CONTEXT, CRITICISM & THEORY

A case for getting law students engaged in the real thing – the challenge to the saber-tooth curriculum

H Brayne

34 *Law Teacher* 1, 2000, pp 17-39

What is our present collective view on the place of experience within undergraduate legal education? As with previous declarations on the content of the academic stage, the professions have confined their prescriptions to matters of subject coverage in law and the development of traditional academic legal skills. We at present pursue a non-experiential approach because historically it set us apart from an apprenticeship model and there is no requirement from any external bodies to make us think again.

The present outcome set down by the professional bodies and the Quality Assurance Agency belong in the cognitive domain. Anecdotal evidence suggests experience of legal practice by the student can help meet these outcomes.

The idea that lawyers should develop an understanding of psychology is not new. Psychological understanding should be used not just to help students to understand how the observed others, the actors in the legal process, are behaving. The student – the eventual practitioner – should use an understanding of psychology to develop insight into, and control over, his or her own experience and behaviour. That there is at some level an emotional dimension to the study and practice of law is inescapable. There is an emotional commitment implied in the thirst for knowledge and truth. There is an emotional drive in the desire for a rewarding career and personal power or wealth.

This is not to advocate that the normal intellectual, critical and analytical skills which we aspire to develop should be replaced by a curriculum focussing on the development of the emotions. This would be no more persuasive than the argument that learning professional skills should replace the intellectual skills in the curriculum. The practice of law requires, perhaps above all else, the use of cognitive skills. Emotional factors or the lack of what is coming to be called 'emotional intelligence' can interfere with the exercise of cognitive skills.

The issue of education and legal ethics has been the subject of much recent research and debate, but there is little evidence that the research is leading to curriculum change. Enabling students to experience the law and face real challenges might broaden the outcomes available to the curriculum designer.

As a result of the narrow conventional approach, law students will deal with law primarily as a series of intellectual abstractions that permit them to avoid unpleasant emotions and result in a barrier between themselves and all truly professional operations. Students have already acquired their own value system on arrival at law school and they have put up tough psychological defences around it. Law school then reinforces this.

The solution is not to be found purely in increasing the knowledge of students and practitioners. Knowledge of rules is not the same as development of a personal values framework. Ascending levels of ethical reasoning may be summarised as follows: (1) punishment and obedience (fear and deference); (2) instrumental relativism (personal gain - not losing out); (3) interpersonal concordance (being a good boy/girl); (4) maintaining law and order (rules, laws and conventions); (5) developing social contracts based on majority interest; and (6) universal ethical principles (justice to all). It would be hard to advance a proposition that aimed for law graduates to achieve less than some development at levels 4 upwards.

A rule-bound approach to teaching professional practice codes, by teaching that correct answers can be found, is an inadequate ambition for law teachers. The ability to analyse legal rules and decisions in a quest for the right answer to legal questions is not enough. Levels 5 and 6 imply an ability to take action and take decisions in the absence of a right answer provided by the rules. Reliance on sanctions and rewards, or even reliance of the sanctity of rules, is a retreat to the 'comfort zone'.

Specific curriculum outcomes might prepare students to get out of the comfort zone. The curriculum implications require outcomes which cover not only the cognitive domain but other outcomes which are performative, affective, strategic emotional management and self-insight. These outcomes seem to be as desirable in a lawyer as in a manager.

If our law schools choose to leave these outcomes to experience acquired before or after law school, rather than adopting them as explicit outcomes within the environment which we control, we are perhaps making three implicit statements: experience matters in ethical and moral development; but we in the academy are not able to provide a planned and controlled environment by which this learning from practical experience can be introduced; so we are content to leave its acquisition to less systematic processes under less scholarly supervision.

On many fronts law schools have been accused of failing. There are doubts about the very intellectual achievements upon which the academic stage is premised. Perhaps the answer does not lie in adjusting or increasing which we already do, but in making space for a different approach. A clinical model is part of the answer. Clinical methods and experiencing the law while a student are not in themselves a goal but a means to an outcome. If law schools do not start to bridge the gap between the experience of practice and the theories of the academy, the immense gap between the theoretical formalities of justice presented by the law school version of the appellate-case method of instruction and the reality of the lower courts creates in many students anger, frustration and, ultimately, defensive cynicism.

The dangers of sending students out without having faced the kinds of challenge that experience will present them with are real, particularly given the increasing pressures on the new practitioner. Resistance to incorporating experience of legal practice into legal education runs deep.

There is not space for everything and to throw out parts of the existing curriculum is a threat to the expertise and even livelihood of many. But the prize which might be obtainable if we create space is worth keeping in view. The capacity to develop an effective personal standard of professionalism is based on the freedom to perceive clearly external demands and pressures, one's own internal value judgments, as well as those self-centred wishes and impulses that run counter to professional goals. Opportunities to deal with such problems are too infrequent during students days. Students need both the ongoing pressure of frequent demands to evaluate professional experiences objectively and then to integrate such learning into mature patterns of behaviour.

Pedagogy and ideology: teaching law as if it matters

N K Sam Banks

19 *Legal Studies* 4, 1999, pp 445-467

Considering whether law students receive a legal education that is meaningful and relevant to them raises interesting questions about what education is, what it's for, how we teach, how we learn and, essentially, how we know what we know. We need to challenge the perception of a single, monolithic interpretation of the law which disregards competing interpretations and contexts. Doing so brings students into their own learning who might otherwise be left outside and better contextualises law for all students.

University education in its widest sense is a whole-person process, where the focus is not so much on the teaching and learning of specific skills or training, as it is on the cultivation of personal autonomy, intellectual independence and the development of lifelong critical perspectives. At the very least, a university education ought to strive to prepare people for a changing world by promoting the intellectual and analytical skills that will assist them in assessing choices about their lives.

Legal education has long been the subject of inquiry into its purpose and methods and the landscape of legal pedagogy reflects the diversity of interest it has generated. More recently, there has been a focus on legal education within a wider knowledge context, examining the teaching and learning of law as part of the overall project of developing analytical and conceptual skills as exemplified in the whole-person process of a university education.

What exactly the form that this 'liberal and humane' legal education should consist of is the subject of considerable curiosity. At the very least it seems to embrace the notion that law must be taught within the context of the society in which it operates. There has, of course, been much attention paid to the teaching of 'law in context' across the literature, both from an experiential and academic stance. At one end of the spectrum is the view that 'context' consists of such practical and practice-based 'lawyer-in-action' skills as client interviewing, drafting, oral argument and the like. Certainly these are appropriate and defined skills for training students preparing to enter professional practice as solicitors or barristers. Clearly this type of education will have more direct, practical relevance to students pursuing law careers rather than law degrees. Wider is the view that context encompasses studying law by reference to the large body of cases and texts that make up the bulk of student learning material. Here the academic and vocational begin to merge, as students learn first how to read cases and then to apply the information gleaned from the material to given fact situations. The skills of comprehension, analysis, synthesis and application learned in this context will likely be of use to students irrespective of their ultimate occupation. Wider yet is the view that law must be examined in its historical, social, cultural, economic and political contexts, which provides a useful analytical tool for students regardless of their educational objectives. Another element to the 'law in context' issue is the observation that law simply affects people differently depending upon their circumstances.

All these various forms of context have been subject to considerable scrutiny in the literature of legal pedagogy in recent years, with some attention paid to investigating the impact of ideology on the construction and interpretation of law. Law exists not only as a form of concrete expression found in statues and common law and as commentary in legal texts and journal articles. Law may be thought of as the expression of the approved rules of conduct which have been agreed upon in the proper manner by the proper persons in power. What counts as the proper mode of law-creation is, of course, itself a matter in the control of the powerful.

Those ideological, social and cultural factors that affect the way lecturers understand and teach also affect the way students learn and communicate with their lecturers. Students bring their own meanings and ideological backgrounds, beliefs and histories with them to the classroom. If we acknowledge the impact of ideology in the way students assimilate information and use it to make sense of the world around them, it is right that legal education should endeavour to place law in a context that, at least in some ways, reflects their own reality. This project is all the more relevant, given the higher education objective of cultivating students' personal autonomy. We ought to provide students with information that makes real for them the way in which law operates. In other words, we need to integrate differing legal and cultural perspectives into and across the law curriculum. Moreover, since law itself is a dynamic and complex matrix of social, cultural, economic, historical, anthropological and psychological factors, our approach must not only be cross-cultural and cross-experiential but interdisciplinary as well.

For students outside the mainstream of traditionally represented law, legal education is often marginalising at best or effacing at worst. This invisibility is hardly consonant with the liberal and humane education students ought to receive from higher education. Compounding matters of invisibility is the conviction of some that the practice of law can do very nicely without all of this folderol of multiculturalism and lesbians, gays and women. So