

Beyond black-letterism: ethics in law and legal education

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33 *Law Teacher* 3, 1999, pp 301-309

The basic commitment remains to inculcate students into an intellectual discipline that seems to exist in a mysterious and self-sustaining world of its own in which internal consistency, constrained rationality and abstract formality are the prized values of the truly excellent legal mind. A taste for substantive justice and a sense of political relevance are decidedly lesser and dispensable virtues. And the fact that we are still discussing whether it is appropriate to teach ethics as part of legal education is simply proof positive of the moribund state of legal education.

Law is applied ethics. Any approach that argues otherwise is mistaken. The black-letter tradition of legal scholarship is a sorry and inadequate excuse for an inadequate approach to law. That being so, the teaching of ethics/politics in law school becomes not so much a choice as a responsibility. There is no way to engage in the study of law without taking some stand on the ethical/political basis of law and the dynamic nature of that ethical/political basis.

In law school, whatever the topic and whatever the idea, law is taught within the pervasive shadow of the Blackstonian mindset. It has come to designate an approach to law that claims to concentrate on narrow statements of what the law is and eschews resort to any extra-doctrinal considerations of policy or context. Criticism is largely confined to highlighting formal inconsistencies and rooting out logical error.

The problem with teaching legal ethics in law schools that are still in the suffocating grip of black-letterism is that it will be a bloodless exercise in collating and ordering ethics principles

without regard to their origin or application in the real world. In order to counteract this tendency and to dislodge the hold that black-letterism continues to have over the legal mind and imagination, there are three basic steps that must be taken: teaching ethics in such a way that encourages students to treat its study as an active and continuing challenge rather than a passive and finite undertaking; teaching ethics in such a way that the method of instruction obliges students to deal with ethical problems in an engaged and participatory setting; and teaching ethics in such a way that ensures that the process and product of ethical reasoning is connected to the messy socio-political context in which ethical controversies and their proposed solutions arise.

There ought to be a willingness to resist hard-and-fast solutions that are supposed to work in all situations. Law students need to confront general ethical dilemmas in concrete circumstances in order to begin to discover, question and articulate their own moral views before they struggle with the complex demands of a more critical inquiry. Any study of law or ethics must not, as black-letterism proposes, be done without recognising the political context and conditions of that undertaking: the resilient black-letter practice of decontextualisation must be strenuously combated. Instead, there has to be a greater recognition that law and politics are intimately and inseparably related; it is futile and fraudulent to study one without the other. Black-letterism works as a convenient mode of denial. It enables legal academics and lawyers to engage in which is a highly political and contested arena of social life – namely, law – and to pretend that they are doing so in a largely non-political way.

Of course, a knowledge of the black-letter rules and an ability to parse them is a valuable and necessary skill for any lawyer to attain. But that alone

is not only insufficient but downright dangerous. It engenders the false impression that lawyers can be good lawyers without concerning themselves with the political, ethical and social consequences of their professional pursuits.

Teaching the reflective practitioner in the United States

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33 *Law Teacher* 2, 1999, pp 310-314

In the United States, regardless of the topic, the shared pedagogy of legal education is that a professor should engage students in discussion of what the law, process or skill is, its underlying policies, the cultural, ethical, moral and social value it reflects and what the law, process or skill ought to be. This philosophy has been part of legal education in the United States long before the Watergate scandal which resulted in the American Bar Association requiring accredited law schools to teach professional responsibility.

Exposing students to a variety of approaches illustrates for them that reasonable people may respond differently to the same circumstances. If part of the goal is to enable students to recognise various ethical situations and exercise judgment, exposing them to inconsistent responses will enhance their development. 'Professionalism' is often used as a term to define some amorphous acceptable behaviour that we hope students will understand.

If students are going to be exposed to some inconsistency, they need a vehicle for processing their experiences. While in school, teachers can be sounding boards and during the training period, the mentoring provided by thoughtful barristers and solicitors who are taking the time to discuss these issues can be ideal.

Legal ethics and morality must be an important component of legal edu-