

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

*Maksymilian Del Mar**

INTRODUCTION

At the beginning of Michel Serres's *The Natural Contract*¹—a book dealing with environmental ethics—Serres asks to consider the following painting and articulate what we can see:



We see, Serres says, a pair of enemies fighting, brandishing sticks.

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1. See generally MICHEL SERRES, *THE NATURAL CONTRACT* (Elizabeth MacArthur & William Paulson trans., 1995). The painting is "Fight with Cudgels" by Francisco Goya (c. 1820-1823), Prado Museum, Madrid.

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.²

Well and good, says Serres, but are not we forgetting, he asks, “the world of things themselves, the sand, the water, the mud, the reeds of the marsh?”³ Can we not “identify a third position, outside their squabble: the marsh into which the struggle is sinking?”⁴

Serres's opening is a memorable one. We can make two points about it. The first is that 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 concern. The second point is that when we realise that we had, at first, not noticed the marsh, we become more aware of our limitations: that we tend to see things in a certain way, or only notice certain things. That awareness—that sense of coming face to face with our limitations—can be difficult, anxious, and painful. Further, that sense of anxiety is not restricted to the appreciation of art. It can also be present in the process of creating an artwork, of making oneself vulnerable, and of not knowing where one will end up.

This Article suggests that such elements are central to ethical development. First, we exercise vision, awareness and attention as a form of moral discipline—developing the ability to slow ourselves down, to see more, not to rush to objectify or categorise some situation in a specific way. Second, we become more capable of coming face to face with our limitations, such that we become more aware of our tendencies to see certain things in certain ways and the implications of our ways of seeing. This Article argues that art—both in terms of the appreciation of art and the creation of imaginative works—can assist us in developing these elements.

There are three parts to this Article. In the first part, the Article considers how extensive focus on text can thwart our ability to exercise

2. SERRES, *supra* note 1, at 1.

3. *Id.* at 2.

4. *Id.* at 1.

vision as a form of moral discipline, thereby making it easier to ignore variety and depth of suffering and vulnerability. Additionally, part one explores what resources we might glean from moral philosophy to bring out this sense of vision as a form of moral discipline. Finally, part one considers the role of art in developing that form of moral discipline.

In the second part, this Article turns to the recent Carnegie Foundation for the Advancement of Teaching Report on *Educating Lawyers* (the Report),⁵ focusing on how ethical education is conceptualised and analysed in the Report, particularly in light of the remarks made in the first part of this Article. This Article argues that the Report is mistaken in locating ethical education exclusively or even dominantly under the canopy of professionalism—under what it calls, throughout the Report, “the apprenticeship of professional identity and purpose.”⁶ 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 runs the risk of ignoring 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, i.e., by the substantive and procedural laws that are expected to apply and by the benchmarks set by professional ethical codes. Although we should not be dismissive of the importance of such texts for ethical education, it is vital that we do not restrict the development of ethical education to text-based resources alone.

The third part of this article offers two concrete practical applications for going beyond text in legal education, which draw from the activities engaged in as part of the Beyond Text in Legal Education project (the Project).⁷ The first application relates to the reading of legal texts; the second to providing hypothetical legal advice.

5. See generally WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

6. *Id. passim*.

7. The Project was funded by the Arts and Humanities Research Council (United Kingdom). The Principal Investigator of the Project was Professor Zenon Bankowski. Three artists led the central workshop of the project: Keren Ben-Dor, Zoë Fothergill, and Alicja Rogalska. The project ran for one year and was completed in 2009. More information is available at www.law.ed.ac.uk/beyondtext (last visited Feb. 22, 2011). A two-volume collection of essays, as the fruit of the project, is under contract with Ashgate and forthcoming in 2012 (Volume I, entitled *THE ARTS AND THE LEGAL ACADEMY*, is co-edited by Zenon Bankowski, Maksymilian Del Mar, and Paul Maharg); Volume 2, entitled *THE MORAL IMAGINATION AND THE LEGAL LIFE*, is co-edited by Zenon Bankowski and Maksymilian Del Mar). For a brief published presentation of some aspects of that project see Maksymilian Del Mar, *At the Lectern: Moral Education in Law Schools and Law Firms*, 59 J. LEGAL EDUC. 298, 298-304 (2009).

I. THE TEXT AND BEYOND

A. THE CITADEL OF THE TEXT

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.”⁸ For Hans Kelsen, for example, “the law is an order, and therefore all legal problems must be set and solved as order problems.”⁹ Only in this way, argued Kelsen, can legal theory become “an exact structural analysis of positive law, free of all ethical-political value judgements.”¹⁰ 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.”¹¹ As Michael Moore noted, it is also intuitively appealing to “the common sense position prevalent amongst most lawyers, judges and legal scholars today.”¹²

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.”¹³ But with time, Goodrich laments, rhetoric was made subordinate to logic;¹⁴ the dynamism of use was replaced by the stasis of meaning; actual usage was replaced by ideal usage.¹⁵ Goodrich argues we should see language as discourse. This view takes a great deal from the rhetorical tradition and asks such questions as: “[W]ho is speaking? ‘Who has the right to speak? Who is qualified to do so? Who derives from it their own special quality, their prestige, and from whom, in return, do they receive if not the

8. Peter Goodrich, *Law and Language: An Historical and Critical Introduction*, 11 J.L. & SOC’Y (NO. 2) 173, 180 (1984).

9. *Id.* (quoting H. KELSEN, *THE PURE THEORY OF LAW* 191-92 (1970)).

10. *Id.* (quoting H. KELSEN, *THE PURE THEORY OF LAW* 191-92 (1970)).

11. *Id.* at 181.

12. *Id.* (quoting M.S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 163 (1981)).

13. *Id.* at 176.

14. Goodrich, *supra* note 8, at 177.

15. *Id.* at 178.

assurance, at least the presumption that what they say is true?”¹⁶

Goodrich is surely 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. According to Roger Cotterrell, for instance, contemporary legal theory continues to be besotted with the ambition 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.”¹⁷ “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.”¹⁸ 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.”¹⁹

Notice, however, that despite their critique of a limitation of the object of legal scholarship and legal theory to that of a search for formal unity in legal doctrine—a logical system, a lawyerly totality—both Goodrich and Cotterrell remain dedicated to the location of law within language. This is despite not conceptualising language as the domain of given meaning, but as an instrument used in specific contexts. For Cotterrell, law remains doctrine even though that doctrine should be viewed as being “produced in, embodied in and legitimating institutional practices.”²⁰ For Goodrich, law remains discourse regardless of whether that discourse is conceptualised as a practice—a practice, moreover, that perpetuates the authority of the pre-existing law-giver.

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,”²¹ H.L.A. Hart’s legal theory and legal scholarship remained within the paradigm of the analysis of law as a body of doctrine. In a paper following her magisterial biography of Hart,²²

16. Goodrich, *supra* note 8, at 185.

17. Roger Cotterrell, *The Sociological Concept of Law*, 10 J.L. & SOC’Y (NO. 2) 241, 241 (1983).

18. *Id.* at 242.

19. *Id.* at 242.

20. *Id.* at 251.

21. H.L.A. HART, *THE CONCEPT OF LAW*, at v (1961).

22. *See generally* NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE*

Nicola Lacey tackled the question of Hart's methodology as portrayed in his book, *The Concept of Law*.²³ Tracing the influence of J.L. Austin, the ordinary language philosopher, on Hart, Lacey shows how both *Causation in the Law* (co-authored with Tony Honoré)²⁴ and Hart's writings on legal responsibility,²⁵ "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."²⁶

In *Causation in the Law*, Lacey explains, "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, practical, professional, or social context in which that legal language was used."²⁷ There is, laments Lacey, "no exploration of the social practices or forms of life within which the causal language game is embedded."²⁸

Lacey does well to pick out what she calls "the paradox of analysis" (at least as practiced by the ordinary language philosophers):

[I]f language speaks for itself, 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 criticize the incoherence of the linguistic practice that it takes as its material?²⁹

According to Lacey, acknowledging this paradox may help us to recognise that "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."³⁰ Legal ideas—to the extent that we locate them in language—have, she argues, institutional conditions of existence: the notion of capacity responsibility,

DREAM (2004).

23. Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945 (2006).

24. H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985).

25. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968).

26. Lacey, *supra* note 23, at 969.

27. *Id.* at 967.

28. *Id.*

29. *Id.* at 965.

30. *Id.* at 969.

for example, “can only be realized in criminal law on the basis of certain institutional developments and in the context of a cluster of social and cultural conditions.”³¹ Rather than focusing exclusively on doctrine—on law as language—we may, for example, investigate institutional factors that constrain the extent to which judges are likely to appeal to pragmatic or policy arguments, or explore the sensitivity of judges to the need to legitimate their decisions.³²

Arguably, Lacey offers us a concept of law less dependent on language than those of Goodrich and Cotterrell. 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, our theoretical focus ought to be on living law, i.e., “not the part of the content of the document that the courts recognise as binding when they decide a legal controversy, but only that part which the parties actually observe in life.”³³ This is the law of everyday life: “[T]he 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, etc.).”³⁴ 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.’”³⁵

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

31. Lacey, *supra* note 23, at 975.

32. *See id.* at 968.

33. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 497 (Transaction Publishers 2002) (1936).

34. BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 31 (2001) (citing EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 455-71 (1975)).

35. Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 *OXFORD J. LEGAL STUD.* 501, 504 (1995) (quoting B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 66 (1926)).

between law and non-law: law is everywhere, and perhaps, therefore, also nowhere.³⁶ You might agree with Goodrich, Cotterrell, and Lacey that modern law is steeped in language. You might argue that we cannot afford to ignore the plain fact that most modern law is written down, promulgated by an authority—most typically by a State, *pace* the protest of legal pluralists—and validated in accordance with a pedigree test. This Article is not the forum through which to enter into these theoretical debates:³⁷ 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 prioritise such text-based values as coherence and consistency, or to point to the use of legal texts and their institutional conditions of existence and their social impact.

Allow me to illustrate this ongoing bias in favour of texts and also to provide a glimpse of an alternative. 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. Sacco argues that: "When the Homo Habilis produced the first pebble tools . . . [t]he dichotomy between law and enforcement did not exist. . . . Adherence to the rule implied its existence and validity The law was mute, except for the yelling accompanying ceremonies and self-help. Sources were mute. Acts were mute."³⁸ Certainly, Sacco does not underestimate the role of language. Indeed, he says, "The biggest legal revolution took place when a descendent of the Homo Habilis began to use an articulated language."³⁹ However, even then he is at pains to point out that it is unclear "whether man began immediately to use it for purposes of law."⁴⁰ Be that as it may, it is not the historical argument here that is the crux of the matter. After all, argues Sacco, it is possible to 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.⁴¹ Rather, as he puts it, the crux of the matter is to "ask which new possibilities" and, it is important to add, limitations, "the articulation of

36. See Tamanaha, *supra* note 35, at 505.

37. The debate is perhaps more advanced in the context of theories of law and society, including anthropology of law, than in contemporary legal theory. See, e.g., Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1 (2005); see also Fernanda Pirie, *Law Before Government: Ideology and Aspiration*, 30 OXFORD J. LEGAL STUD. 207 (2010) (replying to Roberts' argument).

38. Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455, 459-60 (1995).

39. *Id.* at 460.

40. *Id.*

41. *Id.* 464-65.

language opened over time.”⁴²

Sacco is right to remind us that “lawyers are primarily interested in spoken sources and acts and feel uneasy with mute sources and acts;” and that “[w]hen 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; to understand 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?

Scott Veitch’s book, *Law and Irresponsibility*, offers one, quite discomfiting 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 well-organised opportunities to disavow responsibility.⁴⁴ 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. *Kruger v Commonwealth*⁴⁶ was a case that concerned the responsibility of the Australian government for the stolen generation in Australia (the taking of Aboriginal children from their homes). In that case, 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 was required by statute 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 1990s—a regime that took careful and sustained planning, all appropriately legitimised and

42. Sacco, *supra* note 38, at 460.

43. *Id.* at 465.

44. See generally SCOTT VEITCH, *LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING* (2007).

45. *Id.* at 42-52.

46. *Kruger v. Commonwealth* (1997) 146 A.L.R. 126.

47. VEITCH, *supra* note 44, at 111-12 (citing *Kruger v. Commonwealth* (1997) 146 A.L.R. 126).

carried out by the legal and bureaucratic structures of the United Nations.⁴⁸

In all these cases, the law and its institutions function to make us either 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 to collectively not see the suffering caused by our government’s actions *as* suffering. That infliction has, after all, been performed in accordance with legally authorised procedures and in the name of high-sounding principles of “benefit” to peoples of all nations.

Veitch’s argument is complex.⁴⁹ While he is not alone, he is most certainly in the minority by pointing out the danger involved in our idolatrous worship of legality. Judith Shklar’s warnings about the effects of legalism, both as a personal ethic and as a social ideal, are well-known.⁵⁰ 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: for example, Max Weber’s diagnosis of the increasing formal rationalisation of society;⁵¹ Jürgen Habermas’s 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 resist the use of law in the characterisation and resolution of problems;⁵² Niklas Luhmann’s autonomy of the highly differentiated system of articulated legal norms.⁵³ The danger here is that we can come to think that it is the law that does the “ethical” work for us. In doing so, we take away, as Zenon Bankowski 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.⁵⁴ Dwelling in the comfortable house of articulated rules, we do not dare to go outside; we do not dare subject the

48. VEITCH, *supra* note 44, at 12-19.

49. The author has reviewed the argument in detail in Maksymilian Del Mar, *Jurisprudence on the Frontline*, 19 EUR. J. OF INT’L L. (ISSUE 5) 1095 (2008).

50. JUDITH N. SHKLAR, *LEGALISM* (Harvard Univ. Press 1986) (1964).

51. *See generally* MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954).

52. *See generally* JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

53. *See generally* NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

54. ZENON BANKOWSKI, *LIVING LAWFULLY: LOVE IN LAW AND LAW IN LOVE* 26 (2001); *see also* Zenon Bankowski, *In the Judgement Space: The Judge and the Anxiety of the Encounter*, in *THE UNIVERSAL AND THE PARTICULAR IN LEGAL REASONING* 25 (Zenon Bankowski & James MacLean eds., 2006).

limits of our categories to the 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 do not even create that opportunity, that need, that burden, that difficulty.

In a significant passage in his book, 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. The alternative, he says, would be “to start our enquiries and our responses with the harms themselves and work[] back [that] way . . . to start with the bodies, the dead, scarred or emaciated bodies, the deadened, grieving or shattered lives, this one, and this one, and this one, each one.”⁵⁵ To do otherwise is to perpetuate the failure 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.”⁵⁶

The problem, then, is one of beginnings and also of renewal—of how we see, at first, and subsequently how we can 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, is already stultified, if not nullified. Seated comfortably in the citadel of the text, we continue to ignore that suffering. Accordingly, the rules (and texts more generally) cannot be the sole educators of our moral sensibility, of our ethical radar. When they are, the objects 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.

B. SEEING AND THE MORAL LIFE

The issues of beginnings and of renewal are indeed 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 demands respect from us? How do we come to recognise that third object of value, the marsh, in Goya’s painting? How do we come to refresh our sensitivity to that which demands a response from us? 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. VEITCH, *supra* note 44, at 18.

56. *Id.*

It is helpful to briefly consider the contributions of those theorists who speak of the importance of moral particularity,⁵⁷ situation ethics,⁵⁸ moral attention,⁵⁹ the moral imagination,⁶⁰ moral perception,⁶¹ moral vision,⁶² the power of love,⁶³ and the naked face of the other.⁶⁴ In her short, but brilliant book, *The Sovereignty of 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.”⁶⁵ Current moral philosophy, Murdoch says, has proceeded too far down the path of a single elaborate theory that, in her opinion, is based on “the idea that ‘good’ is a function of the will.”⁶⁶ That way of

57. See generally JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* (2004); see also MORAL PARTICULARISM (Brad Hooker & Margaret Olivia Little eds., 2000). Particularism is important for it recognizes that we can be sensitive to reasons (about what we ought to do) that are neither general nor even generalizable as rules.

58. See generally JOSEPH FLETCHER, *SITUATION ETHICS: THE NEW MORALITY* (1966). A focus on the situation helps temper the blind imposition of rules; the focus is, as with particularism, on the unique features of the situation.

59. See generally SIMONE WEIL, *Attention and Will*, in AN ANTHOLOGY 231 (Sian Miles ed., Penguin Classics 2005) (1950) [hereinafter ANTHOLOGY]. The concept of moral attention is discussed in more detail below; the general value of the concept is that it helps us see the development of what is morally salient, and thus does not reduce moral salience to moments of choice (or the exercise of the will).

60. See generally STEVEN FESMIRE, JOHN DEWEY AND THE MORAL IMAGINATION: PRAGMATISM IN ETHICS (2003). Of course, this is one recent reference out of a booming literature on moral imagination. For an earlier exposition, see MARK JOHNSON, *MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS* (1993). Theorists of the moral imagination advocate for a form of cognition that is not dependent on (though may still draw on) rules, but on perceptually and affectively rich engagement with one’s surroundings. See generally *id.*

61. See generally LAWRENCE A. BLUM, *MORAL PERCEPTION AND PARTICULARITY* (1994). For a helpful overview of the literature on moral perception, see Charles Starkey, *On the Category of Moral Perception*, 32 *SOC. THEORY & PRAC.* 75 (2006). Like the concepts of moral attention and particularism, the concept of moral perception focuses on how we learn to perceive the world in ways that provide moral reasons for us to act. The point is that learning to so perceive morally is not reducible to learning rules.

62. See generally IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* (1970); see also DAVID MCNAUGHTON, *MORAL VISION: AN INTRODUCTION TO ETHICS* (1988). What these theorists call moral vision is virtually identical to the ideas of moral perception and moral attention.

63. See generally BANKOWSKI, *supra* note 54. Love is initially contrasted, but ultimately made compatible, with law. See generally *id.* The trick is how to balance them—how to become sensitive to when following the law (especially blindly) is destructive. See generally *id.*

64. EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* (Alfonso Lingis trans., 1969). The image of the face of other, infinitely particular and infinitely demanding, is important for it contrasts with the idea of being guided by general rules. It is not the rules that matter; it is how one responds, and keeps responding, to the demands of the other. See generally *id.*

65. MURDOCH, *supra* note 62, at 1.

66. *Id.* at 4.

seeing the good, she notes, is very attractive, for moral judgments are no longer viewed as “weird statements, but something much more comprehensible, such as persuasions or commands or rules.”⁶⁷ Under this conception, thought is not conceptualised as action, but as “an introduction to action.”⁶⁸ 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.”⁶⁹ The history of this way of conceiving the self is by no means limited to the modern world, and Murdoch indeed traces it back to the work of Descartes and Kant.⁷⁰

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.”⁷¹ 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.”⁷² Murdoch is particularly 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 value 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

67. MURDOCH, *supra* note 62, at 4.

68. *Id.* at 5.

69. *Id.* at 20.

70. Descartes is mentioned as a precursor. *See id.* at 10. Kant is mentioned several times, including where the focus is on the insufficiency of Kant’s emphasis on the rational will. *See, e.g., id.* at 25, 30, 34-35. This may be somewhat unfair to Kant. For an attempt to read Kant differently, and also in a way that makes him compatible with the richer, more situated, and affective exercise of judgement, see BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGEMENT* (1993); *see also* BARBARA HERMAN, *MORAL LITERACY* (2007). The author considers another recent attempt to read Kant differently (by NEIL MACCORMICK, in *PRACTICAL REASON IN LAW AND MORALITY* (2008)) in *The Smithian Categorical Imperative: How MacCormick Smithified Kant*, *ARCHIV FÜR RECHTS—UND SOZIALPHILOSOPHIE* (forthcoming Feb 2012).

71. MURDOCH, *supra* note 62, at 33.

72. *Id.*

view, is something that goes on continually, 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.⁷³

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."⁷⁴ 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 reach of this thought, but on a lower level and not in contact with it, the diverse knowledge we have acquired which we are forced to make use of.⁷⁵

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."⁷⁶ Acknowledging this aspect of Weil's notion 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, 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 to unravel, the cognitive habits that may come from the acquisition and internalisation of rules and categories.

Murdoch's insistence on the importance of moral vision has been taken up by some contemporary ethical theorists and pedagogues, though it has not received as wide a reception as it ought to. Martha Nussbaum is particularly attuned to the need for the academy to cultivate the ethical imagination.⁷⁷ Nussbaum's work is also important because it draws on the Aristotelian emphasis on the primacy of judgment, or *phronesis*, which for her is compatible with the emphasis on vision as a form of moral discipline. She explains, for instance, that "Aristotelian education is aimed at producing citizens who are perceivers."⁷⁸

73. MURDOCH, *supra* note 62, at 37.

74. *Id.* at 34.

75. Sian Miles, *Introduction*, in ANTHOLOGY, *supra* note 59, at 1, 8 (quoting SIMONE WEIL, *WAITING ON GOD* (1951)).

76. *Id.*

77. See generally MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* (1997) [hereinafter *CULTIVATING HUMANITY*]; MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990) [hereinafter *LOVE'S KNOWLEDGE*]; MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986); MARTHA C. NUSSBAUM, *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE* 264-301 (2007).

78. *LOVE'S KNOWLEDGE*, *supra* note 77, at 103; see also William Fortenbaugh, *Aristotle's*

Lawrence Blum is another theorist whose work is important in this context. 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 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 the literature on long-term moral development.⁸¹

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 are not antithetical to, but, on the contrary, can work most effectively in tandem with, the long-standing tradition of rule-and principle-based ethics.⁸² 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, moral development ought not to proceed without text; it should simply not be limited to text. To reiterate, where it is limited to text, it risks not enabling us to come face to face with the limitations of our acquired ways of seeing and noticing. Let us now consider how art—or, more generally, appreciation of and involvement in the production of imaginative works—might assist in going beyond text.

C. ART AND THE ETHICAL IMAGINATION

It is indicative that in his justly famous *The Story of Art*, E.H. 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 a quip thought to have been uttered by Ludwig Wittgenstein: the best philosopher 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 and looking.

Conception of Moral Virtue and Its Perceptive Role, 95 TRANSACTIONS AM. PHILOLOGICAL ASS'N 77 (1964).

79. See generally BLUM, *supra* note 61.

80. *Id.* at 30.

81. For more recent work on moral perception, see Peggy DesAutels, *Gestalt Shifts in Moral Perception*, in MIND AND MORALS: ESSAYS ON COGNITIVE SCIENCE AND ETHICS 129 (Larry May eds., 1996) [hereinafter MIND AND MORALS]; Jennifer Wright, *The Role of Moral Perception in Mature Moral Agency*, in JEREMY WISNIEWSKI, MORAL PERCEPTION 1 (2008); for a helpful overview of a good deal of this literature, see Starkey, *supra* note 61.

82. For a sophisticated defence of this compatibility, see Andy Clark, *Connectionism, Moral Cognition, and Collaborative Problem Solving*, in MIND AND MORALS, *supra* note 81, at 109.

83. E.H. GOMBRICH, THE STORY OF ART 37 (1995).

The emphasis on looking, in turn, can remind us of the emphasis in the theoretical contributions mentioned above on the exercise of vision as a form of moral discipline. It is this sense of careful looking, then, that can form a link between, on the one hand, both appreciating art and creating imaginative works, and, on the other hand, the development of the ethical imagination.

Arguably, the appreciation of art and the creation of imaginative works can also contribute to other features involved in the growth of the ethical imagination, including the development of the courage required to face the contingency of possible consequences; to face the anxiety of unknown outcomes; to allow the unfamiliar, the foreign, and the outside to enter inside; to recognise the incredible power of one's own cognitive dispositions; to feel responsible for one's actions and not distance oneself from their consequences; and to acknowledge one's own vulnerabilities and forms of suffering.

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 was also one of the key collaborators on the Project.⁸⁴ Spending, as she does, most of her day in the gallery, Zoë has every opportunity to 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 spend looking at the pictures. Indeed, sometimes it appears they do everything but. They spend a good proportion of their time reading the labels and descriptions next to the picture. If they are not reading, they are listening to the learned commentary being offered, explaining, perhaps, the life of the artist, and the features of the painting that allow 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 among the gallery objects, pointing and gesticulating. In doing so, he asked the crowd to look, and look again, instead of reading or talking.

What was central in this initiative was not simply exposure to the artwork. As was noted at the beginning of this Article, engagement with artistic works is not, or at least should not be, a passive experience where we expect the art 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.

84. See *supra* note 6; see also *infra* Part III. For more of Zoë's work, see ZOE FOTHERGILL, <http://www.zoefothergill.com/> (last visited Feb. 23, 2011).

An aesthetic experience is an event;⁸⁵ its significance lies “in the interaction between objects or performances . . . and human beings.”⁸⁶

There is, however, also a passive element—or, more appropriately, an actively passive one—in aesthetic experience. Maxine Greene, in her Lincoln Center Institute Lectures on Aesthetic Education, stated “[p]erceiving a dance, a painting, a quartet means taking it in and going out to it.”⁸⁷ This “going out to it,” however, is not a matter of controlling it or projecting upon it one’s own fantasies. We can remind ourselves here of the manner in which both Murdoch and Weil (quoted in the section above) spoke of suspension; of not penetrating the object but letting it penetrate you; of letting its reality seep into you.⁸⁸ What is interesting is that artists themselves have sometimes spoken in this manner when describing the artistic process. Thus, Paul Klee has said:

In a forest, I have felt many times over that it was not I who looked at the forest. Some days I felt that the trees were looking at me, were speaking to me. . . . I was there, listening. . . . I think that the painter must be penetrated by the universe and not want to penetrate it. . . . I expect to be inwardly submerged, buried.⁸⁹

Other theorists have also recognised this aspect of aesthetic experience and some have connected it to the moral life. In his seventh chapter, *The Moral Artist*, 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,”⁹⁰ going on to list a number of ways in which art might be thought to achieve such awareness.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

85. See generally JOHN DEWEY, *ART AS EXPERIENCE* (1934).

86. Kathleen Knight Abowitz, *Moral Perception Through Aesthetics: Engaging Imaginations in Educational Ethics*, 58 J. TEACHER EDUC. 287, 292 (2007). Speaking at a Symposium on John Dewey’s *Art as Experience*, John Fisher reiterated this view by asserting that “aesthetic experience is a construct of the relations of interactions of persons and objects.” John Fisher, *Some Remarks on What Happened to John Dewey*, 3.3 J. TEACHER EDUC. 55, 57 (1989).

87. MAXINE GREENE, *VARIATIONS ON A BLUE GUITAR* 13 (2001) (quoted in Abowitz, *supra* note 86, at 293).

88. Recall Weil’s statement: “waiting, not seeking anything, but ready to receive in its naked truth the object which is to penetrate it.” Sian Miles, *Introduction*, in ANTHOLOGY, *supra* note 59, at 1, 8 (quoting SIMONE WEIL, *WAITING ON GOD* (1951)).

89. MAURICE MERLEAU-PONTY, *Eye and Mind*, in THE PRIMACY OF PERCEPTION 159, 167 (John Wild et al. eds., Carleton Dallery trans., 1964) (quoting G. Charbonnier, *Le monologue du peintre* 143-45 (1959)).

90. FESMIRE, *supra* note 60, at 124.

91. These include: perceptiveness, creativity, expressiveness, skill, response of the Other, and highlighting and hiding. See *id.* at 113-19.

own individual existence and autonomy that dominates the experiential situation.”⁹² Finally, this sense of letting the reality of the artwork, or of the other, not be silenced by one’s own proclivities to categorise or impose some structure of meaning (especially one pre-prepared by a text) is arguably at the heart of Martin Buber’s I-Thou relationship, as contrasted with the I-It relationship.⁹³ For Buber, as soon as we contextualise or categorise the Other in some way (e.g., seeing him as part of some group, or seeing her as composed of such-and-such properties), we transform the I-You encounter into an I-It one; the parallel, then, with the aesthetic case, resides in the sense of active openness combined with resistance to the imposition of categories.⁹⁴

We may speak, too, of the ability of art to remind us of the contingency of our most treasured beliefs and identities. Arthur Koestler, for instance, in his *Act of Creation*, argued that learning the ability “to cast off traditional paradigms . . . is the heart of all creative behaviour.”⁹⁵ Here, art enables us to refresh our vision, to look again, and to proceed through a process of unlearning and thereby renew our sensibility.

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, 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 that respect, it is also noteworthy that arts education has itself gone through many changes in the last quarter century. One prominent example—of relevance to this article’s advocacy for going beyond text—is the story of how Project Zero (a project based at the Graduate School of Education at Harvard University) went from a model of arts education based on “the handling of various symbol systems” to the notion that, in fact, “each artistic area exhibits its own characteristic development paths” and thus requires the “development of several distinct ‘intelligences.’”⁹⁶ Interestingly, then, arts education has itself had to shake off the tendency to subsume the great range of abilities and skills under the properties of symbolic instruments.⁹⁷

92. IREDELL JENKINS, *ART AND THE HUMAN ENTERPRISE* 39 (1958).

93. See MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans., 1970).

94. See generally *id.*, especially the first part.

95. Arthur J. Newman, *Aesthetic Sensitizing and Moral Education*, 14 *J. AESTHETIC EDUC.* (NO. 2) 93, 95 (1980).

96. Howard Gardner, *Toward More Effective Arts Education*, 22 *J. AESTHETIC EDUC.* (NO. 1) 157, 158-59 (1988). For more on Project Zero, see PROJECT ZERO, www.pz.harvard.edu (past visited Feb. 23, 2011).

97. One of the intelligences identified by Gardner is that of the bodily-kinaesthetic intelligence. Gardner, *supra* note 96, at 158-59. Although the focus in this Article is on the

Of course, we must be careful. We must not overstate the case for aesthetic education. As was 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 learned when we reflect on the limits of such rules, and law schools can indeed be great forums for such reflection. 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 principles (of an agent guided by internalised rules) 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 does not, however, seem to be an exaggeration 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 properly explored. It is time, now, to consider how the Report—the most comprehensive and thorough recent survey of legal education in the United States—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 briefly consider the epistemological foundation upon which it seeks to re-establish legal education. The Report argues for a 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.⁹⁸ 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.⁹⁹ Accordingly, the Report urges legal education institutions to re-focus on tacit knowledge, and on learning in environments that demand the exercise of practical skills for the resolution of problems (with simultaneous

appreciation and production of visual art, the Project was not so confined (it had the benefit of a dancer and dance teacher: Keren Ben-Dor). It has also focused on dance and movement. For a discussion, which also connects dance education to the notion of “attention,” see Donald Blumenfeld-Jones, *Bodily-Kinesthetic Intelligence and Dance Education: Critique, Revision, and Potentials for the Democratic Ideal*, 43 J. AESTHETIC EDUC. (NO. 1) 59 (2009).

98. SULLIVAN ET AL., *supra* note 5, at 25.

99. *Id.*

feedback from experts).¹⁰⁰

The Report calls 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 Of particular interest to this Article is the Report's treatment of the last of these apprenticeships, namely the apprenticeship of identity and purpose. What is of particular significance is that both in its argument for re-focusing on skills and abilities that will better prepare students for the profession, and in its subsumption of ethical education under the apprenticeship of identity and purpose, the Report prioritises the interests and concerns of the profession.¹⁰²

It is important to recognise that although the Report prioritises professionalism, it does acknowledge that being a professional is being involved in a form of life, i.e., "the daily habits and behaviours" of professionals,¹⁰³ which are moulded in "the moral climate of an institution."¹⁰⁴ Further, and most significantly in light of the above discussion, the Report does recognise 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. . . . [and to] be citizens as well as experts."¹⁰⁵ However, the Report does not develop this insight in any detail.

100. Although this line is well known in the philosophy and practice of general education, it has not—until this Report—received much sustained focus in the context of legal education in the United States. In the context of legal education in the United Kingdom, it is worthwhile noting that the literature on tacit knowledge is endorsed in MARCUS KEPPEL-PALMER ET AL., *LAWYERS' SKILLS* (12th ed. 2005). For a recent important statement on tacit knowledge, see HARRY COLLINS, *TACIT AND EXPLICIT KNOWLEDGE* (2010).

101. SULLIVAN ET AL., *supra* note 5, at 28.

102. The focus of this Article is on the effects of this on ethical education, but it should also be noted that the Report's understanding of traditional "cognitive, academic" teaching and learning is disappointing. It is one thing to criticise the lack of the development of relevant skills and abilities and to recognise the need for a more sophisticated epistemological basis for legal education. These are welcome developments, but they should not be pursued at the cost of a caricature of the richness and benefits of the academic life in its more traditional garb. We should be very careful about how far we promote the instrumentalisation of tertiary education for professional purposes.

103. SULLIVAN ET AL., *supra* note 5, at 30.

104. *Id.* at 32.

105. *Id.* at 30. In calling for the molding of citizens, and not merely experts, the Report is in good company. Similar calls for the education of students to be cosmopolitan citizens in primary and secondary schools have been made for some time now. For the most recent developments, see *TRANSFORMING LEARNING IN SCHOOLS AND COMMUNITIES: THE REMAKING OF EDUCATION FOR A COSMOPOLITAN SOCIETY* (Bob Lingard et al. eds., 2008). More generally, Martha Nussbaum has argued for an education that prepares students to be world citizens who "develop sympathetic understanding of distant cultures and of ethnic, racial, and religious

Instead, it continues throughout to emphasise the importance of the apprenticeship of identity and purpose, which, as noted above, is largely made subordinate to the values of professionalism.¹⁰⁶

Why is professionalism not enough? It is not enough because to the extent that we limit the location of ethical education under the canopy of professional purpose and identity, we risk limiting the development of the moral sensitivity of law students to the idea that as long as one is acting *as* a professional, one is also acting ethically. As Richard Wasserstrom argued over a quarter of a century ago, immersion in the profession of law carries with it the usual dangers of role-differentiated behaviour, including the danger of subsuming what is morally relevant to consider in any situation one confronts under the tasks and requirements of one's professional role.¹⁰⁷

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."¹⁰⁸ 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

minorities . . . [and] of the history and variety of human ideas of gender and sexuality." CULTIVATING HUMANITY, *supra* note 77, at 69. This is a positive feature of the Report, but it is not further pursued by it. There are two points to make about it from the perspective of this Article. The first is to ask whether the apprenticeship of identity and purpose is best suited to the important task of such citizenship education (the author does not think it necessarily is). The second is to suggest that the education of citizenship does not exhaust—no matter how rich it can be—ethical education more broadly conceived (as discussed in the second section of the first part of this Article).

106. On the one hand, it may be said that the Report offers timely criticism of what it discerned as the subordination in many law schools of the apprenticeship of identity and purpose to the "cognitive, academic" apprenticeship. See SULLIVAN ET AL., *supra* note 5, at 133. Though here, once again, the Report may be unfair to the capacities for cognitive, academic learning to contribute to ethical development. The perspective taken in this Article is that to the extent that we think of cognitive, academic learning as dominated by text (and thus, in the language of the Report, non-apprentice-like), the Report is right that legal education ought not to be so limited. However, this should not mean that we do not recognise the significance of the cognitive, academic mode of teaching and learning for ethical development; nor should it mean that we restrict resources that go beyond text to the inculcation of professionalism. The perspective of this Article is that we need to extend our resources to beyond text and combine this with a broad approach to moral education in law schools, i.e., one that does not subsume it under the canopy of professionalism.

107. See generally Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1 (1975-76). This criticism extends to the legal clinic, at least insofar as clinics seek to replicate the environment of legal practice. *Id.* The Article returns to discuss some of the dangers here in the second section of part three, below. For a more detailed consideration of Wasserstrom's work and the dangers of role-differentiated behaviour, see Maksymilian Del Mar, *The Education of Attention and Encounter in the Legal Academy*, in THE MORAL IMAGINATION AND THE LEGAL LIFE (Zenon Bankowski & Maksymilian Del Mar eds., forthcoming 2012).

108. SULLIVAN ET AL., *supra* note 5, at 30.

suffering often on large scales, but also to make the great diversity and depth of suffering and vulnerability invisible to us, 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 where a student's orientation is already operating under the influence of the text—i.e., of categories of the law to be applied, and the ethical code against which his or her conduct will be evaluated. Ethics, in short, cannot be made subordinate to professionalism.

It is important to emphasise that there are many positive features in the Report's approach to the teaching of ethics in law schools. For one, the criticism of legal ethics courses that tend to focus exclusively, as the Report says, "on teaching students what a lawyer can and cannot get away with"¹⁰⁹ is spot on. Such teaching is truly tragic. It results in, as Deborah Rhode put it, "legal ethics without the ethics."¹¹⁰ 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"¹¹¹ is an acknowledgement that can only be fully endorsed. 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 merely be professionals; we are also, and indeed most importantly, educating human beings.¹¹²

We ought to agree with the Report's call for the implementation of the pervasive method of teaching ethics.¹¹³ We ought also to 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."¹¹⁴ We do well to pay heed to the Report's reminder of the potential that legal clinics have for counterbalancing "the often abstract and depersonalised nature of legal analysis"¹¹⁵ (as long as we do not caricature, nor denigrate the significance of, that analysis). We also do well to agree with the Report that the development of

109. SULLIVAN ET AL., *supra* note 5, at 149.

110. *Id.* (quoting DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 200 (2000)).

111. *Id.*

112. To say this is not to say that teachers in law schools can impose their own personal (or religious) ethics on their students. It is just to say that moral sensitivity cannot be developed in environments defined and structured solely by professional requirements.

113. SULLIVAN ET AL., *supra* note 5, at 151.

114. *Id.* at 154.

115. *Id.* at 159.

“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.¹¹⁶ Finally, we ought to 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 “dismiss[ing] [ethical considerations] as naïve and irrelevant;”¹¹⁷ and “keep[ing] the analytical and the moral, the procedural and the substantive in dialogue throughout the process of learning the law.”¹¹⁸ These are all good messages. The problem is that they do not go far enough.

It is vital, and never trivial, to remind ourselves just how difficult ethical education is—and necessarily so. An ethical experience is most acute when we come face to face with our limitations; when we face up to the irreducible anxiety and vertigo of the ought; to the infinite array of consequences that our actions may bring; to the irreducible contingency of the good. A contingency is made irreducible not because there is no right or wrong thing to do in a particular situation—clearly there sometimes is—but rather because of the inevitability of our ignorance, and the almost irresistible tendency we feel to justify our actions; to distance ourselves from possible implications; and to cover our tracks with good intentions. Ethical education must offer students the opportunity to experience such difficulties and anxieties, for without that experience the development of the ethical imagination will be radically stunted.

The paradoxical thing in ethical education is that nothing can be allowed to become too effective. No one method, no one resource for guidance or evaluation, can be allowed to dominate, or to become too easy, too straightforward. Each must be subject to ceaseless criticism. Each must be made subordinate to the values of alertness and attention. But of course, alertness and attention do not arise from nowhere; they too are skills and capacities that must be learned. How do we learn to be alert, without our capacity for alertness itself becoming complacent? The difficulties are legion. This Article has sought to suggest that art—both in its appreciation and involvement in its production—can assist us to meet some of those difficulties.

116. SULLIVAN ET AL., *supra* note 5, at 146.

117. *Id.* at 144.

118. *Id.* at 142.

III. PRACTICAL APPLICATIONS

This part of the Article offers two distinct practical applications of the above general theoretical picture. It was mentioned, in the opening remarks, that there were two points we could make about the role of Goya's painting in Serres's book. These two points have been further articulated by considering some of the literature on the role of art in section three of part one above. It is the second of those two points that is stressed in this part—i.e., the need for, but also the difficulty of, coming face to face with our limitations, and the tendency to see things in a certain way, or only notice certain things. In the legal context, and precisely as a result of professionalisation, this means that we become sensitive to noticing certain things as relevant and important and that we are dismissive of (or at least are disposed to dismiss) everything else. Without activities that allow us to distance ourselves from these habits and dispositions, we risk never becoming aware of our limitations; we thereby risk becoming dangerously thoughtless.¹¹⁹ Thus, all throughout the two applications below, the theme of unlearning, of confronting our limitations, of not knowing where one will end up, of making oneself vulnerable, and of experiencing a certain form of anxiety related to one's professional dispositions, are the key pedagogical forms.

The two applications are, first, to reading legal texts and, second, to providing hypothetical legal advice. Two very different activities have been deliberately chosen to illustrate the breadth of possible applications.¹²⁰

A. READING LEGAL TEXTS

We mostly read legal texts in the context of a class on, or in the course of research into, a specific area of the law. We read judgments—some of which may range over many areas—often with only one area of the law in mind. In other words, we will often, in reading a legal text, already have come to anticipate or be oriented towards recognising and confirming our recognition of certain patterns of facts: patterns that pick out the bearer of a

119. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (illustrating the danger of thoughtlessness in a particularly powerful manner); see also Hannah Arendt, *Thinking and Moral Considerations: A Lecture*, 38 SOC. RES. (No. 3) 417 (1971).

120. The author has dealt with another application to the understanding of a specific legal concept, "concerted practices" in competition law—elsewhere. See generally Maksymilian Del Mar, *Legal Understanding and the Affective Imagination*, in AFFECT: THE IMPACT OF EMOTION ON LEARNING AND TEACHING THE LAW (Paul Maharg & Caroline Maughan eds., forthcoming 2011).

certain duty or a certain standard of care, patterns that pick out a promise or reliance upon it, patterns that will pick out an intention to harm, and so on. By learning legal rules and principles, then, we are simultaneously learning to see social life in a certain stylised way. When such patterns of facts grow, the rules and principles grow with them. They necessarily accompany them—precisely because it is by reference to the language of rules and principles that officials (judges and lawyers) are asked to justify and evaluate legal decisions.

This Article is not the moment to dwell on the proposals of those legal theorists who have explicitly recognised the inextricability of facts and rules (and principles). Even those that do not speak in the language of the historical framing of facts,¹²¹ and thus those, for example, that speak in terms of the age-old legal syllogism, can still be very usefully read as simply indicating the different ways in which those who are legally trained learn to marshal and discipline facts.¹²² The crucial point is not to fall into the trap of making too great a distinction between the life of facts and the life of rules and principles. Rules and principles can be very profitably thought of as markers of or placeholders for the historical structure of facts; it is the life of facts (constantly challenged by the facts of new cases) that gives rules and principles their “dynamic content.” When we “feel” whether a certain rule or principle—or, more broadly, a certain justification—can be “stretched” to cover a factual pattern, we work with images (even if we conduct our debate or investigation in, and justify it by, the language of rules and principles).

We can think of learning in this context as about recognition and confirmation, i.e., as a matter of developing certain stylised relations with certain specific features of the environment (in this case, texts). Legal scholars, academics, and practitioners learn to develop a heightened sensitivity to the historical structures or patterns of facts, as these can be constructed (and have been constructed by previous generations of officials) from cases. Learning, then, encourages and facilitates the recognition and confirmation of certain stylised ways of seeing features of the environment that are important to a certain community. In the context of legal education, learning to read is learning to develop a way of seeing legal texts such that certain historical structures or patterns of facts are recognised as applicable

121. One theorist who does stress the importance of diachronic framing of facts, including tracing the influence of Gaius’s tripartite division of law into the law of persons, things, and acts on contemporary legal systems is Geoffrey Samuel. *See generally* GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* (2003).

122. *See generally* NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978). Chapters 5 and 6, which speak of the vital importance of imagining and considering alternative scenarios and possible consequences when the “rules run out.” *Id.* at 100.

in novel circumstances. This knowledge is dynamic, it is anticipatory and orientating, and it changes over the course of time. When those trained in this stylised way of seeing legal texts analyze a new judgment, they are constantly seeing structures or patterns of facts; they are evaluating the fit of the facts of the case to those fact patterns with which that they are familiar.¹²³ Their ability to do so, and to do so quickly, is based precisely on that anticipatory and orientating energy of their stylised sensitivity. They can see, immediately and non-inferentially, whether a certain kind of justification (a certain way of structuring those facts) is appropriate or inappropriate, whether it fits or doesn't fit, whether it is elegant or not.

If we understand learning to read legal texts in this way, we can develop a pedagogical program that goes a good deal beyond text. For instance, we can employ diagrams or other forms of visual, and perhaps even audio-visual, representation to assist with the development of stylised sensitivities to certain historical structures or patterns of facts.¹²⁴ This would, of course, need to be supplemented with sophisticated analysis of the role of facts in legal understanding. Here, we could draw on the work of Terence Anderson and William Twining,¹²⁵ as well as Geoffrey Samuel's account of the history of the legal factual patterns.¹²⁶

All this is part of learning. The emphasis, however, in this Article, is on *unlearning*, i.e., on coming face to face with the limitations of how, as a result of professional education, we come to see things in certain ways or are disposed to noticing and finding important certain things rather than others. Of course, to unlearn, we have to first have a sense of what it is that we are learning; hence the above sketch of what we learn when we read. Let us, now, look at some specific activities that may help us unlearn some of the ways in which we read legal texts or approach legal language.¹²⁷

123. For this characterisation of expertise, see Hubert L. Dreyfus & Stuart E. Dreyfus, *What is Morality? A Phenomenological Account of the Development of Ethical Expertise*, in UNIVERSALISM VS. COMMUNITARIANISM: CONTEMPORARY DEBATES IN ETHICS 237 (David Rasmussen ed., 1990); see also Hubert L. Dreyfus & Stuart E. Dreyfus, *Towards a Phenomenology of Ethical Expertise*, 14 HUM. STUD. (NO. 4) 229 (1991). The approach taken in this Article recognises that we can come to see in this direct and non-inferential way, but emphasises that a vital element of ethical development is becoming aware of the inevitable limitations of such skills.

124. The movement for visual and multi-sensory law, which has had long-standing connections with artificial intelligence, is gaining momentum, especially in Switzerland, Germany, and Austria. For more information, see *Multisensory Law*, BECK-COMMUNITY, <http://community.beck.de/gruppen/multisensorylaw> (last visited Jan. 25, 2011). The great thing about this network is that it brings together professional artists and designers with legal scholars.

125. See generally TERENCE ANDERSON ET AL., *ANALYSIS OF EVIDENCE* (2d ed. Cambridge Univ. Press 2005) (1998).

126. See generally SAMUEL, *supra* note 121.

127. The photos that follow are all by Alicja Rogalska. For more information, see ALICJA

2010]

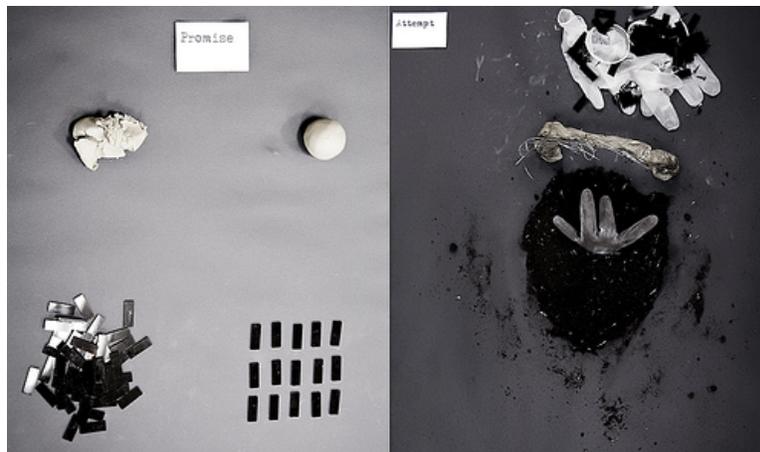
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One of the activities developed as part of the Project was an activity that required the participants¹²⁸ to make an imaginative work out of a legal word common enough in everyday parlance (such as “causation” or “trust”):



Here are some more examples (these are two individual works placed side by side; the word on the left is “promise” and on the right “attempt”):

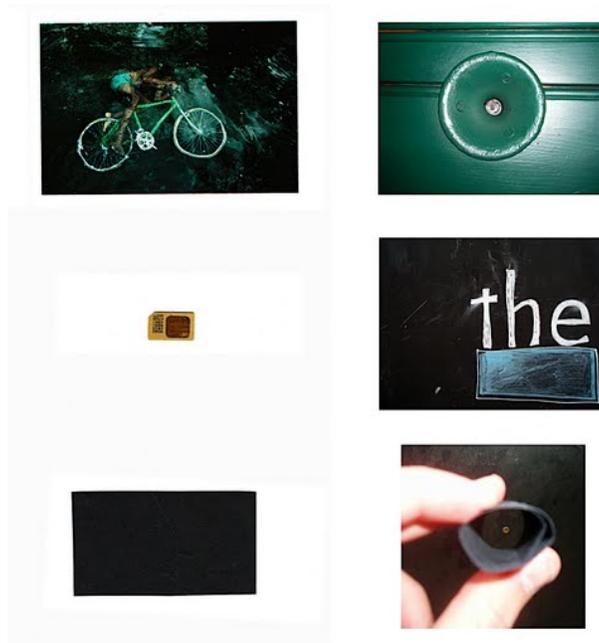


ROGALSKA, www.alicjarogalska.co.uk (last visited Jan. 25, 2011). Alicja was one of the artists involved in the Project.

128. The participants included legal professionals (including both partners in law firms and barristers) and legal educators in both the United Kingdom and the United States.

In this way, a form of legal professional seeing was placed under the embodied scrutiny of a participant, who had to struggle to communicate the legal idea to an audience that contained at least a few members who were not legally trained. Here, it is the stylised *seeing* that is being targeted; not the limits of any particular historical structure or pattern of fact; not any one rule or set of principles. We come to confront precisely the habitual way in which we relate to legal language and thus come to be more aware of the limitations of those habits.

Consider another activity engaged in at the Project, which involved participants being given a digital camera and a series of prompts. They were then asked to spend fifteen minutes per prompt producing one picture in response to it. The prompts were non-legal (they included pills or bits of coloured paper; ordinary items of everyday use), but they could equally involve legal prompts (not just words, but, for example, pictures of wigs etc). Here is an example (the prompts are on the left hand side, accompanied on the right by the pictures taken by the participant):



Participants were encouraged and allowed to relate to the environment in a very different way than they ordinarily would. Here, again, participants were being challenged in their very way of *seeing*.

Notice that the activities highlighted here are not ones whose *principal* aim is to encourage non-textual, non-verbal, non-linguistic forms of communication or experience. Certainly, the activities do involve such elements, but from the perspective of this Article, and the emphasis being placed on unlearning, that is not the key. The key is the way in which the participants were encouraged to relate to the prompts—for instance, commonly encountered legal terms—in an unfamiliar way. Certain activities, the principal aim of which may not have been unlearning, can be altered to make unlearning the focus. For instance, in the following activity, participants were asked to adopt the role of either a describer or a drawer. The observer sat before an image and described it to the drawer, who drew the observer's description.



This activity can greatly increase the ability to listen, to make others more responsive to the other, in ways that may have applications, for instance, to client interviewing.¹²⁹ But the activity can also be given a twist, which makes it more focused on unlearning. For example, the drawer can be asked to draw the observer's voice, and the observer can be asked to describe the opposite of what he could see. This activity was originally conducted in a gallery, and so it involved the observer looking at an image or sculpture, and the drawer drawing an image or sculpture, but one could conduct the same activity with texts. In such instances, the reader describes the opposite of what she reads to a writer who transcribes the opposite of what she hears. The key, once again, is to challenge a certain way of relating to texts, acquired as a result of repeat experience in the law school environment.¹³⁰

129. The late Elaine Tyer, who died suddenly in December 2010 and who was the Director of Professional Legal Studies at the University of Edinburgh, introduced just such an application in her training of client interviewing. Elaine had reported, in conversation, that the activity had a positive effect on students' ability to interview effectively.

130. Unlearning might be seen to function in two ways here: first, as a way of assisting learning, for we arguably learn better by being aware of how and what we are learning; and

B. PROVIDING HYPOTHETICAL LEGAL ADVICE

Let us turn now to a very different activity, that of providing hypothetical legal advice. The specific concern here will be not with providing such advice in an exam environment (though this continues to be a common experience and one of the most traumatic for legal students). Instead, the focus will be on the context of clinical legal education.

There is, of course, no little irony in the recent resurrection of clinical legal education. Indeed, with the recent publication of the Report and its largely positive reception by law schools in the United States,¹³¹ the momentum may be growing for extending the reach of the apprenticeship model. There is irony in this because common law legal education—based as it was in the Inns of Court in London—was, for a long time, founded squarely on an apprentice-model. It was only, arguably, with the need for a legal science—for legal scholarship to confirm itself as scientific, and thus establish itself in the academy—that legal education became more “academic,” “intellectual,” and less clinical.¹³² This irony is informative, however, because it goes to show the inextricability of developments in legal scholarship with those in legal education. It matters a great deal for legal education how legal scholars conceive of their role, and how they themselves understand and research legal ideas and institutions.

There is no doubt that there is much to be gained from clinical legal education. But if clinical legal education is not itself made subject to unlearning, it can have deleterious pedagogical and ethical effects. It will, therefore, be useful to compare the argument to be made here with that of the criticism of clinical legal education offered by Robert Condlin.¹³³

Condlin is no enemy of clinical legal education *per se*; his voice is that of a sympathetic critic. He believes clinical legal education can achieve a great deal that the old lecture-tutorial system cannot. He also believes, however, that if not set up carefully clinical legal education can do more harm than good. Based on the “analysis of scores of hours of taped

second, as a way of becoming aware of how and what we learn influences us to see and notice certain things rather than others (this being an important part of ethical development).

131. A major conference on “The Future of Legal Education,” organised in February of 2008 in Atlanta, was largely devoted to implementing the Report’s recommendations, rather than questioning them. For more information, see *International Conference on the Future of Legal Education*, GEORGIA STATE UNIVERSITY, <http://law.gsu.edu/FutureOfLegalEducationConference/> (last visited Jan. 25, 2011).

132. For an interesting discussion, see Wai Chee Dimock, *Rules of Law, Laws of Science*, 13 YALE J.L. & HUMAN. 203 (2001).

133. Robert Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 318 (David Luban ed., 1983).

supervisory sessions between clinical students and their teachers,” Condlin asserts that the more carefully he looked at these sessions, the more “[i]t began to look as though clinical teachers and students differ from traditional law teachers and students only in that they are even more zealous at modeling and imitating dominating and manipulative behaviour.”¹³⁴ Condlin argues that these sessions resembled what he called the “persuasion mode” of interacting with others:

Clinical teachers and students often competed over the authorship of ideas, concealed their ends and plans for achieving them, attributed (without investigation) meanings to others’ ambiguous formulations, argued for preferences subliminally and indirectly, suppressed strong but relevant feelings, “protected” each other from difficult but necessary topics by ignoring such topics altogether, argued for beliefs in needlessly stylized and hyperbolic ways, and feigned agreement to produce illusory consensus when underlying belief was the opposite. . . .

. . . They also tend to make decisions unilaterally, to keep their agendas private, to dissociate themselves from responsibility for failure, to intellectualize all questions, to argue coercively (if subtly so), and to seal themselves off from data about their own ideological constraints and ineffectiveness.¹³⁵

As a result, according to Condlin, the persuasive mode of interaction in the clinical environment is “a low-visibility, indirect, and often cordial method of manipulating others.”¹³⁶ Even keeping in mind the great diversity in clinical teachers and clinical education programs, these environments are, more often than not, characterised by attempts to accomplish “victory rather than understanding or uncoerced agreement,” and “private, unilateral, competitive, and self-sealing actions rather than public, bilateral, cooperative, and self-reflective ones.”¹³⁷ Under the canopy of “adversarial skills,” clinical teachers “train students to control conversation—by getting others to agree or not to disagree—until the ability becomes a reflex. In other words, students must learn to convince others or silence them on command.”¹³⁸ Accordingly, Condlin provides a list of seven features of persuasion-mode behaviours, which are often features of clinical legal environments, and by extension, legal practice:

134. Condlin, *supra* note 133, at 326.

135. *Id.* at 326-27 (footnotes omitted).

136. *Id.*

137. *Id.*

138. *Id.*

1. A persuasion-mode actor assumes that meaning in communication can and should be produced unilaterally, by attributing single meanings to ambiguous statements
2. The habit of taking charge, particularly by indirection . . . allows one to alter the direction of group action adverse to one's interests while minimizing resistance to that alteration by not letting on that that is being done
3. Persuasion-mode habits encourage one to see problems brought to lawyers as technical, admitting of single, optimum solutions knowable by experts
4. Persuasion-mode habits cause a person to argue forcefully, hyperbolically, and at length
5. Persuasion-mode habits enable a person to minimize self-analysis and to reserve it for private moments when it will not weaken instrumental effectiveness
6. Persuasion-mode habits predispose lawyers to take evaluative stands automatically, as a first response to others' new ideas
7. Finally, persuasion-mode habits cause one—understandably in competitive contexts—to hedge bets, cut losses, and pick winnable fights,¹³⁹

Taken together, this is a form, says Condlin, of “instrumental morality,” which enables one to avoid risks, “to value winning and fear losing,” and generally to become an expert in “manipulating interpersonal exchanges.”¹⁴⁰

Condlin's criticism is valuable, but his account suffers from not making a distinction between learning and unlearning. Even accepting his characterisation of these sessions, one may very well ask whether some of the abilities he outlines are, indeed, as pedagogically and morally dangerous as he makes them out to be. Indeed, he himself acknowledges that what he calls “persuasion-mode habits” may, in certain circumstances (e.g., “competitive contexts”) be quite beneficial, even necessary. The ability to reach a consensus and thus avoid endless dialogue and debate, to persuade another to see a particular dispute in a particular manner, to precisely interpret the problems a client brings, and to respond “automatically” are all abilities which cannot be dismissed too easily. Under the guise of learning,

139. Condlin, *supra* note 133, at 329-30. For more details, see Robert Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981).

140. Condlin, *supra* note 133, at 331.

it is important to develop abilities: to see a structure or pattern of facts quickly, to offer a simple solution to what is undeniably and unavoidably an incredibly complex personal history, and to make that solution a proficient one, enforceable according to the established procedures. All of this is, in fact, the duty of a lawyer.

One can also take issue with Condlin's characterisation of how and what one is learning in clinical environments. Sometimes, some of us see violence where others see confidence; some of us see persuasion where others see leadership, and so on. Further, one must also understand the artificiality of this environment. Unlike a practitioner, the student is being tested on a certain area of the law (i.e., on his or her ability to pick a certain structure or pattern of facts). If the clinic is teaching legal professional ethics, for example, then the clinical teacher will be looking out for the student's sensitivity to issues already identified in that area—such as confidentiality, conflict of interest, or mistakes in trust accounting. The training of this kind of recognition and the confirmation of what is recognised is part of learning. Once again, one should not caricature the learning process here. Nobody believes that mastery of the rules and principles of legal ethics is *all* that is needed in order to be an ethically responsible lawyer. Furthermore, those who are legally trained are not imprisoned by the rules and principles they learn. Let us not underestimate the intelligence and creativity of those that are both teaching and learning the law. Let us not set up the straw-person of learning.¹⁴¹

But Condlin does have a point. It is a point about how we relate to others in such contexts as clinical legal education; in contexts where we are required to provide hypothetical legal advice. The question is: how is that relation stylised? Condlin's criticism is valuable for it broadens out the critical interest here, but his criticism is blunted because he does not make room for the dialectics of learning and unlearning. Thus, we may very well agree with Condlin that it is precisely the result of our involvement and absorption in such contexts that our style of relating with others becomes one of providing simple solutions to complex problems; a form of listening *for* legal issues rather than listening *to* a human being; a matter of positioning oneself as a possessor of technical and otherwise non-accessible knowledge, rather than a matter of positioning oneself as both willing and able to be transformed by the encounter with another.

Let us step back, for a moment, for we have to be careful here. It is important to acknowledge that there is a great deal of room for manoeuvre,

141. There are many examples of sophisticated approaches to clinical legal education, some of which may already combine elements of what this Article is calling learning and unlearning. This Article is not the place for a review.

even within a certain style of relating to others. Contrast, for example, the styles of two lawyers in Krzysztof Kieslowski's film, *No End* (1985).¹⁴² Antek, who dies at the beginning of the film, provided legal representation to a person on trial during Communist rule in Poland for organizing a strike at his factory.¹⁴³ The accused likes Antek, for he believes that Antek understands his political ambitions, including his position in the political reality of the time.¹⁴⁴ The position of the worker of this period was embodied by one who earns the trust and respect of fellow workers.¹⁴⁵ In the film, such trust and respect was reliant on the protagonist's stance against the governing powers.¹⁴⁶ Antek understands that the accused cannot lose face.¹⁴⁷ He cannot be seen as someone who gives up when the chips are down, or as someone who hides his tail between his legs at the slightest government threat.¹⁴⁸ Accordingly, although he does his best to have his client released, Antek does not do so at the cost of hurting his client's political and other interests; not at the cost, we might say, of his humanity (that being a humanity he is forced to adopt, or can only adopt, given what the system has become).¹⁴⁹ When Antek dies, however, another lawyer, Labrador, takes on his case.¹⁵⁰ Labrador is a seasoned criminal lawyer, and one who understands his task very narrowly: to simply get the accused off the charges as quickly and painlessly as possible.¹⁵¹ Labrador is portrayed as an able advocate who will get the job done.¹⁵² And yet, watching the film, one is overcome by feelings of not wanting Labrador to win. One can see, all the more clearly as the film goes on, how a "Labrador win" can only be achieved at the cost of the accused's humanity. And, indeed, this is what happens. The accused, on Labrador's instructions, stops the hunger strike at the prison, agrees to admit the charges, gets a suspended sentence, and is free to go.¹⁵³ He sits, at the end of the film, in the dock, having been deserted by everyone in the courtroom looking desolate and spirit-broken.¹⁵⁴ Ironically, Labrador's clerk congratulates Labrador on the "victory."¹⁵⁵

142. NO END (P.P. FILM POLSKI 1985).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. NO END (P.P. FILM POLSKI 1985).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. NO END (P.P. FILM POLSKI 1985).

155. *Id.*

Is it only these pyrrhic victories we can score in this system? Is this, Kieslowski asks, the only way we display our humanity—by showing what we have lost, what the system does not allow us to display? The point for present purposes is that there is room for maneuver within the stylised encounter with others that one learns in the legal academy. There is a great range of possible attitudes and approaches that each unique person can take into their professional role. Further, there is a great diversity of roles in the legal world (contrast, for instance, the requirements placed on in-house counsel and those placed on partners in law firms).

Nevertheless, despite the above diversity, we can still helpfully apply the concept of unlearning to the activity of giving hypothetical legal advice. To do this, we must target the style of relating to others that is exemplified in the process of learning to give such advice. The pedagogical and the moral danger does not lie in that activity itself—though clearly that advice can be given more or less humanely. Rather, the danger lies in not encouraging and facilitating those who are legally trained to experience such relations in a different way and to generate alternative opportunities for the formation of different kinds of relations within the legal academy. The last point is crucial: we form of all kinds of relations with others as a result of all kinds of encounters, as part of all sorts of activities. Even within the legal academy, we engage in different relations with different colleagues, not to mention students, administrators, and so on. But the good of that community—as well as the very good of legal education—depends at least partly upon the ability of the legal academy to resist the complete domination of one style of relating to others and, in particular, that style that is encouraged and facilitated by the task of giving hypothetical legal advice.

A number of activities, developed as part of the Project, are relevant here. For one, participants were matched in pairs and asked to draw each other with a thick black marker on opposite sides of a transparent sheet of paper (which was propped up to stand between them):



Each pair had to draw themselves simultaneously—a task that was all the more difficult, as the sheet was almost as opaque as it was transparent. What is significant here is the manner in which the participants were given the opportunity to relate to one another. Participants had to pay close attention to the corporeality of the other person, while also confronting the sheer impossibility of capturing anything close to the reality of that corporeality. They experienced themselves as vulnerable: viewed closely and subject to representation in an inevitably inadequate way by another person, experiencing a reciprocal inadequacy at representing the other person.



Many other activities required at least one of the participants to relinquish the need, or perhaps desire, for control. Thus, in one of the activities, the participants were again matched in pairs, and one was asked to relax her hand while the other participant drew with that hand (the drawings were done with pieces of charcoal on large pieces of paper).



In yet another activity, three participants were asked to mirror the movements of one another. Two people would stand opposite each other, with one leading initially. However, the other could take the lead at any moment, requiring the initial leader to mirror the second person's movements.

A third person observed the two, but could, at any moment, tap one of the movers on the shoulder, requiring both to freeze. The third person would then take

up the position of the person he tapped, and the mirroring would begin all over again.

Again, the point of these exercises is to challenge the stylised relations persons develop as a result of certain kinds of activities—such as giving hypothetical legal advice in clinical legal education environments. Unlearning in this manner, one comes to confront the limitations of what one learns (or at least can all too easily come to learn without realising it) in the course of professional legal education.

CONCLUSION

There are, of course, serious limitations involved in 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 because of the tenacity of certain institutional climates in legal practice. The recent development—in countries such as Australia—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, law firms—especially those law firms seen as most prestigious by law students—were already playing second fiddle to big businesses. This development is part and parcel of the continuing evolution of the autonomy of the economic realm. In contrast, little is heard of the great lack in political accountability not only of large corporations, but also of international economic institutions.¹⁵⁶ 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 not only get richer, they get better at getting richer. To recognise this is precisely to recognise the dangers involved in subjecting legal education to the ideals and demands of the legal professional.

This Article concurs with the Report's statement that we ought to recognise that "professional education is . . . inherently ethical education,"¹⁵⁷ but only so long as the statement is taken as a call for recognition that professional education inevitably shapes the sensibility of those that undergo it. However, if the statement is taken to mean that professional education is necessarily ethical—that it necessarily develops *ethical* sensibility—then it ought to be resisted. Ethical sensibility, as this Article has sought to present it, cannot be subsumed under the development of professional expertise.

156. For an analysis of international economic institutions in this respect, see Maksymilian Del Mar & Oche Onazi, *The Moral Quality of Work in International Economic Institutions: Resisting Complacency*, 4 INT'L J.L. CONTEXT 337 (2008).

157. SULLIVAN ET AL., *supra* note 5, at 30.

In his paper written in 2000, Roger Cotterrell argued that the role of jurisprudential study in the academy is to be constructively subversive.¹⁵⁸ By this he meant the following:

[Jurisprudence] should question general assumptions that underlie received professional wisdom about the nature of law It 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.¹⁵⁹

This Article professes a great deal of sympathy with Cotterrell's view—though it would not wish to recommend restricting the role of jurisprudence in the academy to that function alone.¹⁶⁰ 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 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 overview of the epistemology of the social sciences on the basis that legal science deals with a closed system of norms and not, like the social sciences, with human interaction.¹⁶¹ There are, in that respect, and as this Article has sought to show, 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 formalisation and commercialisation.

Going “beyond text in legal education” is to move 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 silent, the ephemeral and opaque, the anxious, the inarticulate—all that we are so

158. Roger Cotterrell, *Pandora's Box: Jurisprudence in Legal Education*, 7 INT'L J. LEGAL PROF. (NO. 3) 179, 183 (2000).

159. *Id.* at 183.

160. Cotterrell would not recommend this either, though, given the bias towards the prioritisation of professional values in some of the literature (as illustrated above in the Report), he has good reason to emphasise this subversive function.

161. See generally JEAN-MICHEL BERTHELOT, *ÉPISTÉMOLOGIE DES SCIENCES SOCIALES* (Paris: Presses Universitaires de France, 2001).

often so keen to sweep under the carpet of the text. However, for that we need to slow down, look, and come face to face with the limitations of our ways of seeing. We need to confront our tendency to have an object before us that we can analyse, interpret, and manipulate, and we need to look carefully at the facility with which we hide our responsibilities somewhere in all that justificatory jetsam and flotsam. We need to cultivate the courage to make ourselves vulnerable, to recognise our own forms of suffering and vulnerability, to resist “hiding from our humanity,”¹⁶² and to thereby become more responsive to the infinite variety and depth of suffering and vulnerability around us. That responsiveness is not one that can emerge from the glorification of legality alone—as important as it may be, in some places and at some times to place emphasis on the Rule of Law. The ethical imagination must dwell, as often as possible, in the limit,¹⁶³ the middle,¹⁶⁴ and on the doorstep. What this Article has sought to suggest is that that anxious dwelling can be assisted, ever so modestly, by art—both by the appreciation of art and by the creation of imaginative works.

162. To recall Nussbaum’s title: *Hiding from Humanity*.

163. See generally DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992).

164. See generally GILLIAN ROSE, *THE BROKEN MIDDLE: OUT OF OUR ANCIENT SOCIETY* (Oxford: Blackwell, 1992).