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The Law School - Global Issues, Local Questions

Edited by

Fiona Cownie

THE LAW SCHOOL - GLOBAL ISSUES, LOCAL QUESTIONS

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Foreword

This collection of essays about legal education arises out of the work of the International Sociology Association's Research Committee on the Sociology of Law. The Committee's Working Group on the Legal Professions, convened by Professor Bill Felstiner, Distinguished Research Professor at the University of Wales, Cardiff, has a number of sub groups, of which the group researching into legal education is one. This is the first collection of that group's research to be published; preparatory discussions and planning took place at Peyresq, in France, and we are very grateful to Mady Smets-Hennekine and the Peyresq Centre d'Art International for their support of our work.

The members of this group come from all over the world. Their discussions have led to the realisation that while legal education is carried out differently in different jurisdictions, there are many issues which are of common concern to legal educators, wherever they come from. *Global Issues, Local Questions* is thus written by contributors who write from their own perspective, but who have chosen to write about topics of general interest, casting new light on the discussions and debates within legal education which are taking place in many different jurisdictions.

In the past the study of legal education in all its forms has commonly been a subject that has been neglected and marginalised. Legal academics have pursued research in substantive areas (whether from doctrinal, socio-legal or critical legal perspectives), but have often denigrated work done by others who have been interested in legal education. These essays are an illustration of the consequences of the ever-increasing professionalisation of legal education research throughout the world which has resulted in a greater self-awareness and a realisation that what we are and what we do as legal educationalists can neither be ignored nor entirely divorced from our research and scholarship in more traditional areas of concern.

The publication of this collection of essays is the first stage of an extended comparative examination of legal education in which this group of scholars is engaged. At this stage, I would like to thank Anthony Berry, computer officer in the Faculty of Law at the University of Leicester, for his assistance with the technical aspects of producing this volume.

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1 Liberalising Legal Education

ANTHONY BRADNEY

Introduction

The most striking feature in the debate about the nature of university legal education in the common-law world has been the existence of dichotomies dividing the starting position espoused by the various writers who have taken part in that debate. Those who favour vocational education have confronted those who prefer academic education, those who see law teaching in terms of skills training have argued with those who see law teaching as the teaching of knowledge and those who see legal education as being about inculcating doctrine have been attacked by practically everybody else. Many writers have regretted the existence of these fundamental divisions in the debate, arguing that they are in fact illusory (Bright, 1991, p. 19). The divisions have, nevertheless, remained and authors have continued to take sides. Yet, through all these divisions, one unifying element runs. Most law lecturers, and most writers concerned with university legal education, are agreed in thinking that such education is a liberal education. Some think that a university legal education is just a liberal education, some think that it is both a liberal education and also some other form of education, but they are generally united in thinking that it is a liberal education.

In a survey of British university law lecturers MacFarlane, Jeeves and Boon found that when asked to indicate what they thought was the most important part of their teaching 74 per cent gave the top score to teaching general intellectual skills. MacFarlane, Jeeves and Boon concluded that '[t]he results of the survey overall indicate a strong bias [in academics in university law schools] towards liberal educational objectives...' (MacFarlane, Jeeves and Boon, 1987, p. 836). This bias towards liberal educational objectives can be found demonstrated in unlikely places and is not confined to Great Britain. Critical Legal Studies, with its denial of the importance of, or existence of the rule of law, is not an obvious place to find support for the notion of a liberal education. Yet in the exchange of correspondence published in the Journal of Legal Education which followed Carrington's attack on those teaching 'legal nihilism' Fiss, who has been associated with the Critical Legal Studies

Movement and who disagreed with Carrington's argument, espoused the liberal position that

> Law professors are not paid to train lawyers, but to study law and to teach their students what they happen to discover. The law school you and I are talking about is an integral part of the university, and by virtue of that membership and all the commitments it entails must be pure in its academic obligations.
> (Martin, 1985, p.26)

Equally, Carrington himself, whilst seeing the university law school as being a professional school devoted to teaching people to be lawyers, thus espousing vocational education, also said in a letter to Fiss '...I have no argument with your assertion that law students may be helped to encounter those who doubt law exists or who doubt that the legal profession has a morally defensible role in our polity' (Martin, 1985, p. 25); a position which could be characterised as indicating a belief in the value of a liberal education.

The prevalence of a belief in the value of liberal education should not be exaggerated. Not all law lecturers would accept the notion of the value of a liberal education. However, even when the notion is criticised the opposing position is often intended to build on what are seen as being valuable elements inherent in ideas of a liberal education whilst disregarding those elements that are damaging either to society or to the individual student. Thus, for example, Thomson, in rejecting the 'liberal arts' model of education also wrote that

> [t]he critical legal movement...identifies with the first great and brilliant theme of the Enlightenment: the belief in the potential of thought to cut through humanly produced distortions and illusions...and to see this as a precondition for human emancipation.
> (Thomson, 1990, p. 191)

The belief that university legal education is, at least in part, a form of liberal education has recently received strong institutional support in England and Wales in the shape of 'The First Report on Legal Education and Training' produced by the Lord Chancellor's Advisory Committee of Legal Education (ACLEC). This recommended, inter alia, that the law degree 'should stand as an independent liberal education in the discipline of law, not tied to any

specific vocation' (ACLEC, 1996, p. 57). However, this apparently happy coincidence of official recognition of the desirability of university legal education being a liberal education with the desire on the part of lecturers to approach it in this manner makes pressing the question what does it mean to say that legal education is, or should be, liberal education? In what way does legal education become liberal?

Liberal Education

The notion of liberal education is neither specific to law nor to university education. Its focus begins with the proposition that education is an education for life and that life is not solely concerned with material or utilitarian matters. In his introductory lecture as Professor of Latin at University College, London A.E. Housman argued

> Existence is not itself a good thing, that we should spend a lifetime securing its necessaries: a life spent, however victoriously, in securing the necessaries of life is no more than an elaborate furnishing and decoration of apartments for the reception of a guest who is never come. Our business here is not to live, but to live happily.
> (Housman, 1961, p. 7)

Traditionally the idea of liberal education has involved both an acceptance of the Aristotelian view of the individual as being inherently curious and the Enlightenment view that individuals can comprehend, and through comprehension control, the world. Barnett has said that a dominant, if conservative view, of liberal education has seen such education as being about 'allowing to unfold characteristics of reason and independence which lie naturally within the individual' (Barnett, 1990, p. 190). This has been seen as being valuable both for the individual and for the state.

> The advanced study of the human sciences involves attempting to realise the aims of the practical Enlightenment (ie Kant's injunction not to learn by rote what others have thought but to think for oneself); it contributes to the formation of intellectually and morally responsible citizens.
> (Davies, 1996, p. 24)

It pursues a form of knowledge which is both useful for the individual and for

society at large.

> ...the knowledge that Newman values as worth possessing for its own sake, for what it is, is best described as that sort of knowledge which allows human beings to understand themselves; whether that be in terms of their past, their culture, their morality or their relation to the natural world. Pursuit of this knowledge produces two great benefits for both the individuals who study and for the society of which they are part...it initiates students both into their own traditions and into a wider civilisation...
> (Bousfield, 1996, p. 68)

Helpful as they are, analyses of this type describe liberal education in terms of what should be achieved rather than the manner in which that might be done. If legal education is to be liberal education it must allow the student to develop their independence of thinking and it must inculcate into the student true knowledge which is worth possessing for its own sake. But what is that knowledge to be and how is this to be done? Seeking an answer to these questions in the available literature that concerns itself with liberal education would be a futile exercise in an essay of this type. The range of literature is too vast and its content too quarrelsome to allow for any clear suggestions. Instead this essay will look more specifically at the work of F.R. Leavis and see to what extent his ideas can help in searching for the way in which legal education can be turned into a liberal education.

Leavis and Liberal Education

The work of Leavis is not chosen randomly from the corpus of material on liberal education. Leavis has both the advantage that his ideas about liberal education have been highly influential within the academy in general and that his own discipline, literature, is one which is in many ways similar to that of law since they both tend to be text oriented subjects.

Leavis' most important contributions to the debate about liberal education are found in his essays 'The Idea of a University' and 'A Sketch for an 'English School', both of which were collected in his book 'Education and the University' (Leavis, 1948a).[1] In these essays Leavis argues that '[t]he problem [for liberal education] is to produce specialists who are in touch with a humane centre, and to produce a centre for them to be in touch with...'

(Leavis, 1948a, p. 28). Leavis thus identifies liberal education not just with the student who is learning but with the culture that the student is learning. Liberal education's job is to contribute to the development of both (Doyle, 1989, pp. 95-98). For the student Leavis sees literature as being a way of building both sensitivity and sensibility.

> The essential discipline of an English School is the literary-critical...It trains, in a way no other discipline can, intelligence and sensibility together, cultivating a sensitiveness and precision of response and a delicate integrity of intelligence - intelligence that integrates as well as analyses and must have pertinacity and staying power as well as delicacy.
> (Leavis, 1948a, p.34)

Sensibility here is, for Leavis, an important concept, lying at the centre of what makes an education liberal. Education is not simply about training an enquiring and empirical mind. It is not solely about producing that which can rehearse, disassemble and analyse the most recondite facts. To do that is of value but 'there must be training of intelligence that is at the same time a training of sensibility; a discipline of thought that is at the same time a discipline in scrupulous sensitiveness of response to delicate organizations of feeling, sensation and imagery' (Leavis, 1948a, p.38). It is in the combination of high intelligence and precise, delicate emotional response that, for Leavis, a liberal education is to be found (Wyatt, 1990, p. 76). Marianne, sensibility in Austen's *Sense and Sensibility*, looks for 'that spirit, that fire, which at once announce virtue and intelligence' (Austen, 1969, p. 51) in a person's character.[2] Similarly, in an appreciation of Wordsworth, Leavis looks for and approves 'spontaneity' in Wordsworth's writing but this spontaneity 'involves no cult of the instinctive and primitive at the expense of the rational and civilised; it is the spontaneity supervening upon complex development, a spontaneity engaging an advanced and delicate organization' (Leavis, 1934, pp. 245-246). For Leavis sensibility, experience, expression and intelligence are so intertwined that a failure in one will necessarily be a failure in all. Thus in his review of Max Eastman's book *The Literary Mind* he writes

> Mr Eastman's defect of sensibility is a defect of intelligence. This becomes plain if we say that he lacks fineness of perception...What we diagnose in expression, as inadequacy in the use of words, goes back to in adequacy behind the words, an inadequacy of experience.

> (Leavis, 1932, p. 22)

In Leavis' writing the personal response of the student to the text studied is very much to the fore whilst factual learning is decried.

> Literary history, as a matter of 'facts about' and accepted critical (or quasi-critical) description and commentary, is a worthless acquisition; worthless for the student who cannot as a critic - that is as an intelligent and discerning reader - make a personal approach to the essential data of the literary historian, the works of literature (an approach is personal or it is nothing...
> (Leavis, 1948a, p. 68)

Leavis' insistence on the priority of individual sensibility should not be taken to indicate an acceptance of the validity of mere subjectivity in reading. The text was both the starting point and the end point for Leavis. In his response to Ezra Pound's book *How to Read* Leavis wrote '[e]verything must start from the training of sensibility' (Leavis, 1948a, p. 120) but that training in sensibility involved began with a close attention to texts.

> It should, by continual insistence and varied exercise in analysis, be enforced that literature is made of words, and that everything worth saying in criticism of verse and prose can be related to judgements concerning particular arrangements of words on the page.
> (Leavis, 1948a, p. 120)

Leavis largely discounted the importance of anything which lay outside the text when looking at a particular poem, play or novel (Leavis, 1953). '[E]verything done by the artist and experienced by the reader is done and experienced here, here and here at an advancing point in a sequence of words...' (Leavis, 1948a, p. 121). But that close textual observation is done in the service of an attempt at an appreciation of value (Leavis, 1945, p. 55; Leavis, 1948a, p. 35). Literature, for Leavis, was a vehicle for considering values which lay at the heart of the individual and society; a vehicle which gave the reader access to observations and arguments not to be found in other sources.

> ...the sociologist can't learn what D.H. Lawrence has to teach about the problems of modern civilized man without being a more intelligent critic than any professional literary guide he is likely to find. Nor, without being an original critic, adverted and sensitized by experience and the habit of

> critical analysis, can the social psychologist learn what Conrad has to teach about the social nature of the individual's 'reality'.
> (Leavis, 1962b, pp. 193-194)

Whilst passionately concerned with culture Leavis was also intensely individualistic. Praising an essay by Eliot about Blake, Leavis writes that Eliot

> stresses in Blake that rare capacity to recognize and seize in his art the personal thisness of his experience which is the mark of creative genius - that thisness in which significance inheres.
> (Leavis, 1982, p. 3)

The text for Leavis is vital but it is vital for the reader's realization of themselves and the culture they are living in. That realization is to be achieved by a personal confrontation with literature. Thus he writes '[o]ne judges a poem by Marvell...out of one's personal living' (Leavis, 1953, p. 176). However, once again mere subjectivity in judgement is rejected. '[O]ur judgements ought to come from an impersonal centre in us...' (Leavis, 1948b, p. 100). Judgement, moreover, is not only to be sustained by repeated reference to the objective text; it is always a judgement addressed to others, to which, if they have an appropriate sensibility, they should respond.

> A judgement is a real judgement, or it is nothing. It must, that is, be a sincere personal judgement; but it aspires to be more than personal. Essentially it has the form: 'This is so, is it not?'
> (Leavis, 1951, p. 227)

Sensibility is to be trained by a consideration of the sensibilities of the great novelists, poets and dramatists mirrored in their work. But more than this a liberal education, a training of both intellect and sensibility, is to be achieved by a reading of those who can combine

> the power of giving concrete definition to (that is, of seizing and evoking in words and rhythms) feelings and apprehensions - the focal core with the elusive aura - that have seemed to him [the writer] peculiarly significant elements in his most private experience,
> (Leavis, 1969, p. 115)

with 'the power of searching and sustained thought' (Leavis, 1969, p. 115). In reading these works the student will be led to reflect on fundamental questions of value and choice for '[t]he problems of a poet that are worth any intensity of study are the problems of a man - one open to being profoundly disturbed by experience, and capable of a troubled soul...' (Leavis, 1982, p. 7).

Liberal Education and Legal Education

How, if we are to follow Leavis, is a legal education to be a liberal education? Legal education, like the study of literature, remains primarily an education based upon texts. New forms of scholarship have supplemented and in some cases supplanted pure doctrinal analysis but, nevertheless, the life of the law for the large part remains a life of books. For a Leavisite liberal education the question is, how do we approach those books? More precisely the question is, what would we wish our students to get out of those books?

Cramton has argued that

> If legal education is to be a form of graduate liberal education, if lawyering is to be more than advocacy, both teaching and practice need to be infused with a delight in conversation on important questions carried on with both hopefulness and humility.
> (Cramton, 1986, p. 8)

It is this which gives the key to the beginnings of a Leavisite, liberal, legal education. For each student, whether they are a law student or any other kind of student, the most important question is how they should relate to other individuals, to communities, to society and to the state. In his inaugural lecture, Bankowski states '[m]y endeavours have always been to try to see how one can lead a good life; to be able to encounter people and deal with them honestly' (Bankowski, 1996, p. 26). If a student's education does not contribute to them answering this question it is not a liberal education. Such an education is intended to make students better citizens, or perhaps more properly better persons, not better lawyers (Brownsword, 1992, p. 48). How this is to be done in a Leavisite manner can be shown by reference to standard legal material.

A typical legal text is Lord Atkin's statement about a person's liability

for negligence in Donoghue v Stevenson.

> The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in the practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
> (Donoghue v Stevenson [1932] AC 562 at p. 580)

Generations of law students have studied this passage, analysed it and no doubt, in some cases, memorised it. Textbooks on tort usually cite some or all of it and analysis in the textbook will repeatedly return to the passage. But what are students expected to take from this text? Jones' *Textbook on Torts*, now in its fifth edition in ten years, provides an illustrative answer. Having quoted the passage above Jones goes on to observe

> The test [for a person's duty of care], then, is reasonable foresight of harm to persons whom it is foreseeable are likely to be harmed by my carelessness. As a principle of liability this statement is too wide, because it is not true, even today, that in all circumstances the infliction of foreseeable damage is actionable in negligence. The whole point of the 'duty problem' is to determine when foreseeable damage is actionable.
> (Jones, 1996, p. 27)

There then follows a lengthy analysis of the effect of subsequent judgements on what we can glean, by way of legal rule and legal principle, from Lord Atkin's initial starting point. Much of this fits squarely within what Leavis would have understood to be a liberal education. Students are referred to precise passages in judgements and Jones attempts to discern how principles either underlie, or can be drawn out of, the historical development

of cases through a relatively close reading of the language of the judgements. Implicit in the analysis is a presumption that the student will attempt a personal understanding based upon their own close attention to what judges have written in their judgements. In this little could be closer to Leavis' approach to literature than the doctrinal lawyer's approach to judgements and statutes. But it is in what is sought in the close analysis of the text that the doctrinal lawyer differs from Leavis and, in so doing, falls far short of offering a liberal education. Jones' concern is with what the legal rule is. His is essentially a factual question; albeit a factual question of a particularly erudite and complex form. Leavis looked for an appreciation of sensibility and value in the text. The doctrinal lawyer is typically concerned with positivist questions about legal rules which are understood as being separated from issues of value. In this the doctrinal lawyer differs not only from Leavis but also from the originator of this particular text, Lord Atkin himself.

Lord Atkin understood law to offer the student precisely the tuition in value that Leavis sought. In a lecture on the educational value of law Lord Atkin said

> I myself am of the strongest opinion that an educational subject derives an enormous claim to be considered if, in addition to acting as a mental gymnastic, it at the same time has a bearing upon character and discipline and training. And I think it is impossible to forget that as far as the law is concerned, it is perpetually laying before the student standards of conduct which are standards of conduct which it is desirable to have maintained in the social state.
> (Atkin, 1932, p. 30)

Lord Atkin's own words suggest immediate Leavisite reflections on the nature of a modern understanding about the relationship between individual and individual and individual and society.

A Leavisite consideration of Lord Atkin's text might take the following form. The powerful trope in Lord Atkin's judgement in Donoghue v Stevenson is Christianity; more specifically, the parable of the good Samaritan and the Christian answer to the question, for whom am I responsible? It is in considering this standard of conduct offered in the text that the doctrinal lawyer's approach can be supplemented and a liberal education begun. For most legal scholars familiarity with the passage, and the doctrinal lawyer's

insistence on searching for a legal rule, has dimmed the sense of moral shock that should attend Lord Atkin's use of that trope. In drawing attention to the parable of the Good Samaritan Lord Atkin expects assent to its message. The reference is there not just for aesthetic or stylistic reasons. It is intended to add powerful, persuasive rhetorical force to his argument. If one agrees with Lord Atkin's judgement one is, impliedly, siding with Christianity; and this in an era when being a good Christian was regarded as being more unreservedly a desirable thing than is the case in contemporary society. Yet the notion of legal liability that Lord Atkin describes is far removed from the values incorporated in the parable. On close observation the legal sensibility that Lord Atkin portrays is one which is both crude and vulgar. As Lord Diplock later said in a much quoted passage in Dorset Yacht Co v Home Office, and as Windeyer J noted in another much cited passage in Hargrave v Goldman, the priest and the Levite in the parable of the Good Samaritan would incur no legal liability for their neglect under the principles of negligence laid down in Donoghue v Stevenson.[3] Reference in Lord Atkin's judgement to a grand, heroic ideal leads to a limited legal liability that is morally squalid and tawdry (albeit a liability slightly less squalid and slightly less tawdry than that which went before Lord Atkin's judgement). If one accepts the message of the Good Samaritan how can one live one's life according to the principles of liability annunciated by Lord Atkin? Beginning from a high point of Christian rhetoric, which calls upon one to aid not merely one's neighbour but one's enemy, Lord Atkin, a convinced and dedicated member of the Church of Wales (Lewis, 1987, p. 20), confines a legal duty of care to a relatively circumscribed and narrow section of an individual's life. The contradiction in this is redoubled by the fact that Christ originally used the parable as an answer to a lawyer's question, 'what shall I do to inherit eternal life?' (Luke X: 25).

Lord Templeman, commenting on developments in the law of negligence after the House of Lord's decision in Anns v Merton London Borough Council, said

> a fashionable plaintiff [now] alleges negligence. The pleadings assume that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone solvent must be liable in damages.
> (CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] 2 All ER 484 at p. 497)

Yet such a development, surprising and unwelcome as it is to Lord Templeman, is closer to the principles of the Good Samaritan than Donoghue v Stevenson and is closer to the original understanding of the Christian message. John Donne's well-known words

> Any Man's *death* diminishes *me* because I am involved in *Mankinde*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*. (Donne, 1987, p. 124)

are no more than a crisper restatement of Christ's original message and that message is restated not only in Christ's telling of the Good Samaritan parable but also in Paul's understanding of the early Church's own unity.

> For as the body is one, and hath many members, and all the members of that one body, being many, are one body: so also *is* Christ.
> For by one spirit are well baptized into one body, whether *we be* Jews or Gentiles, whether *we be* bond or free; and have all made to drink into one spirit.
> For the body is not one member, but many.
> If the foot shall say, because I am not the hand, I am not the body; is it therefore not of the body?
> And if the ear shall say, because I am not the eye, I am not of the body; is it therefore not of the body?
> If the whole body *were* an eye, where *were* hearing? If the whole *were* hearing, where *were* the smelling?
> But now hath God set the members every one of them in the body, as it hath pleased him.
> And if they were all one member, where *were* the body?
> But now *are they* many members, yet but one body.
> And the eye cannot say unto the hand, I have no need of thee: nor again the hand to the feet, I have no need of you.
> Nay, much more those members of the body, which seem more feeble, are necessary:
> And those *members* of the body, which we think less honourable, upon these we bestow more abundant honour; and our uncomely *parts* have more abundant comeliness.
> For our comely *parts* have no need: but God hath tempered the body together, having given more abundant honour to that *part which lacked:*
> *That there should be no schism in the body; but* that the members should have the same care one for another.
> And whether one member suffer, all the members suffer with it;

> or one member be honoured, all the members rejoice with it.
> For ye are the body of Christ, and members in particular.
> (1 Corinthians 12: 12-27)

Both ways of reciting the Christian message celebrate a morality of responsibility and unity that runs beyond an individual's connection with family, community, common religious creed, society or even state. There is a baseness in Lord Atkin's argument and in the happy acceptance of his argument by lawyers. Lord Atkin's judgement is not, as he writes in his judgement, a 'restricted' response to the Christian message; it is a direct but unacknowledged dissent from that message. To suggest, as Lord Atkin does, that 'acts or omissions which *any* moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief' raises the question, what kind of meaning do these moral codes have in they have so little life in the world at large?[4] It is understandable that acts or omissions which some moral codes condemn will not lead to legal liability in a pluralistic and morally hesitant world; a swift movement from acts or omissions condemned by all moral codes to limited legal liability is an entirely different matter. It is in considering this gulf between the moral image prayed in aid Donoghue v Stevenson and the legal principle which results and in considering what this might say about law, lawyers and modern society that a liberal education begins.

Four points in this illustrative example of the possibility of a Leavisite liberal legal education need emphasis. First, the concern in the reading of Lord Atkin's judgement is a concern with value and not, more narrowly, a concern about morality or politics. It is, in Leavis' language, a concern with sensibility. It cannot be subsumed simply into a debate about political or ethical codes. It remains personal and individual. It remains a concern with a student's subjective response which must imply a concern with how their reading of Lord Atkin's judgement will affect the way in which they live their lives. Lord Atkin is not attempting to enunciate a new moral code. Analysing such codes in their pure theoretical form is helpful in understanding our connection with the world. But considering the way in which people like Lord Atkin work out their own moral responses, albeit unsystematically, is also useful. This is so in the case of literature (Welleck and Warren, 1963, p. 115). It can be so in the case of legal judgements. Secondly, the above is exactly a reading of Lord Atkin's judgement. It pays precise attention to

language and the nuances of words. It is solidly grounded in attention to the text of the judgement. It attempts to offer both the precision and the sensitivity of reading and response that Leavis sought. Thirdly, what is of interest is the dissonance between the Christian values to which Lord Atkin aspired and the legal reality which he was willing to accept and the way in which he was willing to use language to persuade his readers to accept that dissonance. This tripartite relationship remains of interest even if one does not accept the validity of Christian values. It is how values, 'the practical world' and language collides that is important. Finally, a legal education becomes liberal by having this kind of analysis added to that which went before. A legal education still needs at times to be technical; it still needs to be an education in, or an education about, law. (A quite separate question is whether or not doctrinal analysis can ever produce a worthwhile analysis of the content of legal rules.)

Liberal Education, Imperialism, Patriarchy and Hierarchy

As was noted earlier Leavis saw liberal education not just in terms of what it did for the student but also in terms of its task in creating or preserving the culture that the student was inculcated into (Wyatt, 1990, p. 88, Mulhern, 1981, p. 117). Liberal education was both there to preserve 'the humane centre' and there to tell the student what 'the humane centre' was (Leavis, 1948a, p. 28). The notion of 'the humane centre' was of particular importance to Leavis' philosophy of education. Leavis sought a critical response from his students. However, a critical response can become, all too easily, merely a subjective response. A response which is solely subjective, which is validated entirely by the fact that it is a genuine personal response, allows of no conversation. This is what the person says and there is no more to be said about it than that. Such subjectivity is, intellectually, not necessarily inappropriate. Steiner, writing about the difficulties of translating poetry into another language, has argued that such difficulties 'implicates even rudimentary acts of linguistic exchange' (Steiner, 1970, p. 22). In seeking the precision of meaning that we find in poetry, and in seeking to translate that precision from one language to another, we learn that finding equivalence between even one word in one language and one word in another may be impossible. But, if this is so, can there be equivalence between one person's understanding of one word in any language and another person's understanding

of that self-same word? And if that equivalence in understanding cannot be found how is conversation possible? How far can we communicate with anyone other than ourselves? It may be true to say that 'man is...unhappily trapped in a language game of which he knows nothing' (Welleck, 1982, p. 6). We may overvalue the advantages and indeed the possibility of conversation. The Chinese novelist Xianling may be correct in concluding '[i]n the end, I can only tell myself what I say' (Xianling, 1991, p. 135). Subjective response may be all there is or, at least, we may not be able to fully communicate, and thus fully debate, our response. However, academic discourse in universities has always presumed, through the conventions of lectures, tutorials and seminars, the possibility of conversation and community (Davies, 1996, p. 27; Feldman, 1989, p. 516), even if that conversation leads us to the conclusion that we have either nothing to say to each other or no way in which to say it. Thus it is not surprising that Leavis sought from students a critical judgement which took the form of saying 'this is so, is it not?' (Leavis, 1951, p. 227). In part he could achieve this by demanding that the critical response played close attention to the words of the text. 'The humane centre' was another way of providing a cultural focus that ensured critical responses were capable of engaging with each other. Critical judgements from individuals had to engage with the stipulated humane centre if in Leavis' view they were to be valid.

Whilst the purpose of 'the humane centre' can easily be understood it does create problems for the idea of a liberal education. The idea of a humane centre, a culture which liberal education tries to protect, can be taken to imply a static body of texts which constitute that culture or centre which must be preserved and taught. Alldridge has already written about the possible problems generated by applying this type of Leavisite view of liberal education to legal education.

> The view of a highly traditionalist school of English teaching, associated with F.R. Leavis, is that there is a canon of great literature exposure to which in some way makes the students better people (perhaps because the canon embodies and promulgates great values?), and that this is why students should study and be examined upon D.H. Lawrence, but not J.R.R. Tolkein or Raymond Chandler, although similar mind-honing exercises in exposition and interpretation could be set...I suggest that there is no text without having been exposed to which a student could definitely be said not to have studied

> criminal law...
> (Alldridge, 1990, p. 41)

If a culture, legal or otherwise, is defined and limited by a small number of set texts which must be studied the range of responses from readers is reduced. Reading stands in danger of becoming ritual as students are asked to consider books already 'known' to be 'great'. Personal judgements by neophyte readers are difficult to make and come only hesitantly. New students look at the words of the texts but see the only the patina of critical judgement that has already glossed the works. Equally, if study is only of 'great works', then swathes of work which deal with small but important issues not debated in the central texts are lost from sight. However, it is not clear that this limited idea of what constitutes a culture does in fact represent Leavis' view. In *The Great Tradition* Leavis identified the great English novelists as being Austen, Eliot, James and Conrad and then added '[t]he view, I suppose, will be confidently attributed to me that, except Jane Austen, George Eliot, James, and Conrad, there are no novelists in English worth reading' (Leavis, 1962a, p. 9). In fact he wrote widely about English novelists and poets who were outside his great tradition. Not everything, in Leavis' estimation, was worth reading but far from everything outside the great tradition was cast aside. Only Leavis' reputation, not his writing, would give cause for centring legal education on a select and immutable body of judgements known to constitute the centre of legal culture.

Even if 'the humane centre' is not simply and solely 'the great tradition' the notion still creates problems for a practice of liberal legal education. Leavis both seeks to instil in students a particular culture and sees an understanding of that culture as being something which only a minority can aspire to (Leavis, 1948, p. 16 and p. 17, Leavis, 1982, pp. 160-161). What that culture was is a matter of some debate. King argues that Leavis reflects and encourages a particular moment in English cultural history.

> Along with the shift in cultural values came a redefinition of the tradition of English literature. The attention given to the literary criticism of F.R. Leavis, with its emphasis on moral seriousness, the realistic portrayal of life, English lower-middle-class non-conformity, and the notion of a provincial England - in contrast to an international, metropolitan or cosmopolitan - cultural tradition was taken up by many young writers, critics and students as standing for the essential England in contrast to the superficial elite values of the

> wealthy, the expensive public schools and the London literary establishment. Similarly the 'cosmopolitan' writings of Yeats, Eliot and other 'modernists' were increasingly seen as foreign, non-British, French or American influenced, the opposite of those who understood what English life and literature are really about. The displacement of Henry James and TS Eliot as English writers was followed by the creation of an 'authentic' English tradition based on such writers as Arnold Bennett, H.G. Wells, William Empson, Robert Graves and Thomas Hardy. The novels of John Wain and the poetry of Philip Larkin and Donald Davie concerned provincial life in the Midlands and the north of England.
> (King, 1980, pp. 216-217)

However, whilst King sees Leavis as leading to a muddy, middle-class, Midlands value system Mulhern sees the matter somewhat differently, perceiving older elite values reasserting themselves in Leavis.

> In attacking industrialism and commerce, the historic destruction of an older order and the despoilation of its natural setting, the now pervasive spirit of 'mechanism' and calculative rationality, the progressive atrophy of organic wholeness in individuals and in society, the *Scrutiny* group continued a line that included Cobbet and Shelley, Carlyle and Lawrence. In propounding the idea of a disinterested clerisy centred on literature and capable of guiding the moral life of an aberrant society, they resumed the argument initiated by Coleridge and brought to classical maturity by Arnold.
> (Mulhern, 1981, p. 306)

Whichever view is taken, it is clear that Leavis' view of culture is exclusionary; there are things that are in the English tradition and things that are not. It is the things that are in the tradition that constitute the culture that is to be taught. Moreover, those things that are in the culture are thought by Leavis to be inherently valuable and, in some way, inherently good. Study of such things was, for Leavis, redemptive (Evans, 1993, p. 131). Leavis intends to teach an English way of doing things and intends to teach an English way that does not include the way of all those who are in fact English (Eagleton, 1983, p. 37, MacKillop, 1995, p. 241). Applying Leavis' ideas to English legal education would imply the identification of, and the teaching of the value of, an English legal culture.

For a cosmopolitan university law school aspiring, because it is an intellectual meritocracy (Young, 1961, p. 60), to draw staff and students from

a wide range of ethnic, national and cultural backgrounds, Leavis' attitude is deeply problematic. Whilst in most cases a legal education will be a legal education in one national legal culture, in English law or French law or whatever, it would be the antithesis of a liberal education for that to imply that the education should involve inculcating into the student values pre-set in that legal culture. Part of the essence of liberalism is that it avoids imposing value choices on individuals except that it forbids value choices that individuals would like to make which would negate the ability of other individuals to make value choices (Rawls, 1988, p. 262). Liberalism insists on an arena of tolerance for the choices of others but goes no further. Similarly, liberal education is predicated on the student's consideration of values but does not involve an insistence on the priority of any particular values except the value of considering values and allowing others the freedom to do the same. This is not to say that particular values cannot be espoused in a particular educational programme and even put forward has having foundational truth. But for there to be a liberal education it must be for each student to decide whether or not things put forward do indeed have foundational truth. In a liberal education there is for the student an academic freedom to decide not what they study but what they believe about what they study. (A freedom which is bounded by the conventions of rational response capable of explanation and defence in conversation noted above.) It is exactly of the essence of a liberal, legal education that a student, in considering the values of a legal culture, might reject them in whole or part. A central objection to Carrington's rejection of the teaching of 'legal nihilism' in the law school was the imposition of values implied by his approach (Carrington, 1984). A similar objection could be made to the stance of Kronman (Kronman, 1981).

It follows from the above that a liberal legal education should always involve giving the student those materials that are necessary to help them reflect upon the values of the culture. Studying Lord Atkin's judgement in Donoghue v Stevenson immediately involves students in looking both at the Christian values that Lord Atkin refers to as well as to the more prosaic or utilitarian values that are implicit in his view of what law should do. These values have to be drawn out and compared. This comparative aspect is important. It is assessing what values are present in a particular example of an individual legal culture and in looking at alternative values available that the student's education proceeds. And it is in the fact that a programme