Can Justice Be Taught?

Some Good and Bad Lessons from United States Law Schools

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I INTRODUCTION

Legal professions in most countries claim as part of their mission both to maintain a high standard of professional ethics and to serve justice. Despite this standard rhetoric, the content and ways of inculcating in young professionals ethics in the narrow sense of the rules governing the legal profession and moral commitment in the broader sense remain quite vague. Even assuming a consensus about what such abstract words mean, how can legal training inculcate such high-minded goals so that legal professionals actually pursue them once they enter the workplace? Can Justice be taught?

Although American legal education has many faults, as will become clear from this discussion, it has the virtue of having openly struggled with this issue. The fight has waxed and waned as the practice of lawyers has changed. The struggle has been strongly affected by the relative power of the actors involved: society as a whole; government both federal and state entities; the consumers of legal services, especially large corporations; the organized bar in the form of the American Bar Association ("ABA") trying to protect its guild-like monopoly on legal services; and last but, as it turns out, not least, U.S. law school professors, who compared to their colleagues in other countries, exert a remarkable power on the content of legal training.

In the last decade, the controversy in the United States over how to teach ethics, in both its narrow and broad meanings, has intensified and been linked to a number of other issues. One is the value and necessity of experiential learning, such as
occurs in clinical courses, whether realistic simulations or live-client clinics. Another factor is the rise of scholarship, both by researchers in other fields and by law professors, concerning the psychological and especially moral development of young adults. This research reinforces a long-simmering debate in United States law schools about the most effective ways to teach law students. Finally, the controversy about ethics, experiential learning and how they should be integrated with the teaching of substantive law has become more urgent as law schools are forced to be more accountable. Large law firms are less willing to subsidize the in-house training of new lawyers due in part to cost-cutting pressures from clients; and the vast majority of new lawyers, who will not have the luxury of such subsidized, on-the-job training in a large firm, are beginning to demand in return for their high tuition bills better preparation to practice law. Add in the rise of transnational practice with the potential of conflicting systems of professional ethics and the pressure for curricular change at U.S. law schools becomes acute. But all change is shaped by the present, entrenched system.

II PRESENT DOMINANT CURRICULUM

The U.S. legal training at the dawn of the 21st century is remarkably like that at the beginning of the 20th century. Mastery of legal doctrine, substantive law and legal analysis predominate. If one visualized the U.S. law school curriculum as a Venn diagram, there would be three circles with almost no overlap, one very large and two quite small. The large circle is the teaching of doctrine and analysis. One of the small circles is knowledge of lawyering skills (interviewing, investigation and development of facts, drafting, counseling, negotiating, etc.) Although these skills are estimated to constitute 70% of what a practicing lawyer actually does, they merit little time in the curriculum: few prestigious law schools have “lawyering skills” courses—such “trade school stuff” is relegated to lower-tier law schools whose students have no chance at large firm subsidized, in-house training. Most schools offer live-client clinics for some upper-level students, but on a small-scale due to the high cost; in many cases, the clinical faculty is marginalized from the core faculty, who teach substantive law. The smallest circle is isolated or slightly overlaps with the skills/clinic circle; this minor part of the curriculum is the
teaching of morality, justice, ethics in the larger sense and professional ethics\(^3\) in
the narrow sense. Despite the constant rhetoric about the social mission of the
profession, the standard curriculum, which in the United States means a curricu-
lum modeled on Harvard Law School’s pattern, little time and few resources are
devoted either to actually experiencing the human contexts in which decisions of
professional ethics must be spotted and resolved or to the discussion of justice.

Thus, most U.S law school graduates present themselves for professional licens-
ing with four-years of undergraduate training in some discipline other than law;
three years of doctrinal-focused training with a minimum of supervised, role-
specific training; and one mandatory, single-semester course in professional
responsibility at law school. These professional ethics courses, described in more
detail below, are treated by many faculty and most students as less important and
challenging than other law school courses and their lasting effects seems to be
minimal once one has entered the workplace.\(^4\) Licensing in most states consists
of a state examination, which tests substantive law, and a nationally administered,
multiple-choice examination on professional ethics (basically a test of what actions
constitute violations that will provoke discipline.) A few states, most notably New
York and California, also require proof of drafting skills; only two states require
apprenticeships before a new lawyer can practice without restrictions\(^5\) in order
to ensure competency in practical skills. Knowledge of substantive law
dominates\(^6\) and the substantive knowledge of the law is disaggregated from the
learning of the social, communicative skills of lawyering and the development of
the student’s moral self including the assimilation of the profession’s moral mission
and professional norms.

III CURRENT REFORM MOVEMENT: TEACHING JUSTICE

But this state of affairs has often been severely criticized\(^7\) and the last ten
years have seen a new push to rebalance and integrate the three circles of
competencies covered in law schools’ curricula described above. The reformers
come from a variety of perspectives but agree on certain basic principles. The
lynchpin idea is that Aristotle got it right: people learn to be good by practicing
good actions. That is, learning to be an ethical lawyer who is truly committed to
justice is a role-sensitive process which is best learned by actually making one’s own choices in the lawyer’s role, under carefully controlled, educational circumstances. This is problem-based experiential learning which unites the teaching of lawyering skills and lawyer’s ethics, the two small circles so estranged from the massive circle of substantive law in the U.S. law school curriculum.

Reformers cite various researchers on psychological and moral development: Piaget and Lawrence Kohlberg (on stages of moral development),8) Howard Gardner (multiple intelligences) and Lev Vygotsky (learning best occurs at “the growing edge” of one’s capacity where the learner thinks for himself but a guide is available to “scaffold” the learner’s progress by asking questions),9) or William Damon (positive psychology i.e. how healthy persons develop, and in particular the moral development of persons in their 20’s, so-called “emerging adults.”) Damon strongly argues that the greatest predictor of whether professionals will do good work in their careers (“good” in the dual sense of excellent by the standards of the professional and ethical by universal moral standards, such as honesty, justice, personal integrity, dedication to the greater social good and compassion) is the development of a personal moral identity and that professional training during early adulthood e.g., during law school, can have a major effect on that development. Some scholars point to the important role of emotion in problem solving, especially moral decision-making.10) That is, many of the reformers in the United States pushing for a rebalancing of U.S. law school curricula and the better preparation of law graduates in the essential skills needed to perform competently in practice claim the first step is that law school professors must learn more about how to teach effectively.

This push for the integration of lawyering skills and development of the student’s personal moral identity occurs at a time when the above-mentioned, one-semester, mandatory professional ethics classes in U.S. law schools are being taught in five different ways: lectures; problem-based discussion; case-opinion discussion; examples (including lawyer case studies and modeling by the teacher or clinic supervisor); and role-sensitive experiential activity (both live-client and simulated client).11) This fifth and last approach is what the present-day reformers advocate refining and expanding. Each approach has benefits and short-comings.

Lectures can convey the history of lawyering and the simple content of the
professional rules and their background, but do little for a student's personal moral
development: listening to a lecture is the quintessential passive experience for the
student. Indeed for the cynical student seeking the limits of tolerated behavior,
lectures focused simply on the content of professional ethical rules could convey
a convenient roadmap of just how far a person can go and escape professional
discipline.

Discussing problem scenarios or dilemmas that arise in legal practice may be
more interesting and engaging, but it may also mislead students into thinking that
ethics is a set of rules to resolve a fixed set of problems; and indeed many
practicing U.S. lawyers think of ethics in this narrow way. Such discussions (“what
rules apply to these facts and what is the result?”) help in the memorization of the
rules of professional ethics, but do little to help students decide more subtle or
more difficult questions that will reoccur regularly year after year as they prac-
tice: “How will I treat my clients?” “How really do ‘honesty’ and ‘care’ enter my
daily life?” “What will I do if my ‘duty’ to my immediate client contradicts what
I believe is right in the larger context (the corporation over the long-term/the family
as a whole/the community at large)?” “What kind of lawyer do I want to be?”

Case-opinion teaching, where one looks at actual cases of discipline imposed on
lawyers (either by bar associations or the courts), may be dramatic and lead to
spirited discussions, but the fact patterns in cases which reach public discipline are
usually so egregious that they offer little guidance to the actual experience of
young professionals.

Modeling, where either story-telling or the actual behavior of one's teacher or
supervisor (for example, in dealing with clients in a clinic) may have more direct
impact on a student, but it is hardly a systematic approach to the teaching of
professional ethics or morality. At its worst, such an approach degenerates into
telling “war stories.” One should note that many U.S. law school professors,
particularly teachers of substantive law, dismiss the idea of being a role model in
the moral development of their students, whether out of fear of improperly influen-
cing students (modeling leads to “brain-washing”) or a sense that fostering moral
development in young people is just not part of their jobs. Reformers reply that
such positions are wrong and illusory: fostering a student's capacity to decide
Can Justice Be Taught? 193

independently for himself or herself the kind of lawyer they will become is far removed from brain-washing. Moreover, faculty members can never escape affecting students moral development: the ways faculty interact with them, the kinds of persons faculty are, including their rejection of any role in fostering personal moral development, send strong messages to students. In fact, the reformers assert, there is no neutral position for a law school professor: to refuse to take a position is to take a position.12)

The fifth approach, role-sensitive experiential learning, grew out of the rise of clinical education in law school, starting during the 1960's when pressure from employers and the ABA, demanding better preparation of new lawyers, and pressure from students for more “socially relevant” classes lead to the founding of numerous live-client clinics for indigents. When the ABA then pushed for the “pervasive” teaching of ethics and professionalism throughout the law school curriculum,13) the clinical faculty readily took up that challenge and began redesigning their clinics to include teaching units on professional ethics. One motivation was that skills courses without a serious ethical component could and sometimes did result in negative ethical learning: students came to see practical lawyering skills as “just a game” where the only point was to “beat” an opponent.14) Clinical teachers felt the urgent need to place the skills they were teaching in a moral framework. As these teachers gradually began producing new forms of scholarship on effective ways to teach ethics and the moral development of students in experiential learning, the present push for the tight integration of clinical and ethical training emerged.

This new, robust experiential approach takes the usual methodology of teaching clinical skills and grafts on ethical issues and problems using several of the techniques for teaching ethics described above. Clinical skills are usually taught in units, each of which follows a four-step process: transmission of principles and theory by lectures, readings and discussions; then students in small groups plan a lawyer's task (such as interviewing witnesses in a lawsuit) which involves those principles; next they execute the task (in simulation with professional or student actors or with real clients, witnesses, etc.); finally students reflect in an organized way individually and as a group and with their professor about how their behavior
fitted with the theory or principles under study. In this newer approach, the teaching units are carefully constructed to also contain ethical issues, some obvious, others hard to spot; control of the embedding of ethical issues is, of course, far easier in simulation-based courses rather than live-client clinics. To ensure that professional ethics are covered systematically, faculty may provide a series of organized lectures, in-class demonstrations and role-play or videos covering the codes of professional conduct, but these classes differ from the traditional, one-semester stand-alone course on professional ethics in that ethics material is carefully coordinated with the practical work in which the students are actually engaged.

Brief descriptions of three, well established programs where professional ethics and lawyering skills are integrated may be useful. The programs are: the Lawyering Program at New York University (NYU) School of Law; the Legal Skills Program at College of William and Mary (W&M) School of Law and the Integrated Business Law Program at Temple University Breasley School of Law.

The NYU Lawyering Program is a required one-year course for all first-year students. It is taught in small classes (around 20 students) with a experienced practitioner/professor; sometimes several classes meet for a combined lecture or demonstration. The small classes act in a loose way as a law firm with the students placed in small teams to carry out lawyering assignments, ranging from dealing a complaint against a landlord for discrimination to a moot court trial. Although the course is based on carefully designed simulation, the scenarios seem very realistic to students since professional actors play the clients and witnesses, and lawyers, professional arbitrators and judges volunteer to conduct the arbitrations or abbreviated trials. The course aims to make students acutely aware of all the moral dimensions involved in their cases, from problems under the code of professional ethics, to issues of how professional courtesy and the difficult questions of what to do when one believes the client's stated goals are bad for the client or the larger society. NYU has a separate course on professional ethics as mandated by the law school certification procedures, but believes that by confronting students from the very beginning of their legal studies with complex ethical and moral choices, they convey the strong message that professional ethics is only a part of the ethical and
moral duty of a lawyer.

The W&M program is one of the most extensive in any U.S. law school. It is a two-year required course for all students. The school organizes all first- and second-year students into so-called virtual law firms in which they stay for the full two years, run by practitioner/teachers who are assisted by gifted third-year students. The law firms function quite realistically, with weekly meetings for assignments; the firms handle at one time several cases or legal matters based on detailed scenarios (other students or members of the community play the clients and witnesses). A school administrator acts as a court clerk receiving filings of documents according to standard civil and criminal procedures; faculty play arbitrators or judges in formal proceedings. Students must work their way through a series of increasingly difficult exercises, again with ethical traps and difficulties embedded in the scenarios. Coordinated with the assignments students handle in their law firms is a lecture series on professional ethics to place the students' experiences into a coherent theoretical framework.

In contrast to the NYU and W&M programs, both of which lead students through a sequence from interviewing and counseling, to negotiations and finally litigation, Temple University's innovation program focuses on transactional work. Prof. Eleanor Myers, the architect of Temple's Integrated Business Law Program, argues forcefully that ethical issues and the kind of decision-making a lawyer must do vary with the type of work one does and that transactional work, as opposed to litigation, where the focus is on the parties rather than an objective decision-maker, offers distinct ethical challenges for the legal professional. Temple offers a one-year long course on business transactions and professional ethics, which focuses on the legal services needed by a single family which owns a closely held corporation. Various problems arise: one family member wishes to sell his stock in the corporation; estate planning must be done; one family member wishes to create a non-profit corporation of his own and register it with the tax authorities in order to qualify for tax advantages, and so on. But as the legal matters evolve, issues of conflict of interest, confidentiality and the lawyer's duty as an officer of the court proliferate. Students must pick their way through the maze, discharging their duty to their clients while observing both the letter and also the spirit of the
IV LESSONS FOR JAPAN?

Not surprisingly, Japanese professors are observing with interest the struggle over innovation in the moral and ethical training in U.S. law schools. Kwansei Gakuin University Law School, which is investigating the feasibility and suitability of simulated clinical education under a major grant as a Center of Excellence from the Ministry of Science, Education and Technology, held an international symposium on this topic in March, 2005. Prof. William Damon Professor of Psychology at Stanford University, Prof. Ann Colby, Senior Scholar at the Carnegie Foundation for the Advancement of Teaching, who is about to publish a major study innovative teaching practices in U.S. and Canadian law schools, and Prof. Peggy Cooper Davis, Director of the NYU Lawyering Program participated. Publication of a collection of their papers translated into Japanese is under preparation.

Given the unsettled state of the new system of university-based Japanese law schools, there is room for experimentation, drawing on U.S. mistakes and experience, when that seems relevant to the Japanese system. The curricula of most Japanese law schools bears a close resemble the standard U.S. law school model: substantive law looms large; comparatively little time and resources spent in elective courses on lawyering skills and ethics. Professional ethics classes seem to be taught, by lecture, problem-based discussion, or examples (story-telling). Simulation exercises are being tried on a small scale. Even granting that the New Japanese Bar Examination will be much more severe a test than what a U.S. law school graduate would ever have to face, if the claims of some U.S. reformers that students who experience integrated skills and ethics training also become better, more motivated students in their substantive law classes, then there may strong practical reasons for Japanese law schools to look closely at these new teaching methods. Moreover, as the period of study in the Legal Training Institute is cut back and may even, at some time in the future, be done away with entirely, the burden of teaching lawyering skills will fall more and more on the law schools. If so, teaching skills without ethics may be a dangerous thing, as American col-
leagues have already discovered. Japanese law schools have the advantage over their U.S. counterparts in that Japan has robust undergraduate law programs through which many students pass before entering the law schools. At the undergraduate level, ethics in the broadest sense, theories of morality and the history of the legal professions in Japan, including their shifting ethical norms, can be studied under the guidance of academicians who have a wide, liberal arts perspective. If students enter Japanese law schools already exposed to such ethical and moral discourse with a sound historical basis, they could profit even more from experiential-based skills and ethics training in Japanese law schools.

1) Traditional lore on the profitability of a new lawyer to a large U.S. law firm runs as follows: the firm loses money on training that person for the first two years; during the next two years the new lawyer is a “wash deal”; only from the fifth year of service is the now in-house-trained lawyer profitable to the firm—and hugely so.

2) American universities around 1900 accepted the emerging law schools built on the Harvard model created by Christopher Langdell (case method, “Socratic dialogue”, focus on appellate decisions, etc.) and have permitted them to stay fairly unchanged despite repeated waves of criticism in part because of money: the case method is cheap (large classes of hundreds of students are possible) yet exciting teaching for both faculty and students. The “Harvard system” means law schools are financially self-supporting, if not highly profitable for universities. Robert Stevens, Legal Education in America: From the 1850’s to the 1980’s note 58 at p. 63 (University of North Carolina Press 1983).

3) This discussion focuses on the moral training of lawyers. The important question of judicial ethics and the special ethical issues of public attorneys must, regrettably, lie outside the scope of this short paper. There is a robust discussion in English of these problems. See e.g., Legal Ethics, vol. 6 part 1 (Summer 2003) for a conference forum on judicial ethics, including articles on England, the Netherlands and Australia.


5) Delaware requires a minimum of a five-month “clerkship” after graduation; Vermont requires six month of the study of law between the end of the first year of law school and within two years of passing the bar examination in the office of an experienced attorney or a judge’s chambers.
6) Of course, colleagues from the civil law tradition argue with some justice that U.S. lawyers know far less substantive law than persons trained in the European-based systems, including the German-derived Japanese system. Leaving aside whether an encyclopedic mastery of substantive law expected in the civil law tradition or the “flexibility” and “analytical abilities” claimed by U.S. lawyers is the key to legal practice in the 21st century, professors in both the common law and civil law traditions need to think hard about whether they provide adequate moral training for their students and whether their teaching techniques are effective.


as the Stanley Report).


16) One should note that this integrated skills and ethics teaching is not confined to legal training. The author recently had the opportunity to discuss with an instructor in an Australian police academy how they deal with the problem of instilling the professional rules for police officers in trainees so that once they start working they do not quickly assimilate to the dominant culture of veteran officers whose "street ethics" are very different from the professed ethics of the police force. The instructor's description of the importance of police cadets to develop their own personal moral identity through a series of four-step exercises (theory, plan, execute and self-reflection on one's behavior) was almost a verbatim account of what Prof. Damon and clinicians, such as Prof. Davis, advocate. The police academy instructor predicted that as more and more officers with this deep sense of their own integrity and their own, personal commitment to the explicit values and norms of the police services enter the workplace, a "tipping point" would occur and the dominant culture in the police force would change.

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