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WHY TEACH LEGAL ETHICS ON UNDERGRADUATE LAW DEGREES?

The curriculum is crowded. Students are overloaded. There are already criticisms that they are being spoon-fed in order to accommodate the breadth of material they are expected to cover. Why add a new topic?

Many students study law without intending to enter the legal profession. Many more who do intend to enter the profession will never do so because of the intense competition. The professional courses (in the UK, the LPC and BVC) do require the teaching and assessment of professional conduct. So why not leave it to them?

In my view there are cogent reasons why legal ethics should be taught at the undergraduate stage.¹ This is not to say that their teaching should be mandated (by the professional bodies) around which there is a different set of issues. However, it is my view that every student's law degree experience will be enhanced by learning about the ethical issues that affect lawyers' practice. I shall present my argument in two ways: first by addressing the inadequacies of leaving it to the professional programmes; then by addressing the values of introducing it to the academic stage.

The professional programmes cannot educate in legal ethics

The LPC and BVC are one-year, intensive courses.² They are tightly prescribed by the professional bodies, down to the amount of time that is spent on individual subjects and skills and the staff-student ratios applied. Professional ethics is a required element of each. However, it is required to be focussed on the requirements of the professional codes. Thus, on the BVC, the Bar Standards Board requires it to be assessed as a component within four other skills assessments.³ The specification goes on to say: 'students must not be told which assessment exercises contain a professional ethics and conduct problem, nor should the professional ethics and conduct problem be identified as such within the exercise'.⁴ Thus ethical dilemmas are embedded within practical tasks requiring the exercise of one or more of a barrister's skills.

The Solicitors' Regulation Authority expresses its requirements in terms of Outcomes. Those relating to Professional Conduct are:

'a successful student should be familiar with the Solicitors' Code of Conduct affecting the conduct of work likely to be encountered by trainees including:

1. the core duties of solicitors under Rule 1
2. acting only when competent to do so
3. principles and practices of good client relations, client care and information about cost
4. conflicts of interest

¹ The most recent full survey of law schools found that 'lawyers' professional responsibilities' was a compulsory element of a module in 24% of law schools and a compulsory module in 2%. It was available as an option in a further 8% (Phil Harris and Sarah Beinart: 'A Survey of Law Schools in the United Kingdom, 2004' (2005) 39 *Law Teacher* 299 at 309).

² They are also offered part-time over two years, but the intensive nature is, if anything, increased as most students are working full time while studying).

³ Bar Standards Board, BVC Course Specification Requirements and Guidance, 5 (a).

<http://www.barstandardsboard.org.uk/assets/documents/2007-8%20Golden%20Book.doc>

⁴ *Ibid.*

5. client confidentiality and disclosure
6. professional undertakings
7. the solicitor and the court
8. avoiding discrimination and promoting equality and diversity.¹⁵

This is to be assessed in two ways:

- A discrete assessment which must last for a minimum of two hours and which should normally be taken during the final assessment period of Stage 1 of the course.
- An assessment within each of the three core practice assessments in which at least 5% of the marks must be allocated to Professional Conduct and Regulation.

The marks are not to be aggregated: a student must pass the discrete assessment in Professional Conduct and Regulation in order to pass the subject.¹⁶

Under both regimes, the task of the assessor is to assess whether the student's response to an ethical dilemma is one which falls within the professional code or not. It is not to assess the student's understanding of the principles which underlie the requirements of the Code or their ability to apply principle to problems where conflict arises between principles in the Code.

So a combination of the professional bodies' focus on assessing compliance with the Code and a very limited time means that it is impractical for the vocational courses to take a broad, developmental, educational approach to the teaching of legal ethics. What is more, the very code compliance approach creates a real risk that students may develop a simple code-compliance attitude towards the ethics of their practice. They may become inclined to treat the Code in much the same way that they might treat a Statute – as a provision to be interpreted or skirted around rather than one which encapsulates underlying principles or a spirit to be applied. There can be no guarantee that individuals will not take this approach anyway, but if they have been introduced to the concepts in a more critical and evaluative way beforehand there is reason to hope that they will develop a more genuinely ethical approach.

This is part of the rationale for choosing to include legal ethics in the undergraduate degree. But there are other reasons which focus on the nature and aims of the undergraduate programmes themselves.

The undergraduate programmes cannot avoid teaching legal ethics

We model our core values in everything we do. The way we approach our teaching gives messages about what we value and what we regard as unimportant. See Carrie Menkel-Meadow's depiction of the ways in which, consciously or not, we give messages about ethics and professionalism.⁷ Deborah Rhode and David Luban put it clearly:

⁵ Solicitors' Regulation Authority: Legal Practice Course Outcomes, p. 3.

<http://www.sra.org.uk/securedownload/file/355>

⁶ Solicitors' Regulation Authority: Information for providers of Legal Practice Courses, p. 20, 4.6 <http://www.sra.org.uk/documents/students/lpc/info-pack.pdf>

⁷ C.J.Menkel-Meadow, 'Can a Law Teacher Avoid Teaching Legal Ethics?' (1991) 41 *Journal of Legal Education* 3.

'The failure of law schools to institutionalize ethical discussion throughout the law school curricula itself raises ethical issues. For faculty to treat professional responsibility as someone else's responsibility encourages future practitioners to do the same. One primary cause of unethical conduct, particularly in organizational settings, is the assumption that moral responsibility lies elsewhere. Legal educators cannot afford to mirror this approach in classroom priorities. A "minimalist approach to legal ethics marginalizes its significance. Educational priorities are apparent in sub-texts as well as texts. What the core curriculum leaves unsaid sends a powerful message that no single required course can counteract." Although law school experiences cannot fully simulate, or insulate individuals from, the pressures of practice, it can provide a setting to explore their causes. Particularly in areas where the interests of professionals and the public do not coincide, future lawyers benefit from analyzing the gap before they have a vested interest in discounting it.'

So, if we ignore the ethics of legal practice we give out a message that it is unimportant. It is understandable that academics with specific interests will regard their own subject as important. It is hard to arrive at an objective hierarchy of legal subjects and I do not propose to attempt to do so. However, if it is accepted that one (amongst many) aims of the law degree is to contribute to the preparation of practitioners it is worth considering this comment, again from Deborah Rhode and David Luban:

'Many practitioners will never encounter the rule of perpetuities after a bar exam; almost all will confront questions of loyalty, confidentiality, and conflicts of interest.'

Educating humans or preparing practitioners?

A common objection to the justification above for introducing professional legal ethics into undergraduate courses is that the aim of an LLB is not vocational preparation but a liberal education. I share the values underlying that observation, but not the premise on which it rests. I shall address this issue in two ways:

1. by proposing that the objectives of vocational preparation and liberal education are not mutually exclusive, but, properly conceived, can be combined within the same programmes; and
2. by identifying a variety of approaches to the learning of legal ethics which will provide educational value in its own right.

Educational and vocational objectives are not mutually exclusive

The aims of the liberal law degree have been brought to active attention in the UK by the use of the concept in the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC)'s First Report on Legal Education and Training, which cited with approval Dawn Oliver's statement:

'A liberal education will have as an aim that students should not merely *know or know how to* but *understand* why things are as they are and how they could be different' and it is 'about a "deep" approach to a subject, in which students try to

⁸ Deborah Rhode and David Luban: *Legal Ethics*, 4th ed. New York, Foundation Press, p1031-2, incorporating a quote from Rhode: *In The Interests of Justice: Reforming the Legal Profession* (2000) p. 203.

⁹ *Ibid.* p. 1031.

relate ideas in one subject to those in others, to understand what they read, questioning material, making links, pursuing lines of inquiry out of interest.¹⁰ The concept was developed in Bob Hepple's subsequent inaugural lecture at Cambridge University.¹¹ He argues that law schools must "make students aware of the values that legal solutions carry, and the ethical and human dimensions of law..."¹² What is significant for our purposes is that this argument arose from the Committee's responsibility to recommend a system of legal education to prepare people for the existing and emerging legal professions.¹³ The provision of a liberal education was seen as essential to the project of preparing individuals for a professional role in the legal system. There was, moreover, specific attention to the ethical challenge.

'... no amount of external regulation of professional practice will serve as an adequate substitute for the personal and professional values and standards that lawyers should internalise from the earliest stages of their education and training. Teaching in ethical values should include more than a familiarisation with professional codes of conduct and the machinery for enforcing them.'¹⁴

Thus no dysfunction was perceived between the desire to prepare able, conscientious lawyers and that of meeting the conventional expectations of a liberal undergraduate education. This is probably expressed as well as anywhere by Roger Burridge and Julian Webb:

'The mission of the liberal law school is the preparation of "good citizens" or "better persons" rather than (simply) good lawyers. If we develop attributes that make good lawyers, that is an added bonus but it is certainly not a primary objective. Citizenship in this regard can be defined as "intelligent participation in the politico-legal life of the community". The role of the liberal law school, it follows, is to develop the capacity of students to engage in rational debate about the law and to form their own independent judgement on matters that will enable their participation in society. Its aim is to enable students to "understand why things are as they are and how they could be different". It is not a primary function of legal education to be vocational, technical, descriptive, specialist, or purposively useful in any more specific or career-orientated sense. In order to enable students to pursue the project of understanding law, legal scholarship must operate as a wide-ranging, probably pluralistic (in the sense of multi- or interdisciplinary) enquiry into the nature and conditions of legal knowledge and the processes and structures by which law operates.'¹⁵

If, therefore, the aims of a liberal education are consistent with the concerns of those wishing to ensure properly-prepared lawyers, why do we receive an impression of continuing conflict over the issue? I suggest that it is a matter of avoiding dominance of the educational concern by the professions. With this in mind, Bradney argues for the continuing centrality of the educational enterprise: 'it is not that a liberal education

¹⁰ Dawn Oliver, 'Teaching and Learning Law: Pressures on the Liberal law Degree', in Birks, ed., *Reviewing Legal Education*, Oxford, 1994 at 78, quoted in ACLEC *First Report on Legal Education and Training*, 1996, 56.

¹¹ Published as: *The Renewal of the Liberal Law Degree*, 1996, 55, (3) Cambridge LJ 470.

¹² *Ibid.* at 484.

¹³ ACLEC *op. cit.* n. 8 at 3.

¹⁴ *Ibid.* 17.

¹⁵ R Burridge and J Webb: *The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School*, 2007, 10 Legal Ethics 72 at 74.

cannot provide technical or professional instruction ... but technical instruction should not overbear the humane nature of the education'.¹⁶

I suggest that this is a relatively uncontroversial statement. What is more, given that technical instruction in professional conduct (knowledge of and compliance with the Codes) is a matter required of the vocational stages, addressing professional ethics from an educational perspective finds its natural home in the undergraduate degree. I would argue that it might achieve a considerable variety of educational goals:

- developing a contextual approach to the study of law: a mechanism for challenging a narrow black-letter approach;
- developing good citizenship;
- providing a vector for critical analysis as an intellectual development;
- introducing a relevant focus for the study of moral and ethical principles; or
- providing a focus for socio-legal analysis.

This list could doubtless be developed and begins to introduce my next suggestion: a variety of approaches to the learning of legal ethics which will meet educational values.

Approaches to introducing legal ethics

The Legal System

Most LLB degrees include a module which addresses the legal system in England and Wales. Typically, this will include material on the hierarchy of the court system and judicial precedent; primary and secondary legislation and the relationship between European Community and domestic provisions; the legal profession, possibly addressing how it is organised and funded.

This is often an introductory module, and there is a risk that educational opportunities will be missed if it seen as simply an information-providing opportunity. Students need to know this information, but can be introduced to a more critical analytical perspective on it if the material is introduced in an appropriate way. Addressing the responsibilities of lawyers is an excellent way of showing students how the legal provisions they will be learning ultimately impact on members of the society they are meant to serve. It adds a significant layer of meaning to the factual information with the potential for assisting understanding rather than mere memorisation and for starting students off on a critical, analytical path which they will need to follow if their degree is to be an educational experience in the fullest sense.

Moral Philosophy

This may be the most traditional way in which ethical issues have been addressed within law degrees. It will normally have been placed in a jurisprudence course and this will usually be at the opposite end of the degree programme to the introductory course described above. It will provide opportunities for discussing classical theories and building on those to explore current philosophical debates. Although these may be done in a relatively abstract way, I would argue that to ground them in the moral dilemmas that are faced in the contexts of legal practice provides two opportunities for enhanced learning. Firstly, it assists many students who struggle with abstract

¹⁶ A. Bradney, 'An Educational Ambition for "Law and Literature"' (2000) 7 *International Journal of the Legal Profession* 343 at 346.

concepts unless they can be situated in concrete examples. Secondly, the choice of legal professional contexts is a powerful motivator to students, most of whom have aspirations to practise or an interest in the law (whether or not they will end up as lawyers).

Law and Literature

The Law and Literature movement has explored how well literature may be used for a variety of educational objectives. A well-known example in the field of legal ethics is Tim Dare's explanation of how he uses Harper Lee's *To Kill a Mockingbird*.¹⁷ This provides a powerful example of a lawyer-hero displaying moral courage in challenging social norms and exemplifying the ethical principles underlying legal professional practice.

Other books could be cited which addressed issues where the moral values were more contested or less clear. So where responsibilities owed to clients come into conflict with those owed to the court these may be well exemplified by a wide variety of popular and more challenging fiction. Resources are available to support work in this field. The journal *Law and Literature*¹⁸ provides regular articles in this field predominantly from a US perspective, but providing analysis which is of broader relevance and validity.¹⁹

One potential value of using fiction to draw students' attention to ethical issues is that it provides a very accessible way in to the topics. Many law teachers today complain that students are no longer practised in conventional academic methods and an approach that engages them through the sheer pleasure of reading can be particularly valuable when seeking to engage students of whom this is true.

Law and popular culture

It is increasingly the case that a proportion of our students have not acquired the habit of extensive reading for pleasure. They are more familiar with visual media through television and film. All that may be done with the written fictional text may be achieved with the use of films and television dramas. Attention has recently also turned to working with theatre drama.²⁰

No fictional forms, perhaps particularly the visual, are safe methods of providing accurate information about procedural or substantive law, and need to be used with appropriate caution. However, the consequences of unethical behaviour, in particular when conflicts arise, can be dramatically presented through film and television.

There is, of course, a huge number of films which could be used in such a way and guides are useful. A number of such guides have been published,²¹ and provide an easy way in to the rich resources available. Greenfield, Osborn and Robson's book

¹⁷ Tim Dare: "The Secret Courts of Men's Hearts" Legal Ethics and Harper Lee's *To Kill A Mockingbird*, In Kim Economides: *Ethical Challenges to Legal Education and Conduct*, Hart, 1998 at 39.

¹⁸ Details available on <http://ucpressjournals.com/journal.asp?j=lal>.

¹⁹ See also Patrick Hanafin, Adam Gearey and Joseph Brooker (eds): *Law and Literature*, (2004) 31, Journal of Law and Society (Special Issue), (Blackwell).

²⁰ See Randolph N Jonakait: 'Law in the Plays of Elmer Rice', 2007, 19 *Law and Literature*, 401.

²¹ See <http://lib.law.washington.edu/ref/lawonfilm.html>, which is a resource in its own right, and provides details of a number of other sources.

*Film and the Law*²² offers not only guidance to the pedagogic use of film, but also has a role as a student text.

Role-play and simulation

Those who have not practised it may assume that the main function of introducing role play to undergraduate legal education is to develop practice skills in students. This, however, is readily controlled so as to meet Bradney's concerns.²³ My earliest introduction to role play in this context was when I was teaching at South Bank Polytechnic in the 1980s. A second year course 'Common Law in Practice' was taught to develop the basic understanding of the law of Obligations introduced in the first year. Student tutorial groups took the role of opposed firms of solicitors representing claimant and defendant in personal injury cases. Part of the object of the course was to ensure that students understood the limits on the ability of the law to predict the outcomes of such cases. Thus, tutorial groups are exposed to the contingent and shifting nature of facts as tutors (playing the parts of clients or witnesses) provide evidence of varying reliability and quality. More significantly, it was possible to change the dynamic of a planned court action by suggesting to those representing a defendant that they might make a low Part 36 offer. Receiving this sent students representing the claimant on a legal research task which led to them discovering the potential costs implications of rejecting such an offer and the pressure this might put on an impecunious client. Even setting aside the scope such a situation provides for identifying ethical issues it can be used to develop understanding of how economic and other inequalities in society may impact on the outcome of a dispute in a way which overrides the formal answer which might have been proposed if the situation had been put forward as a conventional tort problem.

Role play can be readily planned so that students are faced with ethical dilemmas which they must address.²⁴ Whether they get it right or not, and whether there is a 'right' answer at all can then be picked up in seminar feedback sessions, and can lead to a deeper understanding of the issues involved because the student has experienced, not merely thought about, the ethical dilemma. It is worth also flagging up the importance for learning of observing *how* students act when faced with an ethical dilemma, rather than merely hearing their claims as to how they *would* act. The learning experience is much more powerful.

Live clinical work

The realism that transforms the learning experience for students who undertake work with simulations is all the more available when they encounter work with real clients. Laying my cards on the table, I should declare that I regard this as the most effective method of introducing students, whether on academic or vocational courses, to the issues of professional legal ethics. This section is designed to act as an introduction with others exploring the uses of different clinical methods to be added soon.

The use of clinical methods has grown considerably in the UK over the last 15 years, encouraged, in part by the recommendations of the Lord Chancellor's Advisory Committee:

²² Steve Greenfield, Guy Osborn and Peter Robson: *Film and the Law*, 2nd ed., Hart, 2007.

²³ *Op. cit.* n. 16.

²⁴ For examples, see Paul Maharg: *Transforming Legal Education*, Ashgate, 2007, ch. 7.

All teaching institutions should consider the adoption of 'active learning methods' and in utilising their block grants should take account of 'clinical legal studies' and 'active teaching methods'²⁵

More recently it has developed further in association with the *pro bono* movement. Although it is still a minority of law degrees which incorporate credit-bearing clinical modules within their programmes, most law schools operate student law clinics, often on a voluntary basis. The most recent research findings I am aware of show that in 2000, 41% of law schools provided for *pro bono* activities, 19% were planning to introduce them and a further 28% said that they would consider doing so. Only 12% would not consider doing so.²⁶

The advantages of live clinical work are considerable. Central is the fact that students encounter real clients with real problems. This is profoundly motivating. Even if their role is restricted to providing advice, they are immediately faced with the responsibility of getting off the fence and providing accurate, well-researched advice that considers the strengths and weaknesses of the client's case while at the same time ensuring that the client's autonomy of decision is not infringed. If they go further and provide a representation service they will interact with their opponent or their opponent's representative. Here duties of candour come into potential conflict with duties of client confidentiality. Should it be possible to seek a settlement, duties of responsibility of operating within client instructions, without misleading the opponent and coming to the best settlement possible in the client's interest, considering sometimes the need to ensure a future effective relationship as well as the immediate dispute. Where the matter goes to trial similar potential conflicts arise, in the (arguably) different situation of lawyers' duties to the court.

All this provides a rich source of experience on which to explore the ethical principles underlying professional conduct. What is more, students, many of whom come from privileged backgrounds, encounter the life experience of most clients of student *pro bono* clinics, who do not have the economic resources to hire a lawyer. The economic injustices of our society become immediately apparent and add a further layer to an ethical analysis of legal provisions and the dispute resolution processes. Introducing activities encouraging reflection on their work provides a further way of enhancing this feature of clinical work. This could usefully encompass the nature of the relationship with their own clients. Students may readily see themselves as 'doing good' but need to recognise the mutuality of the arrangement where they are receiving the service of their client in providing them with an opportunity to practise and learn.²⁷

Central to all live clinical work is the need to ensure that the client's interest remains paramount. This is ensured by a variety of methods. Students often interview clients in pairs, with a legally-qualified supervisor able to advise and check their work before the interview is concluded. Advice is always checked by a qualified lawyer before being given.²⁸ Students meet after their experiences in clinic seminars in which they

²⁵ ACLEC, *First Report on Legal Education and Training*, 1996, 54, 109.

²⁶ Sara Browne: 'A Survey of *Pro Bono* Activity by Students in Law Schools, (2001) 35, *Law Teacher* 33, at 43.

²⁷ Donald Nicolson argues that clinics which select only those cases which fit the students' particular curricular needs may leave students feeling that their own needs are more important than those of their clients: Donald Nicolson: 'Education, Education, Education': Legal, Moral and Clinical, (2008) 42 *Law Teacher* (forthcoming), and see Kevin Kerrigan and Philip Plowden: 'Who Benefits? Case Management and Clinical Education' (1996) 30 *Law Teacher* 315 at 316-318.

²⁸ Standards for law clinics may be found at <http://www.ukcle.ac.uk/resources/clinic/standards.html>.

report on what happened and how they responded to it. Thus the methods which contribute towards quality assurance for the client also provide an opportunity for students learning and reflection, not only on the law they are applying and the skills they are developing but also on the ethical issues which have arisen. In some cases an entire clinical module may be focussed on exploring ethical issues.²⁹

There are two commonly-voiced objections to introducing clinical experiences. They are:

1. the fact that the experience is real makes it impossible for the teacher to control what is covered to ensure syllabus coverage;
2. the cost of providing live-client opportunities.

These are both real issues and must not be evaded by proponents of clinical techniques. They will be addressed briefly here, but more fully within other sections on clinical approaches.

1. Where students return to report on their work in clinic seminars they have an opportunity to experience vicariously the work of others and to comment upon it. The tutor can lead discussions which draw analogies with other situations and explore the extent to which principles apply elsewhere. The tutor can also draw from students an awareness of underlying principles which then may be used to inform other issues. Both of these can be developed further through integrating the live clinical work with simulated activities.

Moreover, (and admittedly challenging rather than answering the criticism) it may be questioned why a particular syllabus content must be required. The methods suggested above will enable all the requisite principles to be addressed, albeit not in every practical or legal context. If the aim of our study of ethics is a liberal education (rather than to test competence at a series of specific tasks) and if we are taking seriously the attempt to become student-centred rather than teacher-centred, this is entirely appropriate.

2. The high staff-student ratio required of clinic supervision does introduce cost. This can be reduced by recognising the *pro bono* nature of much of the activity. In extra-curricular clinics it is common for practising lawyers to provide supervision free as part of their own *pro bono* commitment. This may be more difficult to arrange in clinics which form a part of the degree programme itself. Note that there are arguments that an extra-curricular clinic provides the better vehicle for addressing legal ethics.³⁰

It may also be possible to work with other agencies in providing useful clinical experience. My own students undertake an option (the FRU Option) as part of their Bar Vocational Course. This uses (and pays for) the work of the employment caseworker at the Free Representation Unit. The Option comes in at no greater a cost than conventionally taught classroom-based Options.³¹

²⁹ See, in respect of such a clinic at La Trobe University, Noone M.A., Dickson J. & Curran E. (2005) 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' 8 *International Journal of Clinical Legal Education* 104.

³⁰ Donald Nicolson: 'Education, Education, Education': Legal, Moral and Clinical, (2008) 42 *Law Teacher* (forthcoming).

³¹ Nigel Duncan: 'On Your Feet in the Employment Tribunal' (1996) *J. Professional Legal Education* 169.

Conclusion

Addressing professional legal ethics is central to many of the missions which may be identified with the liberal education function of the undergraduate law degree. It can enrich and contextualise students' studies in most areas of the curriculum. There is a widespread variety of learning methods available on which there is a considerable literature. Colleagues who share this interest or who wish to find out more may go to www.teachinglegalethics.org , where they will find an international repository of relevant publications and sample teaching materials to which they might contribute themselves, together with an interactive forum for debating and developing these issues.

Nigel Duncan