**“Just teach them the law!”**

**The ethics of value inculcation within legal education**

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**Abstract:** To what extent should law teachers be permitted to advance controversial ethical, moral, or political views as part of the LLB curriculum? This short paper grapples with that question by defending the ethical permissibility of such behaviour on the important proviso that it does not cause students ‘pedagogical harm’. In reaching this conclusion, three alternative views are considered and dismissed, each of which seeks either to eliminate value inculcation entirely or to restrict its scope to the moral-political values currently immanent within established law. The approach taken is argumentative, drawing upon analytical philosophy, with each contested and contestable view being presented in propositional form. Ultimately, it is concluded that value inculcation cannot be avoided within legal education and that, given this fact, the question becomes *which* values law teachers have a responsibility to advance. It is contended that this judgement, fraught though it might be for various reasons, is best left to individual teachers and that, for this reason amongst others, a permissive ‘no-harm’ approach to value inculcation best justifies current pedagogical practices.

*Keywords: normative ethics; philosophy of education; value inculcation; curriculum design*

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## **1. Introduction: the inculcation question**

This short paper defends embedding controversial moral and political values within law school curriculums and discussing them openly with students in the classroom. It rejects calls to make legal education *less* evaluative, arguing in particular against suggestions that law teaching is (or can ever be) simply about disseminating ‘discretely legal’ knowledge and skills. My approach is philosophical and broadly within the analytical tradition. It seeks to establish a partial ‘rational reconstruction’ of law teaching,[[2]](#footnote-2) focused upon the extent to which law teachers are permitted to attempt value inculcation in relation to their students. Rational reconstruction, in the relevant sense and at its most fundamental, is the interpretation of one or more texts, social practices, speech acts, or practical maxims. It assumes that any plausible conception of the practice(s) it interrogates will have an immanent rationality, which the interpreter must explicate if they are to understand the ‘point’ or ‘purpose’ of the practice in question (ibid). Given my focus upon value inculcation, the rational reconstruction I attempt here is limited in scope. It pertains, not to the point or purpose of legal education as a whole, but rather to one important aspect of the ethical positionality of law teachers within the classroom and in relation to syllabus design.

Following Scheffler, these philosophical arguments are not intended to establish pedagogical methods directly but rather to contour what is permissible and required within legal education, from a normative point of view.[[3]](#footnote-3) Nonetheless, my thesis is motivated by two commitments that, in the broadest sense at least, are pedagogical. First, by a respect for our students as critical normative reasoners, with the capacity to arrive at judgements of their own, notwithstanding the influence we may have over them.[[4]](#footnote-4) Second, by a sense of social responsibility as a teacher of future lawyers.[[5]](#footnote-5) As the Law Society and the Council of Legal Education held in 1995, qualified lawyers must understand law’s embeddedness within society and its connection to certain key political concepts, such as rights, liberty, and (social) justice. This commitment was largely echoed in the 2013 Legal Education and Training Review (LETR), which recommended, amongst other things, that all qualifying law degrees (QLDs) incorporate study of legal professional ethics.[[6]](#footnote-6)

Set against this, there are growing political concerns about the perceived rise of ‘radical’ ideologies within higher education. Against a background of attempted institutional decolonisation,[[7]](#footnote-7) significant pushback against Marxist, feminist, and other critical-theoretical work has emerged within governmental rhetoric.[[8]](#footnote-8) This is reflected in the similar concerns of some legal-professional commentators,[[9]](#footnote-9) and in recent legislative attempts to counter this perceived radicalisation under the guise of protecting free speech.[[10]](#footnote-10) The latter has traded upon (somewhat limited) empirical evidence indicating that ‘right-leaning’ minorities of staff and students sometimes feel unable to disagree publicly with their peers.[[11]](#footnote-11) Universities, some would allege, are suffering from a ‘group think’ problem,[[12]](#footnote-12) with the mass inculcation of particular values at its heart.

In what follows, I examine whether it is either possible or desirable to eliminate ethical, moral, and political value inculcation within legal education. I proceed by outlining four ethical maxims that might each govern what is permissible and impermissible within law teaching. These maxims are abstractions of possible ethical positions, however each of them is drawn from a range of literature within both legal pedagogy and general legal theory. Having constructed these positions, and situated them within the relevant literature, I reject the first three, all of which attempt to minimise value inculcation in one way or another. Finally, I expand upon my preferred fourth option.

A couple of definitional points. First, I take ‘values’ to be ‘statements [or concepts] either articulating a fundamental moral principle, or as articulating a social principle that rests on an underlying moral construct’.[[13]](#footnote-13) Second, by ‘inculcation’ I mean any attempt to instil knowledge, skills, or values within a person, whether explicitly or implicitly, be it through fiat or by way of a ‘nudge’.[[14]](#footnote-14)

Two notes on scope. First, I do not consider which values *should* be inculcated (that is, over and above others) but only the general permissibility of inculcation as such. Second, although I discuss harmful inculcation and why it should be avoided, I take no definitive stance on the complete set of values that should be excluded from legal education. The present political moment would seem to justify my immediate focus, and, in any event, the ‘inculcation question’ is both independently interesting and logically prior to these more discrete matters.

One point on research method. Given the argumentative nature of this paper, and its particular focus upon ideology and the teaching of law, the literature I draw upon is multidisciplinary, encompassing normative philosophy, legal scholarship, pedagogical theory, and educational psychology. This scope mandates a certain degree of selectivity when determining the positions to be analysed and the material cited in support of those positions. There is an indefinitely large set of maxims that *might* govern value inculcation within legal education, such that considering every potential position would be impossible. At all points I have been led by three heuristics. First, the contours of the present political moment and, in particular, the governmental rhetoric cited above. Second, the prescriptive content of LETR and the 1995 *Announcement*, also cited above.[[15]](#footnote-15) Third, the concordance between the maxims I discuss and mainstream approaches to liberal legal education, which remains prevalent within the United Kingdom.[[16]](#footnote-16)

## **2. Four positions on inculcation**

This section establishes four positions on the ethics of value inculcation within legal education. Each one is presented in propositional form and briefly situated within the relevant academic literature and public debate. The first is perhaps the most extreme:

*No Evaluation*: value inculcation is wholly impermissible; law teachers should refrain completely from normative evaluation within the classroom.

There are two potential grounds for this principle. On the first ground, the purpose of legal education is solely to produce technically competent lawyers.[[17]](#footnote-17) As such, inculcation should be strictly limited to the knowledge and technical skills necessary to achieve such competence, and normative evaluation *per se* is wholly beside the point. The second ground for *No Evaluation* is more explicitly normative. According to Austin, ‘[t]he existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry’.[[18]](#footnote-18) On the second ground, *No Evaluation* is a normative-pedagogical addendum to this classic statement of ‘legal positivism’,[[19]](#footnote-19) which holds that law teachers should restrict themselves to enquiries of the first kind only. Legal education, according to this version *No Evaluation*, is an *inappropriate* place for ethical, moral, or political argument. The positionality of teachers within the classroom is such that any explicit evaluations from a position of even relative authority must be treated as problematic inculcation in disguise.[[20]](#footnote-20)

*No Evaluation* is rarely practiced: various core and optional modules within the UK on LLB and other programmes invite critical evaluation of the law. In recognition of this, our second ethical position accepts such evaluation as permissible but only where true inculcation is avoided via the provision of fully ‘balanced’ normative debates:

*Normative Balance*: value inculcation is wholly impermissible; law teachers should introduce evaluative positions only alongside opposing and alternative views.

*Normative Balance* requires that no contestable normative position is introduced as either mandatory or default, such that students might feel either obliged or ‘nudged’ to adopt that position.[[21]](#footnote-21) It assumes that law is normatively mailable, such that numerous conflicting positions can be constructed upon or derived from it.[[22]](#footnote-22) This assumption is controversial: several scholars have suggested that contemporary law is not only necessarily ideological but that its ideology is economically, racially, patriarchally, or otherwise fixed.[[23]](#footnote-23) The third ethical position accepts this ‘fixedly ideological’ nature of law but nonetheless seeks to minimise value inculcation:

*Minimal Inculcation*: value inculcation is undesirable; law teachers should only engage with the values necessary for developing salient legal knowledge and skills.

The inculcation envisaged by *Minimal Inculcation* is subtle. It requires students to internalise *only* the values implicit within the legal doctrines and skills that they are required to learn for the purposes of a QLD, as well as for any non-QLD doctrinal subjects they might elect to take. These will include, for example, conceptions of reasonableness within the law of tort,[[24]](#footnote-24) understandings of discrimination found within public and employment law,[[25]](#footnote-25) and principles of representative neutrality within the context of professional legal ethics.[[26]](#footnote-26) *Minimal Inculcation*, however, will not licence the teaching and assessment of non-legal evaluative positions or theories, such as critical race theory, Marxist analysis, or feminism. This approach would rule out teaching such subjects at law schools, contrary to much contemporary practice.[[27]](#footnote-27) Our final position perhaps best fits that more permissive practice:

*No-Harm Inculcation*: value inculcation is presumptively permissible; law teachers may inculcate any values to the extent that this does not cause pedagogical harm.

This maxim departs from the premise that ‘the moral quality of law must be a pervasive concern, students being confronted at every turn with questions about the legitimacy of those landmarks of doctrine and institutional design that represent the salient features of current practice’.[[28]](#footnote-28) It assumes that, at the very least, critical normative attitudes should be inculcated within law students and that doing so requires conveying the importance of particular substantive values, such as individual autonomy, equality, and non-domination.[[29]](#footnote-29) Indeed, *No-Harm Inculcation* only forbids the instilling of values where this would detract from students’ capacity to engage in competent lawyering, judged against the accepted norms of the relevant professions (‘pedagogical harm’).

## **3. Rejecting non-inculcation**

I contend that, despite their apparent appeal, neither *No Evaluation* nor *Normative Balance* are plausible. Moreover, I argue that although *Minimal Inculcation* is feasible, it is so normatively unappealing that it should be abandoned. Establishing these three points creates space for more focused consideration of *No-Harm Inculcation*.

First, *No Evaluation* rests on a category mistake. Law is normative, in that it directs our behaviour.[[30]](#footnote-30) As such, legal propositions cannot be normatively inert: what law does not prohibit, it permits; where it does not empower, it leaves us normatively powerless.[[31]](#footnote-31) This has important implications. If a contract is void – that is, ‘invalid’ *vis-à-vis* the relevant legal order – no contractual rights or obligations arise. However, if an alleged contract is *neither* valid *nor* void, because (for whatever reason) no law of contract exists within that jurisdiction, then the practical implication will be identical: no contractual rights or obligations can accrue.[[32]](#footnote-32)

Critical morality is similar, in that it cannot entail normatively inert implications. The practical outcome of ethical impermissibility is, perhaps paradoxically, logically equivalent to something being *neither* permitted *nor* forbidden. In the former case, we are *licenced* to do the thing in question. In the latter, the only relevant question becomes whether, descriptively speaking, we *can* do it, such that we become ‘permitted’ to do so by logical necessity.[[33]](#footnote-33) Just like law, critical morality cannot be ‘escaped’. There are no ethically inert courses of action and so no argumentative positions, not even ‘merely technical’ legal ones, can be ethically inert either.[[34]](#footnote-34) Law teachers therefore *must* adopt evaluative attitudes: they cannot do otherwise. *No-Evaluation* should be rejected, in other words, because ‘ought’ implies ‘can’.[[35]](#footnote-35)

True, individual legal propositions can be disclaimed as not ethically endorsed by those making them.[[36]](#footnote-36) Law teachers might even disclaim themselves generally as not endorsing any aspect of the law they teach. However, unless the ethics of such detached legal reasoning is *also* disclaimed, teachers must be understood as implicitly endorsing at least the permissibility of reasoning in this manner.[[37]](#footnote-37) Moreover, not only do such implicit endorsements themselves communicate ethical evaluation but even the act of disclaiming one’s neutrality communicates an ethical position to one’s students. At best, it indicates the need to take some kind of ethical stance in relation to law. At worst, given the law teacher’s relative authority within the classroom (Lau 2012),[[38]](#footnote-38) it communicates the need for blanket disavowal. Neither outcome is consistent with *No Evaluation*.

There is something comical about all this: such frenzied pursuit of total normative disclaimer evokes a rather frenetic and pitiable imaginary teacher. But this logistical absurdity is also true of *Normative Balance*. That maxim seems attractive: if we cannot avoid evaluative attitudes, then maybe we can maximise our students’ capacity to choose. Inculcation could be avoided, or so the suggestion goes, by providing a properly balanced ‘menu’ of normative options. This would seem not only to avoid (*ex hypothesi* problematic) inculcation but would also promote leading an ‘examined life’, which has often been cited as the hallmark of liberal education.[[39]](#footnote-39) The hope, according to *Normative Balance* is that law teaching could benefit from evaluative reflection whilst avoiding inculcation completely.

Unfortunately, this hope is illusory. For any given normative issue – the influence of racism upon international law, for example – there will be an indefinitely large set of potential views that one might adopt.[[40]](#footnote-40) Even restricted to views published within reputable periodicals, it would be impossible to represent fully *every* perspective within timetabling constraints. Law teachers must choose which views to offer as part of their normative ‘menus’, such that true impartiality will always be impossible.[[41]](#footnote-41) *Normative Balance* might not suffer from the logical difficulties of *No Evaluation*,but its logistical implications are herculean.[[42]](#footnote-42) Once again, in a slightly different sense, ‘ought’ must imply ‘can’.

Moreover, balance for its own sake entails admitting truly odious perspectives. Taking my previous example, *Normative Balance* would seem to forbid the inclusion of anti-colonial critiques within the study of international law without also airing arguments in favour of European imperialism. This implication reduces *Normative Balance* to an absurdity. What begins as an apparent advantage – promoting an ‘examined life’ via an abundance of equally aired normative perspectives – becomes untethered from the goals of liberal education through the crude imposition of brute evaluative equivalence. As Nussbaum constructs the examined life, it consists in ‘learning how to be a human being capable of love and imagination’.[[43]](#footnote-43) It is difficult to see how *Normative Balance* could get us *there*. As Crowie contends, facilitating this end requires greater normative discernment on the part of individual law teachers.[[44]](#footnote-44)

*Minimal Inculcation* seems to fare better. Not only does it admit the ideological nature of law, but it also coheres with the general tenor of LETR and the 1995 *Announcement*. It presents a logistically feasible mode of normative evaluation and limits inculcation to the values necessary for what we might term ‘competent lawyering’.[[45]](#footnote-45) Moreover, since it permits reflection upon the normative foundations of law, it has the beneficial consequence of facilitating interdisciplinary learning.[[46]](#footnote-46)

Nonetheless, *Minimal Inculcation* should be rejected because it licences indoctrination in line with the hegemonic values implicit within extant legal orders.[[47]](#footnote-47) Not only is the subordination of heterodox normative thought by conventional ‘legalism’ problematic in itself,[[48]](#footnote-48) but evidence also suggests that those in receipt of legal training characteristically defer to such modes of reasoning *whenever* they reason ethically.[[49]](#footnote-49) *Minimal Inculcation*, when seen in this light, presents as little more than Foucauldian ‘discipline’,[[50]](#footnote-50) with law students placed at risk of being inculcated into a restricted set of values via unjustified omission. It would appear, as such, to be self-defeating.

## **4. The *No-Harm* approach**

This section argues in favour of *No-Harm Inculcation*, the basic position of which is that value inculcation is permissible insofar as it does not prevent students from developing into competent lawyers, where competence is determined by the conventional standards of the relevant legal profession(s). This approach has all the advantages of *Minimal Inculcation*: it coheres with LETR and the 1995 *Announcement*; it is logistically feasible in that permits evaluative positions to be adopted within the classroom without mandating overly burdensome multitudes of them; and it promotes interdisciplinary learning via normative critique. Moreover, insofar as it *permits* inculcation in line with the values that underpin various legal doctrines, it leaves students no worse off *vis-à-vis* their capacity to engage with the foundations of hegemonic legal orders than *Minimal Inculcation* itself.

Over and above these points, however, *No-Harm Inculcation* has three significant advantages. First, it mitigates the dangers posed by *Minimal Inculcation* because it permits heterodox evaluative positions to be adopted by law teachers as counterpoints to legal orthodoxy. This not only facilitates institutionally mandated practices such as curriculum decolonisation but also serves the values behind those practices, such as epistemological and social inclusivity within higher education.[[51]](#footnote-51)

Second, *No-Harm Inculcation* capitalises upon the plurality of law teachers themselves by making value inculcation a function of individual judgement outwith circumstances of pedagogical harm. Indeed, capitalising upon this plurality arguably comes close to accomplishing in aggregate what *Normative Balance* strives to accomplish discretely. What distinguishes the plurality of *No-Harm Inculcation* from that of the former maxim, however, is the *quality* of the perspectives it offers. With interdisciplinary research-led teaching becoming the norm, at least within many law schools,[[52]](#footnote-52) students can benefit from a broad range of ‘considered [normative] judgements’ integrated into the research and pedagogy of particular teachers.[[53]](#footnote-53) Ironically, this is plurality of a richer and more meaningful sort than would be possible under the more demanding standard imposed by *Normative Balance*.

Third, by forbidding any value inculcation that would result in pedagogical harm, this approach ensures that law teaching continues to straddle the uneasy divide between the liberal-educational pursuit of an ‘examined life’ and the vocational requirements set by the legal profession. By ‘pedagogical harm’ I mean any teacher-led activity that significantly disrupts the capacity of students to achieve salient learning objectives. The particular harm relevant here is the prevention or frustration of students developing into competent lawyers. *No-Harm Inculcation* requires that the deliberate instilling of values be eschewed if it would lead to that end.

Whether or not students adopt the ‘legal point of view’ as their own,[[54]](#footnote-54) they must be *able* to adopt it. The inculcation of *purely* critical perspectives, to the exclusion of orthodox legal interpretations or justifications, would almost certainly prevent students from developing into technically competent lawyers and so would be ruled out as an approach. Very many normative approaches, including ones that are wholly critical of established law, will not meet this threshold. Indeed, adopting Marxist, feminist, or other critical perspectives is likely more conducive to the development of careful and imaginative reasoning than an insistence upon undertaking legal exegesis alone.[[55]](#footnote-55)

It would violate *No-Harm Inculcation* for syllabuses or classroom discussions to be so dominated by critical evaluation that the students’ knowledge of relevant legal doctrine would be undercut as against market expectations of that knowledge, set by the relevant profession(s). Naturally, this point is module-relative: it bites harder *vis-à-vis* core QLD and other doctrinal subjects than in relation to socio-legal or philosophy of law modules.[[56]](#footnote-56) To take another example, *No-Harm Inculcation* would rule out any instilling of values that is absolute to the point of being dogmatic. Indeed, it is arguable that asserting oneself as an evaluative demagog *always* constitutes pedagogical harm.[[57]](#footnote-57) However, given the particular importance of flexible advocacy and ‘neutral partisanship’[[58]](#footnote-58) within both legal practice and the development of competent legal reasoning,[[59]](#footnote-59) it would certainly constitute such harm for law teachers to behave in this way. Students must not be prevented from developing as advocates and legal analysts, which requires them to practice argumentation within a relatively safe space. Beyond this point however, especially given the plurality of law teachers available, neither openness nor enthusiasm regarding evaluative judgements would necessarily violate *No-Harm Inculcation*.

## **5. Conclusion**

This paper constructed four alternative ethical maxims to govern value inculcation within legal education. The first three – *No Evaluation*, *Normative Balance*, and *Minimal Inculcation* – were rejected as either implausible or insufficiently attractive. The fourth, *No-Harm Inculcation*, was forwarded as an apt reconstruction of contemporary law teaching, which not only fits relevant institutional expectations but also justifies those expectations in normative terms. On this basis, I contended any attempts to prevent value inculcation outright within legal education would be deeply misguided. Notwithstanding the negative political rhetoric currently surrounding critical academic approaches to law and other social phenomena, law teachers must be permitted to engage in value inculcation that does not amount to pedagogical harm.

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