

**Constituting the New Global Law School:
Concrete Measurement of Legal Ethics and Justice Education**
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The Global Law School Commitment to Ethics and Justice Education

Not many law schools see themselves as having a tangible responsibility to deliver justice education. In the past, some have done so, for example Antioch Law School in the United States, but that model withered with the relentless and apparently successful march of global capitalism over the last thirty years.

Today, some schools may identify mechanisms such as legal ethics courses, clinics and *pro bono* schemes as a part of their formal charter or mission statement. They may even put a lot of money into them, but how many actually see these techniques as a part of a fundamental objective to deliver a radical justice education, as their primary reason for being? Almost none, I suggest.

Deans of course are inevitably and relentlessly obliged to consider and advance final student grade averages, graduate destinations and alumni endowments, not to mention prepare their students to operate in a highly competitive and unforgiving legal practice environment.

But recent global events must now give us all pause to wonder if these legitimate but everyday concerns require some radical repositioning. The risks of debt-based trading were not truly accepted after the *Enron* collapse and general financial deregulation expanded, rather than contracted, contributing to the misery of the last 2 years.

So far, only bankers and investment advisors have suffered the fall from grace cause by their mishandling and fraud of investment vehicles, but it will not be long before lawyers are also asked why they signed off on the contracts and schemes behind these devices; and why they continue to facilitate tax havens and aid depletion of national economic income streams, especially in a rapidly heating climate (no pun intended) that is progressively and globally made more violent by overpopulation and uneven wealth distribution. The usual response that lawyers are no more than their clients' agents will seem more hollow as time goes by.

In these *Terminator* scenarios, it is actually remarkable that lawyers and law graduates have escaped the political criticism that is due, but it is unlikely that they will continue to do so. As some lawyers are exposed as participants in recent global financial chaos, all lawyers and their supporting institutions will inevitably be asked to explain. Lawyers' sense of morality is on the critical list and academic legal opinion agrees. Will your law school be ready for that political reality?

The profession as a whole of course will face even harsher criticism for its contribution to the past 30 years (even if countless lawyers have and still do strive for justice). But along with politicians, they will also pressure law schools for more rounded graduates who are not just black-letter fiends, but also have the emotional resources, knowledge and courage to say 'no' to tax evasion, to bad development schemers and occasionally even, to greed in itself.

And how might you start to do that? ...by self-assessing your school's attitudes to justice education.

In the interests of encouraging all law schools to consider if their mission ought to expand to convincingly include education in the justice paradigm of law, or, if they already aspire to it, to reassess whether that paradigm is in fact being achieved, the question arises: according to what criteria might such a self-assessment proceed? This presentation suggests criteria to allow that process of introspection to occur in one indicator of justice education: legal ethics.

Legal Ethics and Justice Education

In the United States, Anthony Kronman, the well-known former dean of Yale law school, asserted in 1999 that '[A] new and aggressive culture of commercial values, which claims for itself a moral as well as a material superiority, is spreading through the profession as a whole.'¹, but there are also real signs that the earlier, almost slavish focus on 'zealous advocacy' and 'neutral partisanship' - as the basis of professional legal ethics in the United States - ought now be moderated by the view that '...ethical lawyering involves not the suspension of moral judgment but rather the exercise of it....'.²

Law students at least are aware that all is not well. They see that morality, altruism and even justice are in reality ignored in lawyers' ethical education and that this is occurring because ethical principles are never sufficiently examined and promoted by law schools themselves. They 'pick up' on the social and political cynicism and are increasingly doing their time in tertiary and pre-admission education with a mixture of weary determination and 'what choice is there?' commentary.³

And Robert Gordon is one of those who, at least in the US context, make no bones about the real priorities of role morality:

'...lawyers at the apex of their profession have hardly renounced their claims to elite incomes, elite status, or elite influence in legal policy making. Lawyers remain perfectly happy to deploy that influence to advance their own interests, and their clients' and to maneuver around the controls of democratically elected law if it gets in their way. All they have renounced are the social responsibilities traditionally attached to the power and opportunity conferred by elite status. The sense of

¹A Kronman, 'Professionalism', 2 *Journal of the Institute for the Study of Legal Ethics* 89-99 at 90 (1999). See also Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* OUP New York, 2000, section on *The Priority of Profit*, pp 31-38

² S Dolovich, 'Ethical Lawyering and the Possibility of Integrity', 70 *Fordham Law Review* 1629-1685 at 1629.

³ Michael Asimow, *et al*, 'Perceptions of Lawyers-A Transnational Study of Student Views of Law and Lawyers', 12(3) *International Journal of the Legal Profession* 407- 436, p 427 (November 2005)

paralysed helplessness descends upon them only when they are asked to consider other interests besides their clients' and their own.'⁴

Sharon Dolovich goes a bit further and calls not just for passive resistance to inequality but active subversion of injustice, referring to David Luban's endorsement of the "betrayal by the lawyer of a client's projects, if the lawyer persists in the conviction that they are immoral or unjust".⁵ Dolovich also calls for 'institutional support' in the cultivation of integrity, which in turn requires 'a broad-based collective commitment to meaningful institutional change'.⁶ Might this 'institutional support' include some concrete methods for self-assessment of commitment to ethics?

So the question becomes, how can the law and by extension, a law school, take seriously any claims to be interested in affirming and teaching justice and producing graduates who value, when necessary, justice *before* rules, if neither seeks to be accountable for those priorities?

There is currently no vehicle to help lawyers and law schools to reflect on its commitment to ethics and no international recipes which could allow for comparison between law schools.⁷ While the presence or absence of legal ethics courses in a law school are tangible indicators of the commitment of the law school to normative legal education, this objective, without some self-assessment process, is increasingly insufficient.

An Instrument to Measure Legal Ethics Education

It is one thing to discuss the theoretical purposes and difficulties in assessing justice education and another to consider how law schools that are attracted to these ideals might achieve self-assessment in practice. The table below provides one possibility.

My approach is to provide an instrumental mechanism for 'scoring' several sub-criteria according to a numerical value in the 'Totals' column of the table. While it would be possible to prescribe a minimum score in order to help an institution decide if it is sufficiently adequate as a legal ethics educator, initially it is probably better to undertake the self-assessment without regard to suggested minimums. If deans could be persuaded to publish the results, so much for the better. In due course, a threshold score might be thought feasible, but the suggestions in this table are untried and are altogether too tentative in nature to allow a credible attempt at setting a minimum score for a law school.

Specific Criteria

⁴ Roobert Gordon, 'Portrait of a Profession in Paralysis', Book Review of Deborah L Rhode's *In the Interests of Justice: Reforming the Legal Profession* 54 *Stan. L. Rev.* 1427, p 1445. See also Robert W Gordon, 'A New Role for Lawyers? The Corporate Counsellor After Enron', in Susan D Carle, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader*, New York University Press, New York, 2005, 371-384.

⁵ Sharon Dolovich, 'Ethical Lawyering and the Possibility of Integrity' (2002) 70 *Fordham Law Review* 29. [emphasis added]

⁶ *ibid*

⁷ The recently formed International Association of Law Schools sees itself as promoting 'diverse approaches to solving legal problems', without yet stating what those approaches ought to be. See <http://www.ialsnet.org/files/IALS-Ebrochure.pdf>, accessed at 14 October 2008.

A number of key criteria are proposed in order for law schools to self-assess the adequacy of their teaching of legal ethics. These particular criteria have been chosen because their presence in a law school is most likely to lead to reflective graduates, capable of the complex ethical judgments that dominate professional practice:

- There is general agreement within legal education that best practice in legal ethics education involves the insertion (integration) of legal ethics content and concepts into other courses within the overall law school curricula. This approach is also often referred to as pervasive or incremental legal ethics education.⁸
- Further, an ethics module is a course which defines ‘ethical behaviour’ as *considered* behaviour; that which takes account of competing ethical principles and intentionally chooses a position and a course of action that is held *bona fide* by its author. Critically, such a module would not primarily define ethical behaviour in terms of behaviour that falls on one side of a line rather than the other, eg compliance with professional conduct rules.⁹ Two consequences follow from this understanding of ethical behaviour.
 - first, that students in an ethics course are encouraged in some way to explore and if possible understand their own values’ structures and secondly,
 - that the ethics course will provide a lawyers’ typology of some description (eg, lawyers are either zealous advocates or ‘responsible’ to the courts),¹⁰ to help them understand their likely behaviours.

Developing students’ self-understanding of values and ethical typologies is therefore included because of their importance to their ethical resilience in subsequent practice environments. The table contains suggested criteria to allow a law school to self-assess the presence or absence of these ‘markers’ (and other self-explanatory measures of the relative importance of legal ethics curricula) in their institution. The right-hand column and concluding row for ‘totals’ allows a law school to construct an overall numerical measure of their own institution’s adequacy and to allow a chronological picture of their performance over several self-assessment periods.

Proposed Self-Assessment Criteria re Adequacy of Teaching of Legal Ethics

Suggested Criteria	Proposed numerical measures of ethics courses			Totals
All students will encounter legal ethics education in some sense within the academic phase of legal education?	0 (no)	1 (yes)		

⁸ See generally, Deborah Rhode, ‘Ethics by the Pervasive Method’ (1992) 42 *Journal of Legal Education* 31; .Mary Anne Noone and Judith Dickson, ‘Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers’ (2002) 4 *Legal Ethics* 127-145; J. J. Shestack, ‘Taking Professionalism Seriously’ (1998) 84 *ABA Journal*, 70.

⁹ Note that for Kronman, ‘The good lawyer... is the lawyer who possesses the full complement of *emotional and perceptual* and intellectual powers that are needed for good judgment, the lawyer’s most important and valuable trait.’ See Kronman A, *The Lost Lawyer*, Harvard University Press, 1993-, 93.

¹⁰ See for example that contained in, Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics*, Cambridge University Press, Melbourne, 2007, Chs 1 and 2.

There are stand-alone courses on legal ethics topics?	0	1		
Relative importance of professional conduct rules in relation to the underlying principles of moral responsibility in the stand-alone ethics curriculum	0 = conduct rules dominate the course	1 = theories of moral responsibility and/ or ethical type dominate	2 = balance between the two	
Stand alone ethics courses are taught by a full member of academic staff	0	1		
Stand-alone legal ethics courses propose at least one method of classifying 'lawyer types' as an aid to student understanding of legal ethics pedagogy	0	1		
Stand-alone legal ethics courses encourage law students to understand their own values as relevant to the type of lawyer they aspire to	0	1		
Legal ethics courses are assessable	0	1		
Clinical-Ethics Interface: students explore ethics and social responsibility debates in clinical live-client placements under the auspices of law school staff	0 (no)	1 (some but not all elements are present)	2 (yes)	
Ratio of number of ethics' courses to the number of compulsory substantive courses in the academic phase [eg, if there are 3 ethics courses and 11 compulsory courses, ratio is 3:11 or 0.27]				Insert ratio [eg,0.27]
Relative presence of integrated legal ethics education: the ratio of the number of substantive law courses which include ethics modules to the total number of compulsory substantive law courses				Insert ratio
Relative importance of ethics courses in the academic phase: the ratio of teaching staff to students in ethics units is no less than in substantive (black-letter) law units				Insert the ratio of one to the other
Total for Legal Ethics and Social Responsibility Education				

Conclusion

In the interests of encouraging all deans and all law schools to consider if their mission ought to expand to include education in the justice paradigm of law, or, if they already aspire to it, to reassess whether that paradigm is in fact being achieved, it is high time to develop a set of recipes or instruments that might allow such self-assessment to proceed. The truly global law school is one that will elevate justice education to a front rank objective, not as something merely alongside other more conventional objectives - but over and above them.

The best case that can be made for implementing an instrument such as that above is their tangible contribution to a moral rearmament of law graduates and future lawyers, recognising that there is no longer a lot of patience in the wider community, locally and internationally, for lawyers and lawyer-dominated businesses which persist with positivist denial of justice objectives and an individual preoccupation with 'last-century' monetary gain.

Whether such instruments are seen as naïve, or as opportunities to deepen and strengthen (as all quality assurance processes are intended), or perhaps even as radical devices designed to transform legal education, depends on individual law schools and their deans. A commitment to a normative and not a positivist orientation may turn out to be a distinguishing characteristic, but if future law schools are to be 'justice artificers' as opposed to technical colleges; if they are to be better known for their integrity rather than their success in increasing lawyers' incomes and if the global realities of over-population, environmental stress and the politics of terror are all to be tackled by law rather than military budgets, then legal educators and especially deans will need to increase the moral awareness and resilience of their graduates. The tools they choose to improve their educational mission cannot fail to play a vital role in that task.
