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BEYOND BLACK-LETTERISM: ETHICS IN LAW AND LEGAL EDUCATION

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IF ALBERT Venn Dicey or even William Blackstone were to return to legal academe today, they would, after a couple of days' re-orientation, be quite at home. Apart from some distinctly marginal courses and courageous teachers, they would be comfortable with the underlying rationale and performance of the law school curriculum. In the last few months of the twentieth century, the basic commitment remains that of inculcating 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. This is depressing beyond words. 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. In their elegant contributions, Brownsword and Webb both struggle to find a way to persuade the "sceptical student" (and one can assume the "sceptical teacher") that ethics is an important dimension of law and that its study has a legitimate role to play in a good legal education.[1] I not so much disagree with their pleas as I am flabbergasted at the need for such efforts and, if truth be told, I am as disappointed in their still felt obligation to do so in apologetic tones.

So let me be clear about my stance—law is applied ethics or, better still, applied politics and any approach that argues otherwise is mistaken; the black-letter tradition of legal scholarship is a sorry and inadequate excuse for a sorry and inadequate approach to law; and such an approach is not simply one kind of legal scholarship, but is an inferior mode of academic pursuit. That being so, the teaching of ethics/politics in law school becomes not so much a choice as a responsibility. As now ought to be clear and beyond sensible dispute to anyone who has even a nodding acquaintance with law, 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. Even the

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[1] See Brownsword, p.269 and Webb, p.284 In making this claim, I disagree with Brownsword's optimistic argument that "technical black-letterism has yielded ground to the view that law is there to be understood in its context." (at p.276) A brief perusal of leading textbooks still suggests that "black-letterism" occupies centre-stage and any ground that has been yielded is peripheral.

dogmatic refusal to treat or teach law as an ethical/political discipline is offering a crude position on the relation between law and ethics/politics and is doing so as a matter of ethical/political theory.[2] It is surely better to do this openly and honestly than covertly and disingenuously. Accordingly, my task in this brief comment will not be to repeat Brownsword and Webb's irresistible entreaties, but to caution against the dangers of being satisfied with the introduction of ethics/politics into the law school syllabus on any basis and in any way. My fear is that, once law schools can no longer ignore calls to incorporate a serious ethical/political component into their educational mandate, they will do so in a predictably black-letter and non-serious manner that will subvert the purpose of such an exercise in the first place.

In law schools, the problem is not so much what is taught (although there is much to be said about that), but how it is taught. Whatever the topic and whatever the idea, law is taught within the pervasive shadow of the Blackstonian mind-set which, adopting Brownsword's phrase, I shall call "black-letterism". By this, I mean the tendency of lawyers to focus almost exclusively on material in a way that rarely gets beyond a taxonomic stock- taking. Originally a typographical term, "black-letter law" was used to refer to rudimentary principles that were printed in boldface type in traditional law texts.[3] However, 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: the textual formulation of the law is regnant and is treated as a world unto itself. In scholarly terms, the limited aim of black-letterism is to identify, analyse, organise and synthesise extant rules into a coherent and integrated whole; there is much talk of *A*s and *B*s in illustrative exegesis with almost no reference to political context or social identity. Criticism is largely confined to highlighting formal inconsistencies and rooting out logical error. This organisational function is seen as an end in itself with the corollary that any study of the social or political context in which those rules arise or have effect is considered, at best, to be someone else's jurisdiction, like the social scientist or political theorists; it is not so much that such work is unimportant but that it is not a necessary part of the lawyer's learning or expertise.

In undertaking such a black-letter task, the informing assumption is that what the courts are doing is largely right. The task of the scholar is to collate that material and then whip recalcitrant areas into conceptual shape. At its most sophisticated, it is taken for granted that legal doctrine is underpinned by an intelligible and just plan of social life such that the task of the legal scholar is to extend law in accordance with

[2] See Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics ?*, 41 J. OF LEGAL EDUC. 3 (1991).

[3] A DICTIONARY OF MODERN USAGE 109–10 (B. Garner 2nd ed. 1995).

the plan so that it becomes less fragmentary and more intelligible.[4] This tradition of black-letterism runs from Coke, Hale and Blackstone through Dicey, Pollock and Anson to Smith, Treitel and Beatson; it remains as alive and kicking as it ever has been. And, if it were not enough that this limited and stultifying mentality should dominate the study and teaching of legal doctrine, its pernicious effect extends to almost everything that legal scholars and teachers touch. This tendency towards arid conceptualism and abstract coherence is particularly marked in traditional jurisprudence textbooks and courses. Rather than study this vast body of literature as offering challenges to the accepted ways of thinking about law and legal education, it is presented and transmitted to students as a lifeless and dead collection of ideas that is simply to be catalogued and organised into different schools and themes. For instance, even when the work of anarchists, revolutionaries and subversives is taught in law schools, it is done in such a way as to rob it of its vibrancy, relevance and edge: potent critiques are reduced to one more piece to be slotted neatly into in the evolving jigsaw of jurisprudential theory rather than as challenges to that very way of thinking about life, law and justice.

And this will be exactly the problem with teaching legal ethics in law schools that are still in the suffocating grip of black-letterism—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. Because I have dealt with the first two steps at greater length elsewhere,[5] I will offer only passing remarks on them and concentrate in the limited space that I have on the third step.

First, if lawyers approach the study of ethics in the same black-letter way that they approach law (i.e., as a set of rules to be mastered and manipulated to serve the purpose in hand), the impact of including ethics on the law school curriculum will not only be pointless, but will be counter-productive. Indeed, under the sway of such a black-

[4] R. UNGER, WHAT LEGAL ANALYSIS SHOULD BECOME (1996).

[5] See A. HUTCHINSON, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (1999). While the focus there is on legal ethics, its arguments and recommendations apply equally to ethics generally.

letter mentality, the teaching of legal ethics and responsibility will be exactly the same as a course on torts or criminal law—long on formal techniques in pseudo-principled analysis and short on substantive engagement with real problems. As with teaching legal doctrine generally, little is achieved by simply asking students to learn rote-like the rules of ethics without also providing them with some critical framework within which to understand how those particular rules came into being, what they are intended to do, etc. It is the same with ethics. If students are taught only a body of static ethical rules and theories, they will be ill-prepared to adapt those sweeping injunctions and general maxims to changing circumstances or to respond to uncertainty in the rules' meaning or application. As so much contemporary jurisprudence insists, it is never possible simply to "follow the rules" as the question of what "the rules" mean and what it means to "follow" them are never beyond dispute.[6] It is important, therefore, to remember that knowledge of the black-letter rules does not and cannot relieve lawyers of the continuing responsibility to exercise moral judgement about how to apply and develop them in concrete situations; their elucidation requires reference to a wide range of interpretive aids and sources, including conventions, customs, tradition, cultural expectations, institutional norms, and social values. The fact that most decisions and practices by lawyers allow for a variety of manoeuvres or results means that lawyers need to develop a professional facility to comprehend and handle uncertainty, contradiction and confusion.

Like law, ethics is contextual in the sense that involves particular people in particular situations making difficult decisions with particular time constraints with imperfect information and with particular consequences for particular people. And, of course, there is no context of contexts that allows people to fix once-and-for-all their obligations and actions when acting in personal or professional roles. There are few right answers that stand outside any context or debate. For many ethicists, a moral approach to life requires a sense of moral virtue that itself involves the development of a moral character in the hurly-burly of actual living. As a black-letter approach continues to deny, there ought to be a willingness to resist hard-and-fast solutions that are supposed to work in all situations—it is not about opting for one particular ethical theory and then doggedly following its commands in an unthinking way. What counts as acting ethically will always be a contextual question. It bears repeating that there is no universal context that allows people to fix once-and-for-all the obligations and actions of the ethically-aware lawyer. In a world of shifting contexts, there is an even greater need to develop a sense of moral judgement that can respond flexibly

[6] See A. HUTCHINSON, IT'S ALL IN THE GAME: A NON-FOUNDATIONAL ACCOUNT OF LAW, POLITICS AND ADJUDICATION (1999).

and firmly to the different challenges that lawyers face. None of this should be taken to mean that ethical behaviour and decision-making is condemned to be irrational or arbitrary, only that what counts and operates as reason is never outside of its informing social and political context. In this way, ethics can be viewed less as a fixed and independent body of knowledge and more as continuing practice within which people construct acceptable norms of behaviour as they struggle to comply with and reconstruct them. Consequently, like studying law, studying ethics should involve more than learning and applying a set of rules. In contrast to understanding the demands of legal ethics as being satisfied by the memorisation of appropriate institutionalised responses to particular fact-situations, it ought to be about developing a framework within which to understand and reflect upon those rules and the processes through which they develop, crystallise, disaggregate and change.

Secondly, once it is accepted that studying ethics is not about perfecting universalisable and enduring codes of appropriate conduct, but about nurturing an active moral process and commitment for meeting ethical challenges, it should be obvious that there will have to be a different approach to the teaching of ethics in law schools. In much discussion about teaching ethics, it is assumed that people bring with them a fully-formed and critical capacity for moral engagement. This is simply mistaken. Many people, especially young law students, do not have a well-established and personal sense of moral responsibility that they can subject to critical scrutiny and refinement; there is an inadequate basis on which to build such an undertaking. In developing an appropriate and realistic approach to teaching ethics, therefore, the first task is to enable and encourage people to enhance and interrogate their own sense of moral judgement and responsibility. In particular, law students need to confront general ethical dilemmas in concrete circumstances in order to begin to discover (or construct), question and articulate their own moral views before they struggle with the complex demands of a more critical inquiry. Without the opportunity for young lawyers to develop such a critical sense of moral responsibility, the teaching and learning of legal ethics will be a hollow and unsatisfying exercise. Instead, an appreciation that what counts as a good moral reason is a matter of justification and persuasion, not proof and authority and that ethical judgement is something that is made and re-made in the situational process of moral engagement and debate recommends that a more hands-on style of learning is required. If ethical issues are to be taken seriously, there must be an acceptance that active debate and involvement with moral issues is a useful and worthwhile pursuit and that such debate must be incorporated into the learning experience. Most importantly, it suggests that acting ethically is not, as black-letterism suggests, about adherence to a set of rules that is resorted to in

occasional moments of indecision, but is about the development of a moral way of living and lawyering that encompasses an organic set of attitudes, dispositions, and values. The black-letter staples of stand-up lectures and rote exams are not the way to go.[7]

Thirdly, 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 combatted. Instead, there has to be a greater recognition that law and politics are intimately and inseparably related; it is futile and well-nigh fraudulent to study one without the other. However, the study of politics and its relationship to law is not enough in itself. That study must be done in such a way that avoids the pitfalls and problems of black-letterism. There is little point in examining law's political context and determinants if it is done within the capacious reach, but narrowing influence of black-letterism. In an important sense, the nature of ethics and politics are such that any pathways that we choose are likely to be "more like a maze than a motorway."[8] To crave anything more is to allow the lingering spirit of black-letterism to intoxicate us into believing that clear directions and speedy routes can be mapped onto the messy and changing terrain of ethical and political inquiry, especially in mapping and exploring the relation of law and politics.

While the tendency to talk about law in terms of political morality is now well-entrenched in both legal theory and legal scholarship, it is performed as an exercise in abstract analysis rather than engaged inquiry. A perfect example of this more theoretical, but no less damaging approach is found in the leading jurisprudential work of Ronald Dworkin. At the heart of his constructivist work is the naturalist insistence that "law ... is deeply and thoroughly political."[9] While this is promising, the bulk of Dworkin's writings disappoint. For him, the resort to politics is not about getting one's hands dirty in the messy world of real-life circumstances, but it is about armchair philosophising in the rarified pursuit of law's inner intelligibility and principled purity. Championing the Blackstonian idea of law-as-integrity and framing the courts as a privileged forum of principle, he maintains that "integrity is a more dynamic and radical standard than it first seemed, because it encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle."[10] Accordingly, while Dworkin has obliged most legal scholars to concede that law is about values as

[7] This approach is implicit in Webb's view that "ethics is not ultimately about following rules and getting right answers to technical problems, it is about ensuring that values evolve and decisions are taken as part of an examined rather than unexamined life." Webb, *supra*, note 1 at (289). As will be obvious, I also agree with Webb's view that the teaching of ethics in this way must rely on a different set of pedagogical strategies. *Id.* at (293-5).

[8] Brownsword, *supra*, note 1 at (283).

[9] R. DWORKIN, A MATTER OF PRINCIPLE 146 (1985).

[10] R. DWORKIN, LAW'S EMPIRE 220 (1996).

much as rules, he has done so in a way that does not disturb the informing black-letterism that underpins the mainstream academic enterprise. In short, Dworkin has made it safe for traditional scholars to talk about values and remain squarely with the formalised and abstract framework with which they are familiar. In a manner of speaking, Dworkin has dislodged black-letter law only to replace it with black-letter theory.

So what are the politics of black-letterism? What is there about it that elicits such allegiance? And what interests are served by it? These are big questions that deserve larger answers than I can give here. But I can offer some tentative, if crude, responses. To begin with, the claim of black-letterism's adherents that all that is done in its name is and can be done in a technical and non-ideological way is no more convincing today than it ever has been. Under cover of this apparently modest and apolitical intellectualised approach, there is a very real set of substantive biases in play; what is claimed to pass for chastisement in the name of coherence and intelligibility is really a barely disguised effort to maintain and defend the status quo. In the same way that the immediate popularity and lasting appeal of Blackstone's *Commentaries* owed as much to the ideological leanings of its author as to its intellectual excellence, so the contributions of today's leading scholars to synthesise the law into a comprehensive and systematic body of rules and principles are neither neutral, objective nor detached.[11] It is not that there is a vast and overt conspiracy in play, but that the naive craft commitments the mainstream academic community provide are much less benign than many members realise or choose to recognise. However, the complacent assumption that the law is by its nature as law good and that this goodness will be enhanced in proportion to the increasing internal coherence and formal intelligibility wears extremely thin in light of much evidence to the contrary: the camel is no animal for legal academics to emulate and sand is a poor building material for law schools. As Pierre Schlag concisely puts it, "the progressive fallacy is the belief that the aspects of a practice ... that are "good" are constitutive or essential to the practice, while those aspects of the practice that are "bad" are merely by- products of or contingent to the practice."[12]

In short, black-letterism works as a convenient mode of denial. It enables legal academics and lawyers to engage in what 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. The main advantage of this is that they can go about their daily routines without assuming any political or personal responsibility for what happens in the legal process. However, the insistence that lawyering is a neutral exercise that does not implicate lawyers in any political process or demand from

[11] See W. TWINING, BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL 130–32(1994) and generally Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).
[12] P. SCHLAG, THE ENCHANTMENT OF REASON 99 (1998).

scholars a commitment to any particular ideology is as weak as it is woeful. Such an image is a profoundly conservative and crude understanding of what it is to engage in the business of courts, legislatures and the like: it accepts and works within the bounds of the status quo. Lawyers tend to confuse legal justice with social fairness. Indeed, the power and prestige of lawyers flow from their professional allegiance to the state's official laws and existing institutions; lawyers as a group, in spite of the efforts of many individual lawyers, are the enlisted custodians of the status quo. By pretending otherwise and renouncing responsibility for the system that their actions hold in place, lawyers and academics are able to maintain their so-called independence and apolitical authority. The black-letter tradition of legal scholarship is in the business of producing political tracts as much as the politician and polemicist; the fact that they are presented and styled in the opaque jargon of professional disinterest and technical expertise serves to compound the disingenuity. As such, black-letterism is an ideology in the profoundest sense of the world in that it presents a particular and partial view of the world as neutral and natural.

In emphasising that law's development is better explained as contingent responsiveness to historical circumstances rather than characterised as the evolutionary unfolding of an inherent moral logic, I ought not to be taken to be making the very different claim that law develops in line with some external deep-logic, such as Marxism or feminism. While there is clearly an inseparable and organic relation between law and social relations, there is no one account of that relation that is valid for all time, all societies and all legal developments. The connections between legal doctrine and material interests are often as casual as they are causal and as contingent as they are necessary: they are as likely to be as wide of the mark in explaining or predicting doctrinal developments as they are directly on target. It is not that legal doctrine is without any logic or intelligibility at all, but that any efforts to go beyond the most general or the most detailed account are confounded by the doctrinal and social facts; the explanations become either so abstract as to lack any practical predictive force or so elaborate as to capture only a particular historical moment in time. There are always competing rationales and too many plausible explanations to satisfy the foundationalist need for explanatory primacy or closure. In the same way that E.P. Thompson announced that "the greatest of all fictions is that the law evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations,"[13] the reverse can be proclaimed with equal force—law does not evolve, from case to case, by the partial logic of class struggle, true only to established interests, unswayed by logical considerations. By different measures at different

[13] E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 250 (1976).

times, the development of law is a mix of the *logical*—in the sense of attempted compliance with law's own generated (and indeterminate) rationality—and the *expedient*—in the sense of responsiveness to society's own political (and indeterminate) demands. Both logic and expediency infiltrate and affect the operation of each other; lawyers and judges are neither only the lackey of established (or any other) interests nor always the intellectual captives of a professional tradition. Black-letterism sees only the *logical* and, when it does see the *expedient*, it seeks to avert its eyes or obliterate it.

The picture that I have sketched is far from encouraging and some of my despondency may be attributable to end-of-millennium blues. In my brighter moments, I am reassured by the exciting work of many less-traditional scholars—for every Smith and Hogan there is a Lacey and Wells; for every Treitel and Beatson there is a Wheeler and Shaw; and for every Salmond and Street there is a Conaghan and Mansell. However, the distance travelled by mainstream legal scholarship over the past few hundred years, let alone one hundred years, is pitifully small; the ghosts of Blackstone and Coke not only stalk the corridors of legal academe, but they are honoured guests in the offices of the professoriate. Indeed, in the preface to Jack Beatson's 1998 edition *Anson's Law of Contract*, he states that his ambition is "to produce the sort of book that I believe Sir William would have produced, had he been writing it at the end of the twentieth century rather than in the last quarter of the nineteenth century."[14] It is not that such scholarship has no place in law libraries, it is that it is still passed off as the apotheosis of good legal scholarship, as the kind of intellectual achievement to which law students should aspire, and as the kind of legal approach that they should adopt. 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. As such, the ignoble legacy of black-letterism is sadly still very much alive and well. Asking whether we should we teach ethics/politics in law schools is about as sensible as asking whether we should teach law in law schools or whether we should teach in schools. Of course, we should—how is it possible not to?

[14] J. BEATSON, ANSON'S LAW OF CONTRACT v (27TH ed. 1998).