

moral dilemmas and conflicts. The process is known as ‘casuistry.’ Casuistry is a form of ethical reasoning that involves the close analysis of particular cases, seeking ethical guidance in an inductive manner rather than deductively through the application of moral theory. Casuists find meaning through paradigm cases and maxims. A case presenting moral ambiguity may be compared to a series of paradigm cases and analysed by reference to accepted maxims, in order to arrive at a reasonably satisfactory solution to the conflict at hand.

There are three possible reasons why law schools teach about ethics and values: (1) for the same reasons they teach torts, that is, because the ‘ethics’ of the legal profession can be useful to practitioners as basic substantive law; (2) for the same reasons bioethicists develop methods of ethical analysis, that is, to aid good faith, and enable conflicted professionals to find ways to choose amongst similarly attractive (or similarly offensive) ethical alternatives; and (3) for the same reasons therapists and jailers do their work, that is, to provide incentives for bad or misguided people to do good things. The first of these has little, but still some, relevance to an inquiry about the role of values teaching. The second and third goals are more directly relevant, but they tend to get conflated. It helps to distinguish between teaching good people how to be better and teaching bad people how to be good.

There seems to be consensus among writers in this area that students and lawyers ought to learn an art often described as ‘deliberative (or reflective) judgment’ — that is, how to recognise moral questions, how to parse their components and how to weigh important moral considerations in context. Seldom, though, is the suggestion made that students and lawyers can learn some right answers, or how to balance appropriately competing claims about what might be right. Teaching a sense of reflective

judgment is viewed as an altogether good thing; teaching specific values, by contrast, is worrisome. Certain nagging doubts about personal values, about moral pluralism and about one’s ethical identity seem to predominate.

The first, and perhaps the least troublesome, objection comes from the relativists. When the topic turns to questions of value a student might object: ‘I’m sorry, but how can we talk about values here? My values may be very different from your values, and nothing we can say here can persuade me that you are right and I am wrong. Let’s talk about law, which we can study, but not values, which are only in our heads.’ Few respected applied ethics writers defend a deeply relativist stance. By contrast, many respected applied ethics writers treat moral values as somehow ‘personal’ and suggest limits on their role within professional education. The notion of personal values, neither as a basis for lawyering commitments nor as an impermissible distortion of those commitments, engenders the same incoherence that surrounded the relativist arguments. A claim that values are personal implies that they are somehow non-negotiable, that they are not based upon reasons or arguments, but just ‘are.’ That kind of offering is justly rejected when proffered by a relativist. Why does it have such currency and validity here?

A seemingly promising way to advance conversations about ethics from the realm of personal opinion and preferences to a more substantive reasoned plane is through the use of moral theory. Moral theory proposals make much good sense, but they are blemished by some deep problems. Moral theories reflect and organise sentiments drawn from work with actual cases. As many commentators have noted, when a carefully crafted theory clashes with deeply held moral sentiments, the theory gets jettisoned, not the sentiments.

Casuistry offers a method of moral reasoning and deliberation which resists theorising and which builds upon common sentiments about normative value. The paradigm cases represent the source of shared sentiments. Most ethical dilemmas or quandaries consist of stories or circumstances where multiple, competing ethical principles or moral theories seem to apply, and how to rank or prioritise the conflicting norms is not readily apparent. In some of those stories or circumstances, the dilemma or conflict will be insoluble for incomparability reasons. Of course, not all dilemmas or conflicts are so insoluble. Ethical conversation and debate assume that some issues are subject to reasoned analysis. Casuistry offers a coherent, practical method for that analysis. It permits the same kind of inductive, analogy-driven scrutiny that legal scholars employ when using common law precedent to decide on a right answer in a difficult legal dispute. Law students perform that process regularly in substantive law courses; they might then be shown a similar process in ethics contexts.

SKILLS

Law talk: speaking, writing, and entering the discourse of law

S L DeJarnatt

40 *Duq L Rev*, 2002, pp 489–509

What is the normal discourse of the academic community of law, a community that exists to produce professionals in the field of law practice and not necessarily to replenish the ranks of law scholars? The practice of law requires lawyers to work collaboratively and collectively — to define issues, create documents, negotiate and resolve legal disputes. It requires lawyers to discuss their writing with their target audience as well as with their colleagues. Law professors regularly present scholarly work to an audience of peers for their reaction.

But law school, even in writing courses, rarely offers students opportunities to experience or to model this crucial part of the normal discourse of law.

Traditional legal pedagogy teaches through speech but evaluates through written analysis, without attending to the significant differences between these means of communication and learning. The relationship between speech and writing has been a major issue in composition in the second half of the 20th century and examination of that relationship has created efforts to revolutionise the way writing is learned and taught. Theoretical work done in the field of composition is instructive because legal research and writing (LRW) is so closely related to the larger study and teaching of composition. Much of the fundamental task of LRW is to enable students to learn that new discourse and to become members of both the academic and practice legal communities.

Current traditional pedagogy treats writing as a means of transmission, focusing the writing teacher on surface errors and form in the writing product, not on the process of writing, the writer's relationship to the reader, the text, or the context of writing. The audience is merely the consumer of the thoughts and ideas transmitted through error-free prose. Modern theorists have rejected this view of composition, though theorists argue that it still holds sway in the classroom.

Three main threads have developed in response to the limitations of the current-traditional paradigm, each attempting to reach a more thorough understanding of the relationships between writer, text and reader. First, the expressivists view writing primarily in terms of the writer's intent. Their theory and pedagogy focuses on fluency, voice and personal writing. Second, process theorists focus on understanding the elements of the process of writing. The process school has focused on what writers do as they

write, and tries to identify the steps writers take as they move from idea to finished text. Third, social constructivist theorists emphasise the context of writing and the writer's discourse community with its social needs and purpose. This school has the most obvious resonance for LRW. The student has to learn to speak our language, to speak as we do, to try on the peculiar ways of knowing, selecting, evaluating, reporting, concluding and arguing that define the discourse of our community. The role of the teacher is to empower the students to become members of the discourse communities of academia, not because academic discourse is superior to the student's personal voice, but because effective writing is writing that is situated within the community expectations of the audience.

Law school differs from other academic communities in several specific ways important to the relationship between speech and writing. Students are often drawn to law because they possess prowess in speech. Law school, however, is a pseudo-oral environment. Evaluation and success in nearly all classes depends on the student's writing. However, traditional doctrinal law classes make no explicit effort to assist students with this transition. Law is at least as much a writing profession as it is a talking profession. In fact, most lawyers spend much more time writing than they do on formal argument or trial work.

LRW teaches analysis, thinking on paper, constructing legal knowledge through writing, and, fundamentally, bringing the novices into the community of law. Beginning law students face an enormous transition to this new discourse community in which writing is now a major part of their professional work. This writing has several distinctive characteristics that are unfamiliar to most new law students. Its purpose is communicative: to provide a succinct but complete analysis of a legal issue to someone

else. That analysis is usually provided to a sceptical audience, trained to look for flaws, who must be persuaded that the analysis is accurate and valuable.

Progressive LRW pedagogy focuses on the writing process and frequent teacher intervention in the process as the best way to teach LRW. To enter the discourse of law, students also need to be the audience and read the legal writing of lawyers, beyond opinions and statutes, on topics they are not working on. They need to invent the discourse community of law within the writing classroom. The key insight that developed social constructivist theory out of the process movement was recognition of the importance of environment to the text — that the writer works within a community, not as a single independent being.

LRW scholars have also advocated the use of group work through small discussion groups, peer editing, and collaborative research, for example, but typically within the class group, so that all of the participants are working on the same substantive writing assignment. LRW scholars have also examined ways to encourage students to be more reflective about their work by speaking about it. However, one limitation of both group work within the class and individual reflection is that neither approximates or invokes the actual audience for legal work. Students could model the reality of law practice by orally presenting their written analysis to an audience of peers who are working on a different problem.

Using orality to help students experience being the audience for their legal writing and to give them the opportunity to talk through their analysis with a present audience should lessen the dissonance that orally adept students experience in law school. To function as legal professionals, they must be able to ask themselves the sceptical questions they will get when they confer with their supervisors.

Building in conversation about writing should help students better understand and develop their ability to have the effective internalised conversations that are essential to good legal writing and analysis.

TEACHING METHODS & MEDIA

Deep and surface learning: can teachers really control student approaches to learning in the law?

P Baron

36 *Law Teacher* 2, 2002, pp 123–139

In pedagogy generally over the past 20 years there has been a move to teaching methods that encourage deep, rather than surface, approaches to learning. A deep approach to learning is one in which the student intends to gain personal understanding from the learning task. A surface approach, on the other hand, is adopted when the student's primary motivation is to avoid failure. Such a student tends to memorise information without meaning and organisation.

Educationalists argue that surface approaches to learning are undesirable. Students who adopt a deep approach to learning are considered to have learning outcomes of a better quality than those who adopt a surface approach. On this basis, teachers should discourage surface approaches to learning and encourage deep approaches.

A deep approach to learning law enables the student to make meaning of legal doctrine and to cope with the rapid rate of change that characterises many areas of the law. From a practical perspective, rote memorisation of particular cases or statutes is unlikely to be of much use to students by the time they are in legal practice. The move to deep learning approaches has coincided with the move to 'student-centred learning' in law. 'Student centred-learning' is a

process of learning by self-discovery under the supervision of a teacher. In this process, the student is the focus of the learning exercise.

Despite the apparent desirability of deep learning in law and the trend to student-centred learning, the nature of law may serve to hinder the widespread adoption of deep learning approaches. The volume of cases, rules, procedures and legislation that dominate law tend to foster a surface approach to learning. For the student, it may be difficult to comprehend the learning of the law as anything more than a system of rules that demands memorisation. Such an approach may be reinforced by the traditional method of teaching law by lecture, which tends to reduce the student to a scribe. The educational literature stresses the importance of teaching methods, and, in particular, the teacher's role in student approaches to learning.

Educationalists suggest that we can encourage our students to adopt a deep approach to their studies in the following ways: by designing our curriculum to encourage active, long-term engagement in learning tasks; by presenting our material in a way that demonstrates our own interest in the subject in an engaging, meaningful and considerate manner; by stating our expectations of our students clearly; and by providing students with some choice in the content and method of study. Conversely, we may encourage our students to take a surface approach to learning by overloading them; creating stressful assignment regimes; stressing the need for recall of trivial information; providing mixed or cynical messages about rewards; or failing to provide effective feedback on student progress. Commentators and teachers have observed that despite the best efforts to create an environment which should foster deep learning, some students still take a surface approach. Indeed, some students resist strenuously taking anything other than a surface approach.

Some commentators have suggested that the approach to learning adopted by a student in any particular learning situation is more complicated than the literature suggests. It is determined by a complex interaction between the students pre-existing beliefs about knowledge and education, their general predisposition towards particular learning approaches and their perceptions of the learning approach that is required by the educational context. If this is the case, establishing contexts which encourage a deep approach may not be sufficient because students' perceptions of that context of their learning situation will influence their approaches to learning.

A psychotherapeutic approach stresses the importance of the personal relationship between the teacher and the learner. As a student feels more understood and thus more integrated and able to learn, this approach is likely to foster mastery of the curriculum. Attempts to understand the meaning of the learning experience for individual students has been shown to enhance students' feelings of personal integration or self-cohesion, leading to increased receptivity to new learning. For instance, in our teaching we need to remain open to the idea that a student's adoption of a surface approach to learning is not necessarily a failing on our part; nor is it automatically the result of 'laziness' or disinterest in the deeper aspects of a particular issue. Rather it may be the result of a specific inhibition.

Collaborative learning may encourage deep learning by lessening the students' anxieties with the prospect that students can overcome their inhibition toward asking deeper questions. Similarly, for the student who goes 'too deep', seeing surface learners approach material with a 'broad brush' technique without terrible consequences may also lessen anxiety and overcome the inhibition toward the broad overview. If students understand that they tend to a particular