

BEYOND TEXT IN LEGAL EDUCATION: ART, ETHICS AND THE CARNEGIE REPORT

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ABSTRACT

This paper argues that the development of ethical education in law schools ought not to be restricted to the use of textual resources. In the first part of the paper, the continuing dominance of text as the object of analysis in legal theory, legal scholarship and legal practice is illustrated. The dangerous implications of this continuing dominance on the capacity to see and recognise the great variety and depth of suffering and vulnerability is also discussed. It is argued that recourse ought to be had to those traditions of moral philosophy that emphasise the importance of cultivating vision as a form of moral discipline – a discipline, in turn, that can benefit a great deal from the use of non-textual resources, and in particular, from both the appreciation of and involvement in the visual and movement-based arts. In the second part of the paper the treatment of ethical education in the recent Carnegie Foundation for the Advancement of Teaching Report on *Educating Lawyers* is discussed. It is argued that we ought not to subsume the development of ethical education under the canopy of professionalism – a canopy already saturated with text, both in the form of the substantive and procedural law that is expected to be applied, and in the form of the evaluation of professional conduct in accordance with the relevant professional code. Finally, in the third part of the paper, a number of policy recommendations are made. Ultimately, the paper calls for an ethical education that combines both textual and non-textual resources. It is only via such a combination that law schools can provide sufficient opportunities for the range of ethical experiences that are required in order to enhance the effective development of the ethical imagination in law students.

INTRODUCTION

As is befitting of a paper with the title “Beyond Text in Legal Education”, I begin with a painting:

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The painting is “Fight with Cudgels” by Francisco Goya.¹ It is used at the beginning of Michel Serres’ *The Natural Contract*.² Serres asks us to consider what we can see. We see certainly, a pair of enemies fighting, brandishing sticks. We observe their tactics, answering blow for blow, counterattacking and dodging:

Who will die? We ask. Who will win? They are wondering—and that’s the usual question. Let’s make a wager. You put your stakes on the right; we’ve bet on the left. The fight’s outcome is in doubt simply because there are two combatants, and once one of them wins there will be no more uncertainty.³

Fair enough, but aren’t we forgetting, asks Serres, “the world of things themselves, the sand, the water, the mud, the reeds of the marsh?”⁴ Can we not “identify a third position, outside the squabble: the marsh into which the struggle is sinking?”⁵ The example serves as both a reminder of the power of art, but also a warning. After all, the picture itself does not direct us towards recognising the vulnerability of the marsh itself: we must notice it. Nothing can replace the work required in recognising that some phenomenon demands a response from us: that it ought to be an object of our

¹ 1820-1823, Prado Museum, Madrid.

² Serres, Michel, *The Natural Contract*, Michigan: Michigan University Press, 1995.

³ *Ibid.*, at 1

⁴ *Ibid.*

⁵ *Ibid.*

concern. But art – both in the form of its appreciation, as well as by way of participation in its production – can provide us, or at least so I shall argue, with resources that may allow us to develop the ethical imagination of law students more effectively than is achievable by an exclusive focus on textual resources.

There are a number of steps in the argument. First, and addressed in the first part of the paper, is the issue of seeing suffering and vulnerability. There are two elements to this part: first, it will be both necessary and useful to offer a brief reminder of the way in which legal scholarship, legal theory and legal practice continue to be saturated by text. Although recognised – and most certainly not ignored by the Carnegie Foundation for the Advancement of Teaching Report on *Educating Lawyers*⁶ (indeed, on the contrary, as I shall discuss below) – the implications of taking legal texts as the exclusive or at least dominant object of scholarship, theory and practice are perhaps not yet fully understood. The histories of legal scholarship, theory and practice have accumulated an extraordinary collection of exegetical devices, have been witness to seemingly never-ending controversies over interpretative methods, and are marked by nothing less than an obsession with the techniques and mechanics of justifications found in appellate court decisions. For legal scholars, the dominant method – at least in the modern West – continues to be that of rational reconstruction: our duty as legal scholars, it is often thought, is to take the chaos of judicial precedents, statutes and regulations, and discipline them all into a coherent body of doctrine, a unified totality of articulated norms. The refrain of the Rule of Law, i.e., that mode of governance under clear, general and pre-articulated rules that, it is said, alone can protect us from the tyranny of judgement exercised by officials who would otherwise have recourse,

⁶ Sullivan, William, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, Hoboken, N.J.: John Wiley & Sons, 2007; hereinafter, “the Report.”

in ad hoc fashion, to raw moral argument, is heard often enough. The dangers here are many, and what must be recognised, more specifically, in the context of this paper, is the capacity of an exclusive focus on texts to make suffering and vulnerability invisible (both on the personal and social structural level), and, simultaneously, to stunt our ability to become aware of the ethical complexity of any given situation.

Acknowledging both the forms in which texts dominate, and the implications that such dominance brings, raises the question of what, if anything, can supplement that dominance – a question that will be dealt with as the second element of the first part of the paper. It is important to state at the outset that nothing said in this paper is an argument against the significance and utility of scholarly, theoretical – not to mention practical – work performed on and via legal texts. The question is not how we can proceed without text. Rather, as above, the question is how we can move beyond text, and more specifically, how can we move beyond text such that we enhance the ethical education of law students in contemporary law schools. Here, it will be useful to draw on those traditions in moral and legal philosophy that speak of the importance of “moral awareness,” “moral attention” and “moral vision.” These are traditions well-represented by such writers as Iris Murdoch, Simone Weil, Lawrence Blum, and others. As I hope shall become clear, the contribution of these theories sits well with those who have, in different ways, recognised the capacity of non-textual resources (including both visual and movement-based arts) to assist in the development of the ethical imagination.

In the second part of the paper, I shall consider, albeit all too briefly, how ethical education is conceptualised and analysed in the Report. That the Report criticises the

continuing dominance of what it calls “the cognitive apprenticeship” in legal education is obvious: perhaps it is even the most important message in the Report. In that sense, the Report sets up the potential benefit of non-textual resources in ethical education very well. However, at least so I shall argue, the Report is mistaken in locating ethical education under the canopy of professionalism – under what it calls “the apprenticeship of professional identity and purpose.” No matter how clinical, how interactive, how practical a legal educational program becomes, as long as ethical education is restricted to conduct as a professional, it will ignore the full array of resources needed for the more effective development of the ethical imagination. The domain of legal professionalism – as we understand it – is too burdened by text: by the substantive and procedural laws that are expected to be applied, and by the benchmarks set by professional ethical codes. The kingdom of ethics, I shall argue, and, therefore also, the development of ethical education in law schools, cannot be swept under the carpet of professionalism. The third and final part of the paper will make some policy recommendations in light of the discussion in the first two parts.

I. SEEING SUFFERING AND VULNERABILITY

In his helpful overview of the history of the relationship between law and language, Peter Goodrich explains how the struggle to construct a legal science resulted in the study of law “in its systematic context, as a grammar and hierarchy of norms, as a structure.”⁷ For Hans Kelsen, for example, “the law is an order, and therefore all legal problems must be set and solved as order problems.”⁸ Only in this way, argued Kelsen, can legal theory become “an exact structural analysis of positive law, free of

⁷ Goodrich, Peter, “Law and Language: An Historical and Critical Introduction” (1984) 11(2) *Journal of Law & Society* 173-206; at 180.

⁸ Kelsen, quoted at *Ibid.*

all ethical-political value judgements.”⁹ The attractions here for legal scholars are immense, perhaps irresistible: the study of law as a system or code, carries with it, says Goodrich, “the attraction of clarity and abstract verifiability in terms of propositional logic and presupposition” and is, thereby, a comfort “to those within the legal institution who have a professional interest in the belief or mythology of legal determinacy.”¹⁰ As Sally Falk Moore noted, it is also intuitively appealing to “the common sense position prevalent amongst most lawyers, judges and legal scholars today.”¹¹

Goodrich looks back, with some nostalgia, to an alternative reading of language, and, simultaneously, law, insofar as we situate it within language. He recalls the rhetorical tradition particularly fondly. “For Cicero,” he says, “rhetoric was the instrument of practice and of practitioners, it was the art and criticism of public speech conceived not as truth (stasis) but as the active and ‘topical’ argumentation necessary for the determination of the needs and choices of the historical and political community.”¹² But with time, Goodrich laments, rhetoric was made subordinate to logic;¹³ the dynamism of use was replaced by the stasis of meaning; actual usage was replaced by ideal usage.¹⁴ Goodrich argues we should see language as discourse – a view that takes a great deal from the rhetorical tradition – and ask such questions as: “Who is speaking? Who has the right to speak? Who is qualified to do so? Who derives from it

⁹ Kelsen, quoted at *Ibid.*

¹⁰ *Ibid.*, at 181.

¹¹ Moore, quoted at *Ibid.*

¹² *Ibid.*, at 176.

¹³ *Ibid.*, at 177.

¹⁴ *Ibid.*, at 178.

their own special quality, their prestige, and from whom, in return, do they receive assurance, at least the presumption that what they say is true?”¹⁵

Goodrich is right to offer a counterbalance to the perennial magnetism of what he calls the stasis of meaning, of that relentless search for universal and timeless criteria under which the content of words can be determined. He is, of course, not alone in criticising that way of conceiving of law-in-language both in legal scholarship and legal theory. Contemporary legal theory continues to be besotted with the ambition, as Roger Cotterrell put it, to “explain the character of law solely in terms of the conceptual structure of legal doctrine and the relationships between rules, principles, concepts and values held to be presupposed or incorporated explicitly or implicitly within it.”¹⁶ “The construction of a professionally plausible and logically coherent concept of law as doctrine”, says Cotterrell, “is both the starting point for and the final expression of knowledge of the nature of law from the standpoint of normative legal theory.”¹⁷ Similarly, according to Cotterrell, the legal professional’s approach to knowledge of law is “to fix the meaning of legal ideas to explain the reality of law.”¹⁸

But notice here that despite the critique of a limitation of the object of legal scholarship and legal theory to that of a search for formal unity in legal doctrine, for that logical system, that lawyerly totality, both Goodrich and Cotterrell remain dedicated to the location of law within language; even if, and importantly so, language here is not conceptualised as the house of meaning, but as an instrument used in specific contexts. For Cotterrell, law remains doctrine, even if, as he argues,

¹⁵ *Ibid.*, at 185.

¹⁶ Cotterrell, Roger, “The Sociological Concept of Law” (1983) 10(2) *Journal of Law & Society* 241-255; at 241.

¹⁷ *Ibid.*, at 242.

¹⁸ *Ibid.*

we should see that doctrine as being “produced in, embodied in and legitimating institutional practices.”¹⁹ For Goodrich, as we have seen, law remains discourse, even if that discourse is conceptualised as a practice – a practice, moreover, that perpetuates, at least according to Goodrich, the authority of the law-giver that is said to pre-exist it.

Let us note, briefly, some other examples of the perennial temptation to locate law within language. Despite calling his own project an exercise in “descriptive sociology”,²⁰ HLA Hart’s legal theory and legal scholarship remained within the paradigm of the analysis of law as a body of doctrine. In a paper²¹ following her magisterial biography of Hart,²² Nicola Lacey tackled the question of Hart’s above-mentioned description of the method of his book, *The Concept of Law*. Tracing the influence of JL Austin, the ordinary language philosopher, on Hart, Lacey shows how both *Causation in the Law* (co-authored with Tony Honoré)²³ and Hart’s writings on legal responsibility,²⁴ “reduced linguistic usage to a body of doctrine rather than seeing it as a social practice that takes place within a context, the specific nature of which requires investigation because it inflects the relevant concepts.”²⁵ In *Causation in the Law*, for example, Lacey says, “Hart and Honoré simply inundate us with a huge amount of actual linguistic data. This data is almost exclusively drawn from appellate case law. The reader is not given a systematic analysis of the institutional,

¹⁹ *Ibid.*, at 251.

²⁰ Hart, HLA, *The Concept of Law*, Oxford: Clarendon Press, 1961, at v.

²¹ Lacey, Nicola, “Analytical Jurisprudence Versus Descriptive Sociology Revisited” (2006) 89 *Texas Law Review* 945-982.

²² Lacey, Nicola, *A Life of HLA Hart: The Nightmare and the Noble Dream*, Oxford: Oxford University Press, 2004.

²³ Hart, HLA and Honoré, Tony, *Causation in the Law*, 2nd ed, Oxford: Oxford University Press, 1985.

²⁴ Hart, HLA, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford: Oxford University Press, 1968.

²⁵ Lacey, *supra* note 21, at 969.

practical, professional, or social context in which that legal language was used.”²⁶

There is, laments Lacey, “no exploration of the social practices or forms of life within which the causal language game is embedded.”²⁷

Lacey does well to pick out what she calls “the paradox of analysis” (at least as practiced by the ordinary language philosophers): “if language speaks for itself,” she says, “it is not clear that philosophical analysis is either necessary or capable of being applied to linguistic usage without doing violence to its meaning. For philosophical analysis is itself a distinctive form of usage. How, then, can linguistic usage criticise the incoherence of the linguistic practice that it takes as its material?”²⁸

Acknowledging this paradox, Lacey thinks, may help us to recognise that “the illumination of legal practices lies not merely within an analysis of doctrinal language; it lies equally with an attempt to locate the analysis within some general account of the history and social role of the institutions and the power relations within which that usage takes place.”²⁹ Legal ideas – to the extent that we locate them in language – have, she argues, institutional conditions of existence: the notion of capacity responsibility, for example, “can only”, says Lacey, “be realised in criminal law on the basis of certain institutional developments and in the context of a cluster of social and cultural conditions.”³⁰ Rather than focusing exclusively on doctrine, on law as language, we may, for example, “explore: 1) the institutional factors that restrict the extent to which judges will appeal to pragmatic or policy arguments, 2) their

²⁶ *Ibid.*, at 967.

²⁷ *Ibid.*

²⁸ *Ibid.*, at 965.

²⁹ *Ibid.*, at 969.

³⁰ *Ibid.*, at 975.

sensitivity to the need to legitimate their decisions, or 3) their system-specific understanding of their constitutional role.”³¹

Arguably, Lacey offers us a concept of law less dependent on language than Goodrich’s and Cotterrell’s. Certainly, it is less dependent on language than Hart’s. Nevertheless, Lacey’s concept is still one that in some sense subordinates the study of institutional conditions to the role they play in making possible the use of, or, indeed, stultifying the life of, legal ideas or legal concepts – as these are articulated in language. We have to dig deeper, much deeper – possibly back to Eugene Ehrlich and Bronislaw Malinowski – before we can find a legal theorist or legal scholar who locates law dominantly or exclusively in the interactions between human beings. For Ehrlich, law is the living law, and the living law “is the law which dominates life itself even though it has not been posited in legal propositions.”³² Law is the law of everyday life: “the customary practices and usages which give rise to and maintain the inner ordering of associations (the family, village community, corporations, business associations, professions, clubs, a school or factory).”³³ Similarly, for Malinowski, “legal rules consist of a class of binding rules which control most aspects of tribal life, which regulate personal relations between kinsmen, clansmen, and tribesmen, settle economic relations, the exercise of power and of magic, the status of husband and wife and of their respective families.”³⁴

³¹ *Ibid.*, at 968.

³² Ehrlich, Eugene, *Fundamental Principles of the Sociology of Law*, London: Transaction Publishers, 2002, at 497.

³³ Ehrlich, quoted in Tamanaha, Brian, *A General Jurisprudence of Law and Society*, Oxford: Oxford University Press, 2001, at 31.

³⁴ Malinowski, quoted in Tamanaha, Brian, “An Analytical Map of Social Scientific Approaches to the Concept of Law” (1995) 15(4) *Oxford Journal of Legal Studies* 501-535, at 504.

You might think that Ehrlich and Malinowski go too far. Locating, as they do, law in the daily interactions of human beings, they render their concept of law, as Brian Tamanaha has argued, incapable of distinguishing between law and non-law: law is everywhere, and perhaps, therefore, also nowhere.³⁵ You might agree with Goodrich, Cotterrell and Lacey – despite their qualifications – that modern law is steeped in language; we cannot afford to ignore the plain fact, you might argue, that most modern law is written down, promulgated by an authority (most centrally, a State – despite the cries of protest by legal pluralists), and validated in accordance with a pedigree test. This paper is not the time to enter into these theoretical debates: the point in citing these examples is to raise awareness of the tendency of legal scholars and legal theorists to focus exclusively on law as text; to see the values of the text (such as coherence and consistency etc) as of the greatest priority; or, in a more sophisticated fashion, to point to the use of legal texts and their institutional conditions of existence, their social impact, and so on.

Let me illustrate this ongoing bias in favour of texts once more. Although well-known in legal anthropological, comparative and sociological studies, Rodolfo Sacco's concept of mute law has had little reception in mainstream legal theory and legal scholarship. "Law may live," Sacco argues, "and lived, even without a lawgiver."³⁶ "When the Homo Habilis produced the first pebble tools", says Sacco, "the dichotomy between law and enforcement did not exist... Adherence to the rule implied its existence and validity... the law was mute, except for yelling accompanying ceremonies and self help. Sources were mute. Acts were mute."³⁷ "The biggest legal revolution took place", continues Sacco, "when a descendent of the Homo Habilis

³⁵ See Tamanaha, *supra* notes 33 and 34.

³⁶ Sacco, Rodolfo, "Mute Law" (1995) 43 *American Journal of Comparative Law* 455-467, at 465.

³⁷ *Ibid.*, at 459-60.

began to use an articulated language.”³⁸ Even then, he says, it is unclear “whether man began immediately to use it for purposes of law.”³⁹ It is not the historical argument here that is the crux of the matter. After all, argues Sacco, we can find examples of mute elements in contemporary systems: unspoken legal sources, such as commercial uses, and determinations of standards of conduct, or unspoken legal acts, such as deliveries, and so on.⁴⁰ Rather, as he puts it, the crux of the matter is to “ask which new possibilities”, and, I would add, limitations, “the articulation of language opened over time.”⁴¹

Sacco is right to remind us that “lawyers are primarily interested in spoken sources and acts and feel uneasy with mute sources and acts”;⁴² and that “when we refer to mute acts, we do it by analogy to spoken acts.”⁴³ What is crucial, then, in understanding the possibilities and limitations opened up by the articulation of language over time is to understand why scholars, theorists and practitioners, feel more comfortable within language; why they are so attracted to language. Why are we, to put it more generally, attracted to the fascinating domain of text, the autonomy, meaning, interpretation of the text, the consistency, coherence, unity, totality of the text, to the abstract, the formalisable, the analysable, to the said, the measured, the explained, articulated, elaborated, demystified, the laid bare, the body of the text?

³⁸ *Ibid.*, at 460.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, at 464-65.

⁴¹ *Ibid.*, at 460.

⁴² *Ibid.*, at 465.

⁴³ *Ibid.*

Scott Veitch's latest book, *Law and Irresponsibility*,⁴⁴ offers one, quite discomfoting answer. Where we might – as it seems we have and continue to – think of law and legal institutions as being primarily concerned with organising responsibility, Veitch argues that, on the contrary, laws and legal institutions provide us, personally and collectively, with opportunities to disavow responsibility. Consider, for example, the popularity of role responsibility (a phenomenon that has developed simultaneously with the increasing bureaucracy and rationalisation of social governance): we are responsible, under this conception, as long we perform our task well, no matter what the ultimate consequences of our actions.⁴⁵ Consider the way that intention is attributed in determinations of legal responsibility: in *Kruger v Commonwealth*⁴⁶ – the case concerning the responsibility of the Australian government for the stolen generation in Australia (the taking of Aboriginal children from their homes) – the Australian High Court found that the Australian government could not have been responsible for the suffering inflicted upon many Aboriginal children and their families because the Chief Protector of Aboriginals (as he was then called) was, required, according to the legislation of the time, to take “the best interests of the children into account.”⁴⁷ Consider, finally, the infliction of mass-scale death and suffering on the Iraq people as a result of the sanctions regime in the 1990's – a regime that took careful and sustained planning, all appropriately legitimised and carried out by the legal and bureaucratic structures of the United Nations.⁴⁸

⁴⁴ Veitch, Scott, *Law and Irresponsibility: On the Legitimation of Human Suffering*, London: Routledge Cavendish, 2007.

⁴⁵ *Ibid.*, at 42-52.

⁴⁶ *Kruger v Commonwealth* (1997) 146 *Australian Law Reports* 126.

⁴⁷ Veitch, *op. cit.*, at 111.

⁴⁸ *Ibid.*, 12-19.

In all these cases, the law and its institutions function to either make us, personally, not care about the consequences that our actions may cause – after all, we always have the comfortable excuse that we were simply following the rules – or they function to make us, collectively, not see the suffering caused by our government’s actions *as* suffering, for that infliction has, after all (or so we tell ourselves, if we reflect upon it at all), been performed in accordance with legally authorised procedures, and further, in the name of high-sounding principles of benefit, surely of benefit, to peoples of all nations.

Veitch’s argument is complex, and I do not have space in this paper to elaborate on it in detail. But Veitch is not alone, though he most certainly is in the minority, in pointing out the danger involved in our idolatrous worship of legality – and the coherence and consistency of the articulated rules within legality’s realm, leading, we often like to think, to certainty and predictability, and thus to the Rule of Law, the most popular refrain of our day. Judith Shklar’s warnings about the effects of legalism, both as a personal ethic and as a social ideal, are well-known.⁴⁹ Shklar argued that the legalistic attitude – i.e., the representation of correct social and personal conduct as a matter of rule-following, where the rules fix the rights and obligations that we have – reaches its high point in contemporary Western legal systems. There are many ways of making this point: Max Weber’s diagnosis of the increasing formal rationalisation of society;⁵⁰ Jürgen Habermas’ theory of increasing juridification, in which the force of the law (its enforcement mechanisms) and its claim to correctness are combined in such a way as to make it almost impossible to

⁴⁹ Shklar, Judith, *Legalism*, Cambridge, Mass.: Harvard University Press, 1986.

⁵⁰ Weber, Max, *Max Weber on Law and Economy in Society*, edited with an introduction by Max Rheinstein, Cambridge, Mass.: Harvard University Press, 1954.

resist the use of law in the characterisation and resolution of problems;⁵¹ Niklas Luhmann's autonomy of the highly differentiated system of articulated legal norms,⁵² and so on. The danger here is that we can come to think that it is the law that – already and perhaps before we know it – does the “ethical” work for us; and, in doing so, takes away, as Zenon Bańkowski puts it, the need to face the anxiety of a difficult decision, to avoid the contingency of situations in which whatever we do seems to have unbearable consequences, where things can go wrong, where our values conflict, and so on.⁵³ Dwelling in the comfortable house of articulated rules, we do not dare to go outside; we do not dare to subject the limits of our categories – learnt by acquiring the knowledge of rules (more or less internalised) – to the almost infinite complexity of a situation; we do not dare to imagine – to see the same situation from numerous viewpoints, to see the many diverse consequences of any one action – for the rules don't even create that opportunity, that need, that burden, that difficulty.

In a significant passage in his book, Scott Veitch considers the alternative to that of the usual situation in which “the dark light of the law” renders certain forms of suffering and vulnerability invisible:

If we were to start our enquiries and our responses with the harms themselves and worked back [that] way – if we were to start with the bodies, the dead, scarred or emaciated bodies, the deadened, the grieving or shattered lives, this one, and this one, and this one, each one – then, from this far more rarely adopted perspective, it would quickly become clear that the strands that might be thought to connect the harms suffered with some responsibility for them appear to have quickly become entangled, been broken, crumpled into dust.⁵⁴

⁵¹ Habermas, Jürgen, *Between Facts and Norms*, Cambridge, Mass: MIT Press, 1996.

⁵² Luhmann, Niklas, *Law as a Social System*, Oxford: Oxford University Press, 2004.

⁵³ Bańkowski, Zenon, *Living Lawfully: Love in Law and Law in Love*, Dordrecht: Kluwer Academic Publishers, 2001, at 26.

⁵⁴ Veitch, *supra* note 44, at 18.

The failure here, as Veitch notes, is the ongoing one of insensitivity “to the voices of those whose position is not our own, but who, in fact, know far more and far better than we do: the victims or their relatives.”⁵⁵ More specifically, the problem is one of beginnings – of how we come to see the suffering before us – *as* suffering. If we start with the rules, the norms, the actions performed under the cloak of legality, then already the suffering is veiled, appearing behind that cloak – its immediacy, its horror, already stultified, if not nullified. The problem, then, is that the rules (and texts more generally) cannot be the sole educators of our moral sensibility, of our ethical radar – once they are, the object that those rules or norms might point to (if they point to them at all, i.e., if they allow those objects to enter our awareness at all), are already stripped of their power to invoke in us the response that they demand.

To reiterate, the issue of beginnings here is crucial. How do we come first to realise that a situation demands an ethical response from us? How did we come to realise that the environment is a value, that it itself demands respect from us – not only because of the effects it will have on future generations of human beings – but because it itself is a source of value? How come it took the peoples of the West so long to realise that minorities deserved equal treatment? Even within the West, that women or immigrants or homosexuals, deserved equal treatment? When our access to the domain of value is restricted to that of the guidance provided by articulated rules or even internalised norms, it is too poor, too feeble a guide to make us see the immense variety of suffering and vulnerability around us.

⁵⁵ *Ibid.*, at 18.

It is here that it is helpful – albeit all too briefly – to consider the contributions of those theorists who speak of the importance of moral particularity,⁵⁶ situation ethics,⁵⁷ moral attention,⁵⁸ the moral imagination,⁵⁹ moral perception,⁶⁰ moral vision,⁶¹ the power of love,⁶² and the naked face of the other.⁶³ In her short, but brilliant book, *The Sovereignty of the Good*, Iris Murdoch notes that there is a “two-way movement in philosophy, a movement towards the building of elaborate theories, and a move back again towards the consideration of simple and obvious facts.”⁶⁴ Current moral philosophy, Murdoch says, has proceeded too far down the path of a single elaborate theory that, in Murdoch’s opinion, is based on the idea that “‘good’ is a function of the will.”⁶⁵ That way of seeing the good, she notes, is very attractive, for moral judgements could now be seen not as “weird statements, but something much more comprehensible, such as persuasions or commands or rules.”⁶⁶ Under this conception, thought is not conceptualised as action, but as “an introduction to action.”⁶⁷ I do not identify myself with the actions or deeds that I perform, but I do identify myself with my will: my intention, based on my beliefs, is all that counts. Again, “I can decide what to say but not what the words mean which I have said. I can decide what to do but I am not master of the significance of my act.”⁶⁸ The history of this way of

⁵⁶ See the work of Jonathon Dancy, but see also the collection of essays in Hooker, Brad and Margaret Olivia Little (eds), *Moral Particularism*, Oxford: Clarendon Press, 2000.

⁵⁷ Fletcher, Joseph, *Situation Ethics*, Philadelphia: The Westminster Press, 1966.

⁵⁸ Weil, Simone, “Attention and Will” in Weil, Simone, *An Anthology*, London: Penguin Classics, 2005, 231-237.

⁵⁹ Fesmire, Steven, *John Dewey and the Moral Imagination: Pragmatism in Ethics*, Bloomington: University of Indiana Press, 2003.

⁶⁰ Blum, Lawrence, *Moral Perception and Particularity*, Cambridge: Cambridge University Press, 1994.

⁶¹ Murdoch, Iris, *The Sovereignty of the Good*, London: Routledge, 1970.

⁶² Bañkowski, Zenon, *Living Lawfully: Love in Law and Law in Love*, Dordrecht: Kluwer Academic Publishers, 2001.

⁶³ Levinas, Emmanuel, *Totality and Infinity*, Pittsburgh: Duquesne University Press, 1969.

⁶⁴ Murdoch, *supra* note 61, at 1.

⁶⁵ *Ibid.*, at 4.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at 5.

⁶⁸ *Ibid.*, at 20.

conceiving the self is by no means limited to the modern world, and Murdoch does well to trace it back through, as we might expect, though no doubt somewhat unfairly, the work of Descartes and Kant.

As a counterbalance, Murdoch speaks of morality as an activity. Language is still there, but it recedes into the background: language is dependent, she argues, “upon contexts of attention.”⁶⁹ Further, contexts of attention do not arise mysteriously from beyond us – we learn them, over time; “we develop language”, she says, “in the context of looking.”⁷⁰ Murdoch is particular clear in the following passage:

One is often compelled almost automatically by what one *can* see. If we ignore the prior work of attention and notice only the emptiness of the moment of choice we are likely to identify freedom with the outward movement since there is nothing else to identify it with. But if we consider what the work of attention is like, how continuously it goes on, and how imperceptibly it builds up structures of values round about us, we shall not be surprised that at crucial moments of choice most of the business of choosing is already over. This does not imply we are not free, certainly not. But it implies that the exercise of our freedom is a small piecemeal business which goes on all the time and not a grandiose leaping about unimpeded at important moments. The moral life, on this view, is something that goes on continuing, not something that is switched off in between the occurrence of explicit moral choices. What happens in between such choices is indeed what is crucial.⁷¹

Murdoch attributes her use of the concept of attention to Simone Weil. In Murdoch’s formulation, Weil’s notion of attention is that of “a just and loving gaze directed upon an individual reality.”⁷² Phrased in this way, we lose something of the uniqueness of Weil’s notion. In Weil’s own words, “attention consists of suspending our thought, leaving it detached, empty and ready to be penetrated by the object. It means holding in our minds, within the reach of this thought, but on a lower level and not in contact

⁶⁹ *Ibid.*, at 32.

⁷⁰ *Ibid.*, at 33.

⁷¹ *Ibid.*, at 36.

⁷² *Ibid.*, at 33.

with it, the diverse knowledge we have acquired which we are forced to make use of.”⁷³ Attention, for Weil, is more a matter of “waiting, not seeking anything, but ready to receive in its naked truth the object which is to penetrate it.”⁷⁴ Acknowledging this aspect of Weil’s notion – as Murdoch no doubt would – is not to say it is incompatible with Murdoch’s insistence on the necessarily long-term development of the cultivation of vision as moral discipline. After all, as noted above, Weil wants us not to proceed too hastily in order to allow what she calls “the naked truth of the object” to penetrate, and thereby also unravel, the cognitive habits that may come from the acquisition and internalisation of rules and categories.

Though it has not received as wide a reception as it ought, Murdoch’s insistence on the importance of moral vision has been taken up by both contemporary ethical theorists and pedagogues. The best work here tends to straddle both. Martha Nussbaum, for example, in *Love’s Knowledge* (where she speaks of the “Discernment of Perception”),⁷⁵ *The Fragility of Goodness*,⁷⁶ and *Cultivating Humanity*,⁷⁷ and other more recent works,⁷⁸ is particularly attune to the need for the academy to cultivate the ethical imagination. Lawrence Blum endorses Murdoch’s approach explicitly.⁷⁹ On the back of a reading of her work, he asks: “How do agents come to perceive situations in the way they do? How does a situation come to have a particular

⁷³ Weil quoted in Miles, Sian, “Introduction” in Weil, Simone, *An Anthology*, edited with an introduction by Sian Miles, London: Penguin Modern Classics, 2005, 1-68, at 8.

⁷⁴ *Ibid.*

⁷⁵ Nussbaum, Martha, *Love’s Knowledge: Essays on Philosophy and Literature*, New York: Oxford University Press, 1990.

⁷⁶ Nussbaum, Martha, *The Fragility of Goodness*, Cambridge: Cambridge University Press, 1986.

⁷⁷ Nussbaum, Martha, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*, Cambridge, Mass.: Harvard University Press, 1997.

⁷⁸ See, especially, Nussbaum, Martha, *Hiding from Humanity: Disgust, Shame and the Law*, Princeton: Princeton University Press, 2004; and her discussion of education in India in Nussbaum, Martha, *The Clash Within: Democracy, Religious Violence and India’s Future*, Cambridge, Mass.: Harvard University Press, 2007, especially chapter 8, “Education Wars.”

⁷⁹ Blum, *supra* note 60.

character for a particular moral agent? What is the relation between our moral-perceptual capacities and other psychological capacities essential to the moral life?”⁸⁰ Blum’s work is also significant for its attempt to integrate the moral perception and particularity literature, with that of virtue ethics and, perhaps most importantly, the literature on long-term moral development, especially via the work of Lawrence Kohlberg. Of great relevance, too, are the many other theorists who speak of the primacy of judgement – looking back, as they tend to do, to Aristotle and the notion of *phronesis* (Nussbaum, for example, notes that “Aristotelian education is aimed at producing citizens who are perceivers”)⁸¹ – but without neglecting the explanatory device of moral perception, such as, for example, Charles Larmore in his *Patterns of Moral Complexity*.⁸²

The best work in this context also recognises that the strengths of that view which emphasises the long-term cultivation of vision as a form of moral discipline is not antithetical to, but, on the contrary, can work most effectively in tandem with, the long-standing tradition of rule- and principle-based ethics. To the extent that moral philosophers in both traditions conceive of their task as mutually-exclusive, the contribution that moral philosophy can make to pedagogy will be all the poorer. To reiterate, beyond text in legal education is not without text; it is simply not limited to text. But, what, then, specifically can be done, what specific resources or activities can be offered, in order to move beyond text?

⁸⁰ *Ibid.*, at 30.

⁸¹ Nussbaum, *supra* note 75, at 103.

⁸² Larmore, Charles, *Patterns of Moral Complexity*, Cambridge: Cambridge University Press, 1987.

It is indicative that in his justly famous *The Story of Art*, EH Gombrich noted that, in writing the work, he “should like to help to open eyes, not to loosen tongues.”⁸³ His statement echoes that of Ludwig Wittgenstein’s: the best philosopher, said Wittgenstein, is the one who can walk the slowest. Combine that statement with Wittgenstein’s invitation that we look rather than talk, and the resulting image of the Wittgensteinian philosopher is that of someone walking slowly, very slowly, looking. Both appreciating and participating in art can contribute to the development of the ethical imagination – the development of which, at least in light of the theoretical contributions mentioned above, must allow for the exercise of vision, for the recognition of morality as a sphere of activity (and not simply as a matter of purely rational choice or a matter of being oriented by pre-articulated rules), for the development of the courage required to face the contingency of possible consequences, feeling the anxiety of unknown outcomes, allowing the unfamiliar, the foreign, the outside, to enter inside, recognising the incredible power of one’s own cognitive dispositions, feeling responsible for one’s actions and not distancing oneself from their consequences, recognising one’s own vulnerabilities, one’s own forms of suffering – and ultimately, thus, becoming capable of noticing, and willing to pay attention to, the immense variety and depth of suffering and vulnerability around us.

It will be instructive here to mention one of the initiatives introduced by Zoë Fothergill at the Talbot Rice Gallery in Edinburgh. Zoë is a curator and manager of events and education at the Talbot Rice Gallery and also one of the key collaborators on our project on Beyond Text in Legal Education at the School of Law in Edinburgh. Spending, as she does, most of her day in the gallery, Zoë has every opportunity to

⁸³ Gombrich, E.H., *The Story of Art*, New York: Phaidon Press, 1995, at 37.

observe in some detail the behaviour of gallery visitors. One of her most dispiriting observations – dispiriting certainly from the perspective of a curator – is how little time visitors spent looking at the pictures. Indeed, sometimes it appears they did everything but: they spent a good proportion of their time reading the labels and descriptions next to the picture, and if they weren't reading, they were listening to the learned commentary being offered, explaining, perhaps, the life of the artist, and the features of the painting that allows art historians to locate the artwork within a particular movement. To counter this tendency not to look, Zoë organised a tour of the gallery led by a professional clown: there were no labels to read, no commentary to listen to, indeed there were no words spoken at all. The clown moved in amongst the gallery objects, pointing, gesticulating, teaching, if you like, the crowd to look, and then look again, and to keep looking.

What was central in this initiative was not simply exposure to the artwork. As I noted at the beginning of this paper, engagement with artistic works is not, or at least should not be, a passive experience where we expect the artwork to do the work for us. Goya's "Fight with Cudgels" does not, by itself, orient our attention to the sinking marsh: we must notice it. An aesthetic experience – as recognised by many, perhaps most prominently John Dewey in his perennially important *Art as Experience*⁸⁴ – is an event; its significance lies, as Kathleen Abowitz has recently put it, "in the interaction between objects or performances and human beings."⁸⁵ Maxine Greene, in her Lincoln Center Institute Lectures on Aesthetic Education, put it this way: "Perceiving a dance, a painting, a quarter means taking it in and going out to it... It requires a mental and imaginative participation (even when the mind does not 'hold sway'), a

⁸⁴ Dewey, John, *Art as Experience*, New York: Perigree, 1934.

⁸⁵ Abowitz, Kathleen Knight, "Moral Perception through Aesthetics: Engaging Imaginations in Educational Ethics" (2007) 58 *Journal of Teacher Education* 287-298, at 292.

consciousness of a work as something there to be achieved, depending for its full emergence on the way it is attended to and grasped.”⁸⁶ Perception, in this way, involves interaction, participation, involvement, immersion. Speaking at a Symposium on Dewey’s *Art as Experience*, John Fisher said that “aesthetic experience is a construct of the relations of interactions of persons and objects.”⁸⁷

A great deal more work would be required here to express the many different ways in which art can help foster the ethical imagination, and, in doing so, to protect us against the ethical blindness that all-too easily ensues from the exclusive focus on that closed system of norms, and its crafty manipulation. In his seventh chapter, “The Moral Artist” of *John Dewey and the Moral Imagination*, Steven Fesmire speaks of the capacity of art to involve “a felt opening of awareness of a situation’s objective potentialities in which something of the world is revealed,”⁸⁸ going on to list a number of ways in which art might be thought to achieve such awareness.⁸⁹ Irving Kaufman spoke of the way in which “art may provide the basis of a joining of moral and aesthetic community interests, for a common good.”⁹⁰ Arthur Koestler, in his *Act of Creation*, speaks of learning the ability to cast off traditional paradigms as the heart of all creative behaviour.⁹¹ Iredell Jenkins, in *Art as a Human Enterprise*, suggests that “when our attitude toward things is primarily aesthetic, it is the self-assertion of things of their own individual existence and autonomy that dominates the experiential

⁸⁶ Greene, Maxine, *Variations on a Blue Guitar*, New York: Teachers College Press, 2001; and quoted in Abowitz, *Ibid.*, at 293.

⁸⁷ Fisher, John, “Symposium on John Dewey’s Art as Experience” (1989) 3(3) *Journal of Aesthetic Education* 49-67, at 57; and quoted in Abowitz, *Ibid.*, at 293.

⁸⁸ Fesmire, *supra* note 59, at 124.

⁸⁹ These include: perceptiveness, creativity, expressiveness, skill, response of the Other, and highlighting and hiding; see Fesmire, *Ibid.*, at 113-119.

⁹⁰ Kaufman, Irving, *Art and Education in Contemporary Culture*, New York, Macmillan, 1966, at 36-7.

⁹¹ As articulated by Newman, Arthur J, “Aesthetic Sensitizing and Moral Education” (1980) 14(2) *Journal of Aesthetic Education* 93-101, at 95.

situation”⁹² – a statement that may remind some of us of Martin Heidegger’s reading, in “The Origin of the Work of Art”,⁹³ of Vincent Van Gogh’s “The Peasant Shoes.” We may speak, too, of the ability of art to remind us of the contingency of our beliefs, of our identities, of the artificiality of borders between nations.

Even to cite such an absurdly briefly list is trivial, in light of the immense tradition of aesthetic education.⁹⁴ Of course, we must be careful. We must not overstate the case for aesthetic education. As I have noted above, we need not, and we should not, promote aesthetic education as superior to, and calling for the replacement of, the development of ethical education in law schools on the basis of an acquisition of the knowledge of rules and principles. Many of these rules and principles have themselves emerged over long periods of time as relatively reliable guides and signposts. Further, much can be learnt – as indeed it sometimes is in law schools – when we reflect on the limits of such rules. The point here is that neither picture of the work of ethics is mutually exclusive: the picture invoked by art – let us say, of the active and anxious immersion into the particularities of a situation – and that picture invoked by systems of articulated rules and principles – i.e. of an agent either guided by internalised rules, or one stepping back to consider what ought to be done by reference to a rule book – can, and should, complement each other. These pictures of moral life, with their differing implications for the shape of education, are not at odds. It is, however, it seems to me, fair to say that in the context of legal education, the exact form of that co-ordination of textual and non-textual resources is yet to be

⁹² Jenkins, Iredell, *Art and the Human Enterprise*, Cambridge, Mass.: Harvard University Press, 1958, at 39; and quoted in Newman, *Ibid.*, at 94.

⁹³ Heidegger, Martin, *Language, Poetry, Thought*, New York: Harper and Row, 1971, see chapter 2.

⁹⁴ For a useful discussion and more readings see Graham, Gordon, “Learning from Art” (1995) 35(1) *British Journal of Aesthetics* 26-37; and Schwartz, Robert, “The Power of Pictures” (1985) *Journal of Philosophy* 189-198

properly explored. I shall return to some specific recommendations and proposals for future work in the third part of this paper: it is time, now, to consider how the Carnegie Report conceptualises ethical education within contemporary law schools.

II. ETHICAL EDUCATION IN THE CARNEGIE REPORT

To understand how the Report conceptualises and proposes to develop ethical education, it is first necessary to consider, very briefly, the epistemological foundation upon which it seeks to re-establish legal education. The Report marks a welcome move away from thinking like a lawyer – or at least, merely thinking like a lawyer – to performing like one. It laments the shift away from apprenticeship models of learning, said to have emerged as a result of the movement of professional education into the academy, which fostered (and, arguably, still fosters) increasing reliance on methods of academic instruction.⁹⁵ It urges us to think of expert knowledge as highly structured knowledge, whose well-developed “schemas for thinking and acting” allow these experts to bring their knowledge to bear with remarkable speed and accuracy – doing so, furthermore, selectively, and necessarily so, says the Report, for expert knowledge is conditioned, or related to contexts.⁹⁶ The re-focus here on tacit knowledge, and on learning in environments that demand the exercise of practical skills for the resolution of problems (with simultaneous feedback from experts), are all – at least it seems to me – welcome developments. The relevant literature here on tacit epistemologies (as in the well-known work, for example, of Michel Polanyi),⁹⁷ and on highly domain-specific perceptual memory (as in chess)⁹⁸ – all this is well-

⁹⁵ The Report, *supra* note 6, at 25.

⁹⁶ *Ibid.*

⁹⁷ Polanyi, Michel, *Knowing and Being*, Chicago: University of Chicago Press, 1969.

⁹⁸ I have explored this in other work: Del Mar, Maksymilian, “Expertise and Error-Making in Chess”, available on SSRN. The work of the Dreyfuses, amongst others, as the Report acknowledges, is obviously relevant here.

known, but has not – until now – received as comprehensive a study, at least in the American context, as it does in the Report.⁹⁹ To the above literature I would add, too, the important work being done on bounded rationality in environments of uncertainty as a model of legal work by Gert Gigerenzer and Christoph Engel at the Max Planck Institute for Human Development in Berlin.¹⁰⁰

Welcome too, is the Report's call for integration of what it calls the three apprenticeships: first, the intellectual or cognitive apprenticeship; second, the expert practice apprenticeship; and third, the apprenticeship of identity and purpose.¹⁰¹ The Report's acknowledgement that being a professional is being involved in a form of life, i.e., "the daily habits and behaviours" of professionals,¹⁰² which are moulded in "the moral climate of an institution"¹⁰³ is important. Perhaps most significant, in light of the above discussion, is the Report's insistence that part of what it means to be an ethical legal professional is "to be conscious of the limits and specificity of [the legal] domain...[to] appreciate other ways of living and contributing to the larger life of...[the] times...to be citizens as well as experts."¹⁰⁴

In calling for the moulding of citizens, and not merely experts, the Report is in good company. Similar calls for the education of students to be cosmopolitan citizens in

⁹⁹ It is worthwhile noting that the literature on tacit knowledge is endorsed in Keppel-Palmer, Marcus, Caroline Maughan, Mike Maughan, Julian Webb, and Andy Boon, *Lawyers' Skills*, Oxford: Oxford University Press, 2005.

¹⁰⁰ See, Gigerenzer, Gert and Christoph Engel (eds), *Heuristics and the Law*, Cambridge, Mass.: MIT Press, 2006. For the Institute, see: <http://www.mpib-berlin.mpg.de/index.en.htm>. For the International Max Planck Research School on Adapting Behavior in a Fundamentally Uncertain World (Uncertainty School) see <http://www.imprs.econ.mpg.de/>.

¹⁰¹ The Report, *supra* note 6, at 28.

¹⁰² *Ibid.*, at 30.

¹⁰³ *Ibid.*, at 32.

¹⁰⁴ *Ibid.*, at 30.

primary and secondary schools have been made for some time now.¹⁰⁵ Of course, they have also been made by many others. Martha Nussbaum, for example, has argued for an education that prepares students to be world citizens who “develop sympathetic understanding of distant cultures...of ethnic, racial, and religious minorities... [and] of the history and variety of gender and sexuality.”¹⁰⁶ However, the question that needs to be posed is whether the Report’s location of that necessary moulding of citizens within what it calls the apprenticeship of identity and purpose is sufficient.

It is important to proceed carefully here. There is much in the Report, once more, that is to be valued. The Report offers timely criticism, for example, of what it discerned, on the basis of its empirical work, as the subordination, in many law schools, of the apprenticeship of identity and purpose to the cognitive, academic apprenticeship.¹⁰⁷ The Report is right to acknowledge that “law schools play an important role in shaping their students’ values, habits of mind, perceptions, and interpretations of the legal world”, and they are right, in that respect, to criticise the “curricular emphasis on analysis and technical competence at the expense of human connection, social context, and social consequences.”¹⁰⁸ Furthermore, and following on from this criticism, the Report is right to argue against the self-defeating attitude of those who remain sceptical about the capacity of law schools to affect the moral development of law students: as they say, much of the empirical research in this context merely proves that “as presently constituted, legal education...[does] not support the

¹⁰⁵ See, for the most recent developments, Lingard, Bob and Stewart Ranson (eds), *Transforming Learning in Schools and Communities: the Remaking of Education for a Cosmopolitan Society*, London: Continuum, forthcoming.

¹⁰⁶ Nussbaum, *supra* note 77, at 68.

¹⁰⁷ The Report, *supra* note 6, at 133.

¹⁰⁸ *Ibid.*, at 139.

development of students' moral judgement.”¹⁰⁹ It does “not show that professional education cannot support that development.”¹¹⁰

However, despite these and many other positive features, the Report is limited by its location of ethical education under the canopy of professional purpose and identity. The domain of the ethical under such a canopy is already limited: not only is the ethical limited to ethical conduct; it is also limited to ethical conduct as a legal professional. Playing the role of a lawyer is, crucially, already to play a role: it is to take a stance in which the law's claim to correctness tends to fall outside the possibility of critical scrutiny. If development of the ethical imagination is limited, for example, to that of the legal clinic – where ethical performance is evaluated, as it is in the case study of The City University of New York,¹¹¹ primarily (if not exclusively) by reference to the relevant professional ethical code – then the possibilities for an ethical experience are already themselves drastically reduced.

At various times, and as I have already cited above, the Report acknowledges the need to develop an awareness “of the limits and specificity of [the legal] domain.”¹¹² If by this the Report means that it is necessary to become aware of how the structures of written laws and the architecture of legal institutions are so well-poised to not only inflict suffering often on large scales (consider, here, once more, the UN sanctions regime in Iraq in the 1990's), but also to make the great diversity and depth of suffering and vulnerability invisible to us – and, furthermore, to make it so easy for us to disavow responsibility, to distance ourselves from the consequences of our actions

¹⁰⁹ *Ibid.*, at 134.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 34-38.

¹¹² *Ibid.*, at 30.

– then this is, indeed, a big step forward. But it is not a step that can be facilitated by involvement in a legal professional environment alone – in a legal-clinic, say – where a student’s orientation is already operating under the influence of categories of the law to be applied, and the ethical code against which his or her conduct will be evaluated. The exercise of the ethical imagination cannot be facilitated – at least not exclusively so – in an environment already saturated with text; it must, in some sense, move beyond text. And, for that to occur, ethical education for law students must be addressed, at least occasionally, outside of the shadow cast by the canopy of professionalism. Ethics, in short, cannot be made subordinate to professionalism.

To reiterate, I would like to stress the many important insights and criticisms made by the Report. The criticism of legal ethics courses which tend to focus exclusively, as the Report says, “on teaching students what a lawyer can and cannot get away with”¹¹³ is truly tragic. It results, as Deborah Rhode put it, cited to this effect in the Report, in “legal ethics without the ethics.”¹¹⁴ The Report’s acknowledgement that such a “narrow focus misses an important dimension of ethical development—the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations”¹¹⁵ is an acknowledgement that can only be fully endorsed – indeed, it is an acknowledgement on all fours with the argument I made above for the importance of moral vision, moral awareness and moral perception. The problem is that we cannot assume that the development of that capacity and inclination is one that can be facilitated, at least not exclusively, under the rubric of an apprenticeship of professional identity and purpose. We are, after all, not educating students to be

¹¹³ *Ibid.*, at 149.

¹¹⁴ Rhode, quoted *Ibid.*

¹¹⁵ *Ibid.*

professionals – at least not merely so – we are also, and indeed most importantly, educating human beings.

I agree with the value of the pervasive method of teaching ethics.¹¹⁶ I agree with the Report’s endorsement of introductory courses in law schools that “highlight the possibilities for structural change in legal practice, disciplinary systems and public policy.”¹¹⁷ I agree with the potential that legal-clinics have for counter-balancing “the often abstract and depersonalised nature of legal analysis.”¹¹⁸ I agree that the development of “compassion and concern about injustice” can be greatly facilitated by legal-clinics in which students come face to face with often impoverished citizens, coming to appreciate the experience of hardship or injustice of these citizens by forming personal connections with them.¹¹⁹ I agree with the Report’s call for inculcating awareness of the “broader message that law is a vital and significant social institution”, considering legal ideas in the “context of their social purpose,” not “dismissing ethical consideration as naïve and irrelevant”,¹²⁰ and “keeping the analytical and the moral, the procedural and substantive in dialogue throughout the process of learning law”¹²¹ – these are all good messages. The problem is that they do not go far enough.

Let’s not kid ourselves: ethics is bloody difficult. It is difficult precisely because the ethical imagination is at work when we come face to face with our limitations; when we face up to the irreducible anxiety of the ought, to the infinite array of

¹¹⁶ *Ibid.*, at 151 and following.

¹¹⁷ *Ibid.*, at 154.

¹¹⁸ *Ibid.*, at 159.

¹¹⁹ *Ibid.*, at 146.

¹²⁰ *Ibid.*, at 144.

¹²¹ *Ibid.*, at 142.

consequences that our actions may bring, to the irreducible contingency of the good: a contingency made irreducible not because there is no right or wrong thing to do in a particular situation – clearly there often is – but a contingency made irreducible because of the inevitability of our ignorance, and the almost irresistible tendency we feel to justify our actions, to distance ourselves from possible implications, to cover our tracks with good intentions. Ethical education must offer students the opportunity to experience such difficulties and anxieties; without that experience, the development of the ethical imagination will be radically stunted. It is time, now, to consider what policy recommendations can be made in light of the discussion in the first part of the paper, and the limitations of the Report indicated in this second part.

III. POLICY RECOMMENDATIONS

I offer, modestly, the following policy recommendations in light of the above discussion:

1. The literature dealing with the theoretical foundations of legal education ought to acknowledge, more fully than it arguably has to date, the dangerous implications of the continuing dominance of text as the object of analysis in legal scholarship, legal theory and legal practice;
2. The bias towards texts in legal scholarship and legal theory tends to prioritise formal values (such as coherence, unity, consistency, often assumed to lead to certainty and predictability) at the expense of considering the ways in which laws and legal institutions make certain

forms of suffering and vulnerability invisible or at least more difficult to recognise;

3. The bias towards texts in legal scholarship and legal theory tends to result in the dislocation of legal science from other social sciences, which deal more directly with interactions amongst human beings, and which, therefore, arguably heighten awareness of the effects of certain modes of regulation on everyday life;
4. The bias towards texts in legal scholarship and legal theory tends to make it more difficult for us to keep in mind the importance of both recognising the limitations of legality and the need to keep vigilant about the responsiveness of laws and legal institutions to the great variety and depth of suffering and vulnerability;
5. The bias towards texts in legal scholarship and legal theory places at risk the limitation of ethics to that of acting in accordance with reasons, and thus to that of ethical conduct as conduct performed in accordance with pre-articulated rules and principles – a limitation that has the tendency to result in our distancing ourselves from the consequences of our actions;
6. Language ought not to be taken as the exclusive guide as to what ought to be done – rather, it ought to be recognised that a person is often already oriented towards objects of value by having developed, over a long period of time, dispositions to see certain objects as sources of value;

7. The development of the ethical imagination is thwarted to the extent that it does not cultivate vision as moral discipline;
8. The development of the ethical imagination requires the undergoing of forms of ethical experience that are not restricted to the use of justificatory mechanisms, but must, on the contrary, include the experience of the anxiety involved in recognising the complexity of any given situation, and the discomfort acknowledged by a person faced with the limits of his or her own cognitive habits and categories;
9. The full development of the ethical imagination requires the use of both textual and non-textual resources, where it is recognised that the latter can assist in creating opportunities for the forms of ethical experience mentioned in (8) above;
10. The appreciation of and involvement in both visual and movement-based arts introduces resources – both in the form of artistic objects as well as activities that allow for interaction with them and production of them – that are capable of developing the ethical imagination;
11. Both theoretical and policy-based initiatives in legal education ought to acknowledge the Report's widening of the epistemological base upon which legal education ought to be based – a base that recognises the

evolution of expertise (i.e., highly structured and domain-specific skills, memory, and perception) within institutional cultures; and

12. Finally, both theoretical and policy-based initiatives in legal education ought to recognise the limitations of confining ethical education in law schools to the domain of the ideals, values and practices of legal professionalism.

Much work remains to be done. It is the aim of the Beyond Text in Legal Education project at the School of Law at the University of Edinburgh to investigate and follow up on the above policy recommendations. The project is unique in that it will involve both practice-led and reflection-based workshops. The practice-led workshops will be conducted by a professional curator, professional artist and professional dancer, and will involve the participation of legal scholars, legal theorists, legal practitioners, and legal education scholars and policy-makers from both the United Kingdom and the United States. The workshops will create a space in which the ethical value of the appreciation and participation in both visual and movement-based arts will be explored. The practice-led workshops will be followed by reflective workshops, in which participants will present papers reflecting on the theoretical and practical implications of forms of ethical experience enabled by the practice-led workshops. The principal outcomes include a collection of essays as well as a policy paper that will consider what changes ought to be made to the structures, personnel and curricular of law schools and continuing legal education programs in law firms in the UK and the US, such that the development of the ethical imagination can be enhanced on the basis of complementing textual and non-textual resources. The response from both the artistic community as well as law schools and law firms in the UK and US

has been very promising. We invite, of course, expressions of interest from all either in initial sympathy with the project, or indeed, from those more sceptical about it.

CONCLUSION

Finally, by way of conclusion, I shall make a few remarks about the limitations of the pursuit of the ethical development of law students based solely on changes to the structures and resources of law schools. Policy changes in legal education can only ever achieve limited success: principally, this is because of the tenacity of certain institutional climates in legal practice. The recent development – in some countries – of the floating of large firms on the share market will only exacerbate some of the dispiriting features of those climates: even before this development, as is of course well recognised, law firms – especially those law firms seen as most prestigious by law students – were already playing second-fiddle to big business. This development is part and parcel of the continuing evolution of the autonomy of the economic realm – little, for example, is heard of the great lack in political accountability not only of large corporations, but also of international economic institutions. In some respects, legal firms are at the forefront of this continuing evolution – in other respects, they get caught up in the alarming speed with which the rich get richer, and get better at getting richer.

To recognise this – and, of course, there is much more to the story – is to recognise the dangers involved in subjecting legal education to the ideals and demands of the legal professional. To say this is also to say that the philosophy of legal education belongs to a general theory of society, incorporating as that does an awareness of the limitations of the ways in which we understand social reality, and in particular, I

think, of the limitations of our pictures of behavioural determinants. As well-intentioned and well-thought through proposed changes in legal education policy can be – and the Report is truly to be applauded for the scope and substance of its study – real changes take place over very long periods of time, and require the long-term co-ordination of many social environments. The practice of legal education will only change together with changes in the practice of legal scholarship, legal theory and legal practice.

On first reading, the Report’s statement that we ought to recognise that “professional education is...inherently ethical education”¹²² is a positive one. If this statement is taken to mean – as I had read it initially – as calling for recognition that professional education inevitably shapes the ethical sensibility of those that undergo it, then I think we ought to endorse the statement. However, if the statement means that professional education is necessarily ethical – that it necessarily develops ethical sensibility – then this statement ought to be resisted. Ethical sensibility, as I have sought to argue in this paper, cannot be subsumed under the development of professional expertise.

I have, in other work, sought to explore the role for jurisprudence in legal education. One of the articles that has stayed with me from that period of research is Roger Cotterrell’s “Pandora’s Box: Jurisprudence in Legal Education.”¹²³ In it, Cotterrell argued that the role of jurisprudential study in the academy is to be constructively subversive.¹²⁴ By this he meant that jurisprudence “should question general assumptions that underlie received professional wisdom about the nature of law.... It

¹²² *Ibid.*, at 30.

¹²³ Cotterrell, Roger, “Pandora’s Box: Jurisprudence in Legal Education” (2000) 7(3) *International Journal of the Legal Profession* 179-187.

¹²⁴ *Ibid.*, at 183.

should do this in a way that enriches professional understanding by broadening it. It should require students to understand that the current view out of the window in the professional house of law is not the only available view of the social world that the law inhabits.”¹²⁵

I have some sympathy with Cotterrell’s view – though I would not wish to restrict jurisprudence to that function alone. The point is that legal professionalism is already accompanied by a certain resemblance of a family of ideas about the nature of law, legal work and legal order. Arguably, that family of ideas – at least in the modern West – is not one that would find much to praise in the work of Ehrlich and Malinowski, i.e., those theorists, as above, who locate law firmly in everyday interaction amongst human beings. Instead, it is a family of ideas that would find much in common with Jean-Michel Berthelot’s exclusion of legal science from his magisterial overview of the epistemology of the social sciences on the basis that legal science deals with a closed system of norms and not, unlike other social sciences, with human interaction.¹²⁶ There are, in that respect, and as I have sought to argue in this paper, inherent dangers in limiting the acquisition of the understanding of law, legal work and legal order amongst the upcoming generations of lawyers, judges, legislators, legal scholars and legal theorists to the apprenticeships of professionalism. The legal professional world itself needs a shake-up – a wake-up from its ever-expanding commercialisation. The project of beyond text in legal education is simultaneously a project of moving beyond the perennial temptations of the text as the glorious and well-lit stage upon which understandings of law, legal work and legal order are constructed. Instead, what we need more of is a lingering in the dark, the

¹²⁵ *Ibid.*

¹²⁶ Berthelot, Jean-Michel, *Épistémologie des Sciences Sociales*, Paris: Presses Universitaires de France, 2001.

silent, the ephemeral and opaque, the anxious, the inarticulate – all that, in short, that we are so often so keen to sweep under the carpet of the text.