Beyond black-letterism: ethics in law and legal education

A C Hutchinson
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 ed-ucation.

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-letterrism 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

N W Tarr
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-

cation form the university through professional school. Rather than side stepping the issues, the students should be confronted with ethical and moral dilemmas at every turn. Those responsible for education and training are often uncomfortable with the messiness of the issues and prefer to foist them onto another. However, the result of the shifting of responsibility is that the future professionals are unprepared to recognise moral and ethical dilemmas or to exercise good professional judgment. We must all take responsibility for training the next generation of reflective practitioners.

Taking the plunge: integrating legal ethics in Australia

G Powles

33 *Law Teacher* 3, 1999, pp 315-321

Monash University Faculty of Law has decided to adopt in principle the pervasive approach to the teaching of skills and ethics, which are intended to be fully integrated into the 4-year LLB program over the next two years. As the project team begins its task of curriculum reform and faculty consultation, it is aware of the scepticism that surrounds an enterprise such as this – scepticism as to both objective and method. The most noble ambition must be to develop for students a learning environment which, by the time they graduate, will have made a difference to the way they see the law and its practice and perhaps even to their capacity to act as morally good lawyers.

Unfortunately, there is no evidence that a law school can succeed in providing its students with the wherewithal to cross the divide between knowing what is right and doing it. The methodological 'Achilles heel' of the enterprise is its dependence on the understanding and cooperation of faculty colleagues who will be called upon to include ethical elements within their subjects. Both of these perceived discrepancies between the ideal and the achievable need to be understood in light of what has been, in Australia, a rather barren landscape as far as the teaching of legal ethics is concerned.

Australia is slowly awakening to a commitment to the teaching of ethics. The legal profession, law schools and professional trainers share the blame for retarded development in this area. The profession has failed to ensure that a well-defined and rigorous legal ethics syllabus is adequately taught to all applicants for admission to practice and there is still no sufficiently specific requirement on that score.

We have seen two main shortcomings. First is the acceptance of the way in which legal ethics is characterised as a set of principles and rules intended to assist the lawyer to recognise and balance competing claims. Second, although mere rules are not enough, legal ethics education requires the study of the whole regime of rules through which lawyers seek to maintain behavioural standards for themselves. The profession has failed to produce a clear code or statement of principles and rules for Australian practitioners.

As far as the legal academy is concerned, recent initiative to introduce new approaches into the law degree curriculum have been both stimulated and rendered spasmodic by the remarkable expansion of the number of law schools. The single most depressing consequence for the majority of law faculties is that class numbers are high and rising, thereby rendering laughable any proposal which seriously suggest that the teaching of legal ethics will be facilitated across the curriculum through supervised small-group activities.

The challenge now is to integrate ethics into the substantive law subjects across the curriculum. While demonstrating to students that issues in legal ethics pervade all areas of law, this approach enables a range of pedagogic techniques and individual teaching styles to be employed here and there through the student's law school experience. It brings home the variety of circumstances in which such issues may arise but also the personal or subjective character of thinking which is brought to bear upon them. In order to enlist colleagues in the integration enterprise, a strategy is required which will convince them of its merit and also illustrate ways in which it may be done.

REVIEW ARTICLE

Ethical challenges to legal education and conduct

K Economides (ed)

Hart Publishing, 1998

366pp

Although Kim Economides, the editor of this substantial treatise (399 pages when both the preface by Lord Steyn and the editor's own introduction are included) does not make this claim, it would be hard to imagine that there has been any prior publication of this breadth of coverage on the foundations for the teaching of legal ethics. It is not so much that this book breaks significant new ground. With the use of a large scale it seeks to map out in detail the terrain for the role of ethical behaviour in the legal profession and the function of the law school in inculcating the principles that underpin it.

The book is comprised of a collection of essays, each of about 20-30 pages in length, submitted by well creden-tialled authors located in a range of jurisdictions. The contributions originate, not just from common law countries, specifically the United Kingdom, Australia, New Zealand, Canada and the United States, but also the Netherlands, Brazil and Italy. The 17 papers are arranged under three themes: rediscovering law's moral