Web Journal of
Current Legal Issues

Ward, 'Legal Education and the Democratic Imagination', [2009] 3 *Web JCLI*
http://webjcli.ncl.ac.uk/2009/issue3/ward3.html

Legal Education and the Democratic Imagination

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(*A revised version of this paper has been published in (2009) 3(1) Law and Humanities 87*.)

Summary

The subject of legal education has long attracted critical debate. Much of this has often seemed to veer towards the apologetic, even depressive. There is no reason why this should be so. Nothing should matter more; at least for those of us who work in the legal academy. The past, present and future of legal education should be a matter of ongoing critical contemplation. And controversy, too. This article, inspired by an invitation to give a plenary address to the UKCLE 'Concepts of Culture in Legal Education' Conference in January 2009, is intended to be a further contribution to this conversation. Moving as it will around two of the defining Questions in legal education - What is a Law School for? and What should a Law School be teaching? - much of what follows may seem rather familiar. If there is any greater originality, it is leant by prejudice; a particular view as to the deeper responsibility of teaching law in a modern liberal democracy, and a collateral supposition as to how this might be best done.

I

The two Questions are of course intimately related. It can only be expected that they should be. Arguments over what should be taught in a Law School tend to sharpen the broader question of purpose. Indeed, one of the pervasive concerns is the thought that the second Question – 'What should we be Teaching?' – serves to constrain the first – 'What is a Law School for?'

This anxiety is shaped, in large part, by the intrusion of professional accrediting bodies, and the obeisance which they demand. The fear, put bluntly, is one of 'anti-intellectualism' (Wilson and Morris, 1994: 106). A Law School, it is suggested, and

rightly, should aspire to be ‘more than a mediocre nursery school for the profession’ (Twining, 1994: 85). The more recent rise of ‘transferable legal skills’ across the sector has served only to exacerbate concerns. But the primary concern relates to the ‘core’; the rationale for which appears to be largely lost in the mists of time. Certainly the ‘core’ was designed long ago; and it rarely seems to change. And like any history, it as much a matter of myth and ritual, a ‘rite of reproduction’, as Peter Goodrich puts it, a supplication to past prejudices (Goodrich, 1996: 59). And power too; of the sclerotic Kafkaesque kind. Devoid of any credible intellectual justification, the continued presence of the ‘core’ is simply a testament to authority, the authority of the professions to decide which bits of law are more important than other bits. Of course, no one really believes that many professional lawyers could care less what gets to be taught in the average Law School curriculum. For them it is a ‘rite of passage’ too. What gets to be taught is not important. It is, as Humpty Dumpty observed, who gets to decide which matters; ‘which is to be master that’s all’.

The intrusion of the professional bodies in legal education continues to rankle, and the contempt, as Peter Birks regretted a decade ago, is largely reciprocal (Birks, 1998: 403-5). Scepticism, however, has tended to nurture a culture of subversion rather than antagonism. The ‘core’ remains. But the obeisance is often cursory in the extreme, whilst its substantive, if not symbolic, hold has become ever more diluted. Perhaps most importantly, legal studies have, in recent decades, witnessed an explosion in contextual and inter-disciplinary studies; one which has, according to one prominent commentator, encouraged a mood of ‘euphoria’ amongst many law teachers (Twining, 1994: 123, 145).

Importantly, whilst the antecedents of so much of this inter-disciplinarity might be traced to earlier critical legal movements, there is nothing here that oscillates against the broader ideas of a ‘liberal legal’ education; and much that moves in its favour. The idea of a ‘liberal legal’ education has engendered, of course, its own particular debate. It has certainly attracted the rhetorical support of policy documents, such as the Dearing Report, which cast liberal education as an instrument for supporting the broader ‘values’ of a ‘democratic society’, and also the ACLEC Report which ventured the case for a ‘humane’ legal education (Cownie, 2008: 311). At the same time, the very term liberal admits certain disciplinary as well as ideological connotations. There is nothing politically or even morally neutral about liberalism, or about liberal legalism. Wesley Pue puts it bluntly; education is ‘applied state theory’ (Pue, 2008: 270, 278-9). Such observations do not preclude the merit of a liberal legal education. But they do reinforce a responsibility to be contextually critical. For this reason, and in defence of the idea broadly conceived, some scholars have taken to recommending a ‘post-liberal’, as opposed to ‘liberal conservative’ legal education; one which embraces ‘permissive moral neutrality’ if not a comprehensive ethical position (Burridge and Webb, 2007: 78, 85-7, 90-7).

The vigour of the debate is testament to the continuing vitality of the original idea. It is reasonable to suppose that the vast majority of legal academics in the UK would see themselves as being engaged in such an enterprise; a critical conversation about the future of something that can be termed, however loosely, a liberal legal education. Some of the strongest advocates are those who embrace the fact that any political society is value-laden, and that its laws must be too precisely because they are written to ‘reflect something fundamental about our human being-ness’ (Burridge and Webb,

2008: 263). For this reason, such an approach is also favoured by those whose immediate concern lies in nurturing a sense of ethical responsibility in prospective lawyers. A liberal legal education, it has been argued, should seek to engage the 'sensitivities of law students' (Bradney, 1999: 308). And it should be critical; a law student 'should not merely *know* or *know how to* but *understand* why things are as they are and how they could be different' (Oliver, 1996: 78).

And there is a further responsibility still; to conversation, to those with whom we converse, to the form of community within which such conversations are nurtured. 'The Western University is based on conversation', as Ronald Bartlett suggests, 'No conversation, no university. It is as simple as that' (Barnett, 2000: 92). And it should be a particular type of conversation too; one that engages across disciplinary boundaries. Bradney gestures to this deeply intellectual responsibility when he cites Newman in defining a liberal education as 'A habit of mind' which 'lasts through life, of which the attributes are, freedom, equitableness, calmness, moderation and wisdom' (Bradney, 2003: 37). Plainly, in large part, these are personal qualities, and intellectual qualities too.

But they are also qualities that manifest themselves in social relations, as Burridge and Webb again aver. The ideal of a liberal legal education should also aspire, as a 'minimum credo' to 'prepare good citizens' (Burridge and Webb, 2007: 74-7). There is, in short, far more to a liberal legal education than learning about the law. Neil MacCormick refers to a broader 'Democratic Intellect' within which a legal education should be presented (MacCormick, 1985: 172-82). In similar tone, Twining invokes the image of a modern University as a 'House of Intellect' which, in order to engage a 'broader and more ambitious role', to 'serve a wide variety of constituencies', seeks to nurture a culture of 'civic-mindedness' which is every bit as important as 'technical competence' (Twining, 1997: 293-4, 338). Law Schools, it can be argued, do have an especial duty to act, and educate, in the 'public interest' (MacGuigan, 1989: 92-9). Perhaps unsurprisingly, given the strength of the communitarian strain in its public philosophy, such injunctions are more commonly found in North America; but not exclusively so. Roger Brownsword suggests that such an interest might describe the 'essential mission' of the socially, as well as intellectually, progressive liberal Law School in the UK too (Brownsword, 1996: 6). In deference to this responsibility, advocates on either side of the Atlantic, have recommended a need to address the more obvious forms of potential social and democratic injustice, such as barriers to access, and associated forms of racial and gender discrimination.

Of course, at this point the law teacher must contemplate rather grander vistas. Law, as Peter Birks rightly noted, 'lives in a new world' (Birks, 1998: 402). The challenges are various, many emanating from outside the narrower academy. It is here that the debate can indeed militate towards the depressive. Across the HE sector, the 'What For' Question has been asked with increasing urgency; the 'decline of donnish dominion' succeeded by the age of 'supercomplexity', and 'massification'. The imagery is dark and daunting. This may be appropriate; it may indeed contribute to a broader pessimism abroad in the academy. But it need not. There is nothing inevitable about the prospective history of Higher Education. There is always room for hope. The 'whole idea of education', Edward Said once remarked, 'is to change and improve things, so that other cultural and political possibilities can emerge, even at moments when so-called pragmatists say it is impossible' (Walker, 2006: 3).

Sixty-five years ago, Harold Lasswell and Myres McDougal wrote that the essential 'aim of education is to seek to promote the major values of a democratic society' (Lasswell and McDougal, 1943: 212). It still is. A conception of liberal education which fails to engage this responsibility is indeed 'vapid, even pointless' (Brighouse and Swift, 2003: 367). The stakes are far too high to permit a pessimism that can debilitate; for reasons which will become apparent shortly, perhaps peculiarly high at present. The idea of a liberal, or perhaps post-liberal education, remains vital. The communication of knowledge, the core business of an identifiable liberal education, is itself a democratic responsibility. Higher education, it has been recently argued, 'must not be reduced to a means of supplying industry with technically competent but socially illiterate graduates; it must develop people capable of creating and shaping a more prosperous, a more just and a more integrated society' (Coffield and Williamson, 1997: 23). It is, again, a conclusion which carries a particular resonance for those of us who teach law students.

II

In 1916 the American educationalist John Dewey published his seminal *Democracy and Education*. In an immediate sense *Democracy and Education* is not an easy read. Dewey was a famously laboured writer; ironically, like so many paeans of educational theory, not a particularly fluent communicator or teacher. Yet the idea which underpins *Democracy and Education*, an idea which had been nurtured through essay after essay during the previous three decades of Dewey's career was a truly inspiring one. The purpose of a liberal education, according to the man whom President Eisenhower termed the great 'philosopher of freedom', is to protect and promote a progressive idea of liberal democracy. This might be an education in the humanities, in physical or biological science, or in law. It did not matter; any educational enterprise, from the first year of primary to the last year of higher education, should be geared to this one central mission.

At the heart of *Democracy and Education* lay precisely this; an affirmation of the ineluctable relation of democracy and education. Democracy is 'devoted' to education, because it is dependent upon the shaping of a 'voluntary disposition and interest' through successive generations; and education 'alone' can do this (Dewey, 1997: 3, 87-8). In this, as he argued strongly in his earlier *The School and Society*, published in 1899, a classroom serves as an incubator for democracy and social progress, whilst a progressive education should be seen as 'a fostering, a nurturing, a cultivating, process' (Dewey, 1997: 10). It is also, in large part, an experiential one. Individuals come to appreciate the value of democracy, and the necessity of social existence and responsibility, through their own experiences. A democratic education is an education 'impregnated with a sense of reality' (Dewey, 1997: 159-60, 163). Education thus comprehended is fluid, an experience of 'continuous reconstruction' which lasts a life-time (Dewey, 1997: 39-4).

In this broader sense it is vocational too; an education designed to equip citizens to contribute in meaningful ways to those particular communities of which they are members. This did not mean, however, that it was utilitarian. For this reason Dewey was peculiarly dismissive of 'slavish' curricula that pretended to 'rigid' knowledge bases, and which were written in deference to a 'remote future' vocation rather than in

aid of promoting present reflection on individual experience (Dewey, 1997: 110). Curricula, like societies indeed, come in democratic and undemocratic forms. It is not difficult, in passing, to imagine the contempt with which he would have refuted the supposition that a Law School curriculum should be fixed around a supposed 'core' of necessary legal facts expounded in supplementary core texts. In a later essay entitled *The Social Significance of Academic Freedom*, Dewey took a deliberately abrasive line; any restriction on educational freedom, particularly any restriction which originates outside the classroom is a 'crime against' educative autonomy and 'democracy' (Martin, 2002: 440-1).

Certainly 'social efficiency' was of great importance to Dewey. But this does not again translate into a simple utilitarianism. Equally as important is the 'cultivation' of 'ideas and art and human interests'. The good citizen thinks not just of society, but of other citizens. It is this which distinguishes the vitality of a democratic form of governance; an appreciation that the 'interests' of others is equally valuable, their experiences and the means of their communication (Dewey, 1997: 120-1). It is the 'particular task' of education, Dewey concluded, nearly a century ago, 'to struggle in behalf of an aim in which social efficiency and personal culture are synonymous instead of antagonists'; and that aim is democracy (Dewey, 1997: 123). The injunction has lost nothing of its resonance over time. And neither has the collateral suggestion; that it is a primary duty of teachers to promote, not just social efficiency and responsibility, but the individual appreciation of 'human interest'. At the centre of Dewey's philosophy of education was a critical determination to overcome the dualism of science and art, the efficient and the 'creative', the supposedly 'sensational' and the 'rational' (Dewey, 1997: 258-61, 33-6).

Education must be both, and 'participative' too. The importance of this creative impulse in Dewey's writings is often neglected. It does not, at first glance, seem to fit the prejudice of a pragmatic thinker. But for Dewey it was indeed central, a vital component of a liberal and democratic education. As early as 1902, in his essay *The School as Social Centre*, he had confirmed that any educational institution must 'provide means for bringing people and their ideas and beliefs together, in such ways as will lessen friction and instability, and introduce deeper sympathy and wider understanding' (Benson, 2007: 38). A good teacher works with the experiences and impressions of the student. The 'dramatization' of experience, Dewey affirmed, is the 'sole way of escape from mechanical teaching':

> "Were it not for the accompanying play of imagination, there would be no road from a direct representative knowledge, for it is by imagination that symbols are translated over into a direct meaning and integrated with a narrower activity so as to expand and enrich it." (Dewey, 1997: 237)

And it is the peculiar value of the humanities, of the considered narrative, to elevate the imagination (Dewey, 1997: 238, 241). At the heart of later writings such as *Art and Experience* lies the supposition that a 'Democratic education must' above all 'aim at training the cultural imagination' (Alexander, 1994/5: 252).

Whilst his ideas have taken strong root in educational debate, Dewey's broader intellectual reputation has waxed and waned during the last century. It is particularly rare indeed to find a legal academic, especially one on this side of the Atlantic,

making reference to Dewey. Fiona Cownie's recommendation of Dewey's idea of experiential learning in the law school classroom is an honourable exception, as is Maharg's *Transforming Legal Education* and Johnstone's 1999 article in this journal (Cownie, 1999: 49-5; Maharg, 2007; Johnstone, 1999). But otherwise, there is not much Dewey about, at least not in the pages of your average law journal. He is, of course, rather more familiar in the wider academic world; in large part due, in more recent years, to the efforts of Richard Rorty. What Rorty admired about Dewey was a preference for 'social hope' over intellectual pessimism. Whilst other philosophers agonised about abstruse metaphysics, Dewey was concerned merely with 'helping people solve problems' (Rorty, 2007: 79).

The familiar criticism of Dewey, of course, is that the pondering did not amount to much in practice; that he was strong on what should be achieved, but rather less so on how. The vision is there, of the role of education to facilitate social progress and to preserve the facility for active democratic participation. But the precise means of how this role is pressed is never quite so clear. This is the difficult bit; the 'How' question. Here policy arguments oscillate, not just within the legal academy, but across Higher Education more generally, as to strategies of access and social justice, of engagement with local communities as well as local stakeholders.

The intellectual arguments, in turn, tend more immediately to the conceptual and pedagogical. Rorty, drawing on Dewey, suggests two critical intellectual capabilities. A first is an embrace of indeterminacy; of thinking rather more about questions, and rather less about answers. As Barnett confirms, 'a genuine higher learning is apparent when the student is enabled to understand the contestability of all the frameworks that she encounters and comprehends *and* to confront that contestability in all its presenting forms' (Barnett, 2000: 158). Rorty agrees, following Dewey in rejecting the idea that there is such a thing as truth waiting to be discovered by the diligent philosopher, or student. There are, instead, context-situated 'attempts to solve problems' (Rorty, 1982: 16). 'Only descriptions of the world', he confirmed, 'can be true or false' (Rorty, 1989: 4-5). To accept such a position, accordingly, is to accept the situation of a liberal 'ironist', the 'sort of person who faces up to the contingency' of their very existence and that of the society within which they live (Rorty, 1989: v). In his later *Philosophy and Social Hope,* Rorty even went so far to suggest that law is a peculiarly contingent discipline; the product of an ongoing series of attempts to resolve particular quarrels and controversies (Rorty, 1999: 73-4). Legal pragmatists might nod sagely; others are likely to be more troubled.

The second capability flows from the first. Instead of thinking about abstract principles, of philosophy or theology or law, or whatever, think instead about other people, of how you might make their lives a little better or a little happier. Where a 'liberal metaphysician' wants to provide intellectual justification for favouring happiness, a 'liberal ironist just wants our chances of being kind, of avoiding the humiliation of others, to be expanded by redescription' (Rorty, 1989: 91). Thus:

> "What matters for pragmatists is devising ways of diminishing human suffering and increasing human equality, increasing the ability of all human children to start life with an equal chance of happiness. The goal is not written in the stars, and is no more an expression of what Kant called 'pure practical

> reason' than it is the will of God. It is a cause worth dying for, but it does not require backup from supernatural forces". (Rorty, 1999: xxix)

A progressive liberal legal education refracts this simple ideal, holding that there are more important relationships that a law student must engage; not between one statute and another, or one case and another, but between real human beings. The Rortian aspiration might seem a bit lacking in ambition, and perhaps a bit allusive; nourishing human relations, being nicer. But it is, in fact, an ultimate ambition, and perhaps the most difficult too. If education is not about the 'nourishment of persons', it is not clear what it is about at all (Goodlad, 1995: 20). Certainly it might be supposed that a legal education should be about more than making people nicer or a bit more helpful. But it must also, as it progresses, make absolutely sure that those who complete law degrees, and who are then despatched to serve as lawyers in the wider world, have a closer sense of just how important it might be to be a little nicer and a little more helpful. And they will not get much guidance here by trawling through the standard textbooks on Property Law or Contracts or Trusts. They will need to look elsewhere, outside the fetish of the 'core'.

And if they follow the advice of Rorty they will look hardest at the likes of Shakespeare and Shelley, Wordsworth and Whitman, the 'strong poets' who recognised the contingency of human existence, who recognised that life is not a matter of comprehending large truths, but rather of reconciling ourselves to 'small interanimating contingencies', and who, above all, realised that the politics that really matter is the politics of making other people's lives that little bit more tolerable (Rorty, 1989: 16-20). And at those jurists who likewise advocate a jurisprudence that is less about rights and regulations and endless case-notes, and more about 'transformative' visions and 'sad and sentimental stories' of suffering and injustice (Rorty, 1991: 182, 186-7). The realisation of the most prosaic and pragmatic of aspirations is dependent upon the nurturing, through a progressive education, of the most allusive of human qualities, the ability to imagine and to empathise. It is for this reason that Rorty's observation, that 'love is pretty much the only law', has such a compelling, if allusive, even whimsical, juristic resonance (Rorty, 1999: 7-16). Justice, in the ironic conception, is a 'romantic hope'; hopeful precisely because it is romantic, and contingent (Rorty, 1999: 212).

III

The Deweyan tradition is not, as we have already noted, so familiar in the legal academy. Rather more familiar perhaps is the Aristotelian, and more familiar still the work of one its leading contemporary exponents, Martha Nussbaum, whose *Cultivating Humanity: A Classical Defence of Reform in Liberal Education* can be placed alongside Dewey's *Education and Democracy* as one of the most compelling modern defences of a progressive liberal education. Of course, their intellectual resources are very different. Where Dewey moved from an early Hegelianism to a thoroughgoing Jamesian pragmatism, the inspiration for Nussbaum is rooted much further back in history, in the classical traditions of Aristotle and Seneca.

It is for this very reason that the principle of practical reason is so central to Nussbaum's work. The purpose of intellectual activity, as she stressed in *Love's Knowledge*, must be the pursuit of the 'common good' through the faculty of reason,

albeit a reason that is tempered by a proper appreciation of human emotion and a capacity for admitting contextual indeterminacies (Nussbaum, 1990: 69-73). As with Dewey, there is a strong political imperative in Nussbaum's work. The purpose of *Cultivating Humanity* is to defend a 'particular norm of citizenship' (Nussbaum, 1997: ix). It was Seneca who determined that the purpose of education is to produce prospective citizens who are 'self-aware, self-governing, and capable of recognizing and respecting the humanity' in others (Nussbaum, 2002: 290). Much of Nussbaum's writing on policy is, of course, informed by Amartya Sen's 'capabilities approach'. Education, according to Sen, is one of the 'relatively small number of centrally important doings that are crucial to well being' and human development (Sen, 1992: 14). It is, of course, a position which resonates crisply with the political as well as moral primacy of public education in Dewey's *Democracy and Education*.

Education, comprehended as a process of critical inquiry, is an irreducibly 'human activity' (Nussbaum 1997: 40). And it defines the conversation of a liberal democracy which is nothing other than an 'expression of deliberative judgement about the overall good' (Nussbaum, 1997: 21, 27). In a compelling passage, Nussbaum recommends:

> "It is up to us, as educators, to show our students the beauty and interest of a life that is open to the whole world, to show them that there is after all more joy in the kind of citizenship that questions than in the kind that simply applauds, more fascination in the study of human beings in all their real variety and complexity than in the zealous pursuit of superficial stereotypes, more genuine love and friendship in the life of questioning and self-government than in submission to authority." (Nussbaum, 1997: 84)

The invocation of 'love and friendship' as a constituent of a progressive society, and the kind of education which nurtures it, is of course critical. It is echoed, as we have seen, in Rorty. It is also found in Derrida (Derrida, 1997: 7-8, 20-2). It had, moreover, already been explored at length in Nussbaum's earlier *Love's Knowledge*.

But in *Cultivating Humanity* the pedagogic implications are drawn more clearly still. More precisely, any intellectual pursuit of justice, ethical or political, must tread the inter-disciplinary margins which lie between politics, philosophy and literature. The value of literature is dual and reciprocal. First, it impresses the narrative nature of human experience. We need, as Nussbaum affirms, 'stories of people's real diversity and complexity' (Nussbaum, 1997: 6). And second, it develops sensitivity to these stories by stimulating the 'powers of imagination that are essential to citizenship' (Nussbaum, 1997: 85). As A. N. Whitehead opined, half a century ago; a 'university' is 'imaginative or it is nothing - at least nothing useful' (Whitehead, 1950: 139). The exercise of a developed 'narrative imagination', according to Nussbaum:

> means the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have. (Nussbaum, 1997: 10-11)

Literature, as she had ventured in her earlier *Poetic Justice* is 'in league with the emotions' (Nussbaum, 1995: 67). This conjunction became the subject of deeper reflection still in *Upheavals of Thought*, where Nussbaum confirmed that it is the

emotions which ultimately 'shape the landscape of our mental and social lives' (Nussbaum, 2001: 1). The ethical consequences, accordingly, are immediate. In terms of nurturing human relations, a sensitive citizen, one who can indeed comprehend the emotions and wishes and desires of someone else, is a citizen who can exercise a compassionate empathy. The ideal of 'social justice' is dependent upon the prior exercise of a 'compassionate imagination' (Nussbaum, 1997: 90-2). Democracy, at this point, becomes not merely cognitive but also sensitive. It becomes a feeling thing; something the vitality of which is dependent upon sensations of fairness and affinity, 'love and friendship' (Nussbaum, 1997: 110).

Nussbaum had already fleshed out the closer jurisprudential implications of this disciplinary relation in *Poetic Justice*; which had opened with the assertion: 'I defend the literary imagination precisely because it seems to me an essential ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are different from ours' (Nussbaum, 1995: xvi). So much, she observed, was noted by Oliver Wendell Holmes: 'life is painting a picture not doing a sum' (Nussbaum, 1995: xix). Citing Walt Whitman, a near contemporary of Holmes, and also Rorty's favourite poet, Nussbaum further confirmed that the best judge is one who embraces poetry. A judge 'cannot simply be a poet', but a judge who is not prepared to exercise her imagination, and who is not prepared to admit empathy and compassion into her judgement, is unlikely to be a good one (Nussbaum, 1995: 83).

In order to be 'fully rational, judges must also be capable of fancy and sympathy'; a conclusion which echoes her rather earlier, but equally striking assertion in *Love's Knowledge*, that we need leaders, political and legal, 'whose hearts and imaginations acknowledge the humanity in human beings' (Nussbaum, 1995: 83; 1990: 101). Or to serve the interests of a liberal democracy; for the 'mission' of such a democracy is the 'recognition' of 'imagination, inclusion, sympathy and voice' (Nussbaum, 1995: 118-19). And the jurisprudence of a liberal democracy must be written in this tenor. Judges may be reluctant to admit the faculty of sensibility in their process of legal judgement, in the construction of their jurisprudence. But it is there all the same; and so it should be.

For the Law School there are, of course, implications of principle and pedagogy here.

There is first the primacy of a deep principle of justice. It may be that much of what Nussbaum has to say about practical justice reduces to a concern for the happiness of others; but there is a far more urgent concern for the principle of justice here than in Rorty's similar injunctions. Justice is not simply a matter of rubbing along better. A second pedagogic implication is the need to promote the inter-disciplinary, and more immediately narrative, nature of a liberal legal education. The case for law teachers teaching beyond the 'core' and beyond the textbook has already been ventured. The process is already well underway. Law today is a discipline 'in flux' (Cownie, 2004: 71-2). And it is not just a matter of learning different things, but of experiencing different ways of thinking. It is this which makes inter-disciplinarity not just an intellectual challenge, but a cultural one too. Disciplines are cultural constructs; and so moving across disciplines means moving across cultures. In a striking passage at the close of *Cultivating Humanity*, Nussbaum opines:

> People who have never learned to use reason and imagination to enter a broader world of cultures, groups, and ideas are impoverished personally and politically, however successful their vocational preparation. (Nussbaum, 1997: 297)

It is not a conclusion that is addressed directly to law students. But it has, for those who teach law students, a sharp resonance.

The pedagogic implication, as we have already noted, militates around the How question. How can we broaden legal education, whilst maintaining a responsible watch on what is valuable for law students and valuable for the community in which they will live and work? It is another of the defining questions that we all, as teachers of law, face. There is a striking consonance between the pedagogic strategies urged by Rorty and Nussbaum. According to the latter, stimulating the 'narrative imagination' is an 'essential preparation for moral interaction', for feeling the injustice experienced by others, and seeking to address it (Nussbaum, 1997: 90). For Rorty too, as we have already seen, the mark of the 'ironist' and the 'strong poet' is the denial of any pretended distinction between the disciplines of literature, philosophy and politics. It is for this reason that Rorty could observe that whilst a knowledge of so-called 'rights' might be of some use to legal scholars, a closer conception of what it means to be 'human' is infinitely more valuable (Rorty, 1998: 177-80).

The jurisprudential implications are apparent; and have been taken on by a number of jurists engaged in what might variously be termed 'law and literature' or 'law and humanities' scholarship. Here, for example, Richard Weisberg's observation, that 'Stories about the "other" induce us to see the other, and once we do so, we endeavour consistently to understand the world from within the other's optic', resonates (Weisberg, 1992: 46). So does Maria Aristodemou's conclusion, that no juristic 'writing ever takes place outside the mirroring love of, and for, others' (Aristodemou, 2000: 295). Likewise, perhaps, there is much in Allan Hutchinson comments that carries a distinctively Rortian tenor:

> "We are never not in a story. History and human action only take on meaning and intelligibility within their narrative context and dramatic settings. There are many stories being imagined and enacted, but we can only listen to them and comprehend them within the vernacular contexts of other stories. Our conversations about these narratives are themselves located and scripted in deeper stories which determine their moral force and epistemological validity." (Hutchinson, 1988: 13)

We cannot detach our cultural lives, or our jurisprudential lives, from these stories; nor should we want to. The same sentiment can be read in Patricia Ewick and Susan Silbey's observation, that it is only 'through our storytelling' that we can '(re)create the commonplace of law' (Ewick and Silbey, 1998: 244). Hutchinson continues:

> "The life of law is not logic or experience, but a narrative way of world-making… More importantly still, it is the stories themselves that come to comprise the reality of our experience. In this sense, legal stories mediate our engagement with the world and with others: they provide the possibilities and

> parameters of our own self-definition and understanding." (Hutchinson, 1988: 14)

Such a supposition insinuates an essential paradox; very often literature, and very often fictive literature, is the best medium for impressing upon law students the reality of law.

IV

Sometimes, where the existing media is peculiarly perverse, or perhaps oddly absent, literature becomes pretty much the only medium. Such examples, it might be thought, are rare. There is no shortage of law relating to crime, or to contracts, or to property, and whilst the law of the constitution might, famously, seem rather elusive, few would suggest that it is absent or even perverse. Even so cynical a commentator as Walter Bagehot found plenty of constitution to write about in the essays which eventually composed his *English Constitution*.

But there is, I would argue, at least one such jurisprudential absence or perversity; and part of the perversity attaches to the thought that it is supposed to be one of the defining experiences of our generation. This perversity is terrorism. We are, apparently, living amidst an 'age of terror'; part of our descent into a new age of 'mega' or 'hyper-terrorism', of pervasive 'global anarchy' as the more excited suggest. 9/11, according to German Chancellor Schroeder, represented a 'declaration of war against all civilization'. The future of 'tolerance and freedom' itself, the leader of the western world intoned, lies in the 'balance' (Ward, 2009: 6). Not really. Cold statistics have since rendered the rhetoric absurd. But for a while, as Susan Faludi has more recently observed, few were inclined to voice their doubts; and so we conjured, for ourselves, our very own 'terror dream' (Faludi, 2007: 2).

The consequences of this challenge and the 'war' which, of course, we are all supposed to be so keen to prosecute are various. There are very obvious jurisprudential consequences, many of which go to the very heart of what it means to live in a liberal democracy. At an extreme, in the weeks that followed 9/11, President Bush could be heard sagely advising his compatriots, 'I don't care what the international lawyers say, we are going to kick some ass' (Sands, 2005: 174). Since its inception, the so-called 'war on terror' has proved to be a subject of constant anxiety amongst international lawyers; some venturing to construct a measure of legitimacy out of a rather convoluted sequence of UN resolutions spliced with an inventive understanding of the doctrine of pre-emption, most musing over the extent to which, when push came to shove, all the grander pretensions of international law, conceived in large part to preclude precisely this kind of unilateralism, proved to be so fragile. Harold Koh is not alone in wondering why so many lawyers 'seem to have concluded that somehow the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules' (Koh, 2002: 23). The grotesque aberration that was Guantanamo Bay, the yawning jurisprudential 'black hole' as Lord Steyn described it, vividly confirmed the extent to which, in the matter of the 'war on terror', law appeared to be essentially silent, effectively impotent (Steyn, 2004: 8).

And not just in Cuba. Domestic governments on both sides of the Atlantic have hastily thrown up all manner of statutory barricades against the terrorist barbarian. Recent enactments in UK counter-terrorist legislation include notorious provisions intended to outlaw the 'glorification' of terrorism in the 2006 Terrorism Act, along with measures to tighten immigration, to detain suspected terrorists and to control their movements. These latter provisions have been subject to various legal challenges, many of which have been brought under the auspices of the Human Rights Act. And judgements such as that famously reached by the House of Lords in the 'Belmarsh detainees' case have been understandably lauded as vital statements of judicial determination to preserve fundamental principles of liberal jurisprudence against the despotic insinuations written into counter-terrorist legislation; except, of course, that the very same judgements can be equally read as a statements of judicial impotence. Their lordships in *A* might have been appalled by the way in which the British government seemed to disregard the liberties of those it sought to detain. But they were also powerless to do much about it (*A*, 2002).

The devising of a counter-terrorist law, as a complement to a counter-terrorist strategy, has thus proved to be conspicuously tortuous. Perhaps, ultimately, the former President of the International Court of Justice is right; terrorism is a word that has no 'legal meaning' (Higgins, 1997: 13-14). Given that no one seems too confident as to how terrorism might be defined, or indeed what it is supposed to be, this is perhaps not so surprising. The discourse of terrorism has always proved to be an opaque and elusive one, possessed of what Michel Foucault confirms is a 'magical aspect', of what Edward Said terms 'fantasies and fixations' (Foucault, 2003: 68, 72; Pilger, 2005: 597). It is for this reason, likewise, that the battle between terrorist and counter-terrorist has so often descended into a battle between alternative 'narratives'. At this point, as we try to pick our way through the rhetorical, as well as jurisprudential, miasma, the value of an alternative literary engagement begins to look ever more persuasive; for as the doyenne of terrorist studies Walter Lacqueur has admitted, 'fiction holds more promise for the understanding of the terrorist phenomenon than political science ever can' (Lacqueur, 1977: 149-50).

Politicians may be struggling to make sense of terrorism, and lawyers of counter-terrorism provisions, but dramatists and novelists, not bound by the same determinant anxiety, have long sought to comprehend its deeper ethical, as well as literary and cultural, sensibilities. Thus much has been recently confirmed by Nussbaum, noting that the events of 9/11, if nothing else, have served to test the strength of our deeper commitment to the principles of justice, reminding us along the way that 'Compassion and terror are in the fabric of our lives' (Nussbaum, 2003: 231). More than even, she argues, in the aftermath of the events of September 11th we need to cling to the hope that compassion nurtures, to our residual belief in liberalism and tolerance as defining political ideals, and democracy as the best instrument for preserving them. Against the reductive nihilism of a supposed 'war on terror', she rightly surmises:

> "We will achieve no lasting moral progress unless and until the daily unremarkable lives of people distant from us become real in the fabric of our own daily lives, until our everyday eudaimonistic judgements about our important ends include them as ends, not just as temporary players in a drama in which we are the central actors." (Nussbaum, 2003: 249)

And then concludes, with compelling eloquence:

> "As Euripides knew, terror has this one good thing about it: It makes us sit up and take notice…It could be the stimulus for blind rage and aggression against all the opposing hockey teams and bad umpires in the world. But if we cultivate a culture of critical compassion, such an event may, like Hecuba's Trojan cry, possibly awaken a larger sense of humanity and by a vivid sense of the real loses and needs of others." (Nussbaum, 2003: 249)

The canon of what might be termed, for reasons of convenience, terrorist literature is historically long. It can, indeed, be traced back to Euripides *Women of Troy*; the presentation before an Athenian audience of the horrors which attended the semi-mythic sack of Troy. The canon can just as easily compose texts as obvious as Shakespeare's condemnation of the intended Powder Plot of 1605 in *Macbeth*, and as allusive as Emily Bronte's *Wuthering Heights*, replete with its elusive references to Jacobin iconography in the chaos that pervades the terminally dysfunctional Earnshaw family (Ward, 2007; 2008).

More generally, however, critics tend to identify the origin of a distinctive modern genre of terrorist literature in novels such as Conrad's *The Secret Agent*, Dostoevsky's *The Demons* and Stevenson's *The Dynamiters*; all of which engaged contemporary concerns regarding late nineteenth century anarchist violence. It is not just that these novels provide a testamentary supplement to political, cultural or indeed legal histories of terrorism and counter-terrorism. It is that they can, as Nussbaum suggests, help us to engage a more subtle, ethical comprehension too. There is, for example, something timeless about the words that Conrad puts into the mouth of his counter-terrorist detective, Inspector Heat, on viewing the remains of the body of one failed bomber; the 'absurdity' and 'futility' of a life lost, the 'shattering violence of destruction', the 'ages of atrocious pain and mental torture' that can be 'contained between two successive winks of the eye' (Conrad, 2004: 65, 68-72). There is a 'passion for humanity' here, as one contemporary reviewer of Conrad's novel perceptively noted, of a kind perhaps which is peculiar to the narrative imagination; of the desire to construct 'hope', as Conrad himself put it, from the starker experience of apparently 'irreconcilable antagonisms' (Ward, 2009: 144).

It is unsurprising that the events of 9/11 have spawned their own particular sub-genre of terrorist literature. For a brief moment, as Martin Amis observed, the pen was emasculated, quieted by the seeming enormity of the event (Amis, 2008: 12). In the years which have since passed, however, numerous plays and poems and novels have been written about 9/11 and perhaps most importantly its deeper cultural and political contexts and consequences. If the jurisprudence of 9/11 and the 'war on terror' which has followed is characterised by its confusion and perhaps its impotence, the literature of 9/11 has become ever more confident and confrontational. Two species of this genre, or sub-genre, are worthy of immediate note; verbatim drama and the emergent 9/11 novel.

The former dramatic genre is not, of course, restricted to the subject of terrorism. But it has proved to be particularly popular amongst dramatists who have sought to engage the 'war on terror' and its various political, cultural and legal consequences. Compelling examples include Robin Soans's *Talking to Terrorists* and David Hare's

coruscating critique of the 'war on terror', *Stuff Happens*; the title of which is taken from US Defence Secretary Rumsfeld's notoriously inept, and tactless, aside, when questioned about civilian casualties suffered during the US bombing of Baghdad. A third such contribution is Vera Brittain and Gillian Slovo's *Guantanamo,* which moves in the most part around the serial injustices which beset the so-called 'Tipton Three'. The observation, articulated in the play by their lawyer Gareth Pierce, has a particular pertinence and poignancy too: 'I think perhaps we're very calloused. We read, we watch, we hear about atrocities – we know what man's inhumanity to man consists of, we know all that, but we don't sufficiently register it' (Brittain and Slovo, 2004: 51-2). Regardless of their literary merit or demerit, plays such as *Guantanamo* seek to overcome precisely this resistance.

As to the emergent genre of the 9/11 novel, defining contributions here include Mohsin Ahmed's *The Reluctant Fundamentalist*, John Updike's *The Terrorist* and Don DeLillo's *The Falling Man*. Released from the shackles of integrity demanded of the verbatim dramatist, these novels are still further able to excavate the deeper ethical consequences of 9/11; of the kind precisely projected by Nussbaum. An instance, as beautiful in its imagery, as it is horrifying in its implication, is DeLillo's description of the iconic 'falling man', spoken by his protagonist Lianne:

> "It hit her hard when she first saw it, the day after, in the newspaper. The man headlong, the towers behind him… The man with blood on his shirt, she thought, or burn marks, and the effect of the columns behind him, the composition, she thought, darker stripes for the nearer tower, the north, lighter for the other, and the mass, the immensity of it, and the man set almost precisely between the rows of darker and lighter stripes. Headlong, free fall, she thought, and this picture burned a hole in her mind and heart, dear God, he was a falling angel and his beauty was horrific." (DeLillo, 2007: 222)

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It might be countered that a study of Euripides has an obvious place in courses on Greek tragedy; that a student who pretends to a knowledge of Shakespeare ought to know a bit about *Macbeth*; that there is a place for the study of the contemporary American novel. But what has this to do with law, still less with debates regarding legal education? To this, I would simply reiterate what has gone before, that a study of law which embraces alternative disciplines is a necessarily richer study; not just because there is an intrinsic merit in reading Greek plays or modern novels, but because doing so will make for a better lawyer. A law student who has stopped to think about the injustices described in plays such as *Stuff Happens* and *Guantanamo,* who contemplates the implications of DeLillo's falling man, who can contextualise the events of 9/11 because he has encountered the similar invocations of apocalypse in Euripides and Shakespeare, will be better equipped to discern the dangerous idiocy which injunctions to 'kick ass' import, as well as the darker dangers which find statutory expression in ATCSA and the 2006 Terrorism Act.

All law it is often, and justifiably, argued has a political aspect; and pretty much all the way down. The veracity of this argument is perhaps clearest of all, however, in those areas of jurisprudence which fall within the broader remit of public law, and associated aspects of civil liberties and human rights. The legal and extra-legal

consequences of 9/11 are of huge import. The challenges they represent, against principles such as the rule of law, the separation of powers, of fundamental human and civil rights, are no ordinary principles; the go to the very heart of what a liberal democracy is supposed to cherish. So much was made plain by the various judgements of the Appellate Committee of the House of Lords in the 'Belmarsh detainees' case. As Lord Hoffmann confirmed:

> "Terrorist violence, as serious as it is, does not threaten our institutions of government or our existence as a civil community. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve, It is for Parliament to decide whether to give the terrorists such a victory." (*A*, paras.86-7)

If we are indeed serious about the role of HE in general, and legal education in particular, as a vehicle for nurturing the ideals of a liberal democracy, no matter how much we might choose to squabble about the niceties of particular ideas of liberalism, and indeed liberty, we must recognise an overarching responsibility to ensure that our students are encouraged to think long and hard about these challenges; not just their legal efficacy, the appropriateness of counter-terrorist measures as legal or extra-legal instruments, but also the broader consequences for the political society in which we live, and the culture which sustains it. The case for crossing cultural and disciplinary boundaries, in order to resuscitate our democratic imagination, has rarely, I would suggest, been stronger.

Of course, the invocation of literature as a supplement to the often infuriatingly elusive study of terrorism and counter-terrorism law and policy is particular. But there is, I would argue, a broader pedagogical implication. If justice is the primary intellectual concern of law students, as it surely is, then they too must tread this margin, leavening their reading of statutes and cases and learned articles in learned law reviews with readings of Euripides and Shakespeare, Conrad, Hare and DeLillo. 'Stories', it has been recently argued, can 'perform multiple functions' in the law classroom, 'allowing us to uncover a more layered and refracted reality than is immediately apparent in the stock stories of law and its systems' (Bohler-Muller, 2007: 58). It is here that the culture of justice is written. And it is not, of course, simply a matter of chronicling this composition; of hearing the voices which, as Ariel Dorfman puts it so beautifully, otherwise lie 'hidden at the bottom of the rivers of silence of humanity' (Dorfman, 2004: 232). It is also a matter of experiencing it, of gaining a familiarity with it, ultimately of feeling it. More than any other discipline, literature can make lawyers kinder and more helpful. It can make them, in simple terms, better lawyers. It is for this reason that literature in particular, and the humanities in general, are often invoked by those keenest to impress a deeper ethical component in legal education. Literature is not, of course, alone in demanding an imaginative engagement. But few disciplines celebrate the engagement so joyously.

Literature makes for better lawyers. And better fellow citizens too, better human beings. It breeds, most obviously, a heightened sense of empathy and concern. The better lawyer, as Kronman confirms, is the lawyer who appreciates that the depth of

her wisdom is defined by the extent of her capacity for 'sympathy' (Kronman, 1993: 66-76). As David Hume observed, nearly two centuries ago:

> No quality of human nature is more remarkable, both in itself and in its consequences, than that propensity we have to sympathize with others, and to receive by communication their inclinations and sentiments, however different from, or even contrary to our own. (Hume, 1978: 316)

Of course, the argument should not be taken too far, and we must remain wary of fetish and disciplinary imperialism alike. A reading of Euripides or Shakespeare or Conrad will not alone make for a good lawyer, any more than a reading of *Donoghue v Stevenson* or *Rylands v Fletcher* might. But a reading of one without the other will probably sell a law student short. It will challenge them less, make them think less.

It will rob them too, of that sense of intellectual optimism and excitement the loss of which Peter Goodrich famously decried:

> "Law school stole my hopes of change and robbed me of any surviving sense of the relevance of my inner world, of poetry, of desire or dream, to the life of the institution. My experience of law school was of the denial of the relevance of my experience of law school' (Goodrich, 1996: 59)."

It will rob them, in short, of their humanity. The very essence of a commitment to the democratic imagination, and it might be argued the legal imagination too, is a determination to nurture this sense of poetry, and with it this sense of humanity; for 'to see it without feeling it', as Rousseau observed, 'is not to know it' (Nussbaum, 2001, 323).

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