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Teach Justice

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I

To his fresh, young law students, Karl Llewellyn admitted that law schools, at least in the first year, aim "to get you 'thinking like a lawyer.'"[1] To them, the law faculty's mission was "to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges."[2]

Such moral vacancy might seem a central feature of Legal Realism, the movement that grew from Llewellyn's lectures to capture generations of lawyers and law professors. The catch-phrase "we are all legal realists now" and its successors seem to invoke (among other images) a special form of professional distance from the morality or the rightness of the legal cause.[3]

Yet Llewellyn saw the dangers in encouraging law students to ignore their ethical instincts. The demands of legal analysis are severe and their management difficult. "It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power . . . [of] social experience."[4]

This moral power was intended to revive in the second year, when law students bring their "ethics out from under ether" but in a form "no longer at war with law or preventing you from seeing the legal question, but informing law, helping you solve and criticize . . . ."[5] This criticism was essential, because the law is enmeshed in ethics and social experience.[6]

Nonetheless, law students' ethics are hardly revived after the second year. Llewellyn and his followers so thoroughly purged most discussion of genuine ethics from the initial curriculum that law students and lawyers are

* William E. Enfield Professor of Law, University of Arkansas School of Law. My thanks to Sandra Pullman for her assistance in preparing the final form of this piece. On her behalf and mine, it is a pleasure to dedicate this piece to Michael Sandel, whose lectures and books inspiring the search for justice have inspired us both. Many of the ideas in this paper are drawn from STEVE SHEPPARD, THE MORAL OBLIGATIONS OF LEGAL OFFICIALS (forthcoming 2008).

[1] KARL N. LLWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL (Steve Sheppard ed., forthcoming 2008) (manuscript at 116, on file with author).

[2] *Id.* at 7.

[3] On the ubiquity of legal realist approaches, see Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986)), which notes that "all major schools of thought are, in significant ways, products of legal realism."

[4] LLEWELLYN, *supra* note 1, at 116.

[5] *Id.* at 119.

[6] *See id.* at 13.

now taught a process and not a purpose for the law. The thin ethics of professional responsibility and the cabined moral clash of constitutional law can hardly be said to develop a sense of right and wrong, or to enhance students' skills in moral judgment. The result is an art wholly of technique and no aesthetic.

II

This soullessness in the taught law has profound implications for the law itself. Lawyers are given no coordinated and professional sense of why the law demands what it does, or of what the law should demand, but instead they are left with only a sense of how it demands or allows what it does. This absence of sense leads to nonsense.

Lawyers are prepared to make finely honed arguments but are left willing to employ them toward goals that are often self-serving, sometimes self-defeating, and occasionally downright evil. One can see it in executive struggles to evade the Constitution, in arguments in legislatures and courts toward the corruption of private law, and in the partisan and personal claims made on the highest realms of government.[7] But it is easily and awfully seen in the readiness of lawyers to distort the words, the meaning, and the very purposes of law to allow an American president to condone the torture of captives, while ignoring or deriding the prohibitions intended to protect the American government and people (much less the tortured prisoners and future American torture victims) from such treatment.[8] The distortion of the law toward such evil and unjust ends is a process that alters its standards of outrage as it goes,[9] accelerating in its decline until it reaches a wholesale loss of authority in law.

The time is past for bringing our ethics out from under the ether. In the words of Deborah Rhode, "Law professors cannot be value-neutral on matters of value."[10]

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[7] The process across the board is nicely illustrated in Robert Spitzer's SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING (forthcoming 2008).

[8] *See* Memorandum from John Yoo and Robert J. Delahunty to William J. Haynes II (Jan. 9, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Memorandum from Jay S. Bybee to Alberto R. Gonzales and William J. Haynes II (Jan. 22, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 81. For an argument these moral failings were the result of weak legal education, see Steve Sheppard, *The Ghost in the Law School: How Duncan Kennedy Caught the Hierarchy Zeitgeist but Missed the Point*, 55 J. LEGAL EDUC. 94, 106-07 & n.38 (2005).

[9] *See, e.g.*, David J. Luban, *The Ethics of Wrongful Obedience*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94, 101-03 (Deborah L. Rhode ed., 2000).

[10] DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 203 (2000).

III

Teaching values in law school would be no revolution, ultimately, only a revival. Law schools before the *Lochner* era had no difficulty in raising profound questions of social and moral obligations in the study of law.[11] Whether the moral silence of much of today's legal education owes more to a focus on technique or to lost confidence in some types of moral claim, there is still a considerable basis in the law for recognizing sound moral argument. It is incumbent on the national law faculty to give law students tools to argue about moral duty, to recognize a compelling moral argument, and to prepare law students to engage in the moral practice of law. The students' success as lawyers depends on it as, ultimately, does the continued authority of the law.

What, then, are the moral values that make sense to teach in law school? And how can they be taught? The answer is rich; indeed it is nearly limitless. For the moment, let me suggest four types of values that can be taught in law school.

A. The Law Should Ensure Fair Treatment Among All

Each person is entitled to be treated honestly, to be free from injury, and to be given what is promised and the respect to which everyone is entitled.[12] In these three ideals are nearly the whole of property, tort, criminal law, and contract. If the law departs from these basic reasons for laws, it does so not just at the expense of wronged plaintiffs or gouged defendants, but then at the risk of its place in the social order as the arbiter of disputes.

B. The Law Must be Told the Truth

Witnesses must swear or affirm to "tell the truth, the whole truth, and nothing but the truth." All the self-serving arguments in the world cannot justify the legions of attorneys and officials who would exempt themselves and their clients from the same obligation. Discovery abuse, misleading complaints, empty answers, hidden evidence, lying witnesses, and more, clog the courts with their deceit, adding costs and inhibiting fair outcomes to disputes. Legal pedagogy cannot morally condone what would, in other con-

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[11] *See, e.g.*, Russell Pearce, *Lawyers as America's Governing Class*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 388-89 (quoting David Hoffman's 1836 *A Course of Legal Study* in describing lawyers' "vocation" as "the protection of the injured and the innocent, the defence of the weak and the poor, the conservation of the rights and prosperity of the citizen, and the vigorous maintenance of the legitimate and wholesome powers of government"); *see also* Michael H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 U. KAN. L. REV. 793 (1999).

[12] This is derived from a venerable model of the basis of justice. *See* J. INST. 1.1.3. ("Iuris praecepta sunt haec: honeste vivere alterum non laedere suum cuique tribuere;" Or, The fundamentals of law are: Live honestly, harm no one, and render to each person what is due.)

texts, amount to conspiracy, contempt of court, fraud, bribery, and obstruction of justice. The authority of law in people's lives depends on the law's promotion of fair hearings and the public good. Neither falsehoods nor concealment should be allowed to diminish that authority. The law schools have a special responsibility to impress students with these professional demands before entering the profit-driven halls of law firms. Every course, whether doctrinal or technical, can challenge students to see and reject mendacity and deception. For instance in a civil procedure lecture on the morality of filing an answer with uninvestigated general denials, or in a criminal law question on whether an indictment is soundly made.

C. The Law Must be Just in its Procedure

Procedural justice can be difficult to ensure because injustice in its applications can be so easily ignored. Perhaps the most important lesson for feminist jurisprudence and race critical theory is that the fairness in procedure cannot be seen from just one perspective or another. These critics force us to see law as the cubists would have us see art; it can only be understood from all perspectives. When should the courts deny a hearing for standing? Why does money count for more toward a remedy than love or a sense of place? Such questions cannot be answered from one perspective alone, but similar inquiries can both explain and criticize the law in course after course. The tool is to depict the rules of the law as they live in practice, not as they rest on a printed page, and then to ask: Whom do they harm and how? Whom do they help and why?

D. Every Lawyer Should Promote Justice

How to define justice? The great tool in history for identifying justice is the principle of wise charity,[13] a principle still easily illustrated by the Golden Rule, "do unto others as you would have them do unto you." If a party could not accept the argument made against the opposing side, if their roles were reversed, then it is an unjust argument. There are, of course, other approaches, such as those of Aquinas, or Kant, or Rawls, yet on close inspection, all of them share a considerable scope with this basic principle of wise charity.

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[13] This idea of justice was central to the thought of the great legal philosopher Gottfried Leibniz. *See* G.W. LEIBNIZ, THEODICY: ESSAYS ON THE GOODNESS OF GOD, THE FREEDOM OF MAN AND THE ORIGIN OF EVIL (1710) (Austen Farrer ed., E. M. Huggard trans., Open Court 1985); PATRICK RILEY, LEIBNIZ' UNIVERSAL JURISPRUDENCE: JUSTICE AS THE CHARITY OF THE WISE (1996).

IV

The case method, embattled as it may be, is tailor-made for instruction in these values. A professor can look to the facts of nearly any legal dispute and find at least half of these values in issue. A tweak of a fact, a new hypothetical, and a particular value is more evident. No class in law school fails to draw in the questions of these basic values, and indeed nearly all of the law is imbedded in the resolutions or continuing arguments implied in these principles. It is incumbent upon our profession to live by these principles of justice and train new lawyers to do the same.