practiced” and how the processes through which we learn can be understood as a trajectory toward becoming competent knowers within a community. Increasingly, CoP also captures how communities might be initiated and sustained to advance that practice or expert domain. CoP theory illuminates the difficult conflicts both in teaching and in learning legal ethics, conflicts driven by the clash between “ethics-as-rules” and “ethics-as-judgment.” Using CoP ideas, this Article argues that legal ethics suffers from a confusing mission and an academic-professional community that is not as strong or interactive as it should be. But the CoP framework also offers possible solutions. This Article shares the author’s and others’ efforts to improve and align legal ethics. It also outlines what would be essential features for a vibrant community in stewardship of this domain. The Article focuses on the Australian context with close comparison to that of the United States.

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INTRODUCTION

Legal ethics education has noble objectives: to help ensure lawyers fulfil their roles as social trustees, gatekeepers of justice, and members of a privileged community. It seeks to cultivate professional identities that are ethical, competent, reflective, and healthy.¹ Formally, legal ethics is central to the mission of the law school.² Yet, after surveying the international literature, one might fairly see it as the educational task to avoid. Steven Lubet, an American law professor, opened a 1988 article with: “‘I teach legal ethics.’ In all of legal education there may be no four words that evoke more pity and pathos than those.”³ In 2006, Australians

1. The addition of “healthy” reflects the growing interest from the profession and the academy in lawyers’ wellbeing, in recognition of its association with ethical practice.

2. Standard 1.3.3 of the Australian Law School Standards, produced by Council of Australian Law Deans (“CALD”) and the Australian Law School Standards Committee (“ALSSC”), provides as a template statement: “The Law School’s mission encompasses a commitment to the rule of law, and the promotion of the highest standards of ethical conduct, professional responsibility, and community.” AUSTL. L. SCH. STANDARDS, Statement of Mission and Objectives, Standard 1.3.3 (Council of Austl. L. Deans & Austl. L. Sch. Standards Comm. 2020), <https://cald.asn.au/wp-content/uploads/2020/07/Australian-Law-School-Standards-v1.3-30-Jul-2020.pdf> [<https://perma.cc/RD63-THNP>] [hereinafter CALD STANDARDS]. Standard 301 of the American Bar Association (“ABA”) Standards and Rules of Procedure for Approval of Law Schools states that “[a] law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Objectives of Program of Legal Education, Standard 301(a) (Am. Bar Ass’n 2022–23) [hereinafter ABA STANDARDS].

3. Steven Lubet, *I Teach Legal Ethics*, 13 J. LEGAL PRO. 133, 133 (1988).

Michael Robertson and Kieran Tranter described a general lack of enthusiasm in legal ethics teaching and low consensus about what this teaching (and thus legal ethics) might entail.⁴ Earlier, Robertson had described the discipline of legal ethics as having a bad reputation, in part because the ethical part of it was patchy and given incoherent emphasis.⁵ Robertson and Tranter also questioned the impact of legal ethics teaching on lawyers' practice, saying that its learning outcomes were neutral or, at best, uncertain.⁶ These are just some of the ambivalent attitudes that have been expressed by legal ethics teachers about their role. Deborah Rhode diagnosed American legal ethics education as having a "mismatch between institutional resources, student expectations, and faculty aspirations."⁷ Moreover, she explained, the "consensus among experts in professional responsibility is that courses in the subject are among the most difficult to teach."⁸

What of students? In an early evaluation of the core legal ethics course that I designed and teach at the University of New South Wales ("UNSW") Law and Justice,⁹ just under half of the sixty-five students surveyed expressed cynicism or worry about being trained in how to speak to others about ethics. They directed concerns at both the academic community and the profession: "*It's extremely frightening to think of how to [speak up] at a law firm.*"; "*[To use the skills I have learned, I would need] evidence from the law firms that being ethical is in their interests—not just from academics whose articles sound like a bunch of technical argle-bargle.*"¹⁰ In many ways, their responses accord with the organizational management literature, which shows that employees need to know that it is safe and worthwhile before they will raise ethical or risk issues with seniors.¹¹ Nonetheless, these law students were also asking for a guarantee from the

4. Michael Robertson & Kieran Tranter, *Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work*, 9 LEGAL ETHICS 211, 216 (2006) (referring to the performance of Australian legal ethics education until around 2003).

5. Michael Robertson, *Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective*, 8 LEGAL ETHICS 222, 239 (2005).

6. Robertson & Tranter, *supra* note 4, at 217. *But see* Christine Parker, *What Do They Learn When They Learn Legal Ethics?*, 12 LEGAL EDUC. REV. 175, 186 (2001) (suggesting that "it is possible for many students to gain some moral guidance and awareness from learning the rules, if they are taught in a way that makes them relevant to practice.").

7. Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS L.J. 1043, 1047 (2007).

8. *Id.*

9. Justine Rogers, *Lawyers, Ethics & Justice End of Course Survey* (2014) (unpublished research) (full set of evaluative findings on file with the Georgetown Journal of Legal Ethics) [hereinafter LEJ Survey]. This evaluation of the course was an Office for Learning and Teaching ("OLT")-funded study as part of a wider "UNSW Sydney self-management, success, and wellbeing" community of practice. Survey response was sixty-five students, conducted in 2014 with ethics approval 14068.

10. *Id.* (two student responses to survey question, "what could be done differently to enhance the effectiveness and/or relevance of the course?").

11. For a discussion, see Justine Rogers, *Since Lawyers Work in Teams, We Must Focus on Team Ethics*, in *NEW DIRECTIONS FOR LAW AUSTRALIA* 483, 488–89 nn.28–46 (Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge & Margaret Thornton eds., 2017).

profession about the transferability and legitimacy of legal ethics practice as taught at law school. While there are several studies on the “dark sides” of legal education and of being socialized as a lawyer,¹² there is little on the challenges for students of learning legal ethics. This Article began as a response to the students’ request, but it came to include the striking feature above: the doubts or mixed feelings of legal ethics teachers, as well.

This Article uses Community of Practice (“CoP”) frameworks and insights to examine legal ethics education from the perspectives of both teachers and students. This Article references the legal ethics literature, my own decade-long experience of teaching it, and the survey results of my and others’ teaching. It is an exploratory, grounding piece for future, empirical study on the perceptions and practices of legal ethics teachers, students, professional leaders, and practitioners.

CoP is a multi-stranded concept. It is a way of explaining that the knowledge we learn is inseparable from the social situation in which it is used or practiced. It describes how the processes in which we learn can be understood as a trajectory toward becoming competent knowers within a community. A CoP also captures how communities start and are sustained; how people who “share a concern, a set of problems, or a passion about a topic” begin to interact on a regular basis—sharing “information, insight and advice.”¹³ Through that interaction, they construct a body of knowledge and set of approaches,¹⁴ and sometimes a “common sense of identity.”¹⁵ The CoP literature helps us understand why legal ethics teachers might tire of the discipline or experience ambivalent feelings, and why students can be so unsure about it. The CoP framework sheds light on the conflicts in both teaching *and* learning legal ethics. It suggests that legal ethics is a complicated practice that suffers from a confusing mission and an academic-professional community that is not as strong or interactive as it should be. But the CoP framework also offers possible solutions, and I also share my efforts, inspired and guided by others in the field, in developing and invigorating the domain.

The Article is structured as follows. Part I sets up and reviews the CoP literature in its two main strands: first as a way of understanding how we learn to become part of a community, and second, how we might shape a community for its knowledge to flourish. Part II uses CoP concepts to examine the professional identity of legal ethics teachers or, in CoP terms, their learning trajectories and

12. Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002). See generally Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); John O. Mudd, *Thinking Critically About “Thinking Like a Lawyer,”* 33 J. LEGAL EDUC. 704 (1983); Nancy B. Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRS. 91 (2002); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCIS. & L. 261 (2004).

13. ETIENNE WENGER, RICHARD McDERMOTT & WILLIAM M. SNYDER, *CULTIVATING COMMUNITIES OF PRACTICE* 44 (2002).

14. *Id.* at 5.

15. *Id.*

communities of practice. It does so by focusing on the Australian history and context but with close reference to the United States. Part III continues by charting the ongoing and sporadic move from “ethics-as-rules” to “ethics-as-judgment.” Part IV reflects on the learning trajectories of law students in legal ethics, which CoP clarifies as both difficult and confusing. In light of these challenges, Part V details my own attempts to define ethics-as-judgment and integrate it with ethics-as-rules. The Article concludes by considering the academic-professional legal ethics teaching community. It suggests using CoP-informed models to evaluate and improve this community and its stewardship of legal ethics.

I. COMMUNITY OF PRACTICE

In this Part, I set up the CoP framework as a reference point for the remainder of the Article. Specifically, CoP literature helps us understand how legal ethics teachers might experience becoming a legal ethics educator. This transition involves learning their teaching practice, being part of the so-called legal ethics community, as well as interacting with students and, at least symbolically, the profession. The CoP literature also sheds light on students’ experiences in the legal ethics classroom, situated as they are within the rest of their law studies and the broader profession, which represents the desired future community for most students. Finally, it prompts us to consider the discipline of legal ethics as the joint expression of a community and how it might then be improved.

The “Community of Practice” was originally developed by a social anthropologist, Jean Lave, and a computer scientist, Etienne Wenger, in the early 1990s. CoP sees learning as social and situated. It identifies knowledge as embedded in communities of people, in relation to overlapping or tangential other communities.¹⁶ When legal ethics teachers learn their legal ethics teaching practice and when law students learn legal ethics as a practice, they are not simply acquiring skills and information (the traditional, cognition approach); they are becoming competent “knowers” and members in a community through participation. CoP emphasizes that “learning, thinking, and knowing are relations among people engaged in activity *in, with and arising from the socially and culturally structured world.*”¹⁷ These relational dynamics mean that what we learn, where that learning occurs, and who we become in the process, are intertwined.¹⁸

In “Strand One” of CoP research, the CoP framework is used to describe a specific phenomenon: how the novice learns not only from the master craftsperson, but through a complex set of social relationships. A whole social group, including

16. See generally JEAN LAVE & ETIENNE WENGER, *SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION* (1991) (arguing that learning is a situated activity).

17. Sasha A. Barab & Thomas M. Duffy, *From Practice Fields to Communities of Practice*, in *THEORETICAL FOUNDATIONS OF LEARNING ENVIRONMENTS* 25, 29 (David Jonassen & Susan Land eds., 2000) (quoting Jean Lave, *The Culture of Acquisition and the Practice of Understanding*, in *SITUATED COGNITION: SOCIAL, SEMIOTIC, AND PSYCHOLOGICAL PERSPECTIVES* 67 (David Kirshner & James A. Whitson eds., 1997)).

18. *Id.* at 29.

other apprentices, support the learning journey within the practice field, a journey to being recognized as a fully-fledged member of that community. In the context of legal ethics, the “community” is an overlapping “network,”¹⁹ not a single cluster of people. This network includes the teachers’ legal ethics teaching and faculty communities; the students’ law school communities; in Australia (and the United Kingdom), the vocational training community; and the legal professional community, itself made up of its leadership, and specialty and sub-specialty communities.

In “Strand Two,” CoP researchers are more concerned with the knowledge itself and how a community can not only preserve, but also develop and enrich it.²⁰ This Article focuses on what qualities are needed in a healthy legal ethics community, and how those qualities might be fostered. I now outline these two strands and then address some of the criticisms of CoP.

A. STRAND ONE: BECOMING A COMPETENT AND INVESTED MEMBER

This first strand of the CoP concept is about the trajectories of becoming competent, invested members of a community. It sheds light on legal academics becoming legal ethics teachers and law students becoming lawyers and deciding whether to incorporate legal ethics values and competencies into their identities. It also considers how the classroom can or might act as an effective path in the wider learning trajectory.

In CoP terminology, the subject of the community’s learning is called a “domain.” It is “not an abstract area of interest but consists of key issues or problems that members commonly experience.”²¹ A domain is “not a fixed set of problems. It evolves along with the world and the community.”²² Moreover, a domain is not only concerned with competence in an area of knowledge, but with the identity and personal experiences attached. As a “joint enterprise,”²³ a domain “creates common ground and a sense of common identity. . . . [It] inspires members to contribute and participate, guides their learning, and gives meaning to their actions.”²⁴ For example, the domain of interest in this Article is legal ethics, and the identities, the ethically conscious lawyer and the legal ethics teacher invested in the ethical welfare of the profession.

The “practice” is the way a community member implements the knowledge that makes up the domain. It is “the set of frameworks, ideas, tools, information styles, language, stories, and documents that community members share.”²⁵

19. John S. Brown & Paul Duguid, *Organizing Knowledge*, 40 CAL MGMT. REV. 90, 91 (1998).

20. *Id.* at 91; ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 77 (1998); WENGER, McDERMOTT & SNYDER, *supra* note 13.

21. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 32.

22. *Id.* at 31.

23. WENGER, *supra* note 20, at 77.

24. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 27–28.

25. *Id.* at 29.

Practice “denotes a set of socially defined ways of doing things in a specific domain: a set of common approaches and shared standards that create a basis for action, communication, problem solving, performance and accountability.”²⁶

The community’s practice entails both explicit and tacit knowledge types: formal knowledge as well as social, behavioral and, often, ethical norms. “It also embodies a certain way of behaving, a perspective on problems and ideas, a thinking style, and even in many cases an ethic stance. In this sense, a practice is a sort of mini-culture that binds the community together.”²⁷ It is progressively learned and developed through activity. The practice is not the same as formal, codified knowledge because those codes (or indeed any documents or tools) can never capture all that is required for successful practice;²⁸ implicit knowledge and social understanding are essential.²⁹ Here, I focus on legal ethics practice; but because my interest is in legal education, I also discuss the teaching practice required to most effectively and appropriately teach it. I note that clinical legal education seeks to synthesize both practices, though this does not necessarily mean its focus is on legal ethics specifically—it might be a range of professional attitudes and skills, including ethics.

In CoPs, learning “contributes to a growing identity within or across communities of practice”;³⁰ “the ‘development of self through participation.’”³¹ This applies most obviously to law students, but also to legal ethics teachers learning their craft. CoP explains how newcomers to a community start at the periphery and move toward full, “legitimate” participation (an inbound trajectory into that community) “as they gain knowledge and learn the community’s customs and rituals and adopt a view of themselves as members of the community.”³² Virginia Buysse, Karen Sparkman, and Patricia Wesley explain how this “practice-centered approach to human learning challenges the validity of interpreting professional practice on the basis of prescribed codes and structures such as published lists of recommended practices or professional competencies, but instead focuses on the importance of practitioners’ contributions to the social order” or their communities.³³ In fact, excessive codification of knowledge “inserts a hurdle into the learning process because it requires the student to make sense of the reification” and stops the identification process.³⁴

26. *Id.* at 38.

27. *Id.* at 39.

28. *Id.* at 9.

29. *Id.*

30. Miriam Gerstein, Sara Hertz & Esther Winter, *Building Communities of Practice in Accounting: A Framework to Link Practice, Research and Education*, 16 J. ACCT. & FIN. 73, 77 (2016) (citing LAVE & WENGER, *supra* note 16).

31. Virginia Buysse, Karen L. Sparkman & Patricia W. Wesley, *Communities of Practice: Connecting What We Know with What We Do*, 69 EXCEPTIONAL CHILD 263, 266 (2003) (quoting Barab & Duffy, *supra* note 17, at 35).

32. *Id.* at 265–66.

33. *Id.*

34. Gerstein, Hertz & Winter, *supra* note 30, at 77.

Individuals' identity is "built around social engagement" and is "constantly being renegotiated" as they "move through different forms of participation."³⁵ These "identity trajectories," among which individuals may choose,³⁶ are:

- Inbound: "Where newcomers' identities are invested in their future as full members of a specific community of practice";
- Boundary: "Where newcomers aim to sustain participation and membership across the boundaries of different communities of practice";
- Peripheral: "Where newcomers do not aim for full membership but where limited 'access to a community and its practice . . . (is) significant enough to contribute to one's identity'";³⁷
- Outbound: "While being directed out of a community may involve 'developing new relationships, finding a different position with respect to a community, and seeing the world and oneself in new ways.'"³⁸

Learning is not, then, a simple trajectory to the center of one community. Throughout our lives, we follow multiple trajectories toward and across different communities of practice, usually at the same time. An individual's continual negotiation of "self" within and across multiple communities of practice may, of course, generate intra-personal tensions as well as instabilities within communities. People may feel they are failing when "moving from a situation where they felt, and were seen as, highly competent to experiencing incompetence" in a new setting.³⁹ In these situations, we choose "whether to disengage and protect ourselves from emotional hurt or reengage and risk further identity disconfirmation."⁴⁰ A workplace example of this, related to certain students' fears about becoming a lawyer, is "the scenario where a newcomer experiences a conflict of identity in relation to a role or practice he or she is expected to adopt."⁴¹ Relevantly, this can either lead to the newcomer's choosing to remain "marginal," participating only minimally "in order to avoid compromising his or her

35. Jeff Jawitz, *Academic Identities and Communities of Practice in a Professional Discipline*, 14 *TEACHING HIGHER EDUC.* 241, 243 (2009).

36. *Id.* at 241, 243–44.

37. An alternative definition of "peripheral": "[t]he term 'peripheral' describes the condition of the individual when being included in the community but not being legitimated to negotiate the meaning of the work." That is, the individual takes from the community, but not vice-versa. Ann-Christine Wennergren & Ulf Blossing, *Teachers and Students Together in a Professional Learning Community*, 61 *SCANDINAVIAN J. EDUC. RES.* 47, 50 (2017) (citing LAVE & WENGER, *supra* note 16).

38. Jawitz, *supra* note 35, at 243 (citing LAVE & WENGER, *supra* note 16, at 154–55).

39. Mark Fenton-O'Creevy, Yannis Dimitriadis & Gill Scobie, *Failure and Resilience at Boundaries: The Emotional Process of Identity Work*, in *LEARNING IN LANDSCAPES OF PRACTICE: BOUNDARIES, IDENTITY AND KNOWLEDGEABILITY IN PRACTICE-BASED LEARNING* 34 (Etienne Wenger-Trayner, Steven Hutchinson, Chris Kubiak & Beverly Wenger-Trayner eds., 2015).

40. *Id.* at 37.

41. Karen Handley, Andrew Sturdy, Robin Fincham & Timothy Clark, *Within and Beyond Communities of Practice: Making Sense of Learning Through Participation, Identity and Practice*, 43 *J. MGMT. STUD.* 641, 648 (2006).

sense of self.”⁴² At the extreme, it might mean “individuals avoid conflicts of identity and practice by choosing *not to join* (i.e. participate in) [what they see as] non-complementary communities of practice.”⁴³ These possibilities have significance, for instance, for legal ethics teachers learning legal ethics teaching practice and law students learning legal ethics, where these domains of knowledge are usually very different from those they have learned and (to varying degrees and in various ways) succeeded in: for legal ethics teachers, other “law” teaching and their own legal education; for law students, their legal education or what it means to “think like a lawyer.”

Finally, the social learning perspective seeks to emphasize and analyze the “situated activity of the learner—the interaction of the learner, the practices being carried out, the reasons the learner is carrying out particular practices, the resources being used, and the constraints of the particular task at hand.”⁴⁴ CoP recognizes and tries to alleviate the fact that the classroom cannot fully provide this situated activity, in which learning is attached to “doing.” For a CoP-informed teacher, then, “the goal shifts from the teaching of concepts to engaging the learner in authentic tasks that are likely to require the use of those concepts or skills.”⁴⁵ Sasha Barab and Thomas Duffy note the concept of “practice fields” as distinct from “the real field” where that learning is applied. The classroom is the practice field for students to “practice the kinds of activities they will encounter outside of schools.”⁴⁶ Rather than conceiving of students as “legitimate participants” in the real community, there is “clearly a separation in time, setting, and activity from them and from the life for which the activity is preparation.”⁴⁷ Problem-based learning, often central to legal ethics education, is one example of a “practice field” approach in which students are faced with a practice issue and generate their own solutions, rather than studying the solutions of someone else.⁴⁸

B. STRAND TWO: COMMUNITIES AS STEWARDS OF THEIR DOMAINS

Scholars are also interested in whether one can be intentional about starting and continuing a community that is both vibrant and dedicated to the domain.⁴⁹ A driving concern is that knowledge, which changes rapidly, might be lost without “more intentional and systematic” ways to manage it.⁵⁰ CoPs are a way to do

42. *Id.*

43. *Id.*

44. Barab & Duffy, *supra* note 17, at 30.

45. *Id.*

46. *Id.*

47. *Id.* (citing PETER M. SENGE, *THE FIFTH DISCIPLINE FIELDBOOK: STRATEGIES AND TOOLS FOR BUILDING A LEARNING ORGANIZATION* (1994)).

48. *Id.* at 30–31.

49. *E.g.*, Brown & Duguid, *supra* note 19; WENGER, *supra* note 20; WENGER, McDERMOTT & SNYDER, *supra* note 13; *see also* Enrico Scarso & Ettore Bolisani, *Communities of Practice as Structures for Managing Knowledge in Networked Corporations*, *J. MFG. TECH. MGMT.* 374 (2007).

50. Barab & Duffy, *supra* note 17, at 30–31.

that.⁵¹ This approach to CoPs highlights the welfare of the shared practice and therefore how best to structure and sustain a community that cares about it. This is especially significant where organizations are internally growing and increasingly disaggregated and where, externally, organizations are collaborating on joint projects.⁵² The critical difference is that, rather than the community defining the learning as in Strand One, in Strand Two, the learning defines and precedes the community.⁵³ Put another way, instead of the community being in the background as a socializing agent, Strand Two says that community itself can be shaped and improved for the benefit of the practice of its members. This second body of CoP literature is especially relevant when thinking about the legal ethics community, and also when assessing the interactions among legal ethics teachers in developing legal ethics as a domain and among the teachers, their faculties, the students, and the legal profession.

As we saw in Strand One, using CoP thinking, knowledge can be developed individually, but only through community and “communal involvement” does it become a “body of knowledge.”⁵⁴ Therefore, to move to the emphases of Strand Two, for the body of knowledge to be followed but also improved, a CoP must be a “community,” characterized by “mutual engagement.”⁵⁵ Interaction is critical: community is defined by members who “interact regularly on issues important to their domain. . . . Interacting regularly, members develop a shared understanding of their domain and an approach to their practice.”⁵⁶ Regular interactions form relationships, which over time develop “common history and identity.”⁵⁷

The central concern in this part of the CoP discussion is how to cultivate a lively community for the benefit of the domain, including through the use of technology.⁵⁸ Its focus is on how to help communities engaged in the process of “discovery and imagination—discovering what [they] can build on and imagining where this potential can lead.”⁵⁹ Strand Two evaluates how best to share knowledge with other institutions, specifically larger or more influential ones, which can then share the practice with others so that the knowledge is not “sticky” or tacit and local only;⁶⁰ and it also worries about how to keep the community

51. *Id.* at 7.

52. *Id.* at 6.

53. For a discussion of the evolution of the term, see Linda C. Li, Jeremy M. Grimshaw, Camilla Nielsen, Maria Judd, Peter C. Coyte & Ian D. Graham, *Evolution of Wenger's Concept of Community of Practice*, 4 IMPLEMENTATION SCI. 1, 3 (2009); see also Jenny Mackness & Karen Guldberg, *Foundations of Communities of Practice: Enablers and Barriers to Participation*, 25 J. COMPUT. ASSISTED LEARNING 528, 528 (2009).

54. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 10.

55. LAVE & WENGER, *supra* note 16, at 74.

56. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 34–35.

57. *Id.* at 35.

58. Mackness & Guldberg, *supra* note 53, at 529 (2009); see also Brenda Moore, *Using Technology to Promote Communities of Practice (CoP) in Social Work Education*, 27 SOC. WORK EDUC. 592, 592 (2008).

59. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 72.

60. For a discussion of the meaning and stakes of “sticky” knowledge, see John Seely Brown & Paul Duguid, *Knowledge and Organization: A Social-Practice Perspective*, 12 ORG. SCI. 198 (2001).

going.⁶¹ As one example, Strand Two might look at how legal ethics teachers “coordinat[e] [their] perspectives” with students and the profession to ensure that their approaches survive beyond their own classroom engagement.⁶²

It seems that certain qualities are needed for a vibrant community to sustain itself. First, homogeneity in membership is not necessary; in fact, diversity will enrich the learning experience and relationships that the community provides.⁶³ Reciprocity is also important. By treating one another with a sense of mutuality, “members of a healthy community of practice have a sense that making the community more valuable is to the benefit of everyone.”⁶⁴ Finally, openness is crucial for learning. Communities will establish their own norms (whether relaxed or “intense”; hierarchical or democratic, etc.), but the community must be a safe place for honesty and curiosity.⁶⁵

C. CRITICISMS OF COMMUNITIES OF PRACTICE

There have been several criticisms made of the CoP framework.⁶⁶ First, as a more generally targeted critique, there are strands of educational scholarship that reject the linearity of how we learn and how we belong.⁶⁷ Some scholars characterize our socialization as one of permanent in-betweenness, constantly at the boundary; a state of never arriving, rather moving in a continual elliptical passage.⁶⁸ As a social constructivist theory, CoP would probably accept some of these queries, but its conceptions do suggest some sort of controlled progression wherein people have different degrees of competence and membership in their communities. For CoPs, some legal practitioners, for example, will have located themselves within the core of the community, on a non-liminal trajectory and past the most difficult thresholds.⁶⁹

That leads to the most significant and direct criticism of CoP as a theory: that there are gatekeepers controlling which and whose knowledge is heard,

61. WENGER, McDERMOTT & SNYDER, *supra* note 13.

62. Etienne Wenger, *Communities of Practice and Social Learning Systems*, 7 ORGANIZATION 225, 234 (2000).

63. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 35.

64. *Id.* at 37.

65. *Id.*

66. Some of these criticisms are outlined by Li, Grimshaw, Nielsen, Judd, Coyte & Graham, *supra* note 53, at 4; see also Lucie Richard, François Chiochio, Hélène Essiembre, Marie-Claude Tremblay, Geneviève Lamy, François Champagne & Nicole Beudet, *Communities of Practice as a Professional and Organizational Development Strategy in Local Public Health Organizations in Quebec, Canada: An Evaluation Model*, 9 HEALTHCARE POL’Y 26 (2014).

67. See generally HOMI BHABHA, *THE LOCATION OF CULTURE* (1994); Olwen McNamara, Lorna Roberts, Tehmina N. Basit & Tony Brown, *Rites of Passage in Initial Teacher Training: Ritual, Performance, Ordeal and Numeracy Skills Test*, 28 BRIT. EDUC. RES. J. 863 (2002).

68. See generally CHRISTOPHER JOHNSON, *SYSTEM AND WRITING IN THE PHILOSOPHY OF JACQUES DERRIDA* (1993).

69. For a study on the nature and applicability of the “rites of passage” framework to the apprenticeship of English barristers, see Justine Rogers, *Feeling Bad and Being Elite: A Comparative Analysis of the Anxieties and Uncertainties of Aspiring Barristers*, 13 COMPAR. SOCIO. 30, 41 (2014).

legitimated, and shared.⁷⁰ This dynamic is present in whatever way CoPs are perceived or approached (as a “natural” phenomenon creating social practices or else as communities to be cultivated for the benefit of those practices). Regarding Strand One, scholars have pointed out that “legitimate peripheral participation” (a CoP notion) does not “inevitably lead to full socialization.”⁷¹ Other writers have pointed out how power dynamics can hinder the growth and functioning of a community.⁷² For instance, a close community can become cliquish and resist external input or collaborations. In these communities, relationships are more important than the development of the domain of knowledge, and new ideas might be discouraged. Communities can become dormant by failing to accept new members.⁷³ Indeed, when knowledge becomes codified, for instance, as a code of ethics, this is usually an expression of power.⁷⁴

In our case, this aspect of power has suggestions for law students’ special valuing of the professional community and its practice (as they see or sense it) over the “academic” practice, evidenced in the evaluation of my course, for example, and as well for the introduction by legal ethics teachers of new ideas and practices. It is also relevant in thinking about which groups are entitled to discuss and decide upon legal ethics practice and codification, and whether these groups are thriving, stagnant or dormant. In his later writing, Wenger tried to explain that the structural elements, that is, the existing knowledge and standards of competence, can be and are modified by individual agency; by people who have convinced others of the value of their newly discovered ideas and approaches.⁷⁵ He reflected that a CoP could be “a cradle of the human spirit” and/or a “cage.”⁷⁶ What was needed to make it a “cradle” was a shared purpose and mutual coordination of perspectives and actions, what he terms “alignment,” between members of a community (and presumably hopeful members, such as students) and its “authorities”⁷⁷ or most influential members.

With these criticisms and limitations in mind, the CoP concepts have illuminated three aspects of legal ethics education, to which this paper now turns: the

70. See Alessia Contu & Hugh Willmott, *Re-Embedding Situatedness: The Importance of Power Relations in Learning Theory*, 14 *ORG. SCI.* 283 (2003).

71. See Handley, Sturdy, Fincham & Clark, *supra* note 41, at 643.

72. See, e.g., Li, Grimshaw, Nielsen, Judd, Coyte & Graham, *supra* note 53, at 4; Joanne Roberts, *Limits to Communities of Practice*, 43 *J. MGMT. STUD.* 623, 628 (2006); Handley, Sturdy, Fincham & Clark, *supra* note 41, at 644.

73. Li, Grimshaw, Nielsen, Judd, Coyte & Graham, *supra* note 53, at 3.

74. See Gerstein, Hertz & Winter, *supra* note 30, at 77. They explain how narrow reification of knowledge—of which a code of conduct is an example—leads to transmission learning. Using this knowledge as the main source of learning in a classroom only serves those who are already members of the community who use and identify with that practice. See also Li, Grimshaw, Nielsen, Judd, Coyte & Graham, *supra* note 53, at 3, for a description of some of the political dynamics of ethical codes and their embeddedness in wider contests of regulatory control. See also *supra* Part II.B; *supra* Part III.B.

75. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 227.

76. *Id.* at 230.

77. *Id.* at 228.

legal teachers' learning trajectory, community, and practice; the students' learning trajectory, community, and practice; and the legal ethics community, specifically the relationship between the academy and the profession.

II. LEGAL ETHICS TEACHERS' LEARNING TRAJECTORIES AND COMMUNITIES

While teaching legal ethics is very satisfying and rewarding, the path to becoming a legal ethics teacher—the discovery and construction of what legal ethics teaching practice is—can often be solitary and irresolute. I mentioned Lubet's words in the introduction. The rest of his reflection is emblematic:

“I teach legal ethics.” In all of legal education there may be no four words that evoke more pity and pathos than those. Tell the truth, didn't you shudder when you read the title? What a thankless task. What a soft subject. What a daunting undertaking. But how can this be? Is there any subject more central both to lawyering and legal academics than the manner in which we lawyers conduct ourselves? Is there any subject more exciting than searching for the interface between public duty and individual rights? Is there any subject more engaging than the introspection required to imagine how we would respond in times of stressful decision making? Why don't my students understand this? Why don't my colleagues?⁷⁸

Legal ethics teachers progress on their own learning trajectories in becoming a teacher in this domain. As this Part details, in doing so, legal ethics teachers interact with more or less vibrant teaching and workplace communities as well as with wider communities, such as faculty management, the legal profession, and government. CoP frameworks help explain why legal ethics teachers seem to lose energy for the discipline or otherwise experience mixed feelings. Generally, these relationships and communities are not strong, or else they are unintegrated. In CoP terms, this situation discourages inbound trajectories and identities more fully attached to the domain.

A. THE TEACHING AND WORKPLACE COMMUNITIES

I turn first to a legal ethics teacher's most immediate community: the legal ethics teaching group. Within each law faculty, this group is usually small, perhaps one to three permanent members. Of these, it is possible that none regard legal ethics as their primary domain of teaching interest, certainly not their primary research field. These teachers may wish to stay at the “boundary” of legal ethics. David Luban and Michael Milleman point out that legal academics as a whole “often have a passionate interest in The Law and in judges” but are

78. Lubet, *supra* note 3, at 133.

“surprisingly uninterested in lawyers.”⁷⁹ These remarks were made some twenty-five years ago, and while there is increasing interest in lawyers and their practices, the bias remains.

Meanwhile, some of the teaching team, permanent or temporary, may also be former practitioners or continue to practice. This usually means they have an “interest in lawyers,” but in a practical sense, not as researchers. Indeed, this group is likely to hold a stronger identification with the professional community and its ethics-as-rules approach to legal ethics practice⁸⁰ than less “legal” versions. They may find the attempts by academics to define that practice differently as confronting or illegitimate.⁸¹ As with any discipline, legal ethics is not singular: “a practice within a discipline is by no means homogenous and [there are] tensions surrounding membership of competing communities of practice within a discipline.”⁸²

Meanwhile, a legal ethics teacher who *is* committed to this domain may be part of a wider community of legal ethics teachers across law schools, domestically and internationally. Some of these teachers will be clinical legal educators as well, and members of that overlapping community.⁸³ As with the path to becoming a law professor generally, the path to becoming a legal ethics professor, moving toward central participation, occurs through interaction. This includes, for instance, engagement in annual or bi-annual legal ethics or other law conferences, conferences that occasionally involve the profession as well.⁸⁴ During these events, legal ethics teachers debate issues of policy, share their practices, research, and insights, discuss experiences, and support one another. But this activity is likely to be irregular, and the teaching community at the inter-faculty level might be dormant for long stretches, a situation worsened recently by COVID-19.

As revealed by Lubet’s anxious questions, it is not simply the students’ recognition that legal ethics teachers seek, but that of the wider legal academy.

79. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO J. LEGAL ETHICS 31, 38 (1995). A “skewed interest” which, they add, “reflects a fundamental misunderstanding of the legal system, because the overwhelming preponderance of legally significant decisions are made by lawyers, not judges, legislators or theorists.” *Id.*

80. See *infra* note 118.

81. For Wendel’s moral justifications of the “legal” approach, see Luban & Wendel, *infra* note 146.

82. Jawitz, *supra* note 35, at 249.

83. For examples of clinicians who work in the field and teach in the law school classroom and/or have roles in law school management, see ADRIAN EVANS, ANNA CODY, ANNA COPELAND, JEFF GIDDINGS, PETER JOY, MARY ANNE NOONE & SIMON RICE, AUSTRALIAN CLINICAL LEGAL EDUCATION: DESIGNING AND OPERATING A BEST PRACTICE CLINICAL PROGRAM IN AN AUSTRALIAN LAW SCHOOL 11–38 (2017). For a history of the development of clinical legal education and its diffusion, see generally Jeff Giddings, Roger Burrridge, Shelley A.M. Gavigan & Catherine F. Klein, *The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia*, in THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE 3 (2011).

84. For example, the Biannual International Legal Ethics Conference, the conference of the International Association of Legal Ethics, and the Australia and New Zealand Legal Ethics Colloquium.

Because legal ethics is (or can be or can seem to be) so different from the other law courses and is not taught pervasively (meaning, in each doctrinal class), legal ethics teachers typically see themselves at the periphery of the law discipline. Legal ethics teaching has especially thin foundations as a newer area of study with limited teaching materials. Almost twenty years after becoming mandatory in the United States,⁸⁵ legal ethics finally became mandatory in Australia in 1992 as one of the “Priestley 11”⁸⁶ doctrines, listed as the “professional conduct” requirement, now called “ethics and professional responsibility.”⁸⁷ Notwithstanding, up until this century, legal ethics was not taught in every Australian law school. Of those that did teach it, some offered it as an elective only.⁸⁸

As illustrated in the next section, the status of legal ethics in the law school reflects a wider, ongoing contest at the legal community level about whether or not it should be part of the law degree. From the practice side, whether it should be in the hands of the critically-minded, academic community;⁸⁹ from the academic perspective, whether it is welcome at all given the academy’s objective to

85. In response to Watergate, legal ethics became mandatory via the ABA Standards. *See* Laurel Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOB. STUD. L. REV. 463, 474 (2005). Even with this leadership and “head start” compared to Australia, in the mid-1990s, U.S. professor Peter Rofes reported that American law schools remained “confused about the role ethics plays in its mission of preparing students for practice” and described most legal ethics courses as cursory. Peter Rofes, *Ethics and the Law School: The Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981, 981 (1995).

86. Named after Justice L.J. Priestley, Chair of the Law Admissions Consultative Committee (“LACC”) in the early 1990s, the Priestley 11 is a “nationally unified set of requirements for admission to the legal profession,” devised by the Consultative Committee of State and Territory Law Admitting Authorities. RICHARD JOHNSTONE & SUMITRA VIGNAENDRA, *AUSTRALIAN UNIVS. TEACHING COMM., LEARNING OUTCOMES AND CURRICULUM DEVELOPMENT IN LAW 4–5* (2003); *LEGAL PRO. UNIF. ADMISSION RULES 2015* (L. Soc’y of N.S. W. 2015), <https://legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2015-0240> [<https://perma.cc/9L3T-MT7QJ>] [hereinafter *PRIESTLEY 11*]. To gain admission to legal practice in Australia, the Priestley 11 requires that students have been taught (and succeeded) in eleven substantive areas. *PRIESTLEY 11*, at sched. 1, pt. 2.

87. *See* AUSTRALIAN L. REFORM COMM’N, *REVIEW OF THE ADVERSARIAL SYSTEM OF LITIGATION: RETHINKING LEGAL EDUCATION AND TRAINING* 21 (1997) (“[T]he practice in many Australian law schools has been to defer responsibility for this subject area until the Practical Legal Training stage of legal education.”); CONSULTATIVE COMM. OF STATE & TERRITORIAL L. ADMITTING AUTHS., *UNIFORM ADMISSION REQUIREMENTS: DISCUSSION PAPER AND RECOMMENDATIONS* (1992) (known also as the Priestley Committee); *see also* Mary Anne Noone & Judith Dickson, *Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers*, 4 LEGAL ETHICS 127, 130 (2001); N.S.W. L. REFORM COMM’N, *SCRUTINY OF THE LEGAL PROFESSION: COMPLAINTS AGAINST LAWYERS* 70 (1993) (“[T]he study of legal ethics and professional responsibility should be an integral part of any law school program.”).

88. *See* JOHNSTONE & VIGNAENDRA, *supra* note 86, at 118.

89. Christine Parker states:

The first mainstream course in legal ethics in an LLB in Australia was taught at the University of New South Wales. It was briefly discredited by the profession because the academic who taught it published a book that critiqued the profession. I know of anecdotal occasions where a local scion of the profession has rung a legal ethics teacher to complain about something that has been said in class that some zealous student has reported back to a parent or boss in the profession. It does happen sometimes.

Kim Economides & Christine Parker, *Roundtable on Legal Ethics in Legal Education: Should It Be a Required Course?*, 14 LEGAL ETHICS 109, 116 (2011).

be more than a mere training institution for the profession.⁹⁰ Other concerns include the notion that legal ethics is hard to teach well, that there are insufficient staff and materials, and that curricula are already overcrowded.⁹¹ Finally, some are concerned that ethics cannot be taught, and ethical reasoning cannot be objectively assessed.⁹²

B. WIDER COMMUNITIES

Outside the teaching and workplace communities, the bodies that “take an active interest in [Australian] legal education” are manifold.⁹³ They come from the profession—the Law Council of Australia (“LCA”) (the association representing the states’ and territories’ law societies and bar associations), the Law Admissions Consultative Committee (“LACC”) and its state and territory counterparts, and the Australasian Professional Legal Education Council (“APLEC”); as well as academia—the Council of Australian Law Deans (“CALD”), the Australasian Law Academics Association (“AALA”),⁹⁴ and the Australian Law Students Association (“ALSA”).⁹⁵ But the government has been a central driver of legal ethics education. For example, in their 2001 paper, Mary Anne Noone and Judith Dickson showed that, around the time of their writing, the government was the main proponent for both a compulsory and more substantial problem-based approach to legal ethics education in Australia.⁹⁶ This should be contextualized in the wider, paradoxical reforms to the profession (removing many restrictive practices as barriers to access but also drastically cutting legal aid, for instance),⁹⁷ as well as increasing reforms and funding cuts to the higher education sector. Notwithstanding, the government recommendation was that professional ethics should be treated as a foundational skill.⁹⁸ Noone and Dickson reported,

90. See *id.* at 110; see also ROBERT BOCKING STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 238 (2001) (discussing the concerns that the profession was making it anti-intellectual and skills-based).

91. See Economides & Parker, *supra* note 89, at 109; see also KIM ECONOMIDES & JUSTINE ROGERS, *THE L. SOC’Y, PREPARATORY ETHICS TRAINING FOR FUTURE SOLICITORS* (2009); Julian Webb, *Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England and Wales*, 30 L. TCHR. 270, 274 (1996).

92. Economides & Parker, *supra* note 89, at 110. For a discussion of ethics assessment, see Justine Rogers, *Coming to Terms with Legal Ethics Assessment*, in *THE ETHICS PROJECT LEGAL EDUCATION* 221, 222–40 (Michael Robertson, Lillian Corbin, Kieran Tranter & Francesca Bartlett eds., 2012).

93. MICHAEL ADAMS, *DEVELOPMENTS IN AUSTRALIAN CURRICULUM AND TEACHING ACROSS THE VARIOUS LAW DEGREES* 1, 3 (2014).

94. Previously the Australasian Law Teachers Association (“ALTA”).

95. Adding to the list supplied by Adams. ADAMS, *supra* note 93, at 3.

96. See Noone & Dickson, *supra* note 87, at 131–32 for a history of the government reports pushing for legal ethics teaching and to teach it as fundamental to practice and as a problem-solving approach.

97. For a discussion of this context, see Justine Rogers, Dimity Kingsford Smith & John Chellew, *The Large Professional Service Firm: A New Force in the Regulative Bargain*, 40 U.N.S.W. L.J. 218, 236–46 (2017).

98. Noone & Dickson, *supra* note 87, at 132.

though, that, unlike its U.S. counterpart at the time,⁹⁹ the Australian legal profession was not actively engaged with legal education, let alone legal ethics education.¹⁰⁰ In CoP terms, there was little interaction between the communities, to the point that Guy Powles called the profession's attitude toward legal ethics a "dereliction of duty."¹⁰¹

In 2014, LACC, the national admissions body, reviewed the status of legal ethics in Australia as a required academic area of knowledge for the degree.¹⁰² LACC comprises a chair (usually a member of the judiciary or barristers' profession) and eleven representatives of those entities involved in admission matters.¹⁰³ One of the eleven members is a representative of the law schools (via CALD), while the other ten members represent the profession, and more specifically, the various states' admitting bodies, the LCA and APLEC.¹⁰⁴ LACC invited formal submissions on whether legal ethics and professional responsibility, among other subjects, ought to be omitted from the academic requirements and thus become a practical legal training ("PLT") requirement only.¹⁰⁵ Led by Professor Vivien Holmes, a group of Australian legal ethics academics, including myself, presented a submission against the move.¹⁰⁶ An expression of the community engagement emphasized by the CoP framework, our primary argument was that the law school is a critical part of the "moral apprenticeship"¹⁰⁷ (or, in CoP terms, of the trajectory to the professional community) through which law

99. For example, in the 1980s and 1990s, the ABA initiated examinations into legal practice and legal ethics, including the Statement of Fundamental Lawyering Skills and Values ("MacCrate Report"). Noone & Dickson, *supra* note 87, at 130–31. At the same time, Rhode has singled out how the scope and format of the U.S. bar examination negatively affects how legal ethics is taught in practice, where law school professors teach to this exam. The bar examination tests the ABA's *Model Rules of Professional Conduct* ("Model Rules") via multiple-choice questions characterized as "trivializing ethics issues" and overlooking the fact that, on key ethics issues, the ethical rules are "silent, ambiguous, or permissive." Rhode, *supra* note 7, at 1049 (citing RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 26, 201 (2000)).

100. They say, by contrast, the judiciary publicly expressed its concerns about aspects of professional practice. Noone & Dickson, *supra* note 87, at 132.

101. Guy Powles, *Taking the Plunge: Integrating Legal Ethics in Australia*, 33 L. TCHR. 315, 316–19 (1999). The author attributed this dereliction in part to the "fragmented and parochial character of the diverse professional bodies into which Australian legal practitioners are still divided as we enter the 21st century." *Id.*

102. See LAW ADMISSIONS CONSULTATIVE COMM., REVIEW OF ACADEMIC REQUIREMENTS FOR ADMISSION TO THE LEGAL PROFESSION (2015) [<https://perma.cc/GB85-BNEY>].

103. *Law Admissions Consultative Committee*, LEGAL SERV. COUNCIL, <https://perma.cc/ZMA3-L3T4> (last visited Sept. 19, 2022).

104. *Id.*

105. LAW ADMISSIONS CONSULTATIVE COMM., *supra* note 102, at 5 ("LACC would be interested to receive submissions about whether the following areas of knowledge [including ethics and professional responsibility] continue to be fundamental threshold knowledge for all entry-level lawyers.").

106. Vivien Holmes, Adrian Evans, Reid Mortensen, Justine Rogers, Jeff Giddings & Francesca Bartlett, LACC Review of Academic Requirements (2014) (submission to the LACC by legal ethics academics) (on file with the Georgetown Journal of Legal Ethics, Vivien Holmes (ANU), and Justine Rogers (UNSW)).

107. *Id.* at 12 (citing WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf [<https://perma.cc/UP8Z-GSXE>] [hereinafter CARNEGIE REPORT]).

students are inculcated into a professional identity. An academic ethics course allows students to consciously explore the ethical dimensions of legal work and a lawyer's identity. Indeed, we argued that there should instead be greater efforts to embed ethics into the entire degree, a point I return to below.¹⁰⁸ For now, ethics remains a compulsory academic unit, but the academy's role in this aspect of the learning trajectory remains uncertain.

The tension between the professional and academic communities about the status of legal ethics also plays out in efforts to define its content (in CoP terms, to reify the practice of legal ethics). The profession's hold over this shared knowledge is embodied in the Priestley 11 selection of subjects (doctrines) and their descriptors.¹⁰⁹ Currently, the Admission Rules contain brief descriptions of these eleven "academic areas of knowledge." For Ethics and Professional Responsibility, the course content must cover lawyers' professional and personal conduct with respect to their duties to the law, courts, clients, and to fellow practitioners.¹¹⁰ In its basic form, this black letter approach, known by legal ethics academics as "legal ethics as rules,"¹¹¹ "holds that knowledge of professional responsibility rules is in itself a sufficient learning outcome for law students."¹¹² Under this approach, teaching and learning legal ethics is no different to torts or contracts, for example. Indeed, each of the Priestley 11 requirements are written in a very similar way, primarily focused on comprehension of concepts and rules.¹¹³ Similarly, to be accredited in the United States, law schools must cover lawyers' professional and ethical responsibilities to clients and the legal system, and other professional skills needed for competent and ethical practice,¹¹⁴ through "substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members."¹¹⁵ In his 2008 paper, Gonzalo Puig, a practitioner and law teacher, estimated that the vast majority of Australian law schools were teaching students the ethics-as-rules approach, as if legal ethics were synonymous with the conduct and practice rules and other legislation regulating lawyers in their practice.¹¹⁶

Meanwhile, in 2002, APLEC, the body representing the vocational training stage, and LACC released joint "Competency Standards" for PLT providers (which can be associations, law schools or other institutions) and their students.¹¹⁷

108. *Id.* The point is followed up at Robertson & Tranter, *infra* note 111.

109. LAW ADMISSIONS CONSULTATIVE COMM., PRESCRIBED ACADEMIC AREAS OF KNOWLEDGE (Dec. 2016), <https://perma.cc/5WQE-4CXL>.

110. PRIESTLEY 11, *supra* note 86, at sched. 1, pt. 2, § 13 (Ethics and Professional Responsibility).

111. Robertson and Tranter call it "the rules approach." Robertson & Tranter, *supra* note 4, at 226–27.

112. *Id.* at 226.

113. See PRIESTLEY 11, *supra* note 86, at sched. 1, pt. 2 (listing eleven Academic Areas of Knowledge).

114. ABA STANDARDS, *supra* note 2, at Standard 302.

115. *Id.* at Standard 303(a).

116. Gonzalo Villalta Puig, *Legal Ethics in Australian Law Schools*, 42 L. TCHR. 29, 32–34 (2008).

117. LAW ADMISSIONS CONSULTATIVE COMM., PRACTICAL LEGAL TRAINING COMPETENCY STANDARDS FOR ENTRY-LEVEL LAWYERS (2015).

These standards, revised in 2017, are still in place and, in contrast to the academic emphasis, possess an ethics-as-judgment quality. “Ethics-as-judgment” is detailed shortly, but generally, it treats the aim of legal ethics education as the cultivation of virtuous attitudes and behavior as well as ethical skills for which the conduct rules are an essential, but not the sole, resource.¹¹⁸ In this case, the PLT standards set out the competencies required of an “entry level lawyer,” centered on recognizing and discharging ethics duties and pro bono commitments, demonstrating professional behavior, and engaging in ethical dialogue and preventative measures.¹¹⁹

In 2019, LACC attempted to update the Priestley 11 after three decades of relative stagnancy.¹²⁰ Far from removing legal ethics from the academic stipulations, as was considered in 2014, this update would have enriched it, at least formally. The subject description for legal ethics would have required students to understand, in addition to the rules, the broad theoretical bases of lawyers’ ethics and regulation, as well as the contextual difficulties in resolving ethical tensions arising from the different obligations.¹²¹ Students would be expected to *evaluate* the substantive rules and principles as well. For reasons that are not entirely clear, in 2021 “the new Priestleys” were withdrawn, and their adoption deferred indefinitely.¹²²

A “rules-based morality,”¹²³ further described in the next Part, remains, then, the profession’s ostensibly preferred conception of legal ethics practice. While the Admissions Rules state that the legal ethics content can be spread across courses, ethics-as-rules is attached, or is interpreted by law schools as attached, to a “stand-alone” formulation, in which there is little to no attention paid to legal ethics issues elsewhere in the curriculum.¹²⁴ This means that legal ethics is not seen as a faculty-wide concern or responsibility.

118. As Rhode put it, “[k]nowledge of what the rules say can only begin, not end, analysis of how discretion should be exercised.” Rhode, *supra* note 7, at 1049. For further discussion, see *supra* Part III.B.

119. PRIESTLEY 11, *supra* note 86, at sched. 2, pt. 4, § 18.

120. LAW ADMISSIONS CONSULTATIVE COMM., REDRAFTING OF THE ACADEMIC REQUIREMENTS FOR ADMISSION (2019), <https://perma.cc/X5A5-VYGL>.

121. An applicant for admission to the Australian legal profession “must demonstrate a coherent body of knowledge that includes, in the case of . . . Ethics and Professional Responsibility: Understanding – (a) the broad theoretical and conceptual basis of lawyers’ ethics and professional regulation, and its social context; (b) the sources of lawyers’ ethical obligations and professional responsibilities (for example, in common law and equity; procedural law; and professional regulation), and the consequences of breach; (c) and evaluating substantive rules and principles governing professional conduct in respect of the lawyer’s duties (for example, to the law; to the administration of justice; to the client; to fellow practitioners; to others); (d) both the contextual difficulties of, and approaches to, ethical tensions that arise for practising lawyers in seeking to discharge their professional obligations.” *Id.* at attach. A.

122. For a reflection on what might have been gained by the updated areas of knowledge, see Andrew Henderson, *What Happened to the New Priestley 11?*, MERMAID’S PURSE (Mar. 10, 2021), <https://themermaids-purse.blog/2021/03/10/what-happened-to-the-new-priestley-11/> [<https://perma.cc/9NYU-Q222>].

123. Robertson, *supra* note 5, at 225.

124. *Id.* at 212.

Indeed, in 1992, once legal ethics became effectively compulsory in Australia, it still was not a law school priority, even by those law schools actually offering it. The subject was taught for some time by rotating casual teachers/practitioners, often merged with evidence and procedure or other courses, and over a short period of time. Also, the stand-alone, ethics-as-rules approach is, as Robertson identifies, relatively cheap in school budgetary terms compared to, for example, providing students the opportunity to tackle “live” ethical issues in a clinical setting.¹²⁵ This low or variable level of interest from upper management of the law school can be a significant discourager for new teachers and researchers in the discipline or domain. Far from being a “joint enterprise” between the profession and the law schools, this lack of law school leadership keeps the discipline in a precarious and under-developed state.

Meanwhile, legal ethics teachers have felt frustrated and perhaps even devalued in response to the professional community requiring them to teach a codes-based approach, at least as a mandatory first step and focus, with which they do not entirely identify and which they regard as limited.¹²⁶ As CoP theory says, codes are not especially meaningful to those who cannot or do not need to implement them in their daily work, let alone negotiate their meanings.¹²⁷ Codified knowledge, according to CoP, means knowledge is devoid of relationality and therefore of ethics. As described in the next Part, these are positivistic qualities that typically lead legal ethics teachers to have concerns about certain aspects of the law degree more broadly. In this way, legal ethics teachers are fulfilling a large tranche of the profession’s “identity work”¹²⁸ on the profession’s behalf. Moreover, they are doing so when most (permanent) legal ethics teachers are, at most, peripheral members of the legal teaching community, positioned at the boundary of the profession with restricted access to it.

III. LEGAL ETHICS PRACTICE: ETHICS AS RULES VS. ETHICS AS JUDGMENT

This Part charts the (fitful and ongoing) move from ethics-as-rules to ethics-as-judgment, as led by legal ethics educators, pushed sometimes by government, and with the occasional active leadership and support of the wider academic and professional communities. Ethics-as-rules is a stand-alone, code-based approach to ethics.¹²⁹ In the next section, I describe the way in which it is perceived by a vocal proportion of legal ethics teachers. First though, the notion of “professional

125. *Id.* at 214.

126. For a synthesis of such responses by legal ethics teachers, see *infra* Part III.A.

127. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 9–11.

128. “Identity work” is a term used in the organizational literature encapsulating the cognitive, emotional and behavioral activities (or “work”) in securing, repairing, revising, and maintaining a personal and social (or professional) identity. See e.g., Andrew Brown, *Identities and Identity Work in Organizations*, 17 *INT’L J. MGMT. REV.* 20 (2015); Brianna Barker Caza, Heather Vough & Harshad Puranik, *Identity Work in Organizations and Occupations: Definitions, Theories, and Pathways Forward*, 39 *J. ORG. BEHAV.* 889 (2018).

129. See *infra* Part II.B.

judgment,” which ought to include “ethics-as-judgement,” is prized by the profession.¹³⁰ The case law, professional literature, and academic studies of professions and professional socialization, show that “professional judgment” denotes something very much in line with CoP thinking. Professional judgment is a practice of assessing a situation and coming to a sound conclusion;¹³¹ it cannot be reduced to a formula,¹³² but involves independence,¹³³ clarity, creativity, strategy, and rigor.¹³⁴ Lawyers exercise professional judgment in actual situations, most importantly in “controversial and ambiguous” ones.¹³⁵ Finally, their skills are learned and refined over time (or *can* be learned and refined)¹³⁶ from within a community.¹³⁷ Aligning with the sentiments of certain leaders of the profession,¹³⁸ the interest of legal ethics teachers is to ensure this professional judgment more consciously includes ethics and that it is exercised by lawyers in dealings with their clients as well as their colleagues and other groups. Again, like many professional leaders, legal ethics teachers are concerned that the contexts and

130. Scholars have long regarded “judgment” as a marker of professionalism as distinct from commercialism or being like any other businessperson. See A.M. Carr-Saunders & P.A. Wilson, *THE PROFESSIONS* (1933). As one senior barrister put it to his pupil, during my studies of the socialization processes at the London Bar: “[to be a good barrister], you can’t be sloppy or show poor judgement, you can make a mistake, but you can’t show poor judgment.” Rogers, *supra* note 69, at 41. Paul Brest and Linda Hamilton Krieger say that “[g]ood lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and that most precious of all qualities, good judgment.” *Infra* note 134, at 3. For an analysis of the important blend of technique and judgment that makes up professional knowledge (and status), see H. Jamous & B. Pelloille, *Professions or Self-Perpetuating Systems? Changes in the French University-Hospital System*, in *PROFESSIONS AND PROFESSIONALIZATION* 109 (J.A. Jackson ed., 1970).

131. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 72–73 (1993).

132. See Justice Craig Colvin, Speech at the Western Australian Bar Association Spring Continuing Professional Development, *Virtue, Honour and Ethics: Problems with a Deontological Perspective on Ethical Responsibilities of Lawyers* (Oct. 20, 2020) (transcript available at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-colvin/colvin-j-20201020#_ftn1 [<https://perma.cc/BG6M-2LU4>]).

133. *Id.* (“Good lawyers do not extend their passion into the arena of the dispute. They do not become invested in the outcome. They do not make quick judgments. They keep an open mind and assimilate information as it comes in without succumbing to confirmation bias. . . . As we say, [lawyers] are not a mere mouthpiece. Instead, they mediate the operation of the law. . . . [As an example of independent professional judgment], ‘a lawyer who forms the view that there is no proper basis to carry out the instructions or no reasonably arguable position to advance must terminate the retainer on that basis.’”) (quoting *Dyczynski v. Gibson* [2020] FCAFC 120 at [217]–[220], Murphy & Colvin, JJ).

134. See PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING AND PROFESSIONAL JUDGMENT* 631 (1954).

135. See David W. Barnett, *Professional Judgment: A Critical Appraisal*, 17 *SCH. PSYCH. REV.* 658, 658 (1988).

136. BREST & KRIEGER, *supra* note 134, at 633 (pointing out that lawyers inevitably gain from experience, but that learning from experience is not inevitable; it requires gaining reliable feedback and engaging in reflection). For an ethics framework that includes reflection and review, see Mark S. Schwartz, *Ethical Decision-Making Theory: An Integrated Approach*, 139 *J. BUS. ETHICS* 755, 755 (2016).

137. For a classic text on how professionals learn “on the job” from senior practitioners and peers, see HOWARD S. BECKER, BLANCHE GEER, EVERETT C. HUGHES & ANSELM L. STRAUSS, *BOYS IN WHITE: STUDENT CULTURE IN MEDICAL SCHOOL* (1961). For a study of barristers’ professional socialization that accounts for the fragmented nature of the professional community, see Rogers, *supra* note 69.

138. See *infra* note 147.

cultures in which lawyers think and work can hinder ethical sensitivity, discussion, and behavior. Later, in Part V, I outline my own efforts to develop ethics-as-judgment and align it with ethics-as-rules, including by enhancing the presence of the professional community in the students' learning.

A. ETHICS-AS-RULES

Legal ethics teachers have singled out the ethics-as-rules approach as both boring and problematic. Criticisms of this approach to legal ethics can be seen as part of wider objections to certain elements of “thinking like a lawyer.” As the dominant task of legal education,¹³⁹ thinking like a lawyer means looking beyond the “social and interpersonal dynamics” and narratives behind cases, largely ignoring the relationships, emotions, and moral and social elements involved. It sees these dimensions as merely “confusing” to “the legal analysis to be performed.”¹⁴⁰ Law students are trained to be (morally) neutral, to “present legal arguments from all sides,” and conceive of the law as “infinitely pliable.”¹⁴¹

Ronald Pipkin famously called legal ethics, meaning ethics-as-rules, “the dog of the [American law school] curriculum,”¹⁴² through which students learn a mechanized and instrumentalized form of ethics.¹⁴³ Robert Granfield further stated that ethical dilemmas, in this formulation, are framed as issues of liability, training students to avoid breaches of contract, tort, fiduciary, or consumer law.¹⁴⁴ To continue the critique, this form of ethics reinforces assumptions already embedded in a law degree of individualism, partisanship, neutrality, and non-accountability;¹⁴⁵ an ethical position known in the legal ethics literature as “the standard conception.”¹⁴⁶ Meanwhile, Thomas Shaffer described this approach to legal ethics teaching as about as interesting as preparing for a driver's license test.¹⁴⁷ Luban and Milleman have referred to the condescension with which legal ethics is often viewed by colleagues, “which students are quick to

139. Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1226 (2004).

140. See Jess Krannich, James R. Holbrook & Julie McAdams, *Beyond “Thinking Like a Lawyer” and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 386 (2009); see also CARNEGIE REPORT, *supra* note 107.

141. See June Chapman, *Why Teach Legal Ethics to Undergraduates?*, 5 LEGAL ETHICS 68, 78–79 (2002); see also Henry Rose, *Law Schools Should Be About Justice Too*, 4 CLEVELAND STATE L. REV. 443, 446 (1992).

142. Luban & Milleman, *supra* note 79, at 37–38 (citing Ronald Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 4 AM. BAR FOUND. RSCH. J. 247 (1979)).

143. ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 306–07 (1992).

144. *Id.*

145. *Id.*

146. For a lucid summary of the legal ethics ideas and debates, including the “standard conception” (partiality, neutrality, and non-accountability), see David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 343 (2017).

147. Lisa Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 465 (1998) (quoting Thomas Shaffer).

pick up on,”¹⁴⁸ describing ethics teaching as a “nagging ache.”¹⁴⁹ Luban and Milleman also have reported on how they and their colleagues receive significantly lower student evaluation scores for their legal ethics teaching than for other courses.¹⁵⁰

Australian scholars are similarly concerned with the state of legal ethics in their home country. In 2001, Adrian Evans said that Australian legal ethics was not reaching its potential to inculcate moral responsibility.¹⁵¹ Margaret Castles agreed that legal ethics was not translating to ethical skills and attitudes in practice.¹⁵² Christine Parker’s evaluative study of the success of the course she convened¹⁵³ told a “hopeful and a disappointing story.”¹⁵⁴ Though some time ago now, these are conclusions from among the most committed legal ethics educators and scholars. More recently, Puig has expressed shock at teaching legal ethics for the first time, where, despite his high hopes and enthusiasm, he was, in his own estimation, ultimately ineffective. The experience spurred him to persuasively call for legal ethics to be taught as “judgment.”¹⁵⁵

It is important to note, though, that the rules of admissions, conduct and practice, and the admissions and misconduct cases, things that constitute “ethics-as-rules,” emphasize “ethics-as-judgment” virtues as well. Ethics-as-rules are not just rules about anything. They express and enforce professional and “ordinary” moral values, such as good character, honesty, and trust. There have also been strong statements *against* the ethics-as-rules approach from among the judiciary and other professional leaders.¹⁵⁶ In their training sessions and hotline advice given to practitioners, the ethics lawyers at the Law Society of New South Wales, for example, ask lawyers to support the spirit of the rules and not get fixated on

148. Luban & Milleman, *supra* note 79, at 38–39.

149. *Id.* at 37.

150. *Id.* at 38.

151. See Adrian Evans, *Lawyers’ Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998*, 12 LEGAL EDUC. REV. 209, 265 (2001).

152. See Margaret Castles, *Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia*, 12 LEGAL EDUC. REV. 81, 84 (2001).

153. Parker, *supra* note 6, at 186.

154. *Id.* at 178.

155. Puig, *supra* note 116, at 30; see also Powles, *supra* note 101, at 321 (citing research establishing the “hard line” resistance, at least in the 1980s and 1990s, to a pervasive approach to legal ethics teaching in Australia).

156. For examples of recent judicial speeches on the vital importance of ethics, see Chief Justice Susan Kiefel, Speech at the Queensland Law Society Symposium: Shaping Legal Minds – The Ethical Mind (Mar. 19, 2021) [transcript available at <https://perma.cc/G89D-9BWQ>]; Colvin, *supra* note 132; Justice Stephen Escourt, Speech at Law Society of Tasmania Litigation Conference, Ethics and Court Appearances (Nov. 12, 2021) [transcript available at <https://perma.cc/MY8T-92DL>]; Chief Justice T.F. Bathurst, Opening of Law Term Address, Law as a Reflection of the “Moral Conscience” of Society (Feb. 5, 2020) [transcript available at <https://perma.cc/9CFG-JNXL>]; Justice Chris Maxwell, Speech at Victoria Law Foundation Oration: Equity and Good Conscience, The Judge as Moral Arbiter and the Regulation of Modern Commerce (Aug. 14, 2019) [transcript available at <https://perma.cc/5BBY-3DAG>].

the technical elements themselves.¹⁵⁷ In other words, in several contexts, the professional community also cautions against a pure rules-based approach, as one that possibly encourages mouthpiece and loophole lawyering or an evasive mindset, at the expense of a lawyers's integrity and independence.

Meanwhile, through their interactions within their faculty and cross-faculty teaching communities, as well as with their students, legal ethics teachers have sought to develop their own "more academic" legal ethics practice, one that substantiates the calls from some among the professional leadership for a non-technical approach. To nuance Puig's depiction of the law schools as uniformly stuck in a rules-based conception,¹⁵⁸ it is clear from the literature and textbook resources that, during the last twenty-five years, there have been real achievements in the broadening of legal ethics practice¹⁵⁹ in the direction for which he called.¹⁶⁰ This direction is termed "ethics-as-judgment."

B. DISCOVERING A PRACTICE: ETHICS-AS-JUDGMENT

The "judgment" approach, as Robertson observes, is a diverse scholarship that is difficult to describe.¹⁶¹ Indeed, he says, it is probably best thought of as a collection of approaches that share the common ground of a virtue-, not a rules-, orientation.¹⁶² Since the time Robertson made this assessment, a capabilities-orientation has emerged as a second characteristic of the judgment approach. A "capabilities-orientation" refers to a concern with what people need (in terms of skills and conditions) to be able to exercise professional ethical judgment and (to link capabilities with virtue) to exercise that judgment in a way that enacts and strengthens good character and promotes good institutions. Among other things, the emphasis on being able to "do" ethics has been brought about by the emergence of more empirical, behavioral approaches to legal ethics.¹⁶³ The "judgment" approach questions the scope and utility of the rules and their completeness. As one example, ethics-as-judgment tries to extend comprehension of the rules to

157. Justine Rogers, *The Lying Lawyer and the Ethics of Negotiation*, in *RESOLVING CIVIL DISPUTES* 197, 206 (Michael Legg ed., 2016).

158. See Puig, *supra* note 116, at 30. Puig's point that legal ethics is primarily taught as a stand-alone subject remains true. *Id.* Meanwhile, there have been many successful efforts to humanize the law degree, not just through legal ethics education.

159. For some examples in the U.S. law school context of creative approaches to teaching ethics, promoting a positive professional identity, and modelling professional ideals, see *CARNEGIE REPORT*, *supra* note 107. See also *Teaching Ethics and Professionalism: Preparing Law Students for Character and Fitness*, 4 *PRACTICE* (Mar. 2018), <https://thepractice.law.harvard.edu/article/teaching-ethics-and-professionalism/> [<https://perma.cc/M8FU-V4CR>] [hereinafter *Teaching Ethics and Professionalism*].

160. Puig, *supra* note 116, at 34.

161. Robertson, *supra* note 5, at 228.

162. *Id.*

163. For a history of legal ethics theory and the emergence of behavioral approaches, see generally Luban & Wendel, *supra* note 146. For a wider history of the "capabilities" movement, see generally LEESA WHEELAHAN & GAVIN MOODIE, *N.S.W. DEP'T OF EDUC. & CMTYS., RETHINKING SKILLS IN VOCATIONAL EDUCATION AND TRAINING: FROM COMPETENCIES TO CAPABILITIES* (2011).

comprehension of the wider, more systemic issues and values. The hope is that this will help the law student develop the capability to devise “sensible reform or prevention measures” once they are in practice.¹⁶⁴

In addition, the “judgment” approach highlights the importance of practitioners’ discretionary decision-making. Luban and Milleman say that legal ethics practice involves identifying which ethical principle is most important given the particularities of the situation.¹⁶⁵ It is this capacity, they argue, that we as educators should seek to develop among students.¹⁶⁶ “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.”¹⁶⁷ Evans provides scaffolds for teachers and students to explore the implications of a lawyer’s decision, as well as the law student’s own future exercise of “judgment,” by comparing the priorities of social ethics frameworks (Kantian, utilitarian, virtue ethics, and Confucian).¹⁶⁸ Such social ethics theories, together with the legal ethics theories, represent a range of views as to how far the content of lawyers’ morality ought to, and rightfully can, exceed the limits of the conduct rules.¹⁶⁹ Elsewhere, William M. Sullivan and his co-authors highlight that students need role models who provide coaching and feedback, as with any other aspects of practice.¹⁷⁰

Overall, as indicated, ethics-as-judgment is very critical of the standard conception of lawyering.¹⁷¹ A counterargument might be that ethics-as-judgment leaves too much discretion and allows for too wide a range of ethical behavior. However, this assumes that the alternatives to the standard conception are without handrails. For example, one of the dominant alternatives posits that lawyers, by virtue of their special political role in maintaining legal systems, ought to follow the rules and generally not express or enact their own personal morality. But this

164. Parker, *supra* note 6, at 190. The former subject description for ethics and professional responsibility contained overlapping elements with these ideas, stating that students must understand the theoretical and historical foundations of the professional rules, what those duties are and the consequences of their breach, and the contextual reasons why it might be difficult to discharge these duties.

165. Luban & Milleman, *supra* note 79, at 39; *see also Teaching Ethics and Professionalism*, *supra* note 159 (describing the UC Irvine Law legal ethics course centered in a contextual approach, where ethics issues vary across practice settings, described in conjunction with other innovative and distinct law school approaches).

166. Luban & Milleman, *supra* note 79, at 39.

167. Robertson, *supra* note 5, at 229.

168. *See* ADRIAN EVANS, *THE GOOD LAWYER: A STUDENT GUIDE TO LAW AND ETHICS* 32–84, (2014); ROSS HYAMS, SUSAN CAMPBELL & ADRIAN EVANS, *PRACTICAL LEGAL SKILLS* 66–67 (4th ed. 2014). Evans’s textbook with Parker includes a complementary “four models of lawyering” framework—the adversarial advocate, responsible lawyer, moral activist, and ethics of care lawyer—to also encourage a broader perspective of what this exercise of ethical judgment might involve. CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS’ ETHICS* (2007). The “four models of lawyering” framework is based on Christine Parker, *A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics*, 30 *MONASH U. L. REV.* 49 (2004).

169. Robertson, *supra* note 5, at 229.

170. *CARNEGIE REPORT*, *supra* note 107, at 146.

171. *See supra* Part III.A.

“fidelity to law” or “responsible lawyer” approach does not therefore support a blind, narrow, and positivistic approach to the rules. It says that the lawyer’s “judgment” is exercised in ensuring that the letter *and* spirit of the rules are honored such that, as leading legal ethics theorist W. Bradley Wendel puts it, the lawyer ought to protect the client’s rightful legal entitlements and not simply try to advance all the client’s interests.¹⁷² There is a varied and thoughtful legal ethics philosophical scholarship to help inform, explore, and test out a lawyer’s discretionary judgment.¹⁷³

Ethics-as-judgment also says that law students and lawyers need to develop (not inhibit) their own sense of morality in order to become ethically astute.¹⁷⁴ W. Brent Cotter identified this in his three levels of legal ethics practice (and therefore, of teaching): the legal profession’s responsibilities, the lawyers’ duties in their work, and the individual’s own values and attitudes.¹⁷⁵ Again, there is an important debate about when this use of a lawyer’s personal morality is and is not justifiable, specifically when it comes to client representation, as distinct from say, when a junior lawyer speaks up to a senior one who is asking the junior lawyer to do something wrong. In this second case, the lawyers are not acting in their political roles, and the applicability of ordinary moral values is more straightforward, if sometimes practically harder to enact than in exchanges with the client. As Noone and Dickson explain, legal ethics must be taught in a way that leads students “on a path of self-discovery”:

Primarily, lawyers need to develop the ability to recognise a question of professional ethics and the skills, knowledge, and insight to resolve the situation. However, they need more than those technical skills if they are to become “responsible in the practice of law.” They need to know that ethical issues provoke tension and conflict and are frequently difficult to solve. They need to and can learn to appreciate that there is a moral content to law and practice.¹⁷⁶

Finally, as Robertson notes, scholars who advance ethics-as-judgment seek to embed it in every subject of the law degree.¹⁷⁷

Turning back to the Australian case, an effort to clarify and prioritize ethics-as-judgment came in 2010, when the Australian Learning and Teaching Council

172. See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 51–80 (2010).

173. For an outline of legal ethics literature, see Luban & Wendel, *supra* note 146.

174. Robertson, *supra* note 5, at 228.

175. Chapman, *supra* note 141, at 71 (quoting W. BRENT COTTER, *PROFESSIONAL RESPONSIBILITY INSTRUCTION IN CANADA: A COORDINATED CURRICULUM FOR LEGAL EDUCATION* 1–6 (1992)).

176. Noone & Dickson, *supra* note 87, at 133 (first quoting Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 *NOVA L.J.* 633 (1986); and then citing YSAIAH ROSS, *ETHICS IN LAW: LAWYERS’ RESPONSIBILITY AND ACCOUNTABILITY IN AUSTRALIA* 24–29 (6th ed. 2014)). See generally MARLENE LE BRUN & RICHARD JOHNSTONE, *THE QUIET (R)EVOLUTION: IMPROVING STUDENT LEARNING IN LAW* (1994) (applying educational theory to law teaching); Tony Greenwood, *Ethics and Avoidance Advice*, 65 *L. INST. J.* 724 (1991).

177. Robertson, *supra* note 5, at 229.

(“ALTC”), funded by the Australian Government, produced six “Threshold Learning Outcomes” (“TLOs”) recommended for the undergraduate law degree.¹⁷⁸ Aligning with and supporting the government’s quality assurance regulation, the TLOs are threshold learning outcomes that all graduates are expected to acquire at a minimum over the course of their degrees.¹⁷⁹ In the language of the “Australian Qualifications Framework,” the national policy for educational qualifications,¹⁸⁰ the TLOs represent what a graduate is expected “to know, understand and be able to do as a result of learning.”¹⁸¹ The TLOs represent an outcomes model of teaching, a shift away from the “input” model represented by the Priestley 11.¹⁸² Again, the government was the primary demander of this change as part of a wider overhaul of the higher education sector, its funding, and its regulation. The change to an outcomes-approach was therefore intended for a range of discipline areas and all post-schooling qualifications, not just law, let alone legal ethics.¹⁸³

The TLOs for Law include Ethics and Professional Responsibility (TLO 2).¹⁸⁴ TLO 2 says that graduates of a law degree should be able to demonstrate:

- (a) An advanced and integrated understanding of approaches to ethical decision making;
- (b) An ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts;
- (c) An ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community; and
- (d) A developing ability to exercise professional judgment.¹⁸⁵

TLO 2 represents, then, an expansion from the comprehension level of the Priestley 11 to include capabilities and values. In TLO 2, “ethics” is predominant,

178. A modified version for the postgraduate (J.D.) degree was endorsed by CALD in 2012. COUNCIL OF AUSTRALIAN L. DEANS, JURIS DOCTOR: THRESHOLD LEARNING OUTCOMES (2012), <https://cald.asn.au/wp-content/uploads/2017/11/Threshold-Learning-Outcomes-JD.pdf> [<https://perma.cc/4H6Y-GC6G>].

179. Anna Huggins, Sally Kift & Rachael Field, *Implementing the Self-Management Threshold Learning Outcome for Law: Some Intentional Design Strategies from the Current Curriculum Toolbox*, 21 LEGAL EDUC. REV. 183, 186 (2011).

180. *Australian Qualifications Framework*, AUSTRALIAN QUALIFICATIONS FRAMEWORK, <https://www.aqf.edu.au> [<https://perma.cc/D3V8-M53M>] (last visited Oct. 4, 2022).

181. SALLY KIFT, MARK ISRAEL & RACHAEL M. FIELD, AUSTRALIAN LEARNING & TEACHING COUNCIL, LEARNING AND TEACHING ACADEMIC STANDARDS PROJECT: BACHELOR OF LAWS: LEARNING AND TEACHING ACADEMIC STANDARDS STATEMENT (2010).

182. Anna Huggins, *Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law*, 38 U.N.S.W. L.J. 264, 276 (2015).

183. For a history of the TLOs, including in the legal context, see *id.*; Leesa Wheelahan, *From Old to New: The Australian Qualifications Framework*, 24 J. EDUC. & WORK 323, 323–42 (2011). For more on the Australian Qualifications Framework, see *Australian Qualifications Framework*, TERTIARY EDUC. QUALITY & STANDARDS AGENCY, AUSTRALIAN GOV’T, <https://www.teqsa.gov.au/australian-qualifications-framework> [<https://perma.cc/M2TK-9DVT>] (last visited Oct. 7, 2022).

184. The TLOs are knowledge, ethics and professional responsibility, thinking skills, research skills, communication and collaboration, and self-management. MAXINE EVERS, LEANNE HOUSTON & PAUL REDMOND, AUSTRALIAN LEARNING & TEACHING COUNCIL, GOOD PRACTICE GUIDE (BACHELOR OF LAWS) 11 (2011).

185. COUNCIL OF AUSTRALIAN L. DEANS, *supra* note 178, at 3–4.

and professional judgment is central. Moreover, the conduct and practice rules appear to be guiding resources for the TLO 2, as distinct from their satisfaction as its sole requirement.

The TLOs were developed by the ALTC's Discipline Scholars in Law, Professors Sally Kift and Mark Israel.¹⁸⁶ The authors' foreword describes a broad, iterative consultation process including academics, judges, regulators, admitting authorities, practitioners, students, law deans, and various other associations. The drafting process was also informed, it says, by "national and international experts and the work of similar projects both within and outside Australia."¹⁸⁷

Nonetheless, it appears as though the professional bodies were at the periphery of this process. Moreover, LACC, the national admissions body, did not adopt the TLOs as admission requirements. Instead it kept the Priestley 11 as the agreed standards for admission to practice.¹⁸⁸ Their decision was, LACC said, in large part because of the uncertainty around the TLOs' status as regulatory requirements.¹⁸⁹ LACC was also swayed by the position of the New South Wales Legal Profession Admission Board,¹⁹⁰ which voiced "strident opposition."¹⁹¹ The Board "claimed that the TLOs would require new skills, which have hitherto not been expected of law graduates, to be admission requirements."¹⁹² It was also worried that existing practitioners "would probably fail to satisfy aspects of the TLO requirements."¹⁹³ In seeking to emphasize and promote the "vital" importance of the ethical values and skills in and the cognitive, emotional, and interpersonal skills entailed by five out of the six TLOs, legal academics Rachael Field (who was involved in drafting the TLOs) and Alpana Roy pointed out, "it is in fact possible that all of the Priestley 11 subjects could fall under the banner of TLO 1 [knowledge]."¹⁹⁴ These writers appear to be questioning why the profession is so attached to technical knowledge as practice, which represents only one of the outcomes, while being apprehensive about, and in certain ways dismissive of, the others.¹⁹⁵

186. With the assistance of Project Officer Rachael M. Field.

187. KIFT, ISRAEL & FIELD, *supra* note 181, at 1.

188. See LAW ADMISSIONS CONSULTATIVE COMM., RECONCILING ACADEMIC REQUIREMENTS AND THRESHOLD LEARNING OUTCOMES 1–6 (2011) (discussing the decision not to adopt the TLOs and to keep the Priestley 11).

189. *Id.* at 2.

190. *Id.*

191. Justine Rogers, *Teaching Soft Skills Including Online: A Review and Framework*, 30 LEGAL EDUC. REV. 1, 18 (2020).

192. Huggins, *supra* note 182, at 271 (citing LAW ADMISSIONS CONSULTATIVE COMM., *supra* note 188, at 2–3).

193. *Id.*

194. Rachael M. Field & Alpana Roy, *A Compulsory Dispute Resolution Capstone Subject: An Important Inclusion in a 21st Century Australian Law Curriculum*, 27 LEGAL EDUC. REV. 1, 5–6 (2017). The current academic standards for Australian Law Schools, the CALD Standards, describe the Priestley 11 as the "fundamental areas of legal knowledge" referred to in the TLOs. CALD STANDARDS, *supra* note 2, at Standard 2.

195. For more on this particular debate, see Rogers, *supra* note 191, at 18–20.

The TLOs were approved by the law schools via CALD.¹⁹⁶ As part of their accreditation processes, Australian law schools must formally evidence that they have satisfied the Priestley 11.¹⁹⁷ But to comply with the academic (CALD) standards that exist in parallel, they must also show how the curriculum addresses each of the TLO requirements.¹⁹⁸ Meanwhile, as a sign of some degree of alignment, the most recent professional (LACC) standards state that the Admission Board (and other regulatory authorities accrediting the law courses) will consider the application of external standards beyond the Priestley 11, including specifically, the TLOs.¹⁹⁹

In this layered and sometimes heated context involving issues of institutional autonomy, regulatory control, and the contested blend of legal and “generic” skills,²⁰⁰ ethics-as-judgment, advanced by TLO 2, remains contingent. Though there have been recent efforts at regulatory agreement between the profession and the law schools, TLO 2’s judgment approach is neither as salient nor settled as the ethics-as-rules approach of the Priestley 11.

Returning to the day-to-day identity and practice of legal ethics teachers, the deep conflict of values and outlook in ethics-as-rules and ethics-as-judgment, as two practices, can be difficult to manage. Rhode argued that legal ethics professors must teach “legal ethics without the ethics” (or ethics-as-rules) as well as an under-developed ethics-as-judgement, which she said was often a superficial attempt at moral philosophy, “the functional equivalent of Cliffs Notes on Kant.”²⁰¹ Meanwhile, the professional self-efficacy of legal ethics teachers,

196. The CALD Standards, devised in 2009, were amended in 2013 to incorporate the TLOs, though with some concerns and “even opposition to” the wider policy and regulatory system. Huggins, *supra* note 182, at 278 (citing Nicola Berkovic, *Dean Warns Gillard’s Regulator Threatens Education of Lawyers*, AUSTRALIAN (Aug. 3, 2012).

197. Section 4.4 of the Law Admissions Consultative Committee Accreditation Standards for Australian Law Courses (“LACC Standards”) requires law schools to provide a “Priestley 11” table to show which courses support the required areas of knowledge. ACCREDITATION STANDARDS FOR AUSTRALIAN LAW COURSES, Content of the Law Course, § 4.4 (Law Admissions Consultative Comm. July 2018), <https://www.legalservicescouncil.org.au/Documents/accreditation-standards-for-law-courses.pdf> [<https://perma.cc/K6W2-DZY2>] [hereinafter LACC STANDARDS]. The CALD Standards state that the law school’s law course must also facilitate student understandings within the eleven Prescribed Areas of Knowledge (the Priestley 11), which an applicant for admission to the Australian legal profession must demonstrate, and the law course must provide learning outcomes in relation to each area of knowledge as evidence. CALD STANDARDS, *supra* note 2, at Standard 2, explanatory note.

198. The CALD Standards state that the law course standards “should be read in conjunction with the Threshold Learning Outcomes” and that “[m]eeting the TLOs is an important step toward certification for the Law School. In applying for certification, the Law School must address the TLOs,” as well as other required standards. CALD STANDARDS, *supra* note 2, at Standard 2, explanatory note.

199. See LACC STANDARDS, *supra* note 197, at cl. 2.2(e) (“In deciding whether a student will have acquired or demonstrated appropriate understanding and competence in relation to an element or area of knowledge, as the case requires, an Admitting Authority will have regard to – (i) the Level 7 criteria specified in the AQF; (ii) the Threshold Learning Outcomes for the LLB or JD as the case requires; and (iii) any other matter that the Admitting Authority considers relevant.”).

200. See Huggins, *supra* note 182, at 286.

201. Rhode, *supra* note 7, at 1043.

whatever their preferred approach, is complicated, when the main concepts, attitudes, and skills are designed for students' later use in practice, and the classroom is only ever a "quasi-authentic" situational context. Moreover, the empirical research into that "authentic" context and central community, the profession itself, is often disheartening. For instance, scholars have described lawyers, in the commercial context at least, as ethically apathetic²⁰² and have shown ethics to exert a minimal influence on conversations and behavior.²⁰³ Finally, there are often pressures on legal ethics teachers from colleagues, mostly unspoken, in which legal ethics courses are expected to redress or reverse the desensitizing effects of the rest of the law degree.²⁰⁴

There are differences between academics and the legal profession in their language, perspectives, and aspirations for legal ethics as a practice, shaped by different forces. In effect, legal ethics teaching practice in Australia and the United States²⁰⁵ appears to be a hybrid of the two practices: ethics-as-rules and a variety of approaches categorized as ethics-as-judgment. These two broad approaches are often poorly aligned, amounting to what Lubet called a real problem with the identity of legal ethics:²⁰⁶ its mission is not clear.²⁰⁷ This Article now considers what this means for law students and their learning trajectory as essential, influential members of the legal ethics community.

IV. LAW STUDENTS AND THEIR LEARNING TRAJECTORIES

Whatever the teacher's approach to legal ethics in supporting the student's inbound trajectory to the profession, there are certain general factors that pose difficulties to a teacher trying to impart and assess anything but arms-length "law." For example, Susan Daicoff's 2012 review showed that United States law students typically find the learning of skills involving "interpersonal dynamics or emotional concerns . . . [to be] challenging or uninteresting."²⁰⁸ She also summarized empirical research that suggests that lawyer (and law student) personalities might find ethical teaching especially undesirable: lawyers are "competitive, dominant, achievement-oriented, focused on the economic bottom line, and

202. See generally Steven Vaughan & Emma Oakley, "Gorilla Exceptions" and the Ethically Apathetic Corporate Lawyer, 19 LEGAL ETHICS 50 (2016).

203. See generally Richard Moorhead & Victoria Hinchly, *Professional Minimalism? The Ethical Consciousness of Commercial Lawyers*, 42 J.L. & SOC'Y 387 (2015).

204. Chapman, *supra* note 141, at 68.

205. Most law courses in the United States still teach legal ethics in the context of the *Model Rules* or equivalent professional conduct and practice rules (in the case of California) and disciplinary cases, at least as a minimum. See CARNEGIE REPORT, *supra* note 107.

206. Lubet frames it as an identity clash between the rules, legal sociology and philosophy, and "the question of how to do justice." Lubet, *supra* note 3, at 133.

207. *Id.* at 134.

208. Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 829 (2012).

analytical,” and they “prefer to be perceived as socially ascendant, confident, and dominant”, even when their true social capabilities do not align with that image.²⁰⁹ These traits tend to work against teaching law students and lawyers’ ethical attitudes and skills.

In the Australian context, Massimiliano Tani and Prue Vines surveyed 5,000 UNSW students in 2005 across all faculties of the university to “investigate students’ attitudes toward their experience and expectations of their university education.”²¹⁰ Law students were more likely than all other students to have enrolled in their degree “for a reason external to themselves,” such as parental pressure, and were “less likely to find their studies intrinsically interesting.”²¹¹ Their extrinsic motivations may make students resistant to teaching that seeks to enliven their intrinsic and altruistic motivations and develop their ethical skills. Foreshadowing some of my own survey findings, Tani and Vines also found that law students were more likely than others to believe that employers cared most about their grades, as opposed to any social characteristics like a “personal code of ethics or their social and leadership abilities, or ability to understand diversity.”²¹²

In a similar vein, Paula Baron and Lillian Corbin have observed that law school education tends

[T]o prioritize performance-oriented students over mastery-oriented students. Mastery-oriented students look for challenges, apply effort and persist in the face of obstacles. They are intrinsically motivated . . . [and see] learning as valuable in itself, and as an ongoing process. Performance-oriented students, on the other hand, view tasks as challenges to self-image. Setbacks are understood as personally threatening, so that these individuals tend to focus upon activities at which they can excel, and avoid experiences that are difficult. . . . [T]raditional pedagogical structures in law encourage and reward performance, rather than mastery.²¹³

Broadly, legal ethics-as-judgment is a mastery mode of learning, while ethics-as-rules is more performative.²¹⁴

Outside the clinical context, the students pose a “double bind,” then, for teachers trying to teach both approaches: students are cynical about the possibility that

209. *Id.* at 829–30.

210. Massimiliano Tani & Prue Vines, *Law Students’ Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?*, 19 *LEGAL EDUC. REV.* 1, 3 (2009).

211. *Id.* at 24.

212. *Id.*

213. Paula Baron & Lillian Corbin, *Thinking Like a Lawyer/Acting Like a Professional: Communities of Practice as a Means of Challenging Orthodox Legal Education*, 46 *L. TCHR.* 100, 106 (2012).

214. Having said all this, even a strictly ethics-as-law approach represents a change in students’ learning trajectory because it relates to them in a direct way: legal ethics is about the law as it applies to them as future practitioners, whereas up until that point, the law they have learned is about the client’s purposes or prospects and/or legal institutions, and indeed they have imbibed certain ways of distancing *themselves* from the knowledge they are being asked to learn.

legal ethics or indeed any university course might (or should) involve “deep” issues of values and identity, but they also reject as “superficial” the professional conduct rules.²¹⁵ In 2001, Parker argued that

[T]he depressing conclusion in much of the scholarly literature is that, even as we try to teach our students ethics, they often learn only to become even more cynical about the possibility of ethical practice. They are doubtful that learning ethical rules will accomplish anything; they are disengaged from ethical theory and turned off by courses that seem to focus only on critique of the profession’s failures and problems that appear to be without solutions.²¹⁶

Concepts from Strand One of CoP, which focuses on how we progress to become competent knowers in a community, shed light on the students’ identity struggle. Baron and Corbin say that, from the time they enter law school, law students should be told that they are entering the legal professional community and that this orientation should be co-led by leaders of the profession.²¹⁷ From then, there should be an opportunity to move along a trajectory in the presence of and “become a member alongside, near peers and exemplars of mature practice, moving from peripheral participant to core member.”²¹⁸

Instead, as demonstrated, there are mixed learning trajectories offered by ethics-as-rules and ethics-as-judgment, representing a confusing mission. Moreover, the student is not truly a member of the professional community, nor are they a member of the academic one; students may be inbound, peripheral members as they learn legal ethics, but cannot transition into full members until long after the course is over. Students are not yet working toward the communities’ shared goals—to practice ethically in a legal context—and cannot contribute to the academic and professional communities in that sense. For Barab and Duffy, societal contribution is what forms “societal identity and the meaning of the activity” engaged in by a group. In learning situations that do not allow for true learner contribution (even those such as problem-based learning that provide context and simulate practice), there is no “opportunity for membership in the community of practitioners,” so the chance to benefit from that setting is foreclosed.²¹⁹ When students lack “full access to the practices and outcomes, as well as a legitimate role in the functioning of the community,” they can become “alienated” from the full experiences that the community offers and fail to generate positive identities.²²⁰ As Rhode notes, “those with little experience in the legal world they are about to inhabit”—that is, those who are on the margins of the

215. Parker, *supra* note 6, at 186.

216. *Id.* at 175–76.

217. Baron & Corbin, *supra* note 213, at 110–11.

218. Barab & Duffy, *supra* note 17, at 40.

219. *Id.* at 35.

220. *Id.* at 47.

community—“may fail to see the personal relevance or market value of professional responsibility courses.”²²¹

Much of this does not apply, or, more likely, is ameliorated, when students can engage in substantial clinical legal education. A clinical experience is often presented as the gold standard for legal ethics education,²²² for similar reasons as those implied by CoP theory: students are offered real issues “worth investing their efforts in.”²²³ Nonetheless, to more fully contribute to legal ethics practice (as distinct from legal practice generally), clinical legal education requires good role models and someone at the clinic with the time to reflect on the ethical processes that students need and how they compare to those used by staff they might be copying from.²²⁴ Moreover, clinical legal education still needs to align with classroom teaching and wider professional practice. As detailed in the next Part, the legal ethics course I teach is fortunate to include and offer a clinical component. And yet still the students have raised concerns about the transferability of “ethics-as-judgment” to legal practice and its legitimacy outside the classroom and by extension, the clinical setting.²²⁵

Continuing with Strand One ideas, it can be difficult for a person to enter a new CoP or exist in multiple CoPs simultaneously if they conflict with each other or with the person’s identity. Every law student could have a different trajectory depending on their goals. Some might be aiming to become full members of either the professional or legal academic communities; some might be trying to stay at the boundaries of both; some might be doing neither but still receive enough influence from those two communities that it affects their identity. On top of this, they may feel loyalty to their other substantive-subject academic identity (e.g., arts, commerce, business, or psychology), with which they may already strongly identify by the time they get to a legal ethics class. This could be why legal ethics students feel torn. They are potentially being pulled in two to three different directions.

Using the Strand One notion of learning as entering a community, one can understand why, in this context, where there are gaps and friction points between the ethics-as-rules and ethics-as-judgment, students might seek official approval from the profession on the complementarity of the “academic” practice and path.

221. Rhode, *supra* note 7, at 1047 (citing Stephen Gillers, *Eat Your Spinach?*, 51 ST. LOUIS U. L.J. 1215, 1219 (2007)).

222. See, e.g., Rhode, *supra* note 7, at 1052–53 (“The best way to improve ethical judgment is generally through engagement with real problems, involving real clients. . . . Linking a professional responsibility course to a clinic or building in additional units to focus on core topics, may be necessary to ensure systematic treatment regardless of what happens to surface in a given semester.”). Also, “[a]s both a sign and result of the rise of law clinics, the ABA Standards note [in Standard 303] their place in the ideal law school curriculum, listing law clinics as an acceptable feature of experiential learning and encouraging their creation and continued institutional support.” *Teaching Ethics and Professionalism*, *supra* note 159.

223. Barab & Duffy, *supra* note 17, at 32.

224. For an example of a clinical course focused on ethics, see Noone & Dickson, *supra* note 87.

225. See LEJ Survey, *supra* note 9, for details of the evaluative study.

As part of an evaluative study of the earliest version of the course I designed, conducted before many of the changes described in Part V were introduced,²²⁶ only 25% of the sixty-five surveyed students said they felt confident that they would address an ethics issue in practice.²²⁷ In addition to a natural uncertainty, the resistance was rooted in the students' perceived mismatch between academic and professional purposes and cultures: "[To be ethical in practice, I would need a law firm with] a friendly culture that is exhilarated by acting on core values and notions of what is right and just";²²⁸ "[The law firm would need to feed] back results from our ethical complaints rather than making it seem like our complaints go to the paper shredder which is what I feel";²²⁹ "[The course] has broadened my view of ethics, but also made me more cynical and probably less trusting [about/of the legal profession]";²³⁰ "[Academics expecting us to talk to others about their ethics] sounds dangerously like a course on preaching ethics to a secular world."²³¹ This indicates that, despite hearing some of the supportive comments from the professional leadership about the value of ethics-as-judgment, the students are not sure whether the parts of the course that extend beyond ethics-as-rules will be supported by the professional community, especially the law firms.²³² This misalignment removes students from the full experience of learning legal ethics practice and limits the possibility for the positive identities legal ethics teachers are seeking to foster.²³³

Parker concluded her 2001 study of her legal ethics course by stating that legal ethics teachers needed to provide students with a practice that could be a solution to the problem of legal ethics.²³⁴ More specifically, professors needed to teach students an explicit reasoning and judgment process, one that connects the application of rules and critical standpoints about those rules and the wider regulatory institutions with the students' personal values.²³⁵ Put another way, legal ethics

226. *Id.*

227. *Id.* at 20. Having said that and to illustrate the tensions (and probably some flaws in the survey design), 72% agreed that they would, upon facing an ethics issue, try to "[c]ome up with a range of possible solutions and assess the practicalities of implementing them before acting." *Id.* at 20. Then (only) 39% felt they were better able to voice their ethical values as a result of the course. *Id.* at 28.

228. *Id.* at 26.

229. *Id.* at 27.

230. *See id.* at 32.

231. *Id.* at 11.

232. Some of the studies on the influence of large law firms ("BigLaw") on law student and wider legal professional identity include Neil Joel Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341 (2011); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245 (2010); Desmond Manderson & Sarah Turner, *Coffee House: Habitus and Performance Among Law Students*, 31 L. & SOC. INQUIRY 649 (2006); Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015); Rogers, Kingsford Smith & Chellew, *supra* note 97.

233. Barab & Duffy, *supra* note 17, at 34.

234. Parker, *supra* note 6, at 195–98.

235. *Id.*

teachers need to better integrate ethical rules and ethical judgment. In the next section, I outline the ways in which I have tried to align these approaches using a broad construction of “judgment” to involve, as per the TLOs, capacity and values. Moreover, through certain interventions, the students’ learning is better supported by the professional community or its practitioners as “core members,” while still retaining some distance and difference from the professional community needed, as CoP Strand Two highlights, for changes in practice to occur. My efforts are intended for the benefit of the students and those with whom they will interact in their professional and social lives, especially as lawyers. But they are also for the benefit of teachers (including myself), to reduce some of the strains of the role, which CoP theory helps explain. My endeavors have benefitted from my involvement in the legal ethics community and contribute, I hope, to broader attempts to clarify the mission of legal ethics education. In CoP terms, I am trying to resolve tensions within the community and improve its practice (as Strand Two research describes) in order to improve the learning and identity trajectories of aspiring lawyers and legal ethics teachers (as Strand One research describes).

V. ALIGNING TWO PRACTICES: THE UNSW LAW AND JUSTICE APPROACH TO LEGAL ETHICS EDUCATION

The legal ethics course that I teach is called Lawyers, Ethics & Justice (“LEJ”). LEJ brings together the professional rules, academic philosophy and critique, and the students’ identities in an explicit and integrated way, while also allowing for and modeling imagination and change. The course is framed as enabling students to reflect on critical questions: what kind of person and lawyer do I wish to be? What kind of profession would I like to enter and help shape?²³⁶ The values and duties we discuss with students include professional ones, such as the service responsibility and social trust, fidelity to law, and the fiduciary duties. We also discuss so-called “ordinary” ethical values and obligations—e.g., honesty, fairness, dignity, autonomy, integrity, and courage.²³⁷

As indicated, LEJ is fortunate to include clinical experience at Kingsford Legal Centre (“KLC”). KLC is a community legal center located right by the law building that provides free legal advice and casework to the most disadvantaged members of the local community, as well as legal education to law students at UNSW and the wider public. CoP illuminates the students’ appreciation of their clinical experience at KLC.²³⁸ In a clinical setting, the students can directly apply

236. For a very accessible, engaging textbook elaborating upon these questions, see RACHAEL M. FIELD, JAMES DUFFY & ANNA HUGGINS, *LAWYERING AND POSITIVE PROFESSIONAL IDENTITIES* 1 (2d ed. 2019).

237. Given the article’s already large scope, I will not share all the sociological and philosophical material with which students engage. I can only briefly mention now the practice area contexts we traverse, from negotiation and ADR to criminal, civil litigation, community legal settings, and in-house/corporate.

238. As evidenced in the LEJ Survey, *supra* note 9, at 29 (“KLC, it just gave me a taste of the real world.”). For further explanation, see Anna Cody, *Developing Students’ Sense of Autonomy, Competence and Purpose Through a Clinical Component in Ethics Teaching*, 29 *LEGAL EDUC. REV.* 1 (2019).

and find meaning from the practices they learn under the supervision and guidance of practitioners or established members of the professional community. In collaboration with the KLC staff, the LEJ “classroom” teachers have shaped the clinical assessment so that it is clearly “about ethics.”²³⁹ Each student is required to attend an “advice night” in which they meet clients, conduct interviews and take notes, brief the (KLC or volunteer) attorney, and then observe the attorney give advice. To fulfil the assessment task, students are asked to reflect on their interviewing and interpersonal (including self-management) skills, as well as their ethical values, skills, and approaches, pointing out strengths and areas for improvement. Students often have to discuss the application of the conduct rules in practice, but they are expected to identify the ethics issue first and then explain how a rule applied (or how they applied the rule), if indeed there was a relevant rule. For this assessment, students may also be asked to critically comment on the role of pro bono and community legal centers more broadly.

I have expanded the KLC experience and extended it into the rest of the course. As one example, LEJ includes a class on the first lawyer-client meeting, centered on a video I produced depicting a complicated interaction.²⁴⁰ Students are asked to evaluate the meeting for its ethical, communicative, and emotional dimensions, drawing on the reading materials needed for their KLC experience and assessment. Again, the students are expected to refer to the conduct rules to explain where they helped guide or instruct the lawyer in the video or ought to have done so.

We start the course with behavioral legal ethics. Behavioral ethics is the study of how and why people make ethical and unethical decisions. Behavioral ethics is a new field, and it draws upon behavioral psychology, cognitive science, evolutionary biology, and related disciplines and has revealed that ethical issues involve the interplay between individuals (their cognitive biases, habits, values, and beliefs) and their contexts (interpersonal, organizational, professional, and social).²⁴¹ The course readings include research to show the blind spots and heuristics that affect us all, as well as those that represent special risks to lawyers, given their practice environments and wider systems.²⁴² We explain to students that professional misconduct cases are not simply a matter of “bad apples”—that is, the straightforward, linear cause-and-effect logic we are familiar with: “a bad person does bad things.” Rather, we all breach our ethical values, more easily than we know or would like to admit, and usually this is due to certain errors and impulses (bad apple) combined with the conditions (bad barrel) and systems (bad barrel maker) in which we are living and working. The teachers and students

239. Noone & Dickson, *supra* note 87, at 138.

240. Videos on file with author. See HYAMS, CAMPBELL & EVANS, *supra* note 168, at 1–44, as the complications in the scenario drew from their book.

241. For a comprehensive introduction to behavioral legal ethics, see generally Jennifer K. Robbenholt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. STATE L.J. 1107 (2013).

242. *Id.*

discuss instances when they have each been tripped up by or succumbed to pressures. This creates a sense that “we’re all in this together,” a community feeling, rather than a sense that the misconduct and malpractice case law applies only to bad apples or so-called “dodgy lawyers”—lawyers to whom we typically cannot relate because, as our blind spots enable us to think, we are inherently and permanently more ethical than others.²⁴³

Students are then provided with an explicit framework for thinking about, evaluating, discussing, and most critically, engaging in ethical action: Professor James Rest’s Four Component Model (“FCM”).²⁴⁴ Rest was a late-20th-century psychologist who, with a team of researchers based at the University of Minnesota, identified the four “psychological processes” (involving capabilities and values) that must occur for ethical behavior to occur.²⁴⁵ Drawing on Breakey’s clear explanation,²⁴⁶ these components are:

1. Awareness: individuals must first realize the morally salient features and perceive the ethical dimensions of a situation.
2. Judgment: having apprehended the situation’s morally salient features, individuals must make a correct judgment about what morality requires of them.²⁴⁷ Ethical judgment is the task of thinking through and articulating justifications for actions that affect others or what we morally ought to do, using criteria of truth and justice.
3. Moral motivation: individuals must then be willing to prioritize moral values.²⁴⁸
4. Moral implementation: individuals need the skills and courage to address and resolve ethics issues. In other words, can the person or firm follow through once they have decided to do the right thing?

The FCM was later extended by Mark Schwartz to include two more components: achievement and review.²⁴⁹ The FCM is an essential resource because it identifies the different components of ethical decision-making and behavior,

243. See *id.* at 1116–17 for an explanation of “overconfidence bias” as an ethical blind spot.

244. For an assessment of the value of Rest’s work for legal ethics teaching and reform, see Justine Rogers & Hugh Breakey, *James Rest’s Four Component Model (FCM): A Case for Its Central Place in Legal Ethics*, in *LEADING WORKS IN LEGAL ETHICS* (Julian Webb ed., forthcoming).

245. Stephen J. Thoma, Muriel J. Bebeau & Darcia Narvaez, *How Not to Evaluate a Psychological Measure: Rebuttal to Criticism of the Defining Issues Test of Moral Judgment Development by Curzer and Colleagues*, 14 *THEORY & RSCH. EDUC.* 241, 242 (2016).

246. Hugh Breakey, *Building Ethics Regimes: Capabilities, Obstacles and Supports for Professional Ethical Decision-Making*, 40 *U.N.S.W. L.J.* 322, 324 (2017).

247. *Id.* at 324–25.

248. We link this component to discussions of extrinsic versus intrinsic motivations for studying and practicing law, including from the research above. See Tani & Vines, *supra* note 210; Daicoff, *supra* note 208.

249. Achievement: individuals must successfully implement their ethical decision and achieve their goals. Review: individuals should evaluate their ethical action and reflect upon the results. If they can still affect its implementation, they may decide to alter the action or otherwise mitigate any consequences of their action which cause them concern. They might decide to change the action in the future to improve it. Breakey, *supra* note 246, at 326 (citing Schwartz, *supra* note 136).

which can often be simply summed up as “ethical judgment.” One criticism of Rest’s work says that all of Rest’s components can and should be seen as “judgment.”²⁵⁰ However, on balance, Rest’s disaggregation is logically and empirically valid.²⁵¹ Moreover, in this situation, in which we are trying to delineate and better talk about what ethics-as-judgment means and could mean, it is very useful.

Another central concept presented to students is the notion of enablers and disablers. Enablers are “supports” that make it easier to speak and act on our values. They are psychological qualities and processes or contextual factors that allow individuals to successfully make ethical decisions, promote their moral motives and capabilities, and reduce the presence and effects of “disablers.” Disablers are “obstacles” that make it more difficult to speak and act on our values. They impede individuals’ moral motives and capabilities and exert pressure on them to make ethically questionable decisions.²⁵² An example of an enabler would be a boss who is open to hearing difficult feedback and who provides fair workload expectations. Disablers might be cost/benefit approaches to a problem, a rigid attachment to role differentiation, “compassion fatigue,”²⁵³ siloed work arrangements, and a culture where mistakes are neither permitted nor acknowledged or learned from. A structural example that is both an enabler and disabler are the rules and disciplinary systems themselves. They enhance ethical sensitivity, reflection, motivation, and action. They also recreate an individualistic and reactive based ethics system whose features can stymie cultural change at the organizational level.

We make clear to students that the FCM and the prospect of enablers and disablers affecting each component can be applied to their own behavior and to that of other lawyers, organizations—including their future workplaces—and the profession. The class activities ask students to identify where in the misconduct case or hypothetical scenario the lawyer’s ethical behavior went awry. For example, they may ask “in this case or scenario, which component or components of the FCM were satisfied by the lawyer and which were not?” Students can also use the FCM to assess whether and to what extent they or others possess the capabilities and values for ethical action. They can also consider whether they or the individuals, groups, or institutions in a scenario are helping others to develop and exercise the capabilities and values for ethical action. For example, the teachers ask the students: “Does the law firm in this scenario, its management and culture, support

250. For more specific examples of such criticisms of the validity and parsimony of the model, see generally Howard J. Curzer, *Tweaking the Four-Component Model*, 43 J. MORAL EDUC. 104 (2014); Gerhard Minnameier, *Deontic and Responsibility Judgments: An Inferential Analysis*, in HANDBOOK OF MORAL MOTIVATION (Karin Heinrichs, Fritz Oser & Terence Lovat eds., 2013).

251. For a full discussion, see Rogers & Breakey, *supra* note 244.

252. Breakey, *supra* note 246, at 328–29 (identifying “demanders” that can exert pressure for the creation, reform, or preservation of a moral norm and can therefore feed into supports and obstacles).

253. *Id.* at 330–31 (discussing the burnout and desensitization that can occur for professionals, including lawyers, who routinely deal with clients in high distress or, in the case of medical professionals, the traumas and/or deaths of patients).

its employees' ethicality?"; "Does the legal profession help support, for instance, sole practitioners in their ethical action? How are they more or less enabled for ethical behavior?"; "How are certain components of ethical action hindered or neglected (disabled) in this case study?" This approach gives better shape to the traditional legal ethics questions on reform or prevention at the structural level: "What can lawyers do to "enable" their ethics?"; "What can organizations and the profession do to support their members through each component of ethical action?" Teachers can practically frame their entire ethics courses according to the components of ethical action that are being developed. They can then discuss it in those terms with students, with reference to enablers and disablers at the individual and collective levels.

To address the second component of Rest's FCM, the judgment phase, students are advised to draw on several sources of ethical guidance. Doing so further illustrates how the ethics-as-rules approach is an embedded aspect of the class and legal ethics practice, not a conflicting one. The sources of ethical guidance include: first, *the rules* or the "law of lawyering" (conduct and practice rules, case law on the "fit and proper" person, common law, equity, and other legislation); second, *the context*, an informed, critical understanding of social facts (sociology and history) and their relevance to ethical issues; third, *social ethics*, ideas about just and right conduct drawn from moral philosophy (e.g., Kant, utilitarianism, Aristotle, ethics of care, etc.); and fourth, *legal ethics theory* (e.g., Luban, Simon, Wendel, Shaffer, Menkle-Meadow, Rhode, Dare, etc.). A final source of ethical guidance is students' *personal ethics*, their own unique ethical composition, drawn from life experience, perspectives, and values. This approach thus both fulfills and expands upon the Priestley 11 requirements.

We use the literature on law students' intrinsic and extrinsic motivations and the relationships between motivation, wellbeing, and the public good²⁵⁴ as entry points to a discussion on component three, ethical motivation, and the ways in which it might interact with professional and organizational cultures and incentives.

One of the ways we teach students implementation, component four, is through business ethicist Professor Mary Gentile's Giving Voice to Values ("GVV") program.²⁵⁵ This method supports TLO 2,²⁵⁶ in which law graduates will demonstrate a developing ability to respond to ethics issues as they arise. GVV aims to

254. See generally Tani & Vines, *supra* note 210; Kennon M. Sheldon & Lawrence S. Krieger, *Walking the Talk: Value Importance, Value Enactment, and Well-Being*, 38 MOTIVATION & EMOTION 609, 609–19 (2014); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015).

255. MARY C. GENTILE, GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT'S RIGHT (2010). For a comprehensive (and pioneering) application of GVV to the legal context, see Vivien Holmes, 'Giving Voice to Values': Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice, 18 LEGAL ETHICS 115 (2015).

256. *Supra* notes 184–86 and accompanying text.

demystify the idea that we will have to take ethical action in our careers, whether a career in law or elsewhere. The focus of GVV is not on what the right thing is (the judgment or decision-making component)²⁵⁷ but on how to get it done (implementation). Indeed, GVV is predicated on the belief that unethical behavior, especially for young professionals, often comes down to poor or no implementation.²⁵⁸ It seeks to demonstrate to students that their feelings of hesitation, awkwardness, reservation, confrontation avoidance, etc., are all normal and widely held and that we can program ourselves to move past them through preparation and practice. GVV reveals the value in “scripting”: literally preparing what we want to say and practicing it by ourselves or with a supportive audience.²⁵⁹ GVV trains students to anticipate barriers and counter-rationalizations: to prepare for sources of resistance from the different people we need to speak to (e.g., clients, the in-house team, one’s supervisor or manager) in order to address an issue. GVV even prepares us to expect resistance from ourselves. Drawing on behavioral ethics research, GVV asserts that with repetition, the “scripting” approach to implementation becomes an internalized default, replacing any intuitive or reasoned avoidance and preventing us from “just going along with the course of least resistance.”²⁶⁰ In this way, GVV fosters communication—communication that involves imagination and experimentation or possibility (“How could we address this in line with our values, and what might that look like?”).²⁶¹ GVV aligns with the CoP belief that open and imaginative dialogue is required for a healthy, thriving domain.²⁶²

Students practice GVV most deliberately in an “ethics implementation” class, where they must rehearse voicing their values to a senior lawyer.²⁶³ As a pre-class activity, students in their groups²⁶⁴ are assigned to watch one of eight videos. In

257. GENTILE, *supra* note 255, at xiii (“The main idea behind Giving Voice to Values (GVV) is the observation that a focus on awareness of ethical issues and on analysis of what the right thing to do may be is insufficient. Precious little time is spent on action—that is, developing the ‘scripts’ and implementation plans for responding to the commonly heard ‘reasons and rationalizations’ for questionable practices, and actually practicing the delivery of those scripts. GVV is all about this neglected area of scripts and action plans and practice: building the skills, the confidence, the moral muscle, and, frankly, the habit of voicing our values.”).

258. Mark G. Edwards & Nin Kirkham, *Situating “Giving Voice to Values”: A Metatheoretical Evaluation of a New Approach to Business Ethics*, 121 J. BUS. ETHICS 477, 483 (2014) (“[M]oral lapses by employees and unethical practices in organisations are frequently the result, not of the lack of awareness of moral or legal standards, nor the lack of the ability to make well-founded moral judgments, but of the lack competence and confidence to act upon and voice them.”).

259. GENTILE, *supra* note 255. For the legal educational context, see Holmes, *supra* note 255; Rogers, *supra* note 191.

260. GENTILE, *supra* note 255, at 214.

261. GVV has been described as having both normative and descriptive strands, but essentially operating in the “performative space,” involving the communication and imagination needed for moral activity and change. See Edwards & Kirkham, *supra* note 258, at 486, 483.

262. Wenger, *supra* note 62, at 227–28, 263.

263. For scenario examples used in another law course, see Holmes, *supra* note 255, at 130–31.

264. For a study of group-based learning in law, see generally Justine Rogers & Marina Nehme, *Motivated to Collaborate: A Self-Determination Framework to Improve Group-Based Learning*, 29 LEGAL EDUC. REV. 1, 1–27 (2019).

each video, a senior practitioner from a specific practice area (a paid actor) asks the students (as if they were junior lawyers) to do something unethical or against their professional—and probably personal—values. Students must respond by designing, seeking feedback on, and improving their implementation strategy to resolve the dilemma they face as the junior lawyer. All eight scenarios were made via “joint enterprise” with the profession, to use the language of CoP. More specifically, I asked (and still ask) practicing lawyers to submit accounts of their own unresolved ethics dilemmas to use as the basis of the scripts or scenarios. It is an example of “greater interaction” between students and the profession, where practitioners were asked to “tell their stories.”²⁶⁵

Moreover, this problem-based learning approach is an example of a “practice field” approach in which students are given an important practice issue and asked to generate their own solutions.²⁶⁶ Students first come up with a strategy as individuals. Then, in class, within their groups, students develop a “mega strategy,” written up on a white board, butcher’s paper, or a shared document online. With the teacher roaming around (or joining online breakout rooms) to listen and chime in where appropriate, each group shares their strategy with another group, usually one that responded to that same video, to receive feedback. I have scaffolded feedback for the students, meaning I provide its required elements as a sequence of steps, so that they improve in this critical ethics area.²⁶⁷ The groups then swap roles. This strategizing and mentoring activity involves processes of listening actively, giving and receiving feedback, defending decisions, articulating values, and coaching and empowering themselves and others. To close the learning cycle, there is a final online reflective element in which students write about their learning²⁶⁸ with regards to the nature of ethics, how to give “upward” ethics feedback to a senior, the important roles of the right type of dialogue and coaching, and what else they anticipate they will need or would prefer, personally, interpersonally, and organizationally, to act on their values as a busy practitioner.

To create a sense that the students are learning alongside the profession as per Strand One, and that the profession has, at least to some extent, endorsed what is being taught as per Strand Two, the course now has a stronger professional presence. For example, in addition to a live panel event, I have produced multiple video sets of real-life, large firm and community legal center lawyers of different levels of experience and authority dealing with complex ethics issues in practice.²⁶⁹ The videos portray, first, the lawyers describing the scenario (written by the lawyers, based on real life cases); second, lawyers as colleagues discussing

265. Baron & Corbin, *supra* note 213, at 112–13.

266. Barab & Duffy, *supra* note 17, at 32; *see also supra* Part I.

267. *See also* Rogers, *supra* note 191, at 46–48.

268. Barab & Duffy, *supra* note 17, at 36–37 (demonstrating that reflection is a central part of CoP design).

269. Pursuant to the licensing arrangements with the law firms, these videos are available to students only, via the course learning management system. Please contact the author if you would like further details.

and analyzing the ethics issues; and third, the lawyers explaining and reflecting upon how the ethics issues were resolved (with the client, colleagues, or opponent). The video makes the scenario seem open and unresolved, and the inclusion of practicing lawyers and the scenarios being their own enhances the contextual dimension of learning.²⁷⁰ In addition, to highlight the congruence of the academic-professional practice, the course material now includes several interviews with professional and firm leaders in the areas of regulation and compliance. The students are also provided with the Queensland Law Society “Deliberative Model,” a set of steps for lawyers facing an ethics dilemma that follows and expands upon the FCM ideas.²⁷¹ Further, we share the New South Wales Law Society’s *Being Well in the Law* guide (produced by ANU law academics) which includes GVV-based pointers about how to strategically address an ethics issue in the workplace. This guide, targeted at practitioners and coming from a professional body, conveys ethics-as-judgment ideas: that value-conflicts are an inevitable part of life and legal practice and that ethical courage and competence support a healthy professional identity.²⁷² These all demonstrate to students that there is (at least some) positive interaction occurring between the academic and professional communities with respect to this domain.

Supported by an enthusiastic and experienced teaching team, these changes and many others have led to dramatically improved course satisfaction results, from 3.7 out of six in 2013 to 5.08 in 2018, a 25% improvement. The qualitative feedback shows that, for many students, legal ethics, enhanced by the clinical experience, is an exciting part of the degree, one in which they can think and talk about their hopes, goals, values, and their fears and uncertainties around their professional careers. Moreover, through the clinical, practical, and behavioral (FCM) approaches just detailed, the course is now better integrated, or less “‘professional rules’ versus ‘ethics judgment’ versus ‘academic critique,’” than it was previously. More specifically, it articulates for students what ethical judgment comprises via the FCM. The conduct rules are, then, not in conflict with this process but are framed as a critical source for ethical behavior. The academic scholarship fits into the framework as well. The legal ethics philosophical scholarship is a primary resource for the ethics-as-judgment component. Moreover, with the help of the concepts of “enablers” and “disablers,” the socio-legal and more critical commentary also fit into the framework of ethics action. In analyzing the cases and hypothetical scenarios, the academic literature thus illuminates what is going on in each component—for example, how certain law firm arrangements

270. To note, it can decrease the content value where those practitioners are not aware of the learning objectives. For more details on the approach, see Rogers, *supra* note 191, at 41–43.

271. *Deliberative Model: Ethical Deliberation Questionnaire*, QUEENSL. L. SOC’Y (2021), <https://www.qls.com.au/Pages/Ethics/Deliberative-Model> [<https://perma.cc/G94B-KVT7>].

272. TONY FOLEY, IAN HICKIE, VIVIEN HOLMES, COLIN JAMES, MARGIE ROWE & STEPHEN TANG, *BEING WELL IN THE LAW: A GUIDE FOR LAWYERS* 36–38 (Renée Bianchi, Claire Chaffey, Tony Foley, Elizabeth Keogh, Liesel von Molendorff, Margie Rowe, Jane Southward, Thomas Spohr & Elias Yamine eds., 2016).

can dull ethical sensitivity (component one of the FCM)²⁷³—and directs students to ideas that could strengthen and improve each component at the individual and collective levels.

As part of this strengthening of the learning trajectory for students and enhancing the legal ethics community, LEJ also deliberately brings the profession into the course, extending the clinical component in order to create a sense of the profession's proximity and support. The course includes videos of actors (enacting lawyers' real experiences), of lawyers "doing" ethics in their contexts, and of lawyers and regulators talking about the value of ethical practice; an evening ethics panel each term; and updated professional materials that serve as evidence for the merits of virtue and capabilities (ethics-as-judgment) approaches.

There remain, though, basic tensions explained in CoP-informed dualities: LEJ students are required to negotiate meaning (the tension between academic and professional), to negotiate practice (the tension between personal ideas of practice and the different requirements of their teachers and the profession), and to negotiate expertise (their own knowledge versus that of the legal ethics teachers and professionals in the field, even if the latter is only imagined at that stage).²⁷⁴ Moreover, students are provided with only limited opportunity (via the clinical component) to see whether what they are learning in LEJ has any historical context²⁷⁵ or whether it represents a "contribution" to the profession's learning of legal ethics practice. As signaled, "this creates a bracketing off of the learning context from the social world through which the practices being learned are of value and of use," and the identification process is stunted.²⁷⁶ To revisit CoP, "[p]ractices are not just performances but meaningful actions . . . students learn not just what and how to carry out a set of practices but the meaning of the performance. This understanding is central to becoming a full member of the community."²⁷⁷ Much of this is true for legal ethics teachers as well.

In their piece applying CoP to legal education generally, Baron and Corbin list various ways in which students might be made to feel part of the professional community from the start and right through to the end of their degree.²⁷⁸ As demonstrated, together with its clinical component, LEJ includes several examples of this—of supporting, enhancing, and modeling interaction between students, academics, and the profession. Baron and Corbin suggest that law school "obligations" (like submitting work on time, treating others with respect, and aiming for

273. Christine Parker, Adrian Evans, Linda Haller, Suzann Le Mire & Reid Mortensen, *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U.N.S.W. L.J. 158, 165, 183 (2008).

274. Joyce Yukawa, *Communities of Practice for Blended Learning: Toward an Integrated Model for LIS Education*, 51 J. EDUC. FOR LIBR. & INFO. SCI. 54, 64–66 (2010).

275. Barab & Duffy, *supra* note 17, at 47.

276. *Id.* at 34.

277. *Id.* at 47.

278. See Baron & Corbin, *supra* note 213, at 111–17.

quality work), rather than being mere “instrumentalist” or “near enough is good enough” suggestions,²⁷⁹ can and should be treated and communicated as the profession’s expectations of “professionalism.” They emphasize, like this Article, that legal ethics can and should be communicated as one of those expectations as well and that students will

[N]eed to contend with possible “conflicting dimensions of those roles, ethical obligations, and individual meaning derived by professionals from the work they do” and not be left solely to rely “upon the hidden curriculum (optional speakers, orientation programs, extracurricular activities), pro bono initiatives, and clinical offerings to probe the questions that are near and dear to their futures, and their hearts.”²⁸⁰

While typically far more “satisfied” with their legal ethics education than before, some students continue to informally express concerns in class about what they are learning and whether it is welcomed by the profession. Applying the Strand One lens to the legal ethics education literature, it seems we are leading students to the periphery of the professional community with a legal ethics practice that needs further alignment. While bumps, conflicts, and forks in a learning trajectory are inevitable, and in fact desired, in a liberal education, better alignment of academic and professional approaches to legal ethics practice would make the path to practice (or a professional life) less conflicted, richer, and more meaningful. One important side consideration is whether a longer clinical experience focused on legal ethics issues (and related intra- and interpersonal dynamics) would be a true innovation in applied CoP.²⁸¹ In any case, to explore these issues of legal ethics education or how we are introducing law students to an ethical life in the law, there needs to be a stronger academic-professional CoP as described in Strand Two research, and more specifically, one dedicated to the domain of legal ethics. As the Conclusion to this Article articulates, a conscious effort by both communities is needed to “bridge [these] worlds.”²⁸²

CONCLUSION: THE LEGAL ETHICS ACADEMIC-PROFESSIONAL COMMUNITY

Legal ethics is expected to do a lot. While legal ethics teachers can try to inculcate and improve the profession’s ethics practice, they cannot be entirely

279. *Id.* at 111.

280. *Id.* at 113–14 (quoting Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 888 (2009)).

281. The two hemispheres of professionalism idea comes from the famous John P. Heinz and Edward O. Laumann study of Chicago lawyers from which they characterized the profession as stratified, in effect, comprising an individual-client hemisphere and a corporate-client hemisphere whose members did not cross into the other. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

282. Gerstein, Hertz & Winter, *supra* note 30, at 79.

responsible for it. This is in part not just because it is unachievable,²⁸³ but also because the attempt is not entirely good for their professional identity and progression. As this Article has highlighted, there is a lack of access to and, it seems, interaction between the different groups making up the legal ethics network. There is implicit competition or, more likely, no relations at all.²⁸⁴ One unintended result is that academic legal ethics practices are denied the chance to align with the professional context more fully²⁸⁵ and be improved through that greater interaction. One American scholar has said that “all efforts at innovation in legal ethics teaching” are “doomed to a marginal impact at best” without this joint commitment.²⁸⁶

A related outcome is that students, as young law graduates, are tasked with transporting academic practices (ethics-as-judgment) into the profession with only the limited guarantee of transferability and legitimacy that their teachers can currently offer them. Legal ethics needs the profession’s more active and sustained interest and involvement, so that what is being learned by students is supported by and leads to a vibrant community of ethical legal practice. We need more interest from the leadership within the law schools too, including the encouragement of more teachers to take on legal ethics as their primary domain. These developments would benefit law students, law teachers, the profession, and those reliant upon ethical legal institutions and practice.

Recalling the second strand of CoP theory,²⁸⁷ writers in the field regard the CoP as a solution to the academic-professional divide. In the accounting context, Miriam Gerstein, Esther Hertz, and Sarah Winter discuss several studies concerned with bridging academia and practice for improved education and professional outcomes. They cite Cecil Donovan, who

[R]ecommends that academics and practitioners spend time in each other’s domains, with arrangements for both sides appropriately resourced and meaningful. He pleads for effective dialogue . . . which would combine the intellectual dimension brought to the discussion by the academics and the

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Law schools cannot endow their students with all the skill and understanding needed to practice law competently in the succeeding years. Nor can even the best law school courses and curricula do a complete job of ensuring that students have the capacity to practice ethically as lawyers, especially given the changes in the profession and in professional expectations likely to occur over the course of lawyers’ professional lives.

Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1091–92 (2007).

284. Li, Grimshaw, Nielsen, Judd, Coyte & Graham, *supra* note 53, at 5.

285. WENGER, McDERMOTT & SNYDER, *supra* note 13, at 124.

286. In an aptly named piece, Russell G. Pearce argued that without a central place in the law school curriculum, the teaching of legal ethics would continue to be fairly ineffective. Russell G. Pearce, *Legal Ethics Must Be at the Heart of the Law School Curriculum*, 26 J. LEGAL PRO. 159 (2002).

287. See *supra* Part I.B.

identification of the skills and knowhow provided by the experienced practitioners.”²⁸⁸

Buysse, Sparkman, and Wesley regard CoPs as “the best way to mitigate the problem of disconnect between research and practice.”²⁸⁹ CoPs would “allow for ease of transfer of information between researchers and practitioners [and students] . . . to build knowledge together.”²⁹⁰

In thinking about the relationships in the law context in particular, Baron and Corbin have asked for “more fluidity in the boundaries between law school and the practice of law.”²⁹¹ Fluidity across boundaries could be improved by involving “the profession more directly in the design of legal practices. Many law schools consult with members of the profession regarding subject design and, where appropriate, invite them to co-teach.”²⁹² But these are not the only ways of sharing knowledge. Moreover, the flow of information must go both ways. Typically, we as legal ethics teachers do not really know a lot about how lawyers “do” ethics. As it currently stands, students tend to learn about the practice of legal ethics from the facts of misconduct cases and the empirical studies that typically report lawyers’ ethical apathy and detachment. Instead, legal ethics professors could teach based on accounts of what lawyers do well when faced with ethical challenges. Indeed, at the collective level, the profession itself leads and engages in a range of ethics activities, from providing ethics support services and conducting major research into areas of injustice and unmet legal need to engaging in policy and advocacy work regarding the rule of law and other social justice issues. There is also the widespread pro bono work conducted by lawyers and their firms. At this point though, as far as being a “joint enterprise,” academics need to be on the active lookout for these endeavors and then decide to feed them into their law/legal ethics courses and pedagogical frameworks. These topics, stories, and data should be part of more accessible and regular conversations.

Trust and a commitment to an “enduring relationship” are essential for an academic-professional CoP.²⁹³ My sense is that practitioners typically feel, at least initially, defensive or cynical about the ethics conversation with academics. It is

288. Gerstein, Hertz & Winter, *supra* note 30, at 79 (citing Cecil Donovan, *The Benefits of Academic/Practitioner Collaboration*, 14 ACCT. EDUC. INT’L. J. 445 (2005)).

289. *Id.* at 80 (citing Buysse, Sparkman & Wesley, *supra* note 31, at 265).

290. *Id.*

291. Penny Carruthers, Kate Offer, Natalie Skead, Meredith Blake, Renae Barker, Ambelin Kwamullina, Jill Howieson & Tracey Atkins, *Enhancing Student Learning and Engagement in the Juris Doctor Through the Rich Tapestry of Legal Story-Telling*, 10 J. AUSTRALASIAN L. TCHRS. ASS’N 26, 39 (2017) (citing Baron & Corbin, *supra* note 213, at 111–15).

292. Baron & Corbin, *supra* note 213, at 115–16.

293. Gerstein, Hertz & Winter, *supra* note 30, at 80 (citing Buysse, Sparkman & Wesley, *supra* note 31, at 265).

common to feel defensive about one's ethics,²⁹⁴ but because of their status, proximity to litigation (and risk aversion), and typical personalities, this conversation might be harder for lawyers than other groups.²⁹⁵ Elizabeth Chambliss has pointed out that lawyers can be wary of academics' motives as well, fearing we follow a "corruption narrative" about the impact of law firms and legal practice on junior lawyers.²⁹⁶ There might also be some sense that we are in no position to assess what is going on in practice. Though, in our favor, ethics is historically meaningful to the legal profession; it is not the same as banking, for instance, where the ideas around social accountability are newer.²⁹⁷ At the same time, it can be harder to change historical practices. The Strand Two frameworks also remind us that no shared practice should be taken-for-granted and protected from reflection and new ideas. For legal ethics, CoP suggests that the approach of the profession (codes-based, individual, and reactive) need not necessarily be treated as fixed or off-limits simply because it is longstanding. To this end, too, people from groups other than legal academia and the profession need to be part of the conversation. Communities must take care not to become "too insular," lest they stagnate.²⁹⁸ Indeed, I note Professor Adrian Evans' view that there is a strong case globally for law schools' revitalization of their whole mission (or domain), primarily in the interests of universal structural justice. Legal ethics would be an essential ingredient here, Evans argues, in the sense that ethics-as-judgment is a critical competency among individuals and organizations to fight injustice.²⁹⁹ This would mean considering a legal ethics and teaching practice that is not primarily a reaction or supplement to the ethics-as-rules approach but starting with a cleaner slate.

In the online context, meanwhile, Christopher Hoadley and Peter Kilner have developed a "C4P framework" for "Communities of Practice" to assess how well the CoP allows for knowledge and skill-sharing activity.³⁰⁰ This framework could

294. Ethics is central to our identities and, more specifically, our "idealistic sel[ves]," which are the selves we use when predicting future behavior (when, in the moment, our attention shifts to our pragmatic selves). Robbenholt & Sternlight, *supra* note 241, at 1118.

295. For a discussion of lawyers' typical personalities, see Justine Rogers & Felicity Bell, *Transforming the Legal Profession: An Interview Study of Change Managers in Law*, 42 *LEGAL STUD.* 446, 461–63 (2022).

296. Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 47, 48 (Leslie Levin & Lynn Mather eds., 2012). For a discussion on the psychologically demanding aspects of legal ethics, and whether these are unrealistic to expect of lawyers, see generally Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 *GEO. J. LEGAL ETHICS* 38 (2010); David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 *GEO. J. LEGAL ETHICS* 1101 (2010).

297. Dimity Kingsford Smith, Thomas Clarke & Justine Rogers, *Banking and the Limits of Professionalism*, 40 *U.N.S.W. L.J.* 411 (2017).

298. Baron & Corbin, *supra* note 213, at 115.

299. See Adrian Evans, *The Role of Law Schools and Clinical Programmes in Ending Poverty*, in *ERADICATING POVERTY THROUGH SOCIAL DEVELOPMENT: A PRACTICAL GUIDE FOR LAWYERS* 37 (Norman Clark & Neil Gold eds., 2021).

300. C4P stands for content, conversation, connections, context, and purpose. Christopher Hoadley & Peter G. Kilner, *Using Technology to Transform Communities of Practice into Knowledge-Building Communities*, 25 *ASS'N FOR COMPUT. MACH. SIGGROUP BULL.* 1, 31 (2005).

be used to further evaluate the nature and strength of the academic-professional community in legal education and specifically the domain of legal ethics.³⁰¹ Per C4P, a strong CoP requires:

- Purpose: a clear objective that is “the reason for which the members come together in the community,” which “creates energy and produces results” and links all the elements needed for knowledge-creation.³⁰²
- Content: “explicit, static knowledge objects” which are needed to attract members, socialize them (teaching them what is important), provide basis for conversation and connection, and build a joint domain.³⁰³
- Conversation: dialogue which merely requires “information exchange” and so is amenable to online communication.³⁰⁴ From their own study, the authors felt that the face-to-face meetings were “the glue” of the group and critical to building relationships—but that the mailing list helped people keep in touch and was useful to mentor and support particularly new members.³⁰⁵
- Connections: interpersonal contacts, which “spark conversations and add context to content.”³⁰⁶ To reiterate, the authors found that face-to-face meetings were necessary here, and when they were infrequent, contributions were lacking.³⁰⁷ It is worth noting that their study was produced before the COVID-19 pandemic, which has increased our levels of experience in online interaction.
- Context: the “who, what, where, when, why and how that enables community members to assess whether and how information is relevant to them.”³⁰⁸

Finally, this Article primarily rests on scholarly reflections made by legal ethics teachers and my own experiences. It thus makes certain claims and suggestions about the legal ethics community and practice that would need to be established through empirical study. Until then, this Article recommends the use of CoP theory in our language and approaches with students: “[e]mphasising communities of practice would challenge the tendency towards abstraction in legal

301. See also LAVE & WENGER, *supra* note 16, at 125–26; WENGER, McDERMOTT & SNYDER, *supra* note 13, at 28, for their indicators of a healthy community of practice, including mutual and ongoing engagement, the rapid flow of information, exploring possibility, support by higher organizations, culminating in a joint stewardship of the domain.

302. Cheryl Hodgkinson-Williams, Hannah Slay & Ingrid Siebörger, *Developing Communities of Practice Within and Outside Higher Education Institutions*, 39 BRIT. J. EDUC. TECH. 433, 438 (2008) (citing Hoadley & Kilner, *supra* note 300, at 33–34).

303. See *id.* at 439 (citing Hoadley & Kilner, *supra* note 300, at 33).

304. *Id.* at 440.

305. *Id.* at 440–41.

306. *Id.* at 441 (citing Hoadley & Kilner, *supra* note 300, at 33).

307. *Id.*

308. *Id.*

pedagogy.”³⁰⁹ This is especially so in the legal ethics domain: “communities of practice are said to be the basic building blocks of social learning systems as they define competence in a given context. They tend to emphasize the importance of so-called “soft knowledge”—knowledge that is only realizable “when ethical principles have been fully integrated into the practitioner’s professional identity.”³¹⁰ Moreover, theories of communities of practice can

[R]evolutionize our thinking about education so that we do not regard it as the imparting of compartmentalized information to discreet groups or as a series of steps to the acquisition of credentials but rather as a process to engage students in meaningful practices, to provide access to participation in such practices, and to widen their horizons so that they can make meaningful contributions to their communities.³¹¹

To bring these words to life, legal ethics teachers need the support of a strong and interactive professional and law school legal ethics community, a community with a more active mission to discover and align what it is doing.

309. Baron & Corbin, *supra* note 213, at 113 (first citing LAVE & WENGER, *supra* note 16; and then citing Frederic W. Hafferty & Ronald Franks, *The Hidden Curriculum, Ethics Teaching, and the Structure of Medical Education*, 69 ACAD. MED. 861, 862 (1994)).

310. *Id.*

311. Gerstein, Hertz & Winter, *supra* note 30, at 78.