Portia lost in the groves of academe wondering what to do about legal education

Margaret Thornton
La Trobe University

Introdiction: A university legal education

The university teaching of law is fraught with difficulties because of the need to satisfy simultaneously the immediate 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. On the other hand, law wants to be respected within the academy as a legitimate academic discipline; it does not wish to be regarded as merely preparing graduates for a trade (Derham 1978:14). Technical analysis, however artful, cannot be equated with rigorous scholarly inquiry, for it is likely to lack intellectual depth and to be contingent upon a predetermined standpoint. William Twining has captured the polarity most graphically in his inaugural lecture entitled "Pericles and the Plumber" (1967) in which he contrasts the visionary leader and law reformer, the product of 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 schizophrenia.[1]

However, when I allude to the contemporaneity of the problem, this is somewhat 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 c.1100. Bologna and the other great universities which subsequently taught law, such as Oxford and Cambridge, taught law as a liberal art (Wieruszowski 1966). 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 some comparable site of local practice, to learn the lawyerly art. In other words, potential tension was averted by the bifurcation of the scholarly and the skills dimensions. 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 would-be lawyers were expected to acquire their appropriate lawyering skills through apprenticeship, leaving them vulnerable to the vagaries of individual masters.

This paradigm of legal education was characteristic also of Australian legal education until relatively recently (Weisbrot 1990:121). 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 focusing on the "propriety of establishing professional courses in a university" (Martin 1986:127). Generally speaking, lectures were given in the evening by practitioners, which meant that a vocationally-oriented standpoint was favoured. It is only since World War II that we find the law schools staffed by full-time, professional academics, as a result of which there has emerged 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 pre-existing tension because deference to the legal profession is not just a political reality but 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 particular subjects or areas of knowledge which must be included within a law curriculum for the approval or accreditation of an LLB. In Victoria, the Council of Legal Education also reserves the right to specify the topics studied within the specified areas of knowledge. Of course, prior accreditation is not strictly essential and has no effect on the academic worth of an LLB degree. However, 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 JD has replaced the LLB) and admission, as graduates have to undertake State Bar examinations in order 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 would be perceived to be at a disadvantage in the job market. It nevertheless should be noted that even in the United States, the 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 likely to be considered the manner in which professional needs can best be served.

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 (Mason 1991; McGarvie 1991). The power and status of the legal profession and of law itself within the community nevertheless enables legal vocationalism to subtly shape the content of the law curriculum regardless as to whether this is formally required or not. It is in this way that the conflation between training and education has occurred.

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 general characteristics of the civilisation of which it is part (Gilmore 1963). The cloak of neutrality assumed by law operates to disguise its essentially ideological role in preserving social relations. In particular, 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 subjects or areas of knowledge specified by the admitting authorities are those which, by and large, privilege property and profits in accordance with the capitalist imperative: property and land law, contracts, torts, company law, equity, and so on. Family law, employment and trade union law, consumer law, welfare law, poverty law, discrimination and human rights law, the areas of practice which are associated with the less powerful sectors of society are unlikely to appear in the compulsory list. The Victorian Council of Legal Education recently opted for the inclusion of company law rather than family law in a review of its required areas of knowledge. Family law was rejected on the ground that the "building block" components of family law were contract, property and trusts (Council of Legal Education, Victoria 1990:12). The fact that families sustain our affective lives, the legal regulation of which is extremely problematic, is ignored because of law's discomfort with the caring dimension. The reduction of the site of affectivity, reproduction and nurturance to legal abstractions would seem to be a singularly unsatisfactory basis for the 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 and which are somewhat 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 has 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. This 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 is 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 (Yeatman 1990). Accordingly, the favoured ordering of subjects may leave little space for elective or "soft" subjects within the legal education curriculum. For example, admission to the Queensland Bar requires the completion of a massive 19 compulsory subjects, including the cognate subjects of commercial law, securities and taxation, as well as company law. There is space for only one elective. A very clear message as to what is important is emitted by the emphasis on those areas which sustain contemporary corporatism.

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 societal constellation of values will elevate them to the status of *de facto* compulsories. Those students who are desirous of engaging in legal practice believe that by doing as many commercially-oriented subjects as possible, they are making themselves more attractive within the job market.[2] Even if such subjects are not offered, the phenomenon of market-drift manifests itself by students and prospective employers putting pressure upon the university to offer 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 which 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 (Benn & Gaus 1983). It is accepted as a fundamental premise of legal education that law belongs to the public side of the dualism. The dichotomy entails an acceptance of the idea that most facets of private life are cordoned off so that 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, is accorded scant attention because it is largely perceived as a private sphere phenomenon which cannot easily be subsumed within one of the subject compartments. The existence of predetermined divisions which may have the imprimatur of the legislature endows the chosen subjects with a rationality which forecloses serious challenge. Similarly, any questioning of the existing form of law is also likely to be accorded short shrift. Hence, the sex specificity of the harm arising from rape 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 coincidence to find that the public/private dualism also coincides with maleness and femaleness. 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 do 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 towards 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 for the poor, for Aboriginal people and for differentiated others, but to the uncaring nature of adversarialism. A combative style of cross-examination designed to elicit "truth" as a predicate to securing "justice" is one which displays little respect for the individual witness. It is this uncaring approach which has been all too frequently emulated within the pedagogic methods of legal education (Wilkins 1987). Its aggressive style has been questioned by women students in particular, who presently constitute approximately 50% of all law students but who find both the style of pedagogy and the substantive sexual closures to be frustrating and alienating (for example, Morgan 1989; Worden 1985). There is a longing for a more personalised and relevant approach which takes cognisance of women's experiences.

Even more insidious than the separate spheres approach within the construction of legal knowledge is the fact that the legal standards which run through the common law are male standards (Naffine 1990). Thus, the "reasonable man", that pillar of the community, forever consigned to riding on the Clapham omnibus, represents not a neutral abstraction but an undeniably male 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 has been occluded by the unquestioned assumptions of neutrality and universality. Although there are pockets of feminist legal scholarship to be found within Australian

law schools and legal studies departments (Graycar and Morgan 1990; Grbich 1990), 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 translated into law because the one-dimensionality of liberal legalism cannot accommodate alterity (Thornton 1990). The point is clearly illustrated in the case of Aboriginality and the inability or unwillingness of the common law to recognise Aboriginal customary law and Aboriginal land claims over the last two centuries of white domination in Australia.[3]

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 university curricula 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 societal *status quo*.

At this point, I would like to interpolate a comment about the socio-economic 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 (Twining 1989; Weisbrot 1990:79).[4] This class background establishes an 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.[5] Furthermore, it is no surprise to find that as the state of the economy declines, there is a concomitant decline in interest in social justice and the more humanistic subjects on the part of law students whose future in the social hierarchy is no longer assured. Social justice concerns are likely to be conveniently dismissed as passe - mere aberrations of the 1970s. The contraction of the contemporary welfare state also serves to reify the significance of the traditional commercial and property values associated with law.

Amongst members of the public generally, there is an increasing cynicism as to law's ability to effect social change. Legal practice has come to be too closely associated with attempts to legitimate questionable business deals and with the generation of private moneymaking 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 socio-political 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 socio-legal 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 being brought to bear on the legal order. However, interdisciplinary or social science approaches to law are inchoate, even after 70 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 (Note 1982:1671). 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 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 (Stevens 1971:480).

In the 1920s, a faculty group at Columbia Law School set out to design a curriculum which integrated law and the social sciences in accordance with prevailing functionalist philosophy. Even though the issue was taken seriously with an outside chairperson being engaged in 1926 and two years expended on the process, the enterprise had virtually collapsed by 1930. Conflict emerged between faculty 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 as to Columbia's efficiency in producing practising lawyers (Stevens 1971:475). 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 (Kalman 1986:76). 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 which integrated law and the social sciences collapsed within a few years. 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* (Kalman 1986:121).

It would seem that the idea of the rule of law as the neutral repository of justice affords a source of comfort which 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 (compare Fox 1989). 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 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 MacDougal at Yale in the 1940s to train law students to be better policy makers. They built upon Legal Realism to make legal education more constructive through what they termed "policy science" (Lasswell & McDougal 1943; McDougal 1947). Lasswell and McDougal recognised that many law graduates do not become lawyers in private practice but high-level government policy makers. 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 (Kalman 1986:184).

Nevertheless, Legal Realism did have an impact on American 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 England or Australia, the work of the late Julius Stone, who 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 (Stone 1950, 1964, 1966). Generally speaking, however, interdisciplinarity and the development of socio-legal perspectives on law seem to have been located more within the realm of rhetoric than reality in Australia. Some of that 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 New South Wales, which has consistently espoused a critical and interdisciplinary approach to the study of law thereby setting it apart in the history of legal education in Australia.

However, the concept of interdisciplinarity is vague, be it at Macquarie or elsewhere. It has been sufficient that law be viewed through some disciplinary lens other than its own. 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 (compare Stevens 1971). 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* (Kerruish 1988:169).

Many members of staff at Macquarie have been strong proponents of a critical approach in respect of the incoherence and manipulability of legal doctrine, as well as of the traditional Anglo-Australian atheoretical legal pedagogy. Critical legal scholarship embraces a variety of philosophical and theoretical traditions, including feminist scholarship (Menkel-Meadow 1988). The approach averredly transcends that of a simplistic interdisciplinary eclecticism in favour of a new legal theory which some see in civic republicanism (for example, Fraser 1990). Other Macquarie academics have been influenced by the American 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 does not set out simply to reform the law within its existing framework but to critique every facet of the legal order, including its ideologies, underlying philosophies and presuppositions. Ultimately, 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 deja vu (David Fraser 1988-89). In particular, they have been attacked for engendering cynicism and nihilism by devoting inadequate attention to the actual processes of social and legal change (Carrington 1984; Charlesworth 1988-89; Martin *et al* 1985). It would appear, however, that it is the deconstructive critique which compellingly demonstrates that there are no right answers which is so threatening to the legal establishment.

The comparable experience of criticism to which Macquarie has been subjected,[6] 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. James Crawford, Dean of Sydney University Law School, at a recent conference on legal education described legal education in Australia as being "universally of the same shade of grey" (Crawford 1991; compare Mason 1991).[7] That is, the similarity of requirements by State authorities together with a common perception of how the "compleat lawyer" should be produced has contributed to a depressing uniformity which has stifled imaginative and creative approaches and indeed all approaches which 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 the law schools produce "the compleat lawyer", for who or what is this archetypical lawyer? The subjects and areas of knowledge specified for admission to practice have barely changed throughout the century, although the nature of practice has altered significantly. So concerned has the Law Society of New South Wales become regarding the disjuncture between undergraduate education and practice that it has instituted a review of legal education (Law Society of New South Wales 1991). The constant model of legal education is predicated upon 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 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 which is a characteristic of the contemporary Australian mega-firm, for example, located in capital cities, where the preponderance of law graduates wish to reside. The degree of professional specialisation[8] also reflects the rapidity of substantive legal change which is currently effected through legislation. Thus, an approach which concentrates upon 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 there are some who never wish to have anything to do with law again after their arid experience of legal education. For those who do, the public service, academia, politics, accountancy, legal aid, business and corporate in-house 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" (Arthurs *et al* 1988:149). The question then arises as to the appropriateness of the current LLB to satisfy heterogeneous needs, a degree which is increasingly being regarded as a generalist degree in the same way as a liberal arts degree (Pearce 1991). Somewhat ironically, this would seem to represent a reversion to the earlier history of the teaching of law within universities when there was no attempt to accommodate the perceived needs of practice.

The noted English jurist, Sir William Blackstone, upon 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* [sic] *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 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* (Jones 1973:22).

Standing back from the profession is not synonymous with turning ones back on it. On the contrary, a space between the academy and the profession must ultimately 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 which 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" (Mason 1991). The legal profession's concern for skills - technical excellence, advocacy, drafting, court procedures, negotiation and so on - 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 (Pearce *et al* 1987; see also Sampford and Wood 1987, 1988, 1989, Sampford 1989).

The analogy between law and theology has been noted before (for example, Kahn-Freund, 1966). 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 Mediaeval Christian universe. It would seem that the questioning process, essential to academic life, is absent in legal education for it is perceived to be destabilising from the point of view of a profession which seeks to reproduce the profession as it is.

The poverty of legal education is a phenomenon of the Western legal world both in common law and in civil law countries (see, for example, Abel and Lewis 1988; Schlegel 1984). 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" (Blankenburg & Schultz 1988:131). Duncan Kennedy, a Harvard Critical Legal Scholar, shows how the process of acculturation is developed through every aspect of legal education in order to conduce to an overall homogeneous self-image of what it is to be a lawyer within an hierarchical system (Kennedy 1982; compare Abel 1989:212f.).

The subordination of the scholarly to the more pedestrian facets of the doctrinal has necessitated sacrificing what should be law's pre-eminent 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* (Allott 1987).

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 style of pedagogy could be instantaneously revolutionised. *Stare decisis* is not just an 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 puts it when discussing the experiment at Queen's College in the City University of New York: "one of the predictable ironies of life is that tradition ousts inspiration." (Fox 1989). Thus, a law school which 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 many illustrious legal educators have noted, learning the law as information is a waste of time (Llewellyn 1960:93), an occupation for fools (Kahn Freund 1966:133) which can produce only "plumbers' mates" (Twining 1967:422). Locating law within the dynamic landscape of the Western intellectual tradition necessitates cognisance being taken of the historical forces and philosophical trends which have influenced it. Legal studies have benefited from the insights of the more recent disciplines of sociology, anthropology, political science and economics being brought to bear upon law to enhance our understanding and to imagine what a utopian vision might look like, an ideal society in which justice, fairness and the non-discrimination principle were 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 towards the study of women 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 have eschewed the favouring of one particular disciplinary approach over another. I would like to suggest, therefore, that the only way in which a truly integrated socio-legal approach towards the study of law and the legal order could be developed would be by adopting this transcendent insight from feminist scholarship.

To some extent, the Department of Legal Studies at La Trobe, has attempted to do this since its inception in 1972. That is, it has generally rejected the methodology of legal doctrinalism in favour of a more expansive and creative critique of the legal order which has not been contingent upon a predetermined standpoint. However, Legal Studies subjects have been undertaken as part of a Bachelor of Arts programme, not as part of a Bachelor of Laws programme. The greater challenge is to develop a transdisciplinary approach towards the study of law within the new Bachelor of Laws programme which 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 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 (Lasswell & McDougal 1943:204).

I recognise that it is difficult to argue against vocationalism in an age committed to efficiency, productivity and economic rationality. The Pearce Committee Report, after all, arose as a result of the attempt by the state to harness the higher education sector in the "national interest" (Boehringer 1988-89; Duncanson 1990). In addition, there is currently a demand for legal education places in Australia which exceeds that of other disciplines. The resourcing of legal education is assessed at the base rate, predicated on an inappropriate 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 relatively low cost. With deference being accorded the prescripts of the state, little thought has been directed to the question of the nature or quality of the new law programmes. It would seem that 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* (Douzinas *et al* 1990:95).

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

Nevertheless, a significant innovation has occurred at La Trobe. A step towards the development of a genuine socio-legal approach towards the study of law has been taken by locating the LLB within the Department of Legal Studies within the School of Social Sciences. The conventional model, which locates law 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 which inform it. This isolationist policy is an undeniable factor in the failure of socio-legal scholarship in the past.

The second important development at La Trobe is that it is anticipated that the preponderance of students will receive joint degrees within the same School, that is, the School of Social Sciences. While joint degree programmes are now the norm within Australian Law Schools, the law degree is generally not integrated with the Bachelor's degree undertaken 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 have been studied elsewhere, it is averred, legal academics do not need to trouble their heads about 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 is hoped to obviate this problem by organising teaching teams, as far as practicable, on a multi-disciplinary basis (compare d'Errico *et al* 1976). Thus, 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 new Bachelor of Legal Studies as well as the Bachelor of Laws programmes.

It is thereby hoped that the social context will not be relegated to the periphery or rendered irrelevant and that a variety of disciplinary and philosophical standpoints will enrich the educational experience for law students in a trailblazing way within the contours of Australian legal education. From these new roots must spring changed meanings of legal knowledge. It is also hoped that the bringing of imaginative transdisciplinary critiques and theoretical insights to bear on legal practice will enable 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 year 2000.

References

Abel, R.L. (1989), *American Lawyers*, New York, Oxford.

Abel, R.L. and Lewis, P.S.C. (eds) (1988), *Lawyers in Society : The Common Law World*, Vol I, Berkeley, University of California.

Abel, R.L. and Lewis, P.S.C. (eds) (1988), *Lawyers in Society : The Civil Law World*, Vol II, Berkeley, University of California.

Allott, P. 'Glum Law', *The Times Higher Education Supplement*, 21 August 1987.

Arthurs, H.W., Weisman, R. and Zemans, F.H. (1988), 'Canadian Lawyers : A Peculiar Professionalism', in R.L. Abel and P.S.C. Lewis (eds) *Lawyers in Society : The Common Law World*, Vol I, Berkeley, University of California.

Benn, S.I. and Gaus, G.F. (eds) (1983), *Public and Private in Social Life*, Canberra, Croom Helm.

Blankenburg, E. and Schultz, U. (1988), 'German Advocates : A Highly Regulated Profession', in R.L. Abel and P.S.C. Lewis (eds) *Lawyers in Society: The Civil Law World*, Vol II, Berkeley, University of California, pp 54-123.

Boehringer, Gill (1988-89), 'Resisting Pearce: The significance of the Review of Macquarie Law School - The Role of Macquarie's Progressives', *Australian Journal of Law & Society*, 5, pp 93-100.

Carrington, P. D. (1984), 'Of Law and the River', *Journal of Legal Education*, 34, pp 222-228.

Charlesworth, Hilary (1988-89), 'Critical Legal Education', *Australian Journal of Law & Society*, 5, pp 27-34.

Chesterman, Michael (1991), 'Specialisation - The Victorian Experience', paper presented at the Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Chesterman, Michael and Weisbrot, David (1987), 'Legal Scholarship in Australia', *Modern Law Review*, 50, pp 709-724.

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

Crawford, James (1991) 'The Future of the Public Law Schools', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Derham, D.P. (1978) 'An Overview of Legal Education in Australia', in R. Balmford (ed) *Legal Education in Australia*, Proceedings of National Conference, Sydney, August 15-20 1976. Melbourne, Australian Law Council Foundation, pp 7-21.

d'Errico, P., Arons, S. and Rifkin, J. (1976), 'Humanistic Legal Studies at the University of Massachusetts at Amherst', *Journal of Legal Education*, 28, pp 18-39.

De Sousa Santos, B. (1987), 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', *Journal of Law and Society*, 14, pp 279-302.

Dhavan, R., Kibble, N. and Twining, W. (eds) (1989), *Access to Legal Education and the Profession*, London & Edinburgh, Butterworths.

Douzinas, C., McVeigh, S. and Warrington, R. (1990), 'Postlegality: After Education in the Law', *Law and Critique*, 1, pp 81-98.

Duncanson, Ian (1990), 'Legal Education, Social Justice and the Study of Legality', *University of Tasmania Law Review*, 10, pp 16-39.

Fox, E. M. (1989), 'The Good Law School, the Good Curriculum, and the Mind and the Heart', *Journal of Legal Education*, 39, pp 473.

Fraser, Andrew (1990), *The Spirit of the Laws*, Toronto, University of Toronto Press.

Fraser, David (1988-89), 'What a Long, Strange Trip it's been: Deconstructing Law from Legal Realism to Critical Legal Studies', *Australian Journal of Law & Society*, 5, pp 35-43.

Gilmore, M.P. (1963), *Humanists and Jurists : Six Studies in the Renaissance*, Cambridge, Belknap.

Goldring, John (1987), 'Babies and Bathwater: Tradition or Progress in Legal Scholarship and Legal Education', *University of Western Australia Law Review*, 17, pp 216-256.

Graycar, Regina and Morgan, Jenny (1990), *The Hidden Gender of Law*, Sydney, Federation Press.

Grbich, Judith (1990), 'Feminist Jurisprudence as Women's Studies in Law: Australian Dialogues', in A.J. Arnaud and E. Kingdom (eds) *Women's Rights and the Rights of Man*, Aberdeen, Aberdeen University Press.

Jones G. H. (ed) (1973). *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Law of England*, London, Macmillan.

Kahn-Freund, Otto (1966), 'Reflections on Legal Education', *Modern Law Review* 29, pp 121-136.

Kalman, Laura (1986), *Legal Realism at Yale 1927-1960*, Chapel Hill, University of North Carolina.

Kennedy, Duncan (1982), 'Legal Education as Training for Hierarchy', in D. Kairys (ed) *The Politics of Law: A Progressive Critique*, New York, Pantheon, pp 40-61.

Kerruish, Valerie (1988), 'Barefoot in the Kitchen: A Response to Jack Goldring', *University of Western Australia Law Review*, 18, pp 167-172.

Lasswell, Harold and McDougal, Myres (1943), 'Legal Education and Public Policy: Professional Training in the Public Interest', *Yale Law Journal*, 52, pp 203-295.

Law Institute of Victoria (1990), *Career Patterns of Law Graduates*, Melbourne, Law Institute of Victoria.

Law Society of New South Wales (1991), *Issues Paper: Undergraduate Legal Education and Practical Legal Training*, Sydney, Law Society of New South Wales.

Llewellyn, Karl (1960), *The Bramble Bush: On Our Law and its Study*, Dobbs Ferry, Oceana Publications.

Martin, Linda (1986), 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales', *University of New South Wales Law Journal*, 9, pp 111-143.

Martin, P. W. *et al.* (1985), '"Of Law and the River", and of Nihilism and Academic Freedom', *Journal of Legal Education*, 35, pp 1-26.

Mason, The Hon. Sir Anthony, Chief Justice of Australia (1991), "Inauguration of the Faculty of Law, University of Wollongong", *Australian Universities' Review*, No 2, 1991, pp 24-25.

McDougal, Myres (1947), 'The Law School of the Future: From Legal Realism to Policy Science in the World Community', *Yale Law Journal*, 56,

pp 1345-1355.

McGarvie, The Hon. Mr Justice Richard (1991), 'The Function of a Degree: Core Subjects', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Menkel-Meadow, Carrie (1988), 'Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School"', *Journal of Legal Education*, 38, pp 61-85.

Morgan, Jenny (1989), 'The Socratic Method: Silencing Cooperation', *Legal Education Review*, 1, pp 151-164.

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

Nash, Gerald (1991), 'Should Law Schools produce Lawyers?', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Note (1982), "Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship', *Harvard Law Review*, 95, pp 1669-1690.

Pearce, Denis (1991), 'Admission to Law School', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Pearce, Denis, Campbell, Enid and Harding, Don (1987), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Canberra, Australian Government Publishing Service.

Peden, John (1972), *Professional Legal Education and Skills Training for Australian Lawyers*, Sydney, Law Book.

Reich, C.A. (1964), 'Toward the Humanistic Study of Law', *Yale Law Journal*, 74, pp 1402-1408.

Sadurski, Wojciech (1987), 'Research in Australian Law Schools', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 144-153.

Sampford, Charles (1989), 'Rethinking the Core Curriculum', *Adelaide Law Review*, 12, pp 38-62.

Sampford, Charles and Wood, David (1987), 'The Place of Legal Theory in the Law School', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 98-119.

Sampford, Charles and Wood, David (1988),'"Theroetical Dimensions" of Legal Education - A response to the Pearce Report', *Australian Law Journal*, 62, pp 32-52.

Sampford, Charles and Wood, David (1989), 'Legal Theory and Legal Education - The Next Step', *Legal Education Review*, 1, pp 107-134.

Schlegel, John (1984), 'Langdell's Legacy Or, The Case of the Empty Envelope', *Stanford Law Review*, 36, pp 1517-1533.

Stevens, R. (1971), 'Two Cheers for 1870: The American Law School', in D. Fleming and B. Bailyn (eds) *Law in American History*, Boston, Little Brown & Co., pp 403-548.

Stone, Julius (1950), *The Province and Function of Law: Law as Logic, Justice and Social Control, a Study in Jurisprudence*, Sydney, Maitland.

Stone, Julius (1964), *Legal System and Lawyers' Reasonings*, Sydney, Maitland.

Stone, Julius (1966), *Social Dimensions of Law and Justice*, Sydney, Maitland.

Tay, Alice (1987), 'Aimless Perspectives', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 154-158.

Thornton, Margaret (1990), *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Melbourne, Oxford University Press.

Twining, William (1989), 'Access to Legal Education and the Legal Profession: A Commonwealth Perspective', in R. Dharan, N. Kibble & W. Twining (eds) *Access to Legal Education and the Profession*, London & Edinburgh, Butterworths, pp 1-38.

Twining, William (1967), 'Pericles and the Plumber', *Law Quarterly Review*, 83, pp 396-426.

Weisbrot, David (1990), *Australian Lawyers*, Melbourne, Longman Cheshire.

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

Wilkins, R.K. (1987), '"The Person You're Supposed to Become": The Politics of the Law School Experience', *University of Toronto Faculty of Law Review*, 45, pp 98-152.

Worden, K.C. (1985), 'Overshooting the Target: A Feminist Deconstruction of Legal Education', *American University Law Review*, 34, pp 1141-1156.

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

Ziegert, Klaus (1987), 'What Law Professors know and what they think they know about the Performance of Law Schools', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 127-143.

Footnotes

1. The tensions arising from an attempt to strike a balance between the theoretical and the practical are very apparent in an article by Professor John Goldring (1987). For a critique, see Kerruish (1988).

2. The desire is rational as the evidence indicates that lawyers spend most time in business law, property law and civil litigation (see, for example, Law Institute of Victoria 1990).

3. *Milirrpum v Nabalco Pty Ltd & The Commonwealth of Australia* (1971) 17 FLR 262.

4. This scenario is replicated all over the world (see, for example, Dhavan *et al* 1989).

5. The Law Society of New South Wales *Issues Paper* has adverted to the way in which present selection criteria for 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 1991:5). The concern of the Law Society is directed towards the expected lack of provision of services for suburban and country clients as students of privileged status tend to favour highly paid positions in city commercial law firms. La Trobe University proposes to break the nexus between law school admission and the extremely high Higher School Certificate aggregate for law by not admitting students into the LLB until after at least two years of university study have been completed. It is hoped that this admissions policy will contribute to greater socio-economic diversity amongst law graduates, although it has been suggested that no change in admission based on previous academic performance is likely to have a significant impact on the socio-economic group who study law (Pearce 1991).

6. The attack culminated in a recommendation by the Pearce Committee that the School either be phased out or reconstituted (Pearce *et al* 1987. For critiques of the Committee's Report, see Sadurski, Tay, Ziegert 1987, Sampford 1988).

7. Sponsored by the Law Council of Australia and held at Bond University, Queensland, 13 to 16 February, 1991. The theme of this conference was "the compleat lawyer".

8. Solicitors may now be accredited as specialists in particular fields of practice in some jurisdictions, an accreditation which is based largely on practical experience (see, for example, Dunn 1991, Chesterman 1991).

* Inaugural lecture presented at La Trobe University, Melbourne on 3 June 1991. It appears in (1991) 9(2) Law in Context. I would like to record my thanks to Jean Crowther for typing the manuscript.

Academic freedom in South Africa*

Seumas Miller
Rhodes University, South Africa

Academic freedom is a matter of great controversy in South African universities. There are a number of very different views of academic freedom and they correspond to competing conceptions of the nature and function of the university. (The following renderings of these conceptions are necessarily crude and somewhat unfair, but they serve my purpose here. It also needs to be noted that in what follows I am concerned only with universities that are state funded - as all South African universities are).

Some extol academic freedom as a fundamental right in the service of the disinterested pursuit of knowledge, and a right to be defended against interference from the state and other movements or organisations outside the university. This view often goes with, what is sometimes called, the Ivory Tower model of the university. On this model the pursuit of knowledge is an intrinsically valuable activity which ought to be undertaken for its own sake and quite independently of the day to day concerns of the outside society. There are, however, held to be (often unforeseen) spin-offs from this activity which do in fact benefit the outside society.

On a second view academic freedom is only a privilege extended in order that knowledge be acquired for the good of the community, and a privilege behind which elitist educational institutions have in fact in South Africa hid their fundamental activity of serving the political and economic interests of the white elite. This view often goes hand in hand with, what might be called, the People's University conception. On this account universities must be democratised and made 'relevant'. Very crudely, the idea here seems to be to wrest control of the university from the forces of reaction (typically administrators and academics) and place it in the hands of the progressive forces (mainly students and workers) so as to make a university education available to the broad mass of the people, and to ensure that research programmes are pursued which benefit this broad mass.

Yet a third position views academic freedom as a sometimes useful, but often distracting, fetish that academics have as they go about what it is held ought to be their main business, namely the training of students to service the economy. This view of academic freedom accords well with, what might be called, the Supermarket model of the university. According to this conception universities are in the final analysis shops or factories in which what is really at issue is the buying, selling and producing of commodities; in this case education. A good university is one in which there is a supply of courses for which students and employers have a demand. In this way employers have a supply of skilled labour and students have a (remunerative) career path.

Now my concern in this paper is not specifically with the question of the nature and proper function of the university, but rather with academic freedom, and more specifically academic freedom in South Africa. However this latter question cannot be answered completely independently of the former. Accordingly, I need to make clear, albeit in suitably general terms, which conception of the university I favour, and which, therefore, I will take as given for the purposes of my discussion of academic freedom.

I suggest that each of these three models is seriously deficient.

The Ivory Tower model fails to give due weight to the fundamental needs of the society in terms of which its existence must ultimately be justified. And this failure is especially obvious in a country as unjust and as impoverished as South Africa.

The People's University model, by contrast, fails to acknowledge the fact that universities are necessarily elitist institutions, both in respect of their student intake, and in respect of the relationship between staff and students. It is only possible for a minority to be provided with a university education; and this is especially so in a relatively poor country such as South Africa. Moreover the relationship between staff and students is necessarily undemocratic; it is that of master to apprentice.

Finally, the Supermarket model, in construing knowledge and learning as commodities, misunderstands their nature and role insociety. Universities are, or ought to be, centres of rational inquiry and of knowledge acquisition and dissemination, and as such their focus is necessarily wider than the purely economic, and their role not merely instrumental, but also critical and transformative of society. This model also ignores the fact that in South Africa - due to prior economic and educational imbalances - the operation of market forces alone will not lead to the satisfaction of the needs of the whole society, and especially the needs of its huge impoverished sector.

I will therefore take it as given in what follows that none of these models is adequate. At the same time I will take it as given that each of them highlights something of central importance.

The Ivory Tower model emphasises the necessarily elitist nature of universities, and their specialist function as centres of knowledge acquisition and of rational inquiry. The People's University conception justifiably draws attention to the role that universities in South Africa have in fact had in serving the interests of white power and privilege, and correctly redefines that role as one of serving the community as a whole, and more specifically, in South Africa at this time, of contributing to the removal of material and social deprivation, and political and economic inequality. Moreover it is a model which by building in democratic power sharing at least tries (albeit unsuccessfully) to deal with the fact that in any society, and especially in highly inegalitarian societies such as South Africa, scarce goods - including university education and intellectual skills and advanced knowledge - are not given away, they are acquired by those powerful enough either to take them or to insist on a share of them. The Supermarket model rightly stresses the importance of the university in contributing, in particular, to economic development.

I will take as my point of entry into the specific issue of academic freedom in South Africa, the meaning or definition that has in fact been given to that term in discussions of academic freedom in South Africa. In much of the discussion academic freedom has been implicitly taken to mean freedom of expression - in the sense of freedom to communicate and be communicated to - and relatedly, intellectual freedom - the freedom to develop and express ideas - for academics and students. On the other hand the explicit definitions in currency are in terms of the freedom of academics to determine what is taught and researched, and to determine who is taught by whom, and who is to receive a degree, and who to fail. If this is what is meant then academic freedom is in large part an aspect of institutional autonomy.

In so far as a person is free to communicate with others they have freedom of expression, whether they are freely communicating in the institutional setting of a university or not. To insist on such freedom of expression within the university is to insist on (a constituent part of) academic freedom. However, freedom to determine who is to be taught and by whom, and who is to be awarded a degree, is not freedom of expression. Nor is freedom to

* Thanks to Ian Macdondald for comments on earlier versions of this paper.