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Exploring Values in Legal Education

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Summary

Legal education involves encounters with values in many ways, both in the substantive content (what we teach) and in our pedagogy (the way we teach). In order to decide where we, as law teachers, stand on these 'value-questions', it is important that we are clear about what we think the purpose of a university legal education is, and clear about the way we teach, recognising that our behaviour in the classroom has as much to do with transmitting values as do the choices we make about what to teach and our approach to legal analysis. The work of Stanley Fish and Bruce Macfarlane is used to explore these issues and to signal some of the hard choices which are involved in a thoughtful approach to legal education.

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The Traditional Dominance of Doctrinal Law

For many years, the dominance of law schools by legal positivism has meant that law students in common law jurisdictions around the world have been taught to think of the law in purely doctrinal terms. Vick comments that:

...although 'traditional' legal scholarship embraces many forms, including legal philosophy, legal history and comparative law, it is doctrinal research that has been predominant, so much so that the academic study of law has become synonymous with it (Vick, 2004, 177).

Twining argues that positivism was used to ground a 'neutral, expository, descriptive science of law as the dominant form of legal study' (Twining, 1994, 155). This approach exemplifies what Margaret Thornton has termed the 'technocentrism' of law, in which '...technical legal rules, with their appearance of neutrality and rationality, effectively mask the partiality and the power of law...' (Thornton, 1998, 370). In particular, clear boundaries are drawn between law and morality. The law student is taught to 'think like a lawyer', learning how to separate 'legal' issues from social, political, moral and other kinds of issue. A law school like this, argues Kennedy, offers a 'trade-school mentality' (Kennedy, 1982, 591).

The actual intellectual content of the law seems to consist of learning rules, what they are and why they have to be the way they are, while rooting for the occasional judge who seems willing to make them marginally more humane (Kennedy, 1982, 594).

Legal education thus becomes a process which Peter Goodrich has described as one which 'steals one's soul' (Goodrich, 1987). There is no room for compassion or empathy; attention is focused exclusively on 'the rules'.

In general, traditional doctrinal legal education tends to lead students to accept the law as neutral, ignoring its values-content. While values are not necessarily completely absent, treatment of values tends to be somewhat restricted, for example focusing on the evaluation of existing or proposed rules against normative conceptions of justice or on the evaluation of proposed legal reforms (Vick, 2004, 179). Discussing the position in the U.K., Bradney comments:

Doctrinal study explicitly identifies questions outside the doctrinal range as being something not relevant for the doctrinal student. It implicitly devalues such questions and treats them as not being worthy of consideration within the precise, objective world of the law school. Moreover, the person skilled in doctrinal techniques is, by virtue of this skill, no better equipped to attend to non-doctrinal questions (Bradney, 1998, 76).

From an Australian perspective, Keyes and Johnston similarly note that:

Traditional legal education is almost entirely concerned with the transmission of content knowledge, and more particularly with teaching legal rules, especially those drawn from case law...Legal rules are taught in year or semester long subjects, based on nineteenth century categorizations of law and without any consideration of their

theoretical, historical, political or economic foundations (Keyes & Johnstone, 2004, 540).

Thus a clear consensus exists about the nature of doctrinal law, which is seen as focusing on the legal rules, while discouraging and devaluing any attempt to analyse the values which permeate it.

Neither Law nor Education are Value-Free

However, doctrinal law no longer dominates legal education in the way it did in the early twentieth century. Scholars from the socio-legal (law and society) and critical legal traditions have for a long time subjected the doctrinal, positivist approach to law to a sustained critique. In the U.K. socio-legal and critical scholarship has now become an established part of the legal landscape, to the extent that some commentators have anticipated the demise of doctrinal scholarship (notably Bradney, who has described doctrinal scholarship as ‘entering its death throes’ (Bradney, 1998, 73)). My own empirical study of English law teachers found that only a small minority of those interviewed would regard themselves as purely doctrinal scholars or teachers, with the majority of legal academics (whether or not they would describe themselves as socio-legal) mixing traditional methods of analysis with analysis drawing on a range of other disciplines within the humanities and social sciences, and small but significant groups focusing on the application of feminist or critical scholarship to legal phenomena (Cownie, 2004, 58). American scholars have also made many contributions to the critique of the doctrinal approach to law, including the challenges of the sociological jurisprudence of scholars such as Roscoe Pound, as well as scholars working in the legal realist and critical legal studies traditions (including critical race theorists) (see Feldman, 2004 & Austin, 1998). Resistance to the dominant doctrinal model of legal scholarship in the U.S.A. was also reflected in the establishment of the Law and Society Association in 1964, whose members have continued to produce legal research drawing on a wide range of disciplines, from anthropology to psychology (see <http://www.lawandsociety.org/>). Similar challenges to the doctrinal model of legal scholarship can be found in other jurisdictions, reflected, *inter alia*, in the establishment of professional associations such as the Law and Society Association of Australia and New Zealand and the Canadian Law and Society Association (<http://lsaanz.org/> and <http://acds-clsa.org/en/>).

We can find a similar picture within the discipline of education. Just as doctrinal law sought to marginalise the question of values, the classical notion of a liberal education, such as that found in Newman’s *Idea of a University*, involved an exclusive focus on intellectual, rather than moral, development, whereby values were similarly marginalised. For Newman, the development of the intellect was the concern of the academy, the development of a moral sense the domain of the Church. Liberal education itself was morally neutral (Stryker, 1996, 7-8). However, in much the same way as socio-legal scholars have rejected the concept of law as value-free, scholars from the discipline of education have also rejected the idea that the educative process is value-free. From feminist pedagogy influenced by Freire to post-modern analyses of the educational process, there are numerous examples of scholars who have sought to argue, in different ways, that education is not value-free (see for example, Aronowitz & Giroux, 1991; Usher & Edwards 1994). In doing so, they emphasise that it is not just the *content* of that which we teach which contains values, but also the ways in which we teach, and the choices we make as teachers. As Harland and Pickering comment ‘higher education is a values-laden enterprise, lived out day-to-day in the social practices of academic life’ (Harland and Pickering, 2011, 1). Their central argument is that values influence the way

we see the world, and how we operate in it; so in this sense, nothing is value-free (ibid, 3). Indeed, they go further and argue that ‘...only with a strong sense of values might students leave university and make a difference in the world, and only then will we be able to hold our heads up as ‘higher’ educators (ibid, 4). This is not, however, a question of indoctrination. ‘Academics and students need to be independent critical thinkers who feel confident to take a critical stance in the world’ (ibid, 4). The issues which are raised by these ideas are complex, but for the purposes of the present argument, what is important is that in terms both of its content and its pedagogy, it is clear that the idea of a value-free legal education is, at the very least, a contested notion.

Values and the Law Teacher

Given the wide acknowledgement of the presence of values, both in law and in pedagogic practice, the interesting question for legal educators is: what should be the approach of an individual law teacher to the values they come across in their day-to-day teaching activities? I have argued previously that while it would seem appropriate to look to the disciplines of education and philosophy for assistance with question, it appears that neither can offer any easy answers (Cownie, 2003). Although there is extensive discussion of the place of values in the education literature, with Halstead and Taylor’s comprehensive review of research on values in education revealing 18 distinct topics relating to the development of values, attitudes and personal qualities by schools, there is little consensus among educationalists about this topic (see Halstead & Taylor, 2000; Halstead & Taylor (2000a). Meanwhile, in the discipline of philosophy, as soon as the topic of values and education is raised, the question of moral relativism soon comes to the fore. Here, as Mendus argues, the picture that emerges from the writings of those who are concerned about moral relativism is one in which “modern education fails society and fails its students by construing moral judgement as a matter of arbitrary, even capricious, personal opinion in a world in which any opinion is as good, or as bad, as any other. According to their view, teachers are, or should be, charged with the task of communicating and defending the moral values of the community, but teachers are so impressed by the diversity of moral belief within the community, and so seized of the importance of tolerating that diversity, that they now believe moral relativism is the only game in town”. Mendus’ own answer to the question ‘What moral guidance should education offer its students?’ is that far from defending the moral values of the community, education should offer two things: an awareness of the complex and intransigent nature of moral conflict in conditions of modernity, and a recognition that intransigence does not make the moral responsibility of the individual go away (ibid, 58).

The Role of the University Teacher

Faced with a situation in which there is little consensus about the appropriate action for individual law teachers to take in relation to the values which inevitably form part of the process of legal education, it would seem that a useful first step would be to be clear about the role of a university teacher. In developing one’s thinking about this issue, the work of Stanley Fish provides a stimulating starting-point. Fish’s recent book *Save the World on Your Own Time* addresses head-on the role of a university academic. His basic point is that university teachers can legitimately do two things: introduce students to bodies of knowledge and traditions of enquiry that had not previously part of their experience, and equip these same students with the analytical skills that will enable them to move confidently within those traditions and to engage in independent research after their course is over (Fish, 2008, 12-13). Anyone who asks university teachers to do more than this, insists Fish, has enlisted in

the “we-are-going-to-save-the-world” army of people who think that universities should be achieving a huge range of other objectives, such as eliminating poverty, gender bias or racism, promoting social responsibility or eliminating environmental pollution. He is particularly critical of the view (personified for him by Derek Bok, former President of Harvard University) that universities should be nurturing good moral character and preparing students to be active, knowledgeable citizens (ibid pp 13-14. In relation to this approach in U.K. universities, see Brownsword (1999)). Fish is clear that, on the contrary, university teachers should focus solely on helping their students to master intellectual and scholarly skills (ibid, 14).

Fish is at pains to point out that his stance does not mean that questions of value should be banished from the classroom – far from it. What is crucial is the way in which questions involving values are approached. Fish’s argument is that questions of value must be subjected to academic, rather than political or ideological attention (ibid, 15). This is because the academy’s dignity and integrity depend on its being able to identify the task it properly performs. Fish’s catch-phrase, which sums up his position, is: ‘Do your job; don’t try to do someone else’s job and don’t let anyone else do your job’ (ibid, 16). Examining these three phrases gives us a clear idea of Fish’s response to the question ‘How should law teachers deal with values in the classroom?’

The first phrase, ‘do your own job’ urges academics to focus exclusively on introducing students to bodies of knowledge and equipping them with analytical skills. It might be objected that this narrow focus is impossible, because teachers come to the classroom as fully developed beings who have already embraced certain values, various causes and so on, who believe in certain things which make it impossible for them to detach themselves from these formative beliefs and perform in a purely academic manner (ibid, 23). Fish has a characteristically straightforward answer. Even if it is the case that whatever we do is shaped to some extent by what we have done in the past, we are perfectly capable of acting in accordance with the norms that belong to a particular sphere of activity, even if our ‘take’ on those norms is inflected somewhat by norms we affirm elsewhere (ibid, 23). In other words, if we choose to import our own values into the classroom, it is just that – a choice. And in Fish’s view, we should choose to leave our own personal values outside the classroom.

The other ‘impossibility’ objection which Fish anticipates is the assertion that there can be no distinction between politics and the academy, because everything is political. Fish’s response is that he is not advocating that academics avoid politics; what he is interested in is what university teachers do with the politics they come across in the course of teaching. His answer is: politics (like all other values) should be subjected to academic interrogation (ibid, 24). Fish calls this process, whereby ‘values topics’ are made the focus of academic enquiry, ‘academicizing’.

To academicize a topic is to detach it from the context of its real world urgency, where there is a vote to be taken, or an agenda to be embraced, and insert it into a context of academic urgency, where there is an account to be offered or an analysis to be performed.(ibid, 27).

Fish is very clear that his approach does not mean that academic work should ignore the values found in politics, ethics, civics, or whatever is under discussion. He is arguing that ‘

...when those issues arise in an academic context they should be discussed in academic terms; that is, they should be the objects of analysis, comparison, historical placement etc; the arguments put forward in relation to them should be dissected and assessed *as* arguments...' (ibid, 25; emphasis in the original).

In the U.K. at least, this approach is relatively straightforward to adopt, due to the development of a large variety of textbooks, many of which adopt a socio-legal/critical approach to their subject, discussing underlying values in their academic context.

The next part of Fish's catchphrase, 'Don't try to do someone else's job', embodies his criticism of those academics who, in his view, have 'forgotten' what their own job is, and spend their time 'trying to form their students' characters or turn them into exemplary citizens' (ibid, 66). While responsible citizenship and moral behaviour are worthy things in themselves, Fish argues that it is not the business of the university to instil such practices in students. In pursuing this argument, Fish is keen that we should not get distracted by arguments based on academic freedom or free speech. 'Yes, of course professors have the right to say what they like as *citizens*... but in their professional capacities the freedom they might claim is defined and limited by the nature of the task they are performing' (ibid, 82). And that task is, of course to 'do their own job'.

In the final part of the catchphrase 'Don't let anyone else do your job', Fish is urging academics not to be thrown off-course by the demands of other interested parties, whose agendas may vary from wanting universities to produce the workforce, to urging them to support a variety of political causes, or telling them to close some departments and open others (ibid, 98). Fish is keen for universities to preserve their autonomy, and argues that in order to do that, it is vital that they do not stray into doing things that are not strictly part of the academic business...if academics confuse advocacy of a cause (however worthy) with teaching, that will give critics a basis for their criticism. 'If academics only did the job they are trained and paid to do – introduce students to disciplinary materials and equip them with the necessary analytical skills' (ibid, 153), then, argues Fish, the critics would not be able to gain such an easy purchase on an argument that has to be taken seriously.

Fish's views are controversial, but they certainly deserve to be taken seriously. Looking at how his arguments have been received, some commentators are persuaded by his arguments and supportive of his stance: as Gillespie comments:

Regardless of whether one views education as an external process, one in which knowledge and action are severed in the Enlightenment-pragmatistic tradition, or whether education is an internal process, one in which knowledge and action are inexorably linked in the Greco-Roman tradition, Fish's ultimate argument remains strong: what ought to be taught, what ought to be cultivated in secular institutions of higher education *is how to think academically*. In this respect, Fish's book ought to be required reading for administrators, faculty, graduate students and policy-makers alike, for it argues clearly and forcefully *the academic ought*. (Gillespie, 2009)

Others, while acknowledging the importance of the issues he raises, offer alternative solutions; Glanzer and Ream, for instance, prefer to found their approach to the question of values on the work of Alistair McIntyre, concluding that:

Narrow prescriptions concerning the role of education may eschew the impact which institutions of higher learning have on the moral formation of their students. However, such a posture is difficult to maintain and is fraught with more illusion than reality. Education is not a neutral endeavour. It serves an end even when this remains unconscious and hidden even from those propagating it. For better and for worse, colleges and universities orient their students in moral space and shape the moral identities of students. As a result, the larger challenge looming on the horizon is how educators think through this orientation process. In the work of Alasdair MacIntyre we find the possibility of initiating and even framing such an understanding. Like all such matters which ask us to cross the divide which unfortunately still often separates theory and practice, the implementation of MacIntyre's thought may prove to be more a matter of will than a matter of the mind. (Glanzer & Ream, 2008, 121).

Others completely reject Fish's basic premise, and argue that promoting particular values is a fundamental part of higher education. Writing about the decision of Widener University to promote civic engagement through a variety of institutional initiatives, including throughout its curriculum, Wilhite and Silver (2005) expressly disagree with Fish's position, and comment:

We take the position that higher education has a responsibility to promote development of values that contribute to creating and maintaining a social order in which the formalized critical inquiry essential to developing discipline-specific knowledge can flourish. We believe that civic engagement is a potentially powerful tool for promoting development of such values. Furthermore, embedding consideration of such values in courses across the curriculum, as opposed to creating special courses for inculcating such values, has the potential to improve learning outcomes for both civic values and discipline-specific knowledge and skills. (Wilhite & Silver, 2005, 53)

It is not the purpose of this article to provide answers to the issues raised by Fish, but to draw attention to their relevance for a serious consideration of legal education, the values which it should embrace (and those which it should not include). Only if we, as law teachers, wrestle with these issues, and begin to work our way towards a fully-thought-out view of the proper nature of legal education, will we be able to justify our position, and guard it against those who might wish to alter it for their own purposes.

Further 'Value' Questions for the Law Teacher

As we have seen, Fish's work raises important questions about values. But there are also other aspects to these 'value-questions' which law teachers must face. Even if we succeed in answering, to our own satisfaction, the challenge to 'do our job' in the way Fish suggests, the very practice of doing that job raises other 'values questions'. In this context, there is a growing literature on academic professionalism, which raises further complex questions about values and teaching in higher education. Writing about the ethics of higher education practice, Macfarlane explains that his focus is on the 'difficult and messy reality of professional life' (2004, 1). The sort of values he is interested in are not those contained within the subject-matter of the discipline, but those present within the social practice of teaching. What goes on in the classroom has been likened by a number of writers to a 'secret garden' (see for example, Whicker & Kronenfeld, 1994). The secret garden metaphor signifies that teaching is a deeply personal, emotionally demanding activity, which requires 'a monumental investment

of self' (Seldin, 1993). This is reflected in a number of different aspects of the teaching process. For instance, one of the qualities most valued by students in their teachers is enthusiasm, which they regard as contributing greatly to the quality of their learning experience (Macfarlane, 2004, 62). Yet communicating a passion for one's subject, or enthusiasm for the topic under discussion almost inevitably involves the teacher in revealing at least some of their own values, as well as an emotional investment in the teaching activity.

Another quality identified by Macfarlane as crucial to the practice of teaching is emotional intelligence. The notion of emotional intelligence incorporates being aware of one's own emotions, learning how to handle these feelings, motivating oneself to achieve a goal, recognising emotions in others and handling relationships effectively. All of these aspects of emotional intelligence come into play when teaching in higher education. There is also a need for balance between maintaining emotional distance from students, yet providing a sufficiently supportive learning environment (which may involve a certain amount of self-disclosure) (Macfarlane, 2004, 124). These affective aspects of teaching are intimately connected with values, which becomes clear as Macfarlane goes on to argue that higher education teachers need to adopt a list of virtues (i.e. values) similar to Aristotle's idea of moral virtues. The virtues he identifies are: respectfulness, sensitivity, pride, courage, fairness, openness, restraint and collegiality (Macfarlane, 2004). He emphasizes that this list is not comprehensive; there are many other desirable virtues to be found in university teachers, such as magnanimity; however, these eight values are those he regards as key (ibid, 130).

Looking at Macfarlane's virtues in more detail, it becomes rapidly apparent that these are definitely particular *values* relating to the practice of teaching. Respectfulness allows the creation of a space where opinions can be expressed, where students can be protected if others break the boundaries, but where intolerant attitudes can be challenged. Particularly interesting for academic lawyers is Macfarlane's comment that 'The classroom is a crucial context where the principle of procedural justice operates' (ibid, 131). The important role of emotions in teaching is emphasized by the next virtue, 'sensitivity', perhaps better understood as empathy, which is needed so that teachers can take account of the different personal needs and circumstances of their students. 'Learners... should be treated as individuals with their own needs, ambitions and challenges rather than as members of an amorphous and faceless crowd' (ibid, 131). The virtue of 'pride' encapsulates the idea that the teaching role should be approached with a conscientious attitude. The values involved here are complex; given the nature of the academy, which rewards research rather than teaching, '...having pride as a teacher means caring about the student experience and keeping to one's own personal standards regardless of the lack of material rewards it may bring' (ibid, 134). 'Courage', the next virtue, is about the duty that teachers have to innovate in the classroom and seek continued improvement as a teacher (ibid, 134). 'Fairness', on the other hand, which is more readily identifiable as a 'value', is partly about procedural justice, but also about retributive justice when dealing with students who have broken the rules, and its converse, 'remedial justice', concerned with ensuring that 'things are put right' (particularly relevant to decisions about the treatment of students with learning difficulties, for example). Finally, distributive justice relates to the morally correct distribution of resources. How much time should lecturers spend with individual students? What is a 'fair' share of time? (ibid, 136-138).

Moving on to 'openness', what Macfarlane is getting at here is the need for university teachers to be self-reflective and open to criticism (ibid, 139). The key issue here is to strike a balance between openness to criticism and retaining professional judgement, based on

expertise and skill, about the educational process. Reacting to every student questionnaire is ducking the issue; the value that is involved here is based on professional integrity, not weakness. The next virtue, 'restraint' is, in Macfarlane's view, 'fundamental' in forming trusting relationships with both students and colleagues. It is particularly relevant in the context of communicating passion for one's subject, to ensure that when sharing one's ideological and intellectual views, one does not become domineering, rather than empowering (ibid, 141). Macfarlane is acutely aware of the complexities involved here:

While stating one's ideological position is consistent with an open and honest stance, to proselytize or indoctrinate takes advantage of the unequal power relationship between lecturers and students...Restraint represents a median position between the extremes of denial that one has any ideological and/or theoretical position through to aggressive advocacy, regardless of the relevance to the teaching topic (ibid, 141).

For law teachers, as with other members of the academy, this is a particularly controversial issue, but one on which Macfarlane is very clear, pointing out that '...if students are expected to develop and practise their own arguments as junior members of the academic community, the lecturer has an obligation to reciprocate' (ibid, 141). The idea is to promote mutual respect, and to reassure students that they will not be prejudiced if their (reasoned) intellectual stance differs from that of their tutor. An academic who fails to give any indication of their ideological stance, he argues, is probably less likely to be able to communicate a passion for the subject or help to motivate students, as well as falling into the danger of intentional or unintentional deceit, whereby knowledge claims are presented to students as value-free 'neutral' facts (ibid, 142). The final virtue, 'collegiality', encompasses the idea of providing a supportive teaching environment, in which discussions can take place with colleagues about the development and evaluation of teaching practice (ibid, 142).

In his conclusion, Macfarlane acknowledges the complexity of the issues he has raised:

Ethics in university teaching, though, as in all walks of life, is a complex business. It cannot be reduced to a simple check-list of solutions dictating right and wrong...such rule-bound responses rob professionals of the essence of their professionalism: the ability to exercise judgement and engage as individuals with ethical issues. Making the right decision in complex circumstances is not an exact science...[but] this does not imply...that anything goes. It means that it is important to strike a balance between the extremes of dogmatism and moral anarchy. In terms of teaching in universities...it means that rational virtues such as a sense of fairness or justice need to be combined successfully with affective virtues such as sensitivity...[and this in turn demands] that considerably more attention is given to the development of the moral character of lecturers in higher education (ibid, 145).

The reference to the need to pay attention to 'the moral character of lecturers in higher education' in this quotation serves to emphasise the very personal nature of the values which are involved in teaching in higher education (as in all educational processes). The student-teacher relationship is a personal one; even in these days of mass higher education, what goes on in university teaching rooms up and down the land is a personal encounter between an individual lecturer and the individual students who make up the class. Law teachers, like others in the academy, need to be aware not only of the values inherent within the subject-matter of their discipline. They also need to pay attention to the pedagogic values which permeate every moment of the teaching process.

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