Conclusion: Towards a More Ethical Profession

> The foolproof—universal and unshakably founded—ethical code will never be found; having singed our fingers once too often, we know now what we did not know then, when we embarked on this journey of exploration: that a non-aporetic, non-ambivalent morality, an ethics that is universal and 'objectively founded' is a practical impossibility; perhaps also an *oxymoron*, a contradiction in terms.
>
> Zygmunt Bauman[1]

Throughout this book we have made a number of criticisms and some specific proposals for the reform of various 'macro' and 'micro' issues relating to professional legal ethics. In this concluding chapter we intend to build upon these proposals in order to further our main aim of encouraging a more ethically aware and concerned legal profession. Accordingly, our suggestions for reform have not been designed to provide definitive answers to particular ethical dilemmas but to bring about an *approach* to ethics which requires lawyers to engage with the multitude of ethical issues raised by legal practice in a far more active and conscious fashion than is generally the case at present.

In this chapter we start by drawing together our discussions of what we regard as the main problem with professional legal ethics—the dominance of formalism and liberalism. This will lead us to a comparison with the advantages of our proposed contextual approach, both as a means of guiding ethical decision-making and enhancing the development of lawyers' moral character. By paying close attention to the way in which this approach may be embedded in the professional codes and taught as part of legal education, we hope to meet some of the possible objections. Finally, we shall briefly explore ways of reinforcing the contextual approach through other institutional changes in order to further reinforce our goal of encouraging a more ethical profession.

1. THE DOMINANCE OF FORMALISM AND LIBERALISM

In Chapter 2, we saw that both formalism and liberalism had their roots in the Enlightenment philosophy of Kant and his followers.[2] Given the middle class origins of lawyers and the affinity between legal values, market liberalism, and constitutional democracy, English and Welsh lawyers are likely to find persuasive the liberal justifications for the rules and roles of professional legal ethics. Given also the many

[1] Bauman 1983, p.10. [2] Ch.2, section 3.

similarities between Kantian deontology, 'ten commandment' forms of Christianity, the structure and aims of law itself, and the dominance of legal formalism in law schools, unsurprisingly the professions turned to the deontological approach to ethics once it was realised that lawyers' social background could not sufficiently guarantee their moral character and ethical standards. Consequently, the new ethical codes were modelled on the most formalistically inclined of all ethical traditions, laying down narrow duties of a minimalist nature, which are meant to be applied in a legalistic and categorical fashion generally without reference to context or consequences.[3] As such, they invite concentration on the letter rather than the spirit of ethical norms; on form rather than substance. As in the case of legal formalism, ethical formalism tends to consider obedience to formally laid down norms as the beginning and end of ethical obligation.

Lawyers' ethics are also influenced by formalism in its more specific guise of legal formalism. Thus, as we have seen,[4] the latter's historical dominance has discouraged legal academics from focusing on issues of morality and justice, and, even more so, on lawyers' ethics. Instead, legal education tends to teach students to value technical skill and professional success. This ethical gap is left unfilled by the vocational courses, where the emphasis is more on rules of 'mere regulation'[5] than ethics and the pedagogical style focuses narrowly on compliance—teaching students to keep their noses clean by avoiding possible disciplinary proceedings.

The role of formalism is also central to the justifications for the current norms governing the lawyers' duties of zeal and confidentiality, and the underlying conception of neutral partisanship. Thus, as we saw in Chapter 7, neutral partisanship is justified on the basis that, by playing their allotted role in the adversarial system and in helping clients vindicate their legal rights, lawyers *ipso facto* act ethically and ensure justice. However, as we argued, this makes a number of dubious assumptions about the meaning and attainability of truth and justice in the legal system. The adversarial system is assumed to ensure that correct facts are found, thus ignoring the possibility that power imbalances between adversaries will simply mean that 'truth' follows power. Moreover, in line with 'fact positivism' with which legal formalism is closely associated,[6] truth is conflated with factual truth, thus ignoring that truths of a moral and political nature may also be at stake in the legal process. Similarly, justice is assumed to flow from the correct application of law to the facts, thus ignoring not only that lawyer creativity in relation to facts, but also that law itself, may be unjust. And in the same way that faith in the adversary system ignores the possible impact of power imbalances between adversaries, including as one important component their lawyers' zeal, so the legitimatory goal of vindicating clients' legal rights ignores the fact that the recognition and application of these rights might reflect wider power imbalances in society. Similarly, lawyers do not simply put into effect legal rights in a mechanical fashion; in many cases they may manipulate or even create such rights in the first place.

[3] Occasionally, consequences are referred to, but in the form of categorical rules rather than those requiring consequential calculations.
[4] Ch.3, section 6. [5] cf Ch.4, section 3.3.1. [6] See Nicolson 1994.

Challenges to the formalistic picture of the legal process also undermine the core liberal arguments that the lawyer's amoral role is justified as the necessary means to individual dignity, autonomy and equality, as well as the political values of democracy and the rule of law. However, the main problem with these liberal arguments is that, in formalistically conflating dignity, autonomy and equality with legal dignity, autonomy and equality, they conveniently ignore the actual invasions of these values wrought by upholding clients' legal rights. Law, we have argued, does not impartially protect everyone's dignity and autonomy, but in both its content and application is riven with discriminatory distinctions based on class, race, ethnicity, gender, etc.

Moreover, as we first argued in Chapter 5,[7] because of its assumptions of rational, self-seeking, and atomistic individualism, even within the context of the lawyer-client relationship itself, liberalism may ironically undermine its whole purpose—the enhancement of individual autonomy. Treating all clients as the *homo oeconimicus* of classic liberal theory may lead to paternalistic invasions of client autonomy where lawyers make unfounded assumptions about their clients' needs, desires and interests, and treat cases as purely technical problems of how most effectively to vindicate their legal rights. Moreover, unable to see beyond the client's formal autonomy, lawyers may ignore the extent to which power differentials based on knowledge, wealth, background and status may render clients dependent on them with a consequent usurpation of their effective decision-making.

The influence of liberalism can be seen, finally, in the professions' argument[8] that their collective autonomy in the form of self-regulation is necessary to ensure that lawyers play their role in protecting individual autonomy against state power and in helping to maintain the liberal scheme of government with its emphasis on the rule of law and the separation of powers. However, as we also saw in Chapter 4 and subsequently, much of the content and enforcement of self-regulation has reflected the needs and interests of the professions themselves rather than those they are supposed to serve. Indeed, the present system fails adequately to create that same separation of powers that lawyers are so ready to enforce elsewhere.

Thus, to summarise, we have argued that through the influence of formalism and liberalism, current professional ethical norms act to undermine lawyers' ability to play a truly positive social role. This does little to assuage public doubts about the amoral role and general function of lawyers, and the process by which even those who do enter law school with the aim of furthering justice are likely to end up as amoral ciphers for large corporations, unthinking technocrats in large or medium-size law firms or as high-street lawyers simply trying to ensure a comfortable living. Consequently, we have argued that a move away from an ethics based on formalism and liberalism to one which requires lawyers to consider the contextual factors relevant to their representation of clients and the impact on specific and general others would go at least some way towards encouraging a more ethical profession.

[7] See also Ch.6, section 3.4, Ch.7, section 3.2.2. [8] See Ch.4, section 2.1.

2. THE CONTEXTUAL ALTERNATIVE

As we argued in the Introduction, professional legal ethics needs to be contextualised both as a topic of study and as a set of norms governing lawyers' ethics. Throughout the book we have thus sought first to understand lawyers' ethics in terms of the various philosophical, sociological and regulatory contexts and, secondly, to develop an approach to ethics which requires lawyers to take cognisance of context in dealing with clients and in resolving the various dilemmas which may arise out of client representation. However, given that the basis of our contextual approach to ethical decision-making was first introduced in Chapter 4 and then developed incrementally in later chapters, it is necessary to provide an overview of how all aspects of the contextual approach may be incorporated into the codes.

As we have repeatedly argued, in contrast to the current narrow and categorical approach to ethics, lawyers should be required to take into account the real life situation of their clients, including all their needs, desires and interests, and the possible impact of their actions on third parties, the general public and the environment. This has led us, first, to a broader understanding of the content of the duties imposed on lawyers *vis-à-vis* clients and in particular to a deeper conception of what is meant by loyalty and autonomy.[9] Thus, instead of the current uni-dimensional and unidirectional understandings of these notions, we argued for a wider duty of good faith on the part of both lawyer and client, and a more contextualised understanding of 'autonomy-in-relation'. Secondly, we called for greater limits on the lawyer's general duty of loyalty as found in its specific manifestations of zeal and confidentiality.[10] This, we argued, should come in the form of decision-making schemas which require lawyers to consider a wide range of contextual factors in deciding how to resolve the conflict between duties to clients with their wider moral duties to act with integrity and concern for the interests of others. Thus, building on our discussion of the problems associated with, on the one hand, highly detailed codes containing categorical duties and, on the other, leaving lawyers absolute discretion as to how to act, in the hope that they will possess the appropriate character for the intuitive resolution of ethical problems, we suggest that in dealing with ethical issues[11] the codes should contain three normative levels.

The first would consist of a general statement of the underlying values which should underpin the lawyer-client relationship, set out at the beginning of the ethical codes, perhaps along the lines of the Preamble to the CCBE Code.[12] Based upon our conclusions in dealing with the issues of lawyer and client autonomy, immoral ends and means, and confidentiality, we suggest that the following values are primary: good faith and trust, which applies to both lawyers in their proximate 'face-to-face' dealings with clients and others, and to clients themselves; non-maleficence, which

[9] See Ch.5. [10] See Chs.6–9.

[11] As opposed to conduct: see Ch.4, section 3.4, where we argue for a separation of the ethical and conduct issues in either different documents or in clearly differentiated parts of the same document.

[12] Referred to in Ch.3, section 4.5.

requires lawyers to refrain from harming others; and beneficence, which requires lawyers to do good and prevent harm to others.

The second layer would consist of more specific general principles which govern the lawyer-client relationship. These could be set out in much the same way as the general principles contained in Practice Rule 1 of the Solicitors' Practice Rules are found in paragraph 1.01 of the LSG. Based upon our discussion in Chapters 6–9 and combined with the requirements of lawyer diligence and independence which we have not discussed at length,[13] we propose the following four principles:

(a) *Loyalty.* The lawyer's primary duty is to uphold their clients' interests, needs and desires. This involves a presumption that lawyers will exercise all necessary zeal on behalf of their clients (the principle of partisanship) and will keep secret all their confidential information (the principle of confidentiality).

(b) *Integrity.* Notwithstanding the principle of loyalty, lawyers must recognise that they are implicated in and hence morally responsible for all actions taken on behalf of clients. They cannot pass on moral responsibility either to clients, who they have freely chosen to represent, or to the profession, which they have freely chosen to enter. Thus in deciding whether to undertake or to continue representation, or to engage in particular forms of representation, lawyers are obliged to consider the impact on their personal moral integrity, the integrity of the profession as a whole, and the interests of affected third parties, the general public, and the environment.

(c) *Candour.* Good faith representation requires a mutual expectation of honest and open communication between lawyer and client with regard to all material aspects of the transaction, and, as far as is compatible with the duty of loyalty, between lawyer and third parties. A failure of candour on the part of lawyer or client may be sufficient to justify termination of the retainer.

(d) *Informed consent.* It is an ethical presumption that clients are entitled to sufficient information to enable them to participate effectively in decision-making throughout the retainer's duration. This presumption extends to all major steps in the transaction, whether regarding means or ends, and their likely cost. Where lawyers are in any doubt as to whether clients would wish to be consulted before steps are taken, the presumption requires that consultation takes place. Lawyers may not override the presumption by obtaining a blanket waiver of consent from clients.[14]

In order that these principles do not remain at the level of pure aspiration without much meaningful content, they need to be fleshed out by commentaries setting out their rationale and underlying values. Moreover, in order to assist lawyers to put these principles into effect and, in particular, to resolve conflicts between them, we propose that the third layer sets out the contextual factors which are relevant to the way in

[13] Though see Ch.5, section 7.

[14] Admittedly, this is the sort of categorical rule we have largely sought to avoid, but it is critical if the whole principle of informed consent is not to be side-stepped. See ibid.

which lawyers should apply the general principles set out above when faced with the type of ethical dilemmas discussed in Chapters 6–9.[15] Given the importance of deciding micro-ethical issues in context, we suggest that separate sections or even chapters be devoted to the contextual factors relevant to the four separate issues we discussed. We have already sketched what we regard as the most important of these factors in Chapters 5, 8, and 9 in the form of broad decision-making schemas.[16] These, we have stressed, are aimed at alerting lawyers to and guiding their decision-making through specifying contextual factors which they must consider, but which will not determine their decisions in mechanical fashion. While some of these contextual considerations are specific to particular issues, others apply across the board, and may thus be usefully summarised here.

Perhaps the most general of these factors is the question of the relevant interests, desires and needs of those involved in and affected by legal representation—understood not only in material (financial or otherwise) but also emotional and psychological terms. This is crucial in determining, first, the informational needs and expectations of clients and, more particularly, what aspects of the case are 'material' for the purposes of the candour principle; secondly, when failures of candour will justify the retainer's termination; and, thirdly, what steps in the representation are 'major' for the purposes of informed consent. This factor is, however, equally important in relation to third parties and the general public whenever they are likely to be affected by actions of lawyers in representing clients. Moreover, lawyers are also justified in considering their own interests, not only in terms of the integrity principle, but also, to some extent, in earning the fees necessary to justify their continuation in private practice and in avoiding dismissal from employment.

The type of needs, interests and desires of those affected by client representation is obviously closely related to a second important contextual factor we have repeatedly stressed. This is the harm likely to ensue to third parties, the general public, the environment and even lawyers themselves both individually and collectively from the loyal representation of clients and conversely the type of harm likely to ensue to clients, those associated with them, and again also to lawyers if limits are placed on client loyalty. However, as we have seen, it is not just the type of harm that is relevant but also its degree and likely occurrence.

While the above questions will depend on many other more specific contextual factors, one factor which will frequently be relevant is the question of the balance of power both between lawyer and client, and between lawyers, as clients' representatives, and affected others. The former will be relevant to the informational needs and expectations of clients, the likely problems of manipulation by client or lawyer, and the extent to which moral activism may lead to problems of client control. Both types of power imbalances will affect the likely harm to clients and others where their interests are in opposition.

[15] Indeed, we would argue that similar approaches could be developed for other ethical principles such as lawyer diligence and in particular lawyer independence.

[16] See sections 7, 6, and 5, respectively.

Finally, because of the way that various contextual factors tend to recur in particular types of cases, we can note that, in evaluating the above, much depends on whether the case involves criminal defence, civil litigation, mediation, negotiation, facilitation or advice giving. Moreover, where the lawyer is not representing a criminal defendant, it will be important to ascertain where the case fits along the continuum between criminal defence paradigm and civil suit paradigm cases.

If ethical codes are to incorporate the sort of decision-making schemas we have outlined, in order to assist lawyers in developing a true understanding and appreciation of the importance of contextual decision-making, as with the general principles, it is essential that commentaries are provided explaining the rationale behind each contextual factor and possibly also giving examples of actual or even hypothetical cases. In this way, it is hoped that the codes will not simply guide ethical decision-making but also help educate lawyers as to the importance of ethics and the wide variety of ethical considerations relevant to the dilemmas they are likely to face. This in turn will ensure that the codes can play two further important functions.

The first is to assist development of lawyers' moral character, which virtue ethics emphasises is necessary to, at least, supplement obligation-based ethical approaches. Secondly, by exposing law students to the various dilemmas and moral considerations that apply in different areas of practice, the codes can help them make ethically informed choices as to what type of legal practice they pursue. It is perhaps a trite point that this is perhaps the most significant ethical decision in a lawyer's career.[17] From this flows the type of moral dilemmas they are likely to face as well as the likely constraints on their ability to exercise moral activism. It is therefore essential that aspiring lawyers are aware of these dilemmas and constraints *before* they make career choices and that they are encouraged to consider such choices in terms of their moral implications rather than simply in terms of financial rewards, career prospects and job satisfaction. Having to understand and evaluate a professional code containing general principles supported by a schema for moral decision-making should alert lawyers to the moral implications and the importance of career choices, as well as providing them with guidance as to how to integrate their personal moral values with their professional obligations throughout their legal careers.

3. POSSIBLE OBJECTIONS TO A CONTEXTUAL APPROACH

If the codes manage to perform these two functions, this will go some way to meeting possible objections to our contextual approach.[18] The first is the argument most likely to be voiced by professional insiders that it would be too demanding in terms of

[17] See eg Nicolson 1994, p.741; Hutchinson 1998, p.176.

[18] cf also the discussion by Simon 1988, pp.70–4 regarding the following and other, less weighty objections to a contextual approach.

time and effort to expect lawyers to use the decision-making schemas.[19] An immediate counter-response is that the considerable financial rewards and status which can flow from the privilege of a practising certificate warrant the expectation that lawyers spend some time working out for themselves whether any harm they cause in using this licence can be justified. In any event, the amount of time involved is likely to decrease as lawyers gain experience in using it. More importantly, given the trend towards specialisation, few lawyers will have to get to grips with the various factors raised by all the contexts of legal practice and with all specific and general ethical considerations. For example, the arguments for neutral partisanship in criminal defence work limit the factors to be considered, whereas city lawyers will not have to worry about abandoning 'criminal defence paradigm' cases and rarely about the problems of paternalism.

A far more plausible variant on the possible objection that our approach is too demanding might rely on the financial and other practical constraints facing lawyers. These may make it unrealistic to expect lawyers to meet the requirements of good faith and various forms of moral activism we have proposed. This argument is unpersuasive when applied to successful barristers in independent practice or partners in thriving solicitor practices. But what about barristers needing to make their reputation in a competitive market? And what about the much greater number of solicitors who are employed by private law practices, the CPS, other public bodies or by private companies? Clearly they risk being dismissed or, at the very least, spoiling their promotion chances by taking the time to meet the requirements of candour and informed consent, or by declining to take on clients, providing qualified representation, breaching confidentiality or even by attempting to engage their clients or employers in moral dialogue. These problems cannot be evaded by stating, albeit accurately, that they stem largely from the fact that legal services have become a product like any other to be sold according to free market principles. We have to deal with the lawyer's social context as it exists.

In response, one can point out that, especially in corporate practice, current fee structures are already sufficiently beneficial to lawyers[20] to justify their having to bear any additional costs imposed by the requirement of good faith or moral activism. In our view, clients should not generally pay more for a quality of service they are entitled to expect nor should they be able to pay less in order to avoid the ethical consideration of representation issues which should be part and parcel of a professional service. Consequently, if there is a cost, it should be borne out of existing profit margins.

As regards moral activism more specifically, state prosecutors may be able to

[19] See Sheinman 1997, p.151 and cf also Ellman 1990, pp.139–41 and 152, regarding Luban's proposals discussed in Ch.8, section 3 and Luban's response in 1990b, pp.1022–3. cf, more generally, the criticisms of consequentialism in Ch.2, section 4.3.

[20] The view that competitive pressures are keeping fees down can be found expressed almost weekly somewhere in the legal trade press. Like many intuitive views it may not always be correct. Economic research suggests that some areas of the legal services market are not, relatively speaking, as price-sensitive as is commonly thought. See Domberger and Sherr 1989.

conceal their moral decisions beneath conclusions that the various tests for prosecution are not satisfied. Similarly, in-house lawyers and other employed lawyers could argue that certain ends or means to ends they regard as immoral are not financially viable or legally supported. But even if one is persuaded that the breach of good faith and candour principles involved is preferable to personal involvement in harm, immorality and injustice, it has to be conceded that the practical opportunities for such strategies are limited. There is only so far one can go in plausibly arguing that prosecutorial policy, financial considerations or the law itself do not support immoral ends or means. And there are only so many times employees can use this strategy before arousing employer or client suspicions.

However, to allow these considerations to trump the arguments for a contextual approach, good faith lawyering and moral activism would be to ignore the point made earlier that if legal neophytes are made aware of the type of ethical dilemmas and external constraints likely to arise in particular areas of practice they cannot later seek to deny moral responsibility for any actions they feel constrained to perform. Put simply, if one is not happy with being required, for instance, to assist in the laying off of workers to maintain profit levels or the destruction of the environment by oil companies and one is not prepared to engage in moral dialogue and other forms of moral activism in order to dampen down client immorality, one should seek alternative career options.

The second possible objection to our contextual approach is the direct converse of the above 'too hard' argument. Here, it may be argued that providing lawyers with discretion to resolve ethical dilemmas will make it *too easy* for those bent on immoral behaviour to get away with it, thus increasing the overall level of lawyer immorality.[21] The position, it might be argued, is already too lax given that many areas of potentially unethical behaviour are currently unregulated and the professions' casual attitude towards breach of those rules that do exist. Both these points are readily conceded, though the latter also rather undermines the call for a prohibition-based regulatory approach.

Nevertheless, as we argued in Chapter 4, the disadvantages in terms of the anaesthetisation of moral conscience, the likely encouragement of legalistic attempts at creative compliance and the likelihood that the profession will continue to baulk at the strict punishment of its own, not to mention all the practical problems with detailed ethical codes, strongly argue against a command and control approach. Without the development of appropriate moral character, strict duties are never going to be able to do all the ethical work necessary to ensure a more moral profession, whereas our contextual approach can, as we have argued, play an important part in the development of moral character.

In any event, it may be recalled that we have rejected a regulatory approach which totally eschews disciplinary sanctions for code breaches.[22] Admittedly, the

[21] cf the views of Cranston 1995, pp.5–6; Paterson 1995, pp.176–7 and 1997, p.37.

[22] See Ch.4, sections 3.4 and 4.3.

imposition of such sanctions may be less frequent than is possible under the current disciplinary approach to regulation.[23] However, by analogy with administrative law, action can be taken when lawyers fail to consider relevant factors in making ethical decisions or balance the various factors in ways which no reasonable lawyer would. Moreover, the process of taking disciplinary proceedings and the publicisation of decisions and the reasoning on which they are based is as important in its educative effect on other lawyers as the realisation that unethical behaviour might be sanctioned. Even if lawyers are ultimately acquitted on 'rule of law' grounds, decisions may establish precedents for the future with important educative effects on others. While our contextual approach may allow those bent on immoral behaviour to evade sanctions if they go through the motions of purporting to consider all relevant contextual factors before acting, although impossible to prove (or, indeed, to disprove), we believe that in the long run it may lead to an overall reduction in lawyer immorality. This is because fewer lawyers should engage in immoral behaviour due to ignorance, indifference or a failure of ethical imagination.

4. INSTITUTIONALISING AN ETHICAL PROFESSIONALISM

We are not, however, so naive as to think that this sea change in lawyer attitudes will occur solely through changes to the content and form of current regulatory norms. What is also needed is a plethora of changes to the legal professions' social and institutional contexts. Here the range of relevant factors is so wide and the possibilities for change so mixed that we intend to do no more than sketch the most important factors, concentrating on those possibilities for change which seem most promising and where we, as legal academics, might have most effect.

On that basis, we start with legal education itself. Incorporating a contextual approach into the codes is undoubtedly important if we are to ethicise the professions, not least because they would then be less susceptible to being taught in a narrow 'black letter' fashion. However, wider educational reform at both the initial and vocational stages of legal education needs to accompany if not precede code changes in order to enable students to develop moral character or help them deal with real-life ethical dilemmas. Admittedly, given the centrality to the Common Law tradition of reasoning by analogy and case distinguishing, law students are capable of understanding the importance of the factual context to legal cases. However, the tradition's separation of law from ethics means that it tends to bury issues of value under layers of technical and pragmatic justification thus rendering it insufficient as a grounding in ethical reasoning. Ethical lawyering within a contextual approach requires that students consciously develop the capacity for a more sophisticated form

[23] Though data from other Common Law systems suggest that sanctions for breaches of ethical rather than regulatory norms are relatively rare under disciplinary models. See the sources discussed in Ch.3, section 7.4.

of reasoning which recognises the centrality of ethical sensitivity and 'judgement' in the Aristotelian tradition of *phronesis*.[24]

Judgement in this sense is itself a virtue.[25] It describes both the capacity for ethical understanding, and the intellectual and practical skills necessary to convert ethical thought into ethical action.[26] It requires a sufficient knowledge and understanding of the ethical principles involved and the empathic capacities necessary to identify, first, that a situation has ethical dimensions, and then to recognise the range of considerations which define its moral terrain. It involves the capacity to select and justify morally appropriate courses of action as they arise in specific situations.

Given the length of time needed to develop these skills and given that lawyers and their ethics form an important constitutive part of the administration of justice, there is a strong case for locating professional legal ethics at the initial stage of legal education. Crucially, as we have sought to show, micro-ethical issues need to be discussed within their sociological and philosophical contexts, since this alone can give students the conceptual tools and language to step back and take a reflective view of the subject. This, however, creates practical challenges for law schools, not least regarding curriculum design. As we have seen, a small number of courses already exist in England and Wales, either teaching professional legal ethics as a subject in its own right or integrating it into some part of the curriculum, such as in introductory 'legal system' courses, jurisprudence, clinical or skills-based courses. These are welcome developments, but from a long-term perspective it is doubtful whether they are sufficient. An emerging body of educational literature suggests that, if professional legal ethics is not to be marginalised, it needs to pervade the curriculum.[27] Ideally, this requires not just its integration into the substantive subjects, but a separate course devoted to both macro- and micro-issues of legal ethics. At the very least, macro-issues, such as the impact and appropriateness of the adversary system and the role of the legal profession, could be discussed in 'English Legal System' or 'Law in Society' courses and remaining issues in courses dealing with legal theory or legal practice.

Teaching legal ethics needs to be considered not only as a matter of what and where but also how. Studies[28] suggest that the development of ethical judgement requires not just substantive knowledge, which could be delivered by relatively traditional means, but also processes of internalisation and reflection developed through

[24] See Ch.2, section 5.3. [25] See Webb 1998a, pp.144–5.

[26] This also requires sufficient strength of moral character, though it is probably beyond the capacity of any system of education to single-handedly ensure that individuals will act on their beliefs: see Rest and Narvaez 1994, esp ch.1. Hence the importance of creating other institutional structures which will encourage individuals to 'do the right thing'.

[27] Webb 1996, 1998a and 1998b. See also Rhode 1992; O'Dair 1997; Brayne *et al* 1998, p.273. The idea of pervasiveness would also seem to underpin ACLEC's call for education in legal ethics and values: ACLEC 1996, para. 2.4. This has been barely emphasised in the drafts of the revised Joint Announcement on Qualifying Law Degrees which will set the 'core curriculum' for the initial stage of professional training at least for the next five years.

[28] See eg Rhode 1992; Rest and Narvaez 1994.

ethical problem-solving, Socratic dialogue, role-play, group-work, and possibly even live client and/or simulated clinical experience.[29] These methodologies should be equally relevant to vocational training, even though the focus at that stage might more justifiably be as much on matters of 'mere regulation' as on ethics. Opportunities created for dialogue and reflection may serve not just to enhance individual moral development, but, at a minimum, may also support a socialising function by acculturating students to an environment in which ethical dialogue and reflection come to be seen as a normal part of legal work. Moreover, drawing on common themes in communitarian, feminist and postmodern theory,[30] we suggest it might also offer the potential to develop in students a sense of 'identity' and of moral self that is embedded more in social networks and interactions than the atomistic, self-centred, 'I' of liberal individualism.

Given the importance of moral communities to the creation of ethical character, it is important that the academy considers ethics not just as an educational topic, but in relation to its own practices. Factors such as staff acquiescence in widespread student cynicism and instrumentalism, the misuse of teacher power in the classroom, oppressive and discriminatory social practices both within the student body and the institution more generally, and the general lack of consensus or even discussion of the moral values of legal education all serve to undermine the capacity of law schools to act as appropriate moral communities.[31] Law schools could also assist the professions in their task of addressing the demographic biases of the system not just by maintaining, if not increasing, the social mix of their intake,[32] but by confronting more explicitly the extent to which their traditional mode of discourse silences the alternative voices of many women, ethnic minorities, and other disadvantaged groups.[33] This is not about 'political correctness'; it is, in authentic liberal fashion, a matter of making space for pluralism to flourish.

In a similarly educative vein, we have suggested that the processes of ethical standard-setting and enforcement within the professions move away from a simple command and control model to play a greater role in normative inculcation. Drawing on the dialogical approach to ethics discussed in Chapter 2,[34] in Chapter 4 we proposed that systems of responsive regulation are developed which enable regulators and regulated to build up through 'regulatory conversations' a deeper contextual understanding of legal practice.[35] Along postmodernist lines, this can be used to make the regulatory process sensitive to a multiplicity of voices. This may be achieved by wider representation of consumer interests on regulatory bodies, a greater willingness to use the expertise of philosophers and academic lawyers (assuming a sufficient body of expertise eventually evolves) on ethics committees, and a willingness to consult on rule changes beyond the professions. Perhaps this kind of approach may, as Sampford suggests, even lead to the creation of localised 'ethical circles' in which practitioners meet to 'develop their own critical morality'.[36]

[29] See Webb 1998b, pp.295–7 for a tentative model.
[30] The nature of these links is developed more explicitly in Kupfer 1996.
[31] Indeed, it is probably the overriding sense of disinterest that creates the greatest barrier to change at present.
[32] See also ACLEC 1996, para. 3.12 for support.
[33] See eg Worden 1985, pp.1144–5; Thornton 1998; McGlynn 1998, p.22.
[34] Section 7.4. [35] Section 2.3.

A third area requiring reform is the business and organisational context to legal practice. The commonly expressed view that law is no longer a profession but a business reflects the increasingly difficult economic and policy climate within which lawyers—and particularly the small to medium-sized solicitors' firms, and some smaller chambers—are operating. As our analysis in Chapter 3 suggested, balancing cost, quality, and ethics remains one of the key challenges for lawyers as we enter the twenty-first century.

No one denies that lawyers are entitled to make a living, or that the need for economic survival can create real difficulties in balancing professional self-interest and public responsibilities. This is, however, no reason for jettisoning the latter. Some lawyers who use the 'business defence' seem to assume that businesses have responsibilities to no one but themselves. This disregards the extent to which successful businesses are expected to adopt extensive responsibilities for their customers and employees,[37] and, perhaps (but not invariably), wider social responsibilities[38] as well. To be involved in business rather than a profession does not excuse one from the human race. What the current situation does demand, however, is both a wider debate about the kind of business strategies that are compatible with an ethical professionalism, and some incremental policy of change. Although we do not pretend to have a blueprint for reform, there are a number of areas where change may be sought.

First, at the level of micro-regulation the professions need to develop clearer practices and higher expectations as regards client care and professional responsibility. Firms and chambers could, for example, be required to appoint in-house compliance officers who are responsible not just to the organisation but to the regulator for creating and overseeing both complaints systems and perhaps wider mechanisms for enhancing 'ethical compliance'. Moreover, as trends like fragmentation and globalisation potentially reduce the power of national regulatory bodies, we would argue that there is a strong case for developing a more organisationally-based ethic within the broader kind of responsive framework offered in Chapter 4. Indeed, given the increasing mismatch between group-based working practices and a system of regulation that is predicated on largely individualistic rules and mechanisms of enforcement, there is an argument generally for creating principles imposing greater collective responsibility on firms and chambers for their members' failings.

Second, there is the question of fees. Fees are critical both to the public's access to justice and the profession's ethical image. And here, rightly or wrongly, lawyers

[36] Sampford with Parker 1995, p.17.
[37] See Company Law Steering Group 1999, ch.5. It is notable, for example, that standards of complaint-handling that have become normalised in business settings are still resisted in some quarters of the legal profession: Ch.4, section 4.2, above.
[38] See eg Company Law Steering Group 1999; Post *et al* 1995.

are not trusted by the general public. At a fairly basic level, the professions need to work far harder in ensuring that cost regimes—and particularly the new conditional fee arrangements—are transparent, and that mechanisms for complaining about or taxing costs are kept simple and inexpensive. The move, apparent in corporate work, towards more 'up-front' fixed fee agreements may also be one way of ensuring greater cost visibility and comparability,[39] provided that, if there is any consequent increase in the competitive tendency to reduce fees, this is not such as to depress quality of service to unacceptable levels.[40]

But there is also an institutional dimension to the fees issue. 'Better' ethics will almost certainly cost more. For some sectors of the profession that might take some of the sheen off partnership, but we suspect it is hardly likely to cause financial hardship. For a significant number of small firms and chambers or sole practitioners it almost certainly will, and here the professions face some conflict between their regulatory and representative roles. Many of the current assumptions about the professions' future seem to be predicated on a presumption that we must safeguard the smallest (and often least economically viable) units, despite the fact that they are also the part of the professions under the most pressure to undertake low quality, high volume work (to keep competitive), to 'borrow' from client accounts and engage in other unethical or unlawful pursuits,[41] and often the least able (or willing?) to pay for the infrastructure necessary for good regulatory compliance. Assuming many such firms are unable to afford the costs of a more localised compliance-based system of regulation, if the professions were to move towards a more compliance-based model, it may be necessary to maintain a two-tier system, involving a greater degree of command and control regulation than at present for those firms unable to achieve the 'professional responsibility standards' necessary to be entrusted with compliance. In that way, the threat of greater regulatory control may itself act as an incentive to firms and chambers to adopt the standards necessary to attain the greater autonomy of a compliance-based system.

Thirdly, there is the question of how firms and chambers, as legal businesses, should engage with their communities. As we have seen, the narrowly individualistic and partisan approach that characterises much legal work within a liberal market economy privileges the autonomy of individual actors over the interests of their communities. A more contextual approach, which enables the lawyer to advise from the perspective of an independent and morally active member of the local (or even national or international) community, could 'empower' clients to achieve autonomy in an ethical manner within the context of a 'just community'.[42] Such an approach might encourage lawyers to offer more creative forms of advice and assistance which

[39] See also Woolf 1995, p.200 for support.

[40] Price competition is of course itself a product of deregulation, so one partial answer to quality might be re-regulation through scale fees, etc., which prevent undercutting (this was a feature in recent Law Society debates on the future of the conveyancing market). However, this overlooks the problem that scale fees may not accurately reflect the value of the work done and can generate significant rents for practitioners.

[41] And hence increasing indemnity insurance costs for the profession as a whole.

[42] Eberle 1993, p.125.

benefit clients and community rather than clients over community.[43] Activities such as *pro bono* work or involvement in initiatives like 'Business in the Community' could play an important part in developing a 'just community' perspective by encouraging lawyers to work for and with a variety of agencies and peoples. Indeed, there are already some signs that clients' expectations may force lawyers in these directions anyway.[44] Such initiatives should be encouraged by the professions collectively, not necessarily using the stick of mandation, or a practice levy, but possibly by offering assistance, through registration and networking activities, to support firms committed to community action, and/or carrots such as continuing education points, practising certificate fee waivers, or waivers of the excess on any indemnity claims in respect of *pro bono* activities.[45]

Despite its costs, this process of ethicising the business side of legal practice may itself have commercial benefits, not just in terms of market advantages, but in the potential for creating new markets for lawyers as ethical advisers and risk managers for commerce, industry and the professions.[46]

A fourth important context involves the demography of the profession. While there are, as we have seen,[47] some important empirical and political problems with associating an ethics of care with gender, there is evidence that a greater influx of women, and perhaps also men from disadvantaged backgrounds, may create opportunities for developing a more caring ethos among lawyers affecting the way clients are treated, a greater concern for the context of ethical issues as well as a desire to avoid harm rather than simply vindicate rights.[48] It is thus important that the universities continue to encourage the opening up of legal education to previously excluded groups. More importantly, pressure needs to be exerted on the professions both to move away from their current tendency to privilege those who are white, middle class, public school educated and, still to some extent, male, and to question much of the inherent masculinism apparent in the traditional structures of and approaches to legal practice.

A fifth institutional factor that appears to reveal some hope for the advent of a more ethical profession is the apparent steady demise of the split profession. Given the tendency of barristers to become involved late in legal proceedings, preventing the establishment of empathetic understandings of the needs and desires of clients, and to treat cases as purely technical problems, it is possible that the increased ability of solicitors to undertake advocacy may result in greater attention to 'autonomy-in-relation' and a greater concern about the impact of client representation on others.

[43] For example, by finding structural solutions to company-induced environmental problems, or, when advising on layoffs, finding cost-effective ways of investing a proportion of the money that might have gone in redundancy payments into a community employment scheme, or facilitating a buyout.

[44] British Aerospace recently announced that it would expect all solicitors' firms on its 'panel' to undertake *pro bono* activity, since this was consistent with the company's own corporate ethos of developing a partnership with the community. British Aerospace's legal department was itself reputedly the first group of in-house lawyers to make a formal commitment to undertake *pro bono* work: see *The Lawyer*, 3 November 1998, p.13. Our thanks to Andy Boon for bringing this item to our attention.

[45] Some, but not all, of these options are considered by Abbey and Boon 1995, pp.273–5.

[46] See further Sampford and Blencowe 1998, pp.337–9, and more generally Kaptein 1998.

[47] Ch.2, section 6. [48] Jack and Jack 1989; Menkel-Meadow 1985.

At the same time, as we noted in discussing the contextual factors relevant to the lawyer-client relationship in Chapter 5,[49] care needs to be taken to ensure that lawyers do not lose their critical perspective by over-identification with clients or that clients are not provided with specialist expertise when relevant.

A final institutional factor which, as we have repeatedly argued, has a crucial impact on the state of current ethical discourse is the adversarial system. Here, we need to consider the ethical case supporting moves towards more inquisitorial procedures. Despite our many reservations about the adversarial system, we have stopped short of calling for its wholesale abandonment—even outside of criminal cases, where there remain strong grounds for its retention, and indeed reinvigoration. In civil cases, we recognise that adversarialism has many failings, not least of which are its tendency to force disputes into win/lose outcomes, its capacity to swallow a disproportionate amount of the parties' resources, its ability to undermine continuing relationships between disputants, and to allow them to trample over other innocent and often unwilling participants in the competitive struggle. We have therefore suggested that the degree of adversarialism needs to be curbed, but that we should not lose sight of the many contextual factors that will affect the application of any procedural model, particularly the power and resource inequalities that frequently characterise disputes. Indeed, the move to more inquisitorial or informal fora may not only not reduce but actually *exacerbate* existing power inequalities unless adequate checks are put in place.

Moreover, if reform to something as fundamental as the adversarial system is to take place, it is important that this happens in the context of appropriate ethical debate. The recent Woolf reforms to the civil justice system illustrate this need. These have sought, quite paternalistically, to impose a new, more co-operative, processual model on litigants largely regardless of their wishes, and possibly even their best interests. As part of this system, Rule 1.3 of the Civil Procedure Rules now obliges lawyers, as the 'overriding objective' of civil litigation, to assist courts in dealing with cases 'justly'—a principle which, through its close association in the Rules with the aims of active judicial case management, may too easily translate into dealing with cases as cheaply and expeditiously as possible. This is likely to create challenging sets of conflicts for lawyers who, if they zealously pursue clients' (adversarial) instructions, may find themselves on collision courses with the courts, and if they do not, with their clients. There are already anecdotal indications[50] that these new rules of the game are causing lawyers, as our earlier analysis suggested, to adopt creative compliance to minimise the fall-out from such potential conflicts, strategies which might actually make it harder for the courts to identify those who are genuinely abusing the system. If adversarial legal procedures are to play a less significant part in the future (and we are convinced that they should) the process of reform must be accompanied by a far more thoroughgoing *ethical* debate than has taken place to date. Hopefully this book will have gone some way to informing the contours of this debate.

[49] Section 7. [50] See Marshall 1999.

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