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LECTURE

THE ETHICAL LAW SCHOOL*

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PROLOGUE

It is a singular honour to be invited to deliver this lecture, only the second in the series, and to have been invited from overseas to do so. My selection may be as much a mystery to you as it is to me, but I do know of Professor White's strong links with the United Kingdom, his many friendships there and the highest regard in which he is held by the legal community. Jim's contribution to legal education is outstanding and I derive considerable pleasure, in giving this lecture, in being associated with that remarkable record which this lecture series commemorates and which in large measure we are here today to recognise and celebrate.

The subject I have chosen draws as much on my experience as a university president as it does as a law professor or dean. I address it, not as a moral philosopher or ethicist, but as a pragmatist. I have chosen it, not because of any ethical deficit or perceived deficit in law schools either here or in the UK, but because it is a topic I regard as important, and it is something which it is so easy to take for granted that it can slip from consciousness and visibility when it is essential that it should be explicit and conspicuous.

I have tried to translate these remarks into American-English: so, even where I am referring to Britain, I shall employ American usage (except where I am quoting): thus, academic staff will be faculty, law teachers will be law professors, vice-chancellors or principals will be presidents, senior academic

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managers will be administrators and high school pupils will be students.

INTRODUCTION

One of the implicit objectives of formal governance arrangements in our universities is to secure and promote propriety, integrity and fairness. We have known for a long time that these are qualities to be highly prized and esteemed in our government and the professions. We have long known that one of the hallmarks of a profession is that it operates according to strict ethical rules. We have come a long way since 1852 when it could suffice to pronounce that an advocate should act “with the character of a Christian gentleman”;¹ or as Lord Esher MR put it in 1889: “[The solicitor’s] duty was . . . not to fight unfairly, and that arose from his duty to himself not to do anything which was degrading to himself as a gentleman and a man of honour.”² Watergate provided a powerful reminder of the temptations to which lawyers might fall prey and reinforced the need for courses in legal ethics for anyone aspiring to become a lawyer, but this lecture is not about what law students or young lawyers should be taught by way of ethics nor what those ethical rules might be.

Just as Watergate reminded us of the ethical responsibilities of lawyers, so recent events in the commercial and corporate world have reminded us of the temptations lying before other professionals, such as auditors and accountants; and it has also brought home to us the incomparable importance of ethics and integrity in the conduct of corporations and the devastating consequences when those standards are not met.

Universities have to be ethical bodies if they are to expect their graduates to conduct themselves ethically throughout their lives. Not that it will ensure that they will do so, but the example has to be set. Universities also have a responsibility to society. The academy must occupy the high moral ground. So, too, must each and every part of the academy. I shall deal specifically here with the law school, but my remarks are equally apposite for every other part of the university and indeed the university as a whole.

We cannot urge our students to absorb the principles of ethical practice just by teaching them if we do not as a community conduct ourselves in a way that is itself ethical and conducive to ethical outcomes. To teach or preach legal ethics but to behave unethically would be sheer hypocrisy. Our discipline, however imperfect, is after all about the quest for justice. We are deeply versed in the principle of legality, in due process, legal protection, constitutional guarantees, non-discrimination and equality. Within the academy, the law school should in these matters be an exemplar and beacon.

I. THE ELEMENTS OF THE ETHICAL LAW SCHOOL

What I mean by “ethical” in this context should become clear as I proceed, but I should elaborate briefly at this point. I mean no more than that the law

1. EDWARD W. COX, *THE ADVOCATE* 54 (1852).

2. *In re G. Mayor Cooke*, 5 T.L.R. 407, 408 (Eng. C.A. 1889).

school and its members should act with integrity and propriety, faithful to the values of the university, the principles on which it is founded, and the objectives to which it is dedicated. This, for example, would encompass fidelity to proper procedures, observance of due process, intellectual honesty, civility in debate, respect for academic freedom, personal probity and collegiality.

Some assistance can be derived from the British Committee on Standards in Public Life which has enunciated seven Principles of Public Life³ (which apply to universities in the UK and are, I suggest, equally apt here in the USA):

- **Selflessness:** Holders of public office should make decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
- **Integrity:** Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- **Objectivity:** In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Accountability:** Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness:** Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty:** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership:** Holders of public office should promote and support these principles by leadership and example.

I shall describe what I mean by the ethical law school in the following categories:

- Ethical in the way the law school conducts its essential work in teaching and research.
- Ethical in the way it maintains and promotes these values and reacts to breaches.
- Ethical in the way members of the law school community behave to one another.
- Ethical in the standards of non-academic behaviour of faculty, administrators and students.
- Ethical in the way the law school manages its affairs.

3. FIRST REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, 1995, Cm. 2850-I.

- Ethical in a broader social context.

The school's ethical obligations are owed to the several constituencies which constitute the law school community – faculty, staff, students and alumni – and to external stakeholders, including the rest of the university, donors and potential donors, potential students and applicants, funding authorities, the legal community and the wider society.

I recognise that, in some or even all of these categories, the law school will not be entirely autonomous but at points will interact with the university of which it is a part. Nevertheless, law schools have sufficient autonomy and sufficient individual identity that these considerations do to a large extent fall within their responsibility, and they certainly have considerable scope to meet these criteria or, sadly, fail to meet them.

A. Ethical in the Way the Law School Conducts Its Essential Work in Teaching and Research

Responsibility here falls on faculty as teachers and researchers and on students, for together we constitute the scholarly community that is the law school. I still subscribe to that quaint notion of collegiality that in my view is the quintessential quality of the true university, but in any event faculty and students are part of a common enterprise of learning, scholarship and research. What, then, does it mean to be ethical in the way we carry out our work in teaching and research?

In teaching, it means that we put truth, balance, and fairness above all other considerations and that we make every effort humanly possible to put aside personal views on politics, religion or whatever. Our students are old, educated, and sophisticated enough to cope with such views when they are expressed, but they must, if they are expressed, be presented in a way that makes it clear they are the personal views of the teacher and constitute commentary or criticism. What I am objecting to is analysis which distorts what, for example, the text of a judgment truly says because it is being corrupted by political or religious bias of some kind. I have known legal scholars and even judges fall prey to this temptation—to use their reputation and authority to portray a legal text or authority in a way that can only be described as perverse or disingenuous.

There are those who will say that this is absurd: that the law is so inherently biased and political itself, the product of the interplay of power and politics, that to pretend there is some ultimate truth is at best a chimera and at worst so naïve as to be ridiculous. But that would be to misunderstand my point. I can accommodate the political or intellectual gloss provided that a real attempt is made to treat the text in a way that is honest and realistic. I am certainly not arguing for an uncritical approach to law; nor for one moment do I have any illusions about the law-making process. To encourage a critical approach in one's students, from every perspective, is one of the duties of the law professor, but that is different from indoctrination and corrupting the sources by imposing upon them one's personal political or religious views, which, in my submission, constitutes an abuse of authority.

The same obligation arises in relation to research and publication. Willfully

to misread or to quote out of context are ethical failings. Plagiarism is an obvious offence. There are not the same opportunities for research fraud in our discipline as there are in the sciences and the empirical social sciences, where sadly there is today evidence of not inconsiderable malpractice.

Faculty also have an obligation to the school, their colleagues and students to teach effectively and diligently, to attend classes, set and grade assignments in timely fashion and be available for consultation; to grade examinations with integrity and impartiality; to carry out administrative duties efficiently and responsibly; to undertake research and publish where this is required; and to balance duties to the school with outside commitments such as legal practice and government service. Failures in any of these areas are not just employee deficiencies: they are unprofessional and unethical.

So far as the students are concerned, the same duty falls on them to attain the highest standard of honourable conduct in their academic work. Thus, any form of cheating or plagiarism must be regarded as a violation of the essential values of the law school.

Let me here say something about academic freedom, which clearly ranks as one of our fundamental guiding values. The principle finds limited expression in British law in the Education Reform Act 1988 which somewhat inelegantly acknowledges “that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges.”⁴ This is reinforced by the Human Rights Act 1998,⁵ which incorporates into British law the European Convention on Human Rights, with its guarantees of freedom of thought, conscience, religion, expression and assembly, and which applies to universities as “public authorities.”⁶

So far as law school authorities and administrators are concerned, academic freedom works in two ways. It limits their power to encroach upon the work of faculty which enjoys the protection assured by the principle of academic freedom, although it most certainly does not mean that the quality, value or acceptability of all academic work is beyond question. No such privilege protects a scholar. Admittedly, there can sometimes be difficult issues of discrimination and judgment as to when the principle applies to a particular case and when scrutiny, adverse judgment and action are permissible. That is the principle of academic freedom operating as a curb on the administration: but it must also be a shield, for the law school administration, and indeed the school community as a whole, must be quick to defend the academic freedom of faculty and students where others within the community or outside seek to curtail it, whether for reasons of political correctness or otherwise. A law school fails in its ethical duty if it is not vigorous and energetic in its defence of the academic freedom of members of its community, even where they enter into delicate, sensitive and controversial terrain and cause upset. If free speech cannot flourish

4. ch. 40, § 202(2)(a) (Eng.).

5. ch. 42, § 1, sched. 1 (Eng.).

6. *Id.* § 6(3)(b) (Eng.).

in our law schools and universities, where will it be safe?

B. Ethical in the Way the Law School Maintains and Promotes These Values and Reacts to Breaches

Every academic institution must have its disciplinary codes and procedures for faculty and students and its procedures and protocols for the conduct of research and for dealing with allegations of research fraud. I take all that as axiomatic. But the test of whether a law school is ethical is not whether these instruments are in place and fit for purpose—which I will assume they are—but whether there is in practice a willingness to invoke them in appropriate cases.

Faculty have been known to falsify their resumés or lists of publications, and research fraud of various kinds is becoming increasingly common; and we have found in recent years a growing incidence of plagiarism in doctoral theses and of cheating and other irregularities by students in examinations. The honour codes of American colleges and universities are unknown in Britain and are outside my own experience. They may be effective instruments, but on principle I prefer the arrangements to which I am accustomed in which the institution itself has responsibility, but typically involving a student on any disciplinary panel.

It was certainly true in the past in my country, and may still be the case in some circumstances, that irregularities and improprieties, and deficiencies in performance, were not dealt with, that the authorities preferred if at all possible to ignore them, and there was a profound reluctance to instigate formal procedures. Where there is evidence of wrongdoing, incompetence or under-performance, the law school must act. I do not say that every case must be dealt with in accordance with the formal procedures if an informal outcome is appropriate. For example, where a faculty member offers to resign, there is no need to pursue formal proceedings leading to dismissal. The resignation should be accepted. But it should not be accepted on an unethical basis, such as over-generous financial terms or agreeing to provide a reference which omits material information.

Informal resolution has two advantages. It saves time and money and, above all, it provides certainty of outcome, which can never be guaranteed when normal internal disciplinary procedures are instituted.

The law school or institution acts ethically only where it takes well-found allegations seriously, investigates them vigorously, though of course fairly, and is prepared to take the appropriate action. Faculty members who have infringed the fundamental norms of scholarly life or who have displayed conspicuous lack of integrity have no place in the academy.

C. Ethical in the Way Members of the Law School Community Behave to One Another

We have over the years seen tensions on university campuses. They can arise for all sorts of reasons. The events taking place may have nothing whatever to do with the university, but are aimed at influencing government or they may be directed at the university administration. Sometimes the problems arise because of tensions between different groups within the university community.

We have seen that in Britain over the years on a number of our campuses with regard to Jewish and Muslim students, which resulted in my chairing a national group on extremism and intolerance on the campus. We made a number of recommendations for setting and enforcing appropriate standards of conduct. Let me quote from our report:

[T]his report does not seek to abridge legitimate freedom of speech or curb what is merely unorthodox or causes irritation or discomfort. It is aimed at more serious conduct which is not compatible with university values, such as intimidation by one student group of the members of another on account of the latter's views, policies or political or religious affiliations; attempts by one group to have another group banned solely on account of its views, policies or affiliations; the distribution of literature which induces fear or anxiety in others within the university community; or arranging meetings at which views are expressed which put others in fear

Universities have a number of responsibilities, obligations and duties which bear on such situations and which in some cases pull in different directions: students and staff are entitled to work and live in a safe and secure environment, free from anxiety, fear, intimidation and harassment; they are also entitled to freedom of speech and to pursue political, religious and other action within the law.

Universities are committed by their charters or other instruments of government, their missions and by the law to the principles of free enquiry and of free speech within the law.

These principles mean that vigorous debate is perfectly proper and acceptable and universities must therefore be tolerant of a wide range of views and opinions on social, economic, political and religious issues, however unorthodox, unpopular, uncomfortable, controversial or provocative.

But any action, publication or speech must be lawful: racial or sexual discrimination and incitement to racial hatred are therefore proscribed, as is any other action, publication or speech forbidden by law.

These principles give rise to an *obligation* on members of universities individually and in groups to respect other members and groups and not to interfere in or seek to hamper or curtail the legitimate activities or affairs of other individuals or groups. This mutual respect is fundamental in a university community and confers *rights* on members of the university to be able to conduct their affairs free from unlawful or improper interference.

Universities therefore have a *duty* to give effect to, to enforce and to

promote these principles, rights and obligations in order to ensure for their members—staff and students—both free speech and freedom from intimidation, harassment and fear.

To these ends, universities should use their disciplinary codes, procedures, other rules and regulations and general powers, or refer to the appropriate authorities, so as—

- to protect free speech within the law;
- to protect their staff and students from discrimination and harassment, whether sexual, racial, political, religious or personal;
- to protect their staff and students from any action which intimidates or gives reasonable cause to be fearful, anxious or threatened; and
- to act firmly against violence and the threat of violence, disorder and breach of the peace and any other unlawful action.⁷

What makes a law school ethical in this respect is to have in place rules which express the values of harmony, tolerance, and free speech and to be quick to protect those values when they are threatened.

With regard to interpersonal relationships, we all have rules and procedures dealing with harassment and discrimination. Our codes of discipline cover interferences of various kinds with other individuals, including sexual assault. This is a particularly difficult area, and I chaired another national committee dealing with this which made a series of recommendations adopted by most British universities.⁸

Then there is the problematic issue of sexual relationships between faculty and students. No consensus on this has emerged. Whereas doctor–patient and high school teacher–student relationships (which I acknowledge are not identical) are universally proscribed, sometimes by the criminal law,⁹ professor–student relationships are either regarded as permissible or only mildly disapproved. My own view is that they are wrong and unethical on the part of the professor. Most institutions, at least in Europe, prefer reticence on this subject. Not so for one of the Colleges in my own University, the Royal Academy of Music—one of the foremost conservatories in the world—which has a Code of Conduct concerning Personal Relationships. The Code begins:

Although staff and students at the RAM are regarded as capable of making mature sexual decisions, members of staff are strongly advised

7. Committee of Vice-Chancellors and Principals, *Extremism and Intolerance on Campus* 6-9 (London 1998).

8. Committee of Vice-Chancellors and Principals, *Student Disciplinary Procedures: Notes of Guidance* (London 1994).

9. As in the U.K.: see the Sexual Offences (Amendment) Act 2000, ch. 44, §§ 3(1), 4(5).

not to enter into a sexual relationship with a student for whom they are educationally or pastorally responsible, or for whom they provide administrative or technical support. In such circumstances, consent may not be as freely given as it appears; similarly, equality within a relationship where one party has educational or administrative responsibility over another is frequently more apparent than real.¹⁰

The teaching of students at somewhere like the Royal Academy of Music is particularly personal and intense. Much of it is one-to-one. In addition, as in a law school, there are professional opportunities, since the professors are also practising musicians. The *raison d'être* of the Code “is to ensure that individual members of staff do not cause a conflict of interests, commit an act of impropriety, abuse the authority vested in them, or show bias.”¹¹ If a relationship does develop, it must be reported to the administration. All institutions should have guidance on this difficult area.

D. Ethical in the Standards of Non-academic Behaviour

The law school authorities must ensure that any irregularity or impropriety in a non-academic context is dealt with effectively. For example, downloading unlawful material from the internet; fraudulent expenses claims; irregularities in student societies: the law school must take seriously any allegations of unethical or improper behaviour in areas such as these and recognise that they require firm and decisive action. A law school that was uninterested in or relaxed about, say, fraudulent expense claims or misuse of research funds would be seriously failing in its own ethical responsibilities and would not meet the test of the ethical law school.

E. Ethical in the Way the Law School Conducts Its Business

It goes without saying that the school must act in accordance with the governing rules of the university of which it is a part and of any rules, regulations and procedures prescribed by the university for the school or introduced by the school for itself. It falls primarily to the dean and the senior administrators to ensure that these procedures are observed. They make for constancy and regularity in the affairs of the school, and it would be ironic if a law school of all places were to be careless of its constitutional procedures. Ethical standards will arise also in connection with law school recruitment and publicity material.

Coupled with this should be formal procedures for the ventilation of complaints and for whistleblowing—procedures which command the confidence of the community as a whole, of those who are complaining and of the wider public. Whether the law school is part of a public institution or private makes no difference: all in a sense have public responsibilities or accountabilities. In

10. *Code of Conduct concerning Personal Relationships at the Royal Academy of Music* (R.A.M., London).

11. *Id.*

Britain, it is now generally accepted that mechanisms of these kinds should at some stage involve an external element.¹²

I have already said that the primary responsibility for ensuring compliance with prescribed procedures falls on the senior administrators, but I need to go further. For the law school to be ethical, its dean and his or her senior colleagues must themselves conduct the school's business and affairs in ways that are scrupulously honest, transparent wherever possible, involve full participation by colleagues and are in all respects above reproach. The dean of a law school, like the president of a university or the chief executive of a corporation, sets the tone and style of the school and articulates and personifies its values. He or she, and the team which he or she leads, have an indispensable role in creating, promoting and sustaining a culture of ethics without which the law school is unlikely to merit the description ethical.

F. Ethical in a Broader Social Context

This is a more difficult area because it inevitably involves issues which are not themselves straightforward or wholly free of controversy. Law schools, like any other bodies, should be alive to their impact on the environment. There are issues about an ethical investment policy (assuming the law school's endowment funds are subject to the control of the school rather than the university). The Universities Superannuation Scheme, with assets of almost \$30 billion, is Britain's third largest private sector pension fund and has recently come under intense pressure from the university community to adopt an ethical or socially responsible investment policy. There can be difficult issues in relation to accepting funds from outside persons or bodies. I give just two examples. The first concerns money from tobacco sources. I take the view, not universally shared, that money should be accepted if the terms are otherwise acceptable, if it comes from a lawful source, is intended for a proper purpose and is not designed to further the interests of a questionable donor. I therefore oppose the efforts of the cancer research charities in the UK to bring pressure to bear on universities to reject all money from tobacco companies.¹³ At least two of our leading universities have attracted widespread criticism for accepting "tobacco money" even in areas far away from tobacco-related research. Is it improper for government to tax so heavily this lucrative trade and use the revenue—some \$15 billion a year in the U.K.—for the public good? Secondly, there was much controversy when the University of Oxford decided to accept a substantial gift from the grandson of a man whose company employed slave labour in Germany during the Nazi era and had paid little or no compensation. There are also difficult issues relating to policies on the admission of students: to what extent should institutions discriminate positively in favour of ethnic minority candidates or those from disadvantaged socioeconomic groups?

12. See Committee of Vice-Chancellors and Principals, *Independent Review of Student Appeals and Complaints* (London 1998).

13. See, e.g., Cancer Research UK, *Preventing Lung Cancer: Isolating the Tobacco Industry*, Consultation Document (London 2002).

On all these matters, views may legitimately differ. What is important is that they are resolved in ways that are open and fair and in which the competing moral imperatives are duly weighed. A law school is entitled to reach a decision which it suspects will attract public criticism, but only if it has given proper consideration to the matter and is able to support its conclusion in a reasoned way that demonstrates its awareness of the ethical dimensions.

II. WHAT CAUSES UNETHICAL BEHAVIOUR?

Without the necessary rules, procedures and protocols in place, unethical practices are, if not inevitable, at least much more likely. These not only set the standards and sensitise the school community, but also provide for appropriate consideration of issues. Of course, lack of personal integrity will lead to unethical behaviour, but I have encountered very little of that throughout my career, except, sadly and inexplicably, among clinical academics.

Unethical behaviour arises less often from rank dishonesty or lack of integrity than from other deficiencies. For example, there may be an inertia on the part of those administrators who ought to deal with a matter, feeling it to be a distraction from more pressing commitments. There is the assessment that to take action will only lead to publicity which would have a damaging impact on the school and its reputation. There is the psychology of those—and it is not uncommon—who recoil from confrontations and difficult or emotionally charged situations. And there is the failure truly to comprehend the nature and quality of the issue at hand. All these I would characterise as manifestations of “ethical illiteracy” or insensitivity. The president who failed to recognise the import of the young law professor who claimed a postgraduate law degree he had never earned was not so much lacking in personal integrity as ethically insensitive or illiterate. Likewise the professor who sat on a committee which selected the members of a board to consider his own wife’s promotion. The conflict of interest and the impropriety of his participation in that discussion did not even occur to him. Professors who write unduly favourable references for their former students are not truly dishonest, but they are surely ethically illiterate.

EPILOGUE

Universities, in my experience, are among the most ethical of organisations; and my experience of law schools in particular convinces me that we have much of which we can be proud in the ethical arena. I have no doubt that will continue to be true in both our countries, but no law school, however successful, respected and prestigious, will be immune from the unethical unless it adopts the practices I have described above as well as generating a constant and pervasive climate of ethical literacy throughout the school.

The ethical law school will command the confidence and respect of the scholarly community and the legal profession, and will be able more effectively to fulfil its mission in teaching new generations of lawyers, in deepening our understanding of the law, in contributing to the workings of the justice system and in its dual and demanding roles within the academy and the legal profession.