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Wondering What to Do about Legal Education

Introduction: A university legal education

The university teaching of law is fraught with difficulties because of the need to satisfy simultaneously the demands of legal practice and the traditional values associated with the university. Engineering and medicine are vocational courses taught within the university in which the focus is on technical excellence; the concern has not been with the development of a critical, independent scholarship. In contradistinction, law has become riddled with self-doubt as to the primary aim of legal education. On the one hand, law, like engineering and medicine, wants to produce first-rate law graduates for practice who are respected and admired by other practitioners for their technical expertise. On the other hand, law wants respect within the academy as a legitimate academic discipline; it does not wish to be regarded as merely preparing graduates for a trade.[1] Technical analysis, however artful, cannot be equated with rigorous scholarly inquiry, for it is likely to lack intellectual depth and to be contingent on a predetermined standpoint. William Twining captured the polarity most graphically in his inaugural lecture, entitled 'Pericles and the Plumber',[2] in which he contrasted the visionary leader and law reformer, the product of

1 David Derham, 'An Overview of Legal Education in Australia' in Rosemary Balmford (ed.), *Legal Education in Australia: Proceedings of National Conference* (Australian Law Council Foundation, 1978) 14.

2 William Twining, 'Pericles and the Plumber' (1967) 83(3) *Law Quarterly Review* 396.

a liberal education, with the competent technocrat, the product of a skills-oriented training course. These conflicting values within contemporary legal education are in danger of engendering paralysis or divisiveness.[3]

However, when I allude to the contemporaneity of the problem, this is misleading. In fact, there has been a tension between the university teaching of law and practical training since law was first taught at the University of Bologna in about 1100 CE. Bologna and the other great universities that subsequently taught law, such as Oxford and Cambridge, taught it as a liberal art.[4] Their focus was on Roman law, canon law and jurisprudence, not the rules of practice. Would-be practitioners, who did not necessarily avail themselves of or have access to a liberal arts education, went off to the Inns of Court in London or a comparable site of local practice to learn the lawyerly art. In other words, the bifurcation of the scholarly and the skills dimensions averted potential tension. This separation was the favoured model for the education of lawyers throughout the Western world for hundreds of years. While the legal profession had control over admission to practice, its concern with legal education tended to be unsystematic and ad hoc, as future lawyers who acquired lawyering skills through apprenticeship could be vulnerable to the vagaries of individual masters.

This paradigm of legal education was characteristic also of Australian legal education until recently.[5] The first law faculties did not appear until the latter half of the nineteenth century. The establishment of the University of Sydney Law School, for example, was preceded by extensive debate on the 'propriety of establishing professional courses in a university'.[6] Generally speaking, lectures were given in the evening by practitioners, which meant a vocationally oriented standpoint was favoured. It is only since World War II that we find law schools staffed by full-time,

3 The tensions arising from an attempt to strike a balance between the theoretical and the practical are apparent in John Goldring, 'Babies and Bathwater: Tradition or Progress in Legal Scholarship and Legal Education' (1987) 17(2) *University of Western Australia Law Review* 216. For a critique, see Valerie Kerruish, 'Barefoot in the Kitchen: A Response to Jack Goldring' (1988) 18(1) *University of Western Australia Law Review* 167.

4 Helene Wieruszowski, *The Medieval University: Masters, Students, Learning* (Van Nostrand, 1966).

5 For example, David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 121; David Barker, *A History of Australian Legal Education* (The Federation Press, 2017); Susan Bartie, *Free Hands and Minds: Pioneering Australian Legal Scholars* (Hart, 2019), doi.org/10.5040/9781509922642.

6 Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 *University of New South Wales Law Journal* 111, 127.

professional academics, because of which there has been a concerted endeavour to adopt a more scholarly approach towards the role of law within the academy.

Commendable though the increased scholarly focus might be, it has in one sense exacerbated the preexisting tension because deference to the legal profession is not just a political reality but also an integral dimension of university legal education. This is because an Australian LLB degree is accepted as a qualification for admission to practice. Admitting authorities in each state (the Supreme Court or a statutorily constituted authority in which senior members of the legal profession predominate) specify subjects or areas of knowledge that must be included within a law curriculum for the approval or accreditation of an LLB. Although prior accreditation is not strictly essential and has no effect on the academic worth of an LLB degree, no Australian university has deliberately chosen to ignore the professional prescripts—that is, to offer the law degree as a coherent course of study without prior accreditation, or at least without setting in train accrediting or endorsement procedures. In the United States, there is a bifurcation between the basic law degree (the Juris Doctor, JD, replaced the LLB) and admission, as graduates must undertake state bar examinations to be admitted to practice once they have completed the JD. Australian universities, particularly the newer ones, are timid about taking such a radical step because their graduates could be regarded as disadvantaged in the job market. It nevertheless might be noted that even US law schools, particularly the more recently established and less prestigious institutions, are extremely deferential to the perceived needs of legal vocationalism, despite the separate bar exam. Doctrinal exegesis is generally considered the best way to serve professional needs.

However, all practitioners, particularly members of the judiciary, do not consider the production of efficient technocrats to be in the best interests of the profession.[7] The power and status of the legal profession and of law itself within the community nevertheless enable legal vocationalism to shape the content of the law curriculum, regardless of whether this is formally required or not. It is in this way that the conflation of training and education has occurred.

7 Chief Justice Anthony Mason, 'Inauguration of the Faculty of Law: University of Wollongong' (Unpublished paper, 1991); Justice Richard McGarvie, 'The function of a degree: Core subjects' (Law Council of Australia Legal Education Conference, 13–16 February 1991).

The construction of legal knowledge

It is a myth of liberal legalism that the law is neutral and autonomous, just as it is a myth that the judiciary can divorce itself from the societal web within which it is enmeshed so that it can somehow miraculously hand down value-free decisions. Law is the central mechanism within our society for transmitting and legitimating societal values and, in every age, law has been shaped by the characteristics of the civilisation of which it is part.[8] The cloak of neutrality assumed by law operates to disguise its essentially ideological role in preserving social relations. We see that the law, far from being neutral, upholds the capitalist imperative and the dominance of white, Anglo-Celtic maleness. The techniques of legal positivism render challenge to the partiality of law difficult. I wish to show briefly how legal epistemology is constructed so that intellectual reflexivity is discouraged; society would rather not have law's carapace of neutrality disturbed.

The 11 compulsory subjects or areas of knowledge specified by the admitting authorities, known as the 'Priestley 11',[9] are those that tend to privilege property and profits in accordance with the capitalist imperative; they include property and land law, contracts, torts, criminal law, company law, equity and trusts. Family law, employment and trade union law, consumer law, welfare law, poverty law, discrimination and human rights law—the areas of practice generally associated with the less powerful sectors of society—are unlikely to appear on the compulsory list. The Victorian Council of Legal Education opted for the inclusion of company law rather than family law in a review of its required areas of knowledge in the early 1990s—a decision that was accepted by the Priestley Committee in the national model soon afterwards. Family law was rejected on the ground that the 'building block' components of family law were contract, property and trusts.[10] The fact that families sustain our affective lives, the legal regulation of which is extremely problematic, was ignored. The reduction of the site of affectivity, reproduction and nurturance to legal abstractions would seem to be a singularly unsatisfactory basis for the

8 Myron P. Gilmore, *Humanists and Jurists: Six Studies in the Renaissance* (Belknap Press, 1963), doi.org/10.4159/harvard.9780674281738.

9 After Justice Priestley, who chaired the Law Admissions Consultative Committee of State and Territory Law Admitting Authorities in 1992.

10 Council of Legal Education Victoria, *Report of Academic Course Appraisal Committee on Legal Knowledge Required for Admission to Practise* (Council of Legal Education Victoria, 1990) 12.

resolution of problems pertaining to incest or custody, for example, either in the particular case or in respect of the formulation of policy. Family law, together with the other subjects mentioned that are less concerned with the maintenance of the societal status quo than the compulsory subjects, may be offered as electives. However, their human-centredness and their peripheral status vis-a-vis the corporate culture have led to these subjects being characterised by students as 'soft' options in contradistinction to the 'hard' compulsories—the doctrinal and technocratic focus of which effectively disguises and reifies their political significance. The hierarchisation of subjects within the curriculum reflects the ordering of the legal professional market, which, in turn, reflects the dominant values of our society. Thus, the practice of corporate law and its facilitation of big business are accorded a much higher status than family law, as we see in the disproportionately high fees and salaries associated with the former compared with the latter. This distinction between 'hard' and 'soft' areas of endeavour within law also reflects the way in which the activities of the modern state are structured and conceived along patriarchal gender lines.[11] Accordingly, the favoured ordering of subjects may leave little space for elective or 'soft' subjects within the legal curriculum. For example, before the acceptance of the Priestley 11, admission to the Queensland Bar required completion of a massive 19 compulsory subjects, including the 'hard' cognate subjects of commercial law, securities and taxation, as well as company law. There was space for only one elective. A clear message as to what was important was conveyed to students by the emphasis on those areas that sustain the economy.

Even if subjects such as commercial law, taxation and securities are not specified as compulsory subjects, either by the admitting authorities or by the university, their privileged status within the constellation of favoured values will elevate them to the status of de facto compulsories. Those students who are ambitious to succeed in corporate legal practice believe that by doing as many commercially oriented subjects as possible, they will be making themselves more attractive in the job market.[12] Even if such subjects are not offered, the phenomenon of market drift manifests itself by students and prospective employers putting pressure on law schools to offer

11 Anna Yeatman, *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State* (Allen & Unwin, 1990).

12 The desire is rational as the evidence indicates that lawyers spend most time on business law, property law and civil litigation. See, for example, Jill Ewing, *Career Patterns of Law Graduates* (Law Institute of Victoria, 1990).

more subjects of this kind at the expense of subjects with a more humanistic and caring orientation. The favoured ordering seeks to draw a clear line of demarcation between public and private life—a dichotomy that privileges public life and the world of the market over private life in the eyes of the law. This public/private dichotomy is central to classical liberalism.[13] It is accepted as a fundamental premise of legal education that law belongs to the public side of the dualism. The dichotomy entails acceptance of the idea that most facets of private life are cordoned off, so they are placed beyond the limits of the law, unless they can be conceptualised within the established terms of legality, as with the contract, property or trusts focus of family law to which I have adverted. Hence, the social reality of violence, which characterises the lives (and deaths) of thousands of women within families and with which existing legal form is unable to grapple, receives scant attention because it tends to be perceived as a private-sphere phenomenon that cannot easily be subsumed within one of the subject compartments. The existence of predetermined divisions that may have the imprimatur of the legislature endows the chosen subjects with a rationality that forecloses serious challenge. Similarly, any questioning of the existing form of law is also likely to receive short shrift. The sex specificity of the harm arising from rape, for example, cannot be accommodated within the traditional criminal law paradigm.

Liberal legalism is ill at ease with corporeality, affectivity and desire—all of which have been relegated to the private sphere and deemed irrelevant to legality. It is therefore no surprise to find that the public/private dualism also coincides with masculinity and femininity. For example, the compulsory subjects emit a very clear message that the business dealings in which men engage within civil society are infinitely more important and valuable than what women have traditionally done within the home—that is, bear children and nurture them, care for the sick and elderly and perform essential household tasks *in order that* men might be free to engage in public-sphere activities. The inequities arising from this sexual division of labour within the private sphere have not been tractable to law reform despite the centrality of liberalism's commitment to formal equality. Conversely, legality has been resistant to the more human-centred and caring values associated with the private realm. I am referring not just to the ways in which the application of fine-sounding rhetoric extolling formal equality may permit grossly disproportionate outcomes

13 Stanley Benn & Gerald Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983).

for the poor, for Indigenous people and for differentiated others, but also to the uncaring nature of adversarialism. A combative style of cross-examination designed to elicit 'truth' as a predicate to securing 'justice' is one that displays little respect for the individual witness. It is this uncaring approach that has been frequently emulated within the pedagogic methods of legal education.[14] Its aggressive style has been frequently questioned by women students, who find both the style of pedagogy and the substantive sexual closures to be frustrating and alienating.[15] They long for a more personalised and relevant approach that takes cognisance of affectivity and caring.

Even more insidious than the separate spheres approach within the construction of legal knowledge is the fact that the legal standards that run through the common law are masculinist ones.[16] Thus, the 'reasonable man'—that pillar of the community forever consigned to riding on the Clapham omnibus—represents not a neutral abstraction, but a skewed standard against which the foibles of both men and women must be measured. This gendered partiality of law has long operated to the disadvantage of women, particularly within tort law and criminal law, but it is occluded by the unquestioned assumptions of neutrality and universality. Although there are pockets of feminist legal scholarship within Australian law schools and legal studies departments,[17] the more common uncritical doctrinal pedagogy subtly operates to maintain the hegemony of masculinity within our society by its tacit acceptance of the proposition that any challenge to legal form lies beyond the reaches of the law.

Just as an unmasking of the abstract standards of the law reveals the gendered nature of justice, a deconstruction exercise also reveals its partiality towards the dominant white, Anglo-Celtic, middle-class values of our society. The prevailing political rhetoric of racial and ethnic diversity has not been transposed into law because the one-dimensionality

14 Robert Kerry Wilkins, '"The Person You're Supposed to Become": The Politics of the Law School Experience' (1987) 45(1) *University of Toronto Faculty of Law Review* 98.

15 For example, Jenny Morgan, 'The Socratic Method: Silencing Cooperation' (1989) 1(2) *Legal Education Review* 151; K.C. Worden, 'Overshooting the Target: A Feminist Deconstruction of Legal Education' (1985) 34(4) *American University Law Review* 1141.

16 Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990).

17 Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (The Federation Press, 1990); Judith Grbich, 'Feminist Jurisprudence as Women's Studies in Law: Australian Dialogues' in Andre-Jean Arnaud & Elizabeth Kingdom (eds), *Women's Rights and the Rights of Man* (Aberdeen University Press, 1990).

of liberal legalism cannot accommodate alterity.[18] The point is clearly illustrated in the case of the tardiness of the common law to recognise Indigenous claims to land and personhood over the past two centuries of white domination in Australia.[19]

There is a concern that challenges to the Austinian idea of law as the command of a sovereign might threaten authority and the stability of our society. In addition, the idea of the autonomy of law is embedded within Anglo-Australian legal positivism. While some law schools do attempt to address law within its social context, the prevailing deference to doctrine threatens to blanch that context of meaning, thereby reinforcing the myth that the rules are acontextual and value-free. Hence, legal vocationalism, in emphasising the internal logic of doctrine and *stare decisis*, plays a significant role in perpetuating the status quo.

At this point, I would like to interpolate a comment about the socioeconomic composition of law students. The evidence reveals that law schools cater to an elite group of students who attended prestigious private secondary schools and whose relatively affluent parents tend to have professional or managerial backgrounds.[20] This class background establishes a homology between law students, practising lawyers and business and professional people. Thus, law students are more likely than not to evince a predilection for subjects closely identified with their class interests.[21] Furthermore, it is no surprise to find that when the economy declines, there is a concomitant

18 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990); Margaret Thornton & Ann Genovese, 'On *The Liberal Promise*: A Conversation' (2015) 41(1) *Australian Feminist Law Journal* 3, doi.org/10.1080/13200968.2015.1045113.

19 The two key cases that changed the common law were determined after this lecture was delivered. They were *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.

20 For example, William Twining, 'Access to Legal Education and the Legal Profession: A Commonwealth Perspective' in Rajeev Dharan, Neil Kibble & William Twining (eds), *Access to Legal Education and the Profession* (Butterworths, 1989); Weisbrot (n. 5) 79.

21 The Law Society of New South Wales adverted to the way admission to law school 'has resulted in law students becoming an elitist group unrepresentative of the community at large'. Law Society of New South Wales, *Undergraduate legal education and practical legal training* (Issues Paper, 1991) 5. The concern of the Law Society was the expected lack of provision of services for suburban and country clients as students of privileged status tended to favour highly paid positions in city firms. La Trobe University proposed to break the nexus between law school admission and the high aggregate entry mark for law by not admitting students into the LLB until after completion of at least two years of university study. The hope was that this would contribute to greater socioeconomic diversity, although it was suggested that no change in admission based on previous academic performance was likely to have a significant impact on the socioeconomic composition of law students. Dennis Pearce, 'Admission to law school' (Conference Paper, Law Council of Australia Legal Education Conference, 13–16 February 1991).

decline in interest in social justice and the more humanistic subjects on the part of law students whose future in the social hierarchy may no longer be assured. Social justice concerns are likely to be conveniently dismissed as passé—mere aberrations of the past. The contraction of the social welfare state also serves to reify the significance of the traditional commercial and property values associated with law.

Among the public generally, there is increasing cynicism as to law's ability to effect social change. Legal practice has come to be too strongly associated with attempts to legitimate questionable business deals and the generation of private profit to be seen as an unqualified social good. A technical focus on doctrinalism within legal education serves to occlude the partiality of practice and to ensure the transmission of formal legal knowledge as though it were unproblematic. This unwillingness to critique the sociopolitical reality of law within the modern state has the effect of exacerbating student cynicism, for it conveys the ethical message that obfuscation and duplicity are acceptable within legal practice.

The elusiveness of sociolegal scholarship

In the process of unmasking the partiality of justice, the hope is that understanding will pave the way to securing a fairer system in accordance with the ideal—an understanding aided by the insights of other disciplines. However, interdisciplinary or social science approaches to law are inchoate, even after almost 100 years of attempts to alter the substantive pedagogy.

A debt is owed to the American legal Realists of the 1920s and 1930s for demonstrating the ways in which legal knowledge is politically constructed. Central to Realist methodology was the idea that progressive law reform must be grounded in social scientific research.[22] The Realists were a disparate group of legal scholars reacting against what they saw as the sterile formalism of the 'law as science' approach developed by Langdell at Harvard University between 1870 and 1895. If legal rules were not value-free, they argued, the rules could have no predictive value. The Realist movement therefore brought about the end of the idea of law as an exact science.[23]

22 Note, ''Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship' (1982) 95(7) *Harvard Law Review* 1669, 1671, doi.org/10.2307/1340723.

23 Robert Stevens, 'Two Cheers for 1870: The American Law School' in Donald Fleming and Bernard Bailyn (eds), *Law in American History* (Little Brown & Co., 1971) 480.

In the 1920s, a faculty group at Columbia Law School in New York set out to design a curriculum that integrated law and the social sciences in accordance with prevailing functionalist philosophy. Even though the issue was taken seriously, with an outside chairperson engaged in 1926 and two years expended on the process, the enterprise had virtually collapsed by 1930. Conflict emerged between faculty members as to the role of the social sciences and the purpose of legal education. The uncertain value of the meaning of social science perspectives for the study of law led to questions being asked about Columbia's efficiency in producing practising lawyers.[24] Legal vocationalism's centripetal pull on the academy may again be observed, together with the idea that there is always a polarity, albeit latent, between law and other disciplines within the context of legal education.

In the 1930s, Yale became the centre of the Realist movement, where a greater commitment to the social sciences could be discerned.[25] Scholars from disciplines other than law, including economists, historians, psychiatrists and statisticians, appeared on the faculty. However, like the Columbia experiment, the functionalist reorganisation of courses that integrated law and the social sciences collapsed soon afterwards. In this case, the catalyst was the outbreak of World War II. This particular social context would seem to offer an important clue in analysing the reasons for Realism's collapse, as suggested by Laura Kalman:

> [The legal Realists'] ethical relativism seemed to mean that no Nazi barbarity could be justly branded as evil, while their identification of law with the actions of government officials gave even the most offensive Nazi edict the sanction of true law.[26]

It would seem that the idea of the rule of law as the neutral repository of justice affords a source of comfort that is not limited to times of acute crisis, such as the rise of totalitarianism or the experience of a post-crisis period when there is a need for stability and the appearance of clarity.[27] In modern society, which is characterised by an increasing sense of alienation and anomie for the individual arising from the loss of community, the rapidity of technological change and the increasing

24 ibid., 475.
25 Laura Kalman, *Legal Realism at Yale 1927–1960* (University of North Carolina Press, 1986) 76.
26 ibid., 121.
27 Cf. Eleanor M. Fox, 'The Good Law School, the Good Curriculum, and the Mind and the Heart' (1989) 39(4) *Journal of Legal Education* 473.

intrusiveness of bureaucratisation, the assumed certainty of neutral legal rules has an appeal beyond the reach of the presumptively value-laden social sciences.

Indeed, we see that post-Realist attempts to integrate law and the social sciences have not been able to demolish or even to lower the barrier between what continue to be understood as discrete disciplines. A concerted attempt was made by Lasswell and McDougal at Yale in the 1940s to train law students to be better policymakers. They built on legal Realism to make legal education more constructive through what they termed 'policy science'.[28] Lasswell and McDougal recognised that many law graduates became not lawyers in private practice but high-level government policymakers. It was this public destination they sought to encourage by their distinctive approach. Ironically, they were then criticised for not teaching 'law'—a familiar charge brought against those who have sought to broaden the curriculum, as occurred at Columbia. Indeed, the work of Lasswell and McDougal prompted an investigation of the Yale Law School by Yale University in 1948.[29]

Nevertheless, legal Realism did have an impact on US legal education, which had a flow-on effect in other parts of the Western world. Although no comparable movement seems to have occurred contemporaneously in either the United Kingdom or Australia, the work of the late Julius Stone, whom I was privileged to have as a teacher and who, in the early 1980s, was described as 'the last of the living Realists', constitutes an important legacy.[30] Generally speaking, however, interdisciplinarity and the development of sociolegal perspectives on law seem to have been located more within the realm of rhetoric than reality in Australia. The rhetoric first manifested itself with the establishment of the University of New South Wales Law School in 1971. Nevertheless, it is Macquarie University Law School, which opened its doors soon after the University of NSW, that consistently espoused a critical and interdisciplinary approach to the study of law, which set it apart in the history of legal education in Australia.

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28 Harold D. Lasswell & Myres S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52(2) *Yale Law Journal* 203, doi.org/10.2307/792244; Myres S. McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community' (1947) 56(8) *Yale Law Journal* 1345, doi.org/10.2307/793069.

29 Kalman (n. 25) 184.

30 Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control—A Study in Jurisprudence* (Maitland, 1950); Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland, 1964); Julius Stone, *Social Dimensions of Law and Justice* (Maitland, 1966).

However, the concept of interdisciplinarity is vague, be it at Macquarie or elsewhere. It has been sufficient that law is viewed through some disciplinary lens other than its own. However, an interdisciplinary approach requires a legal academic to be an expert in more than one discipline—an unrealistic expectation, particularly as the typical legal academic is primarily a generalist producing generalist lawyers.[31] The danger, as Valerie Kerruish warns, is that interdisciplinarity may amount to no more than a vacuous form of eclecticism: 'Legal theory tends to pick up baubles. Simplified versions of ideas and arguments, advanced in other disciplines in which the legal theorist takes a dilettante's interest, adorn its pages.'[32]

Several former members of staff at Macquarie were strong proponents of a critical approach because of what they regarded as the incoherence and manipulability of legal doctrine, as well as the traditional Anglo-Australian atheoretical legal pedagogy. Critical legal scholarship embraces a variety of philosophical and theoretical traditions, including feminist scholarship.[33] The approach averredly transcends that of a simplistic interdisciplinary eclecticism in favour of a new legal theory, which some saw in civic republicanism.[34] Other Macquarie academics were influenced by the US critical legal studies movement, the intellectual descendant of legal Realism, and by the European critical legal studies movement.

The agenda of critical legal scholarship is more radical than that of Realism in that it sets out not simply to reform the law within its existing framework but also to critique every facet of the legal order, including its ideologies, underlying philosophies and presuppositions. It is hoped to effect a transformation of society, not via revolutionary means, but via an intellectual process of critique and theorising. As with the Realists, critical legal scholars have been trenchantly attacked on account of the subversive nature of their inquiries, prompting the inevitable flash of déjà vu.[35] In particular, they have been attacked for engendering cynicism and nihilism by devoting inadequate attention to the processes of social

31 Cf. Stevens (n. 23).
32 Kerruish (n. 3) 169.
33 Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38(1) *Journal of Legal Education* 61.
34 For example, Andrew Fraser, *The Spirit of the Laws* (University of Toronto Press, 1990).
35 David Fraser, 'What a Long, Strange Trip It's Been: Deconstructing Law from Legal Realism to Critical Legal Studies' (1988–89) 5 *Australian Journal of Law and Society* 35.

and legal change.[36] It would appear, however, that it is the deconstructive critique, which compellingly demonstrates that there are no right answers, that is so threatening to the legal establishment. The comparable experience of criticism to which Macquarie has been subjected,[37] viewed against the backdrop of initiatives over the past century, throws into high relief the inordinate difficulty involved in the task of succeeding with a different curriculum or pedagogy. The late James Crawford, a former dean of Sydney University Law School, described legal education in Australia as being 'universally of the same shade of grey'.[38] That is, the similarity of requirements by state authorities together with a common perception of how the 'compleat lawyer' should be produced have contributed to a depressing uniformity that has stifled imaginative and creative approaches and indeed all approaches that are in any way markedly *different* from the norm. So pervasive is the dominance of doctrinalism that difference is invariably equated with inferiority.

Educating the 'compleat lawyer'

There nevertheless resides an unresolved ambiguity even within the legal profession's own terms that law schools produce the 'compleat lawyer', for who or what is this archetype? The subjects and areas of knowledge specified for admission to practice have barely changed in a century, although the nature of practice has altered significantly. The favoured model of legal education arises from the assumption that law graduates are still going to become practitioners in traditional private practice. This does not accord with the reality, as somewhat less than 50 per cent of law

36 Paul D. Carrington, 'Of Law and the River' (1984) 34(2) *Journal of Legal Education* 222; Hilary Charlesworth, 'Critical Legal Education' (1988–89) 5 *Australian Journal of Law and Society* 27; Peter W. Martin, '"Of Law and the River," and of Nihilism and Academic Freedom' (1985) 35(1) *Journal of Legal Education* 1.

37 The attack culminated in a recommendation by the Pearce Committee that the Law School be either phased out or reconstituted. Dennis Pearce, Enid Campbell & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987). For critiques of the *Pearce Report*, see Wojciech Sadurski, 'Research in Australian Law Schools' (1987) 11(3) *Bulletin of the Australian Society of Legal Philosophy* 144; Alice Erh-Soon Tay, 'Aimless Perspectives' (1987) 11(3) *Bulletin of the Australian Society of Legal Philosophy* 154; Klaus A. Ziegert, 'What Law Professors Know and What They Think They Know about the Performance of Law Schools' (1987) 11(3) *Bulletin of the Australian Society of Legal Philosophy* 127; Charles Sampford & David Wood, '"Theoretical Dimensions" of Legal Education: A Response to the Pearce Report' (1988) 62(1) *Australian Law Journal* 32.

38 James Crawford, 'The future of the public law schools' (Conference Paper, Law Council of Australia Legal Education Conference, 13–16 February 1991).

graduates enter and remain in private practice. Even then, a generalist legal education can in no way equip a graduate for the high degree of specialisation that is a characteristic of the contemporary Australian mega-firm. The degree of professional specialisation[39] also reflects the rapidity of substantive legal change that is currently effected through legislation. Thus, an approach that concentrates on doctrinal exegesis may well be obsolete by the time the student has graduated.

The 50 per cent of law graduates who do not venture into or remain in private practice enter a variety of fields, although some wish to never have anything more to do with law after their arid experience of legal education. For those who do, the public service, media, academia, politics, accountancy, legal aid, business and corporate inhouse legal offices are some of the multifarious areas for which a legal education is meant to equip graduates but is more likely to 'project an artificial and misshapen representation of legal reality'.[40] The question then arises as to the appropriateness of the current LLB to satisfy heterogeneous needs—a qualification that is increasingly being regarded as a generalist degree in the same way as a liberal arts degree.[41] Somewhat ironically, this would seem to represent a reversion to the earlier history of the teaching of law within universities when there was no particular attempt to accommodate the perceived needs of practice.

The noted English jurist Sir William Blackstone, on his election to the Vinerian Chair at Oxford in 1758, delivered a lecture—extraordinary for its time—extolling the virtues of a liberal university education for lawyers and decrying the practice orientation of contemporary legal training:

> If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge

39 For example, Ian Dunn, 'Accreditation of specialists: The Victorian experience' (Conference Paper, Law Council of Australia Legal Education Conference, 13–16 February 1991); Michael Chesterman, 'Specialisation: The Victorian experience' (Conference Paper, Law Council of Australia Legal Education Conference, 13–16 February 1991).

40 Harry W. Arthurs, Richard Weisman & Frederick H. Zemans, 'Canadian Lawyers: A Peculiar Professionalism' in Richard L. Abel & Philip S.C. Lewis (eds), *Lawyers in Society: The Common Law World* (University of California Press, 1988) 149.

41 Pearce (n. 21).

> will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.[42]

Standing back from the profession is not synonymous with turning one's back on it. On the contrary, a space between the academy and the profession must redound to the benefit of the profession. As Blackstone recognised, an exclusive focus on prevailing doctrine is likely to induce a kind of intellectual myopia because it is designed only to facilitate an understanding of the law as it is now; it is not designed to produce an understanding of the underlying principles of a completely different statutory schema that may come into effect in a decade or two, for example. A semblance of independence and autonomy will permit the development of an essential critical space in which to question fundamental assumptions underpinning the law. This space permits the study of jurisprudence and legal philosophy so that graduates acquire 'a panoramic view of the law as an entire discipline rather than as a series of discrete and unrelated pigeonholes'.[43] The legal profession's concern for skills—technical excellence, advocacy, drafting, court procedures and negotiation—necessarily renders marginal the theoretical dimension. It is the omission of this dimension from Australian legal education of which the Pearce Committee was most critical.[44]

The analogy between law and theology has been noted before.[45] That is, it is assumed that the overpowering rightness of the basic legal presuppositions cannot be questioned within a positivist paradigm any more than could the existence of God within the medieval Christian universe. The questioning process—essential to academic life—is absent from legal education for it is perceived to be destabilising from the point of view of a profession that seeks to reproduce the profession as *it is*.

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42 Gareth Jones (ed.), *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Law of England* (Macmillan, 1973) 22.

43 Mason (n. 7).

44 Pearce et al. (n. 37); see also Charles Sampford & David Wood, 'The Place of Legal Theory in the Law School' (1987) 11(2) *Bulletin of the Australian Society of Legal Philosophy* 98; Sampford and Wood (n. 37); Charles Sampford & David Wood, 'Legal Theory and Legal Education: The Next Step' (1989) 1(1) *Legal Education Review* 107, doi.org/10.53300/001c.5978; Charles Sampford, 'Rethinking the Core Curriculum' (1989) 12(1) *Adelaide Law Review* 38.

45 For example, Otto Kahn-Freund, 'Reflections on Legal Education' (1966) 29(2) *Modern Law Review* 121, doi.org/10.1111/j.1468-2230.1966.tb01109.x.

The poverty of legal education is a phenomenon of the Western legal world, both in common law and in civil law countries.[46] The same characteristics of conservatism and formalism are found everywhere so that lawyers are reproduced in the traditional mould. In Germany, the final oral examinations have been described as a 'conformity test' to see whether the candidate's thought processes fit the appropriate pattern of 'perceiving, thinking and judging'.[47] Duncan Kennedy, a Harvard critical legal scholar, shows how the process of acculturation is developed through every aspect of legal education to conduce to an overall homogeneous self-image of what it is to be a lawyer within a hierarchical system.[48]

The subordination of the scholarly to the more pedestrian facets of the doctrinal has necessitated sacrificing what should be law's preeminent role in university education:

> University legal education could so easily be the paradigm of university education. Law is at the intersection of the ideal and the real, of metaphysics and magic, of the actual and the possible, of ideas and power, of fact and value, of is and ought, of the past and the future, of the individual and the social, of economics and politics. With the power to communicate so much, we choose instead to have the students learn law as if it had the intellectual, spiritual and moral content of knitting-patterns.[49]

Given the striking degree of uniformity characteristic of legal education and the extraordinary degree of institutional deference towards the professional mainstream, it would be naive to think that either the substance or the style of pedagogy could be instantaneously revolutionised. *Stare decisis* is not just a hermeneutic principle. By association, it has become an implicit quality of law. Change within the framework of legality can therefore be only ad hoc and marginal. As Eleanor Fox put it when discussing the experiment at Queen's College in the City University of New York: '[O]ne of the predictable ironies of life is that tradition ousts

46 For example, Abel & Lewis (n. 40); John Henry Schlegel, 'Review: Langdell's Legacy or, The Case of the Empty Envelope' (1984) 36(6) *Stanford Law Review* 1517, doi.org/10.2307/1228676.

47 Erhard Blankenburg & Ulrike Schultz, 'German Advocates: A Highly Regulated Profession' in Richard L. Abel & Philip S.C. Lewis (eds), *Lawyers in Society: The Civil Law World* (University of California Press, 1988) 131.

48 Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (Pantheon, 1982). Cf. Richard L. Abel, *American Lawyers* (Oxford, 1989) 212 ff.

49 Philip Allott, 'Glum Law', *The Times Higher Education Supplement*, [London], 21 August 1987.

inspiration.'[50] Thus, a law school that developed a humane, interrelated curriculum was subjected to violent attack because the graduates did not know exactly what the bar examiners expected them to know; they knew much more.

However, as various illustrious legal educators have noted, learning the law as information is a waste of time,[51] an occupation for fools,[52] which can produce only 'plumbers' mates'.[53] Locating law within the dynamic landscape of the Western intellectual tradition necessitates cognisance of the historical forces and philosophical trends that have influenced it. Legal studies have benefited from the insights of the more recent disciplines of sociology, anthropology, political science and economics to enhance our understanding and to imagine what a utopian vision might look like—an ideal society in which justice, fairness and the nondiscrimination principle are normative. The study of law in an intellectual vacuum stifles the imaginative impulse.

Conclusion: Towards transdisciplinarity

Feminist scholars have sought to develop a transdisciplinary approach to the study of gender in society. Centuries of exclusion of women's experiences have rendered traditional disciplinary approaches inadequate. To overcome this history of exclusion and to develop new theoretical perspectives, women's studies has eschewed the favouring of one disciplinary approach over another. I would like to suggest, therefore, that the only way in which a truly integrated sociolegal approach towards the study of law and the legal order could develop would be by adopting this transcendent insight from feminist scholarship.

The Department of Legal Studies at La Trobe University has attempted to do this since its inception in 1972. That is, it rejected the methodology of legal doctrinalism in favour of a more expansive and creative critique of the legal order that was not contingent on a predetermined standpoint. However, legal studies subjects were included as part of a Bachelor of Arts program, not as part of a Bachelor of Laws. The greater challenge

50 Fox (n. 27).
51 Karl N. Llewellyn, *The Bramble Bush: On Our Law and its Study* (Oceana Publications, 1960) 93.
52 Kahn-Freund (n. 45) 133.
53 Twining (n. 2) 422.

is to develop a transdisciplinary approach to the study of law within the Bachelor of Laws program that is not distorted by doctrinalism and a naive belief in 'right' answers. Without a thoroughly integrated approach between law, history, philosophy and the social sciences, the historical experiences of failure in North America are likely to be repeated. Effort therefore needs to be expended on developing coherence and a clear sense of direction within law curricula: 'Heroic, but random efforts to integrate "law" and "the other social sciences" fail through lack of clarity about what is being integrated, and how, and for what purposes.'[54]

I recognise that it is difficult to argue against vocationalism in an age committed to efficiency, productivity and economic rationality. The Pearce Committee's report arose because of the attempt by the state to harness the higher education sector in the 'national interest'.[55] In addition, there is a demand for legal education places in Australia that exceeds that of other disciplines. The resourcing of legal education is assessed at the base rate, predicated on a questionable lecture model in which large groups of students passively imbibe predigested knowledge. Australian universities have responded with alacrity to meet the demand for law places, attracted by the prestige of a professional degree and its low cost to teach. With deference accorded the prescripts of the state, little thought has been directed to the question of the nature or quality of the new law programs. Experimentation in the pursuit of knowledge is not valued in the modern age: 'According to Lyotard's musings on post-modernity the social system can only tolerate experimentation to the extent that it enhances its performativity, that is, its efficiency, its ability to produce a result.'[56]

Scholarship that cannot be compressed within the contemporary value matrix is therefore likely to receive short shrift.

Nevertheless, La Trobe took a step towards the development of a genuine sociolegal approach to the study of law by locating the LLB within the School of Social Sciences. The conventional model, which locates law

54 Lasswell & McDougal (n. 28) 204.

55 Gill H. Boehringer, 'Resisting Pearce: The Significance of the Review of Macquarie Law School—The Role of Macquarie's Progressives' (1988–89) 5 *Australian Journal of Law and Society* 93; Ian Duncanson, 'Legal Education, Social Justice and the Study of Legality' (1990) 10(1) *University of Tasmania Law Review* 16.

56 Costas Douzinas, Shaun McVeigh & Ronnie Warrington, 'Postlegality: After Education in the Law' (1990) 1 *Law and Critique* 81, 95, doi.org/10.1007/bf02439607.

in a separate school or faculty, symbolically reinforces the idea of the autonomy of law, artificially cordoned off from any consideration of the social forces that inform it. This isolationist policy was an undeniable factor in the failure of sociolegal scholarship in the past.

The second important development at La Trobe was the preponderance of students who would receive joint degrees within the same school—that is, the School of Social Sciences. While joint degree programs are now the norm within Australian law schools, the law degree is not integrated with a degree in arts, economics or science, even if undertaken concurrently rather than sequentially. Any benefits accruing from the intended interdisciplinary approach are entirely accidental. The bifurcation underscores the secondary nature of 'non-law' knowledge and enhances the focus on doctrinalism. If history, philosophy and politics are studied elsewhere, it is averred, legal academics do not need to trouble their heads with the insights of these disciplines for law. The context of law is thereby quickly shed. However, there is also the very real problem of 'legal scholar as dilettante' to which I have adverted. At La Trobe, it was hoped to obviate this problem by organising teaching teams, as far as practicable, on a multidisciplinary basis.[57] It was envisaged that historians, philosophers, sociologists and economists would participate in the teaching of the traditional areas of knowledge required for admission to practice, in addition to teaching a range of options with creative and critical perspectives on law and the legal order within the Bachelor of Arts, the Bachelor of Legal Studies as well as the Bachelor of Laws programs.

Hence, the hope was that the social context would not be relegated to the periphery or rendered irrelevant and that a variety of disciplinary and philosophical standpoints would enrich the educational experience for law students in a trailblazing way within the contours of Australian legal education. From these new roots would spring changed meanings of legal knowledge. It was also hoped that bringing imaginative transdisciplinary critiques and theoretical insights to bear on legal practice would enable the new incarnation of Portia as enlightened legal practitioner, judge, academic, lawmaker, law reformer and citizen, to implement her vision of a more diverse and more caring jurisprudential community appropriate for the twenty-first century.

57 Cf. Peter d'Errico, Stephen Arons & Janet Rifkin, 'Humanistic Legal Studies at the University of Massachusetts at Amherst' (1976) 28(1) *Journal of Legal Education* 18.

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