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‘Law Teacher as Poet: Transcending the Mechanics of Legal Education’

Prue Vines

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Biopolitics and Resistance in Legal Education

Edited by Thomas Giddens
and Luca Siliquini-Cinelli

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Part I

Normative Resistance

Chapter 6

Law Teacher as Poet

Transcending the Mechanics of Legal Education

Prue Vines

Introduction

This chapter is about developing the area of teaching we are mostly too afraid to pursue because it often feels out of control—judgment. Coming to judgment requires taking into account all the exigencies of the situation and the fact that these are real people with real lives. Doing this well involves including emotions and values in our strict legal reasoning. I define judgment here as more than simply playing the game of whether the doctrine of precedent says 'yes' or 'no'. The reference to the doctrine of precedent will reveal that my background and teaching experience is in common law, and the experience may be different for law students from other disciplines. Including emotions may frighten us because it might ignite our own emotions or those of our students, and we know emotions can be powerful and can wreak havoc. However, our emotions are also a pointer to our moral values,[1] and, as such, have a significant role to play in the education of lawyers. My approach is biopolitical in the naïve sense, in that it takes into account our and others' biological selves as actors and objects of legal thoughts and actions. It might be regarded as an example of naturalistic biopolitics in that it seeks to draw on the biological base of human emotion and apply this to teaching law. Whether it fits into a Foucauldian notion of biopolitics is unclear, and is not the focus of this chapter.[2] The focus is on the student and the teacher as human, with human characteristics.

The analogy of the poet for the law teacher is useful for teaching law as a human/to humans. For me, teaching law very well means facilitating students' learning in a myriad of ways so they can develop their own sense of judgment. Coming to judgment is the thing that distinguishes lawyers from philosophers—lawyers *have* to make determinations that apply to real people in real time, and they cannot duck the need to decide. Judges, of course, must come to judgment, but ultimately all lawyers need to develop this art which

1 Nussbaum (2003).
2 This view of biopolitics draws on the outline by Lieson and Walsh (2012).

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begins as mechanical, and then should turn from mechanical to art, and at its best requires insight into human conditions and the possibilities of law.

The Poet as Model

It may be surprising to think that the law teacher might be analogised to the poet, but there are many similarities, and sometimes an unusual analogy is more illuminating than a more common one. This chapter only briefly considers using poetry in law teaching. Rather, it concerns thinking about the poet and the poet's techniques, habits and aspirations as a model which we, as law teachers, might use. It is useful to consider some definitions of poetry[3] to start us off:

'Poetry' has been defined as:

> Literary work in which the expression of feelings and ideas is given intensity by the use of distinctive style and rhythm; poems collectively or as a genre of literature.
>
> ...
>
> **1.1** A quality of beauty and intensity of emotion regarded as characteristic of poems.
>
> *'poetry and fire are nicely balanced in the music'*
>
> **1.2** Something regarded as comparable to poetry in its beauty.
>
> *'the music department is housed in a building which is pure poetry'*[4]

What is it about poetry that makes it useful for us to consider? This definition speaks of intensity of feeling and ideas, distinctive style and rhythm, qualities of beauty, and the use of 'poetry' as a metaphor for 'beauty'.

The poet seeks to go beyond the mechanical and the obvious, to illuminate things that may otherwise be ignored by using intensity and emotion in a distinctive style. Where the definition uses 'beauty' we might see a particular coming to judgment as 'pure poetry'. Poetry might lift or lower the spirit as part of the development of insight, to instil in the listener or reader a sense that there is more than just the words on the page. The techniques the poet uses to achieve these things vary from following strict rules to breaking the rules, using our human-ness including emotional and bodily awareness to force us to see things differently. Law teachers can learn from both the aspirations and the techniques of the poet. This analogy may inspire us to try to achieve transcendence (going beyond the limits, beyond ordinary limitations) in the teaching of law.

3 Disclaimer: Although I did study English literature at university as an undergraduate, this is very much a lay view of poetry and poets. I do not pretend to be a literary scholar of any kind.

4 *Oxford English Dictionary* Online.

Considering the poet as a model can help us recognise the need to move students from the mechanical learning of techniques (the familiar 'learning to think like a lawyer'[5]) to the meta-cognitive coming to judgment which looks like effortless 'art' and becomes the mark of the effective practitioner. That is the mastery that is needed to be a good lawyer.[6] Poets and law students have to hone their craft by paying attention to the mechanical parts of their craft before they can achieve mastery. The poet must attend to grammar, to choice of words, to determining how to create the wished-for rhythm. They must understand simile and metaphor, assonance, alliteration and allusion until it can all be woven together to create the necessary effect. They need to be persuasive. They need to be able to use connotation and separate it from denotation. Some of these things, such as grammar, choice of words, analogy, denotation are also required of the lawyer.

It is entirely appropriate to focus on skills first. Teaching the mechanics of reading a case or statute allows the student to learn the skill, while also allowing the teacher to demonstrate concern and the students to learn to trust the teacher so they can develop. In early law school the goals associated with this skill development need to be incorporated with three broader goals:

- Tolerance of uncertainty
- Independence of learning
- Intrinsic motivation

Tolerance of uncertainty is required in order to have the student develop the necessary ability to ask critical questions and keep asking them. Independence of learning is required to allow the student to continue to learn long after they have left university. Intrinsic motivation, paradoxically, can be developed so that the student learns to be really interested in the relevant matter.[7]

Along with all those we need to teach the importance of practice—for example, that writing, as for the poet, is a matter of writing, re-writing, and re-writing again. The MIRAT[8] or IRAC form is a classic example of how we teach mechanics, and it is a very good system. However, coming to judgment requires more than MIRAT. A good judgment states the reasoning by which it comes to the ratio decided in a way which is persuasive and incorporates attention to past and possible future cases, and attention to the parties whose dispute is being decided within the context within which the

5 The classic aspiration for law students. See, among many books with similar titles: Schauer (2009) S Fruehwald (2013).

6 I take this to be the kind of reflective practitioner that Donald A Schon is referring to in his classic book: Schon (1991) p 43.

7 For example, Song and Grabowski (2006); Ng (2018).

8 Material facts, Issue, Rule, Application to facts, Tentative conclusion (MIRAT); Issue Rule Application Conclusion (IRAC).

law happens. It pays attention to psychology, sociology, and philosophy as well as law because good law incorporates those things. It is lucid and it is powerful. So, in teaching MIRAT we have to keep the students at it until they are writing a judgment or an opinion in which much more is involved than the mechanics.

Poetry exemplifies this process. We see manuscripts where poets have spent months and years to get a word in a line right. When we see it on the printed page, there is just the one, perfect word.[9] We do not see all the words before, just the final result. Students need to see that hard work and practice is what it takes to move from mechanics to art.

How do we move students from mechanics to art? Teach them to pay attention. The law teacher pays attention, but also teaches the student to pay attention. This is a matter of the student bringing their attention to bear on activities in the classroom, and being present to them. Part of getting students to pay attention includes considering the poetic techniques involving rhythm. Rhythm includes words/sounds and *silences*. Since most lawyers can talk 'under wet cement' it is useful to remind us to stop talking and allow space to *think* in the classroom. It is also a useful way of slowing things down. Our students live in a speedy world in which paying attention is constantly asked for but seldom in a sustained way. One of the best gifts we can give our students is the chance to pause for reflection. Ask not for their first answer, but their thoughtful answer. Slow down the pace so they can think rather than just react. Our students at UNSW Law tend to be very quick, and for them it may be even more important to have slow time so that they can pay attention all around a topic, doing their work mindfully so their concentration and focus are enhanced.

The Poet Follows and Breaks the Rules

Another thing law teachers can learn from the poet is the use of following and breaking the rules and the recognition that the rules can change. Rules, particularly in common law systems, are always in tension—that is why we have to decide which level of the hierarchy a court is in, why we have to determine whether the majority in a plural court decided X while the minority decide Y. That is, indeed, why we have to determine whether the facts in the case are similar or different from the facts in the case which set the precedent.

Rules in poetry have also always been in tension—there are periods of total acceptance of some rule and then it is broken. For example, in Anglo-Saxon

9 See an unusual book which published both the final poem and an earlier version of each: Burr and Wallenstein (eds) (2002).

poetry, the rules involved double alliteration in the middle of the sentence. Here is the beginning of *Beowulf*, probably written between 700 and 750 CE:

> Béowulf wæs bréme –blaéd wíde sprang–
> Scyldes eafera Scedelandum in.
> Swá sceal geong guma góde gewyrcean
> fromum feohgiftum on fæder bearme[10]

Later forms of poetry changed the rules—each time that would have increased the impact of the poem. When Lord Byron wrote *The Destruction of Sennacherib*, the rhyming words were at the end of the poem and the rhythm was dominant. His use of rhythm moved him away from classical, more sedate poetry in its echoing of the hordes pouring down on Sennacherib:

> The Assyrian came down like the wolf on the fold,
> And his cohorts were gleaming in purple and gold;
> And the sheen of their spears was like stars on the sea,
> When the blue wave rolls nightly on deep Galilee ...

And Hopkins brought us more surprises in poetic form:

> I caught this morning morning's minion, kingdom of daylight's dauphin,
> dapple-dawn-drawn Falcon, in his riding
> Of the rolling level underneath him steady air, and striding
> High there, how he rung upon the rein of a wimpling wing
> In his ecstasy! then off, off forth on swing,
> As a skate's heel sweeps smooth on a bow-bend: the hurl and gliding
> Rebuffed the big wind. My heart in hiding
> Stirred for a bird, – the achieve of, the mastery of the thing! ...[11]

And e e cummings, 1894–1962, surprised people again with poems like this:

> maggie and milly and molly and may
> went down to the beach (to play one day)
> and maggie discovered a shell that sang
> so sweetly she couldn't remember her troubles, and
> milly befriended a stranded star

10 Beowulf was famed – his renown spread wide–
Scyld's heir, in Northern lands.
So ought a young man by good deeds deserve,
(and) by fine treasure-gifts, while in his father's keeping
(translated by Benjamin Slade, copyright 2002–2020: https://heorot.dk/beowulf-rede-text.html).

11 Hopkins (1985).

whose rays five languid fingers were;
and molly was chased by a horrible thing
which raced sideways while blowing bubbles: and
may came home with a smooth round stone
as small as a world and as large as alone.
For whatever we lose (like a you or a me)
it's always ourselves we find in the sea[12]

There are two ways of using this particular aspect of the poet's art in law teaching. The first is to assist students in understanding the constant temporal tension in the rules. Our law follows rules until they are changed to new rules. In Australia we could say, for example that there was a long period where the view that Australia was *terra nullius* applied which was only broken in 1992 by the *Mabo* decision.[13]

We can consider the breaking of rules too. We could consider the normal rules of engagement in the classroom. If you break these rules in some way, the benefit of surprise may be yours. There is evidence that the moment of surprise is a critical moment in learning,[14] partly because surprise induces attention. This means creating moments when a student has that moment of sudden insight. For example, in teaching feudal tenures I might jump on a desk and put myself in a position which most students identify as praying. When I tell them this is the position in which the feudal oath was taken they are surprised, and learning follows. You could establish a pattern: for example, raise a case, ask a student for the facts, then ask a student for the issue, then ask a student for the ratio: establish the pattern over a class and then break it. Suddenly ask a question that is completely different, such as 'Why does this case matter?' The surprise makes the students pay attention and then learn. Other ways to surprise include telling students a surprising fact about a case, for example students in torts being told that many people run out of damages (not so surprising) and then are refused access to social security. This surprises most Australians and the students never seem to forget this.

Poetry and Emotion (and the Body)

Poetry has many ways of ensuring that attention is paid, one of which links to our consideration of emotion. It is common for poetry to draw on emotion to create its effect, to make insight occur. Poets move beyond the obvious to develop insight or wisdom. They use emotion to help them do this and they develop our empathic imagination. Legal analysis is only slowly coming to

12 https://poets.org/poem/maggie-and-milly-and-molly-and-may.
13 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
14 Holland and Gallagher (2006).

understand that reason is not only about logic. Law and emotion now has a burgeoning literature.[15] I would argue that developing the empathic imagination as an intellectual tool is profoundly important for the developing law student.[16]

Empathic imagination, in my view, is the ability to imagine the situation of another person in as rich a way as possible. To develop the skill of being able to see what the position of another person is, and to think through the implications of that position rationally and intellectually is very significant. This is not about feeling sorry for people, but about being able to create data which can be tested by a slightly different process. This harnesses the imagination in ways which will help to understand the mental processes of another person (without making the mistake of assuming that we are them). Teaching students to use empathic imagination, not as sheer emotionalism but as an intellectual tool, actually requires them to ask themselves such questions as, 'if I were a person in that position, would it be reasonable to require me to do "X"?' 'What implications would that have for my ability to consider various courses of action?'[17] For example: consider the argument that the government owes a fiduciary duty to Aboriginal children [in Australia] who were removed from their parents. In *Cubillo v Commonwealth (No 2)* (2001) 112 FCR 455, it was argued that the government owed such a duty to Cubillo and Gunner. However, O'Loughlin J rejected the argument that the duty of a guardian to a child should be seen as fiduciary on the basis that such a duty had traditionally been considered only to exist in relation to economic interests. But what were the interests of these children which had been impacted by the states' behaviour? If we step into the shoes of the children, we find that they have suffered the loss of their connection with their families, and their connection with their land. We further find that they have lost their ability to bring actions for native title land for this reason. If we consider this logically and intellectually, we come to the conclusion that clearly the economic interests of the plaintiffs have been affected. One of the interests of a ward which a guardian should protect is their economic interest. Taking students through this process teaches them the intellectual value of empathic imagination as a reasoning process. It requires real care, though, to think this through in order to avoid a form of appropriation occurring. There is a danger that the stereotypical white, middle class law student may simply project themselves in a limited way into the position of the people concerned and fail to comprehend the whole scope of the issue for that person. This is the reason I emphasise the word 'empathy' with its element of comprehension, as opposed to 'sympathy' which is more about an emotional

15 For example, Bandes (ed.) (2000), Conway and Stannard (2016), Martha Nussbaum (2003). See also Jones (2020).

16 Here I draw on an article on including Indigenous Issues in the Curriculum, Vines (2012).

17 Vines, above n 16, 53.

response. It is also the reason I emphasise that it is an intellectual tool which must be practised.

The case of *Trevorrow*[18] (the only Indigenous person in Australia found by a court to have been stolen and awarded compensation for his removal as a young child from his family and culture) can be used to teach torts students how to assess damages. I ask them to do a deep reading of the facts of the case and then to think about the impact of those facts on somebody's life and how one would claim damages for them. In reading the facts we use techniques that might be used for poetry—different people to read different facts aloud, taking the time to read in a literary and more emotional rather than dry and factual way. As students read the facts, they take the roles of different people such as Trevorrow, his mother, the social worker, and the foster mother. The students have to think deeply and use their emotional signals to consider what it would really be like to have lost the chance to identify with the Aboriginal community when all your other siblings were significant elders. We think it through in relation to the requirements of the civil liability legislation and come to judgment. This is not easy. It requires some emotional strength as well as the ability to empathise, but the point is to see that Trevorrow was real and that his hurt was not 'just another legal issue'. This is another lesson from poetry—using emotion to teach students to develop their empathic imagination as an intellectual tool, to feel the emotion but then to use it to arouse the intellect.

This empathic imagination approach might also move us to teach preventive law more often. The more we look to the emotional impact of the law on our clients, particularly the emotional impact of litigation on clients who are not corporations, the less we will be satisfied with focusing on law's remedial rather than preventive aspects. Most law school curricula might be classed as remedial, focused on the courts after the harm. But it is far better for the client to prevent the problem in the first place. Law schools have been so focused on courts that they miss the obvious fact that a massive amount of lawyer work is transactional and should be preventive—drafting contracts, drafting trusts, drafting wills—all these are aimed at problem-solving and it is only when they fail that the courts come into play. As a teacher of succession my view is that the good succession lawyer keeps her clients out of court. We don't have to change our teaching completely—we just have to look at the cases we teach and ask a preventive rather than a remedial question—how could that contract or will have been drafted so that this problem would not have happened? Draft a contract that will prevent this person having to litigate, etc.

18 *Trevorrow v State of South Australia (No 5)* [2007] SASC 285.

Descartes' legacy of the split between mind and body has fed the notions of objectivity and universality and neutrality, which have their place, but should not be treated as the only approach to law and reason. Rather than reason in the form of emotionless logic being regarded as the epitome, we are beginning to see richer forms of reason enriched by emotion. The familiar traditional view has been:

> [The individual] must restrain his emotions, so that they do not cloud his reason, and he must reduce his particularities – as a judge, for example, assumes an institutional role that distances him from personal experiences that might affect his view of the issue before him – so that he can reach a more neutral or universally valid answer.[19]

Feminist scholarship has been essential in challenging this view of reason as thought-minus-emotion,[20] and as noted above, it is only more recently that emotion has become (slightly) acceptable in the legal academy.[21]

Teaching techniques that recognise the place of emotion in both law and learning are required. The history[22] of these cases shows the slow move away from the view that mental illness or irrationality should not be pandered to, if they exist at all, illustrated in the 1939 case of *Chester v Waverley Council*:[23]

> Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.

This is what Latham CJ said when denying the existence of a duty of care for psychiatric harm to a mother who, after searching for hours, saw her dead son taken out of a flooded council excavation some 15 metres long, 4 metres wide, and 2 metres deep. Barricades around it were such that people could walk under it and the Council had placed sand next to it which made it very attractive to children.

Poetry often uses emotion to galvanise insight. Compare the statement of Latham CJ above, which is almost completely emotionless, even anti-emotion,

19 Williams (1993) quoted in Jones (2020) p 3.

20 See for example, Antony and Witts (eds) (1993) and Harding and Hintikka (eds) (1983).

21 See above n 16.

22 For accounts of the history of the action for psychiatric injury see Chamallas and Kerber (1990); E Handsley (1996); Vines et al. (2010).

23 *Chester v Waverley Municipal Council* (1939) 62 CLR 1.

with Evatt J's judgment, in which he uses a poem of William Blake's to show that he understands what has happened here:

> During this crucial period the plaintiff's condition of mind and nerve can be completely understood only by parents who have been placed in a similar agony of hope and fear with hope gradually decreasing ....
>
> William Blake's imaginative genius has well portrayed suffering and anxiety of this kind:
>
> Tired and woe-begone
> Hoarse with making moan
> ...
> Rising from unrest
> The trembling woman prest
> With feet of weary woe:
> She could no further go.

Evatt held (dissenting) that there was a duty owed. The poetry makes the emotional point of the impact of the events on the plaintiff to the student, and it shows the judge using his empathic imagination as an intellectual tool to arrive at a decision. His judgment was the inspiration for legislation which changed the law to allow a parent to recover for psychiatric harm in such circumstances.

Related to the increasing acceptance of emotion in law is the recognition of the body and politics of subjectivity as part of teaching. This has, of course, been used by infants' teachers for centuries, but phenomenologists have begun to develop an approach drawing on the body for learning.[24] We have tended to think of legal education as entirely cerebral, and that we can divorce this from our bodies. But law operates on bodies—bodies are fundamentally part of how the legal system works, so they certainly are not irrelevant, but using the body in our teaching might alter what we think it means to teach people to 'think like a lawyer'. The danger is that 'thinking like a lawyer' can be thought of as like a pair of sunglasses which exclude many complexities of law and foster 'a subtle but insidious form of legal formalism'.[25] Using a bodily approach to learning using phenomenology includes focusing on how the body feels when one is emotional, thinking about a topic, or doing some related activity. The focus is on a 'politics of subjectivity' and may include contemplative techniques to focus the mind. Again, we are using intellectual tools to focus on things which are usually not thought of as intellectual pointers—bodily feelings, and emotions.

24 See Patricia Morgan, https://unsw.academia.edu/PatriciaMorgan/CurriculumVitae; Vines and Morgan (2016).

25 Foley and Tang (2016) p 134.

Tim Parks has described how important the teacher-student relationship is to learning. He is right but his mournful view that online education will kill it should be rejected:

> [T]his is the end of a culture in which learning was a collective social experience implying a certain positive hierarchy that invited both teacher and student to grow into the new relationship that every class occasions, the special dynamic that forms with each new group of students.[26]

That 'special dynamic' is an emotional connection which remains vital however the teaching is done. Teaching is an emotional activity—any teacher will tell you they feel exhausted well beyond the physical activity involved. Emotions in teaching include the love of the subject matter, the relationship with the students, the eliciting of surprise to enhance learning. Engagement, that holy grail of education, also involves emotions:

> Consider unpacking engagement – we all talk about the need for engagement, but we usually have quite a simple vision of it – we mean cognitive engagement with the subject matter, but there is also a need for behavioural engagement and for emotional engagement. Indeed, it is likely that emotional engagement is very helpful for the development of the other forms of engagement.[27]

This brings us back to the idea that reason and cognition involve emotion and that emotion may be a pointer to morality or norms. Many of what we think of as negative emotions are useful indicators that something in the system is wrong. Anger at unfairness may be a touchstone for justice; fear is also a pointer. Shame is a powerful emotion which has a significant effect and use. It has not been common for law teachers to draw on these emotions, to point them out as markers, but perhaps we need to more often. We have tended to consider only the positive emotions in the classroom as assisting with learning. For example, liking and loving classmates/teacher/team; identification as a law student seems to be significant in keeping law students studying, but having an intellectual approach to the recognition of emotions, while allowing them to be felt, may create an extra dimension in teaching. As Nussbaum and others have shown,[28] our felt emotions help us to identify our values. The poet does this all the time, evoking emotions to identify what is bad, good, etc. We can draw on this by asking students to notice their emotions as they read a case—if they feel angry as they read it, is this because it is an unjust situation? If they feel

26 Park (2019).
27 Sagayadevan and Jeyaraj (2012).
28 See n 1 above.

satisfied is this because they feel justice has been done? If they feel disgust does this point to something in the judgment that should not have happened? Awe, fear, anxiety, joy, love—all of these may point us to important values in ourselves and in the case which should be addressed. To ignore these emotional responses is to miss something that is vital in the reasoning.

We might, for example, embrace the reality and truth of emotion as it exists in clients' lives in our teaching. The fact that law resisted compensating psychiatric harm for so long suggests that bringing emotions into the discourse challenges it. Considering emotion, for example, can help us challenge the received wisdom that people who are injured are paid sufficient compensation to make up for what has happened to them. A focus on real emotions and real lives may challenge the hegemony of appellate courts in our teaching—yes there is value in paying attention to the appellate courts, but the impact of the courts on the mass of people flowing through the lower courts and tribunals touches the lives and emotions of far more people than traditional law school discourses often consider. Similar considerations apply to the teaching of preventive as well as remedial law.

Conclusions

When I consider the law teacher as poet, I am hoping to create a classroom environment which will allow students to achieve insights that take them further than they otherwise might go, so that they can exercise a rich and compassionate form of judgment. Sometimes this may claim to be wisdom. The *Oxford English Dictionary* defines 'wisdom' as 'the quality of having experience, knowledge, and good judgement; the quality of being wise'. This is not much of a definition, but it draws on experience and knowledge. Experiences are bodily and emotionally felt as well as intellectually experienced, and I seek to incorporate all of these into the teaching of law. If all these things are drawn into a judgment, we might see wisdom in the judgment. That is truly inspirational, and those are the judgments that are still considered decades later. That truly is transcending the mechanical.

The techniques I have discussed, drawn from the poet's arsenal, are all ways of engaging the whole student by drawing on reasons, emotion, and the body as ways to trigger this richer sort of consideration. Our students need to be able to state the law, but they also need to be able to say 'this law is actually threatening our society/vulnerable groups/individuals'; they need to be able to critique the law in order to protect it and to make it the best that it can be, because law is important for a fully functioning civil society.

When our students can use their legal skills as art, and have insight into law, themselves and others, and have developed some wisdom out of their experience and knowledge we have transcended our limits as teachers. When our students are teaching themselves with all the art, insight, and wisdom they can muster, this is teaching success.

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