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ETHICS IN LEGAL EDUCATION: HIGH ROADS AND LOW ROADS, MAZES AND MOTORWAYS

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1. INTRODUCTION: TAKING ETHICS SERIOUSLY

By one route or another, many academic lawyers in the United Kingdom have arrived at the view that ethics has a legitimate place in the law school curriculum.[1] Whether one is a "contextualist" who feels the need to place law in its broader cultural setting, or a "liberal" who believes that law students should engage with the seminal ideas of (*inter alia*) moral and political philosophy, or a supporter of the Lord Chancellor's Advisory Committee on Legal Education and Conduct's (ACLEC's) insistence that law students should be ethically aware, one will have no difficulty with the idea that moral (or ethical) discourse should be incorporated into the discourse of our law schools. Even the most die-hard black-letter lawyer might concede not only that moral questions must be addressed where they are so registered in legal doctrine, but also that, in those hard cases where the most sophisticated technical manipulation of the legal materials can do no more than offer a number of options to the decision-maker, moral principles are rightly considered as a supplement to the law. In broad terms, then, a consensus is emerging that law schools should take ethics seriously.

Although there is an emerging consensus in the law schools that morality merits a harder look, it is not a consensus arrived at by academics who have all travelled the same road—as I have intimated already, we have arrived at this common destination in rather different ways. There are, so to speak, both high roads and low roads to the view that ethics should figure in the law school curriculum. In this short paper, I will identify four routes leading to this view. My intentions are fairly modest. I simply want to pick out four rather different positions that contribute to the consensus—which, so understood, is more in the nature of a coalition or a coalescence of views. To give each of these positions a name, let me call them respectively "legal idealism" (see section 2), "intersectionism" (see section 3), "contextualism" (see section 4), and "liberalism" (see section 5). Of course, we should not waste time

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[1] In my own case, I arrived at this point some time ago. See, e.g., "Ethics and Legal Education: Ticks, Crossses, and Question-Marks" (1987) 50 MLR 529; and "Where are all the Law Schools Going?" (1996) 30 *The Law Teacher* 1, at 7–9.

arguing about the appropriateness of these particular designations. Nor should we waste time trying to force everything that we read into one of these positions, for these are presented very much in the nature of ideal-types designed to give us some bearings. However, what we make of each of these positions and their particular prescriptions for the ethical dimension of legal education is important and is a matter for further debate.

My intentions, as I say, are fairly modest. I have no grand conclusion. However, in my concluding remarks, I will touch on the thorny question of how one responds to those students who, sticking resolutely to a black-letter approach, remain to be convinced that ethics has any relevance to either their legal studies or their practical ambitions. To be more precise, I will indicate how one might respond from each of the four positions sketched in the main part of the paper. Not surprisingly, the responses are different because the positions themselves, despite uniting around the need for an ethical element in the law school mission, are different.

2. LEGAL IDEALISM

According to legal idealism, we should conceive of law as essentially a moral enterprise. On this view, which I have sought to defend on many occasions, any discussion of legal validity, legal rights and duties, and the like, is to be understood as a discussion of legal-moral validity, legal-moral rights and duties, and so on.[2] Legal discourse has to be conceived of as a species of moral discourse. Legal argumentation has to be understood as necessarily linked to moral argumentation. It follows that legal education is a species of moral education. Engagement with ethics is inevitable and pervasive, in every sense the rule, in no sense an exception.

Now, although there might be a consensus that morality is to be taken seriously in our law schools, there is certainly no consensus in favour of the legal idealist position—at any rate, there is no such consensus in the United Kingdom. To the contrary, the ruling legal positivist view holds that a distinction is to be drawn between discourse directed at determining what the law is and discourse directed at assessing what the law (morally) ought to be. On this view, legal argumentation is not necessarily a species of moral argumentation. Granted, there may be occasions where legal argumentation (contingently) assumes moral dimensions. However, legal argumentation is essentially autonomous; it is independent of moral argumentation; and, unlike the latter, it is bounded by a range of formal source materials that are identified as legally valid by a politically viable constitutional settle-

[2] See e.g. Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (London: Sweet and Maxwell, 1986; reprinted Sheffield: Sheffield Academic Press, 1994).

ment. Of course, legal positivists do not necessarily advise that we should eschew moral evaluation and critique of the law. Indeed, Hartians claim that one of the practical virtues of a legal positivist approach is precisely that it encourages citizens to distinguish between, on the one hand, the authority conferred by a particular political settlement and, on the other hand, the moral legitimacy of a particular politico-legal order—as Hart himself famously expressed the idea, what matters is that citizens "preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."[3]

This is not the place to attempt to settle such a complex and long-running jurisprudential debate. However, it is worth pausing over the thought that, irrespective of which is the better jurisprudential view, we can be quite certain that legal idealism in the law school would be wholly impracticable. According to this line of thinking, whereas a legal positivist framework allows for straightforward exposition of the law followed by various kinds of evaluation, a legal idealist framework seemingly makes it very difficult to get to first base. Purported exposition of even the most settled doctrine would need to be accompanied by a moral caveat, implying a questionmark about the legal validity of such doctrine, and disagreements of a moral nature would constantly threaten to destabilise legal argumentation. At least with a legal positivist approach, a fair bit of legal learning can be accomplished before we start worrying unduly about precisely what it is that we are learning.

How plausible we find this thought against legal idealism depends to a considerable extent on whether we are assuming a legal idealist law school operating in the context of (a) a prevailing legal idealist culture or (b) a prevailing legal positivist culture. In the former case, the approach taken by the law school would simply reflect a more general way of conducting the practice of law, and this would seem perfectly natural. In the latter case—which is the case that we tend to assume—the legal idealist law school looks awkwardly out of step with general practice. This is not to say that such a law school could not cope. The "law" would be taught at a certain distance; students would be instructed in the rules and principles that are treated as "law" within a particular group; but the moral questionmark would be ever-present. The conceptual framework of legal idealism would make a difference (indeed, a thoroughgoing difference) to the law school curriculum and practice, but I rather doubt that learning within such a law school would grind to a halt.

[3] HLA Hart, *The Concept of Law* (2nd ed) (Oxford; Clarendon Press, 1994) p. 210.

From such a robust position as legal idealism, we can turn to a view that recognises a thinner connection between law and morals and, with that, a less radical approach to legal education.

3. INTERSECTIONISM

According to intersectionism, although we should conceive of law (in legal positivist terms) as a morally neutral enterprise, there are occasions when legal and moral concerns intersect. In other words, although moral argumentation is not a necessary feature of legal practice, it is sometimes appropriate.

We find strong echoes of intersectionism in the *Bland* case[4], the leading case in England on the legality of withdrawing feeding and hydration from persons who are in a persistent vegetative state. When the case was before the Court of Appeal, Lord Hoffmann remarked that the question was one on which "[no] difference can be allowed to exist between what is legal and what is morally right."[5] The task of the court, Lord Hoffmann said, was to base itself "not merely on legal precedent but also upon acceptable ethical values"[6], to explain its decision as "not only lawful but right".[7] At the same time, however, Lord Hoffmann emphasised that the *Bland* case was unusual and that judges would not normally attempt to build their arguments "from moral rather than purely legal principles".[8]

Lord Hoffmann's approach in *Bland* is echoed by the Canadian Supreme Court in the *Rodriguez* case.[9] There, Rodriguez, who was suffering from Lou Gehrig's disease, applied for a declaration that section 241(b) of the Criminal Code (according to which it is a criminal offence to aid or abet a person to commit suicide) violated the Canadian Charter of Rights and Freedoms. In a split 5/4 decision, the Court ruled against Rodriguez. However, Sopinka J's leading judgment for the majority is as much an examination of the underlying moral principles as it is of the case-law. Indeed, in dealing with the question of whether, pursuant to section 7 of the Charter,[10] any infringement of Rodriguez's right to security (autonomy in this context) could nevertheless be upheld as being "in accordance with the principles of fundamental justice," Sopinka J. emphasised that it would not be sufficient "merely to conduct a historical review [of the precedents]".[11] Rather, Sopinka J. said, the Court

[4] *Airedale NHS Trust v Bland* [1993] 1 All ER 821.
[5] *Ibid.*, at p. 850.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*, at p. 850–851.
[9] *Re Rodriguez and Attorney-General of British Columbia* (1993) 107 DLR 4th 342.
[10] Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[11] *Ibid.*, at p. 393.

should make sure that it "is looking not just at the existence of the practice itself (i.e. the continued criminalization of assisted suicide) but at the rationale behind that practice and the principles which underlie it".[12] In these remarks, by Lord Hoffmann as by Sopinka J., we have an invitation to think about those occasions when legal and moral considerations intersect and when, concomitantly, those who are involved in legal education must engage with ethics.

Intersectionists might find their path to ethics in several ways. For instance, they might take their lead from moral cues given in legal doctrine, explicit or implicit, or from what they see as the conspicuously moral nature of certain kinds of issues arising for legal determination.

Starting with the latter, if we are prompted to address ethical questions by virtue of the nature of the issue to be resolved, we will draw a distinction between those sorts of issues that attract moral argumentation and those that do not. Where and how this line is drawn, no doubt, will vary from person to person. However, just as many people associate morality rather narrowly with questions of sexual propriety, it might be thought that moral questions arise only in a narrowly drawn category of legal cases. Disputes in medical law will sometimes fit this description—in the Diane Blood litigation,[13] for example, it mattered little that the Human Fertilisation and Embryology Act, 1990 clearly required written consent by the sperm donor; there was simply no way that the legislation could foreclose ethical debate in and around such a highly-charged application. Much the same is true, too, of cases like *Shaw*,[14] *Brown*,[15] and *Wilson*[16] in the criminal law: no matter what the statutes and precedents provide (or omit to provide), the legal agenda is driven by ethical considerations. As Lord Hoffmann suggests, however, such occasions will be the exception rather than the rule.

Alternatively (or additionally), intersectionists might look to the presence of ethical cues in legal doctrine to signal that it is an appropriate occasion for lawyers to turn to moral debate. Such cues might be explicit or implicit. For clear examples of such explicit cues, we might cite the morality clauses of patent regimes. Thus, Article 53(a) of the European Patent Convention provides that patents shall not be granted for

> inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.

[12] *Ibid.*, at p. 394.
[13] *R v Human Fertilisation and Embryology Authority, ex parte DB* (1997).
[14] *Shaw v DPP* [1962] AC 220.
[15] *R v Brown* [1993] 2 All ER 75; and on appeal to the ECHR, see *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39.
[16] *R v Wilson* [1996] 3 WLR 125.

And, in somewhat similar terms, Article 6(1) of the Directive on the Legal Protection of Biotechnological Inventions,[17] states:

> Inventions shall be considered unpatentable where their commercial exploitation would be contrary to *ordre public* or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.

Equally, though, we might find the prompt in an implicit cue—for example, in the US patent regime, where there is no explicit morality clause, the concept of "utility" has been employed to exclude unethical inventions from patentability.[18] Similarly, prior to the many explicit moral cues given by the Human Rights Act 1998, we might find implicit cues in the reasonableness standards around which judicial review is constructed[19]—and, more generally, we might interpret concepts such as "reasonableness;", "good faith", "unconscionability" and the like as open invitations within legal doctrine to recur to moral considerations.[20]

The concept of consent, or informed consent, is a good example of a doctrinal feature that can be accepted and applied at face value or opened up for moral argumentation—after all, a person's consent only carries normative force where it is free and informed, where the consenting party "know[s] the relevant facts and act[s] without being under pressure".[21] Consent, to state the obvious, is of the essence in contract law.[22] Without the contractual consent of the defendant, the principles of freedom of contract and sanctity of contract add nothing to the plaintiff's case. The law perforce must stake out a position on the conditions of consent. It must specify how far the pressure to deal can go without this being inconsistent with voluntary agreement (raising questions of duress and undue influence, and the like); and it must determine the informational pre-requisites of consent (raising questions of fraud, misrepresentation, non-disclosure, mistake and so on). If these conditions

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[17] Directive 98/44/EC; OJ L 213, 30.7.98, p. 13.

[18] Cf Robert P. Merges, "Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies" (1988) 47 *Maryland Law Review* 1051, esp. at 1062–1066.

[19] Generally, see Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997); and, on the Act, see Keith Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 MLR 79.

[20] See e.g. Roger Brownsword, Norma J. Hird, and Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (Aldershot, Ashgate, 1999); and Sir Anthony Mason, "The Impact of Equitable Doctrine on the Law of Contract" (1998) 27 *Anglo-American LR* 1. Thus, at p. 12, Sir Anthony says:
[We should] think of unconscionable conduct in terms of that which shocks the conscience, something which is harsh or oppressive in that it involves taking advantage of another's special disability or disadvantage. So understood, the concept is not one which is open-ended, to be applied according to the subjective whim of the Judge ... In other words, Judges are the arbiters of community standards and expectations, just as they are the arbiters of community standards in applying the standards of reasonableness in common law cases ...

[21] See, George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996) 112.

[22] See further, e.g., Randy E. Barnett, "A Consent Theory of Contract" (1986) 86 *Columbia Law Review* 269, esp. at pp. 300–319.

are clearly stated in the law, we might let sleeping doctrine lie. However, if we decide to run with the hounds, we soon find that the law is deeply unsettled below the surface. As Duncan Kennedy pointed out in a seminal paper, the concept of voluntariness is elastic:

> [W]ithout doing violence to the notion of voluntariness as it has been worked out in the law, [we] could adopt a hard-nosed self-reliant, individualist posture that shrinks the defenses of fraud and duress almost to nothing. At the other extreme, [we] could require the slightly stronger or slightly better-informed party to give away all his advantage ... If we cut back the rules far enough, we would arrive at something like the state of nature—legalized theft. If we extended them far enough, we would jeopardize the enforceability of the whole range of bargains that define a mixed capitalist economy.[23]

This implies an underlying conflict between an ethic of individualism and an ethic of co-operativism (or altruism as Kennedy has it). Thus:

> Confronted with a choice, [we] will have available two sets of stereotypical policy arguments. One "altruist" set of arguments suggests that [we] should resolve the gap, conflict, or ambiguity by requiring a party who injures the other to pay compensation, and also that [we] should allow a liberal law of excuse when the injuring party claims to be somehow not really responsible. The other "individualist" set of arguments emphasizes that the injured party should have looked out for himself, rather than demanding that the other renounce freedom of action, and that the party seeking excuse should have avoided binding himself to obligations he couldn't fulfill.[24]

In other words, individualists and co-operativists have different conceptions of consent (driven by different background ethics), these particular conceptions then shaping whether we think that parties have agreed (and, concomitantly, whether they should be excused).

Of course, it is not only the underlying competing conceptions of the concept of consent that invite ethical reflection. The idea of consent, however we read it, is closely related to the importance that we accord to the individual's right to autonomy or self-determination. Yet, whether we are thinking about autonomous choice in contractual or in medical contexts, there are some choices that we are reluctant to endorse because of their potentially damaging effect on the welfare of the individual concerned. In both contract law and medical law, this

[23] Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 *Maryland Law Review* 563, 582.

[24] Ibid., at 581.

leads to protective exceptions, sometimes defended in openly paternalistic terms but sometimes rationalised by doubting the capacity (for autonomous judgment) of the individual concerned.[25] Equally, there are occasionally hard cases where we are reluctant to endorse one person's opportunity for self-regarding autonomous choice because we are unsure about the ability of others to exercise the same degree of autonomy. Thus, in the *Rodriguez* case mentioned above, what divided the Canadian Supreme Court was not so much whether it was important to respect autonomy, but how best to put in place a legal framework that both facilitates free choice by persons (if necessary, by giving effect to a person's freedom to confer immunity on "interfering" others) but also protects those who are vulnerable against coerced choice masquerading as autonomy (thus protecting a person's freedom to be immune from unwilled interferences).

Enough has been said about intersectionism. The more that one becomes aware of it, the more pervasive it seems; or, the more that ethics enters by implicit legal invitation, the less exceptional it becomes. Nevertheless, even at its broadest, intersectionism treats the connection between law and morals as contingent.

4. CONTEXTUALISM

As I noted in my introductory remarks, one of the changes apparent in the culture of modern English legal education is that technical black-letterism has yielded ground to the view that the law is there to be understood in its context, rather than simply committed to memory and mechanically applied. Of course, this has not been an overnight conversion, the "law in context" project going back at least thirty years and being supported for much of that time by a widely admired series of innovatory texts.[26] Nevertheless, the way in which contextualism has found a natural place in the orthodoxy of legal educational thinking is significant.

Reflecting this changing culture, ACLEC, in its *First Report on Legal Education and Training* (1996), added considerable weight to those who advocate a contextual approach to legal education; for ACLEC underlined the importance of contextual knowledge, equating it with "an appreciation of the law's social, economic, political, philosophical, moral and cultural contexts" (para. 2.4). Taking a lead from this approach, legal education must at least make students aware of the moral context for law for ethics represents a significant strand to be

[25] See e.g., Sabine Michalowski, "Court-Authorised Caesarean Sections—The End of a Trend?" (1999) 62 MLR 115; Caroline Bridge, "Religious Beliefs and Teenage Refusal of Medical Treatment" (1999) 62 MLR 585; and Peter de Cruz, "Adolescent Autonomy, Detention for Medical Treatment and *Re C*" (1999) 62 MLR 595.

[26] Published initially by Wiedenfeld and Nicolson but now part of the Butterworths law list.

woven *into* our understanding of law. Similarly, in the Guidance Notes to the draft Benchmark Standards for Law, now being developed by the QAAHE,[27] study in context is seen as one of the elements in acquiring knowledge of law. Thus:

> Within different kinds of degree programme, there will be different emphases on the context of law. Each institution would specify the kinds of context to which they would expect their students to relate their knowledge of substantive law. Study in context includes that a student should be able to demonstrate an understanding, as appropriate, of the relevant social, economic, political, historical, philosophical, ethical, and cultural contexts in which law operates, and to draw relevant comparisons with some other legal systems.[28]

Granted, this leaves some curricular margin of appreciation, each law school being left to make its own judgment as to the relevance and appropriateness of particular contexts. Even so, a law school that decided to prioritise the ethical context could claim to be acting in a way that was perfectly consistent with the thinking of both ACLEC and the drafters of the law benchmark statement.

Without doubt, the benchmark statement is right in allowing for contextualism to be implemented in more than one way. There is, however, an important distinction between (1) the strategy that a law school adopts to make its students aware of context and (2) the reasons that a law school has in seeking to make its students address the context for law. With regard to the first matter, a law school might think that *ethics* is not the best way of bringing context into play and so its strategy might prioritise other kinds of context. For those who see contextualism as the conduit to ethics, this would be disappointing. The point that I want to emphasise, however, relates to the second matter—that is, what precisely is it that a law school hopes to achieve by bringing students face-to-face with context? In the case of ethical context, there are, I think, two rather different pedagogical objectives.

One version of contextualism is concerned with mapping the broader cultural landscape beyond the law and raising the consciousness of young lawyers. Even if ethics is our only frame of contextual reference, one might try to do this in more than one way. For example, one might try to set the scene for subjects such as family law, labour law, or contract law by painting in that part of the shifting cultural backcloth concerning, respectively, marital, industrial and business relationships. Similarly, subjects such as consumer law, welfare law, and environmental law

[27] The intention is to replace the present model of TQA with a new methodology, encompassing both quality and standards, and within which the subject benchmark statements will play a pivotal role. The new methodology is being piloted in a number of law schools, mainly in Scotland and Wales, and the draft Benchmark Standards for Law cited in the text is the version being used in the trials.

[28] See para. 14, page 5, of the Guidance Notes.

might be introduced by sketching the values prompting the development of these areas of law. Of course, as English law acquires an increasingly European flavour, the context assumes larger, regional, proportions. The intention remains, however, to describe the cultural setting.

In another version, contextualism has more pronounced normative intentions. The purpose of painting in the cultural backcloth is not simply to record that certain values are accepted (or disputed), noting that legal doctrine reflects (or does not reflect) community values, but to engage critically with law in its cultural setting. Again, this normative turn might be developed in more than one way. In *Life's Dominion*, Ronald Dworkin makes the helpful point that an ethical appreciation of law can be generated either "inside out" (i.e. from law to ethics) or "outside in" (i.e. from ethics to law).[29] If contextualists work "inside out;", they might start with legal doctrine that seems problematic, develop the puzzle in a larger ethical context, and work towards a defensible critical position. If, on the other hand, contextualists work "outside in;", then they start somewhere beyond legal doctrine and work back towards a critical assessment of the law. No doubt, there is much to be said for trying out various strategies to see how law students (who are often prone to "switch off" once the discourse moves away from the law (to context) and from what the law is (to what it ought to be)) best remain engaged with normative issues. However, my present purpose is not to discuss the merits of different teaching techniques so much as to underline the point that a normative version of contextualism will engage with ethics with a different intent to its mapping contextual counterpart.

Another way of expressing this distinction is to consider with which "area of performance" (in the language of the Benchmark Statement) ethical contextualism best fits. Does context belong with subject-specific knowledge, or with analysis, synthesis, critical judgment and evaluation? If the mapping version of contextualism seems to belong with the former, the normative version seems to fit with the latter. Of course, this is not to say that attention to ethical context must be classified in one way or the other. However, precisely because context can be put in play for more than one reason, contextualists need to think rather carefully about why they judge that the ethical context for law matters.

5. LIBERALISM

ACLEC, in its *First Report on Legal Education and Training* (1996), sets out five requirements for legal education and training, namely: intellectual integrity and independence of mind; core knowledge; contextual knowledge; legal values; and professional skills (para 2.4). Of these five requirements, ACLEC sees the first as being definitive of *degree level*

[29] Ronald Dworkin, *Life's Dominion* (London: Harper Collins, 1993) at pp. 28–29.

education; and the second, third, and fourth requirements as particularly the concern of *law* degree programmes. To these requirements, ACLEC subsequently (para 4.4) adds a range of transferable intellectual skills, before making its landmark recommendation (para. 4.6) that "the degree course should stand as an independent liberal education in the discipline of law, not tied to any specific vocation." But, what do they mean by a liberal approach to legal education?

In general terms, a liberal legal education seeks to prepare the graduate for intelligent participation in the politico-legal life of the community. As Tony Bradney (drawing on Mill) puts it, the aim is not so much to produce skilful lawyers as "capable and cultivated human beings"[30]—human beings who, in Hugh Collins' words "have a critical and reflective attitude towards the institutions of society".[31]

These ideas are strongly reflected in ACLEC's thinking, the Committee saying that "a liberal and humane education implies that students are engaged in active rather than passive learning" (para 2.2) and it repeats Dawn Oliver's[32] elaboration of the emphasis on understanding that comes with a liberal education (para. 4.4). Thus:

> A liberal education will have as an aim that students should not merely *know or know how to* but *understand* why things are as they are and how they could be different ...

In the spirit of life-long education, however, the logic of liberalism implies that the mode of active learning inculcated as a student is continued after graduation. Thus, once young lawyers rejoin the broader community, they are in a position to participate in the debates about community purpose, policy and principle that form the agenda of their time—whether (to take some topical issues) these are debates about the impact of the Human Rights Act 1998, the Government's access to justice measures, or the merits of the decisions handed down in the Pinochet litigation,[33] and so on. None of this presupposes that liberally-

[30] Tony Bradney, "The Quality of Teaching Quality Assessment in English Law Schools" (1996) 30 *The Law Teacher* 150, 153. And, according to Alan Gewirth, in "The Moral Basis of Liberal Education" (1994) 13 *Studies in Philosophy and Education* 111, at 111, "*liberal* education is a process of fostering abilities and dispositions whereby persons can make effective and morally justified use of their freedom. The freedom in question includes the capacity for acquiring and critically evaluating knowledge and ideas and for using them effectively in the various circumstance [sic] of life. In the first instance this process is for the good of the persons being educated; but as moral it also takes positive account of the good of others, including the society as a whole."

[31] Hugh Collins, "Aims of Teaching the Law of Contract" in Peter Birks (ed) *Examining the Law Syllabus: The Core* (Oxford: Oxford University Press, 1992) 35, 41.

[32] Dawn Oliver, "Teaching and Learning Law: Pressures on the Liberal Law Degree" in Peter Birks (ed) *Reviewing Legal Education* (Oxford: Oxford University Press, 1994) 77, 78; and see, too, her "The Integration of Teaching and Research in the Law Department" (1996) 30 *The Law Teacher* 133.

[33] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening)* [1998] 4 All ER 897; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577; and *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)* [1999] 2 All ER 97.

educated law graduates will take a particular (favoured by academic lawyers) party line in politico-legal debates, or even that they will be conscientious in supporting the ordinary democratic processes associated with representative government. However, it does presuppose that "the law" will hold no mystery for these graduates and that they will be capable of making a rational assessment of the arguments relating to debates arising in and around the practice of law.

In ideal-typical terms, the essence of a liberal legal education can be captured in the following features:[34]

- In the most general terms the mission of the law school (in both its teaching and its research activities) is to work towards an understanding of the phenomenon, or practice, of law.
- The project of understanding law implies (a) a pervasive inquiring approach (a pervasive concern with questions of evaluation, explanation, and so on) and (b) a willingness to follow lines of inquiry into disciplines that contribute to our appreciation of law.[35]
- Law school discourse, to adopt Roberto Unger's description, should be "a sustained conversation about our [socio-economic and political] arrangements."[36] As a result of participating in this conversation, at the point of graduation, students should have the capacity to engage in rational debate about issues arising in and around the practice of law, including the capacity to form their own independent judgments on such matters.
- Although there is no standard way in which the liberal model should be implemented (in principle, it could be instantiated in many different forms), it is a *sine qua non* of this project that law school academics, whether in their role as teachers or as researchers, should act as exemplars of the inquiring approach.

What this means is that, in principle at least, ethical questions must always be on the law school agenda. Whether the question concerns the position to be taken by law in response to some new phenomenon (for example, the regulation of genetics[37] or electronic commerce[38]) or proposal (for example, the proposal that the doctrine of privity of contract should be relaxed, a general principle of good faith adopted, and so on), or the analysis and interpretation of existing legal provisions or deci-

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[34] Here, I am drawing on my paper, "Law Schools for Lawyers, Citizens, and People" in Fiona Cownie (ed) *The Law School: Global Issues, Local Questions* (Aldershot, Dartmouth, 1999) 26.

[35] Generally, this is the manifesto for legal education set out in John N. Adams and Roger Brownsword, *Understanding Law* (2nd ed) (London: Sweet and Maxwell, 1999).

[36] Roberto M. Unger, "Legal Analysis as Institutional Imagination" (1996) 59 *Modern Law Review* 1, 8.

[37] See e.g., Roger Brownsword, W.R. Cornish, and Margaret Llewelyn (eds), *Law and Human Genetics: Regulating a Revolution* (Oxford: Hart Publishing, 1998).

[38] See Roger Brownsword and Geraint Howells, "When Surfers Start to Shop: Internet Commerce and Contract Law" (1999) 19 *Legal Studies* 287.

sions, the instinct to evaluate should be encouraged rather than suppressed. Contrary to the law school culture (so characterised by Karl Llewellyn) in which ethics are knocked into a temporary state of anaesthesia,[39] the culture should be one of critical evaluation—which necessarily leads to ethical considerations.

6. CONCLUSION

As we have seen, several roads lead to the conclusion that ethics has a legitimate place in the law curriculum. However, these are not the same roads and we can get some feel for their differences by considering how their proponents might respond to students who are sceptical about the relevance of ethics.

Student scepticism about the materiality of morality might be expressed in more than one way. Some sceptics might object that they came to law school to study the law; if they had wanted to study moral philosophy, they would have enrolled in Humanities. Others might object that they prefer to deal with the legal facts rather than chasing after their tails in speculative ethical debate. At root, though, the sceptical claim is that the terrain of the law is that of hard fact whereas with morality it is the shifting sand of mere opinion. How would each of the four positions view such scepticism?

From the legal idealist standpoint, the response is fairly straightforward. If legal reason is a species of moral reason, the nature of moral judgments will inevitably affect the nature of legal judgments. If there are no right answers to moral questions, then there cannot be right answers either to legal questions. This might be a matter for regret; but, if this is the way things are, then the sooner that lawyers find a practical way of pursuing the moral enterprise in which they are engaged, the better. On the other hand, if there are right answers to moral questions, and if these right answers regulate legal validity and legal obligation, then the need to subject so-called "legal" doctrine to moral scrutiny is plain.

For the liberal, intersectionist, and contextualist, such a response is not available. In the case of the liberal, inquiry is everything; everything is to be questioned; it cannot be assumed that law and morals are necessarily connected. For the intersectionist, as for the contextualist, the starting point is that law and morals are not necessarily connected.

How, then, might liberals, intersectionists, and contextualists respond? Provided that the law school has given clear advance notice of the particular way(s) in which ethics figure in its mission, then each position has a perfectly adequate response to complaints of unfair surprise and the like. For example, liberals might say to our hypothetical student sceptics (who apparently make some crucial assumptions about

[39] Karl N. Llewellyn, *The Bramble Bush* (New York: Oceana Publications, 1951) at p. 101.

the nature of law, the fact/value distinction, and moral epistemology) that, if they expect to be able to exclude themselves from participation in moral inquiry by standing on, and refusing to debate, these assumptions, then they have not read the conditions on their entry tickets to the liberal law school. Equally, if the sceptics' line is that they want only to familiarise themselves with the legal facts, then liberals can retort that they have missed that important paragraph in the prospectus that emphasises active learning rather than mere passive reception.

So far so good. However, if the sceptics doubt the ethical project at a level beyond reasonable expectation, what deeper defence is available to liberals, intersectionists, and contextualists? How can the ethical dimension of the mission be justified?

For liberals, the justification lies in a particular conception of what it is to be a university and, with that, what it is to be a university law school. Keeping the channels of inquiry open is of the essence of such an institution and this is why ethics (as one line of inquiry) must be a part of the curriculum.[40] Sceptics who genuinely wish to engage with and dispute such a conception, are already joining in a liberal-inspired dialogue and exhibiting precisely the inquiring traits that the law school seeks to cultivate. For intersectionists, it is simply a matter of following the moral signposts given by the law. However, where the moral signposts are less than explicit, the sceptics will need to be told very carefully why a particular ethical excursion is necessary. For, from a sceptical perspective, each moral diversion from the legal highway will need its own justification. As for contextualism, it depends whether it is the mapping or the normative version that is in the dock. In the case of the latter, attack is probably the best form of defence: given that *university* law schools are distinctively concerned with debating both what the law is and *what it ought to be*, an engagement with ethics is essential. In the case of the former, the claim that an awareness of the ethical setting "raises consciousness" might seem a bit limp. Perhaps the better strategy for this version of contextualism is to relate the exercise to the best practice of lawyers. Just as, for example, we achieve a sounder interpretation of a particular section in a statute by reading that section in the context of the statute as a whole, so we achieve a sounder understanding of the statute by placing the legislation itself in its broader social and cultural context (thus taking us to the background ethical context). If students are not persuaded by such an attempt to emulate best legal practice, there is not much more that a (mapping) contextualist can say.

So, we arrive a modest conclusion: just how seriously we take ethics in legal education, and precisely how we respond to those who are sceptical of the turn to morality, will vary depending on the particular road

[40] Cf Roger Brownsword, "Where are all the Law Schools Going?" (1996) 30 *The Law Teacher* 1, at pp. 5–6.

that we have taken. The high roads (legal idealist or liberal) perhaps imply a more pervasive concern with ethics than the low road interpretations of contextualism and intersectionism; but, for present purposes, I simply want to remark that in legal education, as in legal decision-making itself, the pathways that take us to ethics look more like a maze than a motorway.