

LAW REFORM AND LEGAL EDUCATION: UNITING SEPARATE WORLDS*

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I. INTRODUCTION

I begin with a confronting proposition. Law reform and legal education have traditionally been separate worlds, rarely in danger of collision or even constructive combination. This separation is not good for either law reform or legal education, or for the legal profession, the discipline of law, or the advancement of society. These two separate worlds can and should be brought together, so that legal education has a conscious and deliberate law reform ethos and focus.

This proposition is either boringly “old hat” or breathtakingly original, either alternative being equally chastening to the extent that it flags, in the early twenty-first century, aspirations unachieved and work undone. It is contentious and needs to be defended, especially against a diametrically-opposed proposition that the mission of a modern university is to discover and transmit, neutrally and dispassionately, objective and value-free knowledge, and not to promote, directly or indirectly, a particular point of view, program, or ideology. Moreover, in the field of education for professional legal practice, a corollary of this counter-proposition might be that lawyers need to know what the law is, not speculate about what it should or might be.

I leave for the moment this titanic clash of competing world views, so stark in contrast and so insistent upon debate and resolution. I return to the issue after a brief and more measured journey through the history of legal education in Australia,¹ the persistent tensions within the idea of legal education, and the

* This article is a slightly longer, more extensively footnoted, and law review-edited version of Michael Coper, *Law Reform and Legal Education: Uniting Separate Worlds*, in THE PROMISE OF LAW REFORM (Brian Opeskin & David Weisbrot eds., Federation Press 2005), a comprehensive collection of essays about law reform to mark the thirtieth anniversary of the Australian Law Reform Commission. I acknowledge the valuable research assistance I received for the preparation of this essay from two outstanding young law graduates, whose continuing aspirations for law reform and social justice would, if typical of law graduates generally, make the essay unnecessary: Rebecca Jenkin (ANU) and Sarah Knuckey (UWA). I should also acknowledge the assistance, especially in relation to the American materials, of the legendary Professor Roy Mersky, long-time Director of Research at the School of Law of the University of Texas at Austin.

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1. See generally DENNIS PEARCE, ENID CAMPBELL & DON HARDING, AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION (1987) [hereinafter PEARCE REPORT]; NEW FOUNDATIONS IN LEGAL EDUCATION (Carol-Anne Bois

diversity of (often surprisingly inchoate) views about the goals of legal education and how those goals might best be achieved.

A. *The Langdell Legacy and Its Limits*

Unsurprisingly, legal education in nineteenth century Australia followed the early British and American models of training for professional practice by apprenticeship. The quest of the European mind for philosophic theory and abstract generalisation had long found expression in university-based legal education. Even in the UK, the universities of Oxford and Cambridge embraced the study and systemisation of aspects of the law, but training by doing—learning on the job—resonated with the pragmatism and individualised concreteness of the growth and development of the common law.

As is well known, American legal education was revolutionised in 1870 by Professor Langdell's introduction of the casebook method to Harvard Law School. Before this, American law schools either explicated the law through treatises, or treated the study of law merely as a branch of the liberal arts. In either case, they had functioned as "weak supplements to apprenticeship training."² The casebook method, in which general principles are teased out of appellate judgments through Socratic dialogue, responded in a dynamic way to the rapid, post industrial revolution change of late nineteenth century America, and supplanted the static study of law based on the systematic exposition of principle laid out in the treatises. With this new intellectual engagement came academic respectability and apprenticeship training gradually fell by the wayside.

Resilience of the casebook method in the US, and its partial adoption in many Australian law schools, is a testament to the enduring merit of thinking about law as a dynamic process, a system in a state of constant change. In terms of pedagogy, the method favours active learning over the mind-numbing passivity of the hierarchical transmission of knowledge. Yet criticisms of the casebook method have been as powerful as its benefits have been manifest. American legal realists of the 1920s and beyond exposed its inherent narrowness, as it endeavoured to carve out doctrine from within itself, cut off from legislative change and wider social, economic, and political forces.³ Much later, critical

ed., 1998); AUSTRALIAN LAW REFORM COMMISSION, *MANAGING JUSTICE: A REVIEW OF THE FEDERAL CIVIL JUSTICE SYSTEM*, REPORT NO. 89, 113-159 (2000) [hereinafter ALRC]; Vivienne Brand, *Decline in the Reform of Law Teaching?: The Impact of Policy Reforms in Tertiary Education*, 10 *LEGAL EDUC. REV.* 109 (1999); Nickolas James, *A Brief History of Critique in Australian Legal Education*, 24 *MELB. U. L. REV.* 965 (2000); Mary Keyes & Richard Johnstone, *Changing Legal Education: Rhetoric, Reality, and Prospects for the Future*, 26 *SYDNEY L. REV.* 537 (2004); Linda Martin, *From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales*, 9 *U. NEW S. WALES L.J.* 111 (1986); Christine Parker & Andrew Goldsmith, *'Failed Sociologists' in the Marketplace: Law Schools in Australia*, 25 *J.L. & SOC'Y* 33 (1998). For an excellent selection of readings in relation to legal education, see generally *LEGAL EDUCATION* (Martin Lyon Levine ed., 1993).

2. George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 *J. LEGAL EDUC.* 162, 163 (1974).

3. See generally the elegant essay by Jerold S. Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 *N.Y.U. L. REV.* 457 (1978); William Twining, *Pericles and the Plumber*, 83

scholars observed its tendency to support the status quo and to transform the worthy acquisition of skills such as legal reasoning—thinking like a lawyer—into unconcern with the social purposes of law.⁴ Feminist scholars in particular noted the potential and actual perversion of Socratic dialogue from student-centred democratic participation to an authoritarian or patronising power imbalance.⁵ Clinicians observed the remoteness of law in the books, however taught, from law in action, and urged the return to practical, hands-on experience.⁶ These critics, somewhat ironically, courted the prospect of returning to a kind of training by apprenticeship at the danger of losing sight of theory.

The enduring elements of the American debate, telescoped above into a single paragraph, transcend their American context, but did not enter the Australian consciousness until law became an accepted subject for serious intellectual pursuit and legal education became an accepted subject for serious debate.⁷ The acceptability of law as an intellectual discipline did not significantly occur until the rapid growth of Australian law schools in the second half of the twentieth century. As in the UK, apprenticeship training persisted, even as universities established schools or faculties for the study of law. Law schools themselves, at least until the 1960s, followed the British tradition of exposition by treatise, text, and lecture.⁸

LAW Q. REV. 396 (1967). For a good introduction to American legal realism, see Tony Blackshield, *Realism*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 582 (Tony Blackshield, Michael Coper & George Williams eds., 2001).

4. See, e.g., Hilary Charlesworth, *New Directions in Legal Theory: Critical Legal Studies*, 63 LAW INST. J. 248, 249 (1989); Karl E. Klare, *The Law School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336, 338 (1982).

5. See Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 156-57 (1988). See also REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 25-26 (1990); Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 AUSTL. J.L. & SOC'Y 30, 46 (1986).

6. Jerome Frank, *Why Not a Clinical Law School?*, 81 U. PA. L. REV. 907, 914-23 (1933); Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 675-76 (1935). For the history of clinical legal education in the United States, see generally Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millenium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000); Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509 (2003); Grossman, *supra* note 2; Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929 (2002). See also *infra* notes 19, 20, and 35.

7. On the tendency of many legal educators to be anti-intellectual about the study of their own calling, see Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 875 (1985).

8. On legal education in the United Kingdom, see generally the many writings of William Twining, including BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL (1994); WHAT ARE LAW SCHOOLS FOR? (Peter Birks ed., 1996); *What Are Law Schools for?*, in LAW IN CONTEXT: ENLARGING A DISCIPLINE 292, 292-311 (1997); *Thinking about Law Schools: Rutland Revisited*, 25 J.L. & SOC'Y 1 (1998); and Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC), First Report on Legal Education and Training (1996).

B. Emergence in Australia of Law as an Intellectual Discipline

The growth in Australian law schools has come to be characterised as having occurred in three waves,⁹ though there is disagreement about the precise point at which the first and second waves receded and the second and third waves advanced. In any event, the first wave, which followed the establishment of the University of Melbourne Law School in 1857, reflected a very stable pattern of six law schools, one in each State capital. The addition in 1960 of a seventh law school in the national capital Canberra, at the Australian National University, did nothing to disturb this pattern. During the second wave, Melbourne and Sydney were progressively opened up to competition in the 1960s and 1970s with the opening of law schools at Monash University, the University of New South Wales (UNSW), Macquarie University, and the University of Technology Sydney (UTS). By the end of the 1970s, with a second law school in Queensland (Queensland University of Technology (QUT), then Queensland Institute of Technology (QIT)), the number of Australian law schools had doubled from six to twelve.

This was nothing compared with the third wave, a tidal wave of massive proportions, as fourteen more law schools were swept in during a five-year period from 1989 to 1994. With the addition of three more in the last decade, there are currently twenty-nine accredited law schools in Australia: more than four times the first wave; more than double the total of the first two waves; and, startlingly, on a per capita basis, around two and a half times the number of accredited law schools in the US.¹⁰

The second and third waves of Australian law schools transformed the dominant pattern of legal education, as it had existed in Australia for a century, reflecting to an extent the degree of broader social change from the 1960s onward. Law teaching traditionally focused on professional and vocational training and was largely undertaken by busy practitioners, rushing in to give lectures before or after court or their day at the office. Today, part-time teaching by practising lawyers still plays an important role in many law schools—partly by choice, as a deliberate strategy for fostering good relations and exploiting synergies between academia and the profession; and partly by necessity, as law school budgets struggle to accommodate sufficient full-time teachers. Nonetheless, from around fifteen full-time teachers Australia-wide in the immediate post World War II period, there is now a full-time equivalent of around 1,000. The rapid creation of this critical mass, coupled in recent times with strong financial incentives for engaging in serious research, has seen a proliferation of new law journals and a vast increase in the volume of scholarly writing.

9. See, e.g., Ralph Simmonds, *Growth, Diversity, and Accountability*, in *NEW FOUNDATIONS IN LEGAL EDUCATION*, *supra* note 1, at 55, 55.

10. I speculate on the many reasons for this growth in Michael Coper, *Legal Education and Training: Meeting the Challenges of the 21st Century*, a paper presented at the Australia-India Legal Dialogues, Delhi and Mumbai (Mar. 2004) (on file with the author). See also Simmonds, *supra* note 9, at 55.

This in turn has brought into much sharper focus an alternative model of legal education to the predominant model of professional and vocational training: the idea of law as an intellectual discipline, worthy of academic study in its own right. The seeds had always been there, not just in Europe and Oxford and Cambridge and, perhaps to a lesser extent because of their strong professional orientation, some of the leading American law schools, but also in Australia, in the reflective writings of leading practitioners and judges and the handful of full-time academics.¹¹ The establishment of a class of full-time law teachers and scholars, seeking and receiving nourishment from both their teaching and their scholarly reflection, hastened the integration of these twin spheres of academe and challenged the exclusivity of the model of university-based legal education as training only for professional practice.

Even more significant is the sheer growth in student numbers, many of whom have little or no desire to engage in mainstream legal practice and many of whom could not be accommodated even if they did.¹² These students now come to law as an intellectual discipline rather than as vocational training, or are seeking the broad generic skills that a good legal education has such strong potential to impart and that are widely deployable across a range of occupations.¹³

C. *The Unfulfilled Promise of Law as an Intellectual Discipline*

The emergence of the study of law as an intellectual discipline in its own right has led to continuing tensions with the idea of legal education as training for professional practice.¹⁴ Yet, in my view, the two conceptions are profoundly consistent. The best and most effective lawyers, in any form of practice or for that matter on the bench, are those with a deep understanding of the law and the legal system. A deep understanding embraces not just the rules, but their context, their dynamics, their role in society, and their limits; an understanding, in particular, of where the law has come from, as well as an intuition about where it might go. In an ideal world, the budding lawyer at law school would put the law under the most intense microscope, and would thereby acquire a context in which the knowledge and skill required for professional practice would flower into full

11. A handful perhaps, but including such giants as Zelman Cowen, Geoffrey Sawer, and Julius Stone.

12. With the winding down in recent years of the Centre for Legal Education (now regenerating at UTS), recent data on law students and law graduates, including, for example, their origins, motivation, and destinations, are scarce. For a discussion of the data as at 1999, see Brand, *supra* note 1, at 128-38.

13. This last point gives the lie to any simplistic assertion that Australia has too many law schools, too many lawyers, or too many law students. Even in relation to legal practice, there are always unmet legal needs; the challenge is to identify those needs and to match the supply of legal resources to them.

14. Most of the literature on legal education touches on this, but see especially the PEARCE REPORT, *supra* note 1; CRAIG MCINNIS & SIMON MARGINSON, AUSTRALIAN LAW SCHOOLS AFTER THE 1987 PEARCE REPORT (1994); LAW COUNCIL OF AUSTRALIA, 2010: A DISCUSSION PAPER—CHALLENGES FOR THE LEGAL PROFESSION (2001).

bloom. Moreover, he or she would do so in diverse ways, according to the special strength or focus of the law school.

Unfortunately, the reality seems a little different. Two major factors have inhibited both deep understanding and diversity. First, the knowledge-based requirements for professional accreditation¹⁵ tend to encourage a mindset of superficial coverage, squeezing out time for a comprehensively critical perspective and leaving little space in the curriculum for other approaches. Second, and compounding this, the persistent underfunding of Australian law schools inhibits experimentation with, for example, small-group teaching, clinical programs, international visitors, international exchange programs, skills training, and other relatively more expensive innovations.

For these and other reasons, legal education in Australian law schools today has not, in my view, reaped the full benefits of the gradual emergence of the study of law as an intellectual discipline in its own right, on a par with the study of other disciplines in the humanities and social sciences. Emphasis remains on the law as it is, not as it should or might be. In this respect, the impact of the model of legal education as training for professional practice has been, and continues to be, enormous, even though equating the needs of professional practice with a simple knowledge of the law as it is assumes a very narrow view of those needs.

Perhaps inherently conservative forces are at work in the very concept of law as a stabilising force in society, and perhaps law as a vocation tends to attract those temperamentally inclined to the preservation of the status quo. If, however, there is any merit in these tentative explanations for the generally conservative nature of legal education, they are counterbalanced by observations that paint a more complex picture: law is a powerful force for change, and many are attracted to it precisely to equip themselves to be agents for change.¹⁶

D. *More Paradoxes*

There are further paradoxes. If law schools generally teach the law as it is, how is it that lawyers are so often in the forefront of social change and of agitation for social justice and law reform? Is this because of or in spite of their legal education?¹⁷ Indeed, can a passion for law reform and social justice be effectively taught, or at least inspired, at law school?¹⁸ Or, is it more likely to develop from an adverse reaction to a conservative, rule-bound legal education?

15. The so-called "Priestley Eleven," the areas recommended for coverage by the Law Admissions Consultative Committee (LACC), chaired by former NSW Supreme Court Justice Priestley. An interesting history, by way of personal reflection, is given of the development of this approach by former NSW Supreme Court Chief Justice Sir Laurence Street, in an appendix to International Legal Services Advisory Council (ILSAC), *Internationalisation of the Australian Law Degree*, 30-31 (2004) (on file with the author).

16. *See infra* note 54 and accompanying text.

17. I pose this question in relation to Gandhi and Nehru in Coper, *supra* note 10.

18. *Cf.* Douglas N. Frenkel, *On Trying to Teach Judgment*, 12 *LEGAL EDUC. REV.* 19, 29 (2001); Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 *STAN. L. REV.* 1759, 1759 (1993); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 *U.S.F. L. REV.* 621, 637 (2002).

If the latter, then many law schools may have been more instrumental in promoting social and legal change than they ever intended or foresaw.

A law school committed to the highest standards of professional and intellectual education, incorporating core knowledge and skills and a critical perspective, faces a particular pedagogical dilemma. It is a reasonable proposition that one must learn what the law is before one can sensibly apply a critical perspective; yet the enormity of the task not only often colonises the time available for anything else, but also tends to dull the critical senses. Students seem to become hypnotised by the (often futile) search for internal coherence and elegant reasoning, and uninterested in the broader forces at work, just as the critics of the Langdellian casebook method in the US had observed was the limiting aspect of “thinking like a lawyer.” On the other hand, an initial diet of scepticism, broader explanations, the role of discretion, and the impact of social policy and values, raises the opposite danger of blunting the students’ interest in, and even capacity for, rigorous analysis.

It is no mean feat to marry these two things, but in my view, that remains a worthy goal. Indeed, many of the tensions inherent in legal education may be resolved with a judicious blend of contrasting perspectives. Legal education as training for professional practice seems at odds with the study of law as an intellectual discipline; yet, as indicated earlier, it is not really so—we need professionals who understand the role and function of law and scholars who understand the practicalities of law in action. Law as a force for certainty and stability seems at odds with law as an agent of and mechanism for change; yet again it is not really so—we should produce lawyers who understand the imperative for the legal system to simultaneously achieve both constancy and change. And despite the tendency of acculturation into the law by learning to “think like a lawyer” to disillusion the idealists, and the converse tendency of rule-scepticism to diminish analytical rigour, it is not really a Hobson’s choice—we should produce both technically sound lawyers who retain their optimism about reform, and rule-sceptics who can nevertheless push doctrinal analysis to its natural limits.

E. Australian Legal Education: Some Saving Graces

The predominant picture of Australian legal education as focused on the law as it is rather than as it should or might be is tempered by a number of factors. First, there is widespread acceptance (despite the persistence of knowledge-based accreditation requirements) that the acquisition of skills is at least as important as, if not more important than, the attainment of knowledge. Certainly, the acquisition of skills might be seen merely as enabling the skilful better to manipulate the existing system, but it is at least a step in the direction of recognising and coming to terms with the fact that the system is not static, but dynamic.

Second, although seriously constrained by resources, a number of law schools have established substantial clinical programs, characterised in Australia (in contrast with the more common public interest advocacy focus of many American law clinics) particularly by their connections with community legal

centres. Again, exposure to law in action is not necessarily a greater recipe for a reform perspective than is absorption of law in the books, but in practice, and often deliberately so, students are confronted with vivid examples of social injustice and compelling cases for reform.¹⁹ Indeed, construction of a law reform proposal may be an integral part of the course.²⁰

Third, it would be rare today for a law school not to espouse the value of a critical perspective,²¹ even if the execution is sometimes compromised by prioritisation of coverage, lingering habits of the past, conservative mindsets, avoidance of the really hard questions, and inadequate resources.²² Once the legitimacy of a critical perspective is accepted, internalised, and normalised as a standard feature of the curriculum, it is but a small step to constructive consideration of alternatives to the status quo.

Fourth, there is no doubt that the pedagogy of legal education has come a long way²³ since the traditional model of mindless rote-learning: barely understood and inaccurately transcribed notes of formal lectures (extending in time way beyond the normal human attention span), representing in substance an exposition of the current law (at least if the notes had been updated) by a busy practitioner before or after work. A change or development in teaching methodology does not alone have any necessary consequence for the content of legal education or for the introduction of a critical perspective. But, unsurprisingly, more progressive approaches to teaching have gone hand in hand with curriculum development, especially in many of the newer law schools, which in turn have been a catalyst for change in the older law schools. That these more progressive approaches continue to be introduced in a relatively

19. See generally Carey, *supra* note 6; Penny Crofts, *Crossing the Theory/Practice, Divide: Community-Based Problem Solving*, 3 U. TECH. SYDNEY L. REV. 40 (2001); Grossman, *supra* note 2; Mary Anne Kenny & Anna Copeland, *Clinical Legal Education and Refugee Cases: Teaching Law Students about Human Rights*, 25 ALTERNATIVE L.J. 252 (2000).

20. Frank Askin, *A Law School Where Students Don't Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 856 (1999); Liz Curran, *Responsive Law Reform Initiatives by Students on Clinical Placement at La Trobe Law*, 7 FLINDERS J. L. REFORM 287, 290-95 (2004).

21. Indeed, many of the second wave law schools were driven by the perceived need to supply such a perspective.

22. James, *supra* note 1, at 965 (lamenting the marginalization of critique in Australian law schools, though this is based more on impression (including a survey of sometimes misleading or at least uninformative faculty handbooks) than on detailed empirical evidence). Ironically, the lament of many of the prominent American critics is that the critical approach became so extreme and so theoretical that it failed to serve the needs of the profession. See ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 168 (1993); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION TRANSFORMED AMERICAN SOCIETY* 243 (1994). For part of the debate sparked by these two almost contemporaneous works, see Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 744 (1995); Peter G. Glenn, *Introduction: Conversations about the State of the Legal Profession*, 100 DICK. L. REV. 477, 486 (1996). See also *infra* note 30.

23. Sally Kift, *For Better or for Worse: 21st Century Legal Education*, paper presented at the Lawasidownunder [sic] Conference (Mar. 2005) (discussing the changes in the Australian legal education system since 1987); Keyes & Johnstone, *supra* note 1, at 537.

unsympathetic public funding environment is cause for both admiration and apprehension.²⁴

F. *The Curious Disjunction between Law Reform and the Curriculum*

Nevertheless, despite the four factors outlined above that qualify the generalisation that Australian legal education, even today, is focused predominantly on the law as it is, the generalisation is, in my assessment, substantially correct. To the extent that this flows from the perceived needs of the legal profession, it is, as I have argued, a misunderstanding of what is really needed in legal education. In many ways, the situation is surprising. Most academics pursue academia, despite the lure of higher remuneration in legal practice, by a passion to analyse, expound, and improve the law and the legal system. This manifests itself in their scholarship,²⁵ and of course in their community outreach activities. Many serve in law reform bodies. Yet there is a curious disjunction between this side of academia and legal education. By and large, the overwhelming concern of most academics with the improvement of the law and the operation of the legal system has not penetrated the curriculum, at least in any thoroughgoing way.

I have already speculated a little about why this is so. Another reason is that the academy has not fully engaged the goals and purposes of legal education.²⁶ The literature on legal education is large and extensive, especially in the US,²⁷ but the focus on law reform²⁸ is surprisingly small.²⁹ The literature on a critical

24. Margaret Thornton, *The Idea of the University and the Contemporary Legal Academy*, 26 SYDNEY L. REV. 481, 485-86 (2004); Kift, *supra* note 23 (showing the relative low funding for law schools compared to other schools).

25. Interestingly, Australian legal scholarship has itself developed only gradually from being predominantly doctrinal, descriptive, and Anglo-centric to being contextual, critical, and eclectic, and even then with a relative paucity of constructive proposals for reform. *See generally* Michael Chesterman & David Weisbrot, *Legal Scholarship in Australia*, 50 MOD. L. REV. 709 (1987) (discussing the premise that scholarly activity may find a course independent of formal education); John Goldring, *Tradition or Progress in Legal Scholarship and Legal Education*, in NEW FOUNDATIONS IN LEGAL EDUCATION, *supra* note 1, at 27 (stating that the study of law is really a study of society through the lens of the legal system); Jeremy Webber, *Legal Research, the Law Schools and the Profession*, 26 SYDNEY L. REV. 565, 565 (2004). *See also* Richard Markovits, *Legal Scholarship: The Course*, 48 J. LEGAL. EDUC. 539, 544 (1998).

26. The literature is permeated with the general tension between the professional and the intellectual dimensions of legal education. Generally, on the idea of a "liberal" legal education (as the debate is typically characterized in the United Kingdom), see the Twining sources listed in *supra* note 8; PEARCE REPORT, *supra* note 1; ANTHONY BRADNEY, CONVERSATIONS, CHOICES AND CHANCES: THE LIBERAL LAW SCHOOL IN THE TWENTY-FIRST CENTURY 31 (2003); Francis A. Allen, *Humanistic Legal Education: The Quiet Crisis*, in ESSAYS ON LEGAL EDUCATION 9, 14-17 (Neil Gold ed., 1982); Roger Brownsword, *Law Schools for Lawyers, Citizens, and People*, in THE LAW SCHOOL—GLOBAL ISSUES, LOCAL QUESTIONS 26, 38 (Fiona Cownie ed., 1999); Anthony Bradney, *Law As a Parasitic Discipline*, 25 J.L. & SOC'Y 71, 74 (1998).

27. *See, e.g.*, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992).

28. *See* Walter Barnett, *Law Reform and Law for the Layman: A Challenge to Legal Education*, 24 VAND. L. REV. 931, 933 (1971); Robert E. Keeton, *Law Reform and Legal*

approach to legal education is large,³⁰ and of course is the springboard for consideration of reform, but the references to positive reform are relatively slight.³¹ The literature on the teaching of ethics and professional responsibility³² touches on the broader responsibility of the profession for administering a just system and improving its operation, but the references to law reform are understandably oblique. There is a growing literature on educating for justice³³ and the incorporation of moral and social values into legal education,³⁴ which again gives a good foundation for but generally only intersects with concerns about the processes and possibilities for deliberate change. Interestingly, the

Education, 24 VAND. L. REV. 53, 53 (1970); Jane E. Schukoske, *Teaching Law Reform in the 1990s*, 3 HASTINGS WOMEN'S L.J. 177, 181-82 (1992).

29. Conversely, the literature on law reform is large, but the focus in that literature on legal education is small. For example, the excellent bibliography of law reform prepared by the ALRC to assist the authors in the preparation of the book, of which the shorter version of this essay forms a part, see *supra* note *, lacks a category for legal education.

30. See Robert Gordon, *Critical Legal Studies as a Teaching Method, against the Background of the Intellectual Politics of Modern Legal Education in the United States*, 1 LEGAL EDUC. REV. 59, 59 (1989); James, *supra* note 1 (giving the history of the critical approach in Australian legal education); Klare, *supra* note 4 (theorizing that legal education does not adequately prepare students to practice law).

31. The critical legal studies movement was of course criticised for its perceived negative and destructive effects, see Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 251 (1989).

32. See 12 LEGAL EDUC. REV. 1-285 (2001) (containing a special series of articles on the teaching of legal ethics and professional responsibility); Diana Henriss-Anderssen, *Teaching Legal Ethics to First Year Law Students*, 13 LEGAL EDUC. REV. 45 (2002) (discussing the insertion of an ethics course in the first-year curriculum); David T. Link, *The Pervasive Method of Teaching Ethics*, 19 J. LEGAL EDUC. 485 (1989) (describing in detail a first-year ethics course at University of Notre Dame Law School); Julian Webb, *Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education*, 25 J.L. & SOC'Y 134 (1998) (analysing a call from the Lord Chancellor's Advisory Committee on Legal Education for a reworking of ethics in legal education at British law schools).

33. See EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION (Jeremy Cooper & Louise G. Trubek eds., 1997) (espousing the idea of integrating social values into clinical education and curriculum); Judith Dickson, *Teaching about Justice as well as Law*, 28 ALTERNATIVE. L.J. 18 (2003) (outlining the history of discussion in the U.S. and Australia about professionalism in law schools and what methods have been used to help students improve the justice system); Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573, 574 (1994); Wizner, *supra* note 6 (claiming that there is a public interest in law students learning that they have a responsibility to challenge injustice in society).

34. Amy Ruth Tobol, *Integrating Social Justice Values into the Teaching of Legal Research and Writing: Reflections from the Field*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 33, at 88; Stephen F. Befort & Eric J. Janus, *The Role of Legal Education in Instilling an Ethos of Public Service among Law Students: Towards a Collaboration between the Profession and the Academy on Professional Values*, 13 LAW & INEQ. 1 (1994) (discussing how the legal academic and professional communities came together in Minnesota "to increase the level of public service in the profession"); David A.J. Richards, *Liberal Political Culture and the Marginalised Voice: Interpretive Responsibility and the American Law School*, 45 STAN. L. REV. 1955 (1993) (arguing that American law schools should play a central role in developing critical methodologies to facilitate traditional notions of tolerance); Michael I. Swygart, *Stirring to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 3 B.C. L. REV. 803 (1989) (writing that law teachers should include moral and legal responsibility in their teachings and observing how teaching theories have evolved).

literature on clinical legal education comes closest to a positive concern with law reform, with this focus often seen as a natural outgrowth of exposure to the practical problems of the disadvantaged.³⁵

The general absence from the curriculum of a deliberate law reform focus, reflected in the compartmentalisation of the professional lives of most legal academics, may also relate to the professionalisation of law reform in Australia. The making of considered recommendations for legal change in Australia has been allocated largely to statutory bodies established expressly for the purpose and equipped to investigate, consult, consider, and report. Whether the issues for investigation are narrow and technical (sometimes a source of scepticism about the potential contribution of lawyers to broader questions of legal and social change), or wide ranging and socially significant, this vision of law reform tends to quarantine law reform from other actors and other processes. It also diminishes the ownership and responsibility of the legal fraternity as a whole, including academics, for initiating, considering, and evaluating proposals for change.³⁶

G. *A Law School Model for a Law Reform Ethos*

In 2002, I initiated discussion of these issues in the Faculty of Law at the Australian National University by asking the question: What would we really look like if we were a law school committed not only to excellence in teaching and research, but also to making a positive contribution to the continuous improvement of the law and the operation of the legal system? What might be

35. See Kenneth S. Gallant, *Learning from Communities: Lessons from India on Clinical Method and Liberal Education*, in EDUCATING FOR JUSTICE AROUND THE WORLD, 222, 224 (Louise G. Trubek & Jeremy Cooper eds., 1999); Judith Dickson, *The Role of the Clinic in Linking Law and Justice*, 11 MURDOCH U. ELECTRONIC J.L. (2004), www.murdoch.edu.au/elaw/issues/vllnl/dickson111.html; Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 506 (2003); Gabrielle Lessard, *Introduction: The Interuniversity Poverty Law Consortium*, 42 WASH. U. J. URB. & COMTEMP. L. 57, 59 (1992); Antoinette Sedillo Lopez, *Learning through Service in a Clinical Setting: The Effect of Specialisation on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 308 (2001); Rose Voyvodic, *Advancing Social Justice through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, 14 WASH. U. J.L. & POL'Y 101, 101 (2004); Lucie E. White, *The Transformative Potential of Clinical Legal Education*, 35 OSGOOD HALL L.J. 603, 605 (1997); *supra* notes 6, 19, 20. Clinics have also been seen as the saviour of the "lost lawyer." See *supra* note 22. See also Kirsten Edwards, *Found! The Lost Lawyer*, 70 FORDHAM L. REV. 37, 37 (2001). Regarding the funding crisis in Australian legal education, see Andrew Goldsmith, *Why Should Law Matter? Towards a Clinical Model of Legal Education*, 25 U. NEW S. WALES L. J. 721, 724 (2002).

36. This is neither to deny the manifest benefits of professionalised law reform (implying both professionalisation and professionalism), nor to understate the wider contribution of the legal profession through, for example, its various professional bodies such as law societies and bar associations. See Ralph Simmonds, *Professional and Private Bodies*, in THE PROMISE OF LAW REFORM 261 (Brian Opeskin & David Weisbrot eds., Federation Press 2005) (discussing the value of a wide range of diverse academic and professional organizations in Western Australia, which work toward law reform).

the defining characteristics of a law school committed to an ethos of law reform and social justice?

After considerable discussion, we came up with a fifteen-point plan,³⁷ covering both curriculum and non-curriculum matters. The plan is being progressively implemented. The curriculum aspects include the following:

- *Creation of a new elective course on law reform*³⁸ or *critical perspectives on legal change*. It is a matter of astonishment that such a course is almost without precedent in Australian law schools,³⁹ despite the ripeness for academic study of, for example, the theoretical, practical, and comparative dimensions of the institutions, processes, and politics of law reform.
- *Creation of a new elective course on lawyers' roles and responsibilities*. This builds on an existing first-year course on *Lawyers, Justice, and Ethics*, and focuses not only on the traditional questions of legal ethics and professional responsibility, but also on broader questions of opportunities and obligations to serve the community.⁴⁰
- *Expansion of clinical opportunities, incorporating reflection on broader issues of legal policy and law reform*.⁴¹ ANU now has three clinics: two in the LLB program, attached respectively to First Stop, a youth legal centre in the Civic Centre of Canberra, and to the community-based Welfare Rights and Legal Centre; and a supervised internship program in the postgraduate practical legal training program run by the ANU's Legal Workshop.
- *Expansion of internship opportunities*. We now place students not only in external workplaces, but many also work with staff members on appropriate reform-oriented research projects or outreach activities.
- *Addition or restoration to the curriculum of a range of social justice electives*. Any law school's capacity to do this is limited by resources; some previous offerings at ANU had fallen by the wayside following the retirement of key staff members.
- *Consideration of the extent to which all courses incorporate a law reform focus*.⁴² This is being done progressively to ascertain whether our various courses sufficiently engage questions such as: What functions are being served by the law in this area? How might those functions be better served?

37. Michael Coper, *The Ethos and Identity of the ANU Law School: Draft Implementation Plan 6-9* (2004) (on file with the author).

38. See Schukoske, *supra* note 28, at 180-81.

39. Courses of this nature have been offered at the University of Melbourne and La Trobe University. I would be interested to hear from other law schools in order to compile a more complete list.

40. See *supra* notes 33-34.

41. See *supra* note 35.

42. Dickson, *supra* note 33; Keeton, *supra* note 28, at 58.

- *Consideration of ways to ensure that students undertaking empirical research receive proper training in social science empirical research methodology.*

The non-curriculum aspects included:

- consideration of better ways of responding, as faculty members or as individuals, to requests from law reform agencies for submissions on matters under investigation;
- augmentation of faculty visitor programs to ensure a steady supply of prominent visitors with expertise and standing in areas of law reform and social justice;
- stimulation of discussion of law reform and social justice issues nationally and internationally (to this end, we held the *Australian Lawyers and Social Change* conference in Canberra in September 2004, revisiting themes agitated under the same title⁴³ some thirty years before);
- establishment of a Chair of Law Reform and Social Justice.

H. Law Reform Ethos and Free Academic Enquiry

After some initial flirtation with the parochial idea that the ANU action plan was a good idea because it accentuated a point of potential distinctiveness in an increasingly competitive environment, I soon came to the view that it was rather an integral part of the great common endeavour of all Australian law schools.⁴⁴ However, it remains necessary to defend the idea of reform-oriented legal education against the notion that a university should simply be an objective seeker of truth, detached and at arm's length from the political and policy debates of the day, and concerned primarily with the transmission of knowledge from generation to generation.

It is not a part of the notion of universities as detached truth-seekers that they should be social critics, the conscience of society, or agents of social change. That is a more activist view, treating the pursuit of knowledge as necessary rather than sufficient, and envisaging the use of that knowledge to promote change—change based on, or at least arguing for, a vision of the world as it ought to be. The notion of the university as an objective and value-free seeker of truth and conveyor belt for the dispassionate transmission of knowledge is essentially about describing and understanding the world as it is. This notion leaves it to others to apply that knowledge for the betterment of society.⁴⁵

43. AUSTRALIAN LAWYERS AND SOCIAL CHANGE (David Hambly & John Goldring eds., 1976).

44. Cf. Hal Wootten, *Building Better Law Schools*, Address at the ANU Faculty of Law Commencement Dinner (Feb. 2000).

45. On these competing models of a university, see, for example, the essays and further references collected in *THE FUTURE OF HIGHER EDUCATION IN AUSTRALIA* (Terry Hore, et al. eds., 1978); *AUSTRALIA'S FUTURE UNIVERSITIES* (John Sharpham & Grant Harman eds., 1997); and *WHY UNIVERSITIES MATTER* (Tony Coady ed., 2000).

This is not such a hard debate to resolve. The traditional value of academic freedom is consistent with either notion, as far as it protects the freedom of the individual to speak out without institutional interference. Moreover, adoption in legal education of a conscious and deliberate law reform ethos does not dictate any particular outcome or point of view.⁴⁶ It requires a critical evaluation of the status quo and a consideration of the alternatives. True enough, the full weight of the institution is brought to bear on creating an environment in which consideration of change is insistent, nothing is taken for granted, and everything must be justified. To my mind, that is the acme, not the antithesis, of free academic enquiry.

In any event, knowledge is never neutral or value-free. The construction of knowledge reflects unconscious bias, tacit assumptions, subjective perceptions, and embedded values.⁴⁷ A critical perspective is indispensable to the exposure of bias, the questioning of assumptions,⁴⁸ the challenging of perceptions, and the revelation of values often buried deep in supposedly value-free contexts, as the law is sometimes portrayed. That critical perspective is then the platform for debate about reform and options for change (including defence of the status quo). In that debate, all participants should put their biases, assumptions, and values on the table rather than permit those biases to slip by stealth into a supposedly objective exposition and analysis of legal doctrine.

I. Undeveloped Potential for Lawyers to Make the World a Better Place

At the end of the day, there is a compelling case, in my view, for legal education to have a conscious and deliberate law reform ethos. I am thinking here particularly of legal education for professional practice, although development of legal education as an intellectual discipline and as a discipline for a much broader market has been pivotal in introducing a critical perspective and facilitating a shift from what the law is to what the law ought to be. Despite being sometimes pilloried as driven by a left liberal agenda (generally by social conservatives with an equally political conservative agenda), a focus on law reform and social justice is consistent with the traditional role of a university in asking questions, submitting dogma to scrutiny, and exposing alternatives. The

46. This has become quite controversial in the United States, to the extent that clinics have undertaken public interest litigation seeking particular outcomes. For a traditional statement of the value of institutional neutrality, see Barnett, *supra* note 28, at 948-50; Brownsword, *supra* note 26, at 26-27; Keeton, *supra* note 28, at 60-61. For a good account of the much-publicised political backlash in 1998 against the activities of the Tulane Law School's Environmental Law Clinic, see Carey, *supra* note 6, at 536-38. The issue is particularly acute in the area of human rights advocacy, see especially Henry J. Steiner, *Pedagogy and Human Rights: The University's Critical Role in the Human Rights Movement*, 15 HARV. HUM. RTS. J. 317, 317 (2002).

47. See *supra* notes 4-5, 22. The critical legal studies movement and related critical perspectives have been particularly important in demonstrating this scarcely new or original, but nevertheless disturbingly neglected, insight, and in underling how seemingly neutral autonomous legal rules can entrench disadvantage and injustice.

48. See L. Bannai & A. Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognise Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 2-3 (2003).

small step from a critical perspective to thinking about a constructive case for change, and the positive mindset that this encourages, has vast potential to provide lawyers, throughout their careers, with a wonderful pathway to add value to the society they serve. This is not to deny the significant value lawyers add through competent provision of professional services, or to underplay the significant role lawyers play in adhering to and promoting the rule of law. It is merely to add a further dimension to the concept of lawyering, nurtured by law schools asking hard questions and debating alternative answers.

There is also considerable potential here for turning around the adverse image of lawyers, captured so uncomfortably in those celebrated but generally one-dimensional lawyer jokes⁴⁹ that go back to antiquity. There is a close association between the teaching of law as it is, rather than as it should or might be, and the training of lawyers to have profitable but selfish, or at least self-focused, careers. As Oliver Wendell Holmes acknowledged over 100 years ago, there is nothing wrong in itself with the pursuit of material wealth, but there are “other foods besides success.”⁵⁰ Legal education with an ethos of law reform and social justice would give a more altruistic focus to the pursuit of law as a career, and inspire more graduates to use their knowledge and skills to give something back to the society they serve, the society that gave them their privileged position. This is inherent in the notion of a profession, can take many forms, and is by no means wholly absent from the current profession. It would be a considerable advance, however, if it became the typical career goal for a law graduate to leave the legal system a little better than he or she found it.

Regrettably, the external environment for Australian law schools today is not particularly conducive to promoting the spirit of altruism or the ethos of law reform.⁵¹ This is not just a matter of the lack of resources, significant though that is for the ability of law schools to mount special programs such as clinics and internships, to reorient the curriculum generally towards the case for change, and to engage in meaningful dialogue with students through interactive discussion in small groups. It is also a matter of the message sent out by our current system of public funding, in which law students have to pay a higher proportion of the cost of their education than do students in any other discipline. To the extent that this entrenches the idea that the study of law is a private investment in future personal wealth rather than a public investment in knowledge and skills that will add value to society, the barrier to attitudinal change is formidable.

49. See Tobol, *supra* note 34, at 95, 102 (discussing the phenomenon of lawyer jokes, and some representative examples). See also MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005).

50. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 167, 202 (Harcourt, Brace & Co. 1920); Michael Coper, Message from the Dean in ANU Law Students Society, *Careers Guide 2004* (on file with the author).

51. See Thornton, *supra* note 24, at 485-86; Kift, *supra* note 23.

J. Legal Education beyond Law School

Of course, legal education at law school is but one link in the chain of lifelong learning, and needs to be seen in that broader context. Many law students simultaneously undertake a liberal arts degree or the like, that ameliorates the potential (though certainly not inevitable) narrowness of law study taken by itself. Law graduates undertake specialised practical legal training in order to qualify for admission to practice, if this has not been integrated into their primary degree. New entrants to the profession undergo significant graduate training programs run by law firms or substantial reading programs run by the bar. Practitioners undertake continuing legal education programs. Even judges today undergo continuing professional development.⁵²

The existence of these other links in the chain alongside or beyond law school in a sense liberates the law schools from having to do everything at once, and clears the path for an enhanced focus on the big questions (and the small questions) of law reform and social justice. But that does not absolve the other players from a similar concern. Judges are, of course, in a special position: the issue of achieving law reform through the judicial process metamorphoses into a very different debate, the age-old debate about the pros and cons of judicial activism,⁵³ and issues of social justice likewise emerge in familiar tensions between vindicating the values of certainty and stability and doing justice in an individual case. However, even for judges, professional development assists in sensitisation to a range of cultural and other factors that impinge in subtle ways upon judicial decision-making. Moreover, a more thorough understanding of the processes of and prospects for law reform may impinge on the judge's perception of his or her own role. But, the role advocated here for a law reform ethos in legal education in law schools does not quite translate into an equivalent role in continuing judicial education.

There are closer lessons, however, for the other purveyors and receivers of continuing legal education, especially for practitioners at any stage of their careers. Although the focus here has, understandably, been on updates of the law as it is (or at least as it seems to be), the perspective of the law as it should or might be can add value in at least two ways. First, this perspective is an essential ingredient for advisers to understand, or to attempt to predict, the law as it is likely to become. Second, it serves to keep the practitioner in touch with the ethos, hopefully introduced at law school, of taking a serious interest in the continuous improvement of the law and the operation of the legal system, and, informed by the vagaries of daily practice, of recognising and taking opportunities to contribute to that continuous improvement.

52. There is a growing literature on the whole question of further judicial education, see ALRC, *supra* note 1, at 160-203, and, for a recent overview, see John Doyle, How Do Judges Keep Up to Date?, a paper presented at the Lawasidownunder [sic] Conference (Mar. 2005).

53. For a good short introduction to this debate, see Ronald Sackville, *Activism*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, *supra* note 3, at 6, 6-7.

II. CONCLUSION: HARNESSING THE IDEALISM OF THE NOVICE LAW STUDENT

The groundwork must, however, be done at law school. Human beings are born with an intense natural curiosity and, if I may say so without arousing religious controversy, an innate desire to do good. Although varying combinations of undue credentialism in formal schooling and adverse personal or environmental circumstances nullify some idealism, many students manage to reach law school with a burning desire to use the law and the legal system, in ways by definition unknown and unknowable to them at that stage, to make the world a better place.⁵⁴ A sound knowledge of basic principle and the acquisition of basic skills are necessary preconditions,⁵⁵ but they are not enough. Law schools must embrace an ethos of law reform and social justice,⁵⁶ commit to continuous improvement of the law and the operation of the legal system, and make law reform a central ingredient in mainstream legal education. In this way, law schools may better harness—and not kill⁵⁷—the idealism these students bring to law school, and penetrate the consciousness of those who do not.

In this way, students will have a richer and deeper experience at law school and a better chance of finding meaning in their professional lives. The image of lawyers will be enhanced and the law and the legal system will be under constant pressure to change for the better. Without diminishing the significant achievements of professional law reformers, an integrated law reform ethos in legal education should in due course give the entire profession ownership of and responsibility for law reform in its broadest sense.

54. My combination of selective personal observation and rose-coloured glasses may be vulnerable to hard empirical evidence, *cf.* Adrian Evans, *Lawyers' Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998*, 12 *LEGAL EDUC. REV.* 209 (2001).

55. *Cf.* Hal Wootten, Closing Reflections 14, *Australian Lawyers and Social Change*, Conference at Museum of Australia (Sept. 2004) (transcript available at <http://law.anu.edu.au/alsc/HalWootten.pdf>).

56. As a brief afterword, I should acknowledge that law reform and social justice are two overlapping but distinct concepts, either of which can be pursued independently of the other. I take both to be encompassed in my broader description of commitment to the continuous “improvement of the law and the operation of the legal system.” *See* Coper, *supra* note 37, at 2.

57. *Cf.* BRADNEY, *supra* note 26, at 76; Schukoske, *supra* note 28, at 183-85.