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Addressing Emotions in Preparing Ethical Lawyers

Nigel Duncan

PRE-PUBLICATION DRAFT. NOT TO BE CITED.

> While on a summer clerkship with a large and well-respected commercial firm, you are (naturally) concerned to make a good impression. It is your second last year of law school and you are desperate for Articles. The partner supervising you decides to give you some of her files to get ready for "costing". She asks you to total the number of hours which she has spent on each file and, from her harried expression, it is pretty clear that she is concerned to charge out a significant amount on each file. She asks you to "round up" her hours to the next hundred in each file, saying that, on average, clients are happy because the main thing they demand is quality work. You know that these clients are entirely satisfied with the firm and that your supervisor is not about to debate the issue with you. *Would you round up the hours as requested?* (Evans and Palermo, 2005: 113)

This question was put to several hundred graduates of Monash University as part of research conducted by Adrian Evans and Josephine Palermo into individual values and ethical behaviour. The findings were interesting. A majority (56.6%) of respondents were willing to round up the hours in those circumstances, even though they will have been aware that this would add a considerable sum to the bill eventually given to the client. More insight came from the responses to the researchers' request that respondents identified the values they considered that they were applying in order to come to this decision. The researchers also asked respondents to indicate the values that influenced their decision. These included Employment Prospects; Loyalty to your Supervisor; Honesty; Professional Ambition; Client Concern and there was a variety of selected responses.

So it seems that responding ethically to a situation is not merely a question of knowing the rules, or intending to behave well. To understand it requires consideration of individuals' emotional responses to the situation in which they find themselves and the question of their exhibiting moral courage and when that might be particularly difficult. Thus,

the affective domain is engaged and those of us who are interested in preparing students for ethical practice as lawyers should be willing to address it.

Professional Ethics in Current Legal Education

The extent to which professional ethics is addressed in legal education varies with jurisdiction, with the structure of legal education and between institutions. It is common for it to be a required subject under one name or another. Thus in the USA, 'professional responsibility' is the only mandatory subject on the JD.[1] The Bar of England and Wales requires 'professional ethics and conduct' to be taught on its Bar Vocational Course (BSB 2008: 8). The Solicitors Regulation Authority requires 'Professional Conduct and Client Care, including Solicitors' Accounts Rules' as an element of its Legal Practice Course (SRA 2004: 3). Australia's 'Priestley 11'[2] includes 'Professional Conduct (including basic trust accounting)'. All these requirements are relatively similar.

It is worthy of note that the only courses where it is a requirement are those which are regarded as preparation for practice. Thus, in the USA, where the JD is usually the only course students undertake (unless they take specific courses to prepare for different State Bar Exams) this requirement falls on a degree course. In the UK, where there are discrete professional courses which follow an undergraduate degree, there are no requirements on the LLB, but only on the professional courses. In Australia, law degrees which are not designed to prepare students for practice are not required to meet the Priestley 11. So there is no

[1] This requirement is contained in Standard 302(a)(5) of the American Bar Association's Standards for the Approval of Law Schools. This standard requires that all law students be educated in the "history, goals, structures, values, rules and responsibilities of the legal profession and its members." Interpretation 309-9 elaborates on this goal: "The substantial instruction in the history, structure, values, rules, and responsibilities of the legal profession and its members required by Standard 302(a)(5) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association." (ABA 2010).

[2] Eleven compulsory subjects for courses designed to prepare students for admission to practice, introduced in 1992 by the Consultative Committee of State and Territorial Law Admitting Authorities of Australia.

general requirement that ethics should be part of an academic law degree. Indeed, a recent small survey (Chandler and Duncan 2008) found some jurisdictions (eg Japan, Kuwait, Viet Nam) where there was no requirement that ethics be addressed at any stage, most jurisdictions where it was required by the professional body, as in the examples above, but also some jurisdictions, such as Poland and Russia, where it was required by the State.

There is little research on the extent to which ethics is in fact taught. The same study found no consistent pattern. What is more, when UK respondents indicated that ethics were addressed on academic courses, this response represented a typical view of the few actively addressing legal ethics:

> It would be an exaggeration to say that ethics is taught as a topic in its own right. It is covered in a part 1 module on General Principles of Law and also in Legal skills. The final year Pro bono Writing Credit optional module is one where the issue of ethics comes most to the fore, but it is not taught as such on this module, as it is a module where the students prepare an e-portfolio on their PB work. This module is new (started in 2006-7) and increasingly popular. In both the LLB and the LLM there are options in international law and international HR and International mooting where ethics will be covered. There are also LLB options in Discrimination Law and Medical Law which will deal with ethics.'[3]

However, those teaching on the professional courses all indicated that ethics were addressed. Thus the division in England and Wales between academic and professional law courses appears to have encouraged most law schools to leave the study of ethics to the professional stage.

The Narrow Deontology of the Dominant Approach.

When one turns to the content of the teaching of professional ethics there is considerable variety, but, in spite of this, there remains one dominant approach. This tends to have a group of characteristics which are probably related. One is that the central topic is the ethical rules required by the professional Code. Another is that teaching and learning methods adopted

[3] Confidential response to Chandler/Duncan study held by author.

tend to be didactic. A third is that assessment tends to focus on memorisation of the rules. Thus the experience for students encourages them to learn what the rules are, rather than to think critically about them. They know that their assessment will be a memory test, so they will be reluctant to spend time on critical study or learning about how the rules might apply in practice. Most courses recognise this, which encourages a didactic approach by teachers, further encouraged by the institutional advantage that this approach can be met in economical large group classes.

This approach is exemplified by the US Multi-State Professional Responsibility Exam, whose purpose is described:

> The purpose of the NCBE Multistate Professional Responsibility Examination (MPRE) is to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct; thus, the MPRE is not a test to determine an individual's personal ethical values (NCBE 2010: para 1).

The format is 60 multiple choice questions which are to be answered in two hours and five minutes. Although there is no doubt that multiple choice tests may set complex and demanding tasks, a test which allows two minutes per answer is clearly not designed to encourage critical or contextual thinking. This has not prevented the development of thoughtful and experiential ethics teaching programmes in US law schools, but they tend to be optional and additional to the didactic courses preparing students for the exam.

In the UK the assessment of 'professional conduct' on the Bar Vocational Course has been more varied. Students are assessed on their practice skills by realistic role-play and drafting activities. Assessors have embedded ethical dilemmas into some of these and students are expected to practise in a way which is consistent with the requirements of the Code. In addition, there are strict requirements about attendance and engagement with the course and students who fail to attend sufficiently, or to be sufficiently prepared, may fail the professional conduct assessment. This approach still focuses on Code compliance, rather than

encouraging a critical approach to the rules, but does at least relate it to practice and personal behaviour. It should be noted, however, that the requirements for the new Bar Professional Training Course[4] provide for assessment of 'Professional Ethics' by multiple choice test instead, plus answers to short problem questions, to be centrally set and taken as an unseen, three-hour examination (BSB 2010). This appears to be a move towards a narrower approach favouring memorisation and not going beyond Code compliance.

One analysis which distinguishes between different approaches to ethical behaviour is that between deontological and teleological approaches. Deontology, named from the Greek for the study of duty or obligations, focuses on rules to decide on action and, in its strict form, would lead to acting according to the rules regardless of the consequences. Many religious codes are dominated by this perspective, holding a holy book to be the divinely-inspired source of correct behaviour. Teleology, by contrast, is the study of ends, or purposes. It focuses on the consequences of acts (and is therefore often referred to as *consequentialism*).

Adopting either approach leaves many issues for debate. Deontologists may interpret Codes differently or quote selectively from holy books. Consequentialists may disagree as to which consequences carry greater value. However, the point I wish to address here is the essential inadequacy of simply adopting either approach. Deontologists may be criticised for some of the unintended consequences of narrow rule-following. Consequentialists may be criticised for allowing the end to justify the means, when they do something widely regarded as wrong in order to achieve a desirable goal. In practice, few people adopt one perspective to the exclusion of the other. This may be brought to the attention of students by getting them to read judgments where the court is struggling with legislation or case-law which has had (arguably) unintended damaging consequences. Where they feel unable to avoid unjust consequences they may finish with a judgment which declares the law as it clearly stands, but

[4] The BPTC is to replace the BVC as from 2010.

express their unease and suggest that this is a matter to which Parliament should pay urgent attention.[5] These judgments, which generally flow from the arguments presented to the court by the lawyers appearing before it, are also a powerful reminder that a critical approach to the law may be relevant to practitioners as well as to academic lawyers.

An approach to teaching legal ethics which focuses on learning the Codes encourages the narrow deontological approach which, I have suggested, is fundamentally flawed. Students who, when faced with the question: 'what should I do in this situation', are encouraged to think only of what the Code requires and will be less likely to think of consequences or to balance their understanding of the Code with the consequences of simply following it.

That may sometimes be appropriate. There may be situations where it is better to follow the rules than to break them in order to achieve justice in a particular situation. Thus the lawyer defending a client she strongly suspects to be guilty should nevertheless challenge prosecution evidence even if the consequences are the acquittal of a guilty defendant. Here it is (arguably) better for the quality of the criminal justice system that this approach be maintained. However, I would argue that this conclusion is better-achieved by considering the norms (the deontological approach) and then undertaking a consequentialist analysis. A purely deontological approach is less soundly grounded.

Furthermore, there are many situations where the Code is unclear or may be seen as justifying different actions in different situations. In other situations different provisions of the Code may come into conflict. Professional practice is full of situations where judgment must be exercised, and a narrow deontological approach does not prepare students for those demands.

[5] Such cases occur regularly. One which I read on the day I wrote this section is *Redmacher* v *Granatino* [2009] EWCA Civ 649 concerning the status of pre-nuptial agreements. The reports of the Law Commission and equivalent bodies in other jurisdictions also provide examples of studying existing rules from a teleological perspective in proposing reform.

The next section will propose a variety of approaches which may do a better job of educating in professional ethics rather than training a group of narrow deontologists.

Developments Proposing a Broader Approach.

Although the dominant approach to teaching legal ethics has been a didactic, code-compliance approach, many alternative methods have been introduced. Most have arisen in the context of degree programmes rather than the shorter professional courses, which tend to leave little time for critique or contextual discussions. This is not the place for a full exposition of the different methods which have been adopted, but this section will briefly summarise some distinctive approaches.

Best established is the introduction of moral philosophy within a formal study of philosophical principles. This commonly formed an element of jurisprudence or legal theory courses, although these are less common than they formerly were.[6]

An alternative is to include the ethics of the legal profession within a course on the legal system or legal method. This can meet the goals both of a liberal education and of professional preparation by permitting a critical and contextual study of the practice of law as opposed to the black letters of which it is composed.[7]

Law and literature is a significant movement which allows for ethical questions to be explored.[8] A related approach is to use other aspects of popular culture in a similar way: film and television can provide a valuable resource for those wanting to discuss ethical issues.[9]

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[6] In 1974/5 John Wilson's survey of university legal education showed 96% of participating law schools provided jurisprudence, 72% making it compulsory. This had dropped to below 80% by 1991/2, 41% making it compulsory (Wilson 1993). In 2004 the proportion of compulsory courses had fallen further to 34% (Harris and Beinart 2005).

[7] In 2004, 26% of law schools required study of lawyers' professional responsibilities, and a further 8% offered such a course on an optional basis (Harris and Beinart 2005: 309).

[8] The journal *Law and Literature* provides a significant source (Details available on http://ucpressjournals.com/journal.asp?j=lal).

[9] For guidance on useful films and other resources, see http://lib.law.washington.edu/ref/lawonfilm.html,

The clinical legal education movement has been a major source of ideas for introducing legal ethics to students (Duncan 2005, Curran et al 2005). Role-play and simulation provide many opportunities to introduce students to specific issues within controlled situations (Hartwell, 1994). Live clinical models may allow for less control, but add invaluable realism and, with proper supervision and clinical seminars, provide a thoughtful educational experience (Curran et al 2005).

Exercises have been developed where students consider how they would respond to ethical dilemmas and then explore the values which lead them to their decisions (Parker and Evans 2007).

One new development is a module within a UK degree programme which explores students' careers intentions and how they might most effectively prepare themselves for the demands which lie ahead. This lends itself to addressing professional ethics as an element of that study (Roberts 2009).

All these potential methods may exist as self-standing modules within programmes, or be combined in various ways. A number of academics have argued for ethics to be taught pervasively throughout a law degree (Rhode 1992). These, however, have been hard to implement for a variety of reasons (1992: 54). A method which combines an element of planned pervasiveness with coherent ethics teaching within modules is what Rhode describes as 'ethics by the continuing method'. This requires a degree of faculty-wide commitment to ensure that the teachers who are expected to address ethics within their course are sufficiently informed, prepared and motivated to do so. One developed approach to this may be seen in the 'vertical curriculum' developed by Griffith University Law School (Robertson 2005). Here, several themes are actively designed to recur in different contexts and in a progressive manner over the years of a degree programme.

All these methods have the capacity to get students thinking about values: their own values and those of the profession they aspire to join. Wes Pue points out that we ourselves need to have explored our own values if we are faced with students who question our fundamental values. He says:

> Unless one has struggled hard with value choice, such questions are show-stoppers. In the absence of profound knowledge, faculty responses to difficult value questions are likely to mix inadequate fumbling with blaming the student for their "inadequacies" as moral beings. We shoot from the hip when we are untrained in the use of sights (Pue 2008: 285).

We owe it to our students, the profession and its clients to address this issue as effectively as we can.

The following section will explore the input of recent scientific work on the roots of human moral behaviour and the way the brain works in order to inform us as to how we might approach using these and other methods to teach legal ethics in our courses.

Developing Ethical Behaviour

Our Characteristics and our Experience

If we are to achieve an approach to legal education which prepares students as well as possible for the ethical demands of practice we must consider the nature of the challenges which will face them. The example at the beginning of this chapter is just one of many examples, requiring the student to make a short-notice response to a demand from a superior which (s)he may consider unethical. The supervising solicitor's demand clearly contravenes the Solicitors' Regulation Authority's Code of Conduct Rule 1.04 that 'You must act in the best interests of each client' (SRA 2007). But it requires more than knowledge of the rules for the student to take proper action. It also requires courage. This is something we will return to later.

A further example is one which arises regularly in practice.

> You have taken on a case for the Free Representation Unit to advise and represent a client who claims to have been unfairly dismissed for fighting with his foreman. He claims that he was only acting in self-defence. His employer has responded with statements from his foreman and other employees that your client instigated the fight and has a history of losing his temper and acting aggressively. He comes to meet you in the FRU offices. When you begin to explain the strength of the evidence against him he responds angrily. You would prefer not to continue with the case but you are acting under the Bar Code of Conduct which prevents you from refusing a case you are competent and able to take on (BSB 2004, para 601). What would you do?

This example is drawn from the experience of one of my students on the City Law School Bar Vocational Course. It is another situation which requires courage but in this case empathy is also a significant factor. The student's relatively privileged background meant that her client's background and experience were radically different from hers. This situation may create a barrier to the level of empathy which would naturally arise with someone with whom one had much in common.

We will turn to look at empathy and courage below, but first it is worth considering recent research which suggests that there are elements of our brains which help us to respond ethically to dilemmas. This is important because this research challenges two tendencies which have suggested that the brain is hard-wired in favour of self-centred responses.

The first of these tendencies arises from the fact that most of us live in societies which are dominated by market principles which tend to encourage competitive, self-centred behaviour. I do not intend to engage in a debate about the propriety of particular political ideologies. After all, most political systems notionally premised on communist ideologies were consistent with a considerable amount of unethical behaviour. Instead I suggest that different ideological systems are exploited by the powerful. Our system happens to be a market-driven one and therefore is the one to which we should respond. These capitalist principles tend to encourage the values of competition and individualism leading to self-

centred decision-making. This raises issues about whether they may impose some constraint on the tendency to behave ethically or otherwise.

The second tendency, which has developed out of Darwin's theory of evolution, is the view that the process of natural selection must inevitably produce hard-wiring in human minds which leads to self-interested behaviour. In other words, people are inherently self-centred and competitive, evolved thus as a factor in their survival.[10] These two tendencies combine in a justificatory cycle which may influence the perspectives of many of our students who enter legal education. It also gives us notice of aspects of the nature of the world into which they will go once they have left us. Accepting them in a simplistic way may also raise in students' and teachers' minds the thought that any attempt to encourage ethical behaviour is bound to fail.

Life, of course, is not as simple as this. We recognise that individuals' motivation is far more complex than this. Not only may there be personal advantage in behaviour that supports others, but most individuals appear to have some moral sense which may lead them to behave in altruistic or even self-sacrificing ways. What are the sources for this type of behaviour? They are probably multi-faceted.

Conventional 'survival of the fittest' analyses draw attention to the fact that a great evolutionary advantage is given to groups who can co-operate. This goes beyond the immediate family group (where Dawkins's 'Selfish Gene' concept (Dawkins 1989) may justify co-operation). Gary Olson cites Marc Hauser (2006: 416) as presenting sophisticated studies suggesting 'that large-scale co-operation within the human species – including with genetically unrelated individuals within a group – was favoured by selection.' (Olson 2007:

[10] These are hotly-contested areas in which we should be cautious about drawing confident conclusions. 'When you hear another explanation of how a particular human characteristic … derives from our origins as savannah-dwelling lion-fodder, ask a simple question: is this testable? If so (and it often is) it's a scientific hypothesis. Otherwise it's an origin myth.' (Ryrie 2009: 40).

para 8) So, without calling in aid any altruistic tendencies we may well expect a variety of behaviours which value the interests of others. In the field of legal education, Donald Nicolson has proposed four categories of student:

- *'The Sinners*: a very small group, who are already inclined to lie, cheat, bully and oppress others in the service of their clients[11] and themselves;
- *The Saints*: a relatively small group of students with already developed virtuous characters in the sense that they value morality and tend to act accordingly;
- *Thatcher's Children*: possibly the largest group – they are not incorrigibly bad but tend towards amorality and the pursuit of self-interest;
- *The Moral Innocents*: probably the second biggest group - with the right conditions they may develop a sense of ethical professionalism, but otherwise are likely to adopt the current norms of amoral professionalism.' (Nicolson 2008: 161)

He is pessimistic as to the proportion of students 'whose moral characters can be influenced towards that of ethically aware and morally committed professionals' (2008:162). However, most educators would probably take the view, and I would agree, that their task is not to inculcate a particular ethical view, but rather to encourage and facilitate students to engage seriously in debate about ethical issues so that their own decision-making is informed and challenged.

New research gives us reason to believe that most people's minds will provide a fruitful field for sowing ethical ideas. Neuroscientists report experiments which suggest that moral responses are, indeed, influenced by the hard-wiring of the brain. Michael Koenigs found that 'damage to … the ventromedial prefrontal cortex (VMPFC) increases a preference for "utilitarian" choices in moral dilemmas – judgments that favour the aggregate welfare

[11] Admittedly, such behaviour is arguable a morally justified position (see eg Nicolson and Webb 1999 chs 6-8), but only if adopted after due reflection rather than as self-serving justification. (Nicolson's reference)

over the welfare of fewer individuals.' (reported in Moll and de Oliveira-Souza 2008: 30) Thus, when people make explicit moral judgments the VMPFC is engaged and damage to it appears to reduce prosocial sentiments. (2008:33) This receives confirmation from Moll and De Oliveira-Souza's evidence that the VMPFC is engaged when people 'are passively exposed to stimuli evocative of prosocial moral sentiments (such as a hungry child).' (33) This suggests that this physical site in the brain plays a role, where it is not damaged or compromised, in encouraging empathic responses to others in difficult circumstances.

This, however, is not to say that moral behaviour is biologically determined, merely that biology plays a part in moral decision-making. It is clear from our own everyday experience that if a particular ethical approach can be a trait it varies considerably (like other attributes such as intelligence or physical strength) within the population. Furthermore, the capacity of humans to undertake decisions and actions out of principle rather than any (conscious or subconscious) analysis of interests is well-established. This tendency may flow from many sources, including religious convictions, a sense of well-being at doing what is approved by one's peers or simply a feeling of personal satisfaction at taking principled decisions. Modern Darwinists point to evolutionary reasons for the development of all these tendencies.[12] The only safe conclusion is that both Nature and Nurture play a part in individuals' propensity for moral decision-making.

Whatever the balance between Nature and Nurture the fact that Nurture may play a part is of crucial significance for educators. If not, we have no role. How then, might education influence the moral behaviour of prospective lawyers? The starting point is to inform students of different ethical positions which might be held. Note that this simple proposal already goes further than training which simply seeks Code-compliance. It requires

[12] Wright argues that the passing of genes to future generations may be facilitated, in species which operate in social groups, by such behaviour, thus proposing an amoral source for moral behaviour. (Wright 1996, generally and 338-344).

discussion and debate. It would be one possible focus for a jurisprudence or legal theory course. It is intellectually challenging and of great value in adding depth and critical context to legal studies. It can be addressed in many ways for example, through studies of philosophy, through literature or through developed problem-based learning. It is an invaluable starting point for a critical view of Code provisions and should therefore precede that element of education.

It is not, however, sufficient if we wish to prepare students for the ethical demands of practice. If we accept that these learning methods can assist the student to make informed choices about ethical values we need to go further to assist them to put those values into practice when faced with challenging situations. This requires empathy, courage and experience. We shall consider empathy and courage and then explore the ways in which experiential learning may help with developing them.

Empathy

The more we share with others, the greater is the likelihood of an empathic response to them. It is easy to feel empathy for close family members, long-standing friends and neighbours, those with whom we share religious convictions, political views or even experiences. As Decety and Lamm say:

> In humans and other mammals, an impulse to care for offspring is almost certainly genetically hard wired. Less clear, however, is whether an impulse to care for siblings, more remote kin, and similar nonkin is genetically hard wired. (Batson 2006: 59-64) The emergence of altruism, of empathizing with and caring for those who are not kin, is not easily explained within the framework of neo-Darwinian theories of natural selection, and thus social learning explanations of kinship patterns in human helping behavior are highly plausible. Indeed, one of the most striking aspects of human empathy is that it can be felt for virtually any target, even targets of a different species (Decety and Lamm 2006: 1148).

It becomes more difficult when there is greater distance or difference between us. Differences in class, race or education can make empathy less easy to achieve. I do not

suggest that these are *necessarily* barriers to empathy. Many people respond empathically in spite of considerable differences, but others may find that they do become barriers.

There may, moreover, be substantial reasons for thinking that the capacity for empathy with different people is expanding over historical time. Peter Singer notes that Plato proposed a moral advance which seems remarkably restricted to us: 'He argued that Greeks should not, in war, enslave other Greeks, lay waste their lands or raze their houses; they should do these things only to non-Greeks' (Singer 1981, quoted in Wright 1996). Observation of the current expansion of moral concern beyond national boundaries leads him to suggest that it may eventually reach a global scope. This may be to a degree speculative. It is not the case today.

In an increasingly globalised world with major migration between countries for economic reasons and as refugees, we are increasingly likely to encounter people with significant differences from ourselves. What is more, the nature of migration means that a high proportion of migrants will find themselves disadvantaged economically and in other ways and are particularly likely to find themselves in legal difficulties.

Migrants are also more likely to have difficulties with the language of their host country. This produces a further difference, which may inhibit empathy. Moreover, the very difficulty of communication may act as a further barrier to empathy, let alone the fact that the struggle to comprehend adds to the lawyer's work and the stress involved in advising and representing the client. Work with relatively marginal clients is particularly likely during the early years of practice, when newly-qualified lawyers have the least experience to fall back on. All lawyers should have a sufficient degree of empathy with their clients (and perhaps others) if they are to manage effectively the difficult balance between objectivity and engagement.

Decety and Lamm also provide insights into the mechanisms which permit management of that balance. Their argument is in the section of their article headed: 'Self-Other Awareness and Empathy' and concludes:

> … self-awareness and the sense of agency play pivotal roles in empathy and significantly contribute to social interaction. These important aspects are likely to be at play in distinguishing emotional contagion, which heavily relies on the automatic link between perception of the emotions expressed by the other and one's own experience of the same emotion, and empathy that necessitates a more detached relation. We suggest that the nonoverlap in the neural response between self and other frees up processing capacity in the brain for unfolding appropriate future action towards the other. Further, being aware of one's own feelings, and being able to regulate consciously one's own emotions may be what allows us to distinguish empathic responses to others from our own personal distress, with only the former leading to prosocial behavior (Decety and Lamm 2006: 1155).

Their reference to 'nonoverlap in the neural response between self and other' is well-explained by Ramachandran. He describes experiments using monkeys where the same neuron was seen to fire 'not only (say) when the monkey reached for a peanut but also when it watched *another* monkey reach for a peanut!' (Ramachandran 2007: para 6) These neurons are known as 'mirror neurons' and appear not to distinguish between self and the other. How does this link to empathy? Ramachandran describes further experiments with human subjects:

> Neurons in the anterior cingulate will respond to the patient being poked with a needle; they are often referred to as sensory pain neurons. Remarkably, researchers at the University of Toronto have found that some of them will fire equally strongly when the patient watches someone *else* is (sic) poked. (2007: para 8)

He describes these as 'empathy neurons'. If his conclusions are correct, they certainly explain our ability to feel for the concerns of others and the work of Decety and Lamm provides some insight into the balancing processes which enable us to maintain those distinctions when taking difficult decisions.

Thus the evidence from neuroscience gives us a basis for understanding both our capacity for empathy and also for limiting our application of it where it might conflict with self-interest or where it might be limited to those who are in some way close to us. How might educators address the importance of developing a broad capacity for empathy in their students? According to Olson, '[c]ultivating empathic engagement through education remains a poorly understood enterprise' (Olson 2007: para 36).

Preston and De Waal propose a number of factors which affect the likelihood of empathic behaviour.

> The literature suggests that empathy and helping are determined by the subject's ability to help. Human subjects are more likely to help when the level of need or potential benefit to the object is higher (note that this is also when the probability of reciprocation by the object is highest). Adult human subjects that are trait sympathetic volunteer to help a distressed object when they expect to have control over the procedure or expect to be able to help the object. Thus, it may be more accurate to consider helping behavior as the result of a complex cost/benefit analysis on the perceived effectiveness of helping and the effect of helping on short and long-term goals. If the cost is greater than the benefit, attention can be directed away from the distress to control or subvert empathic processing altogether, making the desire to help less likely (Preston and de Waal 2002: 25).

So how do we use these insights to inform our approach to the ethical education of lawyers? Clearly we should be developing in them high levels of competence so that they can identify ways of assisting their client and have confidence in their ability to put it into effect. We should also be encouraging autonomy and independence of mind so that they can exercise effective control over the procedures available to them. These characteristics are very much those generally considered to be engaged in practice as a lawyer and are consistent with many of the principles in the Codes of Practice. They are also to be found in much conventional legal education. They indicate the importance of effective recognition of the cognitive domain for the quality of affective behaviour. However, they are not sufficient.

One paradox is that autonomy, useful for people to be able to act effectively once they have responded empathically, may be challenged by that empathic response. Berlant suggests: 'You want to feel attached to others, but you don't want to be destabilized. Empathy reveals your non-autonomy, and this is a culture that values freedom and identifies freedom with autonomy.' Gibson quotes her as saying that '[y]ou have to train people to act with empathy, to restrain their ambivalence' and continues: '[s]entimental literature—books like *Uncle Tom's Cabin* or films like *Schindler's List*—provides training by demonstrating the consequences of not having empathy' (in Gibson 2006: para 24).

This approach has long been proposed by Nussbaum, who suggests that education in the arts and liberal humanities helps students to understand the lives of strangers (Nussbaum 1997). Olson criticises this on the basis that such work rarely addresses the reasons why the disadvantaged face such problems (Olson 2007). If he is right, it draws our attention to the need to combine studies of literature with a critical take on why those people's experience was as it was. This lends itself superbly to legal studies.[13] Similar approaches can be developed using film and other aspects of popular culture.[14]

These approaches involve a combination of learning which takes students into the experience of others with learning about why they face that experience and what might be done about it. They begin to establish links between the cognitive domain which forms the mainstream of most legal education and the affective domain. In this way they may develop their understanding of empathy for the other.

[13] See, for example, the journal *Law and Literature*, which provides regular articles in this field predominantly from a US perspective, but providing analysis which is of broader relevance and validity. Details are available on http://ucpressjournals.com/journal.asp?j=lal. See also Hanafin, Gearey and Brooker 2004.

[14] See http://lib.law.washington.edu/ref/lawonfilm.html, which is a resource in its own right, and provides details of a number of other sources. See also Greenfield, Osborn and Robson 2007.

The connection between empathy and similarity with the other raises a further paradox which has been recognised in the context of social work training.

> … close similarities between social worker and client—in religion, background, race, class, education, or family—can make for a trickier relationship. "It's easy to assume you know what a person is thinking if they're like you," [Teigiser] says. "You say three things to me and I don't ask anything more because I know it all." Uncovering a connection with someone completely different, however, requires hard work and lots of questions. "You and I might have the same objective experience, but it's not about that," Teigiser says. "Empathy means understanding another person's *subjective* experience." (Gibson 2006: para 13, quoting Karen Teisiger)

This directs us to another prerequisite for effective ethical education: experience, but first we should consider moral courage.

Moral Courage

Both the ethical dilemmas presented in this chapter require courage for an ethical response as well as the capacity for evaluating which alternative is best and the empathy to be able to engage with the other person's needs. No doubt, individuals bring different degrees of courage to their legal studies and legal practice based on their own inherent characteristics and their upbringing. However, as has been found by studies into other aspects of human character, there may be a role for legal education.

What do we mean by moral courage? Leslie Sekerka defines it as 'the ability to use inner principles to do what is good for others, regardless of threat to self, as a matter of practice' (Sekerka and Bagozzi 2007: 135). He points out how affect acts independently from the judgment of the value of a goal when a decision to act is being taken.

> Some instrumental acts will be intrinsically enjoyable or lead to pleasant consequences. Others may be so noxious or unpleasant as to lead to avoidance. The felt affect in response to the consideration of the possible means supplies additional

information to a decision maker on the personal consequences of engaging in goal pursuit (2007: 138-9). This functions through multiple stages via anticipated emotions, affect towards means, desires to act, felt self-conscious emotions and attachment to a group (144).

This suggests ways in which organisations may improve the likelihood of ethical behaviour and may also provide guidance to law schools in establishing a strong group which espouses ethical values. It may also be useful to students to consider this analysis when reflecting on their own fears and behaviour. Although there is limited empirical work in applying these psychological insights to law students some work has been done. In addressing it I will focus on the importance of being able to overcome the natural tendency to defer to dominant behaviour, whether from a senior colleague, as in my first example, or from an aggressive client, as in my second.

The prevalence of this tendency was made appallingly clear in the famous Milgram experiments of the 1960s (Milgram: 1974). Here experimental subjects believed that they were delivering electric shocks of increasing severity to 'victims' who gave wrong answers. A high proportion continued to levels apparently dangerous or extremely painful for the 'victim' upon being prompted by an authority figure. Steven Hartwell conducted a related experiment in the context of legal education (1990: 141-3). Students were interviewing a 'client' seeking advice in respect of a forthcoming rent dispute hearing. Hartwell was in an adjoining room, available to give advice. Twenty four students sought advice and were all told that they must advise their client to perjure herself in court. Although the experimenters had expected that the majority of students would reject this advice, which so clearly flouted their ethical code, all but one obeyed it and advised the client to perjure herself.

Hartwell used Kohlberg's theory of moral development to analyse and explain these disturbing results. Kohlberg identified six stages of moral reasoning, which can be simply represented as follows.

There are two 'pre-conventional' stages. The first is fundamentally punishment avoidance and accepts authoritarianism: might is right. The second is self-interestedly instrumental. Thus collaboration between others may be seen as desirable if it brings benefits. These two stages are seen as pre-conventional as they operate independently of the moral conventions of the culture within which the individual lives.

The two 'conventional' stages are based on those cultural conventions. Stage Three involves conformity and establishing longstanding trusting relationships. People operating at this level tend to be highly concerned with approval by those close to them. Stage Four involves a more conscious acceptance of the rules through which moral conventions are articulated. There is an acceptance of authority and a recognition of the values of maintaining social order.

The post-conventional stages are more concerned with principled moral reasoning. Stage Five, which Kohlberg described as 'social contract driven', engages the individual with fundamental moral principles such as justice and equality. This will involve a critical analysis of rules and a recognition that there are competing values of individual rights and collective interests. Resolution of any such conflicts will come through debate and majority decision. Stage Six involves reasoning based on universal ethical principles, and remains a very abstract concept. Kohlberg found few research subjects who used it consistently, which suggests that it is not common for people to reach this stage.[15]

[15] It should be observed that Kohlberg's analysis is not universally accepted. In particular, it has been criticised for an uncritical acceptance of narrow justice-oriented values and a rejection of the values inherent in an 'ethic of care', see Gilligan 1982. It nevertheless provides a useful schema for categorising moral decision-making and is used in this chapter only with that intention.

Hartwell concluded that in order for people to act ethically when faced with such an authority dilemma it would be necessary for them to have attained Stage Five. This concerned him as

> Stage 5 moral reasoning is not common. Only highly selective groups of individuals such as students engaged in advanced moral philosophy, regularly demonstrate Stage 5 moral reasoning. Law draws its practitioners unselectively from diverse elements of society. Entrance into law school is not predicated upon the attainment of some stage of moral development. Neither success on the bar examination nor high scores on professional responsibility examinations indicate a high stage of moral reasoning. Even under ideal circumstances, the development of an individual's moral reasoning, as measured by change in a Kohlberg stage, is a very slow process. The notion that the moral reasoning of the legal profession might somehow be elevated to Stage 5, either through training or by selection, seemed unrealistic. (1990: 144-5)

Hartwell also developed a reflective practice in his students in respect of their client interviewing. As this improved they became more sympathetic, but this made them 'more vulnerable to manipulative and aggressive clients' (150). This suggests a real conflict between values generally considered desirable in lawyer interaction with clients.

Hartwell responded with three innovations. He introduced assertiveness training (151). He began to teach the Kohlberg theory of moral development to his students (155), and get them to analyse different responses to dilemmas in Kohlbergian terms. Finally, he introduced simulations whereby students were faced with ethical dilemmas and then had to consider the proper responses, devise rules in respect of those issues and justify those rules (164). His tentative conclusions are that there is an improvement in students' scores on a test designed to measure the degree to which they used Stage 5 reasoning. On this basis he qualifies his initial pessimism by suggesting that moral development may be learnt. Crucial components are: recognising the fact of a moral dilemma, which can be improved by empathy; developing a capacity for moral reasoning, which can be improved by the use of

simulation; and exercising a moral choice, which can be improved by assertiveness training (167).

It is the last of these which is most clearly related to the ability to exhibit moral courage. If combined with measures to develop student competence and appropriate levels of self-confidence, some effective steps can be taken towards developing moral courage.

Implications for Legal Education: Experience

This section will seek to draw together the conclusions reached above and apply them to how we might approach our task as legal educators to recognise the impact of emotions on educating ethical lawyers.

We need to support the development of students' knowledge base and the development of their competency with relevant experience. 'Ervin Staub … acknowledges that even if empathy is rooted in nature, people will not act on it "… unless they have certain kinds of life experiences that shape their orientation toward other human beings and toward themselves".' (quoted in Olson 2007: para 16) We have limited influence over our students' life experience, but in designing their legal education there is a number of things we can do.

The conventional classroom may not, however, be an effective way of achieving these goals. Alan Lerner observes that 'attempts to directly teach thinking and reasoning in a classroom setting generally show little transfer to activities outside the classroom, and because moral judgment involves [more highly emotionally charged] topics than are usually dealt with in courses that attempt to teach thinking and reasoning, the degree of transfer is likely to be even smaller.' (Lerner 2004: 673, quoting Haidt 2001)

Most programmes designed to develop ethical practice are based on the theories of Lawrence Kohlberg (1981). Steven Hartwell developed the work described above by designing such experiential courses and conducted research into their impact (Hartwell 1994).

This work, based on the development of role-play, found a significant effect on his students' moral development which was not present in students only taking non-experiential courses.

Why should this be?

> "Experience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases ... The way in which ideas are understood after they have been used feels different in a sense that is not fully explained by the fact that they are more easily remembered." This is particularly true of ideas about values, much of whose content is lost when understood in a purely intellectual way (Myers 1996: 835, quoting Bellow 1973, 391).

Thus it is through being required to undergo appropriate experiences that students 'begin to internalize and make their own moral and ethical judgments.' (Myers 1996: 836)

I would endorse this view and also suggest two other advantages of experiential approaches.

- One is that experience of playing either lawyers or (particularly) clients in role-play can develop insight which can help with empathy for those with very different experiences. This may be even more true of working in live clinical settings where students advise and represent real clients.
- The second is that by providing students with experience of realistic and real situations we can help them to avoid 'fight or flight' reactions when faced with the need to respond appropriately in a challenging situation.

The first of these has been addressed above. I will now turn to the second.

Alan Lerner has provided a clear explanation of how understanding this significant issue may be assisted by an understanding of how the brain works.[16] Following MacLean

[16] A fuller explanation of the gross anatomy and microanatomy of the brain may be found in Roche's contribution to this book at pp. 5-11 and of the brain's significance for emotion at pp 20-24.

(1978) he explains how the brain may be presented as three distinct but interconnected parts: the most primitive (sometimes known as the 'reptilian' brain); the limbic system; and the neocortex, that part of the brain which is most recently evolved (Lerner 2004: 659).

Lerner describes the limbic system as

> primarily involved with the emotional system, with evaluating, organizing, and directing incoming data for processing in the brain stem and the cortex, and with our awareness of ourselves, physically and emotionally.' (ibid) 'It is also involved with certain of our primal activities such as sense of smell, sex, nourishment, and bonding between individuals (Sylwester, 1995, 43-44). It is capable of mediating our responses to external data through its ability to "read" and act upon our emotional responses, as well as overriding rational thought.(2004: 660)

This capacity has a profound consequence when we are faced with a novel problem or challenge.

> Because the limbic system is involved in all of these activities, emotion is involved with virtually everything that we experience or do. For example, when incoming data indicates a problem, and the limbic system in concert with our rational/emotional brain structures, can discover no appropriate solution or problem solving process, anxiety, even fear, takes over, and the brain activates our fight-or-flight stress response. (ibid) **correct page??**.

The neocortex is described as the part of the brain which

> does most of the processing of sensory data, and makes language, logical and formal thinking, and planning for the future possible. It is responsible for the creativity that we call science and art, (Caine and Caine, 1994: 63) and is largely responsible for planning, analysis, sequencing, learning from errors, certain inhibitions to inappropriate behaviors, and capacity for abstraction, including empathy (Caine and Caine 1994: 67). Logical/rational thinking is centered in the neocortex. (Lerner 2004: 660)

The interconnectedness of these parts of the brain is mediated by the limbic system. Its function of directing incoming data either to the neocortex or the primitive brain for processing makes it the key to how individuals respond to

stimulus. If we want our students to use their rational and empathic capacities the neocortex must be engaged. According to Lerner:

> The challenge for legal educators is to help students learn so that, when faced with problems, whether intellectual, moral or both, they avoid resorting solely to the automatic, primitive, flight or fight response, but rather engage their neocortex with all of its power to process sensory data, draw broadly from memory, abstract, identify patterns, analyze rationally, and create new concepts, thus bringing to consciousness a broad range of potentially effective, ethical responses. (2004: 661)

What leads to individuals responding to challenge by engaging their primitive brain rather than their neocortex? It is particularly when faced with stressful situations, with which, unfortunately, legal practice is replete: 'Making choices and exercising judgment produces stress. Making morally charged choices, or choices in situations where one feels personally threatened, produces a high level of stress.' (678) This is not necessarily harmful. It leads the body to produce two hormones, adrenaline and noradrenalin which assist us in thinking and responding effectively. However, where stress is extreme or continuing the body produces excessive amounts of cortisol, a third hormone which tends to inhibit rational thought. 'Our brain resorts to recall primarily from its more primitive, survival oriented reptilian and limbic systems.' (679)

It is not inevitable that this will happen, and it appears that the more we feel capable of dealing with a problem the more likely we are to avoid the reaction (Caine and Caine, 1994). There is a number of ways in which educators can help students to develop the necessary characteristics.

a) Increase number of encounters

One is simply to raise the number of students' encounters with ethical dilemmas. The more often they are raised the more familiar they will become and the less challenging they will

appear when encountered in practice. This supports arguments for a degree of pervasive ethics teaching in law courses.[17]

b) Developing expertise

Another is to develop expertise in our students.

As described by Gary L. Blasi (1995) and Donald A. Schön (1983) experts seem to be able to leapfrog over several levels of detailed analysis to identify and engage patterns of apparently related information directly to a given problem, and also to matters that are facially different, yet analogous, and thus useful for the solution. Their memories include a combination of a deep body of subject matter data, and "experience," the accumulated knowledge from actually using the data in various situations over time (i.e., in context). Accessing these memories permits them to compare and contrast the characteristics of the presenting problem with those of the many problems with which they have engaged in the past (Lerner 2004: 686).

There is a considerable literature on the use of experience to develop high standards of competence at complex professional tasks. Schön's (1983) work explores different levels of reflection (reflection on action and reflection in action) to explain the development of expertise. At its highest levels this has been described as 'artistry' and has been applied to legal education (Webb 1995). It is beyond the scope of this chapter to develop the arguments further. Suffice it to say that this literature provides a strong theoretical basis for the value of incorporating active learning methods combined with a self-conscious reflective process. By undertaking a reiterative process which takes students through a cycle of experience, reflection on that experience, planning for further experience which then takes place, perhaps in different contexts, (Kolb 1984) students participate in a learning spiral which should assist them to develop expertise or even artistry as lawyers.

[17] For approaches to achieving this, see 'Developments proposing a broader approach' section above.

This is commonplace in the discourse on higher education and represents the currently dominant approach amongst education theorists. I refer to it here to draw attention to the fact that our increasing understanding of the role of the affective domain is a further encouragement for this approach. Indeed, Avrom Sherr has published research which shows that even where experience fails to improve lawyers' competence it does improve their confidence (Sherr 1996). If this is true it will have a direct impact on the way in which the affective domain impacts upon individuals' ability to respond rationally to ethical challenges rather than simply react.

Conclusion

This analysis has proceeded at a relatively general level. I have made no mention of gender differences, an understanding of which could play a significant role in our approach to student learning. Nor have I addressed different perceptions students may hold about personality; whether they are 'entity theorists' or 'incremental theorists' (Maughan 2011, 34?). However, while these are further layers of understanding which are worth exploring, I believe that these conclusions are valid and follow the evidence and arguments presented above.

Considering the role of emotions in preparing people to be ethical lawyers provides strong support for a number of educational approaches and developments which have recently been recommended. I shall summarise these here and suggest that the approaches recommended are mutually supportive.

The first relates to the overall curriculum. The inadequacy of narrow Code-compliance suggests that ethical issues should be raised often and in different contexts throughout students' legal studies. A degree of pervasiveness therefore needs to be planned for and this requires careful organisation.

The second relates to the type of learning students are exposed to. Students need a foundation of knowledge which they should then be enabled to apply through a variety of experiential learning approaches. What should that knowledge include? I would argue that it requires much of the substantive legal knowledge already reflected in the compulsory parts of most law degrees; a contextual and critical view of how the legal profession operates today; and a critical view of professional norms. This foundation permits a diversity of experiential approaches which have been widely considered, both in respect of the overall law curriculum, (Le Brun and Johnstone 1994) skills development (Webb and Maughan 1996 and Maughan and Webb 2005) and the development of clinical methods (Brayne, Duncan and Grimes 1998).

Much of this can be achieved in the classroom. The use of problem-based learning, whether simply to reinforce knowledge by its application, or to discover knowledge through the problem-solving process is increasingly used within legal education.[18] Hartwell's research suggests that there is greater development within the affective domain if that problem-solving is approached through simulation rather than as a pure paper or discussion-based exercise (Hartwell 1994). Another advantage of simulation is the fact that students can take on roles other than that of the lawyer. This may have a role in developing empathy.

Simulation is also a necessary prerequisite for students undertaking live clinical work. Providing students with real experience may not be possible for all, given the cost and organisational implications of doing so. However, the growth of pro bono work with other agencies provides a means of engaging the resources and experience of others provided effective learning contracts are developed with those providers. Nor is it necessary for student

[18] For a critical view of its use in legal education see Cruickshank 1996.

law clinics to be integrated into the curriculum for them to have an impact on ethical awareness and moral development (Nicolson 2008).

The diversity of interest of academic staff is bound to have an impact on the nature of the student experience. It is therefore fortunate that such diversity of approach exists. It enables us to address the analytical, critical academic purposes of the law degree while also assisting individuals to develop the resources necessary for their future involvement in society or even as lawyers. Currently, new resources are being developed to provide an international resource bank and forum for those interested in working in this field linked with opportunities to contribute to that bank and to discussion of issues of mutual interest.[19]

Ultimately, students will retain responsibility for their ethical behaviour. Their values will be their own, rather than ours. However, these values will provide a better foundation for their lives after they have left us, whether as legal professionals or other members of society, if they have been exposed to a variety of learning experiences which have required them to think about those values and to do things with them. This, I suggest, is a valid goal for any higher education. For legal higher education it is best placed in the context of a critical and experiential study of practice as a lawyer in the real social and economic context in which that is situated.

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