



The Annual Hal Wootten Lecture 2011

UNSW Faculty of Law

11 August 2011

Not For Profit: Why Legal Education Needs the Humanities

Martha C. Nussbaum

{H}istory has come to a stage when the moral man, the complete man, is more and more giving way, almost without knowing it, to make room for the ...commercial man, the man of limited purpose. This process, aided by the wonderful progress in science, is assuming gigantic proportion and power, causing the upset of man's moral balance, obscuring his human side under the shadow of soul-less organization.

Tagore, Nationalism (1917)

I. The Education Crisis

We are in the midst of a crisis of massive proportions and grave global significance. No, I do not mean the global economic crisis that began in 2008. At least then everyone knew that that crisis was at hand, and many world leaders worked quickly and desperately to find solutions. No, I mean a crisis that goes largely unnoticed, a crisis that is likely to be, in the long run, far more damaging to the future of democratic self-government: a worldwide crisis in education. This crisis affects education at all levels, and it definitely affects legal education; studying the general issue, but focusing in particular on legal education, I shall argue that the broad humanistic

creative aspect, and the aspect of rigorous critical thought – are also losing ground, as nations prefer to pursue short-term profit by the cultivation of useful, highly applied skills, suited to profit-making.

Consider these three examples. They are all drawn from the US, but similar examples arise in Europe, in India (where most of my own development work has focused) – everywhere where politicians want education to produce national profit.

f In 0 1Be eean8a(,)-1(hi)3(ghl)3(y)28(ap(i)3(ede U)-3(ni)3(t)-1(ed S)2(t)-1(at)-1(es)-8(D)-3(epar)-6(t)-1(m)-24 Spe(,)-1(hi)3(ngs)-8(,)-1(r)-6(el)3(eas)-8(ed i)3(t)-1(s)-8(r)-6(opor)-6(t)-1(on0 1B)-1(es)-8(t)-1(at)-1(e)3(ghl

A Test of

Leadership: Charting 1BeFuture of U. S. Higher3EducationThis report contained a valuable critique of unequal access to higher3education. When it came to subject matter, however, it focused entirely ation for3national economic gain. It concerned itself with perceived

What would the law schools of a nation focused on the growth paradigm look like? They would be very likely to be narrow and doctrinal, looking at law from the inside, rather than thinking critically about it from the vantage point of a broader set of social goals and aspirations. And they would focus above all on producing lawyers who could read the law.

ability of all citizens to attain these things is an important mark of national success. So the Human Development model is not pie in the sky idealism: it is closely related to the constitutional commitments, not always completely fulfilled, of many if not most of the world's democratic nations.

People who care about this approach will naturally give a great deal of emphasis to the quality of legal education and the values imparted in it. And they will seek a legal education that is both international and comparative, studying different ways of realizing these goals in different nations. But this gets ahead of my argument: so for the moment let's simply pursue the general question.

If a nation wants to promote that type of humane, people-sensitive democracy, one dedicated to promoting opportunities for "life, liberty and the pursuit of happiness" to each and every person, what abilities will it need to produce in its citizens. At least the following seem crucial:

- the ability to deliberate well about political issues affecting the nation, to examine, reflect, argue, and debate, deferring to neither tradition nor authority
- the ability to think about the good of the nation as a whole, not just that of one's own local group, and to see one's own nation, in turn, as a part of a complicated world order in which issues of many kinds require intelligent transnational deliberation for their resolution
- the ability to have concern for the lives of others, to imagine what policies of many types mean for the opportunities and experiences of one's fellow citizens, of many types, and for people outside one's own nation.

Now that we have a sense of the terrain on which education works, we can return to the ideas I mentioned earlier, saying some things, quite tentative and incomplete, but still radical in the present world culture, concerning the abilities that a good education will cultivate. As I describe each ability, I will relate it to the structure of legal education.

Three values, I would argue, are particularly crucial to decent global citizenship. The first is the capacity for Socratic self-criticism and critical thought about one's own traditions. As Socrates argues, democracy needs citizens who can think for themselves, rather than deferring to authority, who can reason together about their choices rather than simply trading claims and counter-claims.

Critical thinking is particularly crucial for good citizenship in a society that needs to come to grips with the presence of people who differ by ethnicity, caste, and religion. We will only have a

Let us now consider the relevance of this ability to the current state of modern pluralistic democracies surrounded by a powerful global marketplace. First of all, we can report that, even if we were just aiming at economic success, leading corporate executives understand very well the importance of creating a corporate culture in which critical voices are not silenced, a culture of both individuality and accountability. Indeed, both Singapore and China have recently conducted reforms to inject a great deal more in the way of active critical thinking into their education systems, because they feel it is essential to a healthy business atmosphere. Given their suspicion of truly open criticism, however, these experiments are on a very short leash, all criticism of the government being strongly discouraged; so the Socratic ideal is not likely to be realized.

But our goal, I've said, is not simply enrichment, so let us now turn to political culture. As we'll see in more detail later on, human beings are prone to be subservient to both authority and peer pressure; to prevent atrocities we need to counteract these tendencies, producing a culture of individual dissent. One critical voice can have large consequences. (Hal Wootten admired the novel To Kill a Mockingbird for its portrait of the good citizen as solitary dissenter.). By emphasizing each person's active voice, we also promote a culture of accountability. When people see their ideas as their own responsibility, they are more likely, too, to see their deeds as their own responsibility. That was the point Tagore made in Nationalism, when he insisted that the bureaucratization of social life and the relentless machine-like character of modern states had deadened people's moral imaginations, leading them to acquiesce in atrocities with no twinge of conscience.

Now to law school. It might seem that critical thinking is one thing every law school cultivates: after all, don't they all practice a version of "the Socratic method"? However, I think this appearance is quite deceptive. In a curriculum burdened with the need to teach basic doctrinal content – as is very much the case in Australia, more so than in the U. S., where state bar examinations perform much of that function – teaching active critical thinking is a challenge. Moreover, in a system increasingly oriented toward the business and corporate community, it is difficult to include critical thought about justice and inclusion. And yet, this sort of deep and wide-ranging critical thinking lies at the heart of the whole enterprise of training lawyers. Hal Wootten wrote, "Decision-making on the

these is to make sure that from a very early age students learn a different relation to the world. They should gradually come to understand both the differences that make understanding difficult between groups and nations and the shared human needs and interests that make understanding essential, if common problems are to be solved.

This understanding of the world will promote human development only if it is itself infused by searching critical thinking, thinking that focuses on differences of power and opportunity. History will be taught with an eye to thinking critically about these differences. At the same time, the traditions and religions of major groups in one's own culture, and in the world, will be taught with a view to promoting respect for one's fellow world citizens as equals, and equally entitled to social and economic opportunity.

In curricular terms, these ideas suggest that all young citizens should learn the rudiments of world history and should get a rich and non-stereotypical understanding of the major world religions, and then should learn how to inquire in more depth into at least one unfamiliar tradition, in this way acquiring tools that can later be used elsewhere. At the same time, they ought to learn about the major traditions, majority and minority, within their own nation, focusing on an understanding of how differences of religion, race, and gender have been associated with differential life-opportunities. All, finally, should learn at least one foreign language well: seeing that another group of intelligent human beings has cut up the world differently, that all translation is interpretation, gives a young person an essential lesson in cultural humility.

When we think about recasting legal education in order to cultivate this ability, we do not have to think far, because curricula in many nations are currently being transformed so as to incorporate much more international and comparative law, and clinical programs in international human rights add to the curricular development. But I would argue that this is not enough: we need to incorporate an international and world-history perspective in many if not most of the standard courses. It is one thing to study corporate law technically, learning the moves. It is a far richer thing to study it historically and critically, thinking about the role that corporations currently play in the global economy. Hal Wootten complained that law, when he was a student, "was taught to me as an introverted discipline

Wootten, then, is calling for what Ellison called for: a cultivation of the “inner eyes,” so that the lives of social “invisibles” will be seen clearly and with understanding. How can legal education cultivate that “keen concern,” those “inner eyes”?

To begin with, courses of all sorts can be taught with a keen eye to historical and social context and with the critical dimension of which we’ve already spoken, as students are encouraged to think about social justice and to see the legal system from outside as well as inside. The comparative and international dimension can also contribute to the work of seeing the hierarchies in one’s own society clearly. But I think that humanities scholars – historians, political philosophers, literary scholars – have a key role to play in these developments, because they are experts at enlivening the participatory imagination. Co-teaching is one very valuable way of taking advantage of the presence of such humanists in law schools. I co-teach a course on “decision-making” to first-year law students with a colleague who is an expert in game theory and decision theory. They choose the course, often, to gain these fashionable techniques. But then they also gain exposure to John Stuart Mill, Aristotle, Immanuel Kant, and a variety of literary authors who make the issue of perspective-taking come alive for them. We also do offer a wide range of law and literature courses, and we regularly hold conferences on law-literature topics, which bring distinguished people to campus to think about the imagination. One of our conferences, on Shakespeare and the Law, involved Justice Stephen Breyer talking with English professors, philosophers, and other judges about how the fictional world of the plays enriches the thought of a lawyer or judge. This year, we are planning a conference on “Manhood in American Law and Literature,” with the well-known author Joyce Carol Oates as our plenary speaker, that will investigate ways in which social stereotypes of masculinity affect legal thought at many levels. So, the cultivation of imagination can take place at many levels of the legal curriculum, infusing basic courses, creating elective courses, and generating extracurricular activities that lure students in.

There is a general observation to be made at this point, although perhaps it is clear from what I have said already: the humanities are not elitist. They are part of the mental equipment of every good

citizen and especially of every lawyer who is going to be good at serving citizens. In Australia I often encounter the idea that humanities are for privileged elites, and not part of general education for all. No doubt they have been viewed this way, and in Britain they long were taught this way. John Stuart Mill already complained in 1867, in his Rector's Address at St. Andrew's University in Scotland, that English universities teach the classics as a set of frills for gentlemen, rather than thinking about what every person should know as a preparation for citizenship and life – the approach he found in Scotland to a greater degree. But he did not conclude that the humanities should no longer be taught: he concluded that they should be taught differently, with an eye not to pluming oneself on one's knowledge of the great books, but with an eye to what one can do in life, how one can interact with others in a political community, how one can serve that community. The vision I've been defending here is essentially Mill's vision, and it means not taking a list of "great books" for granted, a practice that I've long criticized in the U. S., but, instead, asking what curriculum could bring a heterogeneous group of young citizens into a productive dialogue around the needs of the community – something to which, as I've argued here, the humanities make an invaluable contribution.

The U. S. used to teach humanities in the English way, as a set of plumes in the hats of privileged gentlemen (and I do mean men). But World War II produced a radical democratization of higher education, as all returning GI's had rights to university education given them by the GI Bill. Educators understood that they had to think afresh about the entire topic of the free society and what produced it. One of the most eloquent statements coming out of this period was the book General Education in a Free Society, written at Harvard by literary critic I. A. Richards and other humanities faculty. They ask how to educate people together, if they vary greatly in class, region, and prior preparation, and they come up with curricular proposals that still have merit today; they allocated one-third of the undergraduate curriculum to the humanities. As time went on, however, it was not enough to think about class: in the 1970's and after, people realized that an understanding of race and of the situation of women had to be incorporated into the curriculum; and, more recently the study of human sexuality has become a feature of curricula all around the country. Each of these developments has its analogue in legal education. So, in fact the humanities, far from being elitist, provide crucial tools

scientist told them that what they were doing was all right – even when the other person was screaming in pain (which, of course, was faked for the sake of the experiment). Solomon Asch, earlier, showed that experimental subjects are willing to go against the clear evidence of their senses when all the other people around them are making sensory judgments that are off-target: his very rigorous and oft-confirmed research shows the unusual subservience of normal human beings to peer pressure. Both Milgram's work and Asch's have been used effectively by Christopher Browning to illuminate the behavior of young Germans in a police battalion that murdered Jews during the Nazi era. So great was the influence of both peer pressure and authority on these young men, he shows, that the ones who couldn't bring themselves to shoot Jews felt ashamed of their weakness.

Related research demonstrates that apparently normal people can very easily be led to humiliate and stigmatizes others in a context where both peer pressure and authority operate. One particularly chilling example involves school children whose teacher informs them that children with blue eyes are superior to children with dark eyes. Hierarchical and cruel behavior ensue. The teacher then informs the children that a mistake has been made: it is actually the brown-eyed children who are superior, the blue-eyed inferior. The hierarchical and cruel behavior simply reverses itself: the brown-eyed children seem to have learned nothing from the pain of discrimination. Perhaps the most famous experiment of this type is Philip Zimbardo's Stanford Prison Experiment, in which he found that subjects randomly cast in the roles of prison guard and prisoner began to behave differently almost right away. The prisoners became passive and depressed, the guards used their power to humiliate and stigmatize.

Other research on disgust, on which I've drawn in writing a book on the role of disgust in social inequality, shows that people are very uncomfortable with the signs of their own animality and mortality: disgust is the emotion that polices the boundary between ourselves and other animals. In virtually all societies, it is not enough to keep ourselves free from contamination by bodily waste products that are in the language of psychologists, "animal reminders." Instead, people create subordinate groups of human beings who are identified as disgusting and contaminating, saying that they are dirty, smelly, bearers of disease, and so forth. There is a lot of work done on how such

Bangladesh. Whether reform in this direction will occur, however, is hard to say: for liberal education has high financial and pedagogical costs. Teaching of the sort I recommend needs small classes, or at least sections, where students get copious feedback on frequent writing assignments. European professors are not used to this idea, and would at present be horrible at it if they did try to do it, since they are not trained as teachers in the way that U. S. graduate students are, and come to expect that holding a chair means not having to have much to do with undergraduates. Even when faculty are keen on the liberal arts model, bureaucrats are often unwilling to believe that it is necessary to support the number of faculty positions required to make it really work. Meanwhile, in many nations politicians are imposing increasing demands for “relevance” to national economic goals before they fund

de

Across the board, the curriculum is being stripped of its humanistic elements, and the pedagogy of rote learning rules the roost. The Obama administration, under Arne Duncan, has announced its intention of expanding testing, and there is little sign of sensitivity to the problems it has created.

As for legal education, the future is not yet clear. Certainly the increasing focus on international and comparative law in law schools around the world is a healthy sign; and the increasing interdisciplinarity of many law schools is also promising, with appointments of Ph.D.'s from history, philosophy, and other humanities fields, as well as economists. but on the other hand one all too often sees an increasing domination of the curriculum by the demands of the corporate world. In India, for example, legal education is almost exclusively pre-corporate, and public law is barely taught. And everywhere the humanities – history, philosophy, literature – are always an embattled set of minority perspectives.

What will we have, if these trends continue? Nations of technically trained people who don't know how to criticize authority, useful profit-makers with obtuse imaginations, technically trained lawyers who don't know how to understand and have concern for the communities they serve. Tagore observed, studying the educational institutions of his time – that this sort of educational failure amounted to a “suicide of the soul.” What could be more frightening than that? Indeed, when we consider the Indian state of Gujarat, which has for a particularly long time gone down this road, with no critical thinking in the public schools and a concerted focus on technical ability, one can see clearly how a band of docile engineers can be welded into a murderous force to enact the most horrendously racist and anti-democratic policies such as that state's slaughter of more than 2000 Muslim civilians in 2002, egged on by officials of state and even national government. And yet, how can we possibly avoid going down this road?

Democracies have great rational and imaginative powers. They also are prone to some serious flaws in reasoning, to parochialism, haste, sloppiness, selfishness. Education based mainly on profitability in the global market magnifies these deficiencies, producing a greedy obtuseness and a technically trained docility that threaten the very life of democracy itself, and that certainly impede the creation of a decent world culture.

