


A NEW AGENDA FOR HIGHER EDUCATION

Shaping a Life of the Mind for Practice

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Foreword by

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ways that the instructors of engineers might understand the value of their pedagogical work and the nature of engineering knowledge.

Fiduciary Responsibility and the Harmonizing of Professional Identities

“Advanced Legal Ethics: Finding Joy and Satisfaction in Legal Life”

Daisy Hurst Floyd, Dean, School of Law, Mercer University

As we have seen, professional schools are often concerned first and foremost with teaching their students analytical forms of thinking. But practical comportment and ethical formation are important aspects of professional practice as well. If the meaning of professional action is limited to the application of expert theory and knowledge, then how can future professionals learn to be fully responsive to the needs of their clients, which may not be met adequately by such a delimited vision? It can be difficult to get professional schools to take full responsibility for the professional identities they form, for good or bad, through their dominant forms of pedagogy. In the case of law schools, it can be especially difficult to bring the demands of the lawyer-client relationship to the forefront of student concern.

Daisy Hurst Floyd’s syllabus, “Advanced Legal Ethics: Finding Joy and Satisfaction in Legal Life,” asks second- and third-year law students to reflect on the following questions, over the course of two essay assignments:

What qualities, apart from a solid work ethic and strong case-analysis skills, will you seek to cultivate in yourself that you think would make you a better lawyer? How do these qualities relate to your notion of profession and particular characteristics of the profession, either as it exists or as an ideal? At its best, what do you think being a lawyer can bring to your life?

Think about the times in your life when you have felt or you feel the most yourself—when you feel the most authentic and alive. Do these times occur when you are in a particular place, doing a particular thing, or with a particular person or people? What do these times tell you about who you are and what is important to you? Do you ever experience this feeling when you are doing something related to the law or to being a law student? Do you think you can experience this feeling through being a lawyer? Why or why not? (Floyd, 2003, p. 4)

These essay assignments ask Floyd's law students to reflect on issues that are not typical of their educational experiences in law school. They encourage inquiry into the proper relationship between the personal and the professional, as well as the relationship between legal analysis and the wider communities through which actual legal practice takes place. The assignments provide Floyd's students an opportunity to imagine these relationships anew for their own lives through writing.

Response to Crisis

Floyd's syllabus responds to a growing public recognition that the legal profession is in the grip of a moral and existential crisis. Recent studies reveal an escalation of alcoholism and drug addiction among American lawyers. Why are so many lawyers so unhappy in their work? Why have their professional lives proven to be a burden rather than a source of personal fulfillment through good work? A growing number of articles and books are devoted to these difficult and pressing questions.³ Floyd's course constitutes one pedagogical response to this crisis of meaning.

"Advanced Legal Ethics" proceeds from the argument that the contemporary pathologies of the legal profession have roots in the structure of American legal education and the adversarial culture of American legal practice. American law schools are incredibly competitive places. They place a high premium on winning and on acquiring status. Law schools emphasize "thinking like a lawyer" in the process—an ideal that usually means setting aside one's own personal values and normative commitments. Students learn how to engage in legal thinking, of course. It is essential. They cannot become lawyers otherwise. Only through a deep understanding of legal reasoning can lawyers discern the legal salience of the situations that their clients face and discern what counts as a legitimate argument on a client's behalf within legal institutions. But this is only one aspect of what is at stake in legal action. The wider normative and social dimensions of professional practice are pushed to the margins of the law school and are never reintegrated pedagogically into a more expansive vision of the nature of professional action.

As a result, Floyd's students are forced to set aside the commitments that brought many of them to the legal profession in the first place, such as a commitment to social justice. These commitments are rarely revisited. Drawing from her previous work as a scholar in the Carnegie Academy for the Scholarship of Teaching and Learning (Floyd, 2002), Floyd argues that the drive toward winning and status that law schools nurture produces in law students a deep fear of failure. It also produces an

abiding sense that the persons that they have become over the course of their legal education cannot be reconciled with the commitments that gave meaning to their earlier lives. To borrow Gary Downey's observation about engineering education, learning to "think like a lawyer" in law school is "precisely about making the bulk of one's identity invisible in work" (Downey, 2003, p. 6).⁴ Floyd observes that the law school's "emphasis on compartmentalization as the essence of lawyerly analysis can lead lawyers to compartmentalize their own lives in ways that quickly become unhealthy" (Floyd, 2003, p. 7).

Law schools offer neither trustworthy places for the revelation of these problems nor practical experience in reconciling professional technique with the human desire for meaning in life and work. Students are keenly aware that they cannot admit their fears and crises publicly within the adversarial context of the law school. Floyd contends that students leave law school believing that their crises of normative purpose are merely "personal" problems that signify that they aren't doing a good enough job. Having produced disjointed and incoherent professional identities over the course of several years, law schools rarely take responsibility for helping students learn to put back together what was been torn apart. Through "Advanced Legal Ethics," Floyd attempts to offer a place for such work.

Why is this important? It is important not only for the health and sustainability of legal careers. It is also important because lawyers who cannot navigate the complexity of their own lives from a legal perspective and who only learn to value winning do not make good counselors in the lives of clients. Lawyers must be fully responsive to the needs of their clients. Legal education often presents a severely delimited account of what Floyd calls the "fundamental fact of being a lawyer:" the lawyer-client relation and its responsibilities (Floyd, 2003, p. 2).

Floyd's "Advanced Legal Ethics" offers her second- and third-year law students a rare opportunity to reflect collaboratively on the process of legal education itself and its relation, good or bad, to the demands of actual practice. The course attempts to bring her students' broader identities back into the classroom so that they can overcome their mutual, competitive alienation from one another. Floyd writes:

[T]he syllabus tracks the process of legal education, the effect of that process on the individual, and how that process relates to law practice (the purpose, individual and daily tasks, the attorney-client relationship, etc.) and to the legal profession (ideals, norms, structure, membership, regulation, etc.). (Floyd, 2003, p. 3)

[In this way, the syllabus asks] students to think about what it means to be a professional, in several senses: what are the characteristics of a professional that distinguish the work that he or she does from the work done by nonprofessionals? What does it mean to be a part of the community of legal professionals? How do the larger social community within which lawyers operate and the particular context of the American legal system inform the lawyer's work and identity? (Floyd, 2003, p. 2)

In order to meet these challenges, the syllabus must set out practices through which law students can engage more reflectively with their chosen profession, toward the interests and needs of clients. It must provide exemplary experiences that approach legal practice as the furthering of life purposes through judgment—the lawyer's *and* the client's. Floyd must help her students approach their professional lives in a way that is mindful of the fullness of both self and other—in Floyd's words, "the practice of law as a calling" (Floyd, 2003, p. 4). She must establish that these considerations are central to the calling and everyday practical reasoning of the responsible lawyer and constitute a legitimate concern for legal education.

The first problem that Floyd faces, however, is her students' competitive alienation from one another. Relations of trust must be built so that a community of future professionals might take shape in the classroom. The two essay assignments discussed earlier provide examples of how Floyd fashions the learned alienation of her students into a topic of classroom discussion and analysis. Floyd employs reflective writing in order to help her students understand legal practice anew as a primary locus for the living out of valued life purposes. Through readings and classroom discussion, Floyd's students recognize the common difficulties that they all face in holding on to the normative purposes that brought them to law school, as well as the common fear of failure that law school has reinforced. They recognize their own hopes and vulnerabilities in one another.

Floyd argues that this willingness to cope with vulnerability publicly through community is crucial for responsible legal practice. Clients come to lawyers primarily in times of personal and legal crisis. Responsible representation of a client entails recognizing the vulnerability and meaning of the client's situation in its fullness and advising the client in a way that best serves his or her needs. Thus the course's engagement of student vulnerability is not intended as a path for individual legal professionals to reclaim their private and selfish ends. Floyd hopes to enable her students to draw meaningful analogies between their own struggles and the

vulnerable position of their future clients. This task is both empathetic and analytical. Her students must learn to engage the needs of particular clients. They must also come to grips with the complex interpretive work that is required for meeting those needs.

Design of a Law School

Law school curricula rarely place the fiduciary relationship between lawyer and client at the center of legal pedagogy, however. "Advanced Legal Ethics" encourages students to reflect this omission in their training directly. Floyd's students "collectively design an ideal law school," through writing and discussion:

We will have the luxury of designing it without regard to budget or accreditation concerns because we will pretend, at least initially, that neither will be obstacles. Please write a short description of your conception of an ideal law school, including answers to the following:

Who: Who should be admitted as students? Who should be hired as members of the faculty?

What: What should be included in the curriculum, including how much time should be spent in law school (defined in terms of the calendar, or credit hours, or any other appropriate measure)? What teaching methods should be employed? What method of evaluating student performance should be used?

When: At what point in a person's life should he or she be in law school, e.g., after certain educational or life experience requirements have been fulfilled?

Where: Should our law school be free-standing or part of an educational institution that includes other disciplines; should it be public or private?

Why: Be prepared to justify the choices you have made. (Floyd, 2003, pp. 4-5)

Practices such as this are rare in law school. The exercise requires Floyd's students to place the institution of the law school in relation to the outside community and the needs of persons. They must form defensible judgments about what would constitute a "good" or "ideal" law school that is more fully responsive to its wider constituencies. In order to form these judgments, Floyd's students must reflect critically on their own professional formation, identify its limitations, and propose institutional changes that would provide for a more thorough educational experience. In order to imagine an ideal institution, her students must reflect on

who they are becoming, in light of *who they want or ought to be*. Floyd's students envision an educational institution that is worthy of the challenge of fostering legal practice as a life's calling.

"Advanced Legal Ethics" also helps Floyd's students consider the professional community into which they will enter. Reflection on the development of professional identity requires worthy examples of responsible practice, from which students might draw analogies to their own experience. Floyd provides her students with several opportunities to engage in discussion with practicing professionals—living exemplars.

The Lawyer-Client Relationship

One assignment asks students to conduct interviews with practicing lawyers. Floyd also takes her students on a brief retreat at the end of the course. Six practicing lawyers join them on the retreat, each of whom is sensitive to the challenges of sustaining a career as a calling. The retreat is a powerful pedagogical device and forum for student formation, providing for intense common focus on matters of shared concern.

During the retreat, the group engages in dialogue about the challenges they face in harmonizing their own senses of personhood with the performance of their legal roles. Floyd's students encounter living examples of what it means to live a life in the law. They are introduced to a wider community of professional practice whose ethos provides an alternative to the narrow focus on winning and status that dominates law school curricula. Like the syllabus of Downey and Lucena, the retreat "populates" students' understanding of the professional world with diverse and morally serious perspectives toward legal life. The examples set by their newfound colleagues provide Floyd's students with a powerful basis for reasoning analogically in response to their own particular predicaments.

All of the educational experiences set out by Floyd's syllabus share a common, orienting concern: the relationship between lawyer and client. This "fundamental fact of being a lawyer" orients discussions at the final retreat as surely as it informs students' efforts to imagine the structure of the law school anew (Floyd, 2003, p. 2). "Advanced Legal Ethics" cultivates a model of legal action that is analogous to the model of rabbinical action at the core of Elliott Dorff's syllabus, which we discussed in the previous chapter. The practical reasoning of the lawyer ought to provide a public model, or guide, for the practical reasoning of the client. Although legal analysis is central for understanding the key issues at stake in a client's case, as well as for navigating legal institutions on a client's

behalf, legal reasoning requires more than analytical knowledge and technique. The lawyer must also cultivate the lawyer-client relationship with considerable reflective acumen, so that she can respond fully to each client's particular situation and offer counsel accordingly. Floyd writes:

[In order] to help the client make good judgments, the lawyer must know who the client is; to accomplish that goal, the lawyer has to know who he/she is and what he/she brings to the lawyering tasks. The lawyer who is not reflective cannot form healthy relationships and connections; that failure prevents application of judgment to reach the desired end. Just as the lawyer should seek to answer the questions of who he/she is and what his/her place in the world is, the lawyer ought to help the client answer those questions in the context of the particular problem or need that brought the client to the lawyer: who is the client and what is his/her place in the world? (Floyd, 2003, pp. 2-3)

Only through imaginative social engagement with the needs of another can the lawyer serve as a responsible counselor, or guide, in the life and decisions of the client.

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Indeed, "Advanced Legal Ethics" advances the striking argument that analytical legal competence contributes to the nurturing of a lawyer's normative commitments and a meaningful career *only* through this kind of social engagement. Like many of the teachers profiled so far, Floyd works hard to illuminate the disconnection between the demands of professional practice and the limited conceptions of professional life that often dominate student formation in professional schools. And, like Gary Downey and Juan Lucena's "Engineering Cultures," Floyd's course helps students chart a more proper relationship between technical and social competence in the life of the practicing professional and the importance of this relationship for students' growing narratives of professional selfhood.

Floyd's "Advanced Legal Ethics" is a powerful example of how the analytical knowledge and fiduciary responsibilities that distinguish the legal profession might be integrated with the concerns for meaning, personhood, and context that distinguish pedagogy in the liberal arts. The syllabus envisions legal practice as a collaborative process of discerning public value in the lives of lawyers and clients alike, through analytical practices and social relationships for which the professional is responsible. As such, the course presents a powerful alternative vision of what legal education is all about.