USES OF VALUES IN LEGAL EDUCATION

Graham Ferris

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Cambridge - Antwerp - Portland
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Artwork on cover: Children’s Games, Pieter Bruegel the Elder – KHM-Museumsverband

ISBN 978-1-78068-123-8
D/2015/7849/65
NUR 820


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With thanks and love I offer this book to Daisy, Alex, Cleo, Karen, and Ann
This book is published at a time of some turmoil in legal education in England and Wales. Since the Legal Services Act 2007 and changes in the regulatory environment there has been a series of reports and consultations that have prompted legal academics to reflect upon what they are doing and why. The focus has been on ‘legal services education and training’ with a regulatory concern for the interests of the public as lawyers’ clients at its heart. Many views have been expressed. However, one argument which has emerged virtually unchallenged from this process is the need to develop undergraduate students’ ‘understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values’ (LETR Report, Recommendation 7). This book makes a significant contribution to the debate as to why and how this needs to be done. This observation should not be taken to suggest that the book is primarily concerned with preparation for practice. It is not. It is concerned with legal education as a liberal academic education which uses law as its central discipline. Thus it should prepare students for their lives, whether as lawyers or otherwise.

Graham has identified a number of values which have informed his practice as a legal educator. One which is barely articulated in the book is transparency. It suffuses the book through the very open way in which he presents underlying principles and the rational processes that have led him to them. In so doing he articulates a number of other values which I found hard to resist.

Pluralism is key to his approach to education. This involves respect for difference and an openness to frank debate. But we live in a hierarchical world where students’ self-determination can become perverted by their desire to get through the assessments and thus to meet externally-imposed goals. So another key value is self-determination achieved through relationships that are co-operative rather than manipulative. This has implications for overall curriculum design as well as how the individual teacher works with students.

These, perhaps, are the key values of education. However, we are concerned specifically with legal education, so we are interested in the values that should be applied to evaluating a legal system. Can we agree on these? Graham argues that at a sufficiently high level, we can. He identifies government by political rather than authoritarian process as one value that we might share. Another is rule by rational legal process rather than arbitrary decision-making. Thus we might expect a wide degree of support for principles of democracy and the rule of law,
a foundation for a debate that might incorporate many specific positions on what these concepts mean and how they are best realised. They can be applied to the study of many substantive areas of law.

This sets us up for a consideration of how law actually operates in society. It may be seen as the attempt to control damaging behaviour while facilitating activities considered valuable and permitting optimal personal freedoms. In order to achieve this it seeks to provide a degree of certainty for actors within society. It does so through casuistic reasoning, meaning here not glib, evasive rationalisation, but reasoning that draws rules from individual cases. This is the basis of the common law method and also of the teleological approach to interpretation adopted by the courts in civil law systems. Given that the law operates to resolve disputes in individual cases it is inevitable that casuistic reasoning will apply and Graham embraces this as something approaching a value. How do we apply this to our teaching? The casuistic nature of legal reasoning means that it operates neither at the high level of general theory or the purely anecdotal analysis of individual cases. It seeks to draw rules from individual cases and to do so in a way which is contextually sensitive. In a similar way our teaching needs to recognise that pure theory is too abstract while clinical experience alone may be too concrete. Our educational approach needs to reflect the casuistic reasoning of law itself and embrace a variety of learning approaches.

This analysis forms a thread through Part I of this book, its theoretical underpinning. Part II, a single chapter, is described by Graham as pivotal. It builds on the principle of self-determination with a concern for student well-being. This is another significant topic as student stress appears to be an increasing problem across different jurisdictions. It also has its links with recent literature on resilience and mental health in legal professionals. The basis of the discussion here is ‘self-determination theory’ and ‘cognitive evaluation theory’. I suggested above that self-determination might be perverted by desire to meet externally-imposed goals. Graham addresses this through an analysis of extrinsic and intrinsic motivation. However, what makes this chapter particularly useful is the way in which he demonstrates how these principles have informed the design of a Critical Legal Thinking module. The materials used by students, the way in which classes were conducted and the design of the assessment were all designed to encourage genuine self-determination through a process of co-operation rather than manipulation.

This shift to exemplifying what was discussed in Part I by practical examples of how the insights might be put to useful effect characterises Part III. Firstly, Graham explores why many legal academics are reluctant to teach values. He suggests four reasons and proceeds to demolish each as reasons for avoiding values. However, he recognises that they are useful as a critical standpoint from which to observe our attempts to teach ethics. His critique incorporates an
exposure of the perceived dichotomy between ‘academic’ and ‘professional’ legal education at the undergraduate level. He concludes by pointing out that teaching ethics involves four components. Here he relies on the research of James Rest and Darcia Narvaez who distinguish between moral sensitivity, moral judgment, moral motivation and moral character. Each raises distinct issues and each requires a different approach from educators. The remaining chapters address each of these four components.

In these chapters you will find discussion and argument on many of the issues that legal academics debate. Graham draws on a number of disciplines in analysing these concerns and in presenting his conclusions. He challenges views that moral judgment is not founded on ordinary reasoning and that moral judgment is simply subjective. He points out the dangers of moral certainty. This line of argument is, of course, consistent with his underlying values of pluralism, democracy and self-determination. He points out the dangers of teaching Codes alone (quoting Rhode: ‘legal ethics without the ethics’), identifying the fact that conflicts will inevitably remain.

What makes this particularly useful is the way that he illustrates his arguments with practical examples of materials that can be used, teaching techniques that have worked, and approaches to assessment that are valid and effective. This offers us examples of how to integrate the teaching of values into substantive law subjects. Thus, a land law problem arising from the breakdown of the tenants’ relationship (the arguable injustice of the departing tenant being required to maintain responsibility for a property in which she was no longer living as against the arguable injustice of the remaining tenant being deprived of his home) is used to explore the way in which the legal framing of the problem can lead to different outcomes (a property law analysis tends to support the remaining tenant; a contract analysis the departing tenant – see dicta by Lord Browne-Wilkinson in Hammersmith and Fulham LBC v Monk [1992] 1 AC 478, 491–492). Exploration of the subsequent case law demonstrates the courts struggling with conflicting principles. This reinforces students’ understanding of the fact that conflicts of principle may remain in spite of the application of clear and well-developed rules and that law is better understood as a process than as a series of answers.

The key value of respecting the autonomy of individual students comes to the fore in the chapter on ethical identity. Teachers will recognise the reluctance to encroach on what is properly private. How dare we seek to change students’ core values? Graham’s response to this is based on the value of modelling behaviour, both personally and in the stories we present to students. It also rests on the recognition that moral activism appears to be more fully correlated with having extensive relationships than allegiance to any particular abstract principle. This reinforces the message about how we organise our classes so as to make them a safe place for respectful discussion.
This foreword can only scratch the surface of this thoughtful and stimulating book. If you are looking for a theoretical underpinning to your efforts to introduce values to your teaching; if you are looking for methods of making your classes a more supportive and open place for student discussion and learning; if you are looking for stories or materials to introduce into your teaching; or if you want vivid vignettes to encourage students to think deeply about their values (see, for example, the doctor’s dilemma in chapter 8, section 8), you will find it in this book. Equally, if you distrust the entire project of introducing values and ethics into the law curriculum, you should read it. It may not change your mind, but your arguments will be all the more robust for facing the challenges that Graham poses.

Gray’s Inn
May 2015

Nigel Duncan
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This book moves from the general to the specific and from the theoretical to the illustrative. Hopefully, it also manages to keep the general and theoretical grounded in practical concerns with illuminating examples; and to keep the illustrative more than merely anecdotal but truly illustrative of more general concerns. Thus, it is both theoretical and anecdotal throughout. Nevertheless, the centre of gravity shifts as the book progresses.

Part I is the most general or theoretical of the three parts that make up the book. It attempts to frame the evaluative task and set up aspirational values for practice in legal education. Within Part I itself there is a narrowing of focus. Chapter 1 is concerned with educational values; chapter 2 with ubiquitous contemporary arguments as applied to legal education; and chapter 3 with the values that might hope to be generally agreed upon as fitting for legal educational practice.

Chapter 1 addresses the values of those who educate. It is addressed to academics generally as well as legal academics specifically. It is addressed to institutions and support staff as well as to academics. The modern university is a collective enterprise, and the duties on educators must fall across institutions; we must try to avoid the moral blindness of compartmentalisation of role in the workplace. One central value is critical openness: a value-informed higher education must operate within a pluralist frame of reference. The specific values argued for include a respect for truth and clarity in expression, but also awareness of the importance of university for students as a place where they form their personal identities. Emphasis is given to trying to identify and serve the needs of the students as people, despite the din from voices asserting a legitimate, if not determining, interest in higher education in general and legal education in particular.

Chapter 2 is short and limited in scope. It tries to explain why the language of ethical duty, or fiduciary care, is appropriate in adult education. Modern public discourse is dominated by the claims of the market to resolve most if not all public concerns. The consumer student will force a reform of educational practice. There is no need for ethics in the modern world as the price mechanism will set the right priorities for academic practice. Universities will be forced by competition to improve service provision or will face dissolution. It is pointless to try to find out what students need, when they will let you know loud and clear, by voting with their pocket books. Chapter 2 argues that this line of reasoning is both nonsense and pernicious. It shifts responsibility onto the shoulders of students for institutional failings. It justifies whatever happens to be, and removes responsibility from the account altogether. The first set of arguments
made applies across higher education, although with particular force in legal education. The second set applies solely to law.

Chapter 3 is more specific than chapters 1 and 2 because it is concerned with the values that should inform legal education. Once again it starts with the more general issues, values that might be used to evaluate a legal system. It then moves on to the values that are held by those in the field: the academics, those in professional practice, and those who create law through legislation or judgment.

The central difficulty in identifying values for evaluative purposes is standpoint or perspective. In a diverse modern society it is difficult to find values that can be appealed to as deserving general assent. Valued by whom, and for what reason, are the crucial questions. An effort is made to identify values that are valuable to everyone caught up in a legal system. It is argued that political government is sufficiently valuable to those governed to be a good candidate. In a similar manner, and potentially a broader group, for all of those who are subject to law there is also an interest in the rationality of legal process. Arbitrary rule is as objectionable as authoritarian rule.

In the second half of the chapter the focus shifts to that which is valued within the system, the virtues or excellences of the law, and the nature of the difficulty changes. Within law we have several articulated viewpoints, and we have our practices. It is a matter of trying to make sense of the practices, and understand what is being valued, and why it is valued, that becomes the problem.

For values that can inform an evaluation of law the problem was a legitimate source. For legal virtues the problem is choosing amongst the candidates generated by the legitimate sources. Chapter 3 argues that a very important key to this interpretive effort is the intermediate roles of law and lawyers. It is argued that law is neither concerned with the universal nor the unique, but is about the space between these extremes. Law is casuistic, concerned with actual instances rather than general impression. Law is an attempt to fence in future uncertainty today, a bridge between the present and the future. Lawyers provide a personal service that links clients with systems of social power. Thus, legal practice and the academy value application, realism in expectation, and being useful to those we serve. Legal education reflects this in its use of cases, and in clinical legal education. Here a concern with values illuminates our practice and draws attention to those aspects of educational practice that are weak.

Part II is made up of a single chapter, chapter 4, which might be seen as a pivot on which the books turns. It is concerned with general matters: questions of human psychology and motivation. However, the reason for the concern arises from the very specific worries of the author. Given awareness of student distress it became personally imperative to try and understand what was happening, and how the distress could be alleviated. The general theoretical issues were investigated for the purpose of improving the educational practice of the author. This concern with the psychology of motivation led to a realisation of a need to investigate the role of values in legal education. Historically, chapter 4 preceded chapters 1 to 3. Chapter 4 explains ‘self-determination theory’ and gives an example of how it was used.
in educational practice successfully. The theory is contradictory of motivational practices that are ubiquitous in modern institutional life. A common failure to appreciate the centrality of human values in social organisation is the reason that the book has needed to range so widely. It is what people care about – values – that has been neglected in higher educational practice.

Finally, Part III tries to make the abstract concrete through legal educational practice. The chapters that make up Part III are very much grounded in educational practice. They are an exploration of what we know about teaching in the area of ethical values and behaviour. Although ethical values are a sub-set of all values they are an important sub-set. Ethical values are important if and when they lead to ethical action, or when they lead to unethical action. Thus, chapters 6 to 9 are not concerned with meta-ethics, or talk about ethics. The chapters are concerned with what needs to be done to help people to act in ways that they feel are ethically correct and right. Ethical action requires: an awareness of a potential ethical issue; the ability to think through the potential issues, and decide what should be done; a disposition to care enough about what should be done to want to do it; and the ability to carry the intention into effect. The four chapters are divided between these four analytically separate components of ethical action.

Although very much directed towards what we know about teaching and learning about ethics, Part III still deals with some more general issues. Chapter 5 attempts to deal with objections to teaching ethics specifically, rather than objections to teaching values generally, in legal education. In the more applied chapters it is necessary to have some idea of why different educational action might be effective if the pedagogical endeavour is to be capable of progressive improvement. In chapters 1 to 3 theoretical concerns were illuminated by practical examples. In chapters 6 to 9 practical examples are organised and explained in theoretical terms.

Writing the book has thrown up some previously concealed linkages. Incentives, reinforcement, assessment, consumerism, behaviourism, certification, and status are all part of a rather incoherent but congruous body of beliefs and practices. The ideas that experts should act upon students, and that students are involved in buying market advantage, share a disinterest in who students are. Putting a consideration of values by students into a central place in legal education asserts the importance of who students are, and who they will become. One approach is manipulative and the other is cooperative. After spending several years thinking about this area and reflecting and developing my practice I conclude that cooperative practice is better, and that I should try and help students to grow in a way the students can find satisfying. Furthermore, I think the evidence strongly supports holding this to be a general ethical obligation across higher education generally, and in light of research findings in legal education especially.

It is this belief in the importance of cooperation in the student identity project that pushes ethics to the foreground. Once the desirability of ethical education for the student is identified, two other factors support an emphasis
Ethical discourse supports important general educational objectives, and is especially pertinent to legal education.

Ethical talk is about how we relate to each other, what we praise or blame each other for, and ultimately its boundaries mark the boundary between who counts as a person and what does not. Ethics is about those values that concern our relations with each other. Talk about values, including ethics, is important because often values are submerged in assumptions and ways of being that if reflected upon would be rejected. Education is about helping people to be able to ask questions about values: both their own and other people’s values.

Ethical action is how we treat each other, whether we are compassionate or resentful, trusting or suspicious. How we talk about values affects how we act. People are clearly capable of hypocrisy, but they are also capable of altruistic behaviour. Life can be lived in a fulfilling way, or it can be endured. Our ideals are not a description of how we are, but they do serve to identify for us who we want to be. A liberal or humane education aspires to supporting individuals and society in making better choices and living a better life.

Law is about people and their relations between each other. Ethics is not law but law is a thoroughly ethical subject. Law facilitates life and enforces boundaries on action through the use of social force. Legal education is about how law can expand potential for action or limit liberty of action. In modern society law is concerned with the coordination of people who often do not share the same values, or the same order of priorities amongst those values that they do share. Legal education is about law.

Viewed in this way it is difficult to understand objections to ethics being a major theme and constituent part of legal education. It is even more difficult to make sense of attempts to teach law without teaching about values. The idea of a non-value-informed science of law must surely be as dead as the nineteenth century hyper-rationalism that generated it. And yet: there is clearly resistance to legal ethics, to ethics, to values, to politics and morality corrupting the teaching of law. The concern, if the opposition is sincere, must come from a desire to limit educational ambition: we are experts in law, not in how to live, and there is too much law for us to allow ourselves to be distracted by ethics or values. Such matters may be required for the evaluation of law, but law itself is the essential subject matter of legal education.

This book starts from a concern not with law but with a concern with education. Legal education, to be good education, must engage with values and ethics because it must serve the student need to develop a sense of self that will serve for a good life. In the words of Jerome Bruner:1

ACKNOWLEDGEMENTS

A few words of appreciation are appropriate. I have benefited enormously from the generosity of the people involved in higher education. The annual conferences of the Association of Law Teachers and the Society of Legal Scholars have been regular opportunities to talk and listen and learn from colleagues. I also owe a debt of thanks to the UK Centre for Legal Education Conferences, that did so much for legal education and was so brutally cut down in its prime. The network and series of workshops established in the UK by Nigel Duncan and known as Teaching Legal Ethics UK has been a tremendous support. The US parent organisation, the National Institute for Teaching Ethics and Professionalism, has been inspirational personally as well as institutionally. The series of International Legal Ethics Conferences has invigorated the entire field of ethical education in law. The Legal Education Group at Nottingham Law School has been a constant source of support and inspiration even as it transformed into the Centre for Legal Education. My debt to the scholars whose work informs this book is obvious. My students have, of course, made it all worthwhile.
CONTENTS

Foreword ................................................................. vii
Preface ................................................................. xi
Acknowledgements ................................................. xv

PART I
STATUS QUO AND WHERE TO GO

Chapter 1.
The Values of Legal Educators ............................ 3
1. Aligning with the Interests of Law Students ............... 8
  1.1. Do No Harm .............................................. 9
  1.2. Pluralism and Autonomy .............................. 12
2. Taking Ourselves Seriously: the Importance of What We Care About . . . 13
  2.1. Build Capabilities ...................................... 14
  2.2. Promote Sound Reasoning and Clear Expression ....... 23
  2.3. Promote the Seeking of Truth by Students .......... 25
  2.4. Include Students in a Scholarly Community .......... 31

Chapter 2.
Is it the Duty of Educators to Care What is in the Best Interests of Students? ........................................ 43
1. Why We Cannot Rely upon Consumer Choice to Identify the Best Interests of Students .................................. 44
  1.1. Individual versus Group Utility: the Problem of Prestige Markets . . . 45
  1.2. Education Changes the Consumer: the Problem of Changing Utility over Time ........................................ 47
  1.3. The Future is Unknowable: the Problem of a Non-Ergodic World . . 52
2. How Student Harm Demonstrates Students Cannot Protect Themselves if Academics do not Identify their Best Interests ........... 56
3. Conclusion: It is for Institutions and Academics to Work for the Best Interests of Students ........................................ 65
Chapter 3.
The Content of a Value-Informed Curriculum ........................................ 67

1. Value Pluralism as a Necessary Pose ........................................... 68
2. Values External to Law ............................................................... 71
   2.1. Values that Support Political Rather than Authoritarian
       Government ................................................................. 71
   2.2. The Rule of Law .............................................................. 77
       2.2.1. Legal Decision Making: the Trial as a Paradigm
           of Rationality ......................................................... 79
       2.2.2. The Trial as a Fair Process .................................... 80
       2.2.3. The Trial as a Process that Tests Truth: Toulmin's
           Invariant Features of Argument ............................... 82
   2.3. The Contingent and Contentious Application of Values External
       to Law .................................................................. 86
3. Values Internal to Law ............................................................... 88
   3.1. Casuistic Law ................................................................. 89
       3.1.1. The Problem of Generality in Legal Scholarship
           and Teaching ......................................................... 89
       3.1.2. Law as the Link Between the General Principle
           and the Case at Hand: Casuistic Reasoning ............. 92
       3.1.3. Casuistic Reasoning and the Signature Pedagogies
           of Law ............................................................... 99
   3.2. Bridging Time: Transactional Law ...................................... 103
   3.3. The Lawyer and the Client ................................................ 105
4. Conclusion: the Need for Both External Evaluative Criteria
   and Internal Legal Virtues in Legal Education ............................ 110

PART II.
HOW VALUES SUPPORT LEARNING

Chapter 4.
Student Motivation ................................................................. 117

1. Introduction: the Idea of Intrinsic Motivation ......................... 117
2. The Origins of Self-Determination Theory .............................. 119
3. Extrinsic Motivation ............................................................... 122
4. Helping Students Become More Self-Determined ................... 130
   4.1. Some Experiential Support for the Theory ...................... 131
   4.2. Some Experimental Support for the Theory ................... 134
5. Incentives and Unintended Consequences .............................. 136
PART III.
TEACHING ETHICS

Chapter 5.
Teaching Ethics .............................................. 147
1. The Case against Ethical Conduct as an Educational Aim in Higher Education ........................................ 148
2. The Four Components of Ethical Action .......................... 157

Chapter 6.
Seeing Ethical Problems ........................................ 159
1. Teaching Moral Sensitivity ..................................... 159
2. A Commonly Held but False Dichotomy: Either Cooperating or Competing ........................................ 162
3. Helping Students Reject the False Dichotomy ..................... 164

Chapter 7.
Teaching Moral Judgment ....................................... 169
1. Five Common Misconceptions .................................. 169
   1.1. Is Moral Reasoning Different from Reasoning? .............. 169
   1.2. Ethics are Merely Personal Feelings ....................... 170
   1.3. Ethical Reasoning is Just About Making Us Feel Good After the Fact ........................................ 175
   1.4. If an Ethical Principle is not Absolute then it is not a Principle .... 179
   1.5. Assessing Ethics is the Same as Assessing Any Other Area of Learning ........................................ 184
2. The Use of the Dilemma in Teaching and Learning ............. 191
3. Evidence for Moral Development through Group Discussion .... 193
4. Critical Legal Thinking ....................................... 196
5. A Land Law Dilemma ........................................ 198

Chapter 8.
Ethical Identity ............................................. 203
1. Teaching Moral Motivation .................................... 204
2. Why Do People Act Morally? .................................. 205
3. What Does it Mean for a Person to Have a Fundamental Principle? .... 209
4. Teaching Moral Motivation is Value-Informed Legal Education .... 216
5. Allowing Students to Envisage Themselves More Objectively .......... 219
6. Diversity: Awareness of Difference ............................ 222
Contents

7. Public Role Models ................................................................................. 225
8. Fictional Characters ............................................................................ 230
9. Clinical Legal Education ..................................................................... 234

Chapter 9.
Ethical Action ......................................................................................... 241
1. Teaching Moral Character ................................................................. 241
2. Giving Voice to Values: Some Problems ......................................... 243
3. Giving Voice to Values: Some Strengths .......................................... 247
4. Giving Voice to Values: Some Valuable Insights .............................. 251

Table of Cases ......................................................................................... 255
Bibliography ............................................................................................ 257
Index ......................................................................................................... 273